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SUBMITTED INPUT

A Report to the Special Rapporteur for the Human Rights of Migrants on the Impact of COVID-19 on the Human Rights of Migrant Children, Submitted by the Center for the Human Rights of Children, Loyola University Chicago School of Law



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Input for the Special Rapporteur’s Report on the Impact of COVID-19 on the Human Rights of Migrant Children, Submitted by the Center for the Human Rights of Children, Loyola University Chicago School of Law, June 14, 2021

I. Introduction

The Center for the Human Rights of Children submits this input in response to the call for submissions made by the Special Rapporteur on the Human Rights of Migrants to inform the forthcoming report to the 76th session of the U.N. General Assembly regarding the impact of COVID-19 on the human rights of migrants. This submission will focus exclusively on the impact of the COVID-19 pandemic on child migrants in the United States.

Children are uniquely vulnerable, due to their age, development, and dependence on adults for their safety and well-being. The plight of migrant children has been tied to that of all migrants—perpetuating the unfortunate tradition of treating migrant children as adults in miniature or merely as an extension of the migrant parent or guardian. Migrant children must be given special attention, and all decisions concerning migrant children must be firmly centered around the best interests of the child—especially during times of public emergency such as throughout the COVID-19 pandemic.

Thus, this input calls attention to the ways in which the United States Government (USG) has ignored and/or exploited the unique vulnerabilities of migrant children in the midst of the COVID-19 pandemic. We focus on three key areas related to children in the context of COVID-19: migrant child detention, the use of extraordinary emergency measures to refool migrant children and families, and the impact of USG policies around COVID-19 on the vulnerability of migrant children to human trafficking. Finally, this input will consider the critical role of race and racist ideology in the implementation of immigration policies that have proven harmful to children.

II. International Human Rights Framework for Public Emergencies, including Public Health Emergencies and the Rights of the Migrant Child.

The present call for submissions requests, generally, information related to government responses to the COVID-19 pandemic and the impact on the rights of all migrants. This input addresses the ways in which the USG—through COVID-19 related policies—has violated international norms concerning a child’s inherent right to life, survival and development¹ as well as the peremptory norm related to the right of migrant children not to be returned to persecution and harm under the *jus cogens* imperative of non-refoulement² This input will also address USG policies and practices

¹ General Assembly resolution 44/25, *Convention on the Rights of the Child*, 20 November 1989, art. 6 [hereinafter “UN CRC”].

² *United Nations Protocol Relating to the Status of Refugees* art. I, 31 January 1967, *United Nations Treaty Series*, vol. 19, No. 6223, [hereinafter “Refugee Protocol”]; *Convention Relating to the Status of Refugees* art. 33(1), 28 July 1951, *United Nations Treaty Series*, vol. 189, No. 150, p. 152, [hereinafter “Refugee Convention”]; *see also* Refugee Act of 1980 § 208, 8 U.S.C. § 1158, (c)(1)(A) (2018) (“In the case of an alien granted asylum... the Attorney General shall not remove or return the alien to the alien’s country of nationality or, in the case of a person having no nationality, the country of the alien’s last habitual residence).

implemented in the wake of COVID-19 which generally violate the customary international right of the migrant child to have their best interests considered.³ The manifest violations of children’s rights that flow from these policies have resulted in immense physical, emotional, developmental, and traumatic harm to migrant children.

While responses to public emergencies require careful consideration—balancing societal interests against individual rights—the concept of derogation during times of crisis is not a novel inquiry. The International Covenant on Civil and Political Rights (ICCPR),⁴ which enjoys near universal ratification,⁵ permits derogation of specific rights under the condition that the emergency “threatens the life of the nation” so long as the derogation does not involve discrimination on the basis of “race, color, sex, language, religion, or social origin.”⁶ The central requirement for emergency derogation is that the measures taken by the state are strictly necessary and proportional to the durational, geographic, and material scope of the emergency.⁷ Still, the state must implement safeguards against abuse by the executive, including the right to due process.⁸ The derogation framework requires that the disposition of judicial process be made publicly known—states cannot simply operate through secret extrajudicial processes.⁹

³ UN CRC, *supra* note 1, at art. 3; See generally, U.N. Children’s Fund [UNICEF], *Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, available at <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/>. (Recognizing that every country in the world, apart from the United States, has ratified the UN CRC, and that pursuant to a UNICEF study of the UN CRC, “[t]he right of the child to have their best interests considered is the single most universally adopted principle of the CRC,” the right of a child to have their best interests considered has become a preemptory norm as recognized by treaty, custom and general principles of law recognized by civilized nations.).

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20 [hereinafter “ICCPR”].

⁵ Office of the U.N. High Comm’r for Human Rights, *Status of Ratification: International Covenant on Civil and Political Rights*, (last visited Nov. 13, 2020) <https://indicators.ohchr.org/> (one hundred and seventy-three states have ratified the ICCPR as of November 11, 2020).

⁶ ICCPR, *supra* note 4, art. 4(1) (“[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”).

⁷ See Office of the U.N. High Comm’r for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, at 853-54, U.N. Doc. HR/P/PT/9, U.N. Sales No. E.02.XIV.3 (2003).

⁸ *Id.* at 876 (“every person has the right at all times to be tried by a court or tribunal which is competent, independent and impartial”).

⁹ *Id.* at 870 (citing the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 as providing the fundamental fair trial guarantee of having one’s judgment pronounced publicly); see art. 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; art. 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; arts. 105-108 of the Geneva Convention Relative to the Treatment of Prisoners of War; articles 71-73 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949;

The international community has also created guidelines for the protection of the human rights of children, including migrant children, during times of emergency. The Minimum Standards for Child Protection in Humanitarian Action¹⁰ (including natural disasters) and the UNHCR’s Emergency Handbook¹¹ recognize that child protection is a “life-saving priority” for which “protection, prevention and response mechanisms must be established from the start of an emergency” to prevent children’s lives and well-being from being put at risk.¹² The UNHCR Emergency Handbook identifies key objectives involved in child protection during emergencies including ensuring that 1) children are safe where they live, learn and play; 2) the capacity of children to participate in their own protection is strengthened; 3) children are given child-friendly access to asylum, refugee and other legal procedures; and 4) children with specific needs receive targeted support.¹³ Finally, children are only to be detained as a measure of “last resort and only for the shortest period possible in age-and gender-segregated facilities.”¹⁴ Migrant children subject to detention are “at risk of psychological, physical and sexual abuse and other harms to their development.”¹⁵

Notwithstanding the international rule of law related to public emergencies, and in particular the guidelines for the treatment of migrant children during times of national crisis, the USG ignored and/or exploited the unique vulnerability of children throughout the pandemic response.

III. United States Government Practices that Ignored and/or Exploited Vulnerable Migrant Children.

The following provides a brief synopsis of specific policies and practices of the USG in response to COVID-19 that directly infringed upon the rights of child migrants. This synopsis is not an

common art. 3 of the four Geneva Conventions; art. 75(4) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and art. 6 of Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

¹⁰ The Alliance for Child Protection in Humanitarian Action, *The Minimum Standards for Child Protection in Humanitarian Action* (2019) [hereinafter “CPMS”]. The CPMS were developed by the Alliance for Child Protection in Humanitarian Action and contain 28 standards—agreed upon benchmarks for protecting children in humanitarian situations (82 countries were represented in the creation of the standards). (“The CPMS are grounded in an international legal framework that outlines States’ obligations towards their citizens and other persons within their territories. This framework includes international human rights law, humanitarian law and refugee law. The Convention on the Rights of the Child (CRC) is the primary international legal human rights instrument upon which the CPMS are based.... All children in humanitarian settings are entitled to full protection and enjoyment of their human rights without discrimination. Additionally, international law provides children who are refugees, internally displaced and migrants with the right to appropriate protection and humanitarian assistance.”)

¹¹ United Nations High Commissioner for Refugees, *Emergency Handbook: Child Protection*, (last visited June 8, 2021) [hereinafter “UNHCR Emergency Handbook”] <https://emergency.unhcr.org/entry/43381/child-protection>.

¹² *Id.* at page 1.

¹³ *Id.* at page 2.

¹⁴ CPMS, *supra* note 10, pg 213; *see also* UNCHR Emergency Handbook, *supra* note 11.

¹⁵ UNHCR Emergency Handbook, *supra* note 11, pg 4.

exhaustive discussion of the policies implemented by the USG, but merely a selection of the most harmful practices and concurrent rights violations that have been observed.¹⁶

A. COVID-19 & Migrant Child Detention Practices in the United States

The call for submissions seeks information concerning whether, in the context of immigration detention, measures have been considered to minimize health risks associated with the COVID-19 transmission by reducing migrants' detention and opting for alternatives to detention. It should be noted at the outset that immigration detention of children has been practiced throughout the pandemic. The following information highlights policies that infringe upon a migrant child's right to life, survival and development,¹⁷ the right to have their best interests considered,¹⁸ and the right to the highest attainable standard of health.¹⁹

- **Migrant Children in the Custody of the Department of Homeland Security (DHS): Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)**

ICE's Secret Hoteling Practices & COVID-19. The Trump Administration, in the midst of the pandemic, employed a public health rule (discussed below) to prevent children from gaining access to immigration court hearings at the time of their arrival at the U.S.-Mexico border. These children were expelled without process. Before being expelled, however, migrant children were first secreted away to undisclosed and unlicensed commercial hotels.²⁰ These children were placed under guard by security contractors with no training or certification in child welfare or public health.²¹ There is no public record of the guidelines for these children's care, including whether any precautions were exercised to protect children from acquiring or transmitting the COVID-19 virus. The use of secret detention practices placed children in environments ripe for predatory child abuse and ignored guidelines for children's health and safety.

CBP Processing Facilities & COVID-19. CBP processing facilities are reportedly cramped and overcrowded sparking significant concern that detention conditions will allow the virus to spread

¹⁶ See National Immigrant Justice Center, *A Timeline of the Trump Administration's Efforts to End Asylum*, (last accessed Jan. 24, 2021) available at <https://immigrantjustice.org/issues/asylum-seekers-refugees>.

¹⁷ UN CRC, *supra* note 1, art. 6.

¹⁸ UN CRC, *supra* note 1, art. 3

¹⁹ UN CRC, *supra* note 1, art. 24; see also UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 8 June 2021]

²⁰ See "Declaration of Marisol Vargas" at 6, 2:85-cv-04544-DMG, ECF No. 920-2, *Flores v. Barr*, 407 F.Supp.3d 909 (C.D. Cal. 2020) (recalling being rebuffed by "[u]nidentified men, who appeared to be contractors of DHS" who denied court-appointed monitors access to speak with children detained at the Hampton Inn Hotel in McAllen, TX).

²¹ See Diaz, S. & Schrobilgen, M., *COVID-19's Nefarious Toll on Migrant Children: Executive Overreach and a Framework to Prevent Abuse*, CTR. FOR THE HUM. RTS. OF CHILDREN, (Nov. 2020) available at <https://www.luc.edu/media/lucedu/chrc/pdfs/Schrobilgen-and-Diaz.pdf>.

amongst migrant detainees.²² “Customs and Border Patrol facilities at the border are severely overloaded and do not conduct their own COVID-19 testing.”²³

CBP’s congregate care setting presents a danger to all migrants because processed migrant detainees are invariably shuffled to detention facilities across the country. DHS has not exercised caution with respect to introducing COVID-19 into migrant congregate care facilities: “[d]espite the Chuckwalla Valley State Prison having a massive coronavirus outbreak, ICE arrested three inmates upon their release from the prison in early June[] and transferred them to the Adelanto detention center.”²⁴ Multiple USG’s Inspector General reports indicate that DHS routinely failed to adhere to COVID-19 transmission prevention measures through violations that “threatened the health, safety, and rights of [migrant] detainees.”²⁵

Children remain at risk from DHS practices as they too are processed through CBP facilities. “As of a [March 2021], there are 17,641 unaccompanied migrant minors in government care -- 5,606 children are in CBP custody and 12,035 in the care of the Department of Human and Health Services.”²⁶

- **Migrant Children in the Custody of the Department of Health and Human Services (HHS): Office of Refugee Resettlement (ORR)**

The detention of migrant children in congregate care settings persisted and expanded during the COVID-19 pandemic. While the Biden Administration, through ORR policy, is committed to expediting the release of migrant children to sponsors in the United States, “the number of children entering HHS custody far outpaces the number being released from its care.”²⁷

Reports indicate that temporary shelters for migrant teenagers have significant incidence of COVID-19. One report states that, of children in the temporary shelter “between the ages of 13 and 17[], 32 out of 247 girls who arrived [one night in March] tested positive for COVID-19.”²⁸

²² Marlene Lenthang, *COVID-19 Cases Among Unaccompanied Migrant Children in Facilities Spark Concerns Over Crowding*, ABC News (Mar. 31, 2021), available at <https://abcnews.go.com/Health/covid-19-cases-unaccompanied-migrant-children-facilities-spark/story?id=76788478>.

²³ *Id.*

²⁴ *Immigration Detention and COVID-19*, Brennan Center for Justice (Mar. 27, 2020), available at <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19>.

²⁵ *Violations of Detention Standards amid COVID-19 Outbreak at La Palma Correctional Center in Eloy, AZ*, OFF. OF INSPECTOR GEN., 2021, <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-30-Mar21.pdf>; see also *Violations of ICE Detention Standards at Pulaski County Jail*, Off. of Inspector Gen., 2021, <https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-32-Apr21.pdf>.

²⁶ Lenthang, *supra* note 22.

²⁷ *Id.*; See also, Amelia Cheatham, *U.S. Detention of Child Migrants*, Council on Foreign Relations (May 4, 2021 3:15PM), <https://www.cfr.org/backgrounders/us-detention-child-migrants>.

²⁸ Lenthang, *supra* note 22.

During the month of March 2021, a total of 647 COVID-19 cases in 40 out of 50 Texas-based migrant shelters was reported.²⁹

Notwithstanding the overbroad use of detention for migrant children, an HHS Inspector General report recently found that “[non-temporary ORR-contracted facilities were] generally prepared to respond to an emergency event, such as the COVID-19 pandemic, in accordance with Federal guidance.”³⁰ The report found that ORR detention facilities “had policies and procedures, the capability to quarantine COVID-19 cases in their facilities, and adequate personal protective equipment.”³¹

B. The Use of Extraordinary Emergency Measures to Prevent Migrant Children from Entering the United States

The call for submissions seeks information concerning any emergency measures or declarations or any special legislation activating extraordinary powers based on the COVID-19 pandemic taken by the USG at national or local level, and whether such measures have been temporary and proportional and tailored to migrants’ human rights and fundamental freedoms. The following section discusses an extraordinary measure taken by the USG which significantly infringes upon a migrant child’s right to life, survival and development,³² to have their best interests considered,³³ and—critically—the right of migrant children not to be returned to persecution and harm under the *jus cogen* imperative of non-refoulement.³⁴

Beginning in March 2020, the USG authorized the expulsion of all undocumented noncitizens appearing at the border under the guise of preventing the spread of the COVID-19 pandemic.³⁵ This policy, known as Title 42, categorically denied migrants access to asylum proceedings.³⁶ As

²⁹ Lenthang, *supra* note 22.

³⁰ *Office of Refugee Resettlement Ensured that Selected Care Providers Were Prepared to Respond to the COVID-19 Pandemic*, OFF. OF INSPECTOR GEN., DHHS (2021), <https://oig.hhs.gov/oas/reports/region4/42002031.pdf>

³¹ *Id.*

³² UN CRC, *supra* note 1, art 6.

³³ UN CRC, *supra* note 1, art. 3.

³⁴ *United Nations Protocol Relating to the Status of Refugees* art. I, 31 January 1967, *United Nations Treaty Series*, vol. 19, No. 6223, [hereinafter “Refugee Protocol”]; *Convention Relating to the Status of Refugees* art. 33(1), 28 July 1951, *United Nations Treaty Series*, vol. 189, No. 150, p. 152, [hereinafter “Refugee Convention”]; *see also* Refugee Act of 1980 § 208, 8 U.S.C. § 1158, (c)(1)(A) (2018) (“In the case of an alien granted asylum... the Attorney General shall not remove or return the alien to the alien’s country of nationality or, in the case of a person having no nationality, the country of the alien’s last habitual residence).

³⁵ *See* Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 24, 2020).

³⁶ Refugee Convention, *supra*, note 1; Refugee Protocol, *supra*, note 1. *See also* UNICEF, BUILDING BRIDGES FOR EVERY CHILD: RECEPTION, CARE AND SERVICES TO SUPPORT UNACCOMPANIED CHILDREN IN THE UNITED STATES 9-10 (Feb. 25, 2021).

of January 2021, over 180,000 migrants have been summarily expelled under Title 42, including over 13,000 unaccompanied children.³⁷ The process, by design, fails to screen migrants for fear of persecution or safety concerns upon expulsion or return to country of origin. The measure has no temporal limit, is disproportional, and is not tailored to address migrants' human rights and fundamental freedoms. Indeed, the measure is not even applied on a case-by-case basis but, instead, has sweeping effect.

When the Trump Administration employed Title 42, they leveraged the extraordinary power and resources of DHS to exercise a public health law in a manner that had no rational nexus to public health. With no oversight and no basis in law, CBP officers were operating under Title 42 to effectuate COVID-related “expulsions”—a deliberate term given to what amounts to unlawful, extrajudicial deportations....

Public health officials were not consulted by the Administration in their efforts to roll out Title 42 expulsions. Reports indicate that the CDC initially refused to support the rule, and that it was issued only after direct pressure from the Secretary of DHS and the Office of the Vice President as the head of the Coronavirus Task Force.³⁸ The Administration also disregarded a May 18, 2020 letter to Department of Health and Human Services (HHS) Secretary Alex Azar from a number of public health experts who urged the Administration to rescind Title 42, citing the fact that there was no merit to the stated public health purposes behind the order.³⁹

Title 42 was deliberately designed to avoid special protections for migrant children under U.S. law. Specifically, migrant children designated as “unaccompanied children” under the immigration statute are required to be placed in HHS care.⁴⁰ The Trump Administration deliberately created the term “single minor” so as to expel children without regard for their safety and well-being.⁴¹ The Trump Administration did not act alone. Title 42 was implemented with the support of other governments: “[a]ll single minors expelled from the U.S. under Title 42 authority are done so under informal agreements which remain fluid between the U.S. and the foreign governments.”⁴²

³⁷ See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, U.S. CUSTOMS AND BORDER PROTECTION (last modified Jan. 7, 2021) available at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>; see also Zolan Kanno-Youngs, *Judge Halts “Public Health” Expulsions of Children at the Border*, N.Y. TIMES (updated Jan. 20, 2021) available at <https://www.nytimes.com/2020/11/18/us/politics/trump-migrant-children.html>.

³⁸ Diaz, S. and Schrobilgen, M., *The Role of Public Health in the Rule of Law: The Cautionary Tale of Title 42 Expulsions*. 30 HARV. PUB. HEALTH REV. 1, 6 n.xix (2021).

³⁹ *Id.* at 2-3, 6 n.xx.

⁴⁰ See William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, § 235, 8 U.S.C. § 1232 *et seq.* (2018)

⁴¹ Dara Lind, *Advocates Sue Trump Administration Over Mass Border Expulsions*, ProPublica (June 10, 2020) <https://www.propublica.org/article/advocates-sue-trump-administration-over-mass-border-expulsions>.

⁴² Lomi Kriel, *ICE is Making Sure Migrant Kids Don't Have COVID-19, Then Expelling Them to “Prevent the Spread” of COVID-19*, Tx Tribune (Aug. 10, 2020), <https://www.texastribune.org/2020/08/10/coronavirus-texas-ice-migrant-children-deport/>.

Since the Biden Administration has taken over, Title 42 expulsions have continued.⁴³ While the Biden Administration no longer applies Title 42 to migrant children appearing alone, the policy is still imposed against children who appear as part of a family unit. International guidelines for child protection require governments to put in place measures to prevent separation during an emergency, including avoiding policies that encourage families to split in order to receive appropriate assistance.⁴⁴ Title 42 forces families into the position of sending their children to the U.S. alone to pursue their asylum claims in relative safety.⁴⁵ These types of enhanced immigration restrictions have significant unintended adverse consequences for migrant children.

C. COVID-19 and Vulnerability of Children to Human Trafficking

Pursuant to international guidance, “the most important outcomes of child protection [during times of emergency] are to prevent violence, abuse and exploitation, and to ensure displaced children access to protection services, by establishing or supporting national and community-level child protections systems.”⁴⁶ In a clear violation of migrant children’s right to life, survival and development,⁴⁷ the USG has pursued economic and immigration policies that ignore the vulnerability of children to human trafficking. Clearly identified factors increase a child’s vulnerability to becoming a victim of human trafficking including the demand for migrant workers, protracted economic instability, and the tightening of restrictions on immigration—all factors which have worsened throughout the COVID-19 pandemic.⁴⁸

Migrant child laborers are particularly vulnerable to rights abuses associated with human trafficking during the pandemic. The UNHCR has observed that “[w]hen families lose their income and assets, children are more likely to become involved in the worst forms of child labour (WFCL), such as forced or bonded labour.”⁴⁹ Consider the following exacerbating conditions for migrant laborers, including children, in the era of COVID-19:

⁴³ See Letter to President Joseph R. Biden, (Feb. 2, 2021) available at <https://www.humanrightsfirst.org/sites/default/files/LetterBidenAdminTitle42.Updated.pdf>.

⁴⁴ UNHCR Emergency Handbook, *supra* note 11.

⁴⁵ See Center for the Human Rights of Children, *Submitted Input: An NGO Response to the Special Rapporteur for the Human Rights of Migrants for the Human Rights Council report on pushback practices and their impact on the human rights of migrants*, (Feb. 1, 2021), available at <https://www.luc.edu/media/lucedu/chrc/pdfs/Input-Special-Rapporteur-for-the-Human-Rights-of-Migrants.pdf>.

⁴⁶ *Id.* at pg. 1.

⁴⁷ UN CRC, *supra* note 1, art. 6

⁴⁸ Verite, *Strengthening Protections Against Trafficking in Persons in Federal and Corporate Supply Chains* (2017) <https://www.verite.org/wp-content/uploads/2017/04/EO-and-Commodity-Reports-Combined-FINAL-2017.pdf>; see also Alliance to End Slavery & Trafficking, *COVID-19 Impacts on Trafficking: A Supplementary Brief to A Presidential Agenda for Ending Modern Slavery and Human Trafficking 2021-2024* (2020), <https://endslaveryandtrafficking.org/wp-content/uploads/2020/12/COVID-Brief.pdf>.

⁴⁹ UNHCR Emergency Handbook, *supra* note 11.

Migrant workers are often housed and work under crowded and hazardous conditions without access to adequate protective measures. Migrant farmworkers are at an especially high risk of human trafficking and exposure to the coronavirus. Not only do they lack access to safe housing and adequate healthcare and social services, but they are also less likely to report trafficking or seek medical services due to fear of deportation.⁵⁰

Displaced, unaccompanied and separated children are known to be at significant risk of being “targeted for trafficking, smuggling, sale and illegal adoption.”⁵¹ Asylum seekers, including children and family units, expelled pursuant to Title 42 are “vulnerable to being trafficked by Mexican criminal networks.”⁵² The unprecedented use of Title 42 “to indefinitely close the border to ‘nonessential’ travel, has made migrant children and parents easy prey for the criminal groups waiting just on the other side.”⁵³ At the end of April 2021, DHS Secretary Alejandro Mayorkas announced an intergovernmental initiative to combat transnational criminal organizations that “put profit over human life and routinely prey on migrants.”⁵⁴ Yet, when confronted on how Title 42 incentivizes these same criminal enterprises, “Mayorkas told *The Times* on a press call that the policy would stay in place until it ‘is no longer needed.’”⁵⁵

IV. The Role of Racism and the Abuses of Migrant Children’s Rights under COVID-19

USG policymakers have an extensive history of exploiting public health concerns to effectuate xenophobic ends. Public health grounds of immigration exclusion have long been cornerstones of restrictive immigration policies born of racist public attitudes to keep noncitizens out.⁵⁶

The U.S. has a dark history of weaponizing public health to advance anti-immigrant views. In the 19th century, lawmakers groomed the ideology that immigrants may carry

⁵⁰ Quinn Sandor Kepes, *COVID-19 and Vulnerability to Human Trafficking for Forced Labor*, Verite (Apr. 24, 2020), <https://www.verite.org/covid-19-and-vulnerability-to-human-trafficking-for-forced-labor/>.

⁵¹ *Id.*

⁵² Julia Neusner, *Kidnapped, Raped, and Robbed: Dangerous Title 42 Expulsions to Mexico Continue*, Human Rights First (May 24, 2021), <https://www.humanrightsfirst.org/blog/kidnapped-raped-and-robbed-dangerous-title-42-expulsions-mexico-continue>.

⁵³ Molly O’Toole, ‘*Sitting Ducks for Organized Crime*’: *How Biden Border Policy Fuels Migrant Kidnapping, Extortion* L.A. Times (Apr. 28, 2021), <https://www.latimes.com/politics/story/2021-04-28/biden-title-42-policy-fueling-kidnappings-of-migrant-families-at-border-and-extortion-of-u-s-relatives>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See* Immigration Act of 1891 § 1, Pub. L. No. 51-551, 26 Stat. 1084(a) (“[t]he following classes of aliens shall be excluded...[a]ll idiots, insane persons...persons suffering from loathsome or a dangerous contagious disease.”); *see also* Immigration and Nationality Act, 8 U.S.C. § 1182(a)(1)(A) (1952) (providing grounds for inadmissibility for arriving noncitizens with “a communicable disease of public health significance”).

“loathsome and contagious disease.” This view — predicated on racist, classist, and ableist stereotypes — laid the groundwork for selective medical screenings, deportations, and eugenics in the 20th century. Immigration became synonymous with contagion and a threat to domestic welfare.”⁵⁷

Restrictive immigration practices implemented in the name of the COVID-19 pandemic, but without any scientific nexus to disease prevention, is yet another mechanism to reinforce racist stereotypes and attitudes. The use of Title 42 disparately impacts black and brown immigrants via its application only along land borders and ports of entry—especially the southern border which accounts for over 99% of CBP expulsions for FY2021.⁵⁸

The COVID-19 pandemic presented the Trump Administration with an opportunity to deliver on its promise to shut the border to the “invasion”⁵⁹—the “infestation”⁶⁰—of “animals”⁶¹ and “criminals, drug dealers, and rapists.”⁶² Racist policies implemented under the guise of the COVID-19 pandemic, with no nexus to public health, and with zero protections from a derogation framework cannot be permitted to remain intact. This is particularly salient when these xenophobic policies harm migrant children (intentionally or otherwise) in such profound ways.

V. Conclusion and Recommendations

The USG has ignored and/or exploited the special vulnerabilities of migrant children in their response to the COVID-19 pandemic. These policies lay bare the gaps in the U.S. system and in the general principles of law applied to child migrant protection. In light of the foregoing, we respectfully submit the following recommendations:

First, the Special Rapporteur should fully investigate the systemic human rights violations of migrant children by the USG during or in response to the COVID-19 pandemic. Such investigation will provide transparency and insight into the state actions and institutional failures which enabled

⁵⁷ Azadeh Erfani & Nefertari Elshiekh, *The Biden Administration is Continuing Trump’s Unlawful ‘Expulsions’ of Asylum Seekers in the Name of Public Health*, Nat’l Immigrant Justice. Ctr. (Mar. 12, 2021), <https://immigrantjustice.org/staff/blog/biden-administration-continuing-trumps-unlawful-expulsions-asylum-seekers-name-public>.

⁵⁸ *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. Customs & Border Protection, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (last updated May 11, 2021).

⁵⁹ Julissa Arce, *Trump’s Anti-Immigrant Rhetoric Was Never About Legality — It Was About Our Brown Skin*, Time (Aug. 6, 2019) <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/>.

⁶⁰ Ben Zimmer, *What Trumps Talks About When He Talks About Infestations*, Politico Magazine (July 29, 2019), <https://www.politico.com/magazine/story/2019/07/29/trump-baltimore-infest-tweet-cummings-racist-227485/>

⁶¹ Gregory Korte and Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Migrants: ‘These aren’t people. These are animals.’* (May 16, 2018), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/>

⁶² BBC News Segment ‘*Drug dealers, criminals, rapists*’: *What Trump thinks of Mexicans*, (Aug. 31, 2016), <https://www.bbc.com/news/av/world-us-canada-37230916>.

such abuses. These insights will protect this vulnerable population from being ignored and/or targeted through future abuses of executive power.

Second, with a new Administration, the Special Rapporteur, via its investigatory findings, should call upon the USG to recommit to its international obligations under the ICCPR, the Refugee Convention, the Refugee Protocol, and to urge the US government to ratify the UN CRC. This will strengthen international commitments to the rule of law and the responsible use of state power as applied to the rights of migrant children.

Third, the Special Rapporteur, in partnership with a USG committed to the UN CRC, must facilitate the development of a U.S. domestic law framework that treats migrant children as children and ameliorates the risk of harm to children: “If [migration and] asylum processes are not child sensitive, children may not be able to exercise their right to seek [relief from deportation], or may be put in a position where they are easily exploited by adults.”⁶³

Fourth, the Special Rapporteur, in partnership with a recommitted USG, must facilitate the development of a framework for responsible derogation from certain international human rights obligations in times of national emergency. This framework must consider the unique vulnerabilities of migrant children and must be rooted in best practices developed through scientific evidence and public health practices to meet the special needs of this extremely vulnerable population.

⁶³ UNHCR Emergency Handbook, *supra* note 11, at page 3.