

February 28, 2022

Dr. Felipe González Morales
Special Rapporteur on the human rights of migrants
OHCHR-UNOG
Geneva, Switzerland
OHCHR-migrant@un.org

Externalizing and Policing the Border: Analysis of an Ongoing Human Rights Crisis and Title 42¹

U.S. immigration law and policy are marked by conflicting and contradictory strains: one that purports to be humane, welcoming, accommodating and pragmatic with respect to migration generally and refugees and informal migration in particular; and another that is punitive, xenophobic and racialized, focused on deterrence, control and policing the border, resulting in multiple human rights violations. The latter strain has been sustained over the last 25 years under both Democratic and Republican administrations,² and found recent expression in the Trump administration’s anti-immigrant rhetoric, reductions of the refugee admission ceiling, Attorney General Opinions limiting access to asylum, so-called “safe third country agreements”, the Migrant Protection Protocols (MPP), and the use of Title 42 to summarily expel migrants without due process. This submission explores how Title 42 in particular has led to *en masse* expulsions of disproportionately Indigenous and Black migrants.

Deeply rooted structures and ongoing logics of settler-colonialism and anti-Black racism inform this latter strain and are evident in current expressions of human rights violations at the various “borders”, both physical and social, constructed by these policies. Erasure of Indigenous identity, family separation and lack of language access for Indigenous language speakers, as well as the use of Border Patrol agents on horseback to corral Haitian migrants, are performances of both settler colonialism and anti-Black racism. Moreover, the exercise of U.S. hegemony in the hemisphere and particularly in Mexico, Central America and the Caribbean has led to the export and imposition of this punitive framework in other countries and the effective externalization of the U.S. southern border. This has similarly activated settler colonial and anti-Black impulses in these societies, resulting in the criminalization of and discrimination against migrants and the militarization of borders in Mexico, Guatemala, and Honduras in efforts to stop and deter the migrant flow.

U.S. responsibility for the human rights violations suffered by refugees and migrants in the region extends to the factors motivating their migration. Again, we see two conflicting and contradictory strains of U.S. political and economic policy in the region: one that purports to address the structural causes of

¹ This submission is adapted from the submission made the Promise Institute for Human Rights at the University of California Los Angeles (UCLA) School of Law, together with our partners in this submission Comunidades Indígenas en Liderazgo (CIELO) and the Haitian Bridge Alliance (HBA) to the Inter-American Commission for Human Rights following its *ex officio* hearing on *Protection of persons in human mobility in the United States, Mexico and the North of Central America*, during the 181st period of sessions of the Inter-American Commission on Human Rights.

² For example, in laws such as the Antiterrorism and Effective Death Penalty Act (AEDPA), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and in policies such as Section 287(g) MOUs with Local Law Enforcement, Secure Communities, the Priority Enforcement Program, vastly increased security forces (Border Patrol and ICE) at the border and internally, expanded use of detention and criminalization of migrants, expanded border wall construction, and the use of military-style surveillance at the southern border.

forced migration through economic development and respect for human rights and the rule of law, and another dominated by peculiarly U.S. interests in fighting the drug war, protecting U.S. business interests and access to natural resources, deterring and preventing the migrant flow at its source and transit points, and supporting authoritarian regimes willing to align with these interests. The latter create a feedback loop perpetuating the structural causes of forced migration: greater inequality, environmental degradation, militarization, ongoing human rights abuses, and states captive to both licit and illicit capital. U.S. hegemony in the region similarly establishes the United States as the logical destination of the forced migrant flow and the only hope for escape from poverty, violence and natural disaster.

Enforcement mechanisms seeking to deter and punish migrants, originating in the United States, have expanded into a regional framework resulting in the denial of human rights and the rights to asylum, non-refoulement and due process. Similarly, this framework reproduces patterns of discrimination and the denial of the collective rights of Indigenous peoples. An awareness of both the structural causes and regional scope of the human rights crisis is a necessary starting point for developing a human rights framework and protective mechanisms to ensure respect for the dignity and human rights of those forced to leave their homeland or otherwise exercising their right to human mobility in relation to other first, second and third generation human rights under threat at home and throughout their journey.

The Particular and Racialized Impacts of Title 42 at the Border

On March 20, 2020, the Centers for Disease Control (“CDC”) issued a series of orders commonly referred to as “Title 42”, that enabled U.S. immigration authorities to block entry into the United States and expel (effectively deport) noncitizens without adequate procedural protections, and often depriving them of exercising their right to seek asylum.³ The CDC order “is based on an emergency Department of Health and Human Services (HHS) Interim Final Rule issued simultaneously with the Order under the authority of an obscure provision of the 1944 Public Health Service Act,” Section 362 of which “authorizes the Surgeon General to suspend “introduction of persons or goods” into the United States on public health grounds.”⁴ The Trump administration called Title 42 “necessary” to protect the public from COVID-19 and minimize the number of people being held in congregate settings, including immigration detention centers.

Under this pretext, Title 42 establishes a summary immigration expulsion process, which violates the Refugee Act, legal safeguards for unaccompanied minors, and fundamental procedural rights.⁵ The policy “operates wholly outside the normal immigration removal process and provides no opportunity for hearings or assertion of asylum claims.”⁶ It “deploys a medical quarantine authorization to override the protections of the immigration and refugee laws through the use of an unreviewable Border Patrol health ‘expulsion’ mechanism unrelated to any finding of disease or contagion.”⁷ Many health experts have rejected Title 42 as having no basis as a public health measure, and denounced it as a pretext to ban asylum

³ Just Security. *How an Internal State Department Memo Exposes “Title 42” Expulsions of Refugees as Violations of Law*. (October 5, 2021).

<https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law/>

⁴ Just Security. *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*. (April 13, 2020). <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>

⁵ Id.

⁶ Id.

⁷ Id.

seekers and others seeking protection at the border.⁸ Although a lower federal court issued a preliminary injunction blocking implementation of Title 42,⁹ the U.S. Court of Appeals stayed that order, effectively allowing the Biden administration to continue Title 42 expulsions until a hearing in January 2022.¹⁰ On January 19, 2022, the Court of Appeals heard oral arguments¹¹ and appeared “skeptical” of the government’s arguments to continue the implementation of Title 42.¹² Despite of several objections from senior CDC medical staff and public health experts, on February 4 the CDC decided to extend the use of Title 42 and that it would continue to reevaluate the policy every 60 days.¹³

The legal basis for Title 42 has been widely criticized, both externally and within the Biden administration itself. An internal memo by outgoing State Department senior advisor Harold Koh, described the policy – and its application to Haitians at the U.S.-Mexico border – as violating international refugee law, international human rights law, and U.S. immigration law.¹⁴ He called the use of Title 42 “illegal,” “inhumane” and “not worthy of this Administration that I so strongly support.”¹⁵ Koh’s criticisms of the Biden Administration and their use of Title 42 came shortly after a resignation letter from Daniel Foote, the former Special Envoy to Haiti, who called Biden’s deportation policy “inhumane” and did not want “to be associated” with it.¹⁶ Furthermore, on February 14, 2022, two weeks after the Biden administration decided to keep the policy in place, a group of House Democrats issued a letter pressing officials from the CDC and U.S. State Department “to justify continued use of a Trump-era public health order allowing the quick expulsion of migrants and asylum-seekers arriving at the U.S.-Mexico border amid the pandemic.”¹⁷

⁸ See e.g., Letter to Acting HHS Secretary Cochran and CDC Director Walensky, Columbia Public Health (Jan. 28, 2021) <https://www.publichealth.columbia.edu/research/program-forced-migration-and-health/letter-acting-hhs-secretary-cochran-and-cdc-director-walensky>; Aguilera, Jasmine. *Biden Is Expelling Migrants on COVID-19 Grounds, But Health Experts Say That’s All Wrong* (October 2021), <https://time.com/6105055/biden-title-42-covid-19/>

⁹ Memorandum Opinion and Order, *Gimena Huisha-Huisha et al. v. Mayorkis et al.*, Civ. Action No. 21-100, U.S. District Court for the District of Columbia, Sept. 16, 2021.

¹⁰ Julia Ainsley “Court sides with Biden administration, preserves Covid limits on asylum-seekers for now,” NBC News (September 30, 2021). <https://www.nbcnews.com/politics/immigration/court-sides-biden-administration-leaves-covid-limits-asylum-seekers-place-n1280529>

¹¹ Minnesota Law Review, A public health emergency should not be abused: *Huisha-huisha v. Alejandro Mayorkas* shows the illegality of Title 42 policy (February 22, 2022) https://minnesotalawreview.org/2022/02/22/a-public-health-emergency-should-not-be-abused-huisha-huisha-v-alejandro-mayorkas-shows-the-illegality-of-title-42-policy/?utm_source=rss&utm_medium=rss&utm_campaign=a-public-health-emergency-should-not-be-abused-huisha-huisha-v-alejandro-mayorkas-shows-the-illegality-of-title-42-policy

¹² Law360, Biden Seeks To Expel Migrant Families; DC Circ. Is Skeptical (January 19, 2022) <https://www.law360.com/articles/1456783/biden-seeks-to-expel-migrant-families-dc-circ-is-skeptical>

¹³ Law 360, Biden Extends Pandemic Border Block Amid Legal Challenges (February 4, 2022) <https://www.law360.com/articles/1462076/biden-extends-pandemic-border-block-amid-legal-challenges>

¹⁴ Just Security. *How an Internal State Department Memo Exposes “Title 42” Expulsions of Refugees as Violations of Law.* (October 5, 2021). <https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law/>

¹⁵ Politico. *Top State adviser leaves post, rips Biden’s use of Trump-era Title 42.* (October 4, 2021).

¹⁶ Just Security. *How an Internal State Department Memo Exposes “Title 42” Expulsions of Refugees as Violations of Law.* (October 5, 2021). <https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law/>

¹⁷ Law360, House Dems Push Biden Admin. To Justify Migrant Expulsions (February 15, 2022) <https://www.law360.com/articles/1465376/house-dems-push-biden-admin-to-justify-migrant-expulsions>

Title 42 unlawfully excludes from U.S. territory migrants fleeing war, violence, poverty and disasters, leaving them without the opportunity to seek asylum or other forms of protection.¹⁸ Since Title 42 took effect, over 1,612,830 individuals, including 200,187 family units, accompanied minors, and unaccompanied minors have been expelled from the U.S.¹⁹ From January 2021 to January 2022, “there were at least 8,705 reports of kidnapping, rape, torture, and other violent attacks on migrants and asylum seekers blocked in or expelled to Mexico by DHS.”²⁰ In Mexico, asylum seekers often face violence and extortion by criminal cartels.²¹ Criminal organizations prevent asylum seekers from approaching ports of entry and have gained increasing control due to these turnback policies.²²

Because of Title 42, asylum seekers are pushed to undertake increasingly dangerous U.S.-Mexico border crossings.²³ In 2021, at least 650 people died while crossing the U.S.-Mexico border—“the highest figure recorded since the International Organization for Migration began tracking in 2014.”²⁴ Due to the dangers faced by families who are expelled or stranded in Mexico, the number of unaccompanied children crossing the U.S.-Mexico border has also increased.²⁵ Since February 2021, the CDC formally exempted unaccompanied children from expulsion.²⁶ Yet, this has resulted in thousands of children staying for weeks, and in some cases months, in emergency shelters and has led to family separation, with parents making the impossible choice between sending their children unaccompanied across the border or subjecting them to risk of harm in Mexico.²⁷

Significantly, Title 42 has led to the deportation of Haitian migrants seeking safety and security in the United States. On September, 2021, over 10,000 migrants crossed the Rio Grande in Del Rio, Texas seeking asylum or other forms protection.²⁸ Despite of several objections by the United Nations High Commissioner for Refugees, advocacy groups and members of the president’s own party, the United States responded with Title 42 expulsion and deportation back to Haiti.²⁹ From 19 September to January 2022, there were 152 ICE Air flights to Haiti returning about 16,300 Haitians, including thousands of women and

¹⁸ Haitian Bridge Alliance. *The Invisible Wall: Title 42 and its Impact on Haitian Migrants* (March 2021) <https://www.quixote.org/wp-content/uploads/2021/03/The-Invisible-Wall.pdf>

¹⁹ Customs and Border Protection, “Southwest Land Border Encounters” **Error! Hyperlink reference not valid.**, 2022.

²⁰ Human Rights First, *The Opposite of Orderly and Humane: Use of Title 42 Spurs Disorder and Undermines Security* (Feb. 22, 2022).

<https://www.humanrightsfirst.org/sites/default/files/Title42SpursDisorderUnderminesSecurity.pdf>

²¹ American Immigration Council, *A Guide to Title 42 Expulsions at the Border*, October 2021

at <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>

²² Human Rights First, *The Opposite of Orderly and Humane: Use of Title 42 Spurs Disorder and Undermines Security* (Feb. 2022).

<https://www.humanrightsfirst.org/sites/default/files/Title42SpursDisorderUnderminesSecurity.pdf>

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ On February the CDC issued a notice of exception from expulsion of unaccompanied children, and on August 2021 issued an order continuing Title 42 expulsions while exempting unaccompanied children. See American Immigration Council, *A Guide to Title 42 Expulsions at the Border*, October 2021

at <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>

²⁷ The New York Times, *Many Migrants Are Quickly Expelled, but Others Can Stay. Here’s Why*. (Updated Feb. 14, 2022) <https://www.nytimes.com/2021/12/02/us/politics/immigration-public-health-rule-mexico.html>

²⁸ *Id.*

²⁹ American Immigration Council, *A Guide to Title 42 Expulsions at the Border*, October 2021

at <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>

children.³⁰ As many as 20,000 Haitians have been apprehended and expelled back to Haiti since President Biden's inauguration, about two-thirds of those under the pretext of Title 42.³¹

The recent treatment of Haitians at the U.S.-Mexico border is just the latest manifestation of the anti-Black – and particularly anti-Haitian – history of U.S. immigration law and policy.³² The U.S. Border Patrol has a history of institutional racism and violence.³³ Further, as far back as 1978, when the U.S. government implemented the illegal rapid expulsion program, the United States blocked Haitians from reaching U.S. territory and rapidly removed those who entered without full process.³⁴ Between 1981 and 1991, the U.S. government 'returned' over 25,000 Haitians to Haiti under the interdiction program.³⁵ U.S. immigration courts viewed Haitian asylum claims with "presumptive skepticism,"³⁶ and a discriminatory statute adopted in 1997 excluded Haitian asylum seekers from immigration relief.³⁷

Title 42 also significantly impacts Indigenous migrants from Guatemala through the process of "chain deportation", whereby Mexico transports Indigenous Guatemalan migrants expelled under Title 42 to its southern border for immediate deportation to Guatemala without due process.³⁸ In fiscal year 2021, 173,616 Guatemalans were expelled under Title 42. U.S. Customs and Border Protection fails to identify Indigenous migrants in their data, but as many as 80% of migrants from Guatemala are Indigenous.³⁹ In their encounters with migrants, the Border Patrol regularly fails to identify individuals as Indigenous or

³⁰ Witness at the Border, ICE Air Flights (February 13, 2022). <https://static1.squarespace.com/static/5e221cacff87ba2d2833cf54/t/620bca5024c170434085cfb6/1644939857305/ICE+Air+Jan+2022Fv2THCPDF.pdf>

³¹ WOLA, *A tragic milestone: 20,000th migrant deported to Haiti since Biden inauguration* (February 17, 2022) <https://www.wola.org/analysis/a-tragic-milestone-20000th-migrant-deported-to-haiti-since-biden-inauguration/>

³² Haitian Bridge Alliance's "Report on 20th anniversary of the Durban Declaration and Programme of Action: Response to call for input by the UN's Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance", dated August 16, 2021

³³ American Immigration Council, *The Legacy of Racism within the U.S. Border Patrol* (Feb. 2021), <https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol>

³⁴ Human Rights First. *Biden Administration's Dangerous Haitian Expulsion Strategy Escalates the U.S. History of Illegal and Discriminatory Mistreatment of Haitians Seeking Safety in the United States*, (Sept. 2021),

<https://www.humanrightsfirst.org/sites/default/files/BidenAdministrationDangerousHaitianExpulsionStrategy.pdf>

³⁵ Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1034 (E.D.N.Y. 1993)

https://www.splcenter.org/sites/default/files/documents/0600-002_10-27-2020_brief_of_haitian_bridge_alliance_institute_for_justice_democracy_in_haiti_i.pdf

³⁶ Deborah E. Anker, *Determining Asylum Claims in the U.S.: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433, 455 (1992).

³⁷ Elizabeth M. Iglesias, Identity, Democracy, Communicate Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community, 53 U. Miami L. Rev. 575, 601 (1999)

³⁸ American Immigration Council, *supra* note 2.

³⁹ Declaration of Amilcar Pop, Representative in the Central American Parliament and head of the Commission on Indigenous and Afro-Descendent Peoples, to the Inter-American Commission on Human Rights, during the *ex officio* hearing on *Protection of persons in human mobility in the United States, Mexico and the North of Central America*, 181st period of sessions. <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=181>

provide Indigenous language interpreters.⁴⁰ The invisibilization of Indigenous identity is one of the core logics of settler colonialism which continues to be practiced at the border.

Conclusion

We respectfully request that the Special Rapporteur consider how Title 42, which violates international law and principles of non-refoulement, as well as other efforts to externalize the U.S. border, are just the latest iterations of deeply ingrained structures of anti-Black racism and white settler colonialism that exist within and outside of U.S. borders.⁴¹ The transnational economic priorities driven by extractivist industries are among the forces driving the dispossession of Indigenous and Afro-descendant peoples and leading to human rights violations in their territories and outmigration to the United States. Similarly, the effects of climate change, for which the industrialized world bears primary responsibility, are producing waves of human mobility in response to extreme climatic events and steady streams of migrants due to the erosion of sustainable livelihoods. The current migrant streams themselves are a direct product of the imposition of U.S. geopolitical priorities that override humanitarian and human rights concerns.

Please do not hesitate to ask us for follow up information regarding this submission.

Respectfully yours,



Joseph Berra, Human Rights in the Americas Project Director, Promise Institute for Human Rights, UCLA School of Law

S. Priya Morley, Racial Justice Policy Counsel, Promise Institute for Human Rights, UCLA School of Law

⁴⁰ Declaration of Odilia Romero, Executive Director of *Comunidades Indígenas en Liderazgo* (CIELO), to the Inter-American Commission on Human Rights, during the *ex officio* hearing on *Protection of persons in human mobility in the United States, Mexico and the North of Central America*, 181st period of sessions. <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=181>

⁴¹ A/HRC/38/52, Report of the United Nations Special Rapporteur on contemporary forms of racism: Racial discrimination in the context of laws, policies and practices concerning citizenship, nationality and immigration (2018, 38th session HRC): https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/52