

Report for the Inter-American Commission on Human Rights, 186th Period of Sessions
Public Hearing on the Situation of human mobility from an ethnic-racial approach

Prepared by the Black Alliance for Just Immigration (BAJI), the Center for Justice and International Law (CEJIL), the Center for Immigration Law and Policy (CILP) at the UCLA School of Law, Comunidades Indígenas en Liderazgo Organizativo (CIELO), Haitian Bridge Alliance (HBA), Migrant Works Alliance for Change (MWAC), the Promise Institute for Human Rights at the UCLA School of Law, Observatorio de Racismo en México y Centroamérica, RacismoMX, Espacio Migrante A.C, and Cameroonian Action Network.

Table of Contents

<i>Introduction</i>	3
<i>Race, Racialization, and Racism in Contexts of Human Mobility</i>	3
A. The United States	3
1. Federal Criminal Entry and Reentry Laws in the United States	3
2. Racial Discrimination Against Black Migrants in the United States	11
B. Canada: Exploitation in the Seasonal Agricultural Workers Program	20
C. Dominican Republic: Racism in Migration Policy	23
D. Panama: A Haitian Man’s Experience in the Darién Gap	25
E. Language Violence and Displacement of Indigenous Communities	26
F. Racism and Racial Profiling	32
G. Recommendations and Requests for the Commission	34
1. Recommendations Regarding Structural Racism in the United States	34
2. Recommendations Regarding Discrimination Against Black Migrants in the United States	34
3. Recommendations Regarding States’ Duty to Prevent Harms Committed Against Black People Throughout the Americas, especially at the Darién Gap	35

Introduction

We, the undersigned civil society organizations, write to follow-up on comments and requests by commissioners following civil society testimony on human mobility and structural racism on March 7, 2023 in Los Angeles, California¹. We submit the following report, containing additional considerations and responses from each of our organizations, to further expand upon the need for an anti-racist approach, regional solutions that address root causes of forced displacement of Black² and indigenous people in human mobility in the Americas, and immediate increased protections for Black and indigenous people in human mobility in the Americas.

Race, Racialization, and Racism in Contexts of Human Mobility

A. The United States

1. Federal Criminal Entry and Reentry Laws in the United States

“My children and I still carry tremendous pain from the years that we were forcibly separated by the U.S. immigration system. I hope that sharing my experience with the Inter-American Commission will help bring attention to the many parents and others who have suffered because of where we are from.” — Dixie Gallardo Aldana

At the March 7 hearing, the Center for Immigration Law and Policy’s (CILP) intervention focused on how the borders of the United States are governed by laws and policies that are rooted in racism, causing profound harm to Black, brown, and indigenous migrants in the Americas today. Recent policies—like Title 42³ and “Remain in Mexico”⁴—have received significant attention. But the racism of these laws is nothing new.

¹ Public Hearing on the Situation of human mobility from an ethnic-racial approach, IACHR 186 Period of Sessions, March 7, 2023.

² These follow-up materials adopt the definitions for “migrant,” “refugee,” “Black,” and “sexual and gender-based violence” used in S. Priya Morley et al., *A Journey of Hope: Haitian Women’s Migration to Tapachula, Mexico* (2021), <https://imumi.org/attachments/2020/A-Journey-of-Hope-Haitian-Womens-Migration-to%20-Tapachula.pdf> [S. Priya Morley et al.] at 11.

³ In March 2020, the Centers for Disease Control and Prevention invoked 42 U.S.C. § 265 (“Title 42”)—a law that prevents people from entering U.S. territory for public health reasons—to justify closing U.S. borders in response to the COVID-19 pandemic. The Title 42 order’s effectiveness toward preventing Covid-19 transmission was and remains controversial. See Jasmine Aguilera, *Biden is Expelling Migrants on COVID-19 Grounds, but Health Experts Say That’s All Wrong*, TIME (Oct. 21, 2021), <https://time.com/6105055/biden-title-42-covid-19/>. What is clear is that Title 42 has severely limited migrants’ ability to seek asylum and has disproportionately kept out those who are from Latin America, do not have existing family in the U.S., and lack economic resources. See Adam Isacson, *How the Biden Administration May Keep Asylum Out of Reach After Title 42*, WASHINGTON OFFICE ON LATIN AMERICA (Feb. 17, 2023), <https://www.wola.org/analysis/biden-asylum-after-title-42/#:~:text=The%20transit%20ban,request%20asylum%20in%20those%20countries.>

⁴ Formally called “Migrant Protection Protocols” (MPP), the Trump-initiated “Remain in Mexico” policy forced migrants seeking asylum in the U.S. to wait in Mexico, drastically decreasing the number of people who could meaningfully seek asylum. See, e.g., *Know Your Rights: Migrant Protection Protocols and “Remain in Mexico”*, NATIONAL IMMIGRANT JUSTICE CENTER (Mar. 2021), <https://immigrantjustice.org/know-your-rights/know-your-rights-migrant-protection-protocols-remain-mexico>. The program, which the Biden administration attempted to end

For nearly a century, the U.S. has used the criminal laws governing its borders—specifically federal entry and reentry laws—to criminalize the movement of people. Initially passed in 1929, the U.S.’s illegal entry and reentry laws—now codified at 8 U.S.C. §§ 1325 and 1326—are the most prosecuted federal crimes today. Rooted in a history of racism, these laws still impact tens of thousands of migrants every year, the overwhelming majority of whom are from Mexico and Latin America.

The U.S.’s criminalization of migration in Sections 1325 and 1326 is racist in both motivation and impact, violates Inter-American human rights jurisprudence, and should be proactively addressed by the Inter-American Commission.

I. History: Borders, Criminalization, and Race

A. Borders have targeted racial minorities throughout American history.

Borders, criminalization, and race have been entangled from the beginnings of U.S. history. The very existence of the U.S.-Mexico border was largely driven by racist sentiment against Native Americans and Mexican peoples;⁵ as then-senator John C. Calhoun stated, creating and maintaining this physical divide was crucial to ensuring that “[o]urs... is the Government of a white race.”⁶

U.S. citizenship laws were likewise discriminatory from the start.⁷ But it wasn’t until 1882 that Congress first passed legislation about who could actually enter the country with the Chinese Exclusion Act—clearly motivated by a desire to exclude an entire racial group.⁸ Though it began by targeting Asians, immigration law evolved to restrict numerous racial or social demographics that were considered undesirable.⁹ Congress achieved these objectives through quotas, tests, and outright bans.¹⁰ Numerous immigration laws thereafter relied on racist beliefs—including the Undesirable Aliens Act of 1929, which first criminalized entry and reentry into the country.¹¹

in February 2021, continues to be the subject of litigation by Republican-led states. See Kelsey Ables, *U.S. Judge in Amarillo halts Biden administration’s attempt to end “remain in Mexico” policy*, THE TEXAS TRIBUNE (Dec. 16, 2022), <https://www.texastribune.org/2022/12/16/remain-in-mexico-mpp-judge-ruling-migrants/>.

⁵ Joseph Kowalski, *Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples*, 5 AM. INDIAN L.J. 645, 648 (2017).

⁶ *Id.*; see also Cong. Globe, 30th Cong., 1st Sess. 98 (Jan. 4, 1848) (statement of Senator Calhoun).

⁷ See Naturalization Act of 1790, 1st Cong., 2nd Sess., Ch. 3 at 103 (March 26, 1790) (requiring a naturalization applicant to be a “free white person”).

⁸ An act to execute certain treaty stipulations relating to Chinese, ch. 126, 22 Stat. 58 (May 6, 1882); see also *Major US Immigration Laws, 1790 – Present*, MIGRATION POLICY INSTITUTE (Mar. 2013), <https://www.migrationpolicy.org/sites/default/files/publications/CIR-1790Timeline.pdf>. See also Michael Luo, *The Forgotten History of the Purging of Chinese from America*, THE NEW YORKER (Apr. 22, 2021), <https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america>.

⁹ See, e.g., Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 1 LAW & CONTEMP. PROBS 4, 5-17 (2009).

¹⁰ The Dillingham Commission of 1907-1910 drove decades of immigration policy based on racist pseudoscience derived from testimony from white supremacists, cranial measurements, and factually inaccurate anthropology. See *Highlights from the Library Collection: Immigration Commission Reports*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Dec. 13, 2019), <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/highlights-from-the-library-collection-immigration-commission-reports>.

¹¹ Undesirable Aliens Act, Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

B. The origins of the U.S.’s federal entry and reentry laws are racist.

The 1929 Undesirable Aliens Act was a legislative effort targeted at reducing Mexican immigration.¹² “Expert” eugenicists, who testified before Congress, painted Mexican people as having a “predisposition to criminality, feeble-mindedness, insanity, and a propensity for disease, illness, and physical disability.”¹³ This new Act balanced racist objectives of preventing “contamination of American family stocks by alien hereditary degeneracy”¹⁴ with economic concerns about imposing a quota that would restrict businesses’ ability to exploit Mexican laborers. As the solution, Congress arrived at criminalizing entry and reentry: Latine people crossing the border could be criminalized, marginalized, deported, and kept from becoming permanent residents while leaving the door open for necessary labor.¹⁵

Just over 20 years later, the criminalization of migration first enshrined in the Undesirable Aliens Act was codified in Sections 1325 and 1326 through the McCarran-Walter Act.¹⁶ The atmosphere in which the 1952 codification passed mirrored the explicit racism of the 1920s, abundant with anti-Latine rhetoric, slurs, and goals. Senate Bill 1851 was introduced three months prior, aimed at prosecuting those who sheltered undocumented immigrants; it was nicknamed the “Wetback Bill” and was prompted by legislative discussion about the Mexican migrant “problem.”¹⁷ Accusations of both social and biological inferiority justified these laws.¹⁸

II. Present: Federal Entry and Reentry

A. Sections 1325 and 1326 criminalize migration.

Migration to the United States continues to be criminalized under 8 U.S.C. § 1325, which penalizes first-time border crossing “at any time or place other than as designated by immigration officers,” and 8 U.S.C. § 1326, which criminalizes re-entering the country following a removal order. Generally, immigration—including seeking asylum, other kinds of visas, and deportation—is a civil matter.¹⁹ But criminal convictions—including for illegal entry or reentry—can lead to long prison sentences, prevent migrants from securing lawful status (including asylum), and may form the basis of deportation proceedings for those already residing in the country.²⁰ Criminal convictions may also trigger mandatory detention in immigration prisons while migrants await removal hearings, even after their criminal proceedings have concluded.²¹

¹² See generally Benjamin G. O'Brien, “A Very Great Penalty:” *Mexican Immigration, Race, and 8 U.S.C § 1326*, 37 MD. J. INT’L L. 39 (2022).

¹³ *Id.* at 42.

¹⁴ *Id.* (quoting The Eugenic Aspects of Deportation: Hearings Before the Comm. on Immigr. & Nat, 70th Cong. 3 (1928) (statement of Dr. Harry H. Laughlin)).

¹⁵ *Id.* at 40.

¹⁶ *Id.* at 46.

¹⁷ *Id.* at 46, 47.

¹⁸ Brief for Professors Kelly Lytle Hernández, Mae Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent, *US v. Palomar-Santiago*, 593 U.S. ___ (2021) (No. 20-437).

¹⁹ *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, AMERICAN IMMIGRATION COUNCIL (Mar. 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.

²⁰ See 8 U.S.C. § 1182(a)(2); *Id.* § 1227(a)(2); see also *Federal criminal sentencing for illegal reentry*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 18, 2017), <https://www.ice.gov/news/releases/federal-criminal-sentencings-illegal-reentry>.

²¹ See 8. U.S.C. § 1226(c).

B. Federal entry and reentry laws disparately impact Latine people.

Illegal entry and reentry are the most prosecuted federal crimes in the United States today, with tens of thousands of people charged every year.²² The overwhelming majority of those criminalized are Latine.²³ In 2022, 17,106 people were criminalized for entering the United States: 3,436 were charged for first-time entry²⁴ and 13,670 people were charged for re-entering.²⁵ Ninety-three percent of those criminalized under Section 1325 and 96% of those criminalized under Section 1326 in 2022 were Latine.²⁶ Mexican migrants are particularly impacted: 75% of those charged under Section 1325 and over 72% of those charged under Section 1326 in 2022 were Mexican nationals.²⁷ And while the law doesn't mandate incarceration, Latine people are more likely to be sentenced to prison when charged under Section 1326; indeed, they accounted for 99 percent of people sentenced for illegal reentry in 2021.²⁸

Black, brown, and indigenous migrants, particularly those racialized as Latine, also disproportionately suffer the harms of these laws in ways not captured by numbers alone. Latine people are apprehended by federal and non-federal agents, many of whom cannot communicate with those arrested in Spanish, indigenous, or other non-English languages.²⁹ If criminally prosecuted, migrants may spend years in federal prison before being transferred to immigration custody.³⁰ Conditions in immigration facilities are deeply inhumane, dangerous, and deadly.³¹

Federal entry and reentry convictions are also a central driver of family separation at the border. A combination of racist history, proximity to the U.S.-Mexico border, and racially targeted law enforcement has led Latine children to be disproportionately impacted by family separation and its harms.³² During the Trump administration, the U.S. government used Sections 1325 and 1326 as a “legal justification” for separating Black, brown, and indigenous parents from their children.³³ Parents facing an illegal entry or reentry prosecution are held in criminal custody before their proceedings; because minors are not subject to prosecution under these laws, children are

²² *Fact Sheet: Immigration Prosecutions By the Numbers*, NATIONAL IMMIGRANT JUSTICE CENTER (Nov. 14, 2022), <https://immigrantjustice.org/staff/blog/fact-sheet-immigration-prosecutions-numbers#:~:text=Prosecutors%20charged%203%2C436%20people%20in,district%20court%20in%20FY%202021.>

²³ *Id.*

²⁴ *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1325 FY22 Monthly Defs Filed with Nationality*, U.S. DEPARTMENT OF JUSTICE (Dec. 2022), <https://www.justice.gov/usao/page/file/1460656/download>.

²⁵ *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1326 FY22 Monthly Defs Filed with Nationality*, U.S. DEPARTMENT OF JUSTICE (Dec. 2022), <https://www.justice.gov/usao/page/file/1460666/download>.

²⁶ *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1326 FY22 Monthly Defs Filed*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/usao/page/file/1460661/download>.

²⁷ *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1325 FY22 Monthly Defs Filed*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/media/1183776/dl?inline>.

²⁸ See *Fact Sheet: Immigration Prosecutions by the Numbers*, *supra* note 20.

²⁹ See, e.g., *Policing and Latino Immigrants: Summary of Findings from HRW's Report, "Get on the Ground!": Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, HUMAN RIGHTS WATCH (Sept. 12, 2019), <https://www.hrw.org/news/2019/09/12/policing-and-latino-immigrants>.

³⁰ See, e.g., *Illegal Reentry Offenses*, UNITED STATES SENTENCING COMMISSION (Apr. 2015), <https://www.ussc.gov/research/research-publications/illegal-reentry-offenses>.

³¹ See, e.g., *Conditions in Migrant Detention Centers*, AMERICAN OVERSIGHT (Jan. 20, 2021), <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers>.

³² See Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, CENTER FOR THE STUDY OF SOCIAL POLICY (Oct. 2018), <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf>.

³³ Caitlin Dickerson & Geoff Bennett, *How a Trump-era policy that separated thousands of migrant families came to pass*, PUBLIC BROADCASTING STATION (Aug. 13, 2022), <https://www.pbs.org/newshour/show/how-a-trump-era-policy-that-separated-thousands-of-migrant-families-came-to-pass>.

sent elsewhere.³⁴ Parents and children can be detained in facilities hundreds of miles apart with no information about when they can be reunified.³⁵ The Trump administration used this reality to charge thousands of parents with Sections 1325 and 1326 for the explicit purpose of tearing them away from their children under its so-called “zero tolerance” policy, a practice that drew significant public backlash.³⁶ While this policy is no longer in effect, the harm of family separations continues to this day. Straying from campaign platforms, the Biden administration has continued to separate families at the border and backed out of talks about compensating migrants for the harms they faced for separations that occurred during the Trump administration.³⁷

Black, brown, and indigenous migrants will continue to suffer as long as entry and reentry into the United States are criminalized. Dixie Gallardo Aldana, who testified before the Commission on March 7, 2023,³⁸ is a Guatemalan woman who came to the U.S. seeking safety, but was instead prosecuted for illegal reentry and separated from her 12-year-old son. Her story, along with the tens of thousands of others whose lives have been upended by these racist laws, provide the most compelling proof of the need for the Commission’s intervention.³⁹

C. The deeply rooted racism of federal entry and reentry laws has not been adequately addressed by U.S. law.

Not only do Sections 1325 and 1326 violate international human rights law, as will be discussed below, but they have also been challenged in American courts for violating domestic law. Since September 2020, courts have decided more than 20 challenges filed by legal advocates across the country attacking the constitutionality of federal entry and reentry laws.⁴⁰ All but one of these challenges failed, with courts holding the demonstrated evidence of racism in these statutes as irrelevant or insufficient.⁴¹

A single case has acknowledged the discriminatory intent and impact of these laws. In *United States v. Carrillo-Lopez*, a district court judge struck down Section 1326 for violating the

³⁴ Catherine E. Shoichet, *Children and parents are being separated at the border. Here’s what we know*, CABLE NEWS NETWORK, INC. (Jun. 18, 2018), <https://www.cnn.com/2018/06/18/us/immigration-family-separations-questions/index.html>.

³⁵ Erica Bryant, *Children are Still Being Separated from Their Families at the Border*, VERA (Jun. 23, 2022), <https://www.vera.org/news/children-are-still-being-separated-from-their-families-at-the-border>.

³⁶ Caitlin Dickerson & Geoff Bennett, *supra* note 31.

³⁷ See Anna-Catherine Brigida & John Washington, *Biden Is Still Separating Immigrant Kids from Their Families*, TEXAS OBSERVER (Nov. 21, 2022), <https://www.texasobserver.org/the-biden-administration-is-still-separating-kids-from-their-families/>; Nicola Narea, *Biden is defending key Trump immigration policies in court*, VOX (Jan. 25, 2022), <https://www.vox.com/22893065/biden-family-separations-title-42-border-court>. See also *La ardua labor de un grupo de abogados para reunir a padres e hijos separados en la frontera*, UNIVISION (Feb. 12, 2023), available at <https://t.co/5AZtUQMojB>.

³⁸ See Comisión Interamericana de Derechos Humanos, 186 PS - 6 - RE | Situación de la movilidad humana desde un enfoque étnico-racial (Mar. 9, 2023), available at 39:53 of <https://youtu.be/o4f-0D808jQ?t=2393>; see also <https://promiseinstitute.law.ucla.edu/project/inter-american-commission-on-human-rights-visit-to-ucla/>.

³⁹ See *generally Rooted in Racism: The Human Impact of Migrant Prosecutions*, NATIONAL IMMIGRATION PROJECT (Dec. 2021), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec_Rooted-in-Racism-Report.pdf.

⁴⁰ See *Explainer: Equal Protection Challenges to Prosecutions Under 1325 and 1326: The Groundbreaking Decision in Carrillo-Lopez*, NATIONAL IMMIGRATION PROJECT 6-7 (Dec. 2021), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec-1325-6-Handout.pdf (collecting cases); see also *United States v. Jimenez-Joachin*, -- F.Supp3d --, 2002 WL 17736798 * 1 (D. Mass. Dec. 16, 2022) (collecting cases).

⁴¹ *Explainer: Equal Protection Challenges*, *supra* note 39, at 6-7.

Constitution’s guarantee of equal protection.⁴² The judge addressed the racist history which gave rise to the law as well as its current effects to find Section 1326 unconstitutional. The compelling evidence forced even the government to concede in their argument that the federal illegal reentry statute disparately impacts Latine people;⁴³ yet the government persisted in trying to preserve the law. It appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, which reversed the lower court in May 2023, holding that the federal illegal reentry statute is valid.⁴⁴

With no other court having found the illegal entry or reentry laws invalid as of this writing, migrants remain subject to criminal prosecution under Sections 1325 and 1326. As these racist laws continue to operate at the U.S.-Mexico border, the Inter-American Commission has an important role to play in holding the U.S. accountable for the ongoing harm these statutes cause to Black, brown, and indigenous migrants in the Americas.

III. Examining Entry and Reentry Laws under Inter-American Human Rights Standards

Sections 1325 and 1326 violate Inter-American human rights law. The American Declaration of the Rights and Duties of Man (“Declaration”) recognizes rights relevant to migrants, including Latine people who seek asylum at the U.S.-Mexico border. As an Organization of American States (“OAS”) member state and party to the OAS Charter, the U.S. is bound by the human rights law set forth in the Declaration.⁴⁵

Federal illegal reentry and entry laws violate multiple human rights protected under the American Declaration, including Equality Before the Law (Article II), Liberty and Protection from Arbitrary Arrest (Articles I, XXV), Asylum (Article XXVII), Due Process (Article XXVI), Fair Trial (Article XVIII), and Family (Articles V-VII). In the following sections, we will look at how these rights are implicated by Sections 1325 and 1326.

A. Article II: Equality Before the Law

The right to equality under Article II of the Declaration requires that a state’s practice or law not be “based on racial motives.”⁴⁶ If a state practice depriving a group of their rights is in place “mainly owing”⁴⁷ to a group’s physical characteristics and the fact that they belong to a specific group, it will be considered a discriminatory action.

An act can be discriminatory even if the wording of the law or policy “is or appears to be neutral.”⁴⁸ Even when it is not possible to prove discriminatory *intent*, a state’s action violates this

⁴² *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021); see also Ken Ritter, *US Judge in Nevada: Felony deportation law unconstitutional*, ASSOCIATED PRESS NEWS (Aug. 19, 2021), <https://apnews.com/article/nevada-immigration-race-and-ethnicity-racial-injustice-laws-6e3ebe4ba12d971ec9ed199c005b31b5>.

⁴³ *Carrillo-Lopez*, 555 F. Supp. 3d at 1027.

⁴⁴ *United States v. Carrillo-Lopez*, --F.4th--, 2023 WL 3587596 (9th Cir. May 22, 2023); see also Rio Yamat, *US asks appeals court to reverse deportation law ruling*, ASSOCIATED PRESS NEWS (Dec. 8, 2022), <https://apnews.com/article/nevada-immigration-reno-mexico-government-united-states-8eb9c3575aa00aa149d95d0bef9f928e>.

⁴⁵ See *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am. Comm’n H.R., OEA/Ser.L./V/II.95 Doc. 7 rev. at 550, para. 87 (1997).

⁴⁶ *Expelled Dominicans and Haitians v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 282, para. 399 (Aug. 28, 2014).

⁴⁷ *Id.* at para. 404.

⁴⁸ *Nadege Dorzema et al. v. Dominican Republic* Inter-Am. Ct. H.R. (ser. C) No. 251, para. 235 (Oct. 24, 2012).

right if the law has discriminatory “disproportionate *impact*.”⁴⁹ Either are independently sufficient to establish a violation of the right to non-discrimination, and both intent and impact are present and can be demonstrated in the case of Sections 1325 and 1326.⁵⁰

We submit that an analysis of discriminatory intent should include a historical analysis to contextualize the original motivation of these laws. The criminalization of migration under Sections 1325 and 1326 was founded on racial subjugation and racialized exclusion.⁵¹ Given the explicit eugenicist origins of these laws, the violations of rights flowing from the application of these laws are mainly owed to the individuals’ race.

Furthermore, Sections 1325 and 1326 have an overwhelmingly discriminatory disproportionate impact, as the vast majority of those criminalized are Latine.⁵² Thus, these laws are discriminatory in violation of Article II of the Declaration. The violations of other fundamental rights caused by the application of these laws should be understood in this context.

Additionally, States are obliged “to adopt positive measures to reverse or change discriminatory situations that exist in their societies that prejudice a specific group of persons.”⁵³ There have been no meaningful steps taken by the US government to reverse or change these laws, despite its obligation to do so.

B. Articles I and XXV: Liberty

Article I of the Declaration protects the right to liberty, while Article XXV protects individuals from arbitrary arrest. These rights require “immigration policies that are premised on a presumption of liberty.”⁵⁴ Specifically, the Inter-American Commission on Human Rights has stated that “immigration violations ought not to be construed as criminal offenses,”⁵⁵ and that “a violation of immigration law can never be equated to a violation of criminal laws that warrants the use of the State’s punitive authority.”⁵⁶ But Sections 1325 and 1326 do precisely this: they impose criminal sanctions—including sentences of imprisonment of up to 20 years—for entering the United States without authorization.

The Inter-American Court of Human Rights⁵⁷ has likewise found that criminal detention for migration was arbitrary: “imposing a punitive measure on an immigrant who reenters a country in an irregular manner subsequent to receiving a deportation order cannot be considered [a] legitimate purpose.”⁵⁸ This is precisely the class of individuals criminalized under Section 1326.

⁴⁹ *Id.* at para. 235 (emphasis added).

⁵⁰ See Parts II and III of this brief, above.

⁵¹ See Part II of this brief, above.

⁵² See Part III of this brief, above.

⁵³ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 104 (Sept. 17, 2003).

⁵⁴ *Cuban and Haitian Nationals Detained At and Deported from the Carmichael Road Detention Center v. Bahamas*, Case 12.071, Report No. 459/21, Inter-Am. Comm’n H.R., OEA/Ser.L./V/II, doc. 473 para. 51 (2021).

⁵⁵ *Report on Immigration in The United States: Detention and Due Process*, Inter-Am. Comm’n H.R., OEA/Ser.L./V/II, Doc. 78/10, para. 38 (Dec. 2010).

⁵⁶ *Cuban and Haitian Nationals Detained*, *supra* note 53, at para. 49. See also, *Commission on Human Rights, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers*, Gabriela Rodríguez Pizarro, U.N. Doc. E/CN.4/2003/85 at para. 73 (December 30, 2002) (“[I]rregular migrants are not criminals per se and they should not be treated as such.”).

⁵⁷ The Commission may draw from the Inter-American Court of Human Rights’ interpretations of the American Convention in interpreting and applying the Declaration. See *John Doe et al. v. Canada*, Case 12.586, Report No. 78/11, Inter-Am. Comm’n H.R., OEA/Ser.L./V/II.141 Doc. 29 paras. 69-73 (July 21, 2011).

⁵⁸ *Velez Loor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, para. 169 (Nov. 23, 2010).

The incarceration of migrants convicted under Sections 1325 or 1326 is thus arbitrary in violation of the right to liberty as protected by the Declaration.

C. Article XXVII: Asylum

The right to asylum under Article XXVII of the Declaration requires that every person have the right to “seek and receive” asylum in accordance with “international agreements” and “the laws of each country” in which asylum is sought. Both these criteria must be satisfied for this right to exist.⁵⁹

The Commission has recognized the right to seek and receive asylum under international law, taking into account the protections established in the Convention Relating to the Status of Refugees 1951 and the 1967 Protocol Relating to the Status of Refugees.⁶⁰ Under U.S. domestic law, all people who are at a land border, port of entry or physically present in the United States are entitled to seek asylum.⁶¹ Those who meet the criteria are granted asylum.⁶²

The right to seek and receive asylum in the U.S. is protected under Article XXVII of the Declaration. Sections 1325 and 1326 indiscriminately criminalize people entering the United States, including those with legitimate claims for asylum. This criminalization prevents individuals from accessing their right to seek and receive asylum, as many are unable to access asylum procedures in prison or being deported before asylum hearings can take place.⁶³ Prosecuting individuals under Sections 1325 and 1326 thus violates Article XXVII of the Declaration.

D. Articles XXVI, XVII, and V-VII: Due Process, and the Right to Family Life and Rights of Children

The rights to family life and to due process are also implicated by the criminalization of migration under Sections 1325 and 1326. Articles V, VI, and VII of the Declaration give every person the right to protection of family; to establish a family and to receive protection therefore; and special protection, care, and aid for all children, as well as women during the pregnancy and nursing period. Articles XVIII and XXVI protect the rights to fair trial and due process, respectively. In proceedings that can lead to removal, the Commission has required that States balance their concern for general welfare with the fundamental rights of migrant families such as the right to family life and the rights of mothers and children.⁶⁴ This includes providing an opportunity for an individual’s rights to be duly considered before deportation.⁶⁵ Where a violation

⁵⁹ The Haitian Centre for Human Rights, *supra* note 44, at para. 151.

⁶⁰ *Id.* at para. 155.

⁶¹ 8 U.S.C. § 1158(a)(1). New regulations attempting to limit asylum access are being challenged by advocates. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023); Immigrants’ Rights Advocates Sue Biden Administration Over New Asylum Ban, AMERICAN CIVIL LIBERTIES UNION (May 11, 2023), <https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-biden-administration-over-new-asylum-ban>.

⁶² *See* 8 U.S.C. § 1101(a)(42); *Id.* § 1158; 8 C.F.R. § 208.1 *et seq.*

⁶³ *UNHCR’s Views on the Detention of Asylum Seekers: Using international law to advocate against detention of individuals seeking protection in the U.S.*, UNITED NATIONS HIGH COMMISSIONER (Sep. 2022), <https://www.unhcr.org/631f449d4.pdf>; *see also Fact Sheet: Prosecuting People for Coming to the United States*, AMERICAN IMMIGRATION COUNCIL (Aug. 2021), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

⁶⁴ Wayne Smith and Hugo Armendariz et al v. United States, Case 12.56, Inter-Am. Comm’n H.R., Report No. 81/10, para. 57 (June 12, 2010).

⁶⁵ *Id.* at para. 59.

occurs because the State does not balance these interests, the State will also be responsible for an independent violation of due process if it does not provide an effective remedy.⁶⁶

Sections 1325 and 1326 separate families, as a criminal conviction will result in adult family members being separated from their children to serve their sentences in federal detention facilities.⁶⁷ The criminal proceedings, which are often a precursor to the deportation of parents, do not take into consideration or provide opportunities for migrants to testify to the family and children's best interest,⁶⁸ clearly violating the rights to family life and special protection of children. Additionally, there are no judicial mechanisms available to migrants to challenge these violations of their rights or pursue a remedy, which results in a further violation of their rights to due process and a fair trial. These practices violate Articles V, VI, VII, XVIII, and XXVI of the Declaration as interpreted by the Commission.

To conclude, the history and current impact of the U.S.'s criminalization of federal entry and reentry is fundamentally incompatible with international human rights law. Reforming migration in the Americas must center racial justice and reckon with the structural racism in laws like Sections 1325 and 1326.

2. Racial Discrimination Against Black Migrants in the United States

As the Black Alliance for Just Immigration (BAJI) and the Promise Institute for Human Rights at UCLA School of Law discussed at the March 7 hearing, in recent years, Black migrants from Africa have been migrating to the U.S. through the Americas at increasing rates.⁶⁹ Between 2000 and 2019, the Black African immigrant population in the U.S. grew 246%, from roughly 600,000 to 2 million people.⁷⁰ In 2019 alone, 92,000 migrants from Sub-Saharan Africa were admitted to the U.S., twenty-five percent of whom were admitted as refugees or asylees.⁷¹ Black African migrants in the U.S. come from diverse countries and backgrounds. Five major origin countries include Cameroon, the Democratic Republic of Congo, Eritrea, Ghana, and Somalia.⁷²

Black migrants face widespread anti-Black racism and abuse from the systems and actors they encounter as they move through the Americas in the hope of finding a safe environment with human rights protections. They face particular challenges reaching the United States, as U.S. immigration policies center on violent deterrence and the externalization of border regulation.⁷³ Even upon reaching the U.S., Black migrants suffer from racial discrimination as they are racially

⁶⁶ *Id.* at para. 62.

⁶⁷ See *Rooted in Racism: The Human Impact of Migrant Prosecutions*, *supra* note 38.

⁶⁸ See United States Sentencing Commission, *Primer on Immigration Offenses* 40 (2021), https://www.usc.gov/sites/default/files/pdf/training/primers/2021_Primer_Immigration.pdf (stating that a defendant's motive for illegal reentry is not a basis for downward departure from sentencing guidelines and that motivation to care for a family member must be exceptional in order to qualify).

⁶⁹ *Id.*; Julianna Morgan-Trostle, Kexin Zheng, & Carl Lipscombe, Black Alliance for Just Immigration (BAJI) and NYU School of Law Immigrants' Rights Clinic, *The State of Black Immigrants* (2016).

⁷⁰ Christine Tamir & Monica Anderson, *One-in-Ten Black People Living in the U.S. are Immigrants*, Pew Research Center (January 2022).

⁷¹ *Id.*

⁷² Caitlyn Yates & Jessica Bolter, *African Migration through the Americas: Drivers, Routes, and Policy Responses*, Migration Policy Institute (October 2021) (Nationals of these 5 countries most commonly travel through the Western Hemisphere and accounted for more encounters by U.S. border authorities and Mexican immigration agents than any other African countries from 2015-2019, *See* Box 2, p.6); For further immigrant arrival data in the U.S., see U.S. Department of Homeland Security (DHS), *Yearbook of Immigration Statistics 2021* (Nov. 2022).

⁷³ S. Priya Morley et al., *supra* note 1.

profiled, criminalized, and subject to detention and deportation at disproportionate rates.⁷⁴ Despite the systemic racism and discrimination which Black individuals face in migration, their particular experiences are often disregarded and silenced.

This section will expand upon the oral testimony provided by the Black Alliance for Just Immigration (BAJI) and their client, Rabi Kabamba DaSilva Filipe. It will highlight the widespread racial discrimination faced by Black migrants like Filipe in the Americas, as seen through U.S. border externalization policies, racial profiling, and racist abuse in detention. Further, it will highlight the increasing use of border technology to enforce immigration and demonstrate that such technology only exacerbates racial discrimination and abuse.

a. Border Externalization and Racial Discrimination

Following an increase in African migration through South America in 2015, states in the Americas have actively collaborated to prevent Black migrants from reaching their destination countries, effectively precluding them from declaring asylum. Since 2019, the U.S. and Mexican governments have colluded to externalize U.S. immigration enforcement into Mexico and beyond.⁷⁵ As the Commission has already found, border externalization policies, such as “Remain in Mexico” and Title 42, pose clear violations of non-refoulement obligations and the right to asylum under international law.⁷⁶ The human rights violations associated with border externalization are well established, and such policies have been denounced by the Commission.⁷⁷ However, border externalization measures also disproportionately impact Black migrants and fuel anti-Black racism throughout the Americas, violating another international human right—the right to equal protection and nondiscrimination.⁷⁸

As discussed in the hearing testimony, border externalization measures caused thousands of African migrants to be stranded in Tapachula, Mexico in early 2019, including BAJI’s client, Filipe. Following border externalization efforts with the U.S., Mexican immigration officials began denying Black migrants the exit permits necessary for them to proceed north to the U.S.-Mexico border.⁷⁹ Migrants could not leave without documentation, but many did not intend to seek

⁷⁴ Timantha Goff, et al., *Uncovering the Truth: Violence, and Abuse Against Black Migrants in Immigration Detention*, (Oct. 2022).

⁷⁵ S. Priya Morley et al., *supra* note 1; Azadeh Erfani and Maria Garcia, et al., “Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum”, National Immigrant Justice Center & FWD.us. (August 2021).

⁷⁶ Azadeh Erfani and Maria Garcia, et al., *supra* note 8; Press Release, Inter-American Commission on Human Rights, *IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America* (July 23, 2019); IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, OAS/Ser.L/V/II. 155, July 24, 2015, para. 113-114, 231-232.

⁷⁷ *Id.*

⁷⁸ United Nations General Assembly (UNGA), *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/75/590 (November 10, 2020), p. 19; Inter-American Court of Human Rights (IACrHR), *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 (September 17, 2003), Series A No. 18, para. 118; *See, inter alia*, American Declaration of the Rights and Duties of Man (American Declaration), Article II; Universal Declaration of Human Rights, Article 7; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 2, International Covenant on Civil and Political Rights (ICCPR), Article 26; IACHR, *Human Mobility: Inter-American Standards*, OAS/Ser.L/V/II. Doc. 46/15 (December 31, 2015) p. 85-88.

⁷⁹ Tsion Gurmu, *Combating Transnational Efforts to Detain and Deport Black Migrants Traveling to the U.S.-Mexico Border* in “Spotlight Report on the Borderlands: How Racism, Militarization, and Surveillance Create a Human Rights Crisis on the U.S.-Mexico Border.” National Network for Immigrant and Refugee Rights (2022).

asylum in Mexico because they felt it was too unsafe, insecure, or discriminatory.⁸⁰

Indeed, Black migrants in Tapachula suffered widespread racial discrimination, violence, and rights violations. Filipe and hundreds of other Africans and Haitians were forced to camp outside of the migrant detention facility *Siglo XXI* in the street, with no sanitary items, no place to bathe, and difficulty accessing jobs, resources, or basic care. Filipe described the surveillance of Black migrants from National Guard soldiers and the violent response to the Assembly of African Migrants' peaceful protests. The Assembly demanded the Mexican government provide basic needs and treat Black migrants equally, but the police and National Guard responded with tear gas and violence.⁸¹ Further, Black migrants in Mexican detention facilities were beaten by government officials and subjected to torture, medical neglect, discriminatory food rationing, and other abuses.⁸² Filipe described witnessing blatant anti-Black racism and violence, including the severe beating of an Angolan man by Mexican police. He said, "After seeing the abuse and violence inflicted on Black people, we did not feel safe in Mexico. We left home for a better future, but here we had less safety and access to basic needs than we did in our home countries."⁸³

The deplorable conditions, violence, and rights violations that Black migrants faced in Tapachula were a direct result of racially discriminatory border externalization measures by the United States. These policies spread anti-Black racism and violence in Mexico and throughout the Americas, violating critical human rights such as equal protection and nondiscrimination, the right to life, right of assembly, and freedom of movement.⁸⁴ After months of protesting, in late 2019, the Mexican government began to issue some exit visas, but Black migrants like Filipe continued to suffer unique discrimination. He said, "They were targeting the leaders of the protests, including me, and wouldn't let us leave. When I went to the immigration office to get my visa, the officer came out and said 'That guy will stay here and die here. We will kill him.' They never issued me a visa."⁸⁵

II. Racial Discrimination in U.S. Policies and Practices

U.S immigration laws and policies are built on a historical foundation of white supremacy and blatant racial animus towards Black people.⁸⁶ Despite obligations under domestic and international human rights law to prevent and combat racial discrimination, the anti-Blackness inherent in the U.S. immigration system remains and persists today.⁸⁷ There is overwhelming evidence that Black migrants face systematic discrimination in immigration policies and policing compared to other populations.⁸⁸ For instance, Black migrants face disparate treatment in

⁸⁰ Morley et al., *supra* note 1.

⁸¹ BAJI Client Testimony, Rabi Kabamba DaSilva Filipe, Situation of human mobility from an ethnic-racial approach, IACHR Thematic Hearing (March 7, 2023).

⁸² Gurmu, *supra* note 12.

⁸³ BAJI Client Testimony, *supra* note 14.

⁸⁴ American Declaration, Article I, II, VIII, XXI; ICERD, Article 2, 5.

⁸⁵ BAJI Client Testimony, *supra* note 14.

⁸⁶ Karla McKanders, *Deconstructing Race in Immigration Law's Origin Stories*, 37 Md. J. Int'l L. 18 (2022); Gabriel J. Chin, *A Nation of White Immigrants and Federal Racial Preferences for White Non-Citizens*, 100 B.U. L. Rev. 1279 (2020); Peter Ibe, *Immigration is a Black issue*, American Friends Service Committee (Feb 16, 2021).

⁸⁷ Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOWARD L.J. 899 (2014).

⁸⁸ The Refugee and Immigrant Center for Education and Legal Services (RAICES), *Black Immigrant Lives Are Under Attack*, (2022); BAJI, Haitian Bridge Alliance (HBA), Human Rights First (HRF) et al., *Anti-Black discrimination*

immigration court removal proceedings, including "denials of adequate interpretation, lack of access to counsel, intentionally rushed proceedings, and adjudicator bias."⁸⁹

Further, U.S. policies such as metering, expedited removal, and Title 42 have produced disparate impact in excluding, restricting, and denying Black migrants' rights to asylum.⁹⁰ For example, in May 2022, Haitians represented just 6% of migrants crossing the border, but occupied 60% of expulsion flights ordered by the U.S. under Title 42.⁹¹ The U.S. government also subjected Cameroonian asylum-seekers to mass deportation, violating non-refoulement.⁹² By contrast, the U.S. has provided nearly universal exception to Title 42 for predominantly white Ukrainian refugees arriving in the U.S.⁹³ Racial discrimination is also evident in how immigration officials carry out these policies, often targeting and abusing Black migrants with impunity.⁹⁴

The anti-Black immigration system is deeply entangled with the anti-Black criminal legal system in the U.S., and as a result, Black migrants are criminalized, profiled, surveilled, detained, and deported in disproportionate ways.⁹⁵ Within detention centers, Black migrants face further discrimination and abuse. The U.S. operates the largest immigration detention system in the world, allowing DHS agencies such as ICE and CBP to detain individuals if they are awaiting deportation or suspected of visa violations, illegal entry, or civil immigration violations.⁹⁶

Black migrants experience racial discrimination in immigration detention in a multitude of ways. They are detained for longer periods than non-Black migrants, are often forced to pay much higher bonds to obtain release, and disproportionately have parole denied.⁹⁷ Additionally, Black migrants are overrepresented in solitary confinement compared to other groups.⁹⁸ Black migrant detainees also suffer blatant racism and abuse from guards and inmates within detention centers. While BAJI's client Filipe was detained in the U.S., he faced anti-Black racism and threats such as "we're gonna kill some Black monkeys," and security guards laughed in response.⁹⁹ Further, U.S. immigration officials repeatedly use excessive force, abuse, and retaliation against Black

against non-citizens and ongoing violations of international protections for migrants, refugees, and asylum seekers of African descent, United States of America Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD) 107th Session (August 30, 2022); Ibe, *supra* note 19.

⁸⁹ BAJI et al., *supra* note 21.

⁹⁰ American Immigration Council, *Metering and Asylum Turnbacks* (March 2021); Human Rights First, *Fatally Flawed: Remain in Mexico Policy Should Never be Revived* (September 2022).

⁹¹ Ellen Sullivan, *U.S. Accelerated Expulsions of Haitian Migrants in May*, NY Times (June 11, 2022); Amnesty International, *"They did not treat us like people": Race and migration-related torture and other ill-treatment of Haitians seeking safety in the USA*, (Sept. 22, 2022).

⁹² Human Rights Watch, *Can You Throw Us Back?" Asylum Seekers Abused in the U.S. and Deported to Harm in Cameroon*, (2022), IACrtHR, *supra* note 11; United Nations (UN) Convention Relating to the Status of Refugees (July 28, 1951), Art 33(1).

⁹³ *Id.*

⁹⁴ *Id.*; Aaron Morrison et al., *Haitians See History of Racist Policies in Migrant Treatment*, AP News (Sept. 24, 2021); Natalie Alcoba, *African Migrants 'Forgotten' on Dangerous Treks to US*, Al Jazeera (Oct. 7, 2021).

⁹⁵ BAJI & NYU, *supra* note 2; Ibe, *supra* note 19; The Sentencing Project, *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (Aug. 2013); Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System*, National Council on Crime & Delinquency (March 2009).

⁹⁶ National Immigration Forum, *Fact Sheet: Immigration Detention in the United States* (January 27, 2020).

⁹⁷ BAJI & NYU, *supra* note 2; RAICES, *supra* note 21; HRF, *'I'm a Prisoner Here': Biden Administration Policies Lock Up Asylum Seekers* (April 2022).

⁹⁸ RAICES, *supra* note 21; Franco, K., Patler, C., & Reiter, K, *Punishing status and the punishment status quo: Solitary confinement in U.S. Immigration prisons, 2013–2017*, 24(2), PUNISHMENT & SOCIETY, 170 (2022).

⁹⁹ BAJI Client Testimony, *supra* note 14.

migrants in detention centers.¹⁰⁰ From 2020 to 2022, nine complaints and three lawsuits were filed on behalf of Cameroonian and other African migrants who reported abuse, excessive force, anti-Black discrimination, and other mistreatment in ICE detention.¹⁰¹

Finally, Black migrants are often denied proper medical care and subjected to life-threatening conditions in detention. As Filipe described in his testimony, he was denied proper medical care when he became sick in a U.S. detention center and was told by guards, “wait until your day comes.”¹⁰² Reports have shown Black migrants, particularly Black women, often suffer medical neglect in U.S. detention centers.¹⁰³ The racially discriminatory abuse and inhumane conditions in detention centers violate numerous human rights including non-discrimination, the right to preservation of health, rights against violence and bodily harm, and international torture laws.¹⁰⁴

III. Racial Discrimination and Border Technology

a. *Technology—the latest tool for immigration enforcement—exacerbates discrimination*

In recent years, approaches to immigration regulation have focused on border technology, as seen in the Biden administration’s policies prioritizing “smart border controls.”¹⁰⁵ Biden’s budget plan for 2024 includes \$535 million dollars specifically for border security technology.¹⁰⁶ Smart border policies emphasize a reliance on high-tech measures including biometrics, surveillance, detection technologies, and information technology to enforce migration. Among the growing list of smart border measures in the Americas are technologies such as remote video surveillance, drones, automated license plate readers, motion sensors, integrated fixed towers, ankle monitors, and migrant data analysis and tracking.¹⁰⁷ The global arsenal of border technologies also includes alarming experimental technology such as robo-dogs and artificial intelligence lie detectors.¹⁰⁸

Concerningly, border technologies are often depicted by U.S. politicians as a “humane alternative” to Trump-era immigration policy and are touted as “fair,” “orderly,” and “safe.”¹⁰⁹ However, border technology is not a safe or smart alternative to violent border policies—rather, it functions as an expansion of the mass violence, detention, deportation, and policing already embedded in the U.S. immigration system. The goal of border technology is to more effectively

¹⁰⁰ Human Rights Watch, *supra* note 24.

¹⁰¹ BAJI et al., *supra* note 21.

¹⁰² BAJI Client Testimony, *supra* note 14.

¹⁰³ BAJI et al., *supra* note 21; Rita Omokha, ‘They don’t have any humanity’: Black immigrants in ICE custody report abuse and neglect, *The Guardian* (22 July 2022).

¹⁰⁴ BAJI et al., *supra* note 21, p.16; ICERD, Articles 2(1)(a) and (b), 4(c), 5(b), 5(e)(iii) and (iv); UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

¹⁰⁵ The White House, *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, (Jan. 20, 2021); U.S. Citizenship Act, 117th Congress, 1st Session. p. 142.

¹⁰⁶ The White House, *Fact Sheet: President Biden’s Budget Strengthens Border Security, Enhances Legal Pathways, and Provides Resources to Enforce Our Immigration Laws* (March 09, 2023).

¹⁰⁷ Mizue Aizeki, et al., *Smart Borders or a Humane World?* Immigrant Defense Project’s Surveillance, Tech & Immigration Policing Project & the Transnational Institute (October 6, 2021); Mijente, Just Futures Law, & No Border Wall Coalition, *The Deadly Digital Border Wall* (2021).

¹⁰⁸ Petra Molnar, *Technological Testing Grounds: Migration Management Experiments from the Ground Up*, EDRI and Refugee Law Lab, (2020); Petra Molnar and Todd Miller, *Robo Dogs and Refugees: The Future of the Global Border Industrial Complex*, *The Border Chronicle* (2022).

¹⁰⁹ Press Release, The White House, *Remarks by President Biden on Border Security and Enforcement* (Jan. 5, 2023).

control, surveil, and police migrants to prevent them from reaching the U.S.¹¹⁰ Like past approaches to immigration, smart borders are founded in the logic of deterrence, as they aim to deter migrants from entering the U.S. by making migration increasingly difficult and violent.¹¹¹ The Commission has previously criticized deterrence policies for being ineffective and only increasing danger and human rights violations for migrants.¹¹² Similarly, border technology will only increase violence for migrants, and given the racially discriminatory ways in which immigration is enforced, this violence will disproportionately harm Black migrants.

Technology in general is often characterized as “neutral” or “objective” and States use this narrative to present the guise of increasing fairness in the immigration system with technology. On the contrary, technology is far from neutral—rather, it reproduces, reinforces, and exacerbates existing racial inequalities in society.¹¹³ Studies have repeatedly found that digital technologies reflect and compound racial discrimination; for example, facial recognition algorithms are often 10 to 100 times more likely to inaccurately identify Black faces compared to white faces.¹¹⁴ Technology sectors face diversity and discrimination issues along racial lines and are likely to develop technologies which reproduce these inequalities.¹¹⁵ Additionally, it has been shown that tools like predictive policing in law enforcement use data sets reflecting racial bias, and departments deploy these technologies disproportionately in communities of predominantly racial minorities.¹¹⁶ These compounding factors have dire implications for rights violations in immigration, as technology is used by immigration enforcement agents who already exhibit racial discrimination in profiling, abusing, and criminalizing Black migrants.¹¹⁷

Additionally, border technology is often developed within problematic private and public relationships which are largely unregulated.¹¹⁸ From 2008-2020, CBP and ICE issued 105,997 contracts worth \$55.1 billion to private corporations.¹¹⁹ The profitable border and surveillance industry has created a booming market for tech companies, military contractors, and start-ups to create expensive, invasive technology to prevent, control, and deter migration. These relationships create transparency and accountability issues, as private sector vendors may shield algorithms and data used in their technology as proprietary information.¹²⁰ The lack of governance and regulation in these spaces is deliberate—it allows States to freely experiment with technology in fringe spaces

¹¹⁰ Aizeki et al., *supra* note 40.

¹¹¹ *Id.*

¹¹² IACHR, *Report on Immigration in the United States: Detention and Due Process* (2011), para. 107; IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, OAS/Ser.L/V/II. 155, July 24, 2015, p.56-57.

¹¹³ United Nations Human Rights Council (UNHRC), Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/44/57 (June 8, 2020) p.4.

¹¹⁴ *Id.*; Sophie Bushwick, *How NIST Tested Facial Recognition Algorithms for Racial Bias*, *Scientific American* (Dec. 27, 2019).

¹¹⁵ UNHRC, *supra* note 46.

¹¹⁶ *Id.*

¹¹⁷ Goff et al., *supra* note 7.

¹¹⁸ Public-private partnerships involve the U.S. government granting funded contracts to private sector tech companies to develop products and services for use in immigration enforcement. These partnerships allow governments to forgo responsibility for rights violations resulting from these technologies, while private corporations, which are driven by profit and unaccountable to U.S. voters, design tools (and by consequence, shape policies) for immigration enforcement. See Mijente, *Who’s Behind Ice? The Tech and Data Companies Fueling Deportations* (2018).

¹¹⁹ Aizeki et al., *supra* note 40, p. 2.

¹²⁰ UNHRC, *supra* note 46 at 14; Lex Gill & Petra Molnar, *Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada’s Immigration and Refugee System*, The Citizen Lab, (September 26, 2018).

like borders, where vulnerable individuals already lack protection, resources, and oversight mechanisms.¹²¹ Private sector companies have an independent responsibility to ensure the technologies they create do not violate human rights but face few if any legal requirements to enforce this.¹²² Additionally, even if there were remedies available, the racially discriminatory codes, data, and systems are difficult to explain due to the “black box” effect, which creates challenges for evidentiary burdens in court proceedings.¹²³

b. Surveillance Technology in U.S. Immigration Enforcement

Border surveillance technologies currently being used at the U.S. southern border expose Black migrants to increased violence, detention, and privacy invasions. For example, the U.S. uses Integrated Fixed Towers (IFTs), which are tall, long-range structures with cameras and a radar, to detect movement and identify people from up to six miles away.¹²⁴ IFTs send data to a remote command center system to identify, surveil, and apprehend migrants at the U.S-Mexico border.¹²⁵ Additionally, drones, including small unmanned aerial systems (sUAS), are widely deployed at the U.S. border to prevent migrants from crossing.¹²⁶ sUAS are remotely operated aircrafts which collect images and video and detect human movement.¹²⁷ sUAS were initially developed for military operations in Iraq and Afghanistan but have become a core component of border surveillance, particularly for tracking migrants in mountainous, hard-to-access terrain.¹²⁸ In a six-month period, sUAS devices resulted in the apprehension of 474 individuals at the U.S border, and CBP expects significantly increased apprehensions as it deploys more sUAS.¹²⁹

Even within U.S. borders, technologies are being used to surveil migrants. These technologies extensively collect and use data from migrants, often without consent, and further discriminatory surveillance, profiling, and detention. For example, ICE uses Investigative Case Management (ICM) to collect vast personal data from law enforcement agencies and private third parties to identify and target migrants.¹³⁰ This software allows ICE to access intrusive information, including family details, immigration history, phone records, criminal records, biometric traits, and home addresses, increasing the agency’s ability to racially profile, surveil, and detain.¹³¹ This same technology was used to conduct massive workplace raids, detention, and deportation of undocumented migrants, resulting in the separation of families.¹³²

ICE also uses the mobile application SmartLink for conditional release from detention as

¹²¹ UNGA, *supra* note 11, p. 13-14.

¹²² *Id.*; Gill & Molnar, *supra* note 53, p.58; UN Human Rights Office of the High Commissioner, *Guiding Principles on Businesses and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011) p. 13-16.

¹²³ UNGA, *supra* note 11 at 14.

¹²⁴ Mijente et al., *supra* note 40.

¹²⁵ *Id.*

¹²⁶ David J. Bier & Matthew Feeney, *Drones on the Border: Efficacy and Privacy Implications*, Cato Institute (May 1, 2018).

¹²⁷ Mijente et al., *supra* note 40; DHS, *CBP Has Improved Border Technology, But Significant Challenges Remain*, OIG-21-21 (February 23, 2021).

¹²⁸ Shirin Ghaffary, *The “smarter” wall: How drones, sensors, and AI are patrolling the border*, Vox (Feb 7, 2020).

¹²⁹ *Id.*

¹³⁰ Mijente, *The War Against Immigrants: The Trump Tech Tools Powered by Palantir* (August 2019).

¹³¹ *Id.*

¹³² Spencer Woodman, *Palantir Provides the Engine for Donald Trump’s Deportation Machine*, The Intercept (March 2, 2017); Sam Biddle & Ryan Devereaux, *Peter Thiel’s Palantir Was Used to Bust Relatives of Migrant Children, New Documents Show*, The Intercept (May 2, 2019).

part of its Alternative to Detention (ATD) program. While the ATD program is depicted as a ‘humane’ alternative, it presents serious privacy violations, as it demands released non-citizens either wear electronic ankle monitors or install the SmartLink app, which uses invasive technology with little transparency on data use or protection.¹³³ Further, DHS is currently building \$6.15 billion dollars worth of biometric technology possessing vast surveillance capability to facilitate the deportation of migrants.¹³⁴ The proposed Homeland Advanced Recognition Technology System (HART) will collect invasive data including iris scans, DNA, facial recognition, fingerprints, and voice prints from migrants in the U.S. and share it with various federal and state agencies.¹³⁵

The growing use of surveillance technologies presents troubling violations of the right to equality and non-discrimination, as U.S. immigration enforcement agencies already police and surveil Black migrants at disproportionate rates.¹³⁶ ICE in particular has frequently been found to profile and disproportionately target Black migrants for detention and deportation.¹³⁷ Additionally, border technology like IFTs push migrants to take dangerous routes, resulting in more death and violence, which violates the right to life, security, and human dignity.¹³⁸ Further, technologies such as ICM or SmartLink may violate privacy rights due to their unqualified collection of data from Black migrants.¹³⁹ Finally, as the core purpose of these technologies is to deter migrants from reaching the border, this could violate non-refoulement obligations.¹⁴⁰

c. Technology Used for Immigration Access and Services: CBP One App

In addition to surveillance technology, border enforcement agencies are increasingly using technology for access to vital immigration services. Of particular concern is the U.S. mobile application CBP One, created by CBP. The app has become the primary portal for individuals to apply for asylum or exemptions to Title 42 and is the only way certain migrants can submit

¹³³ Guilia Mcdonell & Nieto Del Rio, *Meet SmartLINK, the App Tracking Nearly a Quarter Million Immigrants*, The Documented, (June 27, 2022); Sarah R Sherman Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, Boston University School of Law, Research Paper Series No 23-6 (2023).

¹³⁴ Immigration Defense Project, *HART Attack: How DHS’s massive biometrics database will supercharge surveillance and threaten rights*, (May 22, 2022).

¹³⁵ *Id.*

¹³⁶ ICERD, Art 2; IACHR, *The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II. Doc. 62. December 5, 2011; IACrHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 (Sept 17, 2003).

¹³⁷ BAJI et al., *supra* note 21; Goff et al., *supra* note 7; Wilson Wong, *Video of Black jogger stopped by ICE agents in Boston prompts calls for investigation*, NBC NEWS, (Oct 8, 2020); National Immigrant Justice Center, *Lawsuit challenging ICE racial profiling tactics may proceed, Illinois federal court rules*, (January 28, 2020); Marine Ines Zamudio, *Group Sues Federal Agency Over Racial Profiling Of Immigrants In Chicago*, (Feb 25, 2020).

¹³⁸ Jeremy Slack, et. al, *The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States*, 15 J. Lat. Am. Geogr. (2016); Samuel Norton Chambers, et al. “Mortality, Surveillance and the Tertiary “Funnel Effect” on the U.S.-Mexico Border: A Geospatial Modeling of the Geography of Deterrence,” *Journal of Borderland Studies*, Volume 36, 2021 (January 31, 2019); Mijente et al., *supra* note 40; American Declaration, Art I; ICERD, Art 5; ICCPR, Art 10.

¹³⁹ ICCPR, Article 17; UN High Commission for Human Rights, *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, 5, U.N. Doc. A/HRC/39/29; Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988); IACrHR, *Members of José Alvear Restrepo Lawyers’ Collective v. Colombia*, (Brief of Amici Curiae Article 19, Electronic Frontier Foundation, Fundación Karisma, and Privacy International).

¹⁴⁰ UN Convention Relating to the Status of Refugees, Art 33; Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, UN Report of the Special Rapporteur on the human rights of migrants (April 26, 2022) A/HRC/50/31.

necessary information before arrival at U.S. borders.¹⁴¹ The app requires individuals to submit their biographical and biometric information to book appointments at the border.¹⁴²

The Biden Administration’s proposed asylum ban relies on CBP One as a supposedly more efficient way to process asylum applications.¹⁴³ However, the app has already been widely criticized for accessibility issues, technical glitches, and racial discrimination.¹⁴⁴ Black and dark-skinned migrants have reported that the app rejects their photos, making it impossible for them to access critical services.¹⁴⁵ Additionally, requiring migrants to use the app to request fundamental human rights like asylum forces them to provide sensitive information with little choice to consent and few guarantees for how it will be used in the future, potentially violating privacy rights.¹⁴⁶ This is especially concerning given that CBP has inadequately protected sensitive data in the past and as a result, facial recognition data was hacked and posted on the dark web.¹⁴⁷

The underlying algorithms behind CBP One are not publicly known, but research shows that the tech sector consistently creates algorithms with extensive bias, and multiple U.S. police departments have banned facial recognition technology for these reasons.¹⁴⁸ The U.S. should not be able to use technology that is widely recognized as discriminatory against Black migrants, who already lack core protections and are in vulnerable positions at the border. The disproportionate impact of CBP One on Black migrants is a clear violation of nondiscrimination in the provision of immigration services. For Black asylum seekers who may be turned away due to the discriminatory impact of the app, this could violate non-refoulement obligations.

d. Border Externalization and the Export of Border Technology

Pressing concerns about the use of border technology are not limited to the U.S. Mexico-border. The global border and surveillance industry is anticipated to reach a value of \$68 billion by 2025.¹⁴⁹ Border, military, detention, technology, and finance industries all contribute to this global border and surveillance industrial complex, which is hugely profitable and growing rapidly. Increasingly, countries around the world are using fleets of drones, centralized biometric

¹⁴¹ U.S. Customs and Border Control, CBP One™ Mobile Application, (March 7, 2023), <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹⁴² Raul Pinto, “CBP One is Riddled With Flaws That Make the App Inaccessible to Many Asylum Seekers”, Immigration Impact (Feb. 23, 2023).

¹⁴³ *Notice of Proposed Rule Making*, U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice, (March 22, 2023).

¹⁴⁴ Bernard Debusmann Jr., *At U.S. Border, Tech Issues Plague New Migrant Applications*, BBC News (March 8, 2023); Dara Lind, *How To Seek Asylum (Under Biden’s Proposed Asylum Transit Ban), In 12 Not-At-All-Easy Steps*, Immigration Impact (Feb. 22, 2023); Melissa Del Bosque, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates say*, The Guardian (Feb. 8, 2023); Cory Booker, CBP One Letter (March 27, 2023).

¹⁴⁵ Bosque, *supra* note 79; Booker, *supra* note 79.

¹⁴⁶ UNHCR, *supra* note 46 at 9.

¹⁴⁷ *Review of CBP’s Major Cybersecurity Incident during a 2019 Biometric Pilot*, Department of Homeland Security (Sep. 21, 2020); Matthew Gault, *DHS Admits Facial Recognition Photos Were Hacked, Released on Dark Web*, Vice (Sep. 24, 2020).

¹⁴⁸ Debusmann Jr., *supra* note 79; “Racial Discrimination in Face Recognition Technology” Harvard University, Science in the News, Oct. 24, 2020.

¹⁴⁹ Global Reports Store (2019) ‘Global Border Security System Industry is Estimated to Grow at a CAGR of 8.6 and Reach Up To 67.81 Billion by 2025’, April; Market Research Future (2019) ‘Border Security Market Research Report - Global Forecast till 2025’, September.

databases, and other technology to track and surveil migrants.¹⁵⁰ As the U.S. pushes border externalization policies and digital technology, it transfers discriminatory technology to countries throughout the Americas and beyond, and Black migrants suffer the consequences. This is particularly concerning for countries with insufficient human rights protections, as technology may be implemented and experimented with using even less regulation and oversight. Thus, it is imperative that a regional and global framework be established for the regulation of technology at the border to combat racial discrimination in border technology.

B. Canada: Exploitation in the Seasonal Agricultural Workers Program

I. Ongoing exploitation in the Seasonal Agricultural Workers Program

The Migrant Workers Alliance of Canada (MWAC) highlighted that the human rights crisis described by Jamaican farm workers is just the latest example of Canada's discriminatory laws and policies relating to temporary foreign workers. Formed in 1966, the Seasonal Agricultural Workers Program (SAWP) is the founding pillar of Canada's Temporary Foreign Workers Program, and a key plank of Canada's temporary migration strategy. It is often held up as a shining example of success, for example at the recent Summit of the Americas in Los Angeles in June 2022, or when Canada took on the role of "champion" of the Global Compact on Migration.

However, issues with the Seasonal Agricultural Workers Program are well-known and began almost at the same time as the program's formation in 1966. Historian Edward Dunsworth writes about the incident: In the first year of that program, an employer Vincent Geerts, and a drinking buddy, burst into a bunk house of 13 Jamaican farmworkers. Reeking of alcohol and brandishing a shotgun, he threatened to shoot the men for causing trouble. Terrified, the men fled the property and took refuge at a farm seven kilometers down the road, where five compatriots were employed. There they set up a rotating night watch to stand guard against a possible renewed assault. They also called the Jamaican Liaison Officer responsible for their wellbeing in Canada to report the incident. Since this incident, SAWP has only continued to expand.

In recent years, during the COVID-19 pandemic, the situation has only worsened. In June of 2020, we issued a report compiling complaints of abuse on behalf of over 1,000 workers in the first 60 days of the pandemic. The report is titled, "Unheeded Warnings" because concerns about SAWP have been raised repeatedly. Among other complaints, 209 migrant workers reported increased intimidation, surveillance and threats from employers, often under the guise of COVID-19 protocols. Critically, while complaints among Spanish-speaking and English-speaking workers are largely consistent on other matters, complaints about threats were disproportionately higher for Caribbean workers who are largely Black men (19.7% of Caribbean workers, as compared to 12.8% of Spanish-speaking workers). Racism, and specifically anti-Black racism, underpins workers' experience. "These people are cruel and I'm tired of them. They have no heart for Black people, they use us like slaves. I tried getting away from this farm for a very long time and I cannot," said one of the workers, Delroy, a seasonal worker for 23 years, father of 5 and also taking care of elderly mother back home.

In addition to dozens of academic studies on the subject (see Appendix 1), migrant farm workers themselves in our organization and groups like Justice for Migrant Workers, Sanctuary Health, RAMA, RATTMAQ and others have been speaking on these matters and noting in

¹⁵⁰ Mark Akkerman, *Financing Border Wars: The Border Industry, Its Financiers and Human Rights*, Transnational Institute (March 2021); UNHCR, *supra* note 46 at 15; CBS News, *Mexico agrees to invest \$1.5B in 'smart' border technology* (July 12, 2022).

particular how their precarious immigration status under SAWP makes them more vulnerable to discrimination, violence and other forms of abuse in Canada. For example, 100 migrant farm workers from Mexico in SAWP wrote a letter to Canada's federal labour ministry in 2018:

"We need permanent resident status on landing, and open work permits. Contracts that limit us to one employer create fear and abuse. With permanent status and open permits that fear and abuse will be much less. Not everyone wants to live here but we want the same rights Canadians have.

We pick grapes for your wine, we pick flowers. We work for up to 17 hours a day. Our current wages are not enough for the work we do, especially with the deductions and taxes. We don't want more deductions from our pay! Some of us are working 18 hours a day and our pay averages \$5.00 an hour.

We get sick from the water at our houses as many employers use wells so the water is not suitable for drinking and harms our health. Some of us sleep with up to 10 people in a room with no privacy. Some of us pay up to \$360 a month for housing and still share a room with four other people. Also many bunkhouses have no heater or air conditioning or ventilation. Some of the windows in houses are sealed which puts our life in jeopardy as there is no way for us to get out of the house in case of emergency or get some air if it's too humid inside."

In November 2020, migrant agricultural organizations from across Canada submitted a report consisting of results surveys and focus groups with over 400 farmworkers detailing inhumane living conditions and violations of basic human rights and dignity of migrant farm workers in Canada. The report begins with the following quote from a farmworker leader: "We are all humans, but some employers treat us like objects, once you don't serve them they change you for another one. So many years of work and at the end they do not say even thank you after working for them almost all our life. We have no indoor bathroom. We have to use a portable toilet outside or pee in a bottle. No internet or television. No dryer or washing machine. We are living in conditions of modern-day slavery. We want decent houses, not stables. It feels worse than if we were in prison. We want our children with us because we miss them terribly."

II. Exploitation of temporary migrants and refugees, creation of undocumentedness

The exploitation in SAWP is part of a spectrum of abusive, inhumane, and racist treatment of migrants in Canada more generally. Over 1.2 million temporary permits were issued in Canada in 2022 including 136,350 temporary foreign work permits (of which approximately 60,000 are SAWP workers); 472,070 international mobility program work permits; 551,405 study permits and 60,158 referred refugee claimants. Many of these are migrants from the Americas including migrant fishery workers, migrant care workers, and asylum seekers.

Without permanent resident status, migrants face reprisals when they try to assert the rights that they do have. For example, agricultural workers, domestic workers and other migrants in low-waged occupations are on employer dependent permits, that is they are unable to work for another employer. Most also live in employer controlled housing. Speaking up against abuse therefore means becoming homeless, and not having any source of income. In addition, employers are legally able to, and/or have access to endless mechanisms to immediately send workers back to

countries of origin, and can blacklist workers such that they are not able to return to the country. With many migrant workers paying thousands of dollars in recruitment fees to come to the country, becoming homeless, losing income, being sent back, and not being able to return – all while under debt and often providing the main source of income for their extended families in their countries of origin – means that no real mechanism exists to access basic labour rights or other protections. In addition, migrant workers are excluded from existing labour laws in most provinces (see for example exclusions in labours in Ontario, and the ILO ruling on unionization of agricultural workers).

Migrants are also excluded from Canada’s universal access to healthcare. The worst impacts are always on racialized people, particularly women. For example, access to reproductive rights and services including abortion is abysmally low for migrant women. The Ontario Human Rights Tribunal recently ruled that Ontario’s provincial police racially targeted 54 migrant farm workers during the hunt for a suspected rapist in 2013, forcing dozens of workers to hand over DNA samples despite "obvious" physical evidence they didn't match the suspect's description.

Instead of ensuring migrants have access to protections under existing labour laws, the federal government has created an inspections regime that has been an utter failure. Canada’s federal Auditor General found problems in 73 per cent of all COVID-19 quarantine inspection reports filed in 2020. They were so bad, that in an extremely rare move, these issues were flagged to the inspections authority before a report was issued. But the problem only got worse in 2021 — when 88 per cent of all inspections examined showed deficiencies.

For a 2022 fact-finding mission, MWAC arranged two meetings for the fact-finding team on September 25, 2022 and October 22, 2022 (See transcripts [here](#) and [here](#)). Over 200 migrant farmworkers detailed shocking stories of exploitation and abuse. Six months later, the fact-finding report has not been issued.

The changes required are clear: all migrants need permanent resident status to protect themselves. However, for migrants in low-wage work in the country, this is simply not an option. The programs that do exist do not address fundamental needs. For example, the “Agri-Food Immigration Pilot Program” created two years ago for farmworkers has a cap of 2,750 applications per year, but has only received less than 400 applications. We found that employers were using the program requirements, particularly a job letter, as a way to further abuse workers. Similarly the pathways for careworkers - the Home Child Care Provider Pilot and Home Support Worker Pilot promise permanent residency upon completion of 24 month work experience but require careworkers to gain high language test scores and show one year of post-secondary education accreditation; and there are only 2,750 spots in each stream dedicated to childcare and elderly care each year. As a result, many thousands of care workers remain permanently temporary, struggling to gain new employment sponsorship every few years.

Despite its grand statements, Canada plans to resettle just over 15,000 refugees through government assisted programs by 2025. In-country claimants fare no better, with only 62% of claims being accepted. Over 70% of appeals by denied claimants are also rejected. Refugee acceptance is arbitrary, based solely on the luck of the draw on which arbitrator is assigned to a claimant. Some arbitrators accepted only 8.6% of claims in front of them in 2022, and others accepted 100%.

Refugee claimants crossing on land from the United States routinely face discrimination and abuse from politicians. Over the last few years, a climate of anti-refugee xenophobia has been created with many calls to close the border. Caving to this pressure, the Safe Third Country Agreement (STCA), which previously only applied to “official border crossings” was extended to

the entire 9,000 kilometers border between the US and Canada. Any refugee claimant crossing in via the border can be turned away without due process within 14 days of crossing.

The STCA consistently forces migrants to take dangerous and deadly routes to travel between the two countries. In the first three months of 2023, at least 11 migrants died crossing from Canada to the US.

Without access to permanent residency, many racialized and low-wage migrants, including agricultural workers end up escaping sites of abuse at which point they become undocumented. Today, over half a million people in the country don't have any immigration status. One of these people is Jess, a migrant farmworker from Jamaica. She told the Toronto Star last recently that leaving a farm after being abused, and then becoming undocumented has “destroyed me, to be honest. I suffer a lot from it. I can't sleep.”

Undocumented migrants are unable to access healthcare, face labour exploitation, and discrimination. Immigration enforcement waits outside schools, work with hospitals and transit agencies and police to target migrants and carry out deportations creating a climate of intense fear and secrecy.

III. Regularization and permanent resident status for all

Migrant organizing over many years has been successful in placing regularization of undocumented migrants at the top of Canada's agenda. Prime Minister Trudeau promised a regularization program for undocumented people and permanent resident status for migrant students and workers in December 2021. Despite almost uniform support from every sector of society and massive mobilizations, no changes have been announced and a piecemeal approach separating different streams of migrants will not respond to the racialized, discriminatory harms at the root of temporary migration.

C. Dominican Republic: Racism in Migration Policy

CEJIL and partner organizations in the Dominican Republic highlight that the Dominican Republic unfortunately represents a clear example of how processes of racialization and racial discrimination become the basis for migration policies that violate the human rights of migrant communities and Dominicans, particularly Dominicans of Haitian descent. In recent months, we have seen a sharp increase in detentions, deportations and expulsions of people to Haiti without due process¹⁵¹, using excessive force and in an environment of stigmatization and xenophobia towards dark-skinned people which goes unchallenged by the Dominican government¹⁵².

These deportations and expulsions have been carried out by the police and military—who lack the proper training to carry out immigration enforcement—to execute violent raids in Black communities, such as those seen in Ciudad Juan Bosch in May 2022, generating terror and

¹⁵¹ In 2021, 44,020 people of Haitian nationality were deported; 627 were pregnant women, according to official figures. From January-November 2022, according to official data, 108,436 people allegedly of Haitian nationality were deported or expelled to Haiti. In a single quarter (August-October 2022), 60,204 were deported or expelled. Due to the volume of deportations, it is virtually impossible to comply with due process requirements. The government itself has admitted that it conducts these deportation operations without a validated protocol, which materially constitutes an expulsion, without guaranteeing due process or access to international protection.

¹⁵² Cfr. Rosario Espinal, “Dos mentiras sobre la migración haitiana,” Acento (blog), 30 de noviembre de 2022, <https://acento.com.do/opinion/dos-mentiras-sobre-la-migracion-haitiana-9136040.html>.

intimidating communities from participating freely in daily, public life¹⁵³. Deportations and expulsions of pregnant women, unaccompanied children and adolescents, and people detained while seeking medical attention, among other particularly vulnerable populations, have been widely reported¹⁵⁴.

These deportations and expulsions represent an unprecedented intensification of practices that the Inter-American System has already condemned in the *Dorzema* (2012)¹⁵⁵ and *Expelled Dominicans and Haitians* (2014)¹⁵⁶ cases, referring to abuses already prevalent over ten years ago. Today, Dominican authorities continue to implement a policy of criminalization of migration, accompanied by xenophobic, discriminatory and racist rhetoric to justify massive deportations and expulsions of racialized migrants and their descendants¹⁵⁷.

Discrimination against Haitians and Dominicans of Haitian descent extends beyond these deportations. Civil society organizations in the DR have long documented labor exploitation and lack of social security for this population in the sugar cane-producing bateyes and recently, the US issued a Withhold Release Order (WRO) which has blocked sugar imports from Central Romana in the Dominican Republic over accusations of forced labor¹⁵⁸. Likewise, tens of thousands of Dominicans of Haitian descent who were stripped of citizenship ten years ago by a Constitutional Court ruling, remain stateless. Law 169-14, passed in 2014 to address the situation, has not provided an adequate solution to guarantee their right to nationality¹⁵⁹, and denationalized

¹⁵³ Proyecto Trato Digno, “La política migratoria del gobierno dominicano en resumen: Operativos migratorios desproporcionados, ineficaces e insostenibles,” 22/11/2022, <http://tratodigno.obmica.org/index.php/2022/11/22/posicionamiento-del-proyecto-trato-digno-la-politica-migratoria-del-gobierno-dominicano-en-resumen-operativos-migratorios-desproporcionados-ineficaces-e-insostenibles/>; Reconoci.do, “Posicionamiento de los Jesuitas sobre las deportaciones,” 29/11/ 2022, <https://www.reconoci.do/posicionamiento-de-los-jesuitas-sobre-las-deportaciones/>; Listin Diario, “Haitianos entran en pánico y se ocultan ante redadas,” listindiario.com, 15/11/2022, <https://listindiario.com/la-republica/2022/11/15/747995/haitianos-entran-en-panico-y-se-ocultan-ante-redadas>.

¹⁵⁴ Radio Ambulante Estudios, “Deportadas y Embarazadas: El Drama de Las Haitianas En República Dominicana,” El Hilo, December 5, 2022, <https://elhilo.audio/podcast/mujeres-haitianas-deportadas-republica-dominicana/>; Caitlin Hu y Etant Dupain, “República Dominicana Deportó a Menores a Haití Sin Sus Familias,” cnn.com, 21 de noviembre, 2022, <https://cnnespanol.cnn.com/2022/11/21/exclusiva-republica-dominicana-expulso-menores-haiti-deportacion-trax/>; Ulises de la Cruz, “Unicef desmiente que RD abandone niños haitianos en la frontera - Periódico El Caribe,” 9 de diciembre 2022, <https://www.elcaribe.com.do/panorama/pais/unicef-desmiente-que-rd-abandone-ninos-haitianos-en-la-frontera/>.

¹⁵⁵ *Case of Nadege Dorzema et al. vs. Dominican Republic. Merits, reparations, and costs*. Judgment of October 14, 2012. Series C, No. 251.

¹⁵⁶ *Case of Expelled Dominicans and Haitians vs. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C, No. 282.

¹⁵⁷ Cfr. Presidencia, Decreto 668-22, disponible en: <https://presidencia.gob.do/decretos/668-22>; Rafael Castro, “Migración multará a los que le alquilen casas a inmigrantes ilegales,” listindiario.com, 19/01/ 2021, <https://listindiario.com/la-republica/2021/01/19/653122/migracion-multara-a-los-que-le-alquilen-casas-a-inmigrantes-ilegales>; La Redacción, “Estudiantes de Haití en RD niegan sean una amenaza para los dominicanos,” Proceso.com.do, 4 de noviembre 2021, <https://proceso.com.do/2021/11/04/estudiantes-de-haiti-en-rd-niegan-sean-una-amenaza-para-los-dominicanos/>;

¹⁵⁸ Bloomberg Línea, “EE.UU. prohíbe entrada azúcar producida en Dominicana por trabajo forzoso”, 23 November 2022, available at: <https://www.bloomberglinea.com/2022/11/23/eeuu-prohibe-entrada-azucar-producida-en-dominicana-por-trabajo-forzoso/>.

¹⁵⁹ After announcing an “audit” of the National Plan for Regularization of Foreigners (PNRE) in 2021, renewals of documents issued under this plan, including to Dominicans of Haitian descent denationalized by Judgment 168-13 of 2013, have been paralyzed, leaving this group vulnerable to detention and deportation. Ministerio de Interior y Policía, “Consejo Nacional de Migración auditará extranjeros que fueron regularizados en plan migratorio,” 2 de noviembre

Dominicans of Haitian descent are also at risk of expulsion from “their own country” in the context of raids¹⁶⁰.

D. Panama: A Haitian Man’s Experience in the Darién Gap

At the hearing on March 7, 2023, John Lazarre testified about his experience in mobility through the Americas as a Haitian man who survived Haiti’s 2010 earthquake and migrated through over ten States in the Americas before becoming a Humanitarian Organizer with Haitian Bridge Alliance (HBA). He testified about how he and other Black people in mobility encounter racism, xenophobia, threats of violence, violence, and extortion everywhere they went. After first fleeing to Brazil after the earthquake and attempting to find refuge there, he was forced to flee Brazil after two years when he received death threats after making demands related to working conditions and the treatment of himself and other Black people at his worksite. He testified to his and other Haitians’ experiencing a generalized anti-Haitian, anti-immigrant sentiment in Brazil while trying to find refuge and then experiencing similar racism and xenophobia from Peru, to Ecuador, to Colombia, to Nicaragua, to Panama, and in Mexico.

Mr. Lazarre and HBA Executive Director Guerline Jozef shared the stories of people who had experienced horrific violence while transiting through the Americas and, in particular, while transiting through Panama’s Darién Gap.¹⁶¹ Ms. Jozef shared written testimony of an HBA client who survived sexual and gender-based violence in Panama’s Darién Gap. The survivor received no State assistance to access social, medical, legal, or humanitarian services. Mr. Lazarre shared the perspective of a man who had to witness his wife being victimized and of other men who were shot and killed for attempting to stop the harms.

HBA Staff Attorney Erik Crew testified that “[t]he discrimination, violence, and extortion that Haitians and other Black people experience while in human mobility throughout the Americas is an ongoing human rights violation with historical roots” and that such discrimination is “animated by anti-Black racism that motivated the earliest immigration policies and continues to shape immigration laws through the present.”

Mr. Crew stated that HBA was “calling for a coordinated, anti-racist approach from States and non-State actors to redress the harms that Haitians and other Black people experience in migration in the Americas.” Mr. Crew noted two prongs to such a coordinated, anti-racist approach:

1. Structural reforms in inter-American relations and repair for ongoing legacies of colonialism, slavery, and neo-colonial imperialism; and

de 2021, <https://mip.gob.do/2021/11/02/consejo-nacional-de-migracion-auditar-extranjeros-que-fueron-regularizados-en-plan-migratorio/>.

¹⁶⁰ The Reconoci.do movement has denounced that DGM has arbitrarily detained Dominicans of Haitian descent during raids. See the following report, including testimony of detained individuals: <https://www.reconoci.do/reporte-especial/>

¹⁶¹ Haitian Bridge Alliance has reported on sexual and gender-based violence experienced by Black people in mobility through the Darién to the Committee on the Elimination of Discrimination against Women and the Human Rights Committee. For more detail, see Haitian Bridge Alliance, *Violence against Black Migrant Women in the Darién Gap (CEDAW Articles 1, 2, 3, 5, 6, 12, 15)* (January 12, 2022), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fPAN%2f47481&Lang=en; see also Haitian Bridge Alliance, *Access to Justice for Victims of Violence in the Darién Gap (ICCPR Article 14)* (January 30, 2023), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fPAN%2f51506&Lang=en.

2. States' immediately offering increased protections to Black people in human mobility.

E. Language Violence and Displacement of Indigenous Communities

As CIELO addressed during the March 7 hearing, the dispossession and displacement of indigenous communities is followed by numerous rights violations, including the violation of human rights of indigenous migrants in its most fundamental aspect: language and the right to an interpreter.

“When I was detained and spent time in the detention center in Texas, there were many of us who spoke indigenous languages. We didn’t understand anything that was going on. It wasn’t because we didn’t have capacity, but rather that they only spoke to us in Spanish or English. Today I realize that was a huge violation of human rights. That is why I became an interpreter.” (González, A.; 2023)

It is from this quote’s perspective that we will present the structure of racism and language violence faced by indigenous migrants in the United States.

According to Odilia Romero (2022), *“The lack of an interpreter greatly reduces the possibilities of access to asylum status. Language is the mattress where our struggles rest. It is essential to access health, understand the educational process or avoid a process of family separation.”* In this way, we propose to understand the structural conditions that affect the lives of indigenous migrants in the United States. It also reflects the structural conditions that forced displacement due to the territorial dispossession of indigenous communities.

This report consists of 4 sections. First, we propose a brief conceptual theoretical framework that defines racism and language violence. Racism organizes power and exercises violence. Indigenous communities and peoples have developed anti-racist proposals that criticize the *mestizaje* project (Mexico) and the genocide (Guatemala).

In 2022, CIELO’s **Center for Indigenous Languages and Power (CILP)** assisted with 3,060 cases, of which 32% were children from the Maya Q’eqchi people of Guatemala, followed by Chuj, Mam and Mixtec. The reasons why the Q’eqchi’ and other peoples move is the dispossession of their territories, as well as the criminalization of their ways of political organization. The report will contrast these dynamics in the Ixil, Kaqchikel, K’iche’, Mixtec, Zapotec, Q’anjobal and Akateko territories-in Guatemala and Mexico in the second chapter.

The **We are here** project, led by CIELO, produced data for a geographical mapping of the existence of 17 indigenous languages with their different variants in Los Angeles. This data partially illustrates the life strategies of indigenous communities, which contrary to racism, were organized to live in the midst of the pandemic.

Finally, data and testimonies of indigenous migrants within detention centers are presented. Language violence, judicial entanglement and the actions by human rights organizations where migrants and unaccompanied minors are left immersed to resolve their situation. This information will be presented and expanded on in the independent report that CIELO will submit to the IACHR under the name: Racism and Displacement. The State of Criminalization and Language Violence in the United States Against Indigenous Migrants.

II. Report Methodology

The information provided is the result of analytical reflection of speeches and interviews with three groups of indigenous migrant women, men and gender non-conforming people from Guatemala and Mexico who, in various ways, collaborate with the organization *Comunidades Indígenas en Liderazgo* (CIELO). The first group were people who know about migration, displacement and racism through their own experience. Most of them came to the United States as a result of land dispossession, political persecution, crude expressions of violence, and structural misalignment. Several of them work as interpreters, supporting procedures for the repatriation of deceased migrants; organizing cultural awareness campaigns against racism for state authorities; providing vaccinations in the context of the pandemic, among other duties, while also working or having worked in the supply chain industry in which the migrant workforce is active. Some were detained inside detention centers. This dual source of knowledge is what shapes the structural vision of this report.

A second group consists of external interpreters working with CIELO. These people are interpreters who have been trained by CIELO and who perform interpretation work in judicial courts, detention centers or some other institutions. These interpreters work in Guatemala or Mexico, from various territories. These voices pluralize this report and imprint a voice located in the analytical circuits of indigenous migration.

The third group consists of indigenous authorities and local community stakeholders in the Ixil, Q'anjobal, K'achikel, Tzutuhil, Q'eqchi', K'iche' and Zapoteco territories. These interviews provide a communal and territorial interpretation of the impact on indigenous communities and their relationship between dispossession, migration and racism.

The outcome is this report, which captures the experience of at least four sources: (a) being indigenous migrants who have faced the labyrinth of migration processes, once they crossed the border; (b) as professionals who take on dealing with racism, violence, dispossession and the violation of the human rights of indigenous migrants; (c) being part of the workforce in the labor market in its various forms; and (e) as leaders of the migrant movement. This methodology provides a structural view of the report.

This report concludes that the territories of indigenous communities are of fundamental interest for the process of capitalist accumulation and dispossession. Policies for the terrorization of women and children, burning of homes and harvests of entire communities, as in the case of Q'eqchi' communities. Or massacres for stripping away water sources, or territory for the development of megaprojects in Mexico.

This contemporary enclave of capitalism against indigenous communities, which seeks to dispossess communal land for the monoculture production of sugar cane, African palm, and oil fields. In addition to the Protected Areas that use conservation discourse to dispossess communities. These are the systemic conditions that force displacement. (Tzul Tzul, G; 2023).

III. Racism and Language Violence

In a comparative way, how and in what ways do indigenous people in Mexico and Guatemala experience racism in the United States? We present a conceptual and comparative theoretical framework on the racism faced by migrants in their countries of origin, in transit, and in the United States. This is a “triple racism” or racism with three faces. a) The one suffered in Guatemala or Mexico b) The one faced in the United States by whites, and c) The racism suffered by Latinos in the United States.

The comparative view of racism in Guatemala, which occurred by the State's decision to orchestrate the genocide, as well as the process of creating laws to render the invisibility of indigenous communities under the argument of *mestizaje* (miscegenation) has shaped the life and struggles of indigenous migrants.

However, those interviewed argue that racism is structural because it creates the laws that enable transnational corporations to dispossess communities of their land while criminalizing an indigenous way of life. Similarly, racism is linked to labor and exploitation. *“As if we were not human. They take advantage of indigenous workers, as many do not speak the Spanish language, Latinos, they want to exploit us more, they do not give us rest, and sometimes they do not allow us to eat. And those who are more inhuman are Latinos who want to be like gringos”* (De León, M; 2023).

Laws, labor and exploitation are concatenated with racism and language. This is considered in the conceptual construction of the term language violence. Language violence is a structural cause of violence. *“Indigenous languages are central to the lives of displaced indigenous people. From having a fair wage, understanding medical treatments, avoiding family separation, to accessing asylum or refugee processes. That is why not having interpreters in indigenous languages is an expression of language violence”*. (Romero, O; 2023).

Language violence occurs when agencies that provide services do not guarantee interpreters. On many occasions, they think that by speaking Spanish slowly the information is rendered. *“Sometimes it is assumed that a person has a mental disorder, but it is not that, but rather that they do not understand the language”* (Velasquez; A. 2023).

i. The correlation between land dispossession and displacement

This chapter consists of information from Q'eqchi, Zapotec, Mixtec, K'iche', Kaqchikel, Achi, Akateko and Ixil territories on the correlation between dispossession and displacement. Below we present a series of testimonies from various territories, which will allow a comparative look from various territories.

“I was threatened by the huachicoleros¹⁶², in Puebla, Mexico. If we didn't leave our community they would burn us, so we fled. When we arrived in this country, many people who speak their own language are not assisted and can't tell their stories because they are not provided with interpreters. That's why we need Mixtec and Nahuatl interpreters” (in Tzul Tzul; 2023).

“Evictions are the concrete reflection of displacement. The fact that communities are in the United States is a reflection of the politics in Guatemala. For example, all the evictions, and the burning of houses and harvests in Estor. That's why the Q'eqchi' have had to leave. The mine¹⁶³ is ravaging communities. There are also several threats of eviction in the Zona Reina, where there are K'iche' and Q'eqchi' relatives” (De León, M, 2023).

¹⁶² Huachicolero. These are groups and networks that perform illicit sales of motor fuel. In 2020, a crisis of these groups began in Mexico, a time characterized by the burning of spaces and confrontations where indigenous communities were also affected.

¹⁶³ They're referring to the Guatemalan Nickel Mine. -CGN-. Which has operating facilities on at least 248 square kilometers of land and mountains, dedicated to nickel mining in the municipality of El Estor, a territory where indigenous Q'eqchi communities live, the people who have ancestrally inhabited that region in Guatemala.

“In Q’eqchi territory, evictions take place every day. Communities have reported burned houses, burned crops. Several communities have disappeared. For example, in El Estor, there are at least three missing communities, one of which is the El Goce community. Which is a community that disappeared when the nickel company expanded its operations in the territory.” (Solis, I. 2023)

“Before communities didn’t have to leave. They didn’t migrate because they had their land and their crops. But hydroelectric power plants have pushed communities to leave their land. It is so in Chajul, not even during war time did they have to leave. There are now colonies of Ixiles from Chajul in Miami.” (De León, M. 2023)

“Twenty years ago there was no talk of migration in Q’eqchi communities.” But megacultures of cane, African palm, genetically modified (GM) lemons, Protected Areas and oil fields have displaced communities.” (Solis, I. 2023)

“Many people have had to leave, because the land to farm on no longer gives.” Here in the city of La Tinta, no one has land to farm on, but rather the land is solely rented out. And during these years, the rental price has been rising. But also the lands are not fertile. That’s drowning communities.” (Pop, D. 2023).

“The are several reasons why communities leave. As far as the K’iche’s peoples of Nahualá are concerned, they have to leave due to natural disasters. The Stand, Eta, Iota storms left communities without homes and crops.” (Tambriz, E. 2023).

These capitalist enclaves by dispossession have caused massive waves of displacement. In the fieldwork phase for this report, it was possible to confirm that information is disseminated in communities about the need for a young workforce in the United States. Therefore, there is a combination between the reasons for displacement as well as the very needs of the market. This is stated in the following testimony:

“It’s been about 20 years since we’ve heard among communities that in restaurants and construction, there’s only work for young people.” (De León, M. 2023)

“In the late 1980s, I was 17, I worked in a sewing factory and there were kids working there. Children have always been exploited. For example, to pick strawberries they prefer it to be a child or a person of short height because it’s fast work and it’s close to the ground.” (Romero, O. 2023).

The combination of these dynamics brings displaced indigenous people into dynamics of slave labor. Several of these cases have been accompanied by CIELO, in courts, hospitals, family detention centers, shelters, detention centers, social services and repatriation processes, among others, in 37 indigenous languages throughout 23 states of the United States.

3. “We are here”

In Los Angeles, it has been the communities themselves who have fought for themselves, to defend their rights to life, language, culture, economy and environment. The basis for these claims comes from the **We are here** project, an initiative to map the spatial distribution of indigenous peoples from Mexico and Guatemala in Los Angeles County. With funds, CIELO served 2,500 indigenous families in the context of the pandemic. According to the project estimates, the scope of this initiative reached more than 12,000 people.

We are here revealed that at least 17 different indigenous populations and their diverse language variables exist in Los Angeles. Other important data shows some of the types of labor where indigenous people work as restaurant workers, in the cleaning industry, laundries, construction, dry cleaners, clothing factories, as street vendors, babysitters and entrepreneurs from home.

According to the database of this project, the information and dissemination strategy were social ties. Janeth Martinez (2023) stated the following: *“It was labor networks, community networks, including musical band directors or chairs of native associations that the information was conveyed.”* A communal methodology was developed for the building of the database, showing that 44% worked in the restaurant sector, 29% in the cleaning sector and 11% in garment factories. What this shows us is that the migrant workforce and indigenous organizing, in coordination with community organizations, managed to resolve some of the fundamental issues in the way of the reproduction of life during the pandemic.

4. Detention centers.

The issue of indigenous children detained in family shelters, family detention centers and adults in detention centers is exacerbated by the lack of interpretation. The following testimonies will show that when migrants were detained, they were never provided an interpreter to navigate interaction with officials, proceedings and legal hearings.

“I was very afraid. I was coming with my 2 1/2-year-old. And they detained us, they took us to the detention center in Texas. There was no water there, they made us sleep on the floor. They gave us aluminum [blankets] and people fought over aluminum [blankets]. The food they gave us was frozen bread and ham. All of us who were detained were people with our children. I saw an 8-year-old boy coming with his grandmother. And they separated them. They told the older lady that the boy was staying and she was being deported. A lady with her niece also came and they were separated” (Velasquez, A; 2023).

*“They kept telling me, ‘You will be deported.’ We're separating you from your son. How are you going to prove that he is your son? I would answer them: If you have doubts, do a DNA test and that way they'd realize that he is my son. But we didn't have an interpreter, I was afraid to speak my language because I've always been discriminated against, **but my language saved my life**, because I used it to talk to my husband to then be able to leave.” (Velásquez, A; 2023)*

“After that experience, I've worked as an interpreter in a detention center where there were children. It's a right for them to have interpreters. But this reality not only takes place there, but in several places. I also work as a community organizer with CIELO and assist indigenous people at the Guatemalan Consulate in L.A. And there I've realized, not only

are there no interpreters, but also, they despise our people. Racism is very strong against us” (Velasquez, A; 2023).

“Many times, family reunification processes are not achieved, because they ask for impossible things. For example, they once asked for a recent photo of the child with the relative who was in the United States. But that is impossible, because in the first place, there is no money in communities to print photos. Then, how could you have a photo? If the family member had been gone for so long.” (Tambriz, E; 2023).

“I got to the detention center, and they put me in the icebox. They gave me prisoner clothes. I was in a room with 40 women. When I woke up I was scared, because it seemed like we were in a lonely graveyard. I was locked up with women who spoke various Mayan languages, Mam, K’iche’ and others. Many of us didn’t understand anything because we weren’t given an interpreter. At five in the morning we had cold milk and frozen food for breakfast, that made me sick. If we wanted to eat fruit, we had to work three hours for a dollar and buy them. I worked in the kitchen, washing dishes, packing food. When they gave us the asylum forms, they were in English, we didn’t understand anything, we couldn’t fill it out. When I had my first hearing, I didn’t have an interpreter. I didn’t understand anything the judge was saying. Now that I work in the courts as an interpreter, I think it was my preliminary hearing. That’s how I learned that the sponsor is the person responsible for a migrant. But migrants do not need a sponsor, because we work to support ourselves, our families and to sustain this country.” (Gonzalez, A; 2023)

According to the CILP director, Luis López Resendiz, 32% of the cases his department handles are minors in detention centers or family shelters. *“This reveals a structural problem, the first is that in the United States there is demand for young labor and on the other hand, that in communities, young people and children have to move due to displacement. This has brought on the problem of unaccompanied minors not being found like those 85,000 cases reported by the NY Times¹⁶⁴. There are several explanations, for example, that some human rights organizations offer to process the cases of minors, i.e. they do immigration paperwork, contact sponsors, carry out medical and psychological examinations, so that minors leave the shelters. They seek to expedite the exit, but along the way they do not provide interpreters. This again shows us the effects of language violence and that is one of the reasons why children are missing.” (Lopez, L; 2023)*

This whole process in which unaccompanied minors transit, contributes to the process of "Latino" homogenization. Latinization represents a challenge for indigenous fights as it invisibilizes their existence. *“The condition of latinization undermines our struggles, because they deny the existence of our peoples, but we exist in numbers and in actions” (Romero, O; 2023).*

Finally, we conclude by saying that it is important that the process of acknowledgement and true respect for indigenous languages be promoted from different authorities. How and in what ways would the migration process occur if indigenous language speakers were respected? How do we implement the right to not migrate?

¹⁶⁴ Refers to NYT report dated February 25, 2023. <https://www.nytimes.com/en/2023/02/25/english/child-exploitation-use-minors-migrants.html?smid=tw-share>

Oral History Bibliography in 2023.

De León Ceto, Miguel.

Gonzalez, Alba.

López Resendíz, Luis.

Martínez Romero, Janeth.

Romero, Odilia.

Solis, Isabel

Tambriz, Helena

Velasquez, Antonia.

Tzul Tzul, Gladys, 2023, Field Journal Number 2.

F. Racism and Racial Profiling

As RacismoMX discussed during the March 7 hearing, racism in Latin America has an exact start day: October 12, 1492. Today, it is sustained by invisibilization, as most Latin American states do not mention race in their regulations, policies, public discourse, or data. Racism in Latin America materializes in a historical dimension: *mestizaje* as a political project. However, this political project continues to have an impact on the racial discrimination experienced by people in the context of mobility today.

To discuss *mestizaje* in Latin America, it is important to know how different orders coexisted historically: segregationist and assimilationist. The first separated society by "races" (although we now know that "races" do not exist in a biological sense), as in countries in the Southern Cone or the Caribbean; and the second sought to "integrate" the indigenous communities. This "integration" involved obligating them to adopt European languages and ways of life while stripping them of their culture, language, and territories, as happened in Mexico, Colombia, and Peru. In reality, the supposed "integration" was an imposition that did not translate into an equitable distribution of rights.

We emphasize that *mestizaje* is an official narrative adopted by several Latin American states. Under this narrative, a biological and cultural mix of European and indigenous populations is exalted, but other identities and ways of life different from hegemonic European ones are erased.

However, *mestizaje*—beyond being a genetic mixture between population groups—is a narrative and ideological project that sought to unify peoples within the newly created Nation-States to have a common identity, but without offering real conditions of equity. However, this narrative led to any person or community that did not fit into this identity being subjected to marginalization and racial inferiorization.

In addition, *mestizaje* also materializes anti-Black racism, since it erases or denies African heritage that exists in the Americas.

With recent exceptions, Black people or Afro-descendants were not considered as part of the people in the official positions of the countries regarding identity, as is the case of Mexico, which until 2019 legally recognized Afro-descendants. There are even loopholes of scientific racism that considered Black or indigenous people as genetically inferior or dangerous. This is still in force, because of the norms that allow States to detain, monitor or harass people solely on the basis of their appearance.

In this regard, we highlight the case of *Amparo en Revisión 275/2019*, which was decided by the Supreme Court in Mexico. In this case, the National Institute of Migration detained and tortured three people from Chiapas for the offense of "not appearing to be Mexican." This case is

the first time that the Mexican State had recognized the profiling of racialized people. It resulted in declaring articles 97 and 98 of the Migration Law, which granted powers to migration agents to detain or monitor migrants, unconstitutional.

Racialization is the process by which a person's physical or cultural characteristics are read and narratives are attributed to them, with negative stereotypes generally assigned to people of brown, indigenous, Afro-descendant or Black skin tone. Therefore, it is necessary to emphasize that, due to the erasure of identities as a consequence of the political project of mestizaje, racism does not only materialize towards people who recognize themselves as indigenous, Afro-descendant or black, but also those who call themselves mestizos or who do not identify with any of them, who, because of their dark skin tone or other ethno-racial markers, also experience racism.

In fact, in a report from RacismoMX entitled "As I Am Seen, I Am Treated: Racial Profiling in Migration,"¹⁶⁵ the organization highlighted that migration agents racially profile Central Americans and Caribbean people even if they do not identify themselves as indigenous or Afro-descendants. The migration agents used variables such as accents, words used, or other racial-ethnic markers to detain or monitor them. In other words, an accent associated with Europeaness is not a reason for detention, while racialized languages and ways of speaking are.

Commissioners, migration is racialized. We consider it necessary to look at the ethnic and racial identity of people in the context of mobility for two main reasons. First is that indigenous, Afro-descendant and racialized people in general are immersed in contexts of historical and structural inequality, living in poverty, with greater vulnerability to violence and the effects of climate change, and because of these conditions, they are the ones who normally move in an irregular manner. Second is that the authorities of Latin American transit or destination countries discriminate against and violate the rights of racialized migrants because they do not fit into the mold of the idea of the national person and, consequently, are victims of institutional racism.

Thus, Racial profiling impacts the lives of victims in multiple ways. Even though it does not always result in acts of physical violence or deprivation of liberty, it inserts discriminatory narratives into communities and affects the psychological and emotional health of those who suffer from it. In turn, it hinders access to education, housing and work due to the discriminatory conceptions assigned to racialized, indigenous or Afro-descendant migrants; notions that are reinforced by the elaboration of racial profiles by the State, and made invisible by the lack of recognition of this widespread problem.

The Observatory proposes understanding racial profiling as a violation with a compound nature. It is not limited to the act of detention, surveillance, harassment or request for documents, but rather it is the gateway that allows other violations to be generated and causes direct and indirect impacts. Directly, it results in disproportionate migratory controls for racialized migrants, including indigenous, Caribbean or Afro-descendant migrants, which manifests itself in arbitrary detentions, deprivation of liberty, and sometimes torture. Indirectly, racial profiling hinders access to other rights and generates fear or collective stress as a result of belonging to a racially profiled population group.

¹⁶⁵ Observatory of Racism in Mexico and Central America, "Como me ven, me tratan," available at: <https://img1.wsimg.com/blobby/go/86f2ada1-8037-4dc1-bc3c-dfb4844a64f7/Como%20me%20ven%2C%20me%20tratan%20-%20RacismoMX.pdf>.

G. Recommendations and Requests for the Commission

1. Recommendations Regarding Structural Racism in the United States

As the Center for Immigration Law and Policy (CILP) discussed, reforming migration in the Americas needs to center racial justice and reckon with the structural racism in laws like Sections 1325 and 1326. The history and current impact of the U.S.'s criminalization of entry and reentry is fundamentally incompatible with international human rights law. The Inter-American Commission can and should address the criminalization of migrants at the U.S.-Mexico border. We urge the Commission to start with the following actions:

1. Conduct a working visit to the United States to observe Section 1325 and Section 1326 proceedings and meet with individuals in federal criminal and immigration detention convicted of these crimes.
2. Publish a report based on these observations with a focus on U.S. federal criminal entry and reentry laws as a key issue of immigration and racial justice in the Americas.
3. Formally condemn family separation, mistreatment of migrants at the border, and the racist history and current racist impacts of federal entry and reentry laws in the Commission's recommendations to the U.S.
4. Recommend that the United States review its laws which criminalize migration, including Sections 1325 and 1326, and employ all necessary means, including repealing, to ensure compliance with Inter-American standards.

2. Recommendations Regarding Discrimination Against Black Migrants in the United States

As BAJI discussed, Black migrants face racial discrimination, surveillance, profiling, and violence throughout their migration journey. The structural racism inherent in immigration enforcement is exacerbated by policies emphasizing deterrence and border externalization, which only create increased violence and dehumanization for Black migrants. The racism and abuse these individuals experience will only be further intensified and spread throughout the Americas by 'smart border' technologies, which disproportionately impact Black migrants. We ask the Commission to bring light to the particular and disproportionate ways in which Black people are the target of discriminatory immigration policies and enforcement. We urge the Commission to denounce these discriminatory policies and practices as blatant violations of international human rights law. We recommend the Commission call for an immediate end to border externalization and deterrence policies. Additionally, the Commission should condemn racial discrimination throughout migration processes and insist upon an anti-racist approach to migration in the Americas. Finally, we urge the Commission to take the following actions regarding border technology:

1. Recommend that the U.S. cease all efforts to use, develop, or adopt new surveillance technologies at the border.
2. Establish and/or advocate for a global governance framework regarding the use of digital surveillance technologies with specific international human rights obligations.
3. Condemn the use of "smart border" enforcement technologies.
 - a. Acknowledge these technologies intensify racial discrimination and violence at the border and throughout migration processes, particularly for Black migrants.

- b. Acknowledge the potential widespread global harm caused by these technologies in connection with border externalization.
 - c. Acknowledge these technologies have dangerous implications for international human rights law prohibitions on racial discrimination as well as privacy and data protection laws.
4. Insist that the U.S. investigate and publish more complete information on the design and use of technologies at the border, including their impact on different racial groups, and disclose all parties involved in public-private partnerships to design such technologies.
 5. Recommend that the U.S. establish an independent body for oversight and accountability of the use of technology at the border.
 - a. Oversight bodies should be independent from government and involve input from racially marginalized communities, migrants, and asylum-seekers.
 - b. Provide a mechanism for migrants to raise concerns about human rights violations related to technology at the border.
 - c. Increase accountability for both public and private sector in their design and use of these technologies.
 - d. Provide remedies for migrants who face human rights violations, including racial discrimination, due to technology at the border.

3. Recommendations Regarding States' Duty to Prevent Harms Committed Against Black People Throughout the Americas, especially at the Darién Gap

In the following section, HBA elaborates and provides more specific recommendations on these two prongs. Further, HBA provides recommendations on the question of States' duty to prevent and account for violence and harms committed against Black people in mobility throughout the Americas, with a focus on the Darién Gap.

These recommendations respond to follow-up comments made by the Commission after the civil society presentation on March 7, 2023. Commissioner Joel Hernandez García spoke to addressing root causes of mobility through regional action and accord and sought follow-up recommendations for his upcoming report on mobility from South to North America in his role as Special Rapporteur on the Rights of Migrants. Commissioner Roberta Clarke also spoke to addressing root causes, using a trauma-informed approach to all action, and the need to address harm committed by non-state actors, such as the harms being perpetrated in the Darién Gap. Below, HBA offers recommendations responsive to the Commissioners' comments and questions.

1) OAS States should make structural repairs in inter-American relations to address root causes of displacement, including but not limited to the following measures:

- a) OAS States should pursue regional strategies towards human mobility based on a human rights approach and a focus on addressing the root causes of migration and forced displacement of Black people in the Americas, such as inequities resulting from the unrepaired legacies of colonialism, slavery, and neo-colonial imperialism, rather than pursuing strategies based on "prevention through deterrence" theory.

- i) States should resolve to initiate reparatory and transitional justice processes for crimes against humanity committed through colonialism, the trans-Atlantic slave trade, and neo-colonial imperialism.
 - ii) States should use power in multilateral financial and trade institutions to satisfy the right to development for Haiti and agree to focus on supporting a strong, safe, sustainable ecosystem in Haiti that allows people to thrive and not be forced to relocate outside of Haiti in order to survive—including new schools, hospitals, roads, and support for the revival of the agriculture and farming industry (that the U.S. has destroyed)
 - iii) States in the OAS should resolve to stop the practice of neo-colonial imperialism, where one State uses historically-based disparities in economic, military, and geopolitical power to support the structural undermining of the right to self-determination and right to development in other OAS states.
 - b) All States of the Americas should accede to the American Convention on Human Rights and submit to the jurisdiction of the Inter-American Court of Human Rights.
- 2) OAS States should immediately expand protections for Black people in mobility in the Americas, including but not limited to the following measures:**
- a) OAS States should immediately stop all deportations to Haiti, returns of people fleeing Haiti through maritime interdiction, and observe the right of non-refoulement, a jus cogens norm at international law that is binding on all States.
 - b) OAS States should use existing provisions within their legal framework, including emergency procedures, if necessary, to grant immediate protected status for people of African descent in mobility.
- i) The grants of Temporary Protected Status for Haitians and Cameroonians in the U.S. are examples of positive special measures States should take.
 - c) OAS States should expand visa access for Haitians and people of African descent.
 - d) To counteract racism and bias against Black people in its immigration system, the U.S. should follow recommendations made in 2022 by the United Nations Committee on the Elimination of Racial Discrimination (CERD), and States in the OAS can adapt these recommendations to the context of each of their respective immigration system.¹⁶⁶

¹⁶⁶ See CERD, *Concluding observations on the combined tenth to twelfth reports of the United States of America*, UN Doc. CERD/C/USA/CO/10-12 (September 21, 2022), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FUSA%2FCO%2F10-12&Lang=en. Recommendations include:

- i) Ending immigration enforcement programmes and policies that indirectly promote racial profiling, such as the section 287 (g) programme under the Immigration and Nationality Act, Para. 19 (c)
- ii) End mandatory detention and ensure due process for all detained non-citizens, without discrimination, including access to legal counsel, Para. 52 (a)
- iii) Reinforce measures to prevent any excessive use of force and undertake prompt, independent and thorough investigations into all allegations of excessive use of force and killings by Customs and Border Protection officers and by Immigration and Customs Enforcement officers, hold those responsible to account and provide effective remedies for victims and their families, Para. 52 (b)
- iv) Discontinue the policy of criminally prosecuting non-citizens, including asylum-seekers, for irregular entry; redouble efforts to swiftly repeal Title 42 and the Migrant Protection Protocols; and provide all non-citizens with sufficient procedural guarantees in the consideration of their applications for international protection; Para. 52 (c)
- v) Set up a comprehensive data-collection system on immigration, disaggregated by ethnicity, nationality, gender and other relevant indicators, including information on detained non-citizens, asylum procedures followed and their outcomes, and incidents of excessive use of force, Para. 52 (d)

3) Recommendations regarding States' duty to prevent harms caused by non-state actors, with a focus on Panama's Darién Gap:

- a) States in the OAS should collaborate regionally, with a human rights approach, to support the state of Panama to address the human rights crisis and ongoing violations occurring in Panama's Darién Gap.
- b) In all regional collaboration, States should reference the relevant recommendations made to Panama by the UN's Human Rights Committee in 2023,¹⁶⁷ the Committee on the

¹⁶⁷ See Human Rights Committee, *Concluding observations on the fourth periodic report of Panama*, UN Doc. CCPR/C/PAN/CO/4 (March 24, 2023), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FPAN%2FCO%2F4&Lang=en. Recommendations include:

- Redouble efforts to prevent and combat all forms of violence against migrant women in the Darién Gap and provide adequate protection to victims; and, in this regard, is encouraged to implement the recommendations made in February 2022 by the Committee on the Elimination of Discrimination against Women. Para. 18 (e).
- Ensure that cases of violence against women, including against migrant women, are promptly and effectively investigated, that perpetrators are punished and that victims obtain comprehensive reparations, and have access to means of protection, including adequate shelters and counselling centers and to system. Para. 18 (b)
- Intensify its efforts to prevent, combat and punish trafficking in persons, and ensure that trafficking crimes are investigated, perpetrators prosecuted and punished, that victims are provided with comprehensive reparation and that they have access to adequate protection and assistance measures, including sufficient geographical coverage of shelters, particularly in border areas; and, in this regard, it is encouraged to implement the recommendations made in February 2022 by the Committee on the Elimination of Discrimination against Women; Para. 30 (a)
- Adopt the necessary protection measures to guarantee the life and safety of migrants who cross the Darién Gap and to effectively prevent and combat all forms of violence against these people; Para. 36 (a)
- Strengthen its efforts to investigate allegations of murders, disappearances, kidnappings, sexual violence, trafficking, assaults, robberies, intimidation and threats against migrants; prosecute and punish those responsible; and provide comprehensive reparation to victims and their families; Para. 36 (b)
- Fully respect the human rights of migrants housed in immigration reception stations, in particular the right not to be deprived of liberty, and guarantee them effective remedies against any violation of their rights; Para. 36 (c)
- Increase efforts to improve living conditions in migrant reception stations and ensure access to basic services; and, in this regard, the State party is encouraged to implement the recommendations made in February 2023 by the Committee on Economic, Social and Cultural Rights; Para. 36 (d)
- Guarantee in practice the protection of asylum seekers and refugees, in accordance with the Covenant and international standards, and strengthen the capacity of the National Office for the Care of Refugees, providing it with adequate financial and human resources, so that it can respond in a timely manner to requests for refuge. Para. 36 (e)

Elimination of Discrimination Against Women in February 2022,¹⁶⁸ and the Committee on Economic, Social, and Cultural Rights in 2023.¹⁶⁹

¹⁶⁸ See CEDAW, *Concluding observations on the eighth periodic report of Panama*, UN Doc. CEDAW/C/PAN/CO/8, (February 24, 2022), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fPAN%2fCO%2f8&Lang=en. Recommendations include:

- Adopt an emergency plan to tackle and eliminate all forms of violence against migrant women in transit in the Darién Gap, based on a human rights approach to the crisis, ensuring victim-oriented and gender-sensitive policies and measures to address the situation, Para. 24 (a)
- Remove the requirement to file a complaint with the Office of the Public Prosecutor in order for women to have access to the National Institute for Women survivor assistance programmes, including shelters for victims of gender-based violence against women, Para. 24 (b)
- Reinforce cooperation and partnerships with the international community and civil society and women's organizations to ensure that migrant women have access to the State party's full range of services providing redress to survivors of gender-based violence against women, including in the areas of health care and psychosocial support, Para. 24 (c)
- Implement protection measures to guarantee the life and safety of women victims and witnesses of gender-based violence, including girls and family members, and increase the availability of shelters for high-risk victims of gender-based violence, allocating financial resources for them; Para. 24 (d)
- Guarantee access to justice for women in the border area of the Darién Gap regardless of their status, intensifying its efforts to investigate and punish the persons responsible for rape and other types of violence, and establish a mechanism within the criminal justice system to address complaints related to gender based-violence against migrant women in transit, ensuring recognition of protection measures for witnesses and survivors; Para. 24 (e)
- Collect data, disaggregated by sex, age and nationality, on women migrants and asylum seekers entering the State through the Darién Gap who have been victims of violence, including sexual violence, as well as information on the outcome of the investigation and prosecution of registered cases. Para. 24 (f)
- Adopt measures to prevent and to provide specialized support to women victims of sexual violence in migrant reception stations, to improve referral systems of women and girl victims of trafficking to the appropriate social services, and to establish specialized shelters for women and girl victims of trafficking, including measures to guarantee the safety of women under protection. Para. 26 (f)

¹⁶⁹ See CESCR, *Concluding observations on the third periodic report of Panama*, UN Doc. E/C.12/PAN/CO/3 (March 31, 2023), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fPAN%2fCO%2f3&Lang=en. Recommendations include:

- Increase reception capacity and continue to improve the living conditions of the migratory reception centres in Darién and Chiriquí, facilitating access to, inter alia, adequate food, drinking water, sanitation and hygiene, health services and access to education; Para. 43 (a)
- Design and implement a contingency plan, with a human rights approach, to respond comprehensively and comprehensively to the influx of migrants, refugees and asylum-seekers, ensuring access to fundamental rights and basic services in the border areas of Darién and Chiriquí, and integrating a gender approach and protection of all persons in vulnerable situations; Para. 43 (b)
- Take into account, in this regard, its Declaration on the Obligations of States with regard to Refugees and Migrants under the Covenant; Para. 43 (c)
- Take into account, in this regard, the recommendations of the Committee on the Elimination of Discrimination against Women, particularly with regard to gender-based violence against women in border areas. Para. 43 (d)