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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

**Report submitted by the Special Rapporteur
on the human rights of migrants, Jorge G. Bustamante**

Addendum

Communications sent to Governments and replies received*

* The present report is submitted late to reflect the most up-to-date responses received from the States. The present document is being circulated as received and in the languages of submission only as it greatly exceeds the page limitations currently imposed by the relevant General Assembly resolutions.

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A. Introduction and general comments

Pursuant to Human Rights Council Resolution 8/10, the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, is mandated, inter alia, to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants and to request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families. In carrying out his mandate, the Special Rapporteur may request, receive and exchange information on violations of the human rights of migrants with a variety of stakeholders including Governments, and is requested by the Human Rights Council to respond effectively to the information received.

This addendum to the report of the Special Rapporteur contains, on a country-by-country basis, summaries of communications addressed to Governments in the form of urgent appeals and letters of allegations between 1 January 2008 and 6 March 2009, as well as replies received until 6 May 2009. Observations made by the Special Rapporteur have also been included where applicable. In this report, country specific communications sent and Government responses are presented as received and therefore, in their original language. However, the names of individual victims and alleged perpetrators have been replaced by initials in order to protect their privacy, to prevent further victimization and to avoid pre-judgement of the alleged perpetrators.

It is important to recall that cases brought to the attention of the Special Rapporteur do not require the exhaustion of domestic remedies. Communications sent to Governments contain only requests for information in situations that raise concern, but also very frequently address situations where information regarding certain facts and actions needs clarification. In transmitting these allegations to Governments, the Special Rapporteur does not make any judgement on the merits of the cases, nor does he support the opinion and activities of the persons on behalf of whom he intervenes.

The Special Rapporteur would like to recall that his communications are aimed at contributing to the effective protection of the human rights of migrants and therefore, the establishment of a constructive dialogue with Governments is a crucial element of this process. The Special Rapporteur also hopes that his exchange of information with Governments contributes to the creation of further synergies among the several human rights bodies, mechanisms and procedures at the international, regional and domestic levels.

B. Tabulation of communications sent to Governments and replies received

To provide a quick reference and overview of the exchange of communications between the Special Rapporteur on the human rights of migrants and Governments, this report includes a table that contains the following information:

Date

This column lists the date when communications were sent to Governments.

State

This column lists the States to which communications were addressed.

Type of Communication

This column contains information on the type of communications, in accordance with articles 9 and 10 of Human Rights Council Resolution 5/2, as follows: UA: Urgent Appeal; JUA: Joint Urgent Appeal; LoA: Letter of Allegation; JLoA: Joint Letter of Allegation.

Individuals concerned

This column contains information on the number, gender and nationality or other related status of the alleged victims of human rights violations.

Alleged violations/human rights issues

This column contains information on alleged human rights violations. Violations mentioned are related to those recognized in the international human rights instruments to which the State concerned is a party and/or to the thematic mandates that have joint the communications sent.

Date of Government responses received

This column lists the date when communications were received from Governments.

Type of reply

This column contains information on the character of the responses received from Governments according to the following general criteria:

- (a) “Comprehensive response” [CR] denotes a reply that is responsive to the allegations and that substantially clarifies the facts. It does not, however, imply that the action taken necessarily complies with international human rights law;
- (b) “Partial response” [PR] denotes a cooperative response from Governments that provides some clarification of the allegations but that (i) may contain limited factual substantiation and highlights that in a subsequent communication the Government will present a comprehensive responses; (ii) may contain limited factual information; or (iii) may fail to address some of the issues mentioned in the communication;
- (c) “no response” [NR] denotes that a response has not been received from the Government and more than 90 days has elapsed since the communication was sent.

Communications sent to Governments and replies received
-Analytical summary list-

Date	Country	Type of comm¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply²
08.04.2008	Belgium	JUA	An Albanian family (husband, wife and a child boy born in Belgium).	Arbitrary Detention of irregular migrants- right to health/non-repatriation for humanitarian reasons	03.06.2008	CR
22.01.2008	Dominican Republic	JLoA	-1 male national from Haiti coordinator of an association of migrant workers and by extension his family; -an undetermined number of migrants living in Ranchadero.	Racism, xenophobia, discrimination and related intolerance against migrants; threats to life and physical and personal security of migrants /protection of the human rights of defenders of migrant workers.	-	NR
16.09.2008	Egypt	JLoA	-A group of Darfurians (including a Sudanese couple and their two year-old girl child) -an Eritrean mother and her 2 girl childs; - 3 male nationals from Sudan; - a seven year old sudanese girl child and approximately 17 more migrants	Arbitrary and Summary Executions- Right to Life and security of the person/ disproportionate use of force by law enforcement officials towards persons attempting to cross the border between Egypt and Israel.	-	NR

¹ Type of Communication: UA: Urgent Appeal; JUA: Joint Urgent Appeal; LoA: Letter of Allegation; JLoA: Joint Letter of Allegation.

² Character of replies received: CR: Comprehensive response; PR: Partial response; NR: No response.

Date	Country	Type of comm¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply²
17.01.2008	Estonia	UA	-A male national from Cameroon married to an Estonian woman and by extension, his wife and child.	Arbitrary Detention- Right to fair proceedings before an independent an impartial tribunal – protection to the unity of the family	-	NR
13.06.2008	France	UA	-A male national from Senegal married to a French national and by extension, his wife and child.	Discrimination against migrants; equal rights as of marriage; protection to the unity of the family; right to an effective remedy/expulsion of a migrant married to a national.	-	NR
16.07.2008		JLoA	Irregular migrants in European Union Member States	Concerns in relation to the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (concerns include the return and removal of unaccompanied minors (art.10); entry ban (art.11); safeguards pending return (art.14) and detention for the purpose of removal (art.15)	04.09.2008	CR
30.11.2007	Guatemala	LoA (sent in 2007)	Undetermined number of children given up for adoption	Sale of children, gender-based violence	09.01.2008	CR

Date	Country	Type of comm ¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply ²
23.09.2008	Iran (Islamic Republic of)	JUA	-a male of Iranian origin, scholar of an independent body of teaching, research and debate on international relations in Iran.	Arbitrary deprivation of liberty; right to fair proceedings before an independent and impartial tribunal; right to leave one's own country; freedom of expression and association with others/ right to education, right to a fair trial/ independence of judges and lawyers.	-	NR
23.05.2008	Italy	JUA	-Roma settlements in the outskirts of Naples; -Roma communities in a Roma Camp in Novarra near Milan and, - an undetermined number of migrants	Rights of minorities; racism, racial discrimination, xenophobia and related intolerance against non-citizens- /criminalization of irregular migration and stigmatization of certain groups in detriment of their human rights' protection.	04.08.2008	CR
04.02.2009		UA	150 nationals from Tunisia	Protection of individuals in the context of mixed migratory flows: access to effective remedies; identification and special protection of persons in vulnerable situations, including minors; age assessment determination/Collective deportation- arbitrary detention/ torture and inhuman or degrading treatment or punishment/ Right to health	15.05.2009	CR

Date	Country	Type of comm ¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply ²
19.02.2009	Japan	JUA	A 13 years old child girl born and raised in Japan and her parents, irregular migrants of Philippine origin.	The best interests of the child, discrimination on the ground of the irregular migration status of the child parents; right to education.	18.03.2009	CR
06.03.2009		JUA Follow up		The rights of the child to express her views freely; the protection of the child against all forms of discrimination or punishment on the basis of the status of her parents and the protection of the unity of the family.	09.04.2009	CR
01.02.2008	Libyan Arab Jamahiriya	UA	-An undetermined number of individuals in irregular situation, including asylum seekers.	Arbitrary and Collective Deportation; the right to have access to judicial procedures; the protection of will- be-returned-nationals against torture in countries of origin.	-	NR
07.07.2008	Mexico	JUA	The director of a centre of undocumented migrants and by extension, all the undocumented migrants beneficiaries of the centre	Threats to life and security of the person /Freedom of expression, protection of defenders of human rights of migrants, xenophobia and related intolerance against migrants.	-	NR
20.01.2009		JUA	-45 migrants nationals of El Salvador, Honduras, Guatemala, Ecuador and China (including 3 deads and 8 who allegedly suffered physical injuries).	Summary executions and physical injuries of undocumented migrants /right to life and security of undocumented migrants; due process of Law and procedural guarantees.	29.04.2009	CR

Date	Country	Type of comm¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply²
29.05.2008	Morocco	LoA	120 migrants nationals of African sub-Saharan countries including but not limited to: Nigeria, Cameroon, Mali, Cote d'Ivoire, Ghana	Right to life, security and health of boat people, /collective expulsions in the context of mixed migratory flows	-	-
27.01.2009	Panama	UA	19 persons of Ethiopian, Eritrean and Somali origin	Right to be considered as a person before the law and general human rights protection of individuals under the jurisdiction of the State	06.04.2009	PR (i)
16.05.2008	Republic of Korea	JUA	-A male of Nepali origin and, a male of Bangladeshi origin, founders of a migrants' trade union	Arbitrary detention -physical injuries, threats to freedom of association including the right to form and join trade unions/ right to security of the person/ the protection of human rights defenders	-	-
01.04.2008	Saudi Arabia	JUA	A Syrian male and by extension his family (wife and 4 children)	Enforced disappearance and physical injuries; arbitrary detention; incommunicado detention; torture and cruel, inhuman and degrading punishment and treatment/ due process of law and detention guarantees.	30.01.2009	PR
26.05.2008		LoA	25 allegedly undocumented nationals of Yemeni origin	Threats to life and personal security; right to health of undocumented migrants under arrest/due process of Law and related guarantees	12.11.2008	CR

Date	Country	Type of comm¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply²
14.08.2008	Saudi Arabia (cont'd)	JUA	7 male of Philippine origin	Death penalty/incommunicado detention/due process of law, right to a fair and public hearing before an independent and impartial tribunal- Summary executions-Torture- Independence of Judges and lawyers	-	NR
30.05.2008	South Africa	LoA	Hundreds of migrants allegedly facing violence and related intolerance (including the dead of 56 migrants)	Racism, xenophobia, discrimination and related intolerance against migrants, including violence and physical attacks to migrants having as a consequence the alleged dead of 56 migrants	-	NR
05.11.2008		JLoA	A monoparental family of Somali origin (mother, 19 and 14 year-old sons and 12 year-old daughter)	Racism, racial discrimination, xenophobia and related intolerance against migrants / right to life	-	NR
24.01.2008	Spain	JLoA	1 girl child of Ecuadorian origin	Racism, xenophobia and related intolerance against migrants	31.03.2008	CR
22.08.2008	Sudan	JLoA	15 women of Ugandan origin	Torture or other cruel, inhuman or degrading treatment or punishment-Violence against migrant women	-	NR
18.04.2008	Thailand	UA	121 migrants of different nationalities (including 37 women and 17 men allegedly dead and 67 survivors)	Protection and de-criminalization of victims of illegal migrant-smuggling networks; ensuring the protection of human rights at all stages of the migration process management; due process of law, including the right to be presumed innocent until proved guilty according to the Law.	-	NR

Date	Country	Type of comm¹	Individuals concerned	Alleged violations /human rights issues	Date of Gov. response	Type of reply²
04.02.2009	United Arab Emirates	JUA	A male born in Bahrain, citizen of the United Arab Emirates.	Arbitrary detention; discrimination on the ground of origin,/independence of judges and lawyers; torture and other cruel, inhuman or degrading treatment or punishment.	-	NR

C. Trends and observations

During the period under review, the Special Rapporteur sent 25 communications on alleged violations on the rights of migrants. In addition, the Special Rapporteur sent a joint letter addressing concerns in relation to the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. (See Communication sent to France on 17 July 2008).

Of the 26 communications that were sent, 17 were in the form of urgent appeals because human rights violations were ongoing or imminent and there was a need to inform the Government authorities about the allegations received without any delay, whilst the remaining 9 communications sent, were letters of allegations, reflecting longstanding concerns or pertaining to allegations of human rights violations that had already occurred.

During the period under review, the Special Rapporteur addressed communications to the following 19 Member States: Belgium, Dominican Republic, Egypt, Estonia, France, Iran (Islamic Republic of), Italy, Japan, Libyan Arab Jamahiriya, Morocco, Mexico, Panama, Republic of Korea, Saudi Arabia, South Africa, Spain, Sudan, Thailand and United Arab Emirates. Only 11 of the 26 communications sent out, received a response from the concerned Governments. The Special Rapporteur would like to thank the Governments of Belgium, France, Guatemala (response to a communication sent in 2007), the Islamic Republic of Iran, Italy, Japan, Mexico, Panama, Saudi Arabia and Spain for their responses to his communications sent. He would also like to remind Governments that have not done so, to provide a response and address all concerns raised in each communication.

Cases that have given rise to the intervention of the Special Rapporteur during the period under review include alleged human rights violations on: arbitrary detention and incommunicado detention of migrants; repatriation of migrants facing the threat of torture in countries of origin; racism, xenophobia, discrimination and related intolerance against migrants; threats to life and physical and personal security of migrants; summary executions; disproportionate use of force by law enforcement officials towards persons attempting to cross borders; expulsion of migrants married to nationals; torture and other cruel, inhuman or degrading treatment or punishment; threats to freedom of association including the right to form and join trade unions; collective deportations and collective expulsions; enforced disappearances and violence against migrant women.

Specific human rights or sets of rights involved in the allegations that have given rise to the intervention of the Special Rapporteur during the period under review include: the right to life and security of the person; the right to health; the right to a fair and public hearing before an independent and impartial tribunal; rights associated to the protection of the family; the right to an effective remedy; the right to leave one's own country; the freedom of expression and association with others; the right to education, rights of minorities; the best interests of the child; freedom from torture and inhuman or degrading treatment or punishment; the right of the child to express his or her views and those to be taken into consideration in proportion to the age and maturity of the child; right to be considered as a person before the law and the due process of law, including the right to be presumed innocent until proved guilty according to the Law.

Human rights issues and themes that have been matter of consideration by the Special Rapporteur on the human rights of migrants in his communications during the period under review, include: the protection of migrants in the context of mixed migratory flows; the human rights impact of the criminalization of irregular migration; racism, xenophobia, discrimination and related intolerance against migrants, including violence and physical attacks; the protection of human rights in the context of irregular cross border; the protection of the child in the context of migration; non-repatriation of irregular migrants for humanitarian reasons; identification and special protection of persons in vulnerable situations in migration-related circumstances, including age determination assessment; deportation of irregular migrants and the protection of the unity of the family; the protection of the child against all forms of discrimination or punishment on the basis of the immigration status of his or her parents and the protection of family unity; the protection of will- be-returned-nationals against torture in countries of origin; equal rights for migrants as of marriage; protection and de-criminalization of victims of illegal migrant-smuggling networks; ensuring the protection of human rights at all stages of the migration process management; violence against migrant women; the protection of defenders of migrants' human rights and of the rights of migrant workers; the independence of judges and lawyers in cases involving migrants; the human rights protection of non-nationals under the jurisdiction of the State.

The Special Rapporteur has continued to cooperate with other mandate-holders in his work. A total of 17 communications were sent jointly by the Special Rapporteur and the following special procedures mandate-holders:

- The Special Rapporteur on extrajudicial, summary or arbitrary executions;
- The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment;
- The Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance;
- The Special Rapporteur on freedom of religion or belief;
- The Special Rapporteur on violence against women, its causes and consequences;
- The Special Rapporteur on the sale of children, child prostitution and child pornography;
- The Special Rapporteur on trafficking in persons, especially women and children;
- The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;
- The Special Rapporteur on the independence of judges and lawyers;
- The Special Representative of the Secretary-General on the situation of human rights defenders;
- The Special Rapporteur on the situation of human rights defenders;

- The Independent Expert on minority issues;
- The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context;
- The Special Rapporteur on the right to education;
- The Working Group on Arbitrary Detention;

It is interesting to note that the largest number of the total joint communications (16) was sent jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (4), followed by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (3), the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (3) and the Special Rapporteur on the right to education (3).

D. Summary of communications sent to Governments and replies received

Belgium

Communication envoyée au Gouvernement le 8 avril 2008

1. Violations alléguées/questions en matière des droits de l'homme: Détention arbitraire de migrants en situation irrégulière- droit à la santé-non-rapatriement pour de raisons humanitaires.
2. Sujet(s) de la communication: Une famille albanaise composée par les conjoints et un petit enfant, né en Belgique.
3. Caractère de la réponse : Réponse exhaustive.
4. Le 8 avril 2008, le Rapporteur spécial sur les droits de l'homme des migrants et le Vice-Présidente du Groupe de Travail sur la détention arbitraire ont envoyé un appel urgent au Gouvernement sur les informations reçus concernant Mme D. B., née le 2 juin 1971, M. J. I., né le 27 novembre 1975, et leur fils, M. I., né le 27 octobre 2004, ressortissants albanais, actuellement retenus au Centre de détention d'immigration 127bis, Tervuursesteenweg, 300 à 1820, Steenokkerzeel. Selon les informations reçues :
5. Mme B., M. I. et M. M. auraient été arrêtés le 30 octobre 2007 à 4 h30 à leur domicile de Gingelom par neuf agents de police à la demande du Bureau d'Immigration du Ministère de l'Intérieur. Depuis, ils seraient retenus au Centre de détention d'immigration susmentionné sur la base d'un ordre administratif. Au moment de l'arrestation, aucune raison spécifique n'aurait été fournie à la famille, mise à part l'annonce d'une convocation pour « un petit entretien » et un contrôle de leurs papiers.
6. La famille serait arrivée en Belgique en 2003. Leur demande d'asile aurait été rejetée par les autorités belges compétentes et la famille risquerait l'expulsion en Albanie. Une demande de régularisation de leur statut en Belgique pour raison humanitaire aurait également été rejetée le 13 septembre 2006, trois ans après son introduction.

7. Une pétition contestant la légalité de l'ordre de détention aurait été rejetée par la Chambre du conseil d'Hasselt le 27 novembre 2007. Celle-ci aurait rejetée la demande sans vouloir en examiner le fond et sans avoir égard aux arguments invoqués concernant la détention de l'enfant. La suspension de l'exécution de l'ordre d'expulsion aurait été refusée par le Tribunal d'Immigration compétent le 26 mars 2008.

8. L'expulsion de la famille en Albanie, prévue pour le 26 mars 2008, aurait quand même été annulée grâce à l'intervention de la Cour Européenne des Droits de l'Homme le jour même. Le rapatriement serait donc suspendu jusqu'au 24 avril 2008 en application de l'article 39 du règlement de la Cour afin de tenir compte de l'examen médical des membres de la famille, comprenant l'examen de M. par un pédopsychiatre, et dans l'attente de l'issue donnée à la plainte constitutionnelle soumise par la famille en Belgique.

9. Le 4 mars 2008, les parents de M. auraient commencé une grève de la faim qui continue jusqu'à aujourd'hui. Comme indiqué par leur certificat médical, leur état de santé ne permettrait pas de voyager vers leur pays d'origine. Selon les informations reçues, la sécurité et l'intégrité physique de la famille seraient en péril s'ils devaient retourner en Albanie. De plus, la famille ne recevrait pas de traitement médical adéquat dans le Centre de Détention d'Immigration, en dépit de la fièvre de 40° dont souffre M. depuis plus de trois jours.

10. Il semble que la détention de M., âgé de trois ans et demi, ait été effectuée sans base légale, compte tenu du fait que ni les décisions administratives publiées contre ses parents, ni l'autorisation de leur détention ne feraient allusion à leur enfant.

11. La détention prolongée de M., son état de santé de même que celui de ses parents font l'objet de sérieuses préoccupations.

Réponse donnée par le Gouvernement à l'appel urgent envoyé le 8 Avril 2008

12. Le 3 juillet 2008, le Rapporteur Spécial sur les droits des migrants a reçu la réponse du Gouvernement à l'appel urgent envoyé le 8 avril 2008, dans les termes suivants:

13. Composition de famille : I.J., né le 27.11.1975 à Funar, de nationalité albanaise. Son épouse, B.D., née le 02.06.1971, à Trebisht Celebi, de nationalité albanaise. Leur enfant I.M., né le 27.10.2004 à Saint-Trond (Belgique), de nationalité albanaise.

14. Les faits tels que relatés dans le résumé sont-ils exacts ?

15. Les faits relatés dans votre courrier sont plus au moins exacts. Il convient néanmoins de les compléter et de les replacer dans leur contexte.

16. L'arrestation de la famille I. faisait suite à un contrôle à l'adresse pour vérifier si la famille résidait toujours sur le territoire. La demande d'autorisation de séjour introduite par la famille le 30 septembre 2006, avait en effet été déclarée irrecevable le 21 août 2007 mais n'avait pu être notifiée. La police locale de Saint-Trond (Gingelom) a été mandatée le 12 septembre 2007 pour effectuer un contrôle à l'adresse. La Police a effectué le contrôle le 30 octobre 2007 à 5 heures 36 du matin. Ayant constaté la présence de la famille à son domicile, elle a prié la famille de la suivre dans ses locaux et pris contact avec l'Office des Etrangers qui a décidé de la maintenir en vue de son éloignement du territoire.

17. Les deux époux sont effectivement arrivés en Belgique en 2003, à des dates différentes. Leurs demandes d'asile n'ont pas été jugées crédibles et ont été déclarées irrecevables tant par l'Office des Etrangers (première instance) que par le Commissariat général aux réfugiés et aux Apatrides (en appel). Le Conseil d'Etat a également confirmé la décision de cette dernière instance. Les demandes d'asile ont donc été définitivement rejetées. Vous trouverez plus loin le détail des procédures.

18. Seule madame B.D., a introduit dans un premier temps une demande d'autorisation de séjour en septembre 2003 quelques mois après le rejet de sa demande d'asile. Dans cette demande, comme la loi sur les étrangers le requiert, elle a invoqué les circonstances exceptionnelles qui l'empêchaient d'introduire sa demande dans son pays d'origine, à savoir, sa crainte d'un retour, et les motifs pour lesquels elle sollicitait une autorisation de séjour en Belgique, à savoir, son intégration alors même qu'elle ne résidait que quelques mois en Belgique. Il est à remarquer qu'une telle demande formulée en séjour illégal après la notification d'un ordre de quitter le territoire exécutoire ne constitue pas une voie de recours et ne confère aucun droit de séjour au requérant.

19. Comme cette demande ne pouvait être examinée indépendamment de la situation de l'époux qui était à l'époque encore à l'examen, elle n'a pas fait l'objet d'un examen immédiat. Ensuite, l'intéressée a mis au monde le 27 octobre 2004 son enfant, M. A la suite des décisions du Conseil d'Etat clôturant définitivement la première demande d'asile de Madame I., demande d'autorisation de séjour de l'épouse a été examinée et a été déclarée irrecevable le 24 août 2006. La famille a été priée d'obtempérer à l'ordre de quitter le territoire lui notifié en 2003 mais elle ne l'a pas fait. Elle a aussitôt introduit une seconde demande d'autorisation de séjour, reprenant les mêmes motifs.

20. A la suite du contrôle de la police à l'adresse, l'Office des Etrangers a décidé de maintenir la famille en vue de son éloignement. La légalité de cette détention a effectivement été contestée auprès des autorités judiciaires, par l'introduction d'un recours devant la Chambre du Conseil du Tribunal de Première Instance seul habilité à se prononcer sur la légalité de la détention. La chambre de Conseil a toutefois confirmé la légalité de la détention.

21. Il convient de remarquer que la famille a refusé à plusieurs reprises son rapatriement, prolongeant de cette façon sa propre détention et elle a finalement opté pour la grève de la faim pour s'opposer à son rapatriement.

22. La Cour Européenne des Droits de l'Homme a informé l'Etat belge que la famille I. a introduit un recours en date du 8 avril 2008. L'Etat belge est invité à transmettre ses observations avant le 4 juin 2008.

23. Il est à noter que l'épouse a une sœur en Belgique qui y est régulièrement établie avec son époux.

24. Historique des différentes procédures

Procédure d'asile :

I.J.:

13.08.03 : 1^{ère} demande d'asile;

19.08.03 : décision de refus de séjour avec ordre de quitter le territoire dans un délai de 5 jours, notifiée le jour même en mains propres (décision d'irrecevabilité);

20.08.03 : introduction du recours urgent suspensif au Commissariat général aux réfugiés et aux apatrides (CGRA);

12.09.03 : décision confirmative de refus de séjour par le CGRA (confirmation de l'irrecevabilité de la demande);

demandes formulées après la décision de maintien en vue d'éloignement :

28.01.08 : 2^{ème} demande d'asile;

05.02.08 : décision de refus de prise en considération (faute d'éléments nouveaux) notifiée le jour même en mains propres;

25.03.08 : 3^{ème} demande d'asile (introduite la veille d'une nouvelle tentative de rapatriement)
Décision de refus de prise en considération (pas de nouveaux éléments), notifiée en mains propres le 26 mars 2008.

B.D.:

07.04.03 : 1^{ère} demande d'asile;

10.04.03 : décision de refus de séjour avec ordre de quitter le territoire dans un délai de 5 jours, notifiée en mains propres le 10 avril 2003(décision d'irrecevabilité);

11.04.03 : introduction du recours urgent suspensif au C.G.R.A.;

16.05.03 : décision confirmative du refus de séjour du CGRA

20.06.03 : recours en suspension et annulation au Conseil d'Etat (CE) contre la décision du CGRA;

11.01.06 : rejet de la demande en suspension par le Conseil d'Etat;

30.05.06 : arrêt du CE actant le désistement;

28.01.08 : 2^{ème} demande d'asile et 3^{ème} demande d'asile: voir procédure développée pour l'époux, les demandes ayant été introduites en même temps.

Procédures d'autorisation de séjour sur base de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers:

a) *Demande d'autorisation de séjour introduite sur la base de l'article 9, alinéa 3 de la loi du 15 décembre 1980 (demandes dites humanitaires)*

femme :

03.09.03 : demande fondée notamment sur base de l'intégration;

13.09.06 : notification de la décision d'irrecevabilité prise le 24.08.06.

couple :

30.10.06 : demande;

21.08.07 : décision d'irrecevabilité;

30.11.07 : notification de la décision d'irrecevabilité au Centre de rapatriement 127bis (CR 127 bis).

b) *Demandes formulées après la décision de maintien en vue d'éloignement :*

c) *Demande d'autorisation sur la base de l'article 9 bis de la loi du 15 décembre 1980 modifiée par la loi du 15 septembre 2006.*

couple :

06.03.08 : demande;

21.03.08 : notification de la décision d'irrecevabilité prise le 21 mars 2008.

d) *Demande d'autorisation sur la base de l'article 9 ter de la loi du 15 décembre 1980 modifiée par la loi du 15 septembre 2006 (demande pour raisons médicales).*

25.03.08 : demande;

31.03.08 : décision d'irrecevabilité prise le 31 mars 2008, adressée au bourgmestre en vue de sa notification.

Enfermement de la famille / tentatives d'éloignement :

30.10.07 : notification d'un ordre de quitter le territoire avec remise à la frontière et détention à cette fin en application de l'article 7, al. 1, 1^o al 2 et et al. 3 de la loi du 15 décembre 1980

02.11.07 : refus de départ suivi d'un nouveau titre de détention, la famille n'ayant pas obtempéré à l'ordre de quitter le territoire ;

05.11.07 : introduction d'une requête de mise en liberté auprès de la Chambre du Conseil (CC) du Tribunal de Première Instance ;;

12.11.07 : report de l'audience à la demande de l'avocat de la famille I.;

16.11.07 : la Chambre du Conseil du Tribunal de 1^{ère} Instance de Bruxelles se déclare incompétente (ratione loci, la famille ayant été arrêtée à Gingelom, Saint-Trond);

27.11.07 : la Chambre du Conseil du Tribunal d'Hasselt déclare la demande recevable mais non fondée;

05.12.07 : vol spécial prévu, mais annulé;

16.12.07 : rapatriement sous escorte prévue, refus de départ, nouvel enfermement;

09.01.08 : recours gracieux auprès du Directeur général de l'Office des étrangers. Rejet de la requête;

15.03.08 : dépôt d'une plainte auprès de la juge d'instruction BRUYNEEL contre les conditions de détention du Centre de rapatriement 127bis;

17.03.08 : audition par la juge d'instruction BRUYNEEL;

25.03.08 : 3^{ème} demande d'asile suivie par une décision de refus de prise en considération (pas de nouveaux éléments);

+ demande d'autorisation de séjour pour motifs médicaux sur base de l'article 9ter

+ requête en suspension en extrême urgence auprès du Conseil du Contentieux des Etrangers(CCE) contre la décision de rapatriement le 26.03.08 ;

26.03.08 : annulation de la participation au vol sécurisé, rejet de la requête par le CCE;

28.03.08 : requête de mise en liberté;

03.04.08 : ordonnance de mise en liberté et exécution étant donné qu'avant fin avril, rien ne peut être entrepris suite à la décision de la Cour européenne des droits de l'homme de permettre à la famille de se soumettre à une expertise médicale. Informations complémentaires et éventuellement tout résultat des enquêtes menées, examens médicaux, investigations judiciaires et autres menées en relation avec ces faits.

25. Par rapport aux motifs médicaux invoqués par la famille, il est à remarquer qu'aucune demande de séjour, ni celle de l'épouse, introduite en 2003, ni celle introduite par le couple le 30 octobre 2006, ne fait état d'éléments médicaux ; seule la crainte d'un retour au pays dans le chef de l'épouse, est exprimée et son intégration.

26. Des problèmes médicaux sont seulement invoqués pour justifier le refus de rapatriement forcé. A ce moment, le couple invoque des problèmes médicaux ; leur conseil M.D., en fait état pour la première fois dans une lettre en date du 4 décembre 2007. Elle parle

des problèmes de reins dont souffre sa cliente, à l'origine, de son hospitalisation en mars 2007.

27. D'autre part, le médecin du centre, le docteur L., qui a examiné l'intéressé a répondu à un autre avocat le 29 novembre 2007, que : « Mme B. a effectivement des problèmes rénaux connus, pour lesquels elle a été hospitalisée ... à Saint-Trond le 30/03/07. Elle est sortie de cet hôpital avec un antibiotique mais ne s'est plus inquiétée de ce problème depuis donc le mois de mars passé. Elle se plaint maintenant à nouveau de problèmes rénaux, ... Il faut remarquer que ces plaintes se remontent seulement au 19/11/2007 et il est clair que nous avons tout fait pour aider cette dame. En ce qui concerne son fils Mr. I. M., ses plaintes (au plutôt ceux de ses parents) varient de diarrhée à constipation. Le WE passé l'enfant a développé une t° de 38,1° pour laquelle nous avons fait venir un médecin de garde. Une thérapie antibiotique a été commencée... il est clair qu'étant sous ABthérapie l'enfant manque un peu d'appétit et on lui donne donc aussi un supplément vitaminée. Globalement, la situation de l'enfant est fort satisfaisante.»

28. Madame I. a été examinée à deux reprises (les 4 et 18 décembre 2007) par un spécialiste.

29. L'enfant a été malade pendant la période de maintien comme cela arrive chez les enfants, mais son état de santé n'est jamais été jugé alarmant. Dans sa classe et avec les éducateurs, il joue et rit comme un enfant normal.

30. L'état de santé de la mère et de l'enfant n'était donc pas de nature à empêcher le retour dans le pays d'origine.

31. Le médecin du centre a à chaque tentative de rapatriement, notamment le 6 décembre 2007 a délivré l'autorisation nécessaire ('fit to fly'), ce qui indique qu'il n'y avait pas de contre-indication médicale au retour des personnes.

32. Les différents membres de la famille ont été examinés à plusieurs reprises durant leur détention tant par le médecin désigné par le centre (plus de 20 fois), les médecins de garde (4 fois) et des spécialistes, que par des médecins extérieurs au centre, choisis par les intéressés ou par des tiers (5 fois) et par « Kind en Gezin » (7 fois).

33. Les intéressés ont entamé une grève de la faim le 04 mars 2007 et ont bénéficié d'un suivi médical durant leur grève de la faim. Les deux époux ont cependant refusé de voir le médecin du centre le 11 mars 2008 (certificat médical); Un certificat médical du 17 mars 2008, du médecin du centre, le docteur D. confirme l'état de santé stable de l'homme et l'état de santé satisfaisant de la femme.

34. Le 17 mars 2008, le docteur V.O.D. (Médecin du Monde), atteste qu'il a examiné la famille le 15 mars 2008 et qu'il a constaté les conséquences médicales de la grève de la faim du couple (grève de la faim depuis le 04.03.08). Ils sont très faibles. Il leur interdit un long voyage pour des raisons médicales évidentes;

35. Le Dr. H., pédopsychiatre, indique le 21 mars 2008 indique que l'enfant devrait être éloigné du centre (un éloignement était prévu avec le vol spécial du 26 mars 2008). Il signale également qu'il ne s'agit pas d'une situation d'urgence exceptionnelle. Il mentionne également qu'il incombe aux parents de mieux accompagner leur enfant.

36. Une nouvelle attestation du Docteur D., en date du 02 avril 2008, confirme que les résultats des examens pratiqués sont rassurants et que le couple se trouve dans un bon état de santé général, ainsi que leur enfant, mise à part un épisode de varicelle sans complication.

37. En ce qui concerne la plainte par rapport aux conditions de détention dans les centres, le petit M. doit être examinée par un pédopsychiatre mandaté par le juge d'instruction dans le cadre de l'introduction par le couple le 26 mars 2008 d'une requête en extrême urgence contre l'Etat belge devant la Cour européenne des droits de l'Homme visant à faire suspendre leur rapatriement pour permettre à un médecin expert de se prononcer sur leur état médical et leur capacité à supporter une expulsion forcée, et garantir que l'enfant soit examinée par le pédopsychiatre mandaté par le juge d'instruction dans le cadre d'une plainte pénale déposée en son nom par ses parents pour traitement inhumain et dégradant. L'instruction étant réputée secrète, l'Office des étrangers peut uniquement vous préciser que des devoirs d'instruction ont été prescrits, dont notamment l'audition de l'enfant par un médecin légiste. Madame B., juge d'instruction attend le rapport du médecin légiste pour désigner le pédopsychiatre.

38. Quelles sont les lois qui régissent l'arrestation et la détention des personnes mentionnées et dans quelles mesures celles-ci sont compatibles avec les normes internationales sur les droits de l'Homme ?

39. Les étrangers qui ont fait l'objet d'une mesure privative de liberté prise en application des articles 7, 8 bis, §4, 25, 27, 29 alinéa 2, 51/5, §1^{er}, alinéa 2, et § 3, alinéa 4, 52 bis, alinéa 4, 54, 57/32, §2 alinéa 2 et 74/6 ou de l'article 74/5 de la loi du 15 décembre 1980³ Peuvent introduire un recours contre cette mesure en déposant une requête auprès de la Chambre du Conseil du tribunal correctionnel.

40. Ces dispositions sont compatibles avec les critères déterminés dans le droit international (article 37 de la Convention des Nations des Unies des droits de l'Enfant, article 5 de la Convention européenne des droits de l'homme, article 9 du Pacte relatif aux droits civils et politiques). A ce sujet, il peut être signalé que de nombreuses juridictions civiles et pénales reconnaissent la possibilité d'un maintien de mineurs pour cause d'immigration. Ainsi, aux termes d'une ordonnance rendue le 17/11/2003, par le Président du Tribunal de 1^{ère} Instance de Bruxelles siégeant en référé : la loi du 15 décembre 1980 ne contient aucune disposition spécifique relative aux mineurs étrangers : ces dispositions sont dès lors appliquées indifféremment aux mineurs et aux majeurs.

41. De même, la Chambre du Conseil de Bruxelles a estimé dans une ordonnance du 22/12/2006 « qu'il n'est pas démontré que le traitement (maintien) soit en l'espèce incompatible avec les droits reconnus à l'enfant et avec les Droits de l'Homme ».

42. Enfin, plusieurs décisions de jurisprudence parmi lesquelles l'arrêt de la Chambre des mises en accusation de la Cour d'appel de Bruxelles rendu le 23 juin 2005 et l'arrêt du 8 décembre 2005 de la Chambre des mises en accusation de Liège stipulent que le maintien en détention d'un mineur étranger n'est pas contraire à l'article 37 de la Convention des Nations des Unies des droits de l'Enfant (C.I.D.E.) du 20 novembre 1989, ni à celle de l'article 5 de la Convention européenne des droits de l'homme.

³ Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

43. Il est à remarquer que l'Etat belge maintient les enfants avec leur parents dans un souci de préserver l'unité familiale lorsque celle-ci refuse d'exécuter la mesure d'éloignement dont elle a fait l'objet ou refuse tout programme de retour volontaire. Dans ce cas, la priorité est donnée à un éloignement rapide, de manière à limiter le plus possible le séjour d'enfants dans des centres fermés. Si la détention perdure, c'est souvent dû à l'absence de collaboration de la part des parents qui ont leur part de responsabilité dans l'exécution de la mesure d'éloignement et partant, dans la détention de leur enfant.

44. En ce qui concerne les mineurs non accompagnés (M.E.N.A), il n'y a plus de détention en centre fermé. Les enfants ou mineurs étrangers non accompagnés qui arrivent à la frontière et ceux qui, en cas de doute, sont identifiés comme tels par le service des Tutelles ne sont plus maintenus dans un centre fermé depuis l'entrée en vigueur de la loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines catégories d'étrangers en date du 7 mai 2007.

45. Les M.E.N.A. qui n'ont pas accès au territoire en application de l'article 3 ou de l'article 52, § 1^{er} de la loi du 15 décembre 1980 précitée sont admis dans un centre d'observation et d'orientation relevant de la compétence du Ministre de l'Intégration sociale, et ce pour une durée de quinze jours maximum pouvant être prolongée de cinq jours en cas de circonstances exceptionnelles dûment motivées. Lorsque l'intérêt supérieur de l'enfant justifie un retour du M.E.N.A. vers sa famille, il sera ainsi fait application de la Convention de Chicago. Le régime sécurisé du Centre d'Observation et d'orientation en garantit les conditions d'application.

46. Les mineurs non accompagnés déjà présents sur le territoire ne sont pas détenus. Le tuteur qui leur est désigné en vertu de la loi-programme du 24 décembre 2002⁴ peut recevoir l'ordre de reconduire l'enfant dans son pays, auprès de sa famille qui est responsable de lui.

47. Enfin, lorsque des mineurs non-accompagnés sont éloignés, des mesures particulières de soutien sont mises en place avec l'accent sur l'importance d'un accompagnement des mineurs vers le pays d'origine ou vers un pays où ils pourront être accueillis par leurs familles ou par des tiers.

48. Dans la pratique, le mineur étranger non accompagné ne sera éloigné que lorsque le retour dans son pays d'origine ou pays où il est admis au séjour est possible avec des garanties d'accueil et de prise en charge de manière appropriée en fonction des besoins correspondants à son âge et à son degré d'autonomie, soit par ses parents ou d'autres adultes qui s'occuperont de lui, soit par des instances gouvernementales ou non gouvernementales.

Dominican Republic

Comunicación enviada al Gobierno el 22 de enero de 2008

49. Violaciones alegadas/asuntos en materia de derechos humanos: Racismo, xenofobia, discriminación y formas conexas de intolerancia; riesgos inminentes a la vida y seguridad

⁴ Titre XIII, Chapitre 6, «tutelle des mineurs étrangers non accompagnés », de la loi-programme du 24 décembre 2002

física y personal de los y las migrantes; protección de los derechos humanos de los defensores de los trabajadores migratorios.

50. Sujeto(s) de la comunicación: 1 hombre de origen haitiano, coordinador de la asociación de trabajadores migratorios y por extensión su familia; un número indeterminado de migrantes habitantes de Ranchadero, República Dominicana.

51. Carácter de la respuesta: Ninguna respuesta.

52. El 22 de enero de 2008, el Relator Especial envió una comunicación al Gobierno conjuntamente con el Representante Especial del Secretario-General sobre la situación de los defensores de los derechos humanos en relación con el caso del Sr J. R., coordinador de las Asociaciones Solidarias de Trabajadores Migrantes de la Línea Noroeste (ASOMILIN).

53. Según información recibida, el 9 de enero de 2008, un grupo de entre 10 y 15 personas se habría presentado en el domicilio de J. R. en la comunidad de Ranchadero, provincia de Monte Cristi. Se le informó a la esposa del Sr J. R. que la familia disponía de un plazo de tres semanas para abandonar la comunidad. Según se informa, un empleado gubernamental de la Dirección General de Migración habría amenazado con expulsar a todos los trabajadores y trabajadoras migrantes haitianos que viven en Ranchadero. Escenas parecidas se habrían producido más tarde en las viviendas de otros trabajadores haitianos.

54. Estos actos habrían ocurrido tras un ataque contra trabajadores y trabajadoras migrantes haitianos y dominicanos de origen haitiano, sucedido en Ranchadero el 28 de octubre de 2007, en que varias personas habrían resultado heridas con machetes, y varias casas habrían sido atacadas. J. R. habría sido amenazado tras informar del ataque a las autoridades. Según se informa, la mayoría de los migrantes haitianos que vivían en la comunidad se habrían ocultado o abandonado la República Dominicana ante el temor de más violencia.

55. Se expresa profunda preocupación por estos supuestos actos de intimidación y hostigamiento en contra del Sr J. R., de su familia y de las comunidades haitianas o de ascendencia haitiana en la República Dominicana, que puedan deberse al origen nacional de los susodichos.

Egypt

Communication sent to the Government on 16 September 2008

56. Violations alleged/human rights issues: Arbitrary and Summary Executions- Right to Life and security of the person- disproportionate use of force by law enforcement officials towards persons attempting to cross the border between Egypt and Israel.

57. Subject(s) of the communication: -A group of Darfurians (including a Sudanese couple and their two year-old girl child); an Eritrean mother and her 2 girl childs; 3 male nationals from Sudan; a seven-year old sudanese girl child and approximately 17 more migrants.

58. Character of reply: No response.

59. On 16 September 2008, the Special Rapporteur jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions sent a letter of allegation to the Government concerning reports of the use of lethal force by Egyptian border guards against migrants, asylum seekers and refugees from other African countries trying to cross the border between Egypt and Israel without authorization.

60. According to the information received, on 22 July 2007, just after midnight, H. A. H., a pregnant Sudanese woman aged 28, was trying to cross the border near Rafah together with her husband and her two year old daughter as part of a group of Darfurians. They were shot at by Egyptian border guards. H. A. H. was hit at the head and died immediately. On 16 February 2008, M. M. H., an Erytrean citizen aged 37, was shot at by Egyptian security forces as she was trying to cross a barbed wire border fence near El Kuntillah on the Sinai Peninsula together with her two child daughters. A bullet hit her in her head and killed her. On 19 February 2008, Egyptian border security forces purportedly shot and killed E. K., a Sudanese citizen aged 50, as he was trying to cross the border near Rafah. Another Sudanese man, A. M. O. (aged 23), was killed in the same area on 10 March 2008. On 28 June 2008, Egyptian border guards allegedly killed a seven-year-old Sudanese girl and a man as they were trying to cross the border near Rafah. Overall 17 persons were shot dead by Egyptian border guards to prevent them from crossing the border since the beginning of the year 2008. Tens more were injured and taken to hospital with serious bullet injuries to the chest, back, thighs or legs.

61. The reports received indicate that the refugees, asylum seekers and migrants arrive near the border fence separating Egypt from Israel at night in small groups aided by local smugglers. They run towards the barbed wire fence and try to either climb over it or cut through it. The Egyptian border security reportedly usually first order them to stop and fire warning shots in the air. However, as the above alleged deadly shootings indicate, those who do not stop may be killed or seriously injured by shots to their head or body.

Estonia

Communication sent to the Government on 17 January 2008

62. Violations alleged/human rights issues: Arbitrary detention- Right to fair proceedings before and independent and impartial tribunal- protection to the unity of the family.

63. Subject(s) of the communication: A male, national from Cameroon, married to an Estonian woman and by extension, his wife and child.

64. Character of reply: No response.

65. On 17 January 2008, the Special Rapporteur sent an urgent appeal to the Government regarding the case of Mr. C. N., a Cameroon citizen, currently residing in Estonia.

66. According to the information received, Mr. C. N. entered Estonia two years ago and applied for asylum. After his marriage with an Estonian citizen, the Estonian Migration Office allegedly recommended him to apply for a residence permit and subsequently, to withdraw his asylum application in court because of his marriage, which he did.

67. To date, no decision has been taken on his application for a residence permit, which would also allow him to work to gain an income for his wife and his child. He inquired twice

with the Migration Office during almost two years pending the decision on his application. He was explained that he would be notified about the outcome of his application on 27 February 2008.

68. When Mr. N. and his wife visited the Migration Office on 17 December 2007, to enquire the delay in the decision on the residence permit, he was detained but reportedly not informed about the reasons for his detention, and sent to a deportation center in Parnu where he is currently being detained without access to legal representation.

69. Concern was expressed that Mr. N.'s deportation to Cameroon is reportedly imminent.

France

Communication envoyée au Gouvernement le 13 juin 2008

70. Violations alléguées/questions en matière des droits de l'homme: Discrimination contre les migrants- Droit à la vie privée et familiale- protection à l'unité familiale- Droit à un recours effectif contre un ordre d'expulsion en cas de mariage avec un ressortissant.

71. Sujet(s) concernés: Un homme d'origine sénégalais, marié avec une ressortissante (Pour extension, son également sujets concernés son époux et son enfant).

72. Caractère de la réponse : Pas de réponse.

73. Le 13 juin 2008, le Rapporteur spécial sur les droits de l'homme des migrants a envoyé un appel urgent au Gouvernement concernant la situation de Monsieur **S. N'D.**, ressortissant sénégalais et vivant actuellement en France, qui aurait reçu un ordre d'expulsion prévu pour le vendredi 13 Juin 2008.

74. Selon les informations reçues, Monsieur S. N'D., ressortissant sénégalais, serait arrivé en France en 1998.

75. Il aurait épousé en avril 2007 une ressortissante française. Le mariage célébré au Sénégal, aurait été retranscrit au consulat français au Sénégal et le couple aurait reçu un livret de famille français. Le couple réside actuellement en France, dans le département de l'Ain. L'épouse de M. N'D. est enceinte et le couple attend un enfant pour le mois d'octobre.

76. Employé comme électricien en France, il aurait alors sollicité en mars 2008 une admission au séjour à titre exceptionnel auprès des autorités. Ce titre de séjour lui aurait été refusé.

77. M. N'D. aurait reçu de la Préfecture de l'Ain, en septembre 2007, un ordre de quitter le territoire français.

78. Le 5 juin 2008, M. N'D. aurait été arrêté à son domicile de Bourg-en-Bresse puis aurait été placé en centre de rétention à Lyon pendant deux jours.

79. Suite à une décision du Juge des libertés et de la détention de Lyon, il aurait été ensuite assigné à résidence et aurait regagné son domicile.

80. Son expulsion était programmée pour le vendredi 13 juin 2008.

Communication sent to the Government on 16 July 2008

81. Violations alleged/human rights issues: Concerns in relation to the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (concerns include the return and removal of unaccompanied minors (art.10); entry ban (art.11); safeguards pending return (art.14) and detention for the purpose of removal (art.15).

82. Subject(s) of the communication: Irregular migrants in European Union Members States.

83. Character of reply: Comprehensive response.

84. On the 16 July 2008, the Special Rapporteur on the human rights of migrants, jointly with the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the sale of children, child prostitution and child pornography, the Special Rapporteur on the right to education, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, the Special Rapporteur on violence against women, its causes and consequences, and the Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti address the Government in its capacity as holding the current Presidency of the Council of the European Union concerning the “Directive 2008/.../EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD))” (the “Return Directive”). This Directive was endorsed by the European Parliament on 18 June 2008.

85. We would like to acknowledge that the Return Directive may be envisaged as an effort which has the potential to provide for uniform standards concerning the return of undocumented immigrants across the European Union and to enhance protection mechanisms in a number of Member States of the European Union. While recognising numerous references in the preamble and the text of the Return Directive to international and European human rights and standards as well as the compulsory provision of legal aid to the concerned individuals as envisaged in article 13 of the Directive, it is, nevertheless, incumbent on us in our capacity as human rights experts to raise a certain number of remaining important concerns with respect to the Directive.

86. One principal concern relates to the detention regime pending removal procedures for irregular immigrants, including unaccompanied minors and other vulnerable groups, as foreseen by articles 15 and 17 of the Return Directive.

87. Article 15 of the Return Directive suggests that the detention period must, as a rule, not exceed six months provided that less coercive measures cannot be applied effectively and there is a risk of absconding or the third-country national concerned avoids or hampers the preparation of return or the removal process. However, in exceptional cases, this period may

be extended by Member States for another period of up to 12 additional months. Article 17 of the Directive would allow Member States to detain unaccompanied minors, who find themselves in a particularly vulnerable position.

Proportionality of detention (article 15)

88. We would like to emphasise that irregular immigrants are not criminals. As a rule they should not be subjected to detention at all. States may only revert to detention as a measure of last resort pursuant to a strict application of the principle of proportionality. This principle is reflected in recital 16 and article 15, paragraph 1 of the Return Directive. However, it would require an assessment of the availability of alternatives to detention, and it would be welcomed if the Directive made clearer reference to the obligation of Member States to explore such alternatives. Also in view of the fact that the Return Directive does not provide for an exhaustive list of concrete reasons for detention in its article 15, paragraph 1, it is feared that Member States may otherwise resort to detention excessively and make it the rule rather than the exception.

89. In addition, Member States have the obligation to ensure that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation of trafficked persons, as well as that trafficked persons are not, in any circumstances, held in immigration detention or other form of custody. We urge you to revise the Return Directive to include these and all other relevant safeguards for the protection of victims of trafficking, which are contained in the OHCHR's Recommended Principles and Guidelines on Human Rights and Human Trafficking.

Maximum period of detention (article 15)

90. Furthermore, we would submit detention periods of up to 18 months in total appear to be excessive. This is especially true if obstacles for carrying out the removal do not lie within the sphere of responsibility of the immigrant liable for return in relation to, for example, failure to obtain the necessary documentation of the country of origin or destination. We would like to recall that the original proposal of the European Commission contained a maximum limit of detention of six months (COM/2005/391 final, article 14, paragraph 4).

Detention and return of unaccompanied minors (articles 10, 14 and 17)

91. It would especially be welcomed if Member States could indicate to us under what circumstances they would consider the detention of an unaccompanied minor to be justified. Article 17, paragraph 1, of the Directive merely states the wording of parts of the guarantees of article 37, lit. (b), clause 2, of the Convention on the Rights of the Child. In our view the Directive does not provide for sufficient legal and procedural safeguards.

92. We would also like to seek clarification as to what conditions would have to be fulfilled in order to satisfy the Member States that a reception facility for an unaccompanied minor in the State of return is "adequate" (article 10, paragraph 2 of the Return Directive).

93. We are further concerned about the lowering of standards safeguarding the right to education, especially educational opportunities for minors. It has to be recalled that the already mentioned original proposal of the European Commission envisaged in its article 6,

paragraph 4, that the right to education would have precluded Member States to issue removal decisions. The current text of the Directive, however, merely requires Member States to ensure that the principle that minors are granted access to the basic education system subject to the length of their stay are taken into account as far as possible (article 14, paragraph 1, fourth indent). A similar qualification is contained in article 17, paragraph 3 of the Directive, in that minors in detention shall have access to education only depending on the length of their stay.

Judicial review of the legality of administrative detention (article 15)

94. We would further encourage that the applicable legal safeguards concerning judicial review of the legality of administrative detention as contained in article 15 of the Return Directive be specified to provide for the obligation of Member States to adopt fixed time-limits rather than stipulating that such review be carried out “speedily” and within “reasonable” intervals.

Emergency situations (article 18)

95. In addition, the circumstances, pursuant to which Member States may invoke the existence of an emergency situation, allowing them to derogate from the already vague time limits for judicial review and to take undefined urgent measures in respect of conditions of detention as envisaged by article 18 of the Return Directive, may be beyond the control of the concerned immigrant liable for return. We would remind Member States that judicial review without delay of the lawfulness detention is not a privilege, but a human right, of which States may not even derogate from in times of public emergency in terms of article 4, paragraph 1, of the International Covenant on Civil and Political Rights (see the Human Rights Committee’s General Comment No. 29 on States of Emergency (Article 4) of 31 August 2001, CCPR/C/21/Rev.1/Add.11, paragraph 16).

96. Similarly, article 13, paragraph 2, of the Return Directive does not render it obligatory for Member States to provide for suspensive effect of appeals against decisions related to return, including decisions on entry bans, giving rise to concern of *fait accompli*.

Entry ban (article 11)

97. The possibility of accompanying a return decision with an entry ban for the rejected migrant ranging up to five years as permitted by article 11 of the Return Directive could violate the principle of *non-refoulement* given that the situation in a given country may deteriorate dramatically within that period. In order to ensure that Member States fully respect this principle as required by article 4, paragraph 4 of the Directive we would welcome specific criteria be included in the Return Directive in order to provide Member States stricter guidelines to be taken into due account when implementing the Directive (see article 5, lit c)).

98. The introduction of an entry ban could create conditions in which migrants would seek to re-enter countries in an irregular way, while risking the possibility of being trafficked. The Directive would therefore increase the vulnerability of migrants to becoming victims of trafficking. Although the Directive states that victims of trafficking who have been granted residence permits “shall not be subjected of an entry ban”, this safeguard is weak. Rapid and adequate identification of the victims of trafficking is a widespread problem in many states,

thus leaving out a large group of victims who have not been properly identified and have not been provided with protection and care.

Vulnerable groups (article 14)

99. We commend the mention in article 14 of the Directive that the “special needs of vulnerable persons are taken into account” and that article 3, lit. i) of the Directive contains a definition of the term “vulnerable persons”. We however would like to highlight the importance of protection and specific safeguards for these vulnerable groups. It is important to stress that victims of severe forms of psychological, physical and sexual violence, including rape, should be treated with particular sensitivity during the determination of their cases, the period of voluntary departure or postponement of the removal process.

100. We further note that, while most of the third-country nationals affected by the Return Directive may not have asked for asylum or humanitarian leave in European Union countries, by analogy extending existing provisions pertaining to the determination of asylum cases may be helpful for the implementation of the Return Directive, and in particular its article 14. We would like to suggest that Member States bear in mind, while deciding upon a removal of a third-country national or the postponement of his/her removal, that, when rape or other forms of gender-based violence (such as trafficking or domestic violence) are committed for reasons of race, religion, nationality, political opinion or membership of a particular social group, it may be considered persecution under the definition of the term “refugee” in the 1951 Convention relating to Status of Refugees.

101. The Directive has to be revised to include specific safeguards for victims of human rights violations, including men, women and children, who had been trafficked for the purpose of sexual or labor exploitation. The Directive should provide for access to redress and remedies for the victims of trafficking, before any return decision is put in place. Rapid identification of trafficked persons is essential: Member States shall develop guidelines and procedures for relevant authorities involved in the detection and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.

102. The Directive does not adequately reflect some of the provisions and safeguards for victims of trafficking, included in the Council of Europe Convention on Action against Trafficking in Human Beings, which came into force in February 2008. The Directive should also be brought in line with and should incorporate the provisions of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, developed in 2002 by the OHCHR.

103. Excellency, we therefore feel inclined, through your Government in its capacity as Presidency of the Council of the European Union, to request the Member States, further to the agreement reached with the European Parliament on 5 June, and prior to any adoption in the Council of the European Union on 24/25 July 2008, to revise the Return Directive. It is of paramount importance that this Directive meet all applicable international human rights standards and take into full account obligations as receiving, transit and countries of origin.

Réponse du Gouvernement à la communication envoyée le 16 juillet 2008

104. Le Gouvernement a répondu le 4 Septembre 2008 à la communication envoyée le 16 Juillet 2008.

105. Mesdames et Messieurs titulaires de mandats au titre des procédures spéciales,

1- Dans votre correspondance en date du 16 juillet dernier, vous avez bien voulu me faire parvenir plusieurs questions que vous adressez à la présidence en exercice du Conseil de l'Union européenne concernant le texte de la directive « *relative aux normes et procédures communes applicables dans les Etats membres au retour des ressortissants de pays tiers en séjour irrégulier* ».

106. En ma qualité de représentant de la présidence en exercice, je souhaite vous faire part des éléments de réponse suivants :

2- L'Union européenne est une communauté fondée sur le droit.

a) Des règles de droit fixent ainsi les conditions d'entrée, de séjour et de résidence des ressortissants de pays tiers dans les pays de l'Union. L'efficacité de la politique d'admission suppose également la mise en œuvre d'une politique d'éloignement à l'encontre des personnes qui ne respecteraient pas ou plus les réglementations relatives à l'entrée ou au séjour. Nul ne conteste à cet égard aux Etats la faculté de mettre en œuvre une politique d'éloignement.

107. Le Conseil européen a invité à définir des normes communes pour la mise en œuvre de leur politique d'éloignement par les Etats membres. Tel est précisément l'objet de la directive « *relative aux normes et procédures communes applicables dans les Etats membres au retour des ressortissants de pays tiers en séjour irrégulier* ». Ce texte a fait l'objet d'un accord politique au Conseil (JAI) des 5-6 juin 2008, avant d'être adopté en première lecture par le Parlement européen le 18 juin dernier, mettant ainsi un terme à une négociation engagée en septembre 2005.

108. L'adoption de ce texte constitue en soi une avancée significative. Comme le relevait en effet la Commission dans les documents présentés en appui de sa proposition Initiale', la situation qui prévaut, dans l'attente de la transposition de la directive, se caractérise par une très grande diversité des régimes applicables, qu'il s'agisse de la définition même des notions en cause ou des règles et procédures mises en œuvre. La directive vise ainsi à harmoniser et à rendre obligatoires des règles communes pour tous les Etats membres, y compris en matière de garanties procédurales et juridiques. Le respect de ces normes pourra le cas échéant être contrôlé par la Commission et par le juge européen, conformément aux procédures pertinentes prévues par le traité CE. Naturellement, la directive ne fait pas obstacle à l'adoption ou à l'application de normes plus favorables (article 4 paragraphe 3). Cette directive est également sans préjudice des règles applicables en matière d'asile.

b) La directive précise explicitement que les règles qu'elle contient doivent être mises en œuvre dans le respect des droits de l'homme et des libertés fondamentales des personnes concernées.

109. L'Union européenne s'est toujours fortement engagée en faveur des droits de l'Homme, qu'elle défend et promeut, en son sein et partout dans le monde. En accord avec les valeurs et les principes fondamentaux qui sont les siens, l'Union européenne place ainsi au rang de ses

premières préoccupations la garantie du respect des droits de l'Homme de tous les immigrants, ainsi que la lutte contre le racisme, la xénophobie, et la traite des êtres humains, tout particulièrement dans le cadre de sa politique migratoire.

c) En tout état de cause, il appartiendra aux Etats membres d'appliquer l'ensemble des dispositions de la directive dans le respect de l'acquis communautaire en matière de droits de l'Homme, d'immigration et d'asile, et des conventions internationales ratifiées par les Etats membres en la matière.

110. Il est à noter à cet égard que plusieurs dispositions dans le texte de la directive s'inspirent des dispositions pertinentes de la Convention Européenne des Droits de l'Homme.

3- La directive « relative aux normes et procédures communes applicables dans les Etats membres au retour des ressortissants de pays tiers en séjour irrégulier » ne constitue que l'un des volets de l'action de l'Union en matière migratoire.

111. Dans le cadre de la mise en œuvre des proies de Tampere (1999) et de La Haye (2004), l'Union européenne a progressivement développé une politique et des instruments communs dans le domaine de l'immigration et de l'asile.

112. En décembre 2005, une « Approche globale des migrations » a été définie, qui vise, par une collaboration accrue entre pays de départ, de transit et de destination, à promouvoir une gestion intégrée et équilibrée des questions migratoires comprenant des politiques destinées, en coopération avec les pays tiers, à tirer parti des avantages de la migration légale et à lutter contre l'immigration illégale. Le champ géographique de cette approche, initialement orienté vers l'Afrique et à la Méditerranée, a été étendu à l'Europe orientale et du sud-est par le Conseil européen de juin 2007.

113. L'Union européenne s'applique aujourd'hui mettre en œuvre les instruments nécessaires à la réalisation de cette Approche globale, en coopération avec les pays tiers d'origine et le transit, notamment en matière d'organisation de la migration régulière et professionnelle ou de migration circulaire.

114. De fait, l'Europe *largo sensu* s'avère aujourd'hui la première destination des migrants internationaux, loin devant l'Asie et l'Amérique du nord L'Union européenne accueille aujourd'hui quelque 18,5 millions de ressortissants en provenance de pays tiers.

4- S'agissant plus précisément des questions soulevées dans votre correspondance :

- Proportionnalité de la rétention

Le texte de la directive ne tend pas à privilégier la voie de la rétention, mais bien celle du départ volontaire.

a) le considérant (16) rappelle que « le recours à la rétention aux fins d'éloignement devrait être limité et subordonné au respect du principe de proportionnalité en ce qui concerne les moyens utilisés et les objectifs poursuivis. La rétention n'est justifiée que pour préparer le retour ou procéder à l'éloignement et si l'application de mesures moins coercitives ne suffirait pas ».

115. Précisément, l'article 15 prévoit que la rétention d'un ressortissant de pays tiers en séjour irrégulier est appliquée à la seule fin de préparer le retour et/ou de procéder à l'éloignement, en particulier lorsque ce migrant présente un risque de fuite ou lorsqu'il fait obstacle à la procédure de retour ou d'éloignement.

116. Dans tous les cas, les Etats membres ont l'obligation d'envisager en priorité l'application de solutions moins coercitives, conformément à (article 15 paragraphe 1. Cette disposition vise précisément à inciter au retour volontaire des ressortissants en séjour irrégulier. Le considérant (10) rappelle aussi que « lorsqu'il n'y a pas lieu de craindre que l'effet utile d'une décision de retour s'en trouve compromis, il convient de privilégier le retour volontaire par rapport au retour forcé et d'accorder à cet effet un délai de départ ».

b) De façon générale, il convient de noter que le considérant (6) rappelle que « les décisions prises en vertu de la présente directive devraient l'être au cas par cas, en tenant compte de critères objectifs, ce qui implique que l'on prenne en considération d'autres facteurs que le simple fait d'être en séjour irrégulier ». En particulier, le texte de la directive inclut des dispositions spécifiques concernant les personnes vulnérables au sens de son article 3 (i), conformément à l'article 14 paragraphe 1.

- Période maximum de rétention

a) Il importe de rappeler que, conformément à l'article 15 paragraphe 5, la durée maximale de rétention est fixée à six mois. Si le texte de la directive ouvre la faculté d'étendre cette durée de rétention, cette extension constitue une exception, limitée à douze mois supplémentaires et strictement conditionnée, conformément aux dispositions du paragraphe 6.

b) Ces dispositions doivent être appréciées à l'aune des régimes actuellement appliqués à titre national par les Etats membres (et aussi par des pays hors de l'Union européenne). Aujourd'hui, dans plusieurs d'entre eux, la durée de rétention s'avère en effet supérieure à six mois ; ou peut même être illimitée. Le texte de la directive introduit ainsi une innovation significative. En la matière, le texte de la directive permet également le maintien d'un dispositif plus favorable dans les Etats membres qui appliqueraient aujourd'hui une durée de rétention plus courte.

- Rétentions et retour de mineurs non-accompagnés

a) De façon générale, il importe de rappeler que le texte de la directive ne crée aucune obligation en matière de rétention et d'éloignement des mineurs. En revanche, il impose aux Etats membres qui en décideraient de respecter un ensemble de normes minimales en la matière.

b) Le considérant (22) rappelle que « conformément à la convention des Nations unies relatives aux droits de l'enfant (1989), l'intérêt supérieur de l'enfant" devrait constituer une considération primordiale pour les États membres lorsqu'ils transposent les dispositions de la présente directive ». L'article 5 fait précisément obligation aux Etats membres, lorsqu'ils transposent la directive, de tenir dûment compte de l'intérêt supérieur de l'enfant (ainsi d'ailleurs que de la vie familiale).

117. Ce principe d'application générale trouve plusieurs déclinaisons dans le corps de la directive, notamment au titre de l'article 10 et plus généralement des garanties procédurales visées notamment aux articles 14 (accès des mineurs au système éducatif de base) et 17 (conditions de rétention des mineurs).

118. Ces dispositions s'appliquent sans préjudice des dispositions plus favorables prévues dans les droits nationaux ou dans des accords bilatéraux ou multilatéraux, telle la convention des Nations Unies relative aux droits de l'enfant, déjà mentionnée.

- Révision judiciaire de la légalité de la rétention administrative

119. Il convient de noter que le texte de la directive introduit des dispositions importantes concernant les garanties procédurales, s'agissant en particulier de l'assistance judiciaire. Le texte de la directive suit en la matière les dispositions pertinentes de la CEDH ainsi le principe directeur n° 8 des vingt principes directeurs sur le retour forcé adoptés par le Conseil des Ministres du Conseil de l'Europe le 4 mai 2005.

- Situations d'urgence

120. Les dérogations prévues pour les délais de contrôle juridictionnel et les conditions de rétention sont limitées aux situations d'urgence, lorsqu'une charge lourde et imprévue pèse sur la capacité des centres de rétention d'un Etat membre. Dans le cas où un Etat membre décide de recourir à ces mesures exceptionnelles, il a l'obligation d'informer la Commission de sa décision et de la fin de ces mesures dérogatoires, dès que les motifs justifiant leur application ont disparu.

- Interdiction d'entrée

a) Il convient de rappeler que, conformément à l'article 11 paragraphe 1, une interdiction d'entrée n'est de droit dans deux cas particuliers: si aucun délai n'a été accordé pour le départ volontaire (notamment dans les cas visés à l'article 7 paragraphe 4) ou si l'obligation de retour n'a pas été respectée. La possibilité d'assortir une décision de retour d'une interdiction d'entrée constitue autrement une simple faculté. En tout état de cause, la durée d'une telle interdiction ne peut dépasser cinq ans, sauf cas exceptionnels (menace à l'ordre du public par exemple). Cette durée maximale doit être appréciée à l'aune des pratiques aujourd'hui suivies par plusieurs Etats membres (et aussi par des pays hors de l'Union européenne).

b) En tout état de cause, des dérogations sont prévues par le texte de la directive : les Etats membres ne peuvent appliquer l'interdiction d'entrée aux personnes victimes de la traite des êtres humains (article 11 paragraphe 3) ; ils peuvent s'abstenir d'imposer, lever ou suspendre une interdiction d'entrée, pour des raisons humanitaires (*ibidem*) ou, pour certaines catégories de cas, pour d'autres raisons (*ibidem*).

c) Les dispositions concernant une éventuelle interdiction d'entrée doivent être comprises également comme une incitation au départ volontaire.

d) De façon plus générale, les décisions d'interdiction d'entrée sont assorties de garanties procédurales, conformément aux dispositions des articles 12 et 13 (décisions rendues par écrit, motivation en fait et en droit, informations relatives aux voies de recours disponibles...). Au-delà, le texte de la directive ménage la possibilité pour les Etats membres de moduler la

durée d'interdiction d'entrée, voire, au cas par cas la possibilité de lever une telle interdiction (article 11 paragraphe 3).

• *Groupes vulnérables*

121. Le texte de la directive vise à prendre dûment en compte les besoins particuliers des personnes vulnérables notamment en ce qui concerne les garanties assurées dans l'attente du retour (article 14), conditions de rétention et l'accès aux soins médicaux (article 16, paragraphe 3). A noter que la définition des « populations vulnérables » s'avère relativement large, aux termes de l'article 3 (i).

122. De façon plus générale, l'encadrement des mesures concernant ces groupes vulnérables a été significativement renforcé à la faveur de la négociation du projet de directive.

Guatemala

123. On 30 November 2007, the Special Rapporteur sent a communication to the Government of Guatemala⁵. The response sent by the Government was not included in the previous report due to the late submission and it is accordingly reproduced hereinafter.

Respuesta del Gobierno a una carta de alegación enviada el 30 de noviembre de 2007

124. El 9 de enero de 2008, el Relator Especial sobre los derechos humanos de los migrantes recibió respuesta a la carta de alegación enviada el 30 de noviembre de 2007 conjuntamente con el Relator Especial sobre la venta de niños, la prostitución infantil y la utilización de niños en la pornografía, y la Relatora Especial sobre la violencia contra la mujer, con inclusión de sus causas y consecuencias, sobre información recibida en materia de adopciones internacionales que serían realizadas en detrimento de los derechos humanos de los menores,⁶ en los siguientes términos:

125. Son exactos los hechos a los que se refieren las alegaciones mencionadas?

126. En relación a los descubrimientos en relación a Jueces de Familia como Alcaldes Municipales, esta Secretaria desconoce si son veraces dichos señalamientos, recomendando que se solicite la información relacionada directamente al Organismo Judicial y/o al Ministerio Público.

127. En relación a “Casa Quivira”, me permito informarle que la acciones tomadas por esta Secretaria fueron las siguientes:

128. 2.1 Intervención Judicial a cargo de la Subsecretaria de Protección Abrigo y rehabilitación familiar. Según nombramiento notificado en la resolución P. 381-2007-OF II.

⁵ See A/HRC/7/12/Add.1, page 14

⁶ See A/HRC/7/12/Add.1, page 14

Not. II, de fecha 12 de agosto del 2007 de la Juez de niñez y adolescencia y adolescentes en conflicto con la ley penal de Chimaltenango, L. M. C. T. M. de C.

129. Alcances de la Intervención:

130. Medida cautelar de abrigo temporal de los 46 niños y niñas quienes deberían permanecer en Hogar Quivira, y velar porque se atendieran las necesidades de los mismos para garantizarles sus derechos humanos a la salud, integridad personal y otros que asiste por ser seres humanos y que por su corta edad se encuentran en una situación de vulnerabilidad a indefensión.

131. Acciones de la intervención que beneficiarían la integridad física y de salud de los 46 niños y niñas puestos en Protección (listado adjunto)

2.1.1. Protección y resguardo físico de 46 niños y niñas, durante 24 horas por personal calificado de la Subsecretaria de Protección y abrigo.

2.1.2. Por no contar con expedientes y datos para individualizar a los 47 niños, se realizó mediante ficha de registro, que incluyera, huellas plantares y dactilares de todos los menores residentes en el Hogar Quivira.

2.1.3. Examen médico por Pediatría de la Subsecretaria de Bienestar, con el fin de establecer su estado físico y análisis de las prescripciones recetadas.

2.1.4. Proveer de insumos con cargo al presupuesto de la Secretaria de Bienestar Social, para proporcionarle a los 46 niños y niñas lo necesario para su bienestar.

2.1.5. Cumplir con la orden de la Juez de niñez y adolescencia y adolescentes en conflicto con la ley penal de Chimaltenango, L., M. C. T. M. d. C., oficio JPINAYACLPC-0083-2007-Srio. de fecha 15 agosto del 2007 de entregar a los niños E. J. L. S. y C. S. C. a sus padres adoptivos.

2.2. Trasladar a centro asistencial a los niños y niñas que según orden médica necesitaba atención especializada.

2.3. Realizar evaluaciones psicológicas, psiquiátricas, neurológicas a los niños que presentaban problemas.

2.4. Cumplir con la orden de Juez de Chimaltenango e informar periódicamente del estado de los 46 niños puestos bajo protección mediante intervención judicial.

2.5. Cumplir con la orden de la Juez Primero de la niñez y adolescencia, L., M. C. T. M. d. C., de la fecha 22 de agosto 07 P-777-2007/of. Notificando los siguientes puntos.

2.5.1. Orden de levantar la intervención del H. Q. decretada en resolución de fecha catorce de agosto.

2.5.2. Revocar el nombramiento de Interventora Judicial recaído en la Subsecretaria de Protección y abrigo de la Secretaria de Bienestar Social.

132. 2.5.3. Traslado Inmediato a hogares privados de acuerdo a su edad, sexo y condición. (listado adjunto).

2.5.4. Clausura provisional del H.Q. para que continúe funcionando, hasta que legalmente acrediten que ante la Secretaria de Bienestar Social y Ministerio Publico, se encuentran inscritos y llenaron todos los requisitos legales para su funcionamiento.

2.5.6. Certificación el expediente de merito en cuatro plezas.

2.5.7. Levantar el arraigo a los niños K. S. C. y de E. J. L. S., entregados a sus padres adoptivos el 16 de agosto del 2007.

2.5.8. Ordenar a la PGN la investigación del caso.

2.5.9. Oficiar a la PGN para que suspenda cualquier tramite de adopción de los niños de merito.

2.5.10. Fijar fecha de audiencia para conocimiento de hechos, debiendo estar presentes en la mismas, Representantes del H. Q., Representantes de los hogares abrigantes, un abogado representante de la PGN, la trabajadora Social asignada por el juzgado, los padres de los menores según se identifiquen en el transcurso del proceso, un representante de la Secretaria de Bienestar Social, la agente fiscal del Ministerio publico.

2.6. Entrega de los informes circunstanciados y las llaves de H.Q. al dejar sin efecto la Intervención Judicial y la actuación en protección de los niños y niñas. Finalizando las acciones realizadas del catorce al veinte y tres de agosto del dos mil siete. En beneficio a la integridad física y salud de niños, niñas del Hogar en mención.

133. Siendo los entes encargados, tanto de diligencias judiciales como de investigaciones, el Organismo Judicial y la Procuraduría General de la Nación.

134. En relaciona a la normativa nacional en la materia, me permito informarle que la Constitución Política de la Republica de Guatemala, máxima norma jurídica del Estado, reconoce y protege la institución de la adopción.

135. Con fecha diez de mayo de ano mil novecientos noventa el Estado de Guatemala aprobó la “Convención sobre los Derechos del Nino”, así mismo, pon fecha cuatro de junio de ano dos mil tres, a través del Decreto 27-2003, decreta la “Ley de Protección integral de la Niñez y adolescencia”, misma que en el titulo II sección V contempla lo relativo a la familia y la adopción.

136. Con fecha 31 de diciembre del ano 2007, entro en vigencia el Acuerdo 77-2007 “Ley de Adopciones”, la que surge como ordenamiento jurídico ouyo objetivo es dar primacía al interés superior del niño frente a cualquier otro, que sea acorde a los principios contenidos en la doctrina de protección integral de la niñez, para que exista un procedimiento ágil y eficiente; así como la implementación del Convenio Relativo a la Protección del Nino y a la Cooperación en Materia de Adopción International, mismo que fue aprobado el 22 de mayo de ano dos mil siete, a través del acuerdo 31-2007.

137. La Ley de Adopciones señala que el ente encargado en materia de adopciones es el Consejo Nacional de Adopciones (CNA), mismo que fue creado como una entidad autónoma, de derecho publico, con personalidad jurídica y es la Autoridad Central.⁷

138. En relación a las cifra oficiales, me permito informarle que es la Procuraduría General de la Nación (PGN), la entidad que resguarda los registros de las adopciones realizadas, manejándose una cifra proyectada para el año 2007 de 5.557 adopciones.⁸

139. Los requisitos se encuentran en el Capítulo II artículo 30 al 34 del Decreto 77-2007. Ley de Adopciones, siendo el Consejo Nacional de Adopciones el que acredita a dichas organizaciones.

140. Los documentos que dichas organizaciones deben presentar se encuentran detallados específicamente en el artículo 31, siendo las siguientes:

- Documento de constitución debidamente registrado
- Nombramiento de su representante legal
- Nomina de empleados y cargos desempeñados
- Dictámenes favorables de funcionamiento emitidos por el Ministerio de Salud Publica y Asistencia Social y por el Ministerio de Educación
- Otros contenidos en el Reglamento de la Ley

Iran (Islamic Republic of)

Communication sent to the Government on 23 September 2008

141. Violations alleged/human rights issues: Arbitrary deprivation of liberty; right to fair proceedings before an independent and impartial tribunal; right to leave one's own country; freedom of expression and association with others/ right to education, right to a fair trial/ Independence of judges and lawyers.

142. Subject(s) of the communication: a male of Iranian origin, scholar of an independent body of teaching, research and debate on international relations in Iran.

143. Character of reply: No response.

144. On 23 September 2008, the Special Rapporteur jointly with the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the right to education, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment

⁷ Art. 17. Ley de Adopciones.

⁸ Fuente: estudio "Adopciones en Guatemala", p. 24, Tipografía Nacional.

or punishment, sent an urgent appeal to the Government in connection with the information received concerning Dr. **M. Z.**.

145. According to the information received, Dr. M. Z., a scholar of international relations and international law, chair of the *International Studies Association of Iran (ISAI)*, also known by its French name and acronym *Association iranienne des études internationales (AIEI)*, an independent body aimed at promoting the teaching, research and debate on international relations, was arrested on or around 15 August 2008. The exact circumstances of his arrest and the place of detention where he is being held were not known.

146. His family had been permitted to meet him only once, on 6 or 7 September, at Branch 12 of the Revolutionary Court in Tehran under the supervision of court officials. Since then Dr. Z. had not been in contact with them. It was unclear whether this meeting was meant as an official courtroom appearance, since Dr. Z. had been accused of offences relating to national security including espionage, but had not formally been charged. During the meeting Dr. Z. appeared to be weak.

147. It was believed that Dr. Z.'s detention might be an attempt to prevent him from travelling to the United States of America to take up a new post at the University of Pennsylvania as he was awaiting his visa when he was detained.

148. Dr. Z. used to be an assistant professor at the Islamic Azad University in Tehran until September 2007, when he was dismissed from the post without explanation. He had taught for more than 10 years, holding posts at a number of important Iranian universities, and has written numerous articles.

149. In view of Dr. Z.'s reported incommunicado detention at an undisclosed place of detention, grave concern is expressed as regards his physical and mental integrity. Further concerns are expressed that his detention might be solely connected to his reportedly peaceful exercise of his right to freedom of opinion and expression, which includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and of his right to freely leave any country, including his own.

Italy

Communication sent to the Government on 23 May 2008

150. Violations alleged/human rights issues: Rights of minorities; racism, racial discrimination, xenophobia and related intolerance against non-citizens/criminalization of irregular migration and stigmatization of certain groups in detriment of their human rights' protection.

151. Subject(s) of the communication: Roma settlements in the outskirts of Naples; Roma communities in a Roma Camp in Novara near Milan and an undetermined number of irregular migrants.

152. Character of reply: Comprehensive response.

153. On 23 May 2008, the Special Rapporteur jointly with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and

the Independent Expert on minority issues, sent an urgent appeal to the Government regarding the attacks against a Roma settlement in the outskirts of Naples and Milan and the arrest of hundreds of undocumented migrants in security raids by law enforcement agencies.

154. According to the information received, on 13 May 2008, approximately 60 people attacked Roma settlements in the outskirts of Naples, using homemade incendiary devices to set fire to tents and houses. On the same day, four Molotov cocktails were thrown at a Roma camp in Novarra, near Milan. Two other Roma encampments were set alight on 14 May 2008 in Ponticelli, near Naples. In the streets of Ponticelli, for several weeks prior to the riots, signs inciting racial hatred against Roma had been posted, which the police failed to act upon. In Trieste, the local administration cut provision of water and electricity to a Sinti camp, apparently in an attempt to force them to leave.

155. During that same period, several officials belonging to the Northern League made strong anti-immigrant statements. The Minister of Interior, Mr. R.M. , is reported to have stated publicly on 11 May 2008 that “all Roma camps will have to be dismantled right away, and the inhabitants will be either expelled or incarcerated”. Milan Deputy Mayor R.d. C. stated that he wanted to institute a numerus clausus on the number of Roma in Milan.

156. In parallel, from 12 to 14 May 2008, throughout Italy hundreds of undocumented migrants – including 50 Roma living in a camp in Rome – have been arrested, registered and fingerprinted. It has been reported that these measures were taken by law enforcement agencies for the purposes of the migrants’ expulsion from Italy.

157. On 21 May 2008, the Council of Ministers adopted a package of new measures in the area of public security. The proposed measures would, among others, criminalize illegal immigration and allow for immigrants to be held in so-called centres for identification and expulsion for a period of up to 18 months. In addition, the measures would make expulsions easier, restrict family reunification and allow for the confiscation of apartments rented to irregular migrants. The package also appears to include a declaration of a state of emergency, which would serve to deal with what is described as “the critical situation which has arisen in Campania, Lombardia and Lazio in relation to the presence of numerous irregular non-EU citizens and nomads living in these areas”.

Reply from the Government to the communication sent on 23 May 2008

158. On 4 August 2008, the Government replied to the communication sent on 23 May 2008.

159. The stigmatisation of certain ethnic or social groups is of serious concern for the Government, state and local authorities. All political forces have firmly condemned all recent attacks against particular groups and will continue to exercise the responsibility to protect all persons present on the Italian territory, as clearly emphasized by the Head of State, Hon. Giorgio Napolitano, on June 2 2008, on the occasion of Italy’s National Day.

160. It is the responsibility of central and local authorities to guarantee the security and the public order throughout the country. We take this opportunity to reiterate that Police controls in Roma camps are carried out only in full compliance with the Law in force. The criminal investigation police carries out these controls when individuals are caught red-handed or by

motivated decree of the judicial authorities; or upon decision by the local Head of the Police Headquarters (*Questore*) who issues *ad hoc* orders, to be considered within the framework of the activities planned jointly with the Prefectures (*Prefettura*) and often with the municipalities concerned.

PONTICELLI (Naples)

161. On Saturday, May 10, 2008, in Naples, a young Roma girl was arrested on a charge of illegally entering a private flat in Principe di Napoli Street, close to the Roma camp located in Malibran Street, in the suburban district of Ponticelli, where she tried abducting a baby, six months old.

162. This attempted abduction provoked a reaction by people residing in Ponticelli who, on the following night, threw incendiary bottles against another Roma settlement in Petri Street, resulting in the destruction of some shanties.

163. The situation of public order got worse on Tuesday, May 13, when, during the shooting of a national broadcast (RAI) programme “La vita in diretta”, hundreds of people grew in the main streets of the district making road blocks, while a group of residents tried penetrating the Roma settlement located in Malibran Street. The quick intervention of the police forces prevented the opposing factions from getting in touch with each other, but unfortunately it was impossible avoiding stones hurling against the Roma.

164. In the evening, thanks to the darkness and despite the watch services placed by the police, suspicious characters succeeded in setting fire both to some shanties within the Malibran Street settlement, close to Argine Street, and to a dismissed building – the former premises of the mental hospital “Tropeano”– located in De Meis Street, that had been occupied without permission by five/six Roma families, then moved away before the fire has started.

165. On the afternoon of Wednesday, May 14, about fifty people, mostly women, made a road block close to one of the various Roma settlements in Ponticelli, where some Roma families were still waiting for being moved to another place by the Naples Municipality.

166. Furthermore, within the Calibra Street Roma settlement, already totally evacuated, some shelters were partially set on fire by unknown persons that the police forces patrolling the area put to flight.

167. The same police forces, having been reported by a cameraman who witnessed the fact, found two incendiary bottles that had been hidden not far from the Malibran Street Roma settlement. Within one of the settlements, two young men have been caught by the police and then seized while trying to steal a double current generator.

168. Finally, on Thursday, May 15, around 9:00 a. m., unknown persons set fire to some shanties and household goods within the abandoned camp of Virginia Woolf Street. Thanks to the intervention of the Fire Brigade the fire was put off at 11:30 a.m..

169. As far as the general conditions of life for Roma and non-Roma in the Ponticelli district of Naples, it must be recalled that this geographical area hosts a high number of Slavic and Romanian ethnic groups Roma families. These families settled in different times: the Slavic ethnic groups families coming from the former Yugoslavia (mostly gathered between

the districts of Secondigliano and Scampia) are present since '80s, while the Romanian ones settled there around 2002.

170. To date, the Roma presence in the province is about 5,400, of which about 800 in camps settled by the Municipality and located in the area behind the Secondigliano prison. 120 more people, all from the Romanian town of Calaras, are accommodated in the former school "Grazia Deledda".

171. Spontaneous and unauthorized Roma aggregations are located in the Neapolitan districts of Ponticelli, Scampia, Poggioreale and Pianura, where around 2,000 Roma people live. In the district of Ponticelli, in particular, 7 unauthorized settlements are counted, with a total of 600 Romanian people coming from the Moldavian region. In the province, the municipalities of Giuliano, Caivano, Torre Annunziata, Acerra, Nola, San Giorgio, Casoria, Torre del Greco, Afragola-Casalnuovo host large Roma settlements.

172. Within these unauthorized settlements, Roma communities live in a degraded social environment with various indicators of social deviance and in a lack of considerable signs of integration. While the householders are mainly engaged with retail trade, collection of various materials and building works, the other components are usually engaged with begging and typical forms of crime, such as thefts in houses and shops that leave a mark on the citizens' perception of security.

173. As a result, the relationships between Roma people and residents in Ponticelli, at first marked by tolerance, step by step got deteriorated mainly because of the increasing number of unauthorized settlements that weighed the urban blight in the area, also as regards the hygienic situation and the general condition of security.

174. Since clamouring crowds are not predictable in their extent, movements and consequences any step to prevent what occurred in Ponticelli district of Naples is unrealistic.

175. Even though an opinion of distrust to Roma population is still generally widespread among some classes in Italy, nevertheless the seriousness and the extent of the events in Ponticelli remain in many respects quite isolated.

176. It is clear that both the Roma community and the Italian civil society were shaken by the events in Ponticelli. The local Roma settlements have been abandoned and people have been moved elsewhere, inside and outside Naples. To date there is no evidence that the events in Ponticelli also affected immigrants and asylum seekers communities.

177. As far as the institutional response to these events, the police headquarters in Naples submitted a report to the judiciary authorities and inquiries are under way to identify involved people.

178. Criminal proceedings against unknown persons were immediately initiated before the Office of the State Prosecutor at the Court of Naples for the offences mentioned in Arts.110, 419, 423 of the Criminal Code (complicity in committing arson, acts of devastation and pillage)

179. At the outbreak of the events, the local Head of the Police Headquarters (*Questore*) immediately ordered the strengthening of protection measures towards the Roma settlements and all the available police forces were summoned in Ponticelli. Small groups of young

motorcycle racers were moving quickly around, trying to attack the settlements. According to an initial assessment they can be considered as previous offenders, making an effort to gain credit among residents, made furious by the Roma presence in the area, and to strengthen their control all over the district. The possibility that the Neapolitan Camorra is involved in the events is also under scrutiny, even though no evidence have been acquired to date in this regard. Inquiries will also ascertain whether political factions are somehow linked to the events. No similar events occurred to other Roma or immigrant communities.

180. To guarantee the maximum security level and avoid that intolerance phenomena could widespread to the whole province, all the police forces were put into operation to protect Roma people living in the camps, also intensifying information activities to acquire evidence on the prospective preparation of further attacks and put in place adequate countermeasures. All the camps were then permanently guarded.

181. Particular care was devoted to the victims, through the intervention of the Municipality and civil protection units to assist and give shelter to the affected people and verify the presence of minors. Thanks to the co-operation provided by “Opera Nomadi”, a prominent NGO committed in this specific field, people living in the attacked settlements were first summoned in the main camp located in Malibran Street; subsequently they were moved to camps located outside Naples or in the Reception Centre of “Santa Maria del Pianto”, in the Poggioreale district.

182. An extraordinary meeting of the Council of Ministers took place in Naples on Wednesday, May 21st. The Council, having welcomed the Minister of the Interior’s proposal to adopt extraordinary measures to face the events and bearing in mind the high presence of Roma people in the Campania, Latium and Lombardy Regions, declared the state of emergency till May 31st in these areas. Furthermore, the Prefects of Naples, Rome and Milan have been entrusted with special powers to deal with the emergency situation, in cooperation with Mayors, local authorities and NGOs.

183. As regards the situation in Naples, the Prefect highlighted that a first element to evaluate is a lack of co-operation and joint purposes with reference to the Roma presence. The opposition towards Roma people takes different ways, such as the postponement of settled actions or their delay, shuffling responsibilities on somebody else etc. For instance, the Regional Council has still to approve a proposal for a regional law on the immigration submitted to its decision three years ago. This is also why the Council of Ministers, during the Neapolitan meeting on May 21, decided to entrust the Prefect with special powers to speed the assumption of adequate decisions. However, according to the position of the Prefect of Naples, the use of such powers has to be regarded as *extrema ratio*, while a constant dialogue with other institutions, authorities, representatives of the Roma communities and civil society is considered the most appropriate way to deal with the problem.

184. Following the decision taken by the Council of Ministers, the Prefect also made a comprehensive evaluation and a proposal for a way ahead. The main points of this proposal are:

- to take a census of the Roma people;
- to locate the regular settlements, also considering the possibility to open new sites;
- ordinary and extraordinary repairs of the regular settlements;

- illegal or irregular camps to be gradually dismissed;
- reasonable allotment of small groups of Roma people on the regional territory;
- to promote projects aiming at integrating and facilitating the social inclusion of Roma families.

185. The first step from where following actions originate is, in the Prefect's view, the census of Roma people and their identification. A main problem to deal with is indeed the lack of identity documents that characterizes many Roma persons, so that even their juridical existence is jeopardized.

186. The census of Roma people also provides good opportunities:

- to estimate the presence of minors, allowing to start with dedicated projects, first of all their school attendance and education;
- to identify persons who violated criminal or other relevant laws and regulations or whose presence in Italy is not complying with immigration rules.

187. The realization of these proposals requires appropriate funds.

MILAN

188. The unauthorized Bovisasca Roma camp lays on an area between **Milan** Northern Train Station (Bovisa Politecnico) and Boviasca Street/Candian Street railroad, property of the Milan Municipality. The soil was found contaminated by arsenic, hydrocarbons and other heavy metals by health authorities (ARPA and ASL). The population of the camp has been increasingly growing and it was estimated as close to 300 individuals at the end of 2007 (mostly of Romanian nationality).

189. Following a Police intervention in a neighbouring area, the number of presences doubled (nearly 750 people) and the living conditions became unbearable, enough for the authorities to decide to move the inhabitants and proceed with a reclamation.

190. In March 2008, following the decision by the Board of Governors of the Municipality, the Municipal Police, in cooperation with State Police, entered the camp and demolished the shacks, checking over 114 people (5 of them, being expelled according to the provisions of Legislative Decree 2007/30). At the beginning of April, a second Police operation was held, so that the remaining shacks were demolished and further 205 Roma were identified. These operations, therefore, responded to the need to manage a social emergency and to protect the health of the Roma community.

191. On May 15th 2008 a further intervention took place, when unidentified persons threw a Molotov Cocktail against a disused shop in Morosini Street, illegally occupied as a dormitory by two Romanian nationals. On the following day the Police took into custody an Italian citizen, unemployed and previous offender, who, together with others, was alleged of the crime based on racist motivations.

TRIESTE

192. The unauthorized Pietraferrata Street camp is located in the southern outskirts of Trieste, property of the Trieste Municipality and it was settled in 1999. Recent controls verified that it lodges only 27 people (7 families) who are Italian citizens belonging to the Roma ethnic Group. Since it was never authorized by the Municipality, many inhabitants were condemned for illegal occupation in 2003, while many of them had been also condemned for crimes against property in other occasions.

193. On March 1st 2008, the electricity company ACEGAS, which provided the camp with water and electricity, turned off the utility (temporarily activated on a forfeit basis for settlements such as Circuses and itinerant performers). Due to the intervention of the Prefect - requesting ACEGAS through the Municipality to reinstate the service for humanitarian reasons - the company reactivated the supply of water and electricity, even if on May 5 it was again interrupted.

194. The municipal administration is trying to figure out a permanent solution to the problem.

SECURITY PACKAGE

195. The new measures on immigration are included in the so called **“security package”** together with other provisions concerning a broader range of security-related issues such as widespread illegality, organised crime and urban security. The “package” consists of five different pieces of legislation and is aimed at ensuring the effective implementation of the principle of legality and, with regard to immigration, at addressing more effectively the phenomenon of illegal immigration (as well as its connection with both ordinary and organized crime) and its negative consequences over the society as a whole, including the hundreds of thousands of migrants who are legally present in Italy. The measures included in the “security package” are meant to curb criminal behaviours of individuals and no provision at all is envisaged against any community, group or class nor is linked to any form of discrimination and xenophobia.

196. As of July 25, 2008 only one of these five bills has come into force. It is the Law Decree (*Decreto Legge*) No. 92/2008, entitled “Urgent measures concerning public order” which has been converted in Law on July 24, 2008. It should be clear that the urgency of this measure is not based on the emergency nature of the problem, but is meant rather to speed up the relevant legislative process⁹. In any case, only very limited aspects of the immigration-related issues have been adopted through the Law Decree. These are: (1) Aliens are returned and EU nationals are removed from the territory by court decision if sentenced to a term of more than 2 years or convicted for crimes against the personality of the State. As a guarantee,

⁹ In the Italian legislative system, a Law Decree is an order made by the Government with the force of law. This institute describes the executive decisions which can be adopted by the Council of Ministers, in its capacity of collective body, in accordance with Art. 77 of the Italian Constitution. This Article provides that the Government can adopt an act, in cases of need and urgency and under its own responsibility, without delegation by the Parliament. This kind of act is provisional. The same day of its adoption, it must be presented to the Parliament (which has to meet within five days). To maintain their effectiveness, Law Decrees must be converted into law within the term of 60 days, or they will lose effectiveness *ex tunc*. During the parliamentary process modifications and adjustments are quite common. The Government cannot adopt Decrees on issues subject to the political control of Parliament.

the order of expulsion has to be validated by the peace Justice (*giudice di pace*) within 48 hours, like in the other cases of administrative expulsion. During this time, the foreigner (including nationals of EU Member States) may be held in a Centre for Identification and expulsion. (2) The illegal stay on the national territory of aliens who commit a criminal offence is added to the list of common aggravating circumstances of the Criminal Code. (3) The occurrence of this aggravating circumstance does not allow to ask for suspension of the sentence as it is normally possible when the sentence is for a term lower than 3 years. (4) The rental to irregular migrants is subject to a sentence ranging from 6 months to three years' imprisonment and to the seizure of the rented property. (5) The period that has to pass before the allowance for the expulsion is considered to be granted by the judicial authority - in case the foreigner is subject to prosecution and is not in precautionary custody - is lowered from 15 to 7 days. (6) The punishment for those who employ irregular migrants is raised and ranges from 6 months to 3 years in addition to a fee of 5,000 euros for each person employed.

197. These provisions do not appear to contrast with international human rights law. In particular, with regard to the expulsion of aliens, the new legislation fully abide with art. 13 of the ICCPR which states that “an alien lawfully in the territory of a State Party (...) may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”. A very similar provision is contained in Protocol NO. 7 of the ECHR.

198. The main immigration-related aspects envisaged by the “security package” are dealt with ordinary legislative measures. Three Legislative Decrees envisage modifications to the current rules concerning asylum, family reunification and the circulation of EU nationals within the framework of the relevant EU Directives. They are expected to be finally adopted by the Government on the basis of an ordinary delegation procedure by the Parliament, in accordance with the Italian rules for the implementation of the Directive, and after being carefully examined by the competent parliamentary committees. Also in this case there is no contrast with the international human rights obligations, also because what is at stake, in this case, is not the content of the measures (which is provided by the EU Directives) but the means each Member State decides to use to implement the measures.

199. The last piece of draft legislation composing the “security package” is a Bill (Senate Act No. 733), containing the most substantive proposals related to immigration issues, notably the treatment of the illegal entry in the country as a criminal offence and the increase of the holding period of illegal immigrants in the Identification and Expulsion Centres (CIE) up to 18 months. These issues, as the other envisaged by the bill, will be duly debated by both Chambers that will eventually decide whether to adopt them or not. Nevertheless, it is worth mentioning that it appears that these proposals, even if adopted, would not be contrary to international human rights law. In fact, for what relates to the treatment of the illegal entry in the country as a criminal offence, a widespread state trend indicate that an alleged principle that aliens whose only offence is the violation of immigration law should not be treated as criminals is not clearly established in international human rights law. On the other hand, the increase of the holding period in the CIE would be fully in accordance with the recent EU

Directive on return¹⁰ which imposes the limit of up to 18 months for holding illegal immigrants into the reception centres in all European countries, including in those that do not foresee yet any time-limits. Moreover, the Bill (A.S. 733) envisages that it is the judge - and not the administrative authority - to be tasked with controlling whether it is necessary and legitimate to extend the holding. Such review, which will take place every 60 days (up to the limit of 18 months) may result in a confirmation or in the expulsion.

200. It should be recalled, however, that this Bill is still in an initial stage of the parliamentary process.

Communication sent to the Government on 4 February 2009

201. Violations alleged/human rights issues: Protection of individuals in the context of mixed migratory flows: access to effective remedies; identification and special protection of persons in vulnerable situations, including minors; age assessment determination; collective deportation; arbitrary detention; torture and inhuman or degrading treatment or punishment/ Right to health.

202. Subject(s) of the communication: 150 nationals from Tunisia.

203. Character of reply: Comprehensive response.

204. On 4 February 2009, the Special Rapporteur, sent an urgent appeal to the Government regarding the information received on a change in the Government's policy in relation to the first aid and reception centre in Lampedusa, which is allegedly having a detrimental impact on the human rights of migrants, including minors, as well as the collective deportation of 150 Tunisian nationals and the fear of approximately 1100 migrants of Tunisian origin, to face a collective deportation that may allegedly expose them to the risks of arbitrary detention or even torture or other inhuman or degrading treatment in their country of origin. According to information received:

205. Until mid January 2009, the first aid and reception centre in Lampedusa temporarily accommodated people rescued at sea while preparations were made for their transfer to various special centres set up throughout Italy in order to address their cases according to their specific situations and individual needs. As such, this arrangement was frequently referred to as a model for the responsible and protection-sensitive management of mixed migratory flows in line with international human rights and, when applicable, refugee law.

206. At the beginning of 2009, the Italian Government made changes to this arrangement whereby all migrants and asylum seekers allegedly should remain in Lampedusa until a decision is made on their cases. As a consequence, a reception centre with 381 places available, which may increase up to 804, is currently hosting approximately 1800 individuals. This situation is of humanitarian concern and also renders it difficult for international organizations and agencies, such as UNHCR, to carry out their respective mandates.

¹⁰ European Parliament Resolution dated 18 June 2008, on the proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for the return of Non EU nationals illegally staying within the EU borders.

207. This new policy is allegedly having a negative impact on the health of those held at the centre, given the inadequate general hygiene conditions and the irregular distribution of essential items, such as clothing and sanitary kits. This new policy, which reportedly is intended to accelerate the process of immigration status determination, is allegedly also having a detrimental impact, particularly on minors who are not benefiting from an age assessment process. As a consequence, individuals that may fall into the category of unaccompanied minors might be at risk of receiving deportation orders or being returned soon after arrival rendering several human rights principles and provisions, such as ensuring the best interest of the child, ineffective.

208. Moreover, a number of approximately 1100 migrants are Tunisian nationals, who fear that their possible deportation may expose them to the risk of arbitrary detention, torture or other inhuman or degrading treatment in their country of origin. A number of 150 Tunisian nationals would have already been deported without granting them access to an effective remedy, including the right to appeal against a refusal of refugee status or humanitarian protection.

Reply from the Government to the communication sent on 4 February 2009

209. Further to your query, the Italian Government is in a position to provide the following information:

210. At European Union level, there is the general agreement about the existence of different types of migratory flows, for which specific EU legislation has been adopted, namely the EU Directive No.9/03 concerning the Minimum Standards for the reception of asylum-seekers, also dealing with those migrants applying for international protection and the EU Directive concerning the Minimum Standards for the return of illegal migrants.

211. Following his recent visit to Lampedusa, Mr. J. Barrot, Vice-President of the European Commission, responsible for Justice, Freedom and Security, recalled the official data and remarked that the Italian Government granted international protection to half of the applicants. He reiterated the European Union's support to Italy through the Presidium Project and the EU Fund for refugees, besides envisaging a 7 million Euros emergency plan.

212. In fact, there is a common understanding that the complex situation of mass flows faced by Italian Authorities in Lampedusa needs to be addressed comprehensively through a European Union approach and intervention. In addition Mr. J. Barrot emphasized the importance to involve, *inter-alia*, third Countries in order to effectively combat the issue of illegal migration.

213. It should be noted that from March 2008 onwards, Italy has turned into one of the major countries of destination of immigrants attempting to reach its Southern Regions' coasts, namely Sicily, Calabria, Apulia and Sardinia and in particular Lampedusa, which is considered to be the European extreme south harbor.

214. It should be underlined that, in 2008, 30.657 foreigners, including 2.325 minors arrived in Lampedusa subsequently to 397 disembarkations, while in the previous year 11.749 foreigners including 1.155 minors reached the island subsequently to 270 disembarkations.

215. In the end of 2008, as soon as the weather conditions allowed, the migratory flows resumed to the same extent experienced during the summer of the same year. Mass disembarkations took place on December 26, 27 and 28. 1095, 310 and 234 immigrants respectively, arrived in Lampedusa. On January 2009, 1007 immigrants reached the coasts of Lampedusa (not only Tunisians).

216. With regard to the nationality of the immigrants arrived from December 26 2008 to January 28 2009, it should be noted that they declared they came from Tunisia (the majority), Nigeria, Egypt, Gambia, Morocco, Somalia and Eritrea.

217. With regard to the specific situation of Tunisian citizens, the Italian authorities consider of utmost importance to provide you with the accurate and correct data concerning the presence of Tunisian citizens in Lampedusa Centre as recorded since January 16 2009:

- 16/01/09: 752 Tunisians out of 1333 individuals in the Lampedusa Centre, despite the limit capacity of 804 places.
- 23/01/09: 1057 Tunisians out of 1405 individuals.
- 30/01/09: 1029 Tunisians out of 1276 individuals.
- 06/02/09: 902 Tunisians out of 1079 individuals.
- 13/02/09: 893 Tunisians out of 1007 individuals.

With specific regard to the space available for migrants in the facility in the Lampedusa Centre, it should be noted that it has been severely affected by a fire set on February 18 2009, which resulted in a reduction of the places available, currently not exceeding 400 places. Therefore, from February 20 onwards, there has been a reduction in the number of individuals hosted in the Lampedusa Centre, as follows:

- 20/02/09: 579 Tunisians out of 590 individuals.
- 27/02/09: 480 Tunisians out of 564 individuals.
- 06/03/09: 457 Tunisians out of 602 individuals.
- 13/03/09: 516 Tunisians out of 689 individuals.
- 20/03/09: 563 Tunisians out of 740 individuals.
- 27/03/09: 612 Tunisians out of 728 individuals.
- 03/04/09: 550 Tunisians out of 713 individuals.
- 10/04/09: 552 Tunisians out of 753 individuals.
- 17/04/09: 546 Tunisians out of 711 individuals.
- 23/04/09: 233 Tunisians out of 408 individuals.

- 27/04/09: 143 Tunisians out of 307 individuals.

It should be noted that, despite the above-mentioned constraints, the managers of the Centre and all the personnel involved transformed their own Offices within the Centre in areas hosting the immigrants reaching the island in order to overcome, as much as possible, the reductions of capacity caused by the fire.

218. As to possible complaints lodged so far, the State Attorney's Office started investigations concerning reportedly offences committed by whoever in the Lampedusa Centre, following both reports submitted by the Security forces on service in the Lampedusa Centre, namely Carabinieri and Revenue Guard Corps, and the complaints submitted by the Lampedusa Mayor; the investigations are ongoing.

219. With specific regard to the situation of unaccompanied minors, it should be underlined that, in line *inter alia* with the UN Convention on the Rights of the Child, the Italian legislative system prohibits the expulsion of unaccompanied minors. By Art. 33 of Legislative Decree No.286/98, it has been established the Committee on Foreign Minors, tasked with taking care of those unaccompanied minors reaching the Italian borders.

220. The dimension of the migratory flows reaching Lampedusa has been indeed so considerable that the Italian Authorities decided to proceed returning, directly from Lampedusa, those illegal immigrants who are not entitled to stay in Italy accordingly with the European Pact on Immigration and Asylum five basic commitments of:

- i. Facilitating the regular migration and integration processes, while considering domestic priorities and reception capacities, as set out by each EU member State;
- ii. Fighting illegal migration, including by means of return measures to the country of origin;
- iii. Enhancing controls at the EU borders;
- iv. Developing a common EU asylum approach;
- v. Launching a global partnership between countries of origin, countries of transit and countries of destination, to favor *inter alia* closer synergies on migration and development-related issues.

221. Within this framework, the Italian Authorities decided to establish an Identification and Expulsion Centre (acronym in Italian, CIE) in Lampedusa working in partnership with the First Aid and Reception Centre, based in Imbriacola Town District, also set in Lampedusa.

222. In accordance with Art.3 of Law Decree No.151/2008, "Urgent Measures to prevent and repress organized crime and illegal migration" (converted into law by Act No.186/2008), the CIE was envisaged by the Ministerial Decree dated January 21, 2009.

223. The Identification and Expulsion Centre will be placed in former military facility "LORAN C", located in the western area of the Island. By a subsequent ministerial Decree, it was decided to temporarily place the CIE in the existing First Aid and Reception Centre in Imbriacola, until May 15 2009, in order to renovate the Loran C facilities and to make them adequate to the purpose.

224. On May 7 2009, 87 foreigners were located in Imbriacola. Thereafter, the Centre in Imbriacola Town will be solely devoted to the reception of foreigners, while the CIE will work within Loran C Facility.

225. With specific regard to relevant safeguards,¹¹ it should be noted that in the framework of the mass flows of January 2009, the Ministry of Interior and the Ministry of Justice agreed to place justices of peace of Agrigento Court in Lampedusa in order to conduct *in situ* the verification of the circumstances behind the measures confirming the holding of foreigners in accordance with Legislative Decree No. 286/1998 (namely the Unified Text on Immigration).

226. In addition, the Territorial Commission for the recognition of the International Protection based in Trapani was temporarily transferred to Lampedusa (between January 16 and January 23, 2009) in order to adequately examine the applications of asylum. After this exceptional period the Territorial Commission went back to Trapani. The Territorial Commission granted 36 protection measures (out of the 76 submitted applications): 6 refugees status recognition measures (4 people from Palestine, 1 person from Eritrea, 1 person from Nigeria); 19 subsidiary protection measures (17 people from Eritrea and 2 people from Sudan); 11 humanitarian protection measures (6 people from Nigerians, 1 person from Senegal, 1 person from Ghana, 1 person from Mali, 1 person from Guinea, 1 person from Sudan). The Commission thus rejected 37 applications submitted by 28 people from Nigeria, 3 people from Senegal, 3 people from Ghana, 1 person from Cote d'Ivoire, 1 person from Gambia, 1 person from Guinea, besides it suspended the examination of 3 cases concerning 2 people from Cameroon and 1 person from Nigeria, in order to conduct further specific investigations.

227. In the period between 20-26 January 2009, all the asylum-seekers were transferred to ad hoc Centers for the Reception of Asylum Seekers, namely CARA, in Trapani, Bari and Crotona. Against this background, it has to be stressed that in case of expulsion and return measures addressing asylum-seekers, the concerned persons will be placed in CIE Centers, in accordance with Art. 21 of Legislative Decree No. 25/2008.

228. With specific regard to the living conditions in the Lampedusa Centre, on a preliminary note, it is key to underline that the management of the Centre – like all the other relevant Centers throughout Italy - is ensured by properly trained personnel as well as by relevant associations signatories of ad hoc agreements with the Ministry of Interior working under the supervision of the Department on Civil Liberties and Immigration.

229. In August 2008, the Department of Civil Liberties and Immigration and the National Institute for Health, Migration and Poverty (acronym in Italian, INMP) signed an ad hoc MoU, to set up a medical task force in Lampedusa, in charge of providing health-care services, including training for health-care personnel of the Centre (specific training on the detection of immigration and poverty-related diseases), paying specific attention to dermatology, infectious diseases and gynaecology.

¹¹ For further detailed information, please refer also to Italian Replies to ICCPR List of Issues-2005, CAT List of Issues-2007, and CERD List of Issues-2008

230. In addition to the efforts to improve and strengthen the reception services in Lampedusa centre, the Ministry of Interior, signed few years ago ad hoc MoUs with the International Organization for Migration (IOM), the Italian Red Cross, and the United Nations High Commission for Refugees (UNHCR) which are all currently deployed *in situ*.

231. The cooperation was launched in 2006 within the *EU Presidium Project*, co-financed by the Ministry of Interior and the EU Commission, and now turns to its third year. Recently, Save the Children has also been included among the organizations deployed in Lampedusa and it is tasked with providing support and advisory services to immigrants concerning the Italian legislation about immigration, asylum, humanitarian protection, trafficking, besides providing specific orientation services for vulnerable groups, including minors.

232. The Italian Red Cross mainly takes care of vulnerable individuals among the irregular migrants and eventually brings them to ad hoc reception Centre, besides providing general information and health-care assistance to women and children. The IOM provides legal advisory services to all irregular migrants, through single and collective interviews. The UNHCR provides assistance to asylum-seekers. As above mentioned, Save the Children provides assistance to minors, by ensuring, *inter alia*, cultural mediation services.

233. With regard to the living conditions in the Centre, it should be recalled that it has been visited among others by a delegation headed by the Tunisian President of the Human Rights Committee within the Tunisian Parliament (on February 23, 2009), by Ms. E. Feller, UNHCR protection senior officer (on March 4, 2009), by Mr. J. Barrot, Vice-President of the European Commission, responsible for Justice, Freedom and Security, (on March 13, 2009), by four archbishops and the CARITAS Director, Monsignor. Vittorio Nozza (on March 25-27, 2009).

234. None of the visitors criticized the measures taken in the Centre, they only requested more space for the individuals held over as well as a reduction in the ratio of people per each bedroom. In this specific regard, the Italian Authorities envisage to rebuild the area destroyed by the fire set on February 18, 2009 by July 3, 2009.

235. As far as the legislative developments are concerned, Law Decree No. 11/2009 which provided for the extension of the stay for irregular migrants up to six months (in line with EU Directive 2008/115/CE on the return of migrants) has not been confirmed by the Italian Parliament. Therefore the term of the stay remains the previous one: it is up to 60 days, in line with Art. 14 of the Unified Text on Immigration (Legislative Decree no. 286/1998). However it should be noted the Italian Government has recently submitted an amendment to Bill No. A.C. 2180, with the aim *inter alia* at extending the stay in the Centre up to six months. The Bill is currently being debated in the Parliament.

Japan

Communication sent to the Government on 19 February 2009

236. Violations alleged/human rights issues: The best interests of the child, discrimination on the ground of the irregular migration status of the child parents, right to education.

237. Subject(s) of the communication: A 13 years old child girl born and raised in Japan and her parents, irregular migrants of Philippine origin.

238. Character of reply: Comprehensive response.

239. On 19 February 2009, the Special Rapporteur sent an urgent appeal to the Government regarding N. C., a 13 year-old girl child born and raised in Japan, whose rights were alleged to be under serious threat, given an alleged risk of deportation of her parents, Ms. S. C. and Mr. A. C., irregular migrants of Philippine origin.

240. According to information received: N. C. is a 13 year-old girl child, born on July 4, 1995 in Kawaguchi, Japan. She currently pursues studies at Warabi Dai-ichi Middle School, in the city of Warabi, Saitama Prefecture, Japan. She has been raised in Japan as an ordinary child would and has developed the social relationships inherent to that in Japan from her birth 13 years ago. She has always lived in Japan, never visited the Philippines, does not speak Tagalog and is native speaker of Japanese, the only language she knows.

241. Her father, Mr. A. C. came to Japan as an irregular migrant in 1992. Her mother, Ms. S. C., also entered and remained irregularly in Japan from 1993 until July 13, 2006 when she was detained by Immigration authorities who issued a deportation order for the couple in November 2006. Immigration authorities have extended on a number of occasions a temporary permission for the family to stay in Japanese territory and the date of February 27, 2009 has been given as the last possible extension for the parents or, for the whole family to depart from Japan. Immigration authorities have informed N.'s parents that it may be possible to issue a special permission for the residence of the child girl N. C. only.

Reply from the Government to the communication sent on 19 February 2009

242. On 18 March 2008, the Government replied to the urgent appeal sent by the Special Rapporteur on migrants in the following terms:

243. Are the facts alleged in the above summary accurate?

244. It stated to recognize the following part “N. C. is a 13 year-old- girl child, born on July 4, 1995 in Kawaguchi, Japan. She currently pursues studies at Warabi Dai-ichi Middle School, in the city of Warabi, Japan” to be true.

245. With regards to the following part, “She has been raised in Japan as an ordinary child would and has developed the social relationships inherent to that in Japan from her birth 13 years ago”, we recognize the following part “she has been raised in Japan from her birth 13 years ago” to be true.

246. N. C. ‘s parents entered Japan illegally using the passports of other persons, and N. C. herself has been overstaying without acquisition of the status of residence stipulated in the Immigration Control and Refugee Recognition Act (hereinafter referred to as the “Immigration Control Act”). Both she and her parents have been staying illegally in Japan.

247. With regard to the following part, “She has always lived in Japan, never visited the Philippines, does not speak Tagalog and is native speakers of japans, the only language she knows”, to be true. We also recognize that she has been educated in Japanese and understands Japanese, but we are unable to confirm whether or not she speaks Tagalog.

248. Regarding the following part “ her father Mr. A. C. came to Japan as an irregular migrant in 1992”, we can confirm that he illegally entered Japan on May 12, 1993.

249. Regarding the part, “her mother, Ms. S. C., also entered and remained irregularly in Japan from 1993 until July 13, 2006 when she was detained by Immigration authorities who issued a deportation order for the couple in November 2006”, we can confirm that she illegally entered Japan on April 1, 1992, and she was arrested by the police on July 13, 2006 for violation of the Immigration Control Act. On September 28 of the same year, after being rendered a sentence by the Saitama District Court of two years and six months imprisonment suspended for four years, she was released by the court but detained by the Immigration bureau. The Immigration bureau proceeded with deportation procedures in accordance with stipulations of the Immigration Control Act and issued a deportation order on November 20, 2006.

250. Regarding the following part “Immigration authorities have extended on a number of occasions a temporary permission for the family to stay in Japanese territory and the date of February 27, 2009 has been given as the last possible extension for the parents or, for the whole family to depart from Japan”, the permission which was given to the three family members after the deportation order was issued was “provisional release” to allow them to prepare for their departure. The permission was extended 22 times and was valid until March 9, 2009 (as of March 5, 2009).

251. Deportation procedures stipulate that the suspect should be taken into custody. The permission of provisional release is to provisionally release from custody because of the reasons such as health problems or preparation for departure, therefore it is not the permission for legally staying in Japan.

252. Regarding the following part “Immigration authorities have informed N’s parents that it may be possible to issue a special permission for the residence of the child girl N. C. only”, although the Immigration Bureau issued all three C. family members with deportation orders in 2006 under which they are to be deported back to their country, the Immigration Bureau has told them that if in accordance with the free will of all three family members, N. C. wishes to continue her studies under an appropriate custodian such as relatives other than her parents, they will consider granting special permission to stay N. C. through favourable re-examination of the results of the decision. (Note: three close relatives, namely an older sister of Mr. A. C., a younger brother and a younger sister of Ms. S. C. are currently staying in Japan with a status of residence such a “permanent residence”).

253. Have complaints been lodged by or on behalf of M. C.? If so, please provide the details, and where available the results, of any investigation, judicial or other inquiries which may have been carried out in this regard. If no inquiries have taken place, or if they have been inconclusive, please explain why.

254. In 2006, deportation procedures were carried out for the C. family because of their illegal entry and illegal stay, and on November 20 of the same year, deportation orders were issued for them. The Japanese deportation procedures start with an investigation into the violation conducted by an immigration control officer and has three procedural stages which are: examination by an immigration inspector, a hearing by a special inquiry officer and the decision of the Minister of Justice. In the procedures, preliminary procedures such as notification, a hearing and introduction of exculpatory evidence are stipulated. Therefore,

there are procedures in place to guarantee the rights of foreign nationals who are subject to deportation. Further, the authority over the procedures is given to different organs; (1) investigation into violations and enforcement of detention orders and deportation orders are conducted by immigration control officers, (2) the authority over violation examination is given to immigration inspectors, (3) the authority over the hearing is given to special inquiry officers, (4) the authority over the decision of objection and granting special permission to stay to the Minister of Justice and (5) the authority over issuing detention orders and deportation orders to supervising immigration inspectors. Through this process, due consideration is given to ensuring that checking mechanism is in place between the organs for protection of foreign nationals' rights.

255. Regarding the case of the C. family, the determination of the immigration inspector and the finding of the special inquiry officer were provided through a detailed hearing of their circumstances and necessary investigation into their situation in the deportation procedures. They also filed an objection with the Minister of Justice requesting to stay in Japan, however they were not granted special permission to stay and their deportation orders were issued.

256. The C. family filed an appeal with the court for withdrawal of the measure of issuing deportation orders etc. by objecting to the measure. The Tokyo District Court and the Tokyo High Court ruled in favour of the state because they recognized that there was no illegality in the country's decision and measures. Their appeal and request for their appeal to be accepted, which had been filed with the Supreme Court, were dismissed and the said judgement was finalized in September 2008.

257. Please provide information on how the right to education of N. C. is ensured by your Excellency's Government.

258. In cases where foreigners wish to enrol their children in public schools for compulsory schooling, those public schools accept foreign children free-of-charge just as they do Japanese schoolchildren. Thus, N. C. attends public junior high school free-of-charge now.

259. Has the Government taken any measures to implement the legal principle of the best interest of the child and accordingly, to protect the right of the child girl N. C. to enjoy family unity protection, to continue attending school and developing the social relations of a child of her age and to be protected against discrimination on the ground of the status of her parents? If so, please provide the details, and where available the results, of the implementation of those measures. If no measures have been adopted, please explain why.

260. Deportation procedures stipulate that the suspect should be taken into custody and school children are no exception to this stipulation.

261. However, the Immigration Bureau generally tries to avoid detention, by utilizing the provisional release on the same day as the commencement of detention when the Immigration Bureau is to enforce a detention order or deportation order for a school child. The Immigration Bureau gives due consideration so that the deportation procedures do not become an obstacle to their school attendance by allowing the parents to act as the child's proxy when children must appear for provisional release or in the investigation and examination into violation.

262. In the said case, deportation procedures were taken without N. C. 's detention since the start of the procedures in August 2006, by conducting an investigation into the violation while allowing her to stay in her house with her parents, and permitting provisional release after issuing a detention order and deportation order.

263. Please provide information on the legal framework for the protection of children born in Japan from non-nationals parents, mentioning differences in the implementation of applicable law on the ground of the children parent's immigration status, if any.

264. With regards to the inquiry concerning immigration control for a foreign national, a child who is born from foreign national parents comes under the Immigration Control Act as a foreign national because the basic concept of the Japanese Nationality Act is one's blood lineage.

265. In the case of a child born from foreign national parents in Japan, regardless of whether they are staying legally or illegally in Japan, the child can apply for acquisition of a status of residence to the Minister of Justice within 30 days of the child's date of birth if the foreign national child wishes to stay in Japan for over 60 days in accordance with Article 22-2 of the Immigration Control Act.

266. If one parent is staying legally, in accordance with Article 22-2 of the Immigration Control Act, the Minister of Justice will decide the child's status of residence depending on the parent's status of residence and will grant a stay.

267. If the foreign national parents are staying illegally, in accordance with Article 50 of the Immigration Control Act, the Minister of Justice will decide whether or not to grant special permission to stay, comprehensively taking into consideration the said foreign national's personal circumstances such as the reason he or she wishes to stay in Japan, the life situation and family situation as well as domestic and international situation.

268. Children living in Japan are subject of the Child Welfare Act regardless of their nationality.

269. In addition, even if parents are staying Japan illegally under the Immigration Control Law; the child living in Japan will experience no difference in term of enforcement of the Child Welfare Act.

Communication sent to the Government on 6 March 2009

270. Violations alleged/human rights issues: The rights of the child to express her views freely; the protection of the child against all forms of discrimination or punishment on the basis of the status of irregularity of her parents and the protection of the unity of the family.

271. Subject(s) of the communication: A 13 years old child girl born and raised in Japan and her parents, irregular migrants of Philippine origin.

272. Character of reply: Comprehensive response.

273. On 6 March 2009, the Special Rapporteur sent an urgent appeal to the Government of Japan to follow up on the case brought to the attention of the Government of Japan on 19

February 2009. The follow-up brings new information regarding the case of N. C., a 13 year-old girl child born and raised in Japan, whose rights were alleged to be at threat because the eventual deportation of the family or of her parents to the Philippines, leaving the child behind in Japan.

Reply from the Government to the communication sent on 6 March 2009

274. On 9 April 2009, the Government replied to the urgent appeal sent by the Special Rapporteur on Migrants on 6 March 2009, in the following terms:

275. Question 1: Are these additional facts alleged in the above summary accurate?

276. It stated that recognize the following part “On 27 February 2009, upon reporting to the Tokyo Immigration Bureau at 9.00 a.m., the parents of N.C. were allegedly informed that their provisional release is extended until 9 March 2009” to be true.

277. With regard to the following part “9 March when they will have to make a decision in relation to the two options originally offered to the family, They are: either for all family members to leave Japan or, for the parents to leave the Japanese territory, leaving N. C. behind, otherwise they will be detained indefinitely”, the Immigration Bureau issued all three C. family members with deportation orders in 2006 and they are to be deported back to their country. However the Immigration Bureau has told them that if, in accordance with the free will of all three family members, N. C. wishes to continue her studies under an appropriate custodian such as relatives other than her parents, the Immigration Bureau will consider granting special permission to stay to N. C. through favorable re-examination of the results of the decision. In this regard, it is true that the Immigration Bureau has told the parents that they will not be granted further provisional release in the event they do not make a decision by 9 March.

278. There are not stipulations concerning the time limit for detention under a deportation order, however a person who has been issued with a deportation order shall be deported promptly in accordance with the Immigration Control Act. Thus, they will not be “detained indefinitely”.

279. We recognize the following part “ N.C. has stated publicly that she wishes to remain in Japan” to be true.

280. Question 2: Please provide information on whether N. C.’s right to express her view freely on this matter has been recognized and exercised, particularly;

2.1. Whether N. C. view on this matter has been given due weight in accordance with her age and maturity;

2.2. Whether N. C. has been provided the opportunity to be heard in any judicial and administrative proceedings affecting her particularly in the matter of this urgent appeal;

281. There are sufficient opportunities for N. C. to express her views freely in the deportation procedures and judicial proceedings. In fact, both a handwritten statement by N. C. and a DVD in which N. C. herself appears expressing her views were submitted, and moreover her opinion was heard from her parents who are her statutory agents. Furthermore,

documents including her written opinion were submitted by her lawyer who is acting as her representative.

282. Question 3:

a. The protection of N. C. against all forms of discrimination or punishment on the basis of the status of irregularity of her parents in conformity with article 2.2. of the Convention on the Rights of the Child ratified by Japan in 1994;

b. The protection of the family as the natural and fundamental group unit of society in accordance with article 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights, ratified by Japan in 1979;

c. The protection of N. C's family environment considered to be conducive to the full and harmonious development of the children personality in accordance with paragraph 21 of the Vienna Convention and Programme of action;

d. The protection of N. C's right to education taking into consideration the fact that N. C. currently pursues studies at Warabi Dai-ichi Middle School, in the city of Warabi, Saitama Prefecture, Japan and that she has been raised in Japan as an ordinary child would and has developed the social relationships inherent to that in Japan from his birth 13 years ago;

283. With regard to the three C. family members, the Minister of Justice made its decision with due consideration of the best interest of the daughter N. C. and then finally the deportation orders. The decision and action on the part of the state were deemed legal by national judiciary.

284. At the same time, although all three C. family members were to be deported, the Immigration Bureau also told them that if, in accordance with the free will of all three family members, they wished for their daughter to continue her studies while under the care of an appropriate custodian, the Immigration Bureau would consider granting special permission for her to stay. Consideration is also given with regard to the care for their daughter in that, on the condition that she was granted special permission to stay, the Bureau also told her parents that it would consider allowing the parents to re-enter Japanese territory after a set period of time following their deportation if they wished to see their daughter.

285. Thus, the Government of Japan considers that this case does not include any discrimination as outlined in paragraph 2 of article 2 of the Convention of the Rights of the Child.

286. The Government of Japan has also been providing social security support to the family in light of article 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights, which stipulate that the right to enjoy the widest possible protection and assistance be accorded to the family, which is the natural and fundamental group unit of society.

287. In addition, as mentioned above, although a deportation order was issued for N. C. herself, the Immigration Bureau told the family that if, in accordance with the free will of all

three family members, they wished for their daughter to continue her studies while under the care of an appropriate custodian, it would consider granting special permission to N. C. to stay, taking into account the fact that she was born in Japan and finished public elementary school there. Thus, careful consideration was paid to the family environment for the full and harmonious development of the child's personality. Such measures are consistent with paragraph 21 of the Vienna Declaration and Programme of Action, as well as give due consideration to the right of education N. C., who was born and raised in Japan.

288. In any case, these measures were not adopted to urge the family to separate and leave the daughter behind in Japan, or for all the family members to be forced to leave the Japanese territory.

289. The Government of Japan implemented a series of measures with due consideration of the best interest of N. C., including her right to education.

290. Question 4: Please provide information if consideration has been given to the compliance of Japan's human rights obligations under international law and international human rights law, in particular whether the decision to remove the family from Japan or, to remove the parents leaving N. C. behind would result in interference with the rights to family or private life as commented by the Human Rights Committee at paragraph 4 of its General Comment No. 16 on "The right to respect of privacy, family, home and correspondence, and protection and honour and reputations", which states that "(T)he expression "arbitrary interference" can also extended to interference provided for under the law and that "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".

291. According to the principle of customary international law, whether foreign persons are accepted in another state or meet the criteria for being accepted in a non-discriminatory manner is left entirely to the discretion of the legislative policies of each state. The International Covenant on Civil and Political Rights takes these principles as its premise and does not change the fundamental basis.

292. It is owing to their illegal stay that deportation procedures for the three C. family members are being carried out, and the decision of whether or not to grant them special permission to stay was made with overall consideration being given to a number of factors including the necessity for humanitarian consideration.

293. On the 13 of March, the C. family reported their decision that N. C. continues her studies under the custody and care of her relatives who hold residence status, although her parents will go back to their country by the 13 of April. Accordingly, on the 16 March, the Minister of Justice granted N. C. special permission to stay for one year with the purpose of her studies, after confirming various conditions such as the will of her relatives, N. C. stays in Japan as a legal resident and will be allowed the extension of the period of stay.

Communication sent to the Government on 1 February 2008

294. Violations alleged/human rights issues: Arbitrary and collective deportation; the right to have access to judicial procedures; the protection of will-be-returned-nationals against torture in countries of origin.

295. Subject(s) of the communication: An undetermined number of individuals in irregular situation, including asylum seekers.

296. Character of reply: No response

297. On 1 February 2008, the Special Rapporteur sent an urgent appeal to the Government regarding the decision of Lybian authorities to immediately deport all migrants suspected of having entered the country in an irregular manner.

298. According to the reports brought to my attention, the decision could lead to a collective and arbitrary expulsion of migrants, including asylum seekers and refugees who, if forcibly returned to their countries of origin, could face torture and other serious human rights violations.

299. These measures could affect the rights of thousands of people including women and children who would not be granted their right to access to judicial procedures in order to challenge removal.

300. Concern was expressed that there is no screening mechanism to review the individual circumstances of the aforementioned persons in order to ensure that their return would not expose them to risk of torture or other serious human rights violations.

Mexico**Comunicación enviada al Gobierno el 7 de Julio de 2008**

301. Violaciones alegadas/asuntos en materia de derechos humanos: Amenazas a la vida y seguridad de la persona/ libertad de expresión, protección de defensores de los derechos humanos de los migrantes; xenofobia y formas conexas de intolerancia contra los y las migrantes.

302. Sujeto(s) de la comunicación: El director de un centro de refugio para migrantes indocumentados y por extensión, también son sujetos afectados, todos los migrantes beneficiarios de los servicios proporcionados por dicho centro.

303. Carácter de la respuesta: Ninguna respuesta.

304. El 7 de julio de 2008, el Relator Especial envió una comunicación al Gobierno de México conjuntamente con el Relator Especial sobre la promoción del derecho a la libertad de opinión y de expresión, y la Relatora Especial sobre la situación de los defensores de los derechos humanos, en relación con el caso del padre A. S. G., coordinador de la Pastoral de Movilidad Pacífico Sur del Episcopado Mexicano y director del refugio para migrantes indocumentados en Ixtepec, Oaxaca, Hermanos en el Camino. El Padre A. S. G., ha

denunciado públicamente en varias ocasiones las violaciones de derechos humanos presuntamente cometidas por miembros de la policía y de las fuerzas de seguridad en contra de migrantes en México.

305. De acuerdo con las informaciones recibidas, el 24 de junio, aproximadamente cuarenta personas – entre ellos miembros de la policía, de las fuerzas de seguridad, y de las autoridades de Ixtepec – habrían entrado sin permiso en el refugio Hermanos en el Camino y habrían amenazado con incendiarlo en el plazo de cuarenta y ocho horas si el centro no fuera cerrado. Las autoridades locales habrían justificado su sugerencia de cerrar o reubicar el refugio con el argumento de que *“desde la llegada de los migrantes a esta localidad han aumentado los problemas de delincuencia e inseguridad”*.

306. Se temía que la amenaza de incendiar el refugio Hermanos en el Camino podría estar directamente relacionada con las actividades del padre A. S. G., en particular con el refugio que ofrece a migrantes en Ixtepec. En vista de lo aquí resumido, se expresa preocupación por la integridad física y psicológica del padre A.S.G. y la de los migrantes hospedados en el refugio Hermanos en el Camino.

Comunicación enviada al Gobierno el 20 de enero de 2009

307. Violaciones alegadas/asuntos en materia de derechos humanos: ejecuciones sumarias y lesiones personales a migrantes indocumentados; derecho a la vida y la seguridad de los y las migrantes indocumentados; debido proceso y garantías procesales.

308. Sujeto(s) de la comunicación: 45 migrantes nacionales de El Salvador, Honduras, Guatemala, Ecuador y China (incluidos 3 muertos y 8 personas con lesiones personales agravadas)

309. Carácter de la respuesta: Respuesta exhaustiva.

310. El 20 de enero de 2009, el Relator Especial envió una comunicación al Gobierno de México conjuntamente con el Relator Especial sobre las ejecuciones extrajudiciales, sumarias o arbitrarias sobre información recibida en relación con el deceso de 3 migrantes y las lesiones personales agravadas ocasionadas a 8 migrantes cerca de la comunidad El Carmen Arcote del Municipio de San Cristóbal de Las Casas, Chiapas. De conformidad con la información recibida, en la mañana del día 9 de enero en las inmediaciones de la comunidad El Carmen Arcotete del Municipio de San Cristóbal de Las Casas, Chiapas, la Policía Estatal Preventiva (PEP) disparó contra una camioneta que transportaba alrededor de 45 migrantes indocumentados, originarios de El Salvador, Honduras, Guatemala, Ecuador y China. El conductor de la camioneta desatendió un llamado de las autoridades locales para que detuviese el vehículo, que recibió como consecuencia numerosos impactos de bala y chocó contra un árbol. La señora N.D. P. y el señor L.C.M., ecuatorianos, y el señor K.P.C., guatemalteco, perdieron la vida por los disparos y 8 personas sufrieron lesiones físicas: los señores L.A.Z.P., A.C.C., M.T. y C.M.G. de origen ecuatoriano; el señor G.C.M de origen guatemalteco; el señor J.J.M.T de origen salvadoreño; y los señores X.L.Y y L.T.H., ambos de origen chino. Seis de estas personas se hallan hospitalizadas. Los migrantes capturados por las autoridades de policía locales fueron detenidos en la Comisaría de la Policía estatal en Tuxtla Gutiérrez para prestar declaración y posteriormente entregados al Instituto Nacional de Migración. Los migrantes procedentes de Centroamérica fueron presuntamente expulsados de

México. Los migrantes procedentes de Sudamérica y China se hayan presuntamente recluidos en la Estación Migratoria de Iztapalapa, en Ciudad de México y temen por su seguridad a causa de sus presuntos testimonios con respecto al tratamiento dado por sus captores. Los representantes de la Procuraduría General de Justicia del Estado denegaron el permiso para ver los migrantes detenidos al Centro de Derechos Humanos Fray Bartolomé de Las Casas, una organización local de derechos humanos que quiso prestarles asistencia letrada. Según dicha organización, a los migrantes se les negó también el acceso a sus representantes consulares.

Respuesta del Gobierno de México a la comunicación enviada el 20 de enero de 2009

311. A fin de dar respuesta al llamamiento urgente planteado al gobierno de México por los Relatores Especiales sobre la ejecuciones extrajudiciales, sumarias o arbitrarias y sobre los derechos humanos de los migrantes de la Organización de las Naciones Unidas, en relación a la muerte de los migrantes indocumentados N.D.P., L.C.M., K.P.C, el Estado mexicano desea informar lo siguiente:

312. - ¿Son exactos los hechos a los que se refieren las alegaciones descritas?

313. El 9 de enero de 2009, en el ejido el Arcotete, municipio de San Cristóbal de las Casas, Chiapas, elementos de la policía estatal preventiva de la Secretaría de Seguridad Pública y Protección Ciudadana del estado de Chiapas, dispararon en contra de una camioneta de redilas que transportaba en la parte posterior a 45 migrantes indocumentados.

314. - Se proporcione información detallada sobre las investigaciones iniciadas en relación con el caso, incluyendo los resultados de los exámenes médicos, en caso de que se hubieran llevado a cabo.

315. Ese mismo día, la Fiscalía de Distrito Altos de San Cristóbal de las Casas, Chiapas, inició la investigación por los delitos de homicidio y abuso de autoridad en agravio de las Sras. N.D.P., L.C.M.C. (de nacionalidad ecuatoriana) y el Sr. K.P.C. (de nacionalidad guatemalteca); lesiones y abuso de autoridad en agravio del Sr. J. de J.M.T. (de nacionalidad salvadoreña), la Sra.M.E.C.C., (de nacionalidad guatemalteca), y los Srs. L.A.Z.P., C.M.G., A.C.C y M.T.M.O. (de nacionalidad ecuatoriana).

316. De igual forma participó la Fiscalía Especializada en delitos cometidos en contra de inmigrantes del estado de Chiapas, misma que el 9 de enero de 2009 inició el acta administrativa 005/FEDCCI/2009, la cual se encuentra integrada con las siguientes actuaciones:

- i. Diligencia de identificación y entrega de cadáveres.
- ii. Necropsias practicadas el 10 de enero de 2009, por dos médicos peritos del servicio médico forense. En la conclusión se estableció que la muerte de las señoras D.P y M.C. fue como consecuencia de las heridas de bala recibidas.
- iii. Constancia de 10 de enero de 2009, mediante la cual se solicitó al Subsecretario de Cooperación Internacional y Asuntos Migratorios del estado de Chiapas que por su conducto se informe a los representantes de los consulados de Guatemala, Ecuador y

El Salvador, los apoyos jurídicos y médicos brindados por las autoridades estatales a los migrantes indocumentados, así como, lo relativo al traslado de los cadáveres a su país de origen.

- iv. Solicitud de 12 de enero de 2009, dirigida al Director del Hospital Regional de Tuxtla Gutiérrez, Chiapas, a efecto de que una vez dados de alta del hospital los señores J. de J.M.T., L.A.Z.P., C.M.G., A.C.C., M.T.M.O. y la Sra. M.E.C.C., fueran trasladados a bordo de una ambulancia a las instalaciones estatales del Sistema para el Desarrollo Integral de la Familia estatal (DIF).
- v. Solicitud de 12 de enero de 2009, dirigida a la representante del Centro de Recuperación Nutricional del DIF, para que se proporcione alojamiento, alimentos y cuidados necesarios en favor de la Sra. M.E.C.C., y los Srs. J. de J. M. T. y L.A.Z. P., por no contar con vivienda y recursos económicos para su estancia en el país.
- vi. Solicitud verbal del señor M.T. de 12 de enero de 2009, para ser repatriado a su país de origen. El 13 de enero de 2009 el Fiscal requirió al representante del INM realizar los trámites necesarios para su repatriación.
- vii. Constancia de 15 de enero de 2009, mediante la cual el Fiscal solicitó al representante de INM la expedición del formato migratorio FM3 en beneficio de la Sra. M.E.C. C. y L.A.Z.P., para la permanencia en el país.
- viii. Constancia de entrega de pasaportes provisionales y documento migratorio FM3 a los señores A.C y Z.P.
- ix. Constancia de ayuda humanitaria de 18 de enero de 2009, proporcionada por representantes del gobierno de Chiapas a los familiares de los indocumentados que perdieron la vida y de los lesionados.
- x. Solicitud de colaboración de 27 de enero de 2009, dirigida al Cónsul de Ecuador para hacer entrega a los familiares de la Sra.N.D.P., la cantidad de \$270 dólares como parte de las pertenencias de la occisa.

317. Adicionalmente, la Comisión Nacional de los Derechos Humanos inició una queja de oficio en este asunto por considerarlo de especial gravedad e importancia.

318. Se proporcione información sobre las diligencias judiciales y, las sanciones de carácter penal, en caso de que hayan sido adoptadas contra del o los presuntos culpables.

319. Después de realizadas las investigaciones por la Fiscalía de Distritos Altos de San Cristóbal de las Casas, el 17 de enero de 2009 ejerció acción penal en contra de los Señores C.Á., J.H.G. y E.G.E., quienes fungían como policías estatales preventivos al momento de los hechos, por su probable responsabilidad en los delitos de homicidio calificado, lesiones y abuso de autoridad.

320. El 26 de enero de 2009, el juez penal les dictó auto de formal prisión, por lo que actualmente se encuentran detenidos y se sigue un proceso penal en su contra.

321. Se proporcione información sobre las disposiciones legislativas, administrativas o de otro carácter que han sido o serán adoptadas con miras a prevenir la ocurrencia futura de hechos similares.

322. La política de México en materia de promoción y protección de los derechos humanos de los migrantes tiene como fundamento la universalidad de estos derechos, independientemente de la situación migratoria, el principio de la responsabilidad compartida, el fortalecimiento de la cooperación internacional y la no criminalización de la migración.

323. En ese espíritu, en julio de 2008 entró en vigor la reforma a la Ley General de Población que despenaliza la migración indocumentada, armoniza el orden jurídico con los tratados internacionales en la materia y contribuye a eliminar abusos contra migrantes indocumentados.

324. El Instituto Nacional de Migración (INM) es la institución federal especializada para atender la política migratoria. El INM coordina el “Programa de Reordenamiento de la Frontera Sur” que facilita la documentación y vigilancia de los flujos migratorios.

325. En el mes de marzo de 2008 el Instituto Nacional de Migración (INM) introdujo la Forma Migratoria para Trabajadores Fronterizos que permite el ingreso documentado de trabajadores de Guatemala y Belice para laborar en los estados de Chiapas, Campeche, Tabasco y Quintana Roo. Bajo este Programa se amplió la Forma Migratoria de Visitantes Locales, que otorga facilidades a los visitantes locales guatemaltecos, a fin de que la población transfronteriza pueda ingresar en tránsito local en los estados de Chiapas, Tabasco y Campeche, lo que brinda mayor protección a los migrantes frente a posibles abusos.

326. Se realizan esfuerzos para asegurar que la repatriación de nacionales centroamericanos vía terrestre se lleve a cabo de manera ordenada, digna, ágil y segura, con base en acuerdos con Guatemala, El Salvador, Honduras y Nicaragua.

327. Desde 2003, el INM opera un “Programa de Dignificación de Estaciones Migratorias”, que tiene por objeto mejorar las condiciones físicas y servicios de las instalaciones destinadas al aseguramiento de migrantes indocumentados. Actualmente, el INM cuenta con 48 estaciones migratorias ubicadas en 23 estados con capacidad total de alojamiento de 3,958 personas. Bajo este Programa, entre 2003 y 2007 se han construido 10 y se han dignificado 84 estaciones migratorias. Se busca garantizar mejores condiciones en las estaciones migratorias, incluidas la atención médica y los problemas sanitarios, así como la atención especial a mujeres, niñas y niños migrantes.

328. A fin de proteger los derechos humanos de los migrantes, existen los “Grupos Beta de Protección a los Migrantes” que operan en las rutas de migrantes en las fronteras norte y sur. Estos grupos brindan asistencia a migrantes lesionados o heridos; realizan actividades de localización y asistencia jurídica, entre otras. Actualmente operan 20 oficinas en todo el país.

329. Existen también programas para brindar atención integral especializada a mujeres, niñas, niños y adolescentes migrantes y repatriados, incluyendo los no acompañados, entre otros mediante esfuerzos interinstitucionales y con la sociedad civil, proporcionando servicios integrales de recepción, valoración médica, social y psicológica, alojamiento, alimentación y vestido a través de la Red de Albergues de Tránsito públicos y privados.

Morocco

Communication envoyée au Gouvernement le 29 mai 2008

330. Violations alléguées/questions en matière des droits de l'homme : Droit à la vie et à la sûreté des individus et à la santé des migrants durant la traversée en mère-expulsions/déportations collectives dans le cadre de flux de migration mixte.

331. Sujet(s) de la communication: 120 personnes originaires de l'Afrique subsaharienne y inclus le Nigéria, le Cameroun, le Mali, la Cote d'Ivoire, le Congo et le Ghana (parmi eux 4 mineurs et une femme enceinte).

332. Caractère de la réponse : Pas de réponse.

333. Le 29 mai 2008, le Rapporteur spécial sur les droits de l'homme des migrants a envoyé une lettre d'allégation au Gouvernement concernant deux groupes de 60 migrants, soit 120 personnes au total, originaires d'Afrique subsaharienne, principalement du Nigéria, du Cameroun, du Mali, de Côte d'Ivoire, du Congo et du Ghana, qui auraient tenté de rejoindre l'Espagne dans deux embarcations de type zodiac au départ de El Hoceima durant la nuit du 28 avril 2008. Parmi l'un des deux groupes de migrants se trouvaient au moins quatre enfants en bas-âge ainsi qu'une femme enceinte. Les passagers auraient payé chacun la somme de 1,250 euros. Les deux embarcations naviguaient en direction d'Almería lorsqu'un navire de la Marine Royale marocaine les aurait interceptés. La première embarcation se serait arrêtée et aurait été remorquée vers les côtes marocaines. La seconde embarcation aurait à son tour été interceptée, mais selon les informations reçues, le passeur qui se trouvait à bord aurait menacé verbalement le conducteur de l'embarcation de le jeter à la mer s'il obéissait aux injonctions des soldats marocains. Il est allégué que cette seconde embarcation aurait continué d'avancer et un navire de la Marine Royale marocaine l'aurait suivie puis, arrivé à la hauteur de celle-ci, des soldats auraient crevé le bateau pneumatique, provoquant son naufrage. Dès lors les migrants seraient tous tombés à l'eau, provoquant la noyade de 10 d'entre eux, dont les quatre enfants et la femme enceinte. Un second navire de la Marine Royale aurait secouru les 31 rescapés mais 19 personnes seraient toujours portées disparues à ce jour. Les 31 survivants auraient été détenus et conduits au poste de police d'El Hoceima (Maroc) puis déportés en camion, de nuit, jusque dans le désert, dans la région d'Oujda à la frontière maroco-algérienne. Malgré les traumatismes subis, ils n'auraient reçu aucun soin médical depuis leur arrivée au Maroc.

Panama

Comunicación enviada al Gobierno el 27 de enero de 2009

334. Violación alegada/asuntos en materia de derechos humanos: derecho al reconocimiento de la personalidad jurídica y la protección general en materia de derechos humanos a los seres humanos que se hayan bajo la jurisdicción de un Estado.

335. Sujeto(s) de la comunicación: 19 personas de origen Etiope, Eritreo y Somalí.

336. Carácter de la respuesta: Respuesta parcial, pero altamente satisfactoria.

337. El 27 de enero de 2009, el Relator Especial sobre los derechos humanos de los migrantes, envió al gobierno una comunicación en relación con información allegada sobre 19 personas de origen etíope, eritreo y somalí, algunas de los cuales se hallarían detenidas en el sector de Albrook o en la sede del Servicio de Migración ubicada en ciudad de Panamá, corregimiento de Calidonia, por más de dos meses desatendiendo presuntamente reiteradas solicitudes relacionadas con la determinación de su estatuto jurídico y garantías referentes al debido proceso. Seis hombres y una mujer todos de origen somalí se hallarían detenidos desde hace más de dos meses; un hombre de origen etiope, diez hombres y una mujer de origen eritreo se hallarían detenidas por más de un mes.

338. Estas 19 personas habrían ingresado de manera ilegal a la República de Panamá presuntamente a través de la Provincia del Darién y se habrían presentado libremente al Servicio de Migración, que las habría recluido en centros de detención para migrantes de conformidad con su género. Ms. A.G. se hallaría presuntamente detenida en la Sede del Servicio de Migración que se encuentra ubicado en ciudad de Panamá, Corregimiento de Calidonia y las 18 personas de sexo masculino, se hallarían presuntamente detenidas en el Albergue Masculino del Servicio Nacional de Migración de la República de Panamá, ubicado en el sector de Albrook, en ciudad de Panamá.

339. Representantes del ACNUR sede Panamá habrían tenido acceso a algunas de estas 19 personas, con quienes habrían tenido entrevistas sumarias que llevarían al ACNUR a concluir sobre la necesidad de examinar a fondo y a través del procedimiento regular, algunas de las solicitudes de asilo. Las personas en dicha situación presuntamente estarían en necesidad de protección internacional y por ende, el ACNUR tendría un interés y un papel potencial a desempeñar en la determinación de su estatuto jurídico. Dichas personas no podrían ser consideradas migrantes y por ende, no se hallarían dentro del ámbito de aplicación de mi mandato. No obstante, algunas de las 19 personas anteriormente mencionadas podrían no cumplir con los requisitos de la definición del estatuto internacional de los refugiados, y por ende, podrían eventualmente ser consideradas migrantes, y requerir entonces la protección que en materia de derechos humanos el gobierno de Panamá, de conformidad con la normatividad internacional en la materia, otorga a todos aquellos que se hallan bajo su jurisdicción.

Respuesta del Gobierno al llamado de Urgencia enviado el 27 de enero de 2009

340. El 6 de mayo de 2009, el Relator Especial sobre los derechos humanos de los migrantes, recibió la respuesta del Gobierno en relación con un llamado de urgencia relacionado con 19 personas de origen etíope, eritreo y somalí retenidos en centros de detención para migrantes de conformidad con su género, en los siguientes términos:

341. Las autoridades panameñas pertinentes, en respeto a las garantías en relación con el debido proceso emanado de los instrumentos jurídicos internacionales de derechos humanos y de la legislación panameña, liberó el 30 de enero de 2009 a los retenidos africanos que habían ingresado de manera irregular a la República de Panamá. Inmediatamente después, la Oficina Nacional para la Atención de Refugiados (ONPAR), procedió a la tramitación y concesión de Protección Internacional para que dichas personas accedieran a la determinación de su estatus jurídico.

342. Es importante señalar que las gestiones realizadas fueron posibles después de superar dificultades de comunicación debido a problemas lingüísticos.

343. Al agradecer la oportuna intervención del Relator Especial sobre los Derechos Humanos de los Migrantes, la Misión Permanente de Panamá se complace en comunicarle que en breve le haremos llegar un detallado informe sobre los hechos, las garantías procesales de las que se han beneficiado cada una de las 19 personas de origen etíope, eritreo y somalí, y las diligencias administrativas y judiciales que fueron adoptadas.

344. De conformidad a la información recibida por el ONPAR, 7 personas son de origen somalí: F.H.O., A.H., A.A.S., M.A.H., I.A.H., O.A.M. y A.A.I., esta última de sexo femenino; 1 persona es masculina de origen etíope: H.B.; y 11 personas son de origen eritreo: D.N., M.A., T.A., M.K., T.A., Y.W., F.D., B.T., F.N., H.G. y A.G., esta última de sexo femenino.

Republic of Korea

Communication sent to the Government on 16 May 2008

345. Violations alleged/human rights issues: Arbitrary detention -physical injuries, threats to freedom of association including the right to form and join trade unions/right to security of the person and protection of human rights defenders/right to security of the person and protection of human rights defenders.

346. Subject(s) of the communication: A male of Nepali origin and a male of Bangladeshi origin, founders of a migrants' trade union.

347. Character of reply: No response.

348. On 16 May 2008, the Special Rapporteur jointly with the Special Rapporteur on the situation of human rights defenders, sent an urgent appeal to the Government regarding the case of Mr. T.L. (Nepalese) and Mr. A.S. (Bangladeshi).

349. Mr. T.L. and Mr. A.S. are founders of the Seoul-Gyeonggi-Incheon Migrants Trade Union (MTU), a union working for the human rights and labor rights of migrant workers regardless of visa status. Mr. T.L. is serving as President in the union, and Mr. A. S. as the Vice President. Both have been active in the movement for migrant workers' human and labor rights in the Republic of South Korea for several years; Mr. T.L. since 2003 and Mr. A. S. since 2002.

350. According to the information received, on 2 May 2008, Mr. T.L. and Mr. A.S. were arrested and detained at Cheongju Detention Center. It has been reported that both men in fact face imminent deportation.

351. At approximately 8:20 pm on 2 May 2008, Mr. T.L. and MTU's vice General-Secretary were walking out of the MTU office in Yegwan-dong (Seoul) when they were confronted by 10 to 15 immigration officers. The officers surrounded Mr. T.L. and forced him into a van waiting nearby. They twisted Mr. T.L. arms behind his back which aggravated a ruptured disk in his neck and caused acute pain in his shoulder and arm. He was also kicked in the shin by one officer. In the van the migration officers presented a detention order to Mr. T.L.

352. At approximately 9:00, pm Mr. A.S. was arrested at his home by 10 migration officers. Mr. T.L. and Mr. A.S. were detained at Cheongju Foreigners' Detention Center that same night.

353. The two men had access to a lawyer the day after they were detained. Objections to their detention and the deportation orders against them have been filed, but both Mr. T.L. and Mr. A.S. have been told by the Director of the Seoul Immigration Authorities that they may be deported at any time. A lawsuit seeking cancellation of the detention and deportation order has been submitted to the competent court on 9 May 2008.

354. On 27 November 2007, the former president, Vice President and General Secretary, respectively, of MTU were arrested in the same manner and later deported on 13 December 2007.

Saudi Arabia

Communication sent to the Government on 1 April 2008

355. Violations alleged/human rights issues: Enforced disappearance and physical injuries; arbitrary detention; incommunicado detention; torture and cruel, inhuman and degrading punishment and treatment/ due process of law and detention guarantees.

356. Subject(s) of the communication: A Syrian male and by extension his family (wife and 4 children).

357. Character of reply: Partial response.

358. On 1 April 2008, the Special Rapporteur sent an urgent appeal to the Government jointly with the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the question of torture, and the Special Rapporteur on the right to education, regarding the case of Mr. M.B.H., born in Al-Ghoutah al-Sharquia in Syria and resident of Sekaka (Al-Jouf).

359. According to the allegations received, on 3 July 2003, he was arrested by the security services (Al-Mabahit al-Aama) when he was on his way to Syria together with his wife and four children. He was ordered to stop his car, forced to get out, was beaten and taken to an unknown place. He was held in solitary confinement for several months. During this period, Mr. M.B.H was repeatedly beaten on different parts of his body, suspended from his wrists, deprived of sleep and threatened with being killed.

360. For six months after his arrest, in spite of many attempts to find out from the Saudi authorities, his family had no information about his whereabouts. They later learned that he was held at the prison of Al-Hayr, not far from Riyadh.

361. Mr. M.B.H was taken out of his cell in the middle of the night and transferred to an office where several persons were present for what appeared to be a trial. One of them, to whom he mentioned that he had been ill-treated, told him to shut up and said that he would merit hanging. This person, presumably the judge, sentenced him to 18 months' imprisonment. After sentencing, he was transferred to the detention centre in Al-Jouf.

362. No one has been able to visit Mr. M.B.H. He has not had access to any lawyer. Despite the fact that his prison term ended on 3 January 2005, Mr. M.B.H has not been released. It is reported that he was again transferred to another unknown location. Since Mr. M.B.H arrest, his four children have not been allowed to attend school, and the family has been deprived of access to certain basic services.

Communication sent to the Government on 26 May 2008

363. Violations alleged/human rights issues: Threats to life and personal security; right to health of undocumented migrants under arrest/due process of Law and related guarantees.

364. Subject(s) of the communication: 25 allegedly undocumented nationals of Yemeni origin.

365. Character of reply: Comprehensive response.

366. On May 26 2008, the Special Rapporteur sent an urgent appeal to the Government of Saudi Arabia in relation to information received on an alleged incident that took place in the Province of Asir, near Khamis Mushait, Saudi Arabia on 9 March 2008. According to the information received, a group of 25 alleged undocumented migrants from Yemen were hiding from the police in a hole at a waste dumping site in the Province of Asir, Saudi Arabia, when a fire started. Seven of them managed to escape unscathed but eighteen suffered burns of varying severity. According to reports the fire was supposedly started by the police to force the group of undocumented migrants to come out of the hole. The police reportedly took the victims to the police station for questioning.

367. The victims have been reportedly denied access to a hospital and received inadequate medical care. They have been deported to Yemen without the possibility of filing a complaint about the circumstances surrounding their arrest.

368. According to reports, the spokesperson of the police of the Province of Asir allegedly denied that the police was responsible for starting the fire.

Reply from the Government to the communication sent on 26 May 2008

369. On 12 November 2008, the competent authority in the Kingdom of Saudi Arabia has indicated that those Yemeni migrants had entered the Kingdom clandestinely and were living illegally at various locations, including the so-called waste dumping site in the governorate of Khamis Mushait in the Asir Province, which such persons habitually use as hideouts. On 23 March 2008, the competent authorities were notified that a fire had broken out at that dumping site where the migrants were living. On arriving at the scene, they found 18 Yemenis injured by the fire and transported them immediately to hospital for treatment. Following investigations, it was discovered that several fires had been caused at various times by those illegal migrants at that dumping site. The migrants were also found to be using that site as a hideout from which they engaged in criminal activities, drug trafficking and weapons smuggling. They lived in shacks, built from discarded cardboard and straw, in which they lit fires to cook food and burn stolen cables in order to extract and sell their metallic content. The responsible authorities often received reports of fires at that dumping site. In one incident, a Yemeni was killed by one of his compatriots who shot him several times with an automatic

weapon. The culprit was arrested and his confession to the commission of this act was legally attested.

370. With regard to the allegations made:

371. The facts alleged in this case are inaccurate and groundless, as confirmed by the head of the Yemeni migrant community in the Asir Province who emphasized that the claims made by those Yemeni lawbreakers were false. On the contrary, he commended the care and attention that the province's Yemeni community were enjoying.

372. None of the persons injured in the fire had submitted any complaint to the competent authorities and none of them had accused any specific person of being responsible for the fire. None of them had any claim against anyone and their statements in acknowledgement of this fact had been placed on record.

373. All the injured persons had received the requisite treatment and, being undocumented migrants residing illegally in the Kingdom, had been expelled to their country of origin after being discharged from hospital. No legal or administrative penalty had been imposed on any of them.

374. No legal or administrative sanction has been imposed on anyone in connection with that fire since none of the injured persons were accused, nor did they accuse anyone else, of being responsible therefore.

Communication sent to the Government on 14 August 2008

375. Violations alleged/human rights issues: Death penalty/incommunicado detention/due process of law, right to a fair and public hearing before an independent and impartial tribunal, Summary executions-Torture- Independence of Judges and lawyers.

376. Subject(s) of the communication: 7 male of Philippine origin.

377. Character of reply: No response.

378. On 14 August 2008, the Special Rapporteur jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment sent an urgent appeal to the Government of Saudi Arabia, regarding the sentences imposed against seven Filipino men found guilty of a triple murder. Three of them were sentenced to death and four to eight years imprisonment and one thousand lashes each.

379. According to the information received, Mr. E.G., Mr.R.M.G., Mr.E.A., Mr. V.A., Mr. E.F.D., Mr.O.B. and Mr. J.S., seven Filipino migrant workers, were arrested in April 2006 on charges of having murdered three other Filipino nationals. The seven men were tried by a General Court in Jeddah and sentenced in July 2007. Mr.E.A., Mr. E.G., and Mr. R.M.G. were sentenced to death. Mr. V.A., Mr. E.F.D., Mr.O.B. and Mr. J.S. were sentenced to eight years imprisonment and one thousand lashes each.

380. The seven men were held incommunicado and were not given access to lawyers until April 2008, i.e. eight months after their conviction and sentencing in first instance. Allegedly, they were also tortured during interrogation in order to force them to confess to the murders, including by being beaten on the soles of their feet. The seven men are currently held at Briman Prison in Jeddah. It would appear that their appeals are still pending before the second instance court.

South Africa

Communication sent to the Government on 30 May 2008

381. Violations alleged/human rights issues: Racism, xenophobia, discrimination and related intolerance against migrants, including violence and physical attacks to migrants having as a consequence the alleged death of 56 migrants.

382. Subject(s) of the communication: Hundreds of migrants allegedly facing violence and related intolerance (including the death of 56 migrants).

383. Character of reply: No response.

384. On 30 May 2008, the Special Rapporteur sent a letter of allegation to the Government with regard to the wave of violent attacks faced by migrants in South Africa during May 2008. Many of those migrants who had been attacked had originally moved to South Africa fleeing the dire conditions in their countries of origin. According to the information received, hundreds of migrants had been facing all types of violence, resulting in the death of 56 migrants. According to the information received, the attacks began in Johannesburg in the Province of Gauteng and have spread to other Provinces becoming disturbingly xenophobic in character.

385. The Special Rapporteur noted that despite a delay in responding to this wave of violence, the Government had lately addressed the situation and had undertaken measures to curb the violence and prevent further actions.

Communication sent to the Government on 5 November 2008

386. Violations alleged/human rights issues: Racism, racial discrimination, xenophobia and related intolerance / the right to life of migrants.

387. Subject(s) of the communication: A monoparental family of Somali origin (mother, 19 and 14 year-old sons and 12 year-old daughter).

388. Character of reply: No response.

389. On 5 November 2008, the Special Rapporteur sent a letter of allegation to the Government jointly with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, regarding information received about Ms. F. and her 19 and 14 year-old sons and her 12 year-old daughter. According to the information, they were stabbed to death in a shop run by other Somalis in a village in the Eastern Cape. Ms. F. was reportedly stabbed over 100 times in what has been characterized as a xenophobic attack. According to reports, both female victims may have been subjected to sexual assaults. Three other Somali

merchants were allegedly killed in Johannesburg and Port Elizabeth since 3 October. These acts follow a wave of violent attacks faced by foreigners in South Africa last May 2008, targeting particularly migrants and refugees who had moved to South Africa fleeing the dire conditions in their countries of origin.

390. Concern was expressed that the murder of Ms. F. and her family reflect a pattern of xenophobic violence in South Africa over the recent months.

Spain

Comunicación enviada al Gobierno el 24 de enero de 2008

391. Violaciones alegadas/asuntos en materia de derechos humanos: Racismo, xenofobia y formas conexas de intolerancia contra los y las migrantes.

392. Sujeto(s) de la comunicación: una menor de origen ecuatoriano

393. Carácter de la respuesta: Respuesta exhaustiva.

394. El 24 de enero de 2008, el Relator envió una comunicación al Gobierno, conjuntamente con el Relator Especial sobre formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia, relativa a la información recibida en relación con una menor de nacionalidad ecuatoriana que habría sido víctima de agresiones físicas y verbales de contenido xenófobo y racista en Barcelona.

395. Según la información recibida, el incidente se habría producido el martes día 7 de octubre en un tren de la línea ferroviaria de la Generalitat de Cataluña en el trayecto de Plaza España a Martorell, poco antes de llegar a la estación de 'Colonia Güell', donde el agresor descendió del tren. S.X M. M., un joven de 21 años, de nacionalidad española, se habría fijado en la menor de nacionalidad ecuatoriana que viajaba sola. Se acercó a ella y, sin dejar de hablar en ningún momento por el teléfono móvil, le insultó y le amenazó de muerte. Posteriormente se lanzó contra la chica ecuatoriana a la que golpearía varias veces al tiempo que continuaba profiriendo insultos racistas y xenófobos hacia la menor.

396. Tras insultarla y gritarle al oído varias veces que se marchara a su país, el presunto agresor comenzó a golpearla cada vez con más agresividad, llegando incluso a propinarle patadas en la cara, hasta que el tren paró y el presunto agresor se bajó de él, mientras continuaba profiriendo insultos de contenido racista.

397. La Audiencia de Barcelona habría decidido mantener la situación de libertad provisional sin fianza para el joven que agredió a la chica ecuatoriana, tras haber desestimado los recursos en contra del Ministerio Fiscal y de la víctima.

Respuesta del gobierno a la comunicación enviada el 24 de enero de 2008

398. Mediante escrito conjunto de 24 de enero pasado, los Relatores Especiales sobre Racismo y Discriminación Racial y sobre Derechos Humanos de los Migrantes de Naciones Unidas solicitaron a España información sobre la agresión sufrida por una menor ecuatoriana en un tren de los Ferrocarriles de la Generalitat de Cataluña el día 7 de octubre de 2007.

399. En concreto, los Relatores Especiales solicitan información sobre los siguientes puntos:

1.- Hechos ocurridos.

2.-Medidas para combatir las manifestaciones de carácter racista o xenófobo.

3.- Indemnización de la víctima.

1.- Información relativa a los hechos denunciados

400. El día 7 de octubre de 2007, en un tren de los Ferrocarriles de la Generalitat de Cataluña que realizaba el trayecto entre la Plaza de España de Barcelona y la localidad de Martorell, un hombre joven agredió e insultó a otra pasajera de 16 años de edad y nacionalidad ecuatoriana, que viajaba sola.

401. Los hechos tuvieron lugar al aproximarse el tren a la estación de "Colonial Güelt", momento en que el agresor, que se encontraba hablando por un teléfono móvil, se fijó en la joven y tras insultarla y gritarle al oído varias veces que se fuera a su país, comenzó a agredirla físicamente. La situación se prolongó hasta el momento en que el tren se detuvo en la estación, apeándose el agresor mientras continuaba profiriendo insultos de contenido racista.

402. Instantes después, la joven agredida solicitó auxilio al teléfono de emergencias 112, siendo atendida, en un fuerte estado de nerviosismo y temor, en una estación próxima por la Guardia Civil.

403. Desde ese momento, el Área de Investigación de la Comandancia de Barcelona de la Guardia Civil inició las gestiones para localizar al autor de los hechos, que culminaron con su detención a la entrada de su domicilio, el día 19 siguiente. El presunto agresor es un joven de 21 años, residente en la localidad barcelonesa de Santa Coloma de Cervelló. Un video captado por el sistema de seguridad del tren fue determinante para su identificación y para apreciar la agresión sufrida por la joven.

404. El detenido pasó a disposición del Juzgado de Instrucción de Guardia de Sant Boj de Llobregat (Barcelona) el día 23 y, tras su comparecencia ante el Juez, quedó en libertad con cargos. Justificó sus actos diciendo que estaba borracho, y que nunca habla tenido comportamientos racistas. Estos extremos los desmentirían posteriormente la víctima y un testigo.

405. La titular del Juzgado de Primera Instancia e Instrucción número 2 de Sant Bol de Llobregat dejó en libertad con cargos al joven porque la parte acusadora no pidió ninguna otra medida, como la prisión provisional. Según fuentes del Tribunal Superior de Justicia de Cataluña (TSIC), el fiscal no asistió a la declaración del imputado y la familia de la menor renunció a ser representada por un abogado, motivo por lo que la juez no tuvo otra opción que dejarle en libertad.

406. No obstante y con posterioridad, la Fiscalía recurrió y pidió el arresto del imputado por considerar que existía riesgo de fuga y para proteger a la menor. Sin embargo, la Juez no aceptó estos argumentos en base a que el imputado tiene arraigo social y está en paro, por lo

que no tiene medios para huir. Igualmente, la juez cree suficientes las medidas cautelares adoptadas hasta la celebración del juicio: prohibición de acercarse a la joven, prohibición de abandonar las localidades de Santa Coloma de Cervelló, en la que él reside, y de Sant Boj de Llobregat. También se le prohíbe viajar en la línea S-8, en la que se produjo la agresión, y se le ordena que se persone dos veces al día ante la Policía Municipal de Santa Coloma de Cervelló y cada quince días en el juzgado.

407. La víctima declaró en el juzgado el día 25 por la mañana, ratificando los extremos recogidos en el atestado policial. El forense considera la posibilidad de que sufra un shock postraumático como consecuencia de la agresión, por lo que se le ha ofrecido oficialmente el oportuno tratamiento.

408. La menor acudió al edificio judicial con protección policial y acompañada de su madre y de su hermana, pidiendo a los medios de comunicación que se preservara su identidad. Además de los familiares, acompañaron a la misma dos representantes del Consulado de Ecuador en Barcelona y su abogado. La familia es oriunda de la ciudad de Guayaquil y residen desde hace siete años en Cataluña. El padre se encuentra en Ecuador, pero se le ha ofrecido visado para viajar a España si lo desea.

409. El presunto agresor fue examinado por un psiquiatra, el cual dictaminó que sufre un trastorno psicológico, derivado de una relación traumática con su infancia, por el que lleva diez años recibiendo ayuda profesional: Sin madre y con un padre alcohólico, estuvo bajo el cuidado de una abuela "con limitaciones humanas". No obstante, se le considera responsable de sus actos.

410. El Presidente del Gobierno, varios Ministros, grupos políticos, sindicatos, organizaciones sociales y toda clase de colectivos ciudadanos repudiaron con la máxima contundencia la agresión y expresaron su solidaridad con la víctima. Asimismo, y bajo el lema "todos contra el racismo", convocados por partidos políticos, sindicatos y decenas de asociaciones pro-derechos humanos y de ayuda a los inmigrantes, cientos de personas se concentraron en distintas capitales españolas como muestra de repudio al ataque.

411. El 7 de noviembre pasado, la Ministra de Asuntos Exteriores de Ecuador, que se encontraba de visita oficial en España, visitó a la menor, acompañada por la Secretaria de Estado para Iberoamérica del Ministerio de Asuntos Exteriores español, quien, en nombre del Gobierno, condenó nuevamente el acto violento sufrido por la ciudadana ecuatoriana, que interpretó como un "hecho aislado", que "no representa de ninguna manera a la sociedad española, que aprecia y respeta a la población ecuatoriana residente en España".

412. Asimismo, dicha Secretaría de Estado manifestó su total disposición a apoyar las gestiones que el Gobierno ecuatoriano emprenda en relación con el caso, así como el deseo de que la menor "no se sienta desamparada porque en nuestro país estos hechos son punibles y el Gobierno español va a actuar para que actos como el sucedido tengan consecuencias dentro del marco del Estado de Derecho".

413. Cabe señalar, finalmente, que la Consejería de Acción Social de la Generalitat de Cataluña ejercerá, en el ámbito de sus competencias, la acusación popular en el proceso judicial por la agresión.

2.- Medidas vigentes en España para eliminar toda forma de impunidad por delitos motivados por actitudes racistas

414. El Gobierno español considera que las Leyes, especialmente las penales, no deben ser el único instrumento para llevar a cabo la tarea de eliminación de las actitudes racistas, sino que debe darse a este fenómeno *un tratamiento integral* que comprenda medidas punitivas y medidas policiales junto a la concienciación y educación social en valores de rechazo hacía las conductas de carácter racista o xenófobo.

415. En este sentido, se explican a continuación la normativa vigente en la materia, las medidas de orden policial y las de concienciación y educación en valores.

2.1 Medidas legales normativa básica en vigor

2.1.1 El Código Penal español frente a la discriminación de carácter xenófobo

416. El Código Penal de 1995 ha procurado avanzar en el camino de la igualdad real y efectiva, tratando de cumplir la tarea que en ese sentido, impone la Constitución a los poderes públicos.

417. En este sentido, hay que citar los siguientes artículos del Código Penal vigente:

Art. 22: Son circunstancias agravantes:

"4. a Cometer e/ delito por motivos racistas, antisemitas u otra case de discriminación referente a la ideología, religión o creencias de la víctima, la etnia, raza o nación a la que pertenezca, su sexo u orientación sexual, o la enfermedad o minusvalía que padezca".

Art. 174:

"1. Comete tortura la autoridad o funcionario publico que, abusando de su cargo, y con el fin de obtener una confesión o información de cualquier persona o de castigarla por cualquier hecho que haya cometido o se sospeche que ha cometido, **o por cualquier razón basada en algún tipo de discriminación**¹², la sometiere a condiciones o procedimientos que por su naturaleza, duración u otras circunstancias, le supongan sufrimientos físicos o mentales, la supresión o disminución de sus facultades de conocimiento, discernimiento o decisión o que, de cualquier otro modo, atenten contra su integridad moral. El culpable de tortura será castigado con la pena de prisión de dos a seis años si el atentado fuera grave, y de prisión de uno a tres años si no lo es. Además de las penas señaladas se impondrá, en todo caso, la pena de inhabilitación absoluta de ocho a 12 años 390.

En las mismas penas incurrirán, respectivamente, la autoridad o funcionario de instituciones penitenciarias o de centros de protección o corrección de menores que cometiere, respecto de detenidos, internos o presos, los actos a que se refiere el apartado anterior."

¹² Esta mención procede de la reforma 15/2003

Art. 314:

"Los que produzcan una grave discriminación en el empleo, público o privado, contra alguna persona por razón de su ideología, religión o creencias, su pertenencia a una etnia, raza o nación, su sexo, orientación sexual, situación familiar, enfermedad o minusvalía, por ostentar la representación legal o sindical de los trabajadores, por el parentesco con otras trabajadores de la empresa o por el uso de alguna de las lenguas oficiales dentro del Estado español, y no restablezcan la situación de igualdad ante la ley tras requerimiento o sanción administrativa, reparando los daños económicos que se hayan derivado, serán castigados con la pena de prisión de seis meses a dos años o multa de 12 a 24 meses. "

Art. 510:"1. Los que provocaren a la discriminación, al odio o a la violencia contra grupos o asociaciones, por motivos racistas, antisemitas u otros referentes a la ideología, religión o creencias, situación familiar, la pertenencia de sus miembros a una etnia o raza, su origen nacional, su sexo, orientación sexual, enfermedad o minusvalía, serán castigados con la pena de prisión de uno a tres años y multa de seis a doce meses 816.
2. Serán castigados con la misma pena los que, con conocimiento de su falsedad o temerario desprecio hacia la verdad, difundieren informaciones injuriosas sobre grupos o asociaciones en relación a su ideología, religión o creencias, la pertenencia de sus miembros a una etnia o raza, su origen nacional, su sexo, orientación sexual, enfermedad o minusvalía':

Art. 515: Son punibles las asociaciones ilícitas, teniendo tal consideración: "5. ° Las que, promuevan la discriminación, el odio o la violencia contra personas, grupos o asociaciones por razón de su ideología, religión o creencias, la pertenencia de sus miembros o de alguno de ellos a una etnia, raza o nación, su sexo, orientación sexual, situación familiar enfermedad o minusvalía, o inciten a ello."

Art. 607 bis "1. Son reos de delitos de lesa humanidad quienes cometan los hechos previstos en el apartado siguiente como parte de un ataque generalizado o sistemático contra la población civil o contra una parte de ella. En todo caso se considerará delito de lesa humanidad la comisión de tales hechos: 1. Por razón de la pertenencia de la víctima a un grupo o colectivo perseguido por motivos políticos, raciales, nacionales, étnicos, culturales, religiosos o de género u otros motivos universalmente reconocidos como inaceptables con arreglo al derecho internacional. "

418. Cabe señalar, para concluir este apartado, que el sistema penal vigente castiga determinados comportamientos que sean expresión de discriminación pero además lo hace, sin perjuicio de conductas constitutivas de delito por si mismas, es decir, que si además se cometen lesiones, malos tratos, abusos sexuales, coacciones o amenazas, injurias, etc... Estas conductas se castigan independientemente.

2.1.2. La ley de Acompañamiento del año 2003

419. Con la base jurídica del artículo 13 del Tratado de la Comunidad Europea, se aprobaron en 2000 dos directivas: en primer lugar, la *Directiva 2000/43/CE del Consejo, de 29 de junio de 2000*, relativa a la aplicación del principio de igualdad de trato de las personas independientemente de su origen racial o étnico, que aborda tal principio en diversos ámbitos; en segundo lugar, la *Directiva 2000/78/CE del Consejo, de 27 de noviembre de 2000*, relativa

al establecimiento de un marco general para la Igualdad de trato en el empleo y la ocupación, que pretende luchar contra las discriminaciones basadas en la religión o convicciones, la discapacidad, la edad y la orientación sexual.

420. Mediante las nuevas medidas se adecua la legislación española a estas dos directivas procediendo a su transposición a nuestro derecho. Además, se establece un marco legal general para combatir la discriminación por el origen racial o étnico de las personas en todos los ámbitos, se aborda la definición legal de la discriminación, directa e indirecta, y se moderniza la regulación de la igualdad de trato y la no discriminación en el trabajo, modificándose, entre otros, determinados preceptos del Estatuto de los Trabajadores, de la Ley de Integración Social de los Minusválidos, de la Ley de Procedimiento Laboral, de la Ley sobre Infracciones y Sanciones en el Orden Social y de la legislación en materia de función pública.

2.1.3 Ley 19/2007, de 11 de julio, contra la Violencia, el Racismo, la Xenofobia y la Intolerancia en el deporte.

421. Realiza un compendio exhaustivo de los actos o conductas que incitan a la violencia en el deporte y los actos que son considerados racistas o xenófobos.

2.2 Actuación policial

422. Las Fuerzas y Cuerpos de Seguridad del Estado disponen de mecanismos de carácter policial específicos para combatir las actuaciones xenófobas de carácter violento, tanto por lo que se refiere a *los comportamientos individuales* como aquéllos otros cometidos por *grupos* que, en sus postulados, efectúan proclamas racistas o xenófobos contra determinados grupos de población específicos (inmigrantes, toxicómanos, mendigos, etc).

423. Analizaremos por tanto este fenómeno desde la perspectiva de los comportamientos violentos de carácter individual y desde la perspectiva de las actuaciones racistas o xenófobas relacionadas con grupos organizados:

a) Comportamientos violentos de carácter individual

424. Por parte de los órganos policiales encargados de la vigilancia de estas conductas a nivel central, se coordina permanentemente la actuación policial con los órganos de ámbito periférico, labores que permiten evaluar, a nivel nacional, la incidencia delictiva de todos aquellos individuos (o grupos) que, de manera organizada, llevan a cabo actos de naturaleza violenta.

425. Las conductas individuales -no protagonizadas por personas relacionadas con grupos que apoyan este tipo de acciones- son investigadas de manera individualizada, poniendo especial énfasis en aportar las pruebas pertinentes para determinar que el hecho delictivo presenta aspectos racistas o xenófobos. En estos casos la actividad preventiva es especialmente difícil, ya que -salvo respecto a determinados individuos que hayan protagonizado hechos anteriores ya conocidos por las fuerzas y cuerpos de seguridad- no se dispone de información previa que pueda relacionar el presunto hecho punitivo con grupos o

campanas de instigación de tales conductas (lo que permitiría a las fuerzas y cuerpos de seguridad anticiparse a la acción delictiva).

b) Actuaciones violentas relacionadas con grupos de carácter racista o xenófobo

426. Con carácter permanente, por unidades policiales especializadas, se lleva a cabo el seguimiento y control de todos aquellos grupos que, en razón a sus postulados ideológicos radicales y violentos, son susceptibles - con sus acciones - de vulnerar el ordenamiento jurídico vigente, fundamentalmente, de cometer delitos enmarcados en el ámbito de los derechos fundamentales de las personas.

427. Las Brigadas y Unidades de Información ubicadas en provincias en las que se ha registrado un mayor número de incidentes violentos protagonizados por individuos incardinados en el ámbito de la extrema derecha o con connotaciones racistas, xenófobas u homófobas, aplican las previsiones contenidas en un **Plan operativo de Actuación** en previsión y evitación de este tipo de hechos y para la averiguación de sus autores.

428. Este Plan Operativo:

- Establece un *dispositivo de ejecución y control permanente*. En este sentido, debe resaltarse que la investigación y seguimiento de estos grupos se realiza de manera constante, obteniendo información y efectuándose un control continuo sobre estos grupos de riesgo - así como sobre cada uno de sus miembros - mediante la recopilación de información, identificación, determinación de la jerarquía dentro del grupo, obtención y análisis de información (pasquines, octavillas, etc), así como mediante el estudio de las actividades desarrolladas.

- Dispone, *en momentos y lugares concretos* (como los fines de semana) *de un refuerzo* en el número de funcionarios encargados de prevenir o reprimir estas conductas agresivas. El ámbito de aplicación se extiende a las inmediaciones de los lugares en que habitualmente se reúnen o pueden reunirse miembros de estos grupos, como bares, parques o estadios deportivos, especialmente, en este último caso, coincidiendo con los momentos previos y la conclusión de los espectáculos deportivos.

429. Al objeto de realizar un seguimiento efectivo de los actos violentos protagonizados por miembros de estos grupos, se encuentra actualmente en vigor la **Instrucción 23/2005, de la Secretaria de Estado de Seguridad**, que une a las distintas Comisarías Generales - y a las Unidades correspondientes de la Guardia Civil - en la consecución de este objetivo común, centrado en la prevención, control y persecución de estas conductas.

430. Esta Instrucción - que intenta atajar en nuestro país la actividad de los grupos juveniles violentos, tanto de carácter latino, como ligados a ideologías de extrema derecha o extrema izquierda - ha sido determinante para establecer criterios objetivos de adscripción o pertenencia de los individuos a los grupos objeto de estudio, lo que ha supuesto un apoyo fundamental en las investigaciones policiales.

3.- Indemnización de la víctima

431. Existe una Comisión Nacional de Ayuda y Asistencia a las Víctimas de Delitos Violentos y contra la Libertad Sexual que esta compuesta a propuesta de los Ministros de Justicia, Economía y Hacienda y del Interior. Esta presidida por un magistrado nombrado a propuesta del Consejo General del Poder Judicial e integrada por representantes de la Administración General del Estado y, en su caso, de las organizaciones vinculadas a la asistencia y defensa de las víctimas. En el caso de que se decida la concesión de una indemnización, será realizada por el Ministerio de Economía y Hacienda.

432. En casos de víctimas de delitos violentos y contra la libertad sexual será de aplicación la Ley 35/1995, de 11 de diciembre, de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual, así como el Real Decreto por el que se aprueba el reglamento de ayuda a las víctimas de delitos violentos y contra la libertad sexual (Real Decreto 738/1997, de 23 de mayo, modificado por Real Decreto 429/2003, de 11 de abril y por RD 199/2006, de 17 de febrero.). Para el caso que nos ocupa el Ministerio de Economía y Hacienda tendrá que determinar si éste está dentro del ámbito de aplicación de dicha Ley. Cabe destacar al respecto lo dispuesto en los artículos 2 y 4:

Artículo 2. Beneficiarios

433. Podrán acceder a estas ayudas quienes, en el momento de perpetrarse el delito, sean españoles o nacionales de algún otro Estado miembro de la Unión Europea o quienes, no siéndolo, residan habitualmente en España o sean nacionales de otro Estado que reconozca ayudas análogas a los españoles en su territorio.

434. En el caso de fallecimiento, lo previsto en el párrafo anterior será exigible respecto de los beneficiarios a título de víctimas indirectas, con independencia de la nacionalidad o residencia habitual del fallecido.

435. Podrán acceder a estas ayudas, a título de víctimas directas, las personas que sufran lesiones corporales graves o daños graves en su salud física o mental como consecuencia directa del delito.

436. Son beneficiarios a título de víctimas indirectas, en el caso de muerte, y con referencia siempre a la fecha de ésta, las personas que reúnan las condiciones que se indican a continuación:

a. El cónyuge del fallecido, si no estuviera separado legalmente, o la persona que hubiera venido conviviendo con el fallecido de forma permanente con análoga relación de afectividad a la de cónyuge, con independencia de su orientación sexual, durante, al menos, los dos años anteriores al momento del fallecimiento, salvo que hubieran tenido descendencia en común, en cuyo caso bastará la mera convivencia.

b. Los hijos del fallecido, siempre que dependieran económicamente de él, con independencia de su filiación y edad, o de su condición de póstumos.

c. Los hijos que, no siéndolo del fallecido, lo fueran de las personas contempladas en el párrafo a) anterior, siempre que dependieran económicamente de aquél.

d. En defecto de las personas contempladas por los párrafos a), b) y c) anteriores, serán beneficiarios los padres de la persona fallecida si dependieran económicamente de ella.

437. De concurrir varios beneficiarios a título de víctimas indirectas, la distribución de la cantidad a que ascienda la ayuda se efectuará de la siguiente forma:

a. La cantidad se dividirá en dos mitades. Corresponderá una al cónyuge o a la persona que hubiera venido conviviendo con el fallecido en los términos del párrafo a) del apartado anterior. Corresponderá la otra mitad a los hijos contemplados por los párrafos b) y c) del apartado anterior, y se distribuirá entre todos ellos por partes iguales.

b. De resultar beneficiarios los padres del fallecido, la cantidad a que ascienda la ayuda se repartirá entre ellos por partes iguales.

438. Serán también beneficiarios a título de víctimas indirectas los padres del menor que fallezca a consecuencia directa del delito.

Artículo 4. Concepto de lesiones y daños

439. A los efectos de la presente Ley, son lesiones graves aquellas que menoscaben la integridad corporal o la salud física o mental y que incapaciten con carácter temporal o permanente a la persona que las hubiera sufrido.

440. No se considerará incapacidad permanente aquella que no suponga un grado de minusvalía de, al menos, el 33 %.

441. Las lesiones corporales o los daños a la salud física o mental habrán de tener entidad suficiente como para que, conforme a la legislación de la Seguridad Social, tuviera lugar una declaración de invalidez permanente en cualquiera de sus grados o una situación de incapacidad temporal superior a seis meses.

442. Reglamentariamente se determinarán el procedimiento y el órgano competente para la calificación de las lesiones o daños a la salud.

443. Cabe recordar que las solicitudes de las ayudas se dirigirán al Ministerio de Economía y Hacienda. Si la resolución de dicho Ministerio es recurrida, la Comisión Nacional de Ayuda y Asistencia a las Víctimas de Delitos Violentos y contra la Libertad Sexual será competente para resolver los procedimientos de impugnación de las resoluciones de dicho Ministerio.

444. Finalmente, conviene señalar que el procedimiento judicial se encuentra sub iudice, por lo que nos e puede proporcionar de momento información adicional a la incluida en el presente informe.

Sudan

Communication sent to the Government on 22 August 2008

445. Violations alleged/human rights issues: Torture or other cruel, inhuman and degrading treatment or punishment-Violence against migrant women.

446. Subject(s) of the communication: 15 women of Ugandan origin.

447. Character of reply: No response.

448. On 22 August 2008, the Special Rapporteur jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Special Rapporteur on violence against women, its causes and consequences, sent a letter of allegation to the Government of Sudan.

449. According to the information received, on 23 June 2008 at about 9:00, a Criminal Investigation Department Officer (CID) accompanied by two Southern Sudan Police Service (SSPS) officers arrested five Ugandan female traders at a Ugandan Bar in Malakal (Upper Nile State) and took them for interrogation at Malakal Police Station. Six other Ugandan women were arrested in another bar in Malakal. At the time of the arrest, none of the eleven women were informed about the reasons for their arrest.

450. The eleven Ugandan women were detained at the Malakal police station and only released at 16:30 on 23 June 2008. While in detention, the women were severely beaten by CID and SSPS officers and suffered visible physical injuries, which were seen by UNMIS Human Rights Officers. Police officers accused the women of engaging in prostitution, while at the same time allegedly trying to force them to have sex with the officers. Before their release, the women were threatened and warned not to report this incident to anybody.

451. The Director of the CID in Malakal told UNMIS Human Rights officers that the eleven women had been arrested, because they were reportedly engaging in immoral activities. He denied allegations that police officers had physically abused the women in the process of interrogation or tried to force them to have sex with police officers.

452. They also brought to the Government's attention the alleged gang rape of Ms.A.N. (40 years old), Ms. I.U. (21 years old), Ms. A.B. (19 years old), Ms. S.L. (40 years old), four Ugandan nationals, by Southern Sudan Police Service (SSPS) officers in Bor, Jonglei State.

453. According to information received, three armed SSPS Officers forced open the door of A. N.'s market shop at around 21:30 on 26 June 2008. Ms. N.'s housemate S.L. was present in the shop at the time. The policemen brought along Ms. I.U. and Ms. A.B, who work and live in the shop next door. When A.N. asked the policemen what they wanted she was chained to a chair. The policemen held the four women captive in the shop and took turns raping them. S.L. had her arm broken during the attack. It is also alleged that the SSPS Officers stole a mobile phone and 1400 SDG from the women. The policemen left the shop at 22:30, leaving A.N. chained to the chair.

454. When A.N. and S.L. went to Bor Police Station to report the crime on 27 June 2008, the SSPS Officers present refused to file a case. Only the woman with the broken arm was

provided with a Form 8, on which doctors can note results of a medical forensic examination. Two of the rapists were reportedly present at Bor Police Station when the women attempted to report the crime. When the women pointed out the alleged rapists to the duty officer at the Police Station, Sergeant O.O., refused to take action.

Thailand

Communication sent to the Government on 18 April 2008

455. Violations alleged/human rights issues: Protection and de-criminalization of victims of illegal migrant-smuggling networks; ensuring the protection of human rights at all stages of the migration process management; due process of law, including the right to be presumed innocent until proved guilty according to the Law.

456. Subject(s) of the communication: 121 migrants of different nationalities (including 37 women and 17 men allegedly dead and 67 survivors).

457. Character of reply: No response.

458. On 18 April 2008, the Special Rapporteur on the human rights of migrants sent an urgent appeal to the Government on information received regarding the recent death of 54 undocumented migrants, including an 8-year-old girl, as well as the ongoing detention or the lack of information on the whereabouts of a number of undocumented migrants from Myanmar in Ranong Province. According to the information received:

459. A total number of 37 women and 17 men died recently as a result of lack of oxygen while being transported in a 10-wheel truck from Choke Charoen fishing pier to Ban Ao Makam on Sakdidet Road in Tambon Vichit of Phuket's Muang district.

460. Reports indicate that the group of smuggled persons crossed by boat to the Thai town of Ranong from Myanmar's southern tip at Victoria Point. They were reportedly packed into an airtight container, measuring 6m by 2m, on a lorry for the journey to the resort island of Phuket. Reportedly, the driver of the truck was offered 80,000 Baht to drive the 121 migrant workers from Ranong to Phuket. Due to the failure of the ventilation system in the container, the migrant workers tried to bang on the walls to give signals to the driver that they were suffocating. Reportedly, the driver finally stopped the truck and opened the doors. When he saw that many of the migrant workers were dead, he ran away.

461. According to the information received the 67 survivors were brought to a hospital in Samaran district, Ranong Province for medical treatment. Afterwards, 46 of the survivors were allegedly brought before the provincial court where all were charged under the Immigration Act of 1979 with illegal entry in to the Kingdom of Thailand. With the exception of 4 persons who were able to pay the fine for illegal entry, the rest were reportedly detained at the Ranong Prison. A total number of 14 minors and 4 adults were allegedly detained at the Immigration Detention Centre in Samaran District, Ranong Province. The whereabouts and status of the remaining persons are unclear.

462. Reports indicate that the group of 42 migrants reportedly detained at Ranong Prison, will be transferred to the Immigration Detention Centre of the Ranong Province upon the

completion of ten days imprisonment. All survivors will be purportedly deported to Myanmar soon.

463. The Kingdom of Thailand has offered great opportunities for migrant workers from the neighbouring countries to seek jobs in Thailand. However, reports indicate that there are an increasing number of migrant workers in the above-mentioned provinces who are being subjected to harsh and unsafe working conditions, including excessive working hours and non payment of wages. They fill the low-paid, often dangerous jobs in sectors including textiles, construction and fisheries.

464. Reports note that the national registration system for migrants is ineffective, with its exorbitant registration fees, limited time periods for registration, the breakdown in the sending countries' abilities to provide the initial documentation required, and the fact that only employers can register migrants for work permits.

465. It is recommended that specific measures be taken to protect and decriminalize the victims of illegal migrant-smuggling networks, and effective strategies should be adopted to eliminate the use of exploitative labour. Furthermore, effective protection of the human rights of migrants should be guaranteed at every stage and in every procedure of migration management, both in the receiving State and in the States of transit and origin. This focus on rights should be an integral part of any migration procedure, including the deportation or return of non-documented individuals.

466. Concern is expressed that the 46 migrants who were brought before the provincial court were not provided with legal aid.

467. Concern is also expressed that the deportation of the undocumented migrants to Myanmar may hinder the Thai authority's investigation into the incident, as some of the smuggled persons could provide information which would help to bring the perpetrators to justice.

United Arab Emirates

Communication sent on 2 February 2009

468. Violations alleged/human rights issues: Arbitrary detention; discrimination on the ground of origin/independence of judges and lawyers, torture and other cruel, inhuman or degrading treatment or punishment.

469. Subject(s) of appeal: A male born in Bahrain, citizen of United Arab Emirates.

470. Character of reply: No response.

471. On 2 February 2009, the Special Rapporteur on the human rights of migrants sent an urgent appeal joint with the Working Group on Arbitrary detention, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers in relation to information received regarding Mr. K.A.A. Al J., born 1971 in Bahrain, citizen of the United Arab Emirates who was allegedly arrested by authorities of the United Arab Emirates some time on or after 24 November 2008. Two weeks after his arrest, upon insistence of his relatives residing in Bahrain, the authorities of the United Arab Emirates acknowledged that

Mr. K.A.A. Al J. was held in detention “for questioning”. They maintained that his detention formed part of a “routine procedure” and that his release could be expected within the following two weeks. However, Mr. K.A.A. Al J. has been held at an undisclosed place of detention without access to lawyers or his family since his arrest.

472. Mr. K.A.A. Al J. had allegedly been arrested by intelligence service officials of the Kingdom of Saudi Arabia at the airport of Riyadh on 26 April 2007 and detained without charge or trial until 24 November 2008. Mr. K.A.A. Al J. had regularly performed religious studies in Al Qassim in Saudi Arabia for several years. While he was in custody in Saudi Arabia, his family could visit him after three months in detention. The Saudi authorities maintained that keeping Mr. K.A.A. Al J. in custody was only a “preventive measure” and that his release could be expected soon. He was “released” on 24 November 2008. However, it appears that he might have been transferred to the United Arab Emirates under circumstances not explained to his family.

473. In view of Mr. K.A.A. Al J.’s reported detention at an undisclosed place of detention concerns are expressed with respect to his physical and mental integrity.

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