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NGO ALTERNATIVE REPORT

An NGO Alternative Report for the UN Committee on the Elimination of Racial Discrimination, Submitted by the Center for the Human Rights of Children, Loyola University Chicago School of Law

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The Center for the Human Rights of Children is an interdisciplinary academic center with a mission dedicated to advance and protect the rights of children. Faculty authors have over 30 years combined experience working on child migration and human rights issues as practitioners, advocates, and scholars, and regularly work with and collaborate with NGOs, government agencies, academia and researchers, and other stakeholders

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I. Introduction

From August 8 to 30, 2022, during its 107th Session, the UN Committee on the Elimination of Racial Discrimination ("Committee") will review the combined tenth through twelfth period reports submitted by the United States of America ("US") under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). Since the United States Government (USG) last produced a report in 2014, advancements in compliance with the Convention have been initiated via government trainings to address (i) racial profiling (ii) the prevention of hate crimes and hate speech, and (iii) excessive use of force by law enforcementⁱ. Additionally, USG has produced a number of executive orders (EO) to promote the elimination of racial discrimination such as EO 13985 Advancing Racial Equity and Support for Underserved Communities and EO 13993 Revision of Civil Immigration Enforcement Policies and Prioritiesⁱⁱ.

Despite state actions to enhance compliance with the Convention, the US has significant room for growth and must address the racial inequities that permeate the immigration system. We want to underscore the critical intersection of racism and racist acts against all people of color in the US, including US citizens and migrants. This report, composed by the Center for the Human Rights of Children (CHRC), seeks to provide input on the following themes: racial discrimination in the US immigration system with a particular focus on the experience of migrant children and families. Our analysis will focus the intersection of US immigration policies and its obligations under Articles 2, 4, and 5 of the Convention. While we focus on these particular Articles, we acknowledge that our analysis and recommendations invoke other cross cutting and intersecting Articles and rights articulated under ICERD and other international human rights instruments. The sources used to inform our input and recommendations include the most recent USG periodic combined report under ICERD, published governmental reports and data, NGO published reports, published academic reports and research, reliable media reports, and current legislation and US governmental policies.

II. The United States Immigration System is Infused, from Past to Present, with an Ethos of Racism

The United States immigration system was built upon the ability to import cheap labor, generally from the Global South in the form of Black and Brown bodies, while foreclosing full civic participation to those same peoplesⁱⁱⁱ. This is evidenced throughout policies such as the forced migration and enslavement of African Americans beginning in 1619, to the Chinese Exclusion Act in 1882, and the Bracero Program in 1942^{iv}. While the United States relied upon cheap labor from the Global South, the mechanisms for exclusion demonstrate significant influence by xenophobic and exclusionary laws and policies^v.

The Naturalization Act of 1790, which was the first US law to define eligibility for US citizenship, restricted naturalization to "free white person[s]".^{vii} Confining naturalization solely to white persons, at the exclusion of all persons of color, expressed rudimentary concepts of membership and in-group exclusivity that continue to inform contemporary US immigration laws.^{viii} The

foundational naturalization law of the US cemented the codification of social constructions equating whiteness to citizenship and possession of rights, while excluding all other racial groups.^{ix} Legal scholars have opined that “[a]t different times and in differing degrees in the history of the United States, the law has functioned to perpetuate tiered personhood based on race or ethnicity, forming different groups and classes of persons.”^x

This racist approach to restricting civic participation is again demonstrated in 1882 when Congress passed the Chinese Exclusion Act.^{xi} After permitting significant numbers of Chinese laborers into the United States in order to build the continental railroad, the immigration system again decided that the laborers’ civic participation was a threat to the decisionmakers’ vision for their ideal America^{xii}. Thus, the Act became the first comprehensive US immigration policy to refuse immigrants based specifically on race and ethnicity^{xiii}. The Chinese Exclusion Act paved the way for immigration procedures still used today such as those related to immigrant detention^{xiv}.

Echoing historical immigration patterns of ushering foreign laborers into the US, then promptly expelling those laborers when they were no longer needed, was the *Bracero Program*. Between 1942 to 1964, under an arrangement of three bilateral agreements between the US and Mexico^{xv}, four million Mexican workers (*braceros*)^{xvi} were legally transported into the US under short-term labor contracts to fulfill labor shortages in the railroad and agricultural industries.^{xvii} Although agreements between the US and Mexico stipulated that *braceros* were to be protected from discrimination and poor wages, in practice, US growers benefitted from cheap and abundant labor while *braceros* suffered from exploitation, abuse, and racial discrimination.^{xviii} The program highlighted the US’s contradictory immigration regime, which incentivized the flow of both documented and undocumented migrant laborers to meet market demands in the US agricultural industry under the *Bracero Program*, while simultaneously threatening, apprehending, and deporting those same migrants under “Operation Wetback” in 1954.^{xix} Operation Wetback was an overtly racist, military style campaign implemented during the Eisenhower administration which resulted in the arrest and mass deportation of Mexican and Latino nationals, including Mexican nationals who became US citizens^{xx}.

Contemporary immigration law and policy in the United States is inextricably tied to this racist history—its ideologies, policies of exclusion, and racialized narrative is rooted in a history of racism^{xxi}. As a result, immigration policies are centered around concepts of nationalism—white nationalism—which views immigrants as an existential threat to the nation’s racial status quo^{xxii}. During the 1920s, this attempt to maintain the racial status quo was made plain through the 1924 Immigration Act—designed to “make permanent the racial composition of America at that time.”^{xxiii} This Act was so widely associated with white supremacy that it was held out by Adolf Hitler in *Mein Kampf* as a model for achieving racial purity.^{xxiv} The mass deportations and racist rhetoric of Operation Wetback was cited as a positive example by President Trump during the Presidential election debates,^{xxv} and informed his subsequent immigration policies. These racist underpinnings, and systemic design to exclude persons of color, invariably result in a pervasive culture of racism and state sanctioned acts of reprehensible violence against migrants of color.

In this crosshair of a system animated by racial hostility, child migrants of color are particularly vulnerable.^{xxvi} Black and Brown migrant children in particular are caught at an intersection in which their national origin, race, and status as children combine to create conditions of intense subordination.^{xxvii} Migrant children, facing the egregious effects of “othering” are not even treated

as children in the US immigration system, unlike other legal systems. They are, instead, treated as adults in miniature—facing the exact same system and legal standards as adults without any regard for their age, stage of development, diminished capacity, disability, or the presence of trauma. Adolescents, children, toddlers, and even infants subject to immigration detention, are required to appear in the same court as adults to defend their right to remain in the safety of the United States and are subjected to adversarial proceedings in which there is no consideration of their best interests. This system defies principles of child welfare that infuse every other area of US law.

III. The US Obligations Under ICERD on the Elimination of All Forms of Racial Discrimination

This input will focus its analysis and discussion of the USG obligations under ICERD Articles 2, 4, and 5.

Article 2, 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms... to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (c) Each State Party shall ***take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;*** (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization...(emphasis added)

Article 4, States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5, In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

IV. Structural Racism in the Contemporary Immigration System: Executive Action is Not Enough

While we acknowledge the progress of the Biden Administration in the implementation of Executive Orders (“EO”) to improve situations of racial discrimination (see Section III(A) below) against immigrants and migrants in the US, executive action alone will have limited sustained impact on correcting an immigration system imbued with an ethos of racism. An executive order (EO) is a signed, written, and published directive from the President of the United States that manages operations of the federal government.^{xxviii} EOs are not law or legislation, however, and thus they require no approval from Congress, and Congress cannot overturn them.^{xxix} Only a sitting US president may overturn an existing executive order by issuing another executive order, as demonstrated by the Biden Administration’s reversal of several of President Trump’s EOs curtailing immigration^{xxx}. This process lacks input and collaboration from Congress, and thus can be perceived as a unilateral governmental policy, much like EOs produced by the Trump Administration criminalizing migrants. Any progress under the EOs produced under the Biden Administration are vulnerable to subsequent executive action and future administrations.

Given the historical ethos of racism and discrimination against migrants and immigrants in the US immigration system, the USG should consider a bolder, more systemic approach to comply with its expressed intentions and its obligations under ICERD to eliminate all forms of racial discrimination. The USG, with input from civil society, should conduct a federal assessment of racial discrimination against migrants and immigrants in *all* areas of law, regulation, and policy across each USG department and agency. This assessment could then inform a federal action plan to eliminate racism, racialized violence, discrimination, and provide a roadmap for future legislative and regulatory reform to the US immigration system, and thus clarify its intentions regarding US immigration law, regulations, policy, and executive authority in this area. Additionally, there are other immediate steps the USG can implement to ameliorate the harm of racist practices and racial discrimination against migrants and immigrants, which are discussed below and in the recommendations.

A. Despite Efforts, the USG Cannot Comply with Articles 2 & 5 of ICERD

The USG is required to “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms,”^{xxxxi} to ensure the “right to equal treatment before the tribunals and all other organs administering justice,”^{xxxii} and the ensure “the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”^{xxxiii} Yet a system, built upon discrimination, cannot be easily amended to protect people of color.

The Biden Administration has made efforts to ameliorate the racist effects of the previous Administration’s immigration policies. Specifically, the Biden Administration has executed

several Presidential Executive Orders (“EO”) including Proclamation 10141, *Ending Discriminatory Bans on Entry to the United States*, which “revoked EO 13780 and other proclamations that had prevented certain individuals from entering the United States from primarily Muslim and African countries. President Biden declared that ‘those actions are a stain on our national conscience and are inconsistent with [the United States’] long history of welcoming people of all faiths and no faith at all.’”^{xxxiv} Similarly, President Biden issued EO 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, which articulated the current Administration’s baseline values and priorities for enforcement of civil immigration laws and directed a comprehensive Department-wide review of civil immigration enforcement policies. It also directed the Department of Homeland Security (DHS) component agencies to issue interim guidance implementing the revised enforcement priorities.^{xxxv} Lastly, the Biden Administration notes that USG policy prohibits racial profiling across immigration law enforcement, investigation, and screening activities.^{xxxvi} In other words, the USG is purportedly taking strides to ameliorate racial profiling in the criminalization of immigration/immigrants—a term colloquially referred to as “cimmigration.”

- **Crimmigration as a Form of Racial Discrimination**

Crimmigration refers to the convergence of criminal and immigration law in which the state expels those deemed “criminally alien” from the populace.^{xxxvii} Crimmigration is embodied by a two-way pipeline to deportation in which criminal convictions result in immigration law consequences and violations of immigration law are penalized through the criminal justice system.^{xxxviii} In fiscal year 2017 (FY17), fifty-six percent of all persons deported by Immigration and Customs Enforcement (ICE) were deported on criminal grounds.^{xxxix} In the US, one in three Black males and one in six Latino males will likely serve a prison sentence, compared to only one in seventeen white males.^{xl} Consequently, the symbiotic merging of criminal and immigration law operates by funneling predominantly Black and Latinx non-citizens from the criminal court system to the immigration court system with the intended outcome of deportation.^{xli}

- **Creating Broader Categories of Deportable Criminal Offenses Which Disparately Impacts Migrant Communities of Color.**

Over the past three decades, US policy changes have expanded the ways in which immigrants can be criminalized, resulting in disproportionate immigration consequences for noncitizens of color.^{xlii} The broadening of offenses that constitute as aggravated felonies and crimes involving moral turpitude now frequently result in punitive immigration repercussions, namely deportation.^{xliii} Presently, nonviolent behaviors such the use of false documents qualify as aggravated felonies alongside rape and murder.^{xliv} This expansion of deportable offenses results in disproportionate immigration enforcement against Black and Brown immigrants.^{xlv}

- **Criminalizing the Act of Migration which Disparately Impacts Migrant Communities of Color.**

In addition to expanding the criminal grounds of removal from the United States, the USG has also expanded the criminalization of migration itself.^{xlvi} Immigration violations, such as physical presence in the United States without authorization, have historically been treated as a civil offense. A significant change in the treatment of immigrants as criminals followed from the

reclassification of undocumented entry and reentry as crimes under 8 US Code § 1325 and 1326. 8 USC. 8 § 1325 makes it a crime *to unlawfully enter* the United States.^{xlvii} It applies to people who do not enter with proper inspection at a port of entry, such as those who enter between ports of entry, avoid examination or inspection, or who make false statements while entering or attempting to enter. A first offense is a misdemeanor punishable by a fine, up to six months in prison, or both. 8 USC. § 1326 makes it a felony *to unlawfully reenter*, attempt to unlawfully reenter, or to be found in the United States after having been deported, ordered removed, or denied admission.^{xlviii}

According to data from US Customs and Border Protection (CBP), illegal entry and re-entry constitutes the highest number of criminal convictions by type at over 4,000 arrests in FY22, followed by illegal drug possession and driving under the influence with, comparatively, only about 1,000 arrests each.^{xliv} Prosecuting illegal reentry as a felony is a punitive measure that uniquely applies to immigrants—the overwhelming majority of which are Black and Brown migrants from the Global South.¹ In fact, the combined, violations of 8 USC. §§ 1325 and 1326 became the most prosecuted federal offenses in recent years. Indeed, as of December 2018, they constituted 65 percent of *all* criminal prosecutions in federal court.^{li} The criminalization of the act of migration has given rise to the narrative of the “criminal alien.” The narrative is so ubiquitous that the term “illegal alien” or just “illegals” is normalized in all facets of American society.

Persons from Mexico, Guatemala, Honduras, and El Salvador make up the majority of migrants encountered at both the southern border of the United States and nationwide^{liii}. At the US-Mexican border, crimmigration manifests as merged associations of skin color, race, and ethnicity, with safety and citizenship.^{liiii} Within these associations, white populations are positively constructed as safe citizens while Black and Brown populations are negatively constructed as dangerous “illegals” and criminals.^{liv} Accordingly, crimmigration is inextricably linked to the racialization of Black and Brown immigrants from the Global South.^{lvi}

➤ **Over-policing of Migrant Communities of Color**

One of the mechanisms to enforce crimmigration within US borders is Section 287(g) of the Immigration Nationality Act, which allows DHS to enter into formal written agreements (Memoranda of Agreement or MOAs) with state or local law enforcement agencies and deputize selected state and local law enforcement officers to perform certain functions of federal immigration agents. The MOAs are negotiated between DHS and the local authorities and include delegation of authority to a limited number of state and local officers. The result of such agreements is state sanctioned over-policing of Black and Brown residents in the form of investigatory traffic stops.^{lvii} During these traffic stops, minor offenses such as a broken taillight or a traffic violation are used as a segue to expose a driver's criminal offenses or ask about a driver's immigration status.^{lviii} Although traffic stops are technically a race-neutral policy, they have a disparate impact on Black and Latinx migrants who statistically are more likely to be stopped and subjected to heightened levels of scrutiny.^{lix} A 2020 study, with an expansive dataset of nearly 100 million traffic stops across the US, found that "Black drivers were twenty percent more likely to be stopped than white drivers relative to their share of the residential population."^{lx}

It follows that since Black and Brown persons are more frequently subjected to investigatory traffic stops, Black and Brown immigrants are overrepresented amongst total immigrant populations

facing deportation on criminal grounds—despite there being no evidence that Black or Brown immigrants commit crimes at a higher rate relative to other immigrant populations or the US population more generally.^{lxi} For example, even though crime rates for marijuana usage are steady across racial groups, Black persons are still nearly four times more likely than white persons to be arrested on a possession charge.^{lxii} Moreover, although Black immigrants comprise only seven percent of the immigrant population, they comprise over twenty percent of noncitizens facing deportation on criminal grounds.^{lxiii} In practice, the over-policing of Black and Brown communities results in inflated exposure of migrants of color to the criminal legal system—which is one of the primary ways in which migrants of color end up being deported.^{lxiv}

Under the 287(g) program, US Immigration and Customs Enforcement (ICE) deputizes state and local law enforcement agencies by granting them authority to identify and remove noncitizen immigration offenders.^{lxv} While the USG acknowledges review of the use of its 287(g) program,^{lxvi} the USG fails to clarify how insidious the racist effects of this program are for migrants of color. 287(g) only increases the likelihood that immigrants of color have contact with the criminal justice system at disproportionate rates. The evidence is overwhelming that deputizing local law enforcement to enforce federal immigration laws harms immigrants and their communities.^{lxvii} The numerical impact of 287(g) partnership agreements is not clear, because the USG does not track the number of deportations and detentions that have resulted from these agreements.^{lxviii} However, the evidence is clear that 287(g) partnership agreements harm immigrants of color who are already more likely to be stopped by law enforcement as a result of aggressive policing of communities of color.^{lxix} “Many 287(g)-participating sheriffs have gone beyond policy disagreements and are claiming authority to defy federal policy in order to enforce inhumane policies, particularly to preserve the anti-immigrant, anti-human rights legacy of the Trump administration.”^{lxx} Since immigrants of color are more likely to be deported on criminal grounds and more likely to be detained,^{lxxi} these programs produce a disparate impact for immigrants of color.

In its Concluding Observations on the combined seventh to ninth periodic reports of the USG^{lxxii} the ICERD Committee explicitly called for the USG to end “immigration enforcement programmes and policies which indirectly promote racial profiling, such as the Secure Communities programme and the Immigration Nationality Act section 287(g) program.” While the Biden Administration has ended the Secure Communities program,^{lxxiii} 287(g) persists.^{lxxiv}

➤ **Over-policing and Misapplication of Law Discriminates Against Migrant Children**

The over-policing of adults of color in the United States also extends to juveniles. Brown and Black children are disproportionately placed in juvenile justice proceedings.^{lxxv} This not only has implications of racial discrimination within the juvenile justice system, but also has discriminatory impact on migrant children seeking immigration status and protection in the US immigration system. CHRC recently conducted an in-depth review of immigration cases that were denied as a matter of discretion wherein the US Citizenship and Immigration Services (USCIS) officer relied exclusively on underlying juvenile delinquency records to deny the case. CHRC found 1) USCIS adjudicators rely inappropriately on immigration case law to support the proposition that juvenile records may be considered as a matter of discretion in immigration adjudications; 2) USCIS officers fundamentally do not understand the legal scheme or purpose of juvenile justice systems

as a matter of state law and policy; and 3) USCIS officers misapply juvenile justice records in the discretionary immigration process.

Notwithstanding the clear policies behind the majority of state juvenile justice systems, with no training on adolescent development nor an understanding of juvenile justice case law related to youth, USCIS uses juvenile records to allege sufficient “significant adverse factors” to support a negative discretionary determination of youth seeking adjustment of status. Indeed, adjudicators often suggest that these juvenile justice system contacts outweigh the fact that applicants with juvenile records typically have resided in the United States for extensive periods or “grown up” in the United States. The inappropriate use of juvenile records in this way demonstrates a fundamental misunderstanding of the juvenile justice law and policy.

For additional details, please refer to Appendix A, *The Inappropriate Use of Juvenile Records in Immigration Discretion, Academic Research and Position Brief*, July 2022, Loyola University Chicago School of Law

➤ **Overbroad Use of Detention Disparately Impacting Migrant Communities of Color**

There is broad consensus that the US system of mass incarceration, including immigration detention, imposes significant costs and hardships on our society and communities and does not make us safer.^{lxxvi} Just as a disproportionate number of people of color are harmed by the US criminal justice system,^{lxxvii} immigrant detention disproportionately harms immigrants of color.^{lxxviii} While, in general, individuals are far more likely to be detained for an immigration violation than a criminal conviction, Black immigrants are more likely to be detained for a criminal conviction than an immigration violation.^{lxxix} Caribbean immigrants are almost twice as likely to be detained for a criminal conviction than an immigration violation.^{lxxx} Immigrants from Africa and the Caribbean are more than three times as likely to be detained throughout their removal proceedings.^{lxxxi}

Moreover, there are widespread reports of people of color in immigration detention suffering horrific abuse. For example, a 2021 study found that 31% of detainees subjected to ankle shackling were Black, even though they constituted just 15% of the detainees in the sample population.^{lxxxii} In 2018, the first national study on hate and bias in US immigration detention centers found 800 complaints of abuse based on race, ethnicity, or nationality.^{lxxxiii} Additionally, a 2022 report documented twenty-four cases of abuse against eighteen Cameroonian asylum seekers who were later deported.^{lxxxiv} The documented abuses included rape, abusive solitary confinement, isolation or segregation, pepper spray, beatings, and painful restraints.^{lxxxv} In February of 2022, an official complaint was filed against an immigration detention facility in New York alleging “racist and retaliatory abuse, violence, and medical neglect” of detainees.^{lxxxvi}

Pretrial criminal custody affects defendants’ ability to adequately defend themselves.^{lxxxvii} However, unlike criminal defendants, immigrant defendants do not have a right to counsel under the 8th amendment, because removal proceedings are civil not criminal proceedings.^{lxxxviii} Thus, detained immigrants in removal proceedings experience even more difficulty obtaining legal counsel. For many years, legal representation rates for detained individuals have ranged between

roughly 10 and 30%.^{lxxxix} During 2015 – 2017, about 30% of detained individuals were represented by counsel.^{xc} In contrast, representation rates for individuals who were never detained has generally ranged between 60 and 80%.^{xcj}

➤ **Private Immigration Detention Profits from the Discrimination and Harm Against Migrants of Color**

The USG has the authority and the responsibility to eliminate the use of privately-operated immigration detention facilities. The Federal Government has the responsibility to ensure the safe and humane treatment of those in the Federal criminal justice system. In fiscal year 2015, for-profit companies operated only about 10% of the facilities, but due to the facilities' relatively large capacity, about 67% of individuals (including juveniles) were detained at least once in a privately operated facility.^{xcii} The DOJ found in 2016 that privately operated criminal detention facilities do not maintain the same levels of safety and security for people in the federal criminal justice system.^{xciii} President Biden cited the 2016 DOJ study when he issued an EO in 2021 to eliminate the use of privately operated criminal detention facilities.^{xciv} Privately operated immigration detention facilities also do not maintain adequate levels of safety and security for detained immigrants.^{xcv}

Since immigrants of color are detained at disproportionately higher rates, the burden of harms inflicted by detention also falls disproportionately on immigrants of color. As of September, 2016, 65% of the average daily detainee population was confined in privately operated facilities.^{xcvi} The amount of time immigrants spend in detention in these for-profit facilities spend is consistently and substantially longer than in privately operated facilities.^{xcvii} Noncitizens who were granted immigration relief were detained an average of 87.1 days in privately operated facilities compared to 33.3 days for those detained in not privately operated facilities.^{xcviii}

There is also a higher average number of grievances filed against privately operated facilities than against publicly operated facilities. In fiscal year 2015, there were an average of 691.3 grievances filed against privately operated facilities compared to 41.9 grievances filed against not privately operated facilities.^{xcix} This was true despite the fact that research suggests that privately operated facilities are more likely to lack transparency and accountability.^c

Private immigration detention centers are plagued with reports of unsafe and unsanitary conditions.^{ci} In March, 2022, the Department of Homeland Security's Inspector General found "such egregious conditions" in one privately operated facility^{cii} that they recommended the immediate relocation of all immigrants detained in that facility.^{ciii}

The integration of the immigration and criminal justice systems serve to reify notions of racial differences and solidify the standardization of a nationalized, white, "us" versus a Black and Brown "other". The disparity deeply effects migrant communities of color.

- **The Structural Racism of the US Immigration System Is Disproportionately Harming Migrant Children Via Family Separation**

The consequences of US immigration laws and policies have a disproportionate impact on the health and well-being of children and families of color in the United States.^{civ} Immigration laws and policies create greater numbers of apprehensions, detention, and deportation of immigrant household members.^{cv} These enforcement practices lead to the involuntary short- and long-term separation of parents and children when the USG detains and forcibly removes the parents of children authorized to be in the United States.^{cvi} This is contrary to other policies and practices in child serving systems. Under the US child protection system, a child cannot be separated—or removed from the care of their parents or family members—solely because they were undocumented, a civil offense.^{cvii} To do so would violate the child’s best interest, a domestic and international child protection standard.^{cviii}

The criminalization of immigration offenses changes this paradigm, to the detriment of children’s health and well-being. The harmful impacts of family separation on children have been well-documented.^{cix} This includes high levels of insecurity, depression, anxiety, distress, economic hardship, and trauma.^{cx} In a 2008 study, 68% of Latino children worried that they, a family member, or close friend might be deported. Another study showed that increased immigration enforcement activity has a negative effect on children of Mexican immigrants who fear the police, equate a stigma with immigration, and distance themselves from their culture and heritage.^{cxii} Scholars have described the separations enforced by the United States via immigration policies as amounting to “legal violence.”^{cxiii} For many migrant and immigrant families in the United States, especially families of color, family separation has been a form of racialized violence throughout the duration of the contemporary deportation system. Nearly four million US citizen children in the US have at least one undocumented parent, and mixed-status families live under the constant threat of separation via deportation.^{cxiii}

- **The Treatment of Children as Adults in Miniature as a Form of Racial Discrimination**

Despite the promise to provide equal treatment before tribunals,^{cxiv} defying customary international law and practice,^{cxv} migrant children, predominantly children of color, entering the US are expected to navigate the immigration system as adults in miniature. In all other child-serving US systems, children are entitled to specific treatment that accounts for their unique needs and vulnerabilities. The US immigration system, however, fails address the unique needs of children in any meaningful way. There is no best-interests analysis accompanying children’s immigration claims.^{cxvi} Migrant children are not provided with equal treatment before tribunals.^{cxvii} Instead, the absence of a system designed with concern for the vulnerable needs of children results in harm to migrant children’s safety, health, and well-being.^{cxviii}

The resulting effect is that harmful practices toward children pervade the immigration system from apprehension to adjudication. Abiding by the same legal regime as adults, migrant children are expected to prove their eligibility for asylum or other permanent protection from deportation.^{cxix} Since there is no statutory right to an appointed attorney for civil cases in the US, migrant children, like adults, must represent themselves in removal proceedings against a government prosecutor if

they are unable to secure counsel.^{cxx} Moreover, unrepresented migrant children not only have to defend themselves before a foreign court, but they must also gather significant evidence to support their case and complete complex immigration forms—all by themselves.^{cxxi}

Despite the USG’s ability to ameliorate some of the harsh effects of the immigration system by implementing a best interests standard in all decisions impacting a migrant child, the government deliberately chooses not to utilize this approach. To date, the United States is still the only country that has failed to ratify the Convention on the Rights of the Child.^{cxxii} Consequentially, migrant children in the US are subjected to unnecessary detention and other forms of state-sanctioned violence including family separation.^{cxxiii} The governmental perception of migrant children as “alien” or “other” greatly contributes to the normalization of violent and traumatizing experiences committed against the migrant child including systemic detention and family separation.^{cxxiv}

- **Systemic Detention of Children as a Form of Racial Discrimination**

Despite the USG obligation to guarantee “the right to security of person and protection by the State against violence or bodily harm,”^{cxxv} all unaccompanied migrant children apprehended by the USG are subjected to protracted periods of detention upon arrival. For years, the USG has asserted that the detention is “protective custody.” Legislative history demonstrates that the purported intention is to protect children from trafficking and/or provide children with “protection” and a “safe and stable environment.”^{cxxvi} Yet the vast majority of these children have family, including significant numbers of parents and legal guardians, who are completely capable of offering safe and stable, protective environments for migrant children. Detention is anathema to the USG domestic child welfare system demonstrating a clear preference for family reunification.^{cxxvii} Moreover, the effects of detention are well known to be too harmful to outweigh the purported reasons behind detention and less harmful alternatives are routinely dismissed by the USG. In this regard, migrant children do not maintain the right to security of person nor protection against violence inflicted by a government institution.

Substantial scientific research unequivocally concludes that all children experience deleterious effects from being detained, regardless of the form of detention. Expert consensus determined that “even brief detention can cause psychological trauma and induce long-term mental health risks for children.”^{cxxviii} Studies of detained immigrant children in the US report high rates of depression, anxiety, post-traumatic stress disorder, and suicidal ideation—among other behavioral problems.^{cxxix} Particularly at risk of experiencing negative psychological impacts of detention are young children and migrant children with pre-existing trauma.^{cxvxcxxxi}

One study found that the length of detention was positively correlated with the severity of negative psychological symptoms.^{cxvxcxxii} The same study concluded that, of the detained immigrant children participating in the study, fifty percent reported experiencing suicidal ideation while twenty-five to eighty percent reported inflicting self-harm.^{cxvxcxxiii} When parental separation is included as an additional stressor to a child’s detainment, migrant children face additional harms such as strained parent-child relationships, withdrawal,^{cxvxcxxiv} and even death.

Detention of children in the context of border patrol has proved fatal. The case of Jakelin Caal Maquin (7-year-old Guatemalan girl), made national headlines when she died due to dehydration while under Border Patrol supervision. She died in ICE custody while she and her father sought

asylum in New Mexico. The US Department of Homeland Security Secretary Nielsen went on Fox News blaming the family and girl for undertaking the journey.^{cxxxv} Almost 3 weeks afterwards, the death of an 8-year-old Guatemalan boy (Felipe Gomez Alonso) while in a US detention center^{cxxxvi} signaled a disturbing trend. Neglect of migrant children, too, is widespread, as evidenced by how they have been at holding facilities.^{cxxxvii}

Moreover, if migrant children are released from detention, most will not receive follow-up mental health services to address the trauma incurred by detention, among other events.^{cxxxviii} As a result, migrant children are left with an increased risk of adverse health outcomes and psychological distress.^{cxxxix} Notwithstanding research and documented harms associated with detention, the USG continues to advance laws and policies that result in the systemic detention of migrant children, who are overwhelmingly Black and Brown, by advancing the normative narrative that they are somehow different and deserving of less protections than that of American (white) children.

- **Family Separation in All its Forms as a Form of Racial Discrimination**

Migrant children have had the unique experience of being direct targets of violence inflicted by USG officials. This has taken place in all the manifestations of involuntary or forced family separation. The term “family separation” became part of the collective vernacular when the Trump Administration began systematically separating children (including infants and toddlers) from their parents at the US-Mexico border pursuant to the Zero Tolerance policy. Yet, as noted earlier, family separation has been a form of racialized violence throughout the duration of the contemporary deportation system. Nearly four million US citizen children in the US have at least one undocumented parent and mixed-status families live under the constant threat of separation via deportation.^{cxl}

Under the well-documented Zero Tolerance policy, parent-child separations were enforced along the US-Mexico border with the intentional goal of targeting Latinx migrants.^{cxli} The Trump Administration implemented the policy with the resolve to punish Central American migrants through criminalization and psychological distress and the endorsement of a racial divide.^{cxlii} Implementing Zero Tolerance solely at the southern border was an intentional strategy by the Trump Administration designed to victimize, penalize, and deter migrants from Central America and Mexico.^{cxliii} It is estimated that between 5,300 to 5,500 children were separated from their parents and experience the protracted, harmful effects of separation.^{cxliv} The Biden Administration has abandoned joint efforts toward civil damages for separated parents.^{cxlv}

Outside of Zero Tolerance, children who arrive at the border with non-legal primary caregivers are routinely separated by the USG.^{cxlvi} This applies even to children who are encountered in the care of adult family members or other trusted caregivers that is not the legal guardian.^{cxlvii} For example, children are routinely separated from grandparent or aunts/uncles by the USG even in cases where that individual raised the child in an *informal* filial guardianship arrangement. The USG has interpreted the law^{cxlviii} to require physical separation and transfer of these children to detention facilities. These children, like all children forced into the immigration detention system via family separation, suffer the compounded effects of both forms of racialized state violence.

It is notable that the USG has created an Interagency Task Force on the Reunification of Families, which condemned the intentional separation of children from their parents or legal guardians that occurred under the use of the Zero Tolerance Policy and established a Family Reunification Task Force to identify and reunite families. However, families impacted by this policy continue to suffer the harmful consequences of family separation with no access to remedies to address the harm they experienced.

B. Despite efforts, the USG is not complying with Article 4 of the ICERD

Article 4 of the ICERD clearly indicates that States Parties must “condemn all propaganda ... based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.”^{cxlix} While the USG notes their reservation to hate speech, namely that “the United States cannot accept any obligation that could limit protections for freedoms of expression, peaceful assembly, and association guaranteed in the US Constitution” it must, nonetheless, undertake to eradicate propaganda to the extent permitted under US law. Notably absent from the USG ICERD Report is any discussion around the use of hate speech in relation to migration. Advocates take note that hate speech in the context of migration has been a driving contributor to state violence against migrants of color.

From the campaign trail to the oval office, the Trump Administration referred to immigration as a threat to the sovereignty of the American people. Much of the Administration's characterization of immigration was stewed in racist rhetoric and white supremacist race theories. When describing the situation at the southern border, Trump remarked, "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists."^{cl} Trump's demonizing narrative of migrants made it clear that immigrants are not welcome in America. His frequent use of hostile fiction regarding Black and Brown bodies carries real consequences of dehumanization and terrorization of both US citizens and migrants.^{cli}

Inciting hatred and fear of Black and Brown immigrants was a recurring theme of the previous Administration's political rhetoric.^{clii} Senior leadership under the previous administration pitched publicity around migration that perpetuates the "white genocide" myth.^{cliii} Senior leadership in the previous administration openly peddled insidiously racist characterizations of Central Americans explaining that they “don't speak English. They don't integrate well. They don't have skills.”^{cliv} Government-level perpetuation of racial stereotypes is particularly harmful in that it inflicts genuine hostility and suspicion towards immigrants beyond the system already designed to do so.

Hate speech against Black and Brown migrants at the highest levels of USG has given permission to rank and file officers to perpetuate stereotypes and, in some instances, has incited officials to violence. The Trump Administration's overt racial hostility and lack of repercussions against hate speech and white nationalism was formally acknowledged by the ICERD Committee in a statement issued as part of an early warnings and early action procedure in 2017.^{clv} The statement was in response the events in Charlottesville, SC in August 2017, where a known white nationalist killed

civilian, Heather Heyer, and injured others at a peaceful demonstration. The Committee called upon the USG to “unequivocally and unconditionally reject racist hate speech...”

The Custom and Border Patrol's (CBP) culture of thriving racism and xenophobia was verified in 2019 when ProPublica broke the news that a group of roughly 9,500 current and former CBP agents were members of a secret Facebook group that was entrenched with "sexist and xenophobic" content.^{clvi} Within the group, members made racist insults against migrants from Central America and joked about migrants, including children, who died while trying to enter the US.^{clvii} In one exchange, members commented on a post about a news story of a teenage Guatemalan migrant who died while in custody at a Border Patrol station—with one group member posting "If he dies, he dies" while another member commented with a GIF of Elmo saying, "Oh, well."^{clviii} The posts reflect "a pervasive culture of cruelty aimed at immigrants within CBP. This isn't just a few rogue agents or 'bad apples.'"^{clix}

Some officers were emboldened to act on their racist animus, such as in the 2018 case of a CBP official charged with running down a Guatemalan migrant with a Ford F-150 pickup truck.^{clx} The text chain amongst agents, revealed in a Tucson federal court filing after the attack, described migrants as “guats,” “wild ass shitbags,” “beaners” and “subhuman” and included repeated discussions about “burning the migrants up.”^{clxi} Many officers cited Trump’s entreaty to use lethal force against migrants as permission to respond to rock throwing with rifle fire.^{clxii} Disturbingly, one DHS official who works closely with CBP says, “They developed a system where ‘If you throw rocks at us, we will shoot at you.’”^{clxiii}

The legacy of CBP’s white supremacy is well documented. From inception to present-day, the agency has been fraught with a legacy of infusing a white supremacist agenda into national security policy enforcement.^{clxiv} James Tomsheck, former head of internal affairs at CBP between 2006 and 2014, concedes “The agency had problems with misconduct, lack of sensitivity to immigrants, and violence along the border.”^{clxv} Under the Trump administration, CBP’s culture of misconduct, racism, and unaccountability only became more virulent.

In a secret internal report administered by the Police Executive Research Forum (PERF), it was revealed that CBP agents were initiating circumstances that would render "justification for the deadly use of force," such as stepping into the path of oncoming vehicles.^{clxvi} PERF further concluded that “[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.”^{clxvii} Critically, the report found that there is a "lack of diligence" in the investigation of CBP shooting incidents, and more strikingly "there don't appear to be any consequences for agents who violate the use-of-force policy."^{clxviii} Richard Skinner, former Inspector General for US Department of Homeland Security, reports that CBP had a culture of "what happens in the field stays in the field."^{clxix}

Speaking to the culture of CBP, Jenn Budd, a former Border Patrol agent, said that “[i]n the academy they mandate and they teach the agents to use racist terms for migrants so that they see these people as ‘others’ and that they are not like them,” and that “[a]s a trainee, if you aren’t willing to use these terms, if you aren’t willing to be harsh towards the migrants that you encounter, then you are judged by that, and that reflects on whether or not they’ll retain you.”^{clxx}

There has been no indication the USG's CERD Report that the Biden Administration intends to address the culture of racism and its violent consequences for migrants of color.

C. The USG Fails to Address Article 5 related to Environmental Inequity and Migration: Policies that Ignore Race and Racism

In an effort to eradicate discrimination and ensure equal access to economic social and cultural rights, ICERD creates obligations upon governments to investigate the manifestations of structural racism in the administration of government benefits. In its report, the USG recognized the disparate impact of environmental inequity on communities of color in the United States. The USG explains the significant strides regarding efforts to address environmental pollution and the disparate impact on US communities of color. The USG fails, however, to address the nexus between environmental or climate inequity, harm caused by US environmental practices and policies, and migration in US law and policy.

The United States' carbon-intensive economy presents an existential threat to persons residing in the Global South who will be disproportionately impacted by climate-disrupting greenhouse gases and toxic emissions. Research overwhelmingly suggests that the most dramatic effects of climate change are wrought on communities already marginalized by the state, specifically ethnic minorities, indigenous communities, women and children.^{clxxi} Climate change has largely been described as a social and racial justice problem, noting that "racism is 'inexorably' linked to climate change."^{clxxii} While the Refugee Protocol (adopted under US law) may not explicitly provide protection for individuals fleeing the consequences of climate change, the USG has an obligation to understand the nexus of our climate pollution to the social science of environmental inquiry abroad to understand how protected groups are experiencing persecution in the form of dispossession of land, appropriation of resources, deracination as patterns or practices of severe discrimination, tantamount to persecution, and worthy of protection under the Refugee Convention.

Children in these marginalized groups are at the greatest risk of harm associated with climate inequity. The developing bodies of children are more sensitive to the impact of climate change, including rising temperatures, decreased air quality, ecosystem disruption, floods, droughts, and wildfires. Research shows that these climate change impacts directly contribute to asthma, infectious and respiratory diseases, food insecurity, and increased mortality.^{clxxiii} "Although data is limited, existing evidence suggests young people are the most likely to move in response to climate related shocks. The inclination to migrate tends to be highest among young people in general and they are often overrepresented in contexts of migration and displacement."^{clxxiv} Children also experience exacerbated intersecting vulnerabilities that leave them increasingly at risk of harm.^{clxxv} Girls, indigenous children, children with disabilities, and other children with heightened vulnerabilities experience climate inequity at disparate levels.

USG policy fails to acknowledge, let alone connect, climate/environmental inequity and protectability under the Refugee Convention and the US Refugee Act. The prevailing theory is that neither the Refugee Convention nor the Refugee Act can be used to protect climate refugees because most of these refugees migrate internally and/or it is difficult to characterize the environmental drivers of migration as "persecution" under the Refugee Convention.^{clxxvi} The

Refugee Convention and Refugee Act are seen as inapplicable to climate refugees because climate change, in theory, does not *discriminate*—a key feature of the Refugee Convention.^{clxxvii} However, the Human Rights Committee has stressed that people fleeing climate change may have valid claims under the Refugee Convention, including in situations where climate change and violence are intertwined, and that international refugee law is applicable in the context of climate change and disaster displacement.^{clxxviii} The UNHCR has urged states and practitioners that “the impacts of climate change must be understood within a broader socio-political context, and disasters might exacerbate existing persecution, discrimination or marginalization, proving a refugee claim.”^{clxxix}

Refugee law cannot be dismissed automatically in claims for refugee status as a “climate migrant.”^{clxxx} Instead, the USG must make efforts to understand the social nature of natural disasters and how climate inequity exacerbates already existing discrimination, thereby bolstering protection for migrants of color from the Global South.^{clxxxi} Decision makers must look at each claimant’s status within her local and wider social context and determine whether she is facing discrimination, including direct, indirect and systemic discrimination.^{clxxxii} That discrimination, of course, must rise to the level of persecution.^{clxxxiii} Many climate migrants, however, face dispossession of land, appropriation of resources, and deracination resulting from severe and persistent discrimination such that persecution can be demonstrated.^{clxxxiv} In order to meet its obligations under ICERD, the USG must begin to approach the climate crisis in the context of racialized discrimination against migrant populations.

Please also see Appendix B, *Input to the Special Rapporteur on the Human Rights of Migrants on the Impact of Climate Change and the Protection of Human Rights of Migrants*, submitted by the Center for the Human Rights of Children at Loyola University Chicago School of Law, April 2022.

V. Recommendations

We request that the Committee, in its Concluding Observations, require the United States to address the systemic racism inherent in its immigration system, to use its power and end racially motivated harm and violence to immigrant and migrant families and children in the US. To that end, the USG should commit to the following intersecting actions:

1. **Conduct a federal assessment of racial discrimination against migrants and immigrants** in *all* areas of law, regulation, and policy across each USG department and agency in collaboration with NGOs and civil society. This assessment could then inform a federal action plan to eliminate racism, racialized violence, discrimination and provide a roadmap for future legislative and regulatory reform to the US immigration system, and thus clarify its intentions regarding US immigration law, regulations, policy, and executive authority in this area.
2. **Abolish the use of privately-owned immigration detention facilities.** Since immigrants of color are detained at disproportionately higher rates, the burden of harms inflicted by private detention also falls disproportionately on immigrants of color.
3. **End child detention in the US.** Most unaccompanied children arriving at US borders have family within the United States. The decision to detain them in government facilities is a

political decision. USG resources should be reallocated from apprehension and detention (*i.e.*, “shelters”) and instead reallocated to support the utilization of child protection specialists, and appointment of child advocates and attorneys for all unaccompanied children to ensure the best interests of the child are prioritized in any placement and care decisions. (See also Recommendation 5, *Promote family unity and end separation of migrant children and families based on immigration violations.*)

4. **Phase out discretionary immigration detention, opting instead for less restrictive measures such as case management.** The use of discretionary immigration detention must be entirely abolished due to the harm it causes to immigrants and immigrant families, particularly immigrants of color. There is broad consensus that the US system of mass incarceration, including immigration detention, imposes significant costs and hardships on our society and communities and does not make us safer. Privately operated immigration detention facilities also do not maintain acceptable levels of safety and security for detained immigrants.
5. **Promote family unity and end separation of migrant children and families based on immigration violations.** Immigration violations should have no bearing on a parent or family member’s ability to care for and remain with their children or family members. Preventing family separation in all forms, both at the border and the interior, and prioritizing family reunification is imperative to uphold the human rights of children. The USG should also create protocols to consider alternatives to apprehension and detention of individuals with family members residing in the US. The USG must develop a mechanism for child protection experts who work outside of the federal immigration agency to evaluate children who arrive with adult family members or other trusted caregivers, but who meet the definition of an unaccompanied child, so that the child can be immediately reunified with that adult family member if there are no safety or trafficking concerns, while maintaining the “unaccompanied” designation and the substantive legal protections associated with it.
6. **End 287(g) Partnerships which deputize local law enforcement.** The USG must end the INA 287(g) partnership agreements that deputize state and local law enforcement agencies to enforce federal immigration law. The evidence is overwhelming that deputizing local law enforcement to enforce federal immigration laws harms immigrants, their families and their communities.
7. **Prohibit consideration of expunged (adult) criminal convictions and juvenile adjudications in immigration adjudications.** The consideration of expunged criminal convictions when determining an immigrant’s removability disparately impacts immigrants of color, and the Executive Branch must act to prohibit this practice. Immigrants are more likely to be overpoliced, are more likely to be charged at higher rates when they have not committed crimes at higher rates, and are more vulnerable to accepting guilty pleas.^{clxxxv} Expungement of criminal records is a way to rectify the harms of a racially biased criminal justice system.^{clxxxvi} In the immigration context, the INA does not explicitly allow nor disallow the consideration of expunged criminal convictions when determining an individual’s removability.^{clxxxvii} Nevertheless, the USG has interpreted expunged convictions to constitute convictions for immigration purposes.^{clxxxviii}

8. **Ratify the UN Convention on the Rights of the Child (UN CRC)** to amplify opportunities to create a more developmentally informed and child-centered immigration system. The UNCRC sets out the guidelines for the treatment of all children (including migrant children) addressing rights related to best interests and the ability to seek asylum without discrimination. Specifically, the UN CRC will facilitate upholding the equal right of migrants of color to be treated as children in a court system or administrative justice setting.

9. **The Committee should consider working with the Human Rights Council to explore the nexus between climate inequity, racial discrimination, forced migration, and protectable characteristics under the Refugee Convention.** Additional research and country conditions experts are needed to illuminate, for human rights defenders and adjudicators alike, the socio-political underpinnings that give rise to persecution (violations of the right to life, dispossession of land, misappropriation of resources, and deracination) and protection under the Refugee Convention.

ⁱ See USG ICERD Report.

ⁱⁱ *Id.*

ⁱⁱⁱ Vialet, J. C. (1980). *A brief history of US immigration policy / joyce C. vialet*. District of Columbia: Congressional Research Service, Library of Congress, 1991.

^{iv} *Id.*

^v See e.g., Johnson, K. R. (2009). The intersection of race and class in US immigration law and enforcement. *Law and Contemporary Problems*, 72(4), 1-35. Retrieved from <https://www.jstor.org/stable/20779033> (The Chinese exclusion laws and the national-origins quota system disfavoring immigration from southern and eastern Europe)

^{vi} See e.g., Jones, R. (2021, Oct 30,). Facing up to the racist legacy of america's immigration laws. *International New York Times* ("In the years after the Revolutionary War, the fledgling states continued to exploit enslaved people and recruit more free white settlers from Europe.")

^{vii} Naturalization Act, 1 Stat. 103 (1790). <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/1/STATUTE-1-Pg103.pdf>

^{viii} McKanders, K. M. (2021). Immigration and racial justice: Enforcing the borders of blackness. *Georgia State University Law Review*, 37(4), 1139.

^{ix} *Id.*

^x *Id.* at 1151.

^{xi} An act to execute certain treaty stipulations relating to Chinese, May 6, 1882; Enrolled Acts and Resolutions of Congress, 1789-1996; General Records of the United States Government; Record Group 11; National Archive

^{xii} Department of State Office of the Historian. Chinese immigration and the chinese exclusion acts. Retrieved from <https://history.state.gov/milestones/1866-1898/chinese-immigration>

^{xiii} *Id.*

^{xiv} King, S. M. (2019). Child migrants and america's evolving immigration mission. *Harvard Human Rights Journal*, 32, 59. Retrieved from <https://search.proquest.com/docview/2330021155>

^{xv} Clemens, M. A., Lewis, E. G., & Postel, H. M. (2018). Immigration restrictions as active labor market policy: Evidence from the mexican bracero exclusion. *The American Economic Review; Am Econ Rev*, 108(6), 1468-1487. doi:10.1257/aer.20170765

^{xvi} Kosack, E. (2021). Guest worker programs and human capital investment: The bracero program in mexico, 1942–1964. *The Journal of Human Resources*, 56(2), 570-599. doi:10.3368/jhr.56.2.0616-8015R2

^{xvii} González, B. J., & Loza, M. (2016). Opening the archives: Legacies of the bracero program. *Diálogo (Chicago, Ill.)*, 19(2), 3-6. doi:10.1353/dlg.2016.0051

^{xviii} Zatz, M. S., Calavita, K., & Gamboa, E. (1993). *Using and abusing mexican farmworkers: The bracero program and the INS*. Beverly Hills, Calif: Law and Society Association. doi:10.2307/3053955

^{xix} See e.g., *Operation wetback* (2020). Encyclopædia Britannica Inc.

^{xx} Peralta, E. (2015). It came up in the debate: Here are 3 things to know about 'operation wetback'. Retrieved from <https://www.npr.org/sections/thetwo-way/2015/11/11/455613993/it-came-up-in-the-debate-here-are-3-things-to-know-about-operation-wetback>

^{xxi} Vialet, *supra* note 3

^{xxii} Garand, J. C., Qi, D., & Magaña, M. (2020). Perceptions of immigrant threat, american identity, and vote choice in the 2016 US presidential election. *Political Behavior*, 44(2), 877-893. doi:10.1007/s11109-020-09644-z

^{xxiii} US Department of State Office of the Historian. The immigration act of 1924 (the Johnson-Reed act). Retrieved from <https://history.state.gov/milestones/1921-1936/immigration-act>

^{xxiv} See for instance James Q. Whitman's *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017), which places the US Immigration Act of 1924 within the context of Nazi theory and practice.

^{xxv} Peralta, *supra* note 20.

^{xxvi} Hamilton-Jiang, S. L. (2019). Children of A lesser god: Reconceptualizing race in immigration law. *Northwestern Journal of Law and Social Policy*, 15(1), 39.

^{xxvii} *Id.*

^{xxviii} See, “What Is An Executive Order?”, American Bar Association, January 2021, Retrieved from https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/

^{xxix} *Id.*

^{xxx} See for example USG ICERD Report, Para 7, Para 16, Para 17, Para 32, Para 34, Para 85, Para 86

^{xxxi} Article 2

^{xxxii} Article 5

^{xxxiii} Article 5

^{xxxiv} See USG ICERD Report, Para 16 (“On January 20, 2021, President Biden issued Proclamation 10141, Ending Discriminatory Bans on Entry to the United States, which revoked EO 13780 and other proclamations that had prevented certain individuals from entering the United States from primarily Muslim and African countries. President Biden declared that “those actions are a stain on our national conscience and are inconsistent with [the United States’] long history of welcoming people of all faiths and no faith at all.””)

^{xxxv} See USG ICERD Report, Para 17 (“On January 20, 2021 President Biden issued EO 13993, Revision of Civil Immigration Enforcement Policies and Priorities, which articulated the current Administration’s baseline values and priorities for enforcement of civil immigration laws. On the same date, the then-Acting Secretary of the Department of Homeland Security (DHS) issued a Department-wide memorandum, Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities, which did four things. First, it directed a comprehensive Department-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities related to national security, border security, and public safety. Third, it rescinded several existing policy memoranda issued by the previous administration, which conflicted with the current Administration’s values and priorities. Fourth, it directed DHS component agencies to issue interim guidance implementing the revised enforcement priorities.”)

^{xxxvi} See USG ICERD Report, Para 19 (“DHS policy prohibits racial profiling across all DHS law enforcement, investigation, and screening activities. DHS also adheres, where applicable, to DOJ’s 2014 Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity. As part of DHS’s commitment to improving policies and operations, ICE is currently reviewing its 287(g) program. The 287(g) program utilizes two models: the jail enforcement model (JEM) and the warrant service officer (WSO) model. JEM authorizes certain state or local law enforcement personnel to identify and process for removal non-citizens with criminal convictions or pending charges who are arrested by state and local law enforcement agencies. WSO authorizes certain state and local law enforcement personnel to serve and execute administrative warrants to incarcerated non-citizens in their agency’s jail. ICE is required to provide continuous oversight of partnering state and local law enforcement agencies and to inspect these partnering agencies every two years to ensure compliance with ICE policies and procedures.”)

^{xxxvii} a term coined in 2006 by legal professor Juliet Stumpf

^{xxxviii} Saad-Diniz, E. (2018). Crimmigration Law. *International Journal of Refugee Law* 30.2 : 401-3.

^{xxxix} US Immigration and Customs Enforcement. (2017). *Fiscal year 2017 ICE enforcement and removal operations report*. (). Retrieved from <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>

^{xl} NAACP. (2022). Criminal justice fact sheet. Retrieved from <https://naacp.org/resources/criminal-justice-fact-sheet>

^{xli} Das, A. (2018). Inclusive immigrant justice: Racial animus and the origins of crime-based deportation. *U.C. Davis Law Review*, 52(1), 171.

^{xlii} Scholnick, M. (2022). Executive branch solutions to ameliorate the harsh consequences inflicted on immigrants of color by the crimmigration system.

^{xliii} *Id.*

^{xliv} 8 U.S.C. § 1101, available [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1101%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1101%20edition:prelim))

^{xlv} Aranda, E., & Vaquera, E. (2015). Racism, the immigration enforcement regime, and the implications for racial inequality in the lives of undocumented young adults. *Sociology of Race and Ethnicity (Thousand Oaks, Calif.)*, 1(1), 88-104. doi:10.1177/2332649214551097

^{xlvi} U.S.C. § 1101, [https://uscode.house.gov/view.xhtml?req=\(title:8%20section:1101%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:8%20section:1101%20edition:prelim))

^{xlvii} Improper Entry by Alien, 8 USC. 8 § 1325 (2006). <https://www.govinfo.gov/app/details/USCODE-2010-title8/USCODE-2010-title8-chap12-subchapII-partVIII-sec1325>

^{xlviii} Reentry of Removed Aliens, 8 USC. § 1326 (2018). <https://www.govinfo.gov/app/details/USCODE-2020-title8/USCODE-2020-title8-chap12-subchapII-partVIII-sec1326>

^{xlix} US Customs and Border Protection. (2022). Criminal noncitizen statistics fiscal year 2022. Retrieved from <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics>

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- ^l Keller, D. (2012). Re-thinking illegal entry and re-entry. *Loyola University of Chicago Law Journal*, 44(1), 65.
- ^{li} American Immigration Council. (2021). Prosecuting people for coming to the united states. Retrieved from <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>
- ^{lii} US Customs and Border Protection. (2022a). Nationwide encounters. Retrieved from <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; US Customs and Border Protection. (2022b). Southwest land border encounters. Retrieved from <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>
- ^{liii} Urbina, M. G., & Peña, I. A. (2019). Crimmigration and militarization: Policing borders in the era of social control profitability. *Sociology Compass*, 13(2), e12654-n/a. doi:10.1111/soc4.12654
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clxxxiv Persecution may include significant economic deprivation. *Koval v. Gonzalez*, 418 F.3d 798, 805-06 (7th Cir. 2005).

clxxxv See discussion *infra* Section II.C.1.

clxxxvi See e.g., CTR. FOR SOC. DEV., (2020). Congressional Briefing – Undoing Racism: Removing Debilitating Criminal Penalties, Retrieved from <https://csd.wustl.edu/congressional-briefing-undoing-racism-removing-unwarranted-criminal-penalties/> (“Because blacks are disproportionately represented in the criminal justice system, they have been hurt the most. Expungement would be a small but significant step in undoing systemic racism.”); Evonne Silva, *There is No Just Future Without a Clean Slate* (Jul, 13, 2020, 6:00 PM), <https://thehill.com/opinion/criminal-justice/507091-there-is-no-just-future-without-a-clean-slate/>.

clxxxvii INA Section 101(a)(48)(A) (defining a conviction for immigration purposes as “a formal judgment of guilt... entered by the court or, if adjudication of guilt has been withheld where a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed).

clxxxviii US CITIZENSHIP & IMMIGR. SERV. POLICY MANUAL: CHAPTER 2 – ADJUDICATIVE FACTORS, <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2#footnotelink-23> , (last visited May 10, 2022).

VI. APPENDICES

A. APPENDIX A:

THE INAPPROPRIATE USE OF JUVENILE RECORDS IN IMMIGRATION DISCRETION, Sarah J. Diaz, J.D., LL.M & Lisa Jacobs, J.D

Also available at

<https://www.luc.edu/media/lucedu/law/centers/chrc/pdfs/TheInappropriate-Use-of-Juvenile-Records-in-Immigration-Discretion.pdf>

B. APPENDIX B:

An NGO Input for the Special Rapporteur's Report on The Impact of Climate Change and the Protection of the Human Rights of Migrants, Submitted by the Center for the Human. Rights of Children, Loyola University School of Law, April 2022, Kellie Tomin (2L) & Sarah J. Diaz, J.D. LL.M.

Also available at

https://www.luc.edu/media/lucedu/law/centers/chrc/pdfs/un_call_for_input_on_climate_migration.pdf

Appendix A



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ACADEMIC RESEARCH
& POSITION BRIEF

THE INAPPROPRIATE USE OF JUVENILE RECORDS IN IMMIGRATION DISCRETION

By Sarah J. Diaz, J.D., LL.M & Lisa Jacobs, J.D.¹

The Center for the Human Rights of Children (CHRC) and the Civitas ChildLaw Center at Loyola University Chicago School of Law, after conducting a review of denied adjudications, make the following observations regarding the use of juvenile delinquency records in immigration benefits adjudications: 1) USCIS adjudicators rely inappropriately on immigration case law to support the proposition that juvenile records may be considered as a matter of discretion in immigration adjudications; 2) USCIS officers fundamentally do not understand the legal scheme or purpose of juvenile justice systems as a matter of state law and policy; and 3) USCIS officers misapply juvenile justice records in the discretionary immigration process.

1) US law does not support the proposition that juvenile records may be considered as a matter of discretion in immigration adjudications.

The CHRC et al. conducted an in-depth review of several immigration cases that were denied as a matter of discretion wherein the USCIS officer relied exclusively on underlying juvenile delinquency records to deny the case.ⁱⁱ In many of the denial notices, the adjudicators cite *Paredes-Urrestarazy v. USINS* for the proposition that “USCIS may consider an applicant’s adverse conduct even in the absence of a conviction.”ⁱⁱⁱ This approach allows adjudicators to consider juvenile delinquency records when reviewing a case, even when these juvenile records are not considered “convictions” under immigration law.^{iv} USCIS officers often explain in their denials that “it is well-established that USCIS may consider all relevant factors, including arrest reports and related documents regarding an arrest”^v noting that “this is especially appropriate in cases involving discretionary relief from deportation, where all relevant factors concerning an arrest and conviction should be considered to determine whether an alien warrants a favorable exercise of discretion.”^{vi} Denials often cite *Matter of Thomas*, 21, I&N Dec. 20 (BIA 1994) for the proposition that “significantly, evidence of criminal conduct which has not culminated in a final conviction can nevertheless be considered in discretionary determinations.”

Assuming *arguendo* that these cases support the propositions asserted, all of the cases rely on the ability to inquire into juvenile delinquency adjudications because they fall under the rubric of *Matter of Marin*’s “criminal conduct” or “bad character.” Juvenile delinquency adjudications, however, are definitively not considered criminal conduct under state law and the United States Supreme Court has long held that juvenile delinquency is not evidence of incorrigible bad character. USCIS’ blanket characterization of juvenile encounters with law enforcement as being the same as adult criminal

arrests defies the law and policy of the juvenile justice system and ignores Supreme Court guidance with respect to the treatment of children under the law.

While most immigration benefits are discretionary, there are limits to what USCIS may consider when adjudicating a discretionary immigration benefit. Since 1978, the BIA has relied on “a framework for an equitable application of discretionary relief.”^{vii} The seminal framework laid out in *Marin* involves a balancing of equities against adverse factors which are limited to “the nature and underlying circumstances of the exclusion (inadmissibility) ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent’s bad character.”^{viii} The relevant *Marin* adverse factors at issue in this brief can thus be summarized as falling under the rubric of “criminal history” or “other evidence of respondent’s bad character/moral character (or both).” Juvenile encounters with law enforcement and juvenile delinquency adjudications, however, are neither criminal matters nor evidence of incorrigible bad character.

2) USCIS officers fundamentally do not understand the legal scheme or purpose of juvenile justice systems as a matter of state law and policy.

While the US immigration system insists on treating migrant children as adults in miniature, the same is simply not true for the nation’s juvenile justice systems. In defiance of state laws and Supreme Court jurisprudence acknowledging the diminished culpability of children, USCIS appears to categorize juvenile delinquency adjudications as “criminal history” and/or evidence of “bad moral character” in order to make a discretionary determination. This is true even though juvenile justice systems do not consider juvenile delinquency proceedings as “criminal matters.”

The nation’s juvenile delinquency systems recognize the principle that significant developmental differences between young people and adults require legal structures and legal responses tailored to the social, emotional and cognitive differences between young people and adults. While juvenile justice structures and terminology differ from state to state, juvenile justice systems across the country apply procedures, protections and legal standards that differ significantly from their criminal analog. The goals of juvenile justice systems are similarly distinct from those of criminal legal systems. While adult-focused criminal legal systems typically seek to impose accountability for illegal conduct through punitive responses, youth-focused systems typically seek to provide early interventions, community-based resources and restorative supports to address a range of youth behaviors and to facilitate the long-term well-being of young people and their communities.

In Illinois, for example, the purpose and policy section of Article V of Illinois’ Juvenile Court Act establishes that the Act is intended to deal with the unique challenges of youth delinquency and to capitalize upon the unique opportunities for youth to be “equip(ped) with competencies to live responsibly and productively”. Accordingly, the Act provides for policies and processes distinct from those applied to adults under the state’s criminal laws. The Act emphasizes these distinctions by providing that “(a) juvenile adjudication shall never be considered a conviction nor shall an adjudicated individual be considered a criminal.”

3) *USCIS officers misapply juvenile justice records in the discretionary immigration process.*

The nation's juvenile delinquency systems have created legal structures and legal responses that recognize that children's brains and bodies are fundamentally different than that of an adult. These systems recognize that 1) juvenile encounters with law enforcement, whether or not they result in delinquency adjudications, must not be treated as criminal matters; and 2) a young person's character is not fixed and misconduct is not indicative of "bad character"; in fact, adolescents are highly responsive to positive supports and resources.

a. Contacts with the juvenile delinquency system are not criminal matters and should not be considered under the rubric of "criminal history."

Because the nation's juvenile delinquency systems are premised on the significant developmental differences between young people and adults, they accordingly utilize legal structures, processes and outcomes distinct and different from adult criminal justice processes. For example, juvenile justice systems generally do not employ criminal procedure in addressing juvenile encounters and arrests nor do they contemplate the same criminal culpability. As indicated, Illinois' Juvenile Court Act explicitly provides that a juvenile adjudication (a juvenile court's determination that a youth has engaged in delinquent conduct) is not a criminal conviction and shall not be considered as such. The Act also emphasizes that "[u]nless expressly allowed by law, a juvenile adjudication shall not operate to impose upon the individual any of the civil disabilities ordinarily imposed by or resulting from conviction."^{ix}

In addition to distinguishing between delinquency adjudications and criminal convictions, Illinois' statute also creates youth-specific alternatives to prosecution and formal court proceedings. One such provision creates station adjustments. When youth are arrested in Illinois, a law enforcement officer may resolve the arrest by referring the matter to a prosecuting agency or designee of the juvenile court, which will determine whether a juvenile petition (complaint) will be filed. In the alternative, Illinois law provides for a juvenile officer to dispose of an arrest, at his or her discretion, through a station adjustment. The provisions for station adjustments are a uniquely child and youth-centered approach; there are no similar provisions for station adjustments of adults in Illinois.

USCIS has nevertheless considered these "mere arrest" encounters in its decisions to approve or deny a discretionary benefit. In an Illinois case that was reviewed by the CHRC et al., USCIS relied on the juvenile's encounters with law enforcement that did not even result in a finding that the juvenile was delinquent to deny the applicant a benefit notwithstanding that he has lived in the US nearly his entire life. In that case, the records of contact between the applicant and the juvenile justice system did not even rise to the level of an adjudication. Instead, the two juvenile arrests listed in the case were resolved through a "station adjustment"—not referred for prosecution.

Station adjustments are only one example of the legal and programmatic mechanisms in place in Illinois to address delinquent conduct and delinquency system referrals. Similarly, other states' juvenile justice systems provide a variety of procedures to meet the developmental and legal needs of young people in ways which differ significantly from their state's adult criminal legal system processes. USCIS decisions, however, fail to distinguish these delinquency processes from criminal records.

Instead, USCIS adjudicators are using state records without understanding the function and policy of the underlying law. The presence of juvenile delinquency adjudications alone, let alone evidence of mere arrests, is insufficient to be considered under the rubric of “criminal conduct” in the adverse discretionary factors set out in *Marin*.

b. Contacts with the juvenile delinquency system should not be considered under the rubric of “bad character.”

The United States Supreme Court has made the critical observation “that the character of a juvenile is not as well formed as that of an adult[;] the personality traits of juveniles are more transitory, less fixed.”^x As a result, the Supreme Court has found that “incurrigibility is inconsistent with youth,”^{xi} and that assessing the youth’s character as fixed “reflects an irrevocable judgment about [a youth’s] value and place in society, at odds with a child’s capacity for change.”^{xii}

In a series of five decisions, the Supreme Court has explicitly confirmed that youth are “categorically less culpable”^{xiii} for misconduct, even that which causes serious harm.^{xiv} In *Miller v. Alabama*, for example, the Court noted that adolescents can be expected to exhibit “transient rashness, proclivity for risk, and inability to assess consequences”^{xv} and that the malleability of these characteristics must be considered by courts. Just as importantly, the Court has repeatedly held that young people have a unique capacity for change and rehabilitation^{xvi}. Because “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’ ”^{xvii} As a consequence, the Supreme Court admonishes us that criminal offending as a young person may not be indicative of adult character and behavior.^{xviii}

The Supreme Court’s line of decisions distinguishing children and adolescents from adults is informed by decades of developmental research. The Supreme Court has adopted rulings supported by the scientific evidence that acknowledge that youth possess a “lack of maturity and an underdeveloped sense of responsibility. . . [which] often result in impetuous and ill-considered actions and decisions.”^{xix} Scientific studies have repeatedly demonstrated that the ability to make sound judgment does not develop until the early to mid-twenties.^{xx} Juvenile courts have thus been shaped to affirm the principle that because children and adolescents are fundamentally different from adults, young people should not be subjected to the same legal standards, systems, and penalties.

Nonetheless, in a system that treats children as adults in miniature, adjudicators in the immigration system are treating contacts with the juvenile justice system the same as adult arrests and convictions in the analysis for discretion. Specifically, USCIS adjudicators cite multiple BIA cases relating to adult arrests and the propriety of using the facts and circumstances of those arrests in a discretion decision to support the proposition that a juvenile record warrants the exact same treatment. It does not. That USCIS insists that juvenile justice system contacts should be available as evidence of moral character and a reflection of who the young person will eventually become flies in the face of decades of research that suggest—as the Supreme Court has endorsed—incurrigibility is inconsistent with youth. Juvenile justice arrests and/or court records, without any further indication of incurrigibility, should not be considered as a matter of discretion under the rubric of “bad character.”

Conclusion

Notwithstanding the clear policies behind the majority of state juvenile justice systems, with no training on adolescent development nor an understanding of juvenile justice case law related to youth, USCIS uses juvenile records to allege sufficient “significant adverse factors” to support a negative discretionary determination of youth seeking adjustment of status. Indeed, adjudicators often suggest that these juvenile justice system contacts outweigh the fact that applicants with juvenile records typically have resided in the United States for extensive periods or “grown up” in the United States. The inappropriate use of juvenile records in this way demonstrates a fundamental misunderstanding of the juvenile justice law and policy.

ⁱ [Sarah J. Diaz](#) is the Associate Director of the Center for the Human Rights of Children and Lecturer at Loyola University Chicago School of Law. [Lisa Jacobs](#) is a Clinical Professor of Law at Loyola University Chicago School of Law and Vice Chair of the Illinois Juvenile Justice Commission—charged with advising the Governor, General Assembly, and other stakeholders on matters of juvenile justice law and policy. The authors wish to acknowledge the significant research contributions of Loyola University Chicago School of Law students, Alex Fox and Madeline Brashear. The authors also wish to thank Katie Dorsey, law student editor with Loyola’s WJD program.

ⁱⁱ The cases reviewed for this research and position brief were coordinated through the special advocacy efforts of Azadeh Erfani, Senior Policy Analyst at the National Immigrant Justice Center, and Jessica Farb, Directing Attorney with the Immigration Center for Women and Children.

ⁱⁱⁱ *Paredes-Urrestarazy v. USINS*, 36 F. 3d 8011, 809 (9th Cir, 1994).

^{iv} *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) (en banc), citing *Matter of C.M.*, 5 I&N Dec. 27 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

^v *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988); *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996).

^{vi} *Matter of Grijalva*, *id.* at 722.

^{vii} *Matter of Marin*, 13 I&N Dec. 581 (BIA 1978).

^{viii} *Id.* at 584.

^{ix} 705 ILCS 405/1-8(A).

^x *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

^{xi} *Graham v. Florida*, 560 U.S. 48, 73 (2010), as modified (July 6, 2010) (internal citations omitted).

^{xii} *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (internal citations omitted).

^{xiii} *Roper v. Simmons*, 543 U.S. 551 (2005)

^{xiv} See generally *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), *Graham v. Florida*, 560 U.S. 48, *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. ____ (2016), *Jones v. Mississippi*, 593 U.S. ____ (2020).

^{xv} *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

^{xvi} *Montgomery v. Louisiana*, 577 U.S. ____ (2016).

^{xvii} *Montgomery v. Louisiana*, 577 U. S., at ____ (slip op., at 8) (quoting *Roper*, *supra*, at 569–570; alterations, citations, and some internal quotation marks omitted).

^{xviii} *Roper v. Simmons* (03-633) 543 U.S. 551 (2005).

^{xix} *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

^{xx} Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Annual Review of Clinical Psychology 459 (2009); Ezequiel Mercurio et al., Adolescent Brain Development and Progressive Legal Responsibility in the Latin American Context, 11 FRONTIERS IN PSYCH. 627, 24 April 2020.

Appendix B

SUBMITTED APRIL 14, 2022

SUBMITTED INPUT

An NGO Input for the Special Rapporteur's Report on The Impact of Climate Change and the Protection of the Human Rights of Migrants, Submitted by the Center for the Human Rights of Children, Loyola University School of Law

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Input for the Special Rapporteur on the Human Rights of Migrants on the Impact of Climate Change and the Protection of the Human Rights of Migrants by the Center for the Human Rights of Children, Loyola University Chicago School of Law, April 14, 2022

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Input for the Special Rapporteur on the Human Rights of Migrants on the Impact of Climate Change and the Protection of the Human Rights of Migrants by the Center for the Human Rights of Children, Loyola University Chicago School of Law, April 14, 2022

I. Reconceiving Climate Inequity as Persecution against Protectable Groups including Children

The Center for the Human Rights of Children submits this response to the call for submissions made by the Special Rapporteur on the Human Rights of Migrants to inform the Special Rapporteur's forthcoming thematic report to the General Assembly at its 77th session in September 2022. This input will focus specifically on the nexus of climate change and migration with an emphasis on both the protectability of climate migrants and the unique vulnerability of children in all aspects of climate migration.

There is an adage that “nature does not discriminate.” This perception has led to a misunderstanding amongst those charged with defending the human rights of migrants that individuals fleeing climate change are not entitled to the special protections often associated with severe discrimination, namely protection under the Refugee Convention.¹ This input seeks to clarify the manner in which the effects of climate change can be directly tied to protectable characteristics of migrants and that the failure to provide equitable protection from the effects of climate change can and must come under the rubric of protection-based claims for more migrants.

Research overwhelmingly suggests that the most dramatic effects of climate change are wrought on communities already marginalized by the state, specifically ethnic minorities, indigenous communities, women and children.² Climate change has largely been described as a social and racial justice problem, noting that “racism is ‘inexorably’ linked to climate change.”³ While the Refugee Protocol may not explicitly provide protection for individuals fleeing the consequences of climate change, there is room to better understand the social science of climate impact to understand how protected groups are experiencing persecution in the form of climate inequity (dispossession of land, appropriation of resources, deracination) as patterns or practices of severe discrimination, tantamount to persecution, and worthy of protection under the Refugee Convention.

¹ *Children Uprooted in a Changing Climate*, UNICEF, <https://www.unicef.org/environment-and-climate-change/migration> (last visited Apr. 1, 2022) (“Many people uprooted by climate change are unlikely to meet legal definitions or other conditions for employment-based, family or humanitarian admissions to destination countries, leaving many children stranded with nowhere to go.”).

² Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 J. OF L. & POL. ECON. 109, 114 (2020); Rachel Baird, *The Impact of Climate Change on Minorities and Indigenous Peoples*, MINORITY RTS. GRP. INT’L 1 (2008) (available at <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-524-The-Impact-of-Climate-Change-on-Minorities-and-Indigenous-Peoples.pdf>); Talia Buford, *Climate Change and Vulnerable Communities – Let’s Talk About This Hot Mess*, PROPUBLICA (May 3, 2018, 5:00AM), <https://www.propublica.org/article/climate-change-and-vulnerable-communities-lets-talk-about-this-hot-mess>; S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality*, (U.N. Dep’t of Econ. & Soc. Aff., Working Paper No. 152, 2017).

³ Sarah Kaplan, *Climate Change is Also a Racial Justice Problem*, WASH. POST (June 29, 2020), <https://www.washingtonpost.com/climate-solutions/2020/06/29/climate-change-racism/>.

Children in these marginalized groups are at the greatest risk of harm associated with climate inequity. The developing bodies of children are more sensitive to the impact of climate change, including rising temperatures, decreased air quality, ecosystem disruption, floods, droughts and wildfires. Research shows that these climate change impacts directly contribute to asthma, infectious and respiratory diseases, food insecurity, and increased mortality.⁴ “Although data is limited, existing evidence suggests young people are the most likely to move in response to climate related shocks. The inclination to migrate tends to be highest among young people in general and they are often overrepresented in contexts of migration and displacement.”⁵ Children also experience exacerbated intersecting vulnerabilities that leave them increasingly at risk of harm.⁶ Girls, indigenous children, children with disabilities, and other children with heightened vulnerabilities experience climate inequity at disparate levels.

II. The Legal Paradigms and the False Narrative Surrounding Climate Migration

As social and legal researchers develop a firmer understanding of climate inequity, rights-based frameworks including climate impact, international human rights law, and the paradigm for refugee protection are converging. What is becoming clear is that climate inequity is driving migration, and that many “climate migrants” can and should come under the rubric of refugee protection.

a. The Climate Impact Paradigm

The Global Refugee Compact calls for protection of persons displaced by disasters and recognizes that climate, environmental degradation, and natural disasters “increasingly interact with the drivers of refugee movements.”⁷ Although the Refugee Convention does not explicitly cover persons who migrate due to climate change, the Global Refugee Compact recognizes that when environmental degradation and natural disasters force external migration, the UN High Commissioner for Refugees (UNHCR), the International Organization for Migration, and other special mechanisms must respond with growing engagement.⁸

UN climate reports recognize that the impact of natural disasters does not affect everyone equally; the impact can differ across factors such as class, ethnicity, and gender.⁹ The poor and marginalized are often highly vulnerable to natural disasters, particularly because they are often

⁴ Daniel Helldén et al., *Climate Change and Child Health: a scoping review and an expanded conceptual framework*, *The Lancet Planetary Health*, Vol. 5, Issue 3 (Mar. 1, 2021).

⁵ UNICEF, U.N. MAJOR GRP. FOR CHILD. & YOUTH, & INT’L ORG. FOR MIGRATION, *CHILDREN UPROOTED IN A CHANGING CLIMATE*, 11 (2021) (available at <https://www.unicef.org/media/109421/file/Children%20uprooted%20in%20a%20changing%20climate.pdf>) (citing UK AID, *RAPID EVIDENCE ASSESSMENT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION PATTERNS* 59 (2021); INT’L ORG. FOR MIGRATION, *YOUTH AND MIGRATION – ENGAGING YOUTH AS KEY PARTNERS IN MIGRATION GOVERNANCE* 3 (2020) (citing U.N. DEP’T OF ECON. & SOC. AFF., *INTERNATIONAL MIGRATION IN A GLOBALIZING WORLD: THE ROLE OF YOUTH* (2011)); Martina Belmonte & Simon McMahon, *SEARCHING FOR CLARITY: DEFINING AND MAPPING YOUTH MIGRATION*, INT’L ORG. FOR MIGRATION 4 (2019)).

⁶ *Id.*

⁷ UNHCR, *Global Compact on Refugees*, U.N. Doc. A/73/12 (Part II) ¶ 8, 12 (2018).

⁸ *Id.* ¶ 63.

⁹ Islam, *supra* note 2, at 4; see also Eric Neumayer & Thomas Plümper, *The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002*, 97 *ANNALS OF THE ASS’N OF AM. GEOGRAPHERS* 551, 561 (2007).

forced to move into the most disaster vulnerable areas due to unaffordable land and housing markets.¹⁰ When disasters strike these vulnerable areas, these individuals are more likely to lose income and assets.¹¹ In societies where women are marginalized in everyday life, natural disasters and the indirect effects of those disasters (such as post-disaster events) often kill more women than men.¹² Indigenous groups are also particularly vulnerable to adverse impacts from natural disasters, due to certain risk factors such as climate change, environmental factors, geographical factors, vulnerable livelihoods, resource extraction, and health risks.¹³ There is also a growing body of research that shows climate change will disproportionately impact children’s health and wellbeing. “Climate change will challenge the very essence of children’s rights to survival, good health, wellbeing, education, and nutrition, as enshrined by the Convention on the Rights of the Child (CRC) and emphasized in the UN Sustainable Development Goals.”¹⁴

The Committee on the Rights of the Child, in its Joint Statement on Human Rights and Climate Change, has expressed that climate inequity “poses significant risks to the enjoyment of the human rights [of children]”¹⁵, including the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water, and the right to cultural rights.¹⁶ It also noted that “failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.”¹⁷ Moreover, “[i]n accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.”¹⁸ In fact, the Committee on the Rights of the Child has taken strides to recognize accountability for Global North/Global South transboundary climate-induced harm in egregious cases. In distinct cases, children can now be considered “under the jurisdiction of the state on whose territory *the emissions originated*”¹⁹—further recognizing domestic and interstate responsibility in climate inequity.

Of course, as a rule, U.S. domestic refugee law requires more than “general country conditions” or “overly broad social groupings” to achieve protectability. Thus, the convergence of legal paradigms, understanding climate inequity, understanding the right to life, and an expanded

¹⁰ Stephane Hellagatte et al., *Shock Waves, Managing the Impacts of Climate Change on Poverty*, in CLIMATE CHANGE AND DEVELOPMENT SERIES, WORLD BANK GROUP 85 (2016).

¹¹ *Id.* at 9.

¹² Neumayer, *supra* note 2, at 561.

¹³ Human Rights Council, Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction, Prevention and Preparedness Initiative, U.N. Doc. A/HRC/27/66 ¶¶ 29-44 (2014).

¹⁴ See Helldén, *supra* note 4, at e164.

¹⁵ Committee on the Elimination of Discrimination against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of & Child and Committee on the Rights of Persons with Disabilities, Statement on Human Rights and Climate Change, ¶ 3, U.N. Doc. HRI/2019/1 (Sept. 16, 2019).

¹⁶ *Id.*

¹⁷ *Id.* ¶ 10.

¹⁸ See Committee on the Rights of the Child, Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No.104/2019, ¶ 10.10, U.N. Doc. CRC/C/88/D/104/2019 (Oct. 8, 2021) (unedited version) [hereinafter Sacchi Decision].

¹⁹ *Id.* ¶ 10.7 (emphasis added).

understanding of how people become displaced gives advocates and adjudicators a stronger perspective on the nexus between climate inequity and the nuance of refugee protection.

b. The Human Rights Paradigm: The right to life in the protection of refugees

Globally, an increasing number of individuals are advancing claims for refugee status in the context of climate change.²⁰ As the understanding of our obligations under a human rights paradigm expands, these developments can be drawn upon to reframe our understanding of how governments persecute such that certain migrants meet the refugee definition.²¹ The UN Human Rights Committee (the “Committee”) recently recognized that states may not deport individuals who face climate change induced conditions that violate the right to life in their originating state.²² Similarly, the CRC requires states to specifically ensure children's rights to life and health by considering the dangers and risks of environmental pollution.²³

The global community has broadened its understanding that the right to life creates an obligation upon the states to not only refrain from the arbitrary deprivation of life but to ensure conditions conducive to life.²⁴ This approach emphasizes that refugee status determinations in the context of climate change must “take into account wider social context”²⁵ in which climate change impacts unfold.²⁶

The approach calls for a more nuanced understanding of the nexus between state-facilitated harm (through action or more often through *inaction*) and the refugee definition. Where failures of state protection resulting from systemic discrimination tantamount to persecution are the principal cause of an individual’s exposure to serious denials of human rights due to climate inequity, the refugee definition must be considered.²⁷

c. The Refugee Paradigm: State action or inaction leading to discrimination so severe as to be considered persecution

As a general observation of immigration practice, there appears to be a failure to connect climate inequity and protectability under the Refugee Convention. The prevailing theory is that the Refugee Convention cannot be used to protect climate refugees because most of these refugees migrate internally and/or it is difficult to characterize the environmental drivers of migration as “persecution” under the Refugee Convention.²⁸ The Refugee Convention is seen as inapplicable to climate refugees because climate change, in theory, does not *discriminate*—a key feature of the

²⁰ Matthew Scott, *Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change*, 35 REFUGEE SURV. Q. 26, 27 (2016).

²¹ MATTHEW SCOTT, CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION 154 (2020).

²² Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 9.14, International Covenant on Civil and Political Rights (2016).

²³ General Assembly resolution 44/25, Convention on the Rights of the Child, 20 Nov. 1989, art. 24.

²⁴ See generally Alexandra R. Harrington, *Life as We Know It: The Expansion of the Right to Life Under the Jurisprudence of the Inter-American Court on Human Rights*, 35 LOY. L.A. INT’L & COMP. L. REV. 313 (2013).

²⁵ Scott, *supra* note 21, at 154

²⁶ *Id.*

²⁷ See Scott, *supra* note 21, at 156 (supporting this proposition).

²⁸ PIERRE-MARIE DUPUY & JORGE E. VIÑUALES, INTERNATIONAL ENVIRONMENTAL LAW 442 (2nd ed. 2018).

Refugee Convention.²⁹ However, the Human Rights Committee has stressed that people fleeing climate change may have valid claims under the Refugee Convention, including in situations where climate change and violence are intertwined, and that international refugee law is applicable in the context of climate change and disaster displacement.³⁰ The UNHCR has urged states and practitioners that “the impacts of climate change must be understood within a broader socio-political context, and disasters might exacerbate existing persecution, discrimination or marginalization, proving a refugee claim.”³¹

Refugee law cannot be dismissed automatically in claims for refugee status as a “climate migrant.”³² Instead, human rights defenders and decision-makers must be aware of the social nature of natural disasters and climate change effects and how these conditions can exacerbate already existing discrimination, thereby bolstering claims for refugee status under the Refugee Convention.³³ Decision makers must look at each claimant’s status within her local and wider social context and determine whether she is facing discrimination, including direct, indirect and systemic discrimination.³⁴ That discrimination, of course, must rise to the level of persecution.³⁵ Many climate migrants, however, face dispossession of land, appropriation of resources, and deracination resulting from severe and persistent discrimination such that persecution can be demonstrated.³⁶

III. Case Studies: Illustrating the Nexus between Climate Inequity and Refugee Protection

The following case studies illuminate the socio-political landscape that gives rise to refugee protection for many “climate migrants.” It bears noting again that children, though under-studied in this emerging intersection, often bear the brunt of the harms of climate inequity which, in turn, violate their human rights³⁷:

Children comprise up to 50 per cent of the population in the Global South, the part of the world which is most affected by the impacts of climate change. People are displaced from

²⁹ Scott, *supra* note 21, at 3.

³⁰ *UN Human Rights Committee Decision on Climate Change is a Wake-Up Call, According to UNHCR*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 24, 2020), <https://www.unhcr.org/en-us/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html>.

³¹ UNICEF, U.N. MAJOR GRP. FOR CHIL. & YOUTH, & INT’L ORG. FOR MIGRATION, CHILDREN UPROOTED IN A CHANGING CLIMATE, 11 (2021) (available at <https://www.unicef.org/media/109421/file/Children%20uprooted%20in%20a%20changing%20climate.pdf>).

³² Jane McAdam, *Current Developments - Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement*, 114 AM. J. OF INT’L L. 708, 712 (2020) (citing AF (Kiribati) [2013] NZIPT 800413 (N.Z.) ¶ 56; Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125 (N.Z.) ¶ 54).

³³ *Id.* at 712.

³⁴ Scott, *supra* note 21, at 133.

³⁵ Persecution does not include discrimination, except in extraordinary cases. *Sharari v. Gonzales*, 407 F.3d 467, 474-75 (1st Cir. 2005); To establish a claim for asylum based on discrimination, the discrimination must be extremely serious, regular, and frequent. *Alibeaj v. Gonzales*, 469 F.3d 188, 191 (1st Cir. 2006).

³⁶ Persecution may include significant economic deprivation. *Koval v. Gonzalez*, 418 F.3d 798, 805-06 (7th Cir. 2005).

³⁷ Sacchi Decision, *supra* note 18, ¶ 2, 3.1.

and migrating away from regions affected by climate change hazards such as sea level rise, storms, and drought to escape risks, have secure livelihoods, and work towards a better future. Sometimes, children may embark on this journey by themselves, families may bring their children with them, or the children are left behind as their caregivers are compelled to seek opportunities separating families.³⁸

While observing the case studies below, we must at all times consider the enhanced impact upon particularly vulnerable children within these groups.

a. Palm Oil Magnates, *Campesinos* and Violence in Honduras

In Honduras's Bajo Aguán region, small farmers (*campesinos*) and agricultural cooperatives have been involved in land disputes with local palm oil agribusinesses for over 20 years.³⁹ The disputes date back to a World Bank modernization program in which acres of land that had been used for subsistence farming were illegally conveyed to palm oil agribusinesses.⁴⁰ Palm oil is a key component of the Global North's move to a clean economy. Specifically, palm oil is exported to the Global North where it is used for biofuels and traded in the carbon market.⁴¹ Since the modernization program, *campesinos* have tried to regain their land by appealing to the courts, installing roadblocks, and illegally occupying the land.⁴² Violence, often backed by money from the Global North and other international institutions,⁴³ has forced many *campesinos* and agricultural cooperative members to flee the region.⁴⁴ For example, one cooperative has seen half of its families leave.⁴⁵ The Honduran government has failed to resolve contested titles, failed to address allegations that the land was obtained by force and at an unfair price and failed to solve many of the murders that occurred in the region.⁴⁶

b. Guatemala Subsistence Farmers & Pervasive Flood and Drought

In 2020, Guatemala experienced “[u]npredictable storms and back-to-back hurricanes [which] brought heavy downpours to the hills of western Guatemala, triggering mudslides that buried [] crops and left pests and disease in their wake. When the land dried out, it stayed dry, and the region is once again gripped by prolonged heat waves and persistent drought.”⁴⁷ In indigenous regions,

³⁸ Robert Oakes, *Climate Change, Migration, and the Rights of Children*, U. N. UNIV. (Nov. 15, 2016), <https://unu.edu/publications/articles/climate-change-migration-and-the-rights-of-children.html>.

³⁹ Nina Lakhani, *Honduras and the Dirty War Fuelled by the West's Drive for Clean Energy*, THE GUARDIAN (Jan. 7, 2014, 2:00PM), <https://www.theguardian.com/global/2014/jan/07/honduras-dirty-war-clean-energy-palm-oil-biofuels>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Sasha Chavkin, *Lawsuit: World Bank Arm Aided Firm that Hired 'Death Squads'*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 7, 2017), <https://www.icij.org/inside-icij/2017/03/lawsuit-world-bank-arm-aided-firm-hired-death-squads/>.

⁴⁴ Laura Gottesdiener, *How a Bloody Land Feud in Honduras is Stoking Migrant Flight to U.S.*, REUTERS (Dec. 23, 2021), <https://www.reuters.com/investigates/special-report/honduras-migration-land/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Denise Chow & Carlos P. Beltran, *Hungry and Desperate: Climate Change Fuels a Migration Crisis in Guatemala*, NBC NEWS (Sept. 22, 2021, 6:51PM), <https://www.nbcnews.com/science/environment/hungry-desperate-climate-change-fuels-migration-crisis-guatemala-rcna2135>.

which have faced decades of structural racism, the effects of climate inequity are the most profound.⁴⁸ Indigenous children often face the most significant perils of Guatemala’s climate inequity: “Acute malnutrition in children under five has more than doubled since 2019 due to the hurricane related crop losses, volatile commodity prices and the pandemic.”⁴⁹ Yet, as more and more indigenous or other marginalized Guatemalans arrive in the United States, they are continually referred to as “economic migrants.”

c. Indigenous Children in Colombia’s La Guajira Region

Climate inequity caused by climate change and extractive practices in Colombia’s wealthy region of La Guajira is so severe that it led one advocate to explain that “indigenous children are more likely to die in La Guajira than cattle.”⁵⁰ Indigenous communities suffer the effects of severe drought, compounded by private companies diverting a river to sustain regional mining practices. “In a semidesertic region in Colombia, Cerrejón (the largest open-pit coal mine in Colombia and Latin America, and the 10th biggest in the world) has created environmental inequalities and control and infrastructure arrangements that transform local water dynamics, affecting Wayúu people in a differentiated way.”⁵¹ The government of Colombia recognizes the problem:

[Colombia’s Constitutional Court] ruling T-302 of 2017 included figures on infant mortality and malnutrition [for the Wayuu people] that make for difficult reading...The Constitutional Court... reported 4,770 deaths of children due to malnutrition or associated diseases over an eight-year period. According to the statistical analysis, these deaths were related to a lack of access to improved water sources, unmet basic needs and barriers to health services in early childhood. For 2013, the mortality rate associated with malnutrition in children under 5 years of age in La Guajira was 32.54 per 1,000 children, while the national average was 6.76.⁵²

Much of this climate inequity can be traced back to both persistent government discrimination in the allocation of state resources as well as the private extraction industry (specifically, diverting a river and precluding access to water by the Wayuu people). The Colombian government, nonetheless, “has declared the extractive industries to be of ‘national interest’, condemning communities to involuntary resettlement and displacement.” When these individuals migrate across borders, in search of survival, this implicates the right to life and their claims must be understood in the context of the Refugee Convention.

⁴⁸ Nina Lakhani, ‘So Many Have Gone’: Storms and Drought Drive Guatemalans to the U.S. Border, THE GUARDIAN (Nov. 1, 2021, 5:30PM), <https://www.theguardian.com/world/2021/nov/01/guatemala-storms-drought-climate-migrants>.

⁴⁹ *Id.*

⁵⁰ Natali Segovia, Remarks at Loyola University Chicago School of Law’s Civitas ChildLaw Center CoffeeTalk (Apr. 6, 2022).

⁵¹ Astrid Ulloa, *The Rights of the Wayúu People and Water in the Context of Mining in La Guajira, Colombia: Demands of Relational Water Justice*, 13 HUM. GEOGRAPHY 6, 6 (2020).

⁵² Joanna Barney, *Colombian State Failing the Wayúu Children of La Guajira*, IWGIA (Sept. 16, 2021), <https://www.iwgia.org/en/news/4527-colombian-state-failing-the-way%C3%BAu-children-of-la-guajira.html>.

IV. Migration Driven by Climate Inequity under the Rubric of the Refugee Convention

At first blush, when Honduran & Guatemalan subsistence farmers present themselves as having fled their home countries due to lost land, they tend to be lumped in with other “economic migrants.” When indigenous migrants move across borders, they express that they are in search of survival. The type of persecution these migrants experience, resulting from persistent and structural discrimination, is not immediately evident. The violence experienced, the land lost (either due to flood, drought, or lost to seemingly personal disputes) can give rise to the impression that these individuals do not qualify for protection under the rubric of the Refugee Convention.

When their adolescent children arrive in the United States it can be even more difficult to determine the socio-political underpinnings of the forced migration. For example, when indigenous Guatemalan children arrive malnourished in the United States, the parents—not the government of Guatemala—are immediately blamed. Social science research indicates that “[i]n Guatemala, 50% of infants and children are stunted (very low height-for-age), and some rural Maya regions have [an average of greater than] 70% children stunted.”⁵³ Studies indicate that “stunted” children (children experiencing chronic malnutrition) “experience developmental delays during early childhood.”⁵⁴ Nonetheless, the limited understanding of the indigenous experience leads to ongoing disparate treatment. For example, there are reports that indigenous children were forcibly separated from their parents due to presumed neglect when children appeared malnourished.⁵⁵ These children are not necessarily considered for public-sphere, state-related persecution cases under the rubric of the Refugee Convention. Instead, they are viewed as economic migrants, some considered climate migrants, in search of a better life.

This misapprehension of the nexus between discriminatory patterns and practices of state violence and the protectability of migrant groups (indigenous migrants, campesinos, women and children or other potential particular social groups) can largely be attributable to the false narrative that climate change and refugee protection are disconnected. The UN holds states of origin primarily responsible for addressing environmental migration by helping their citizens build climate resilience.⁵⁶ However, the Honduran, Guatemalan, and Colombian governments, in the examples cited above, have categorically failed to protect (and in some cases directly contribute to harm experienced by) indigenous groups, *campesinos* and other agricultural cooperatives or vulnerable groups—especially children—from the harms of climate inequity including dispossession of land, appropriate of resources, and deracination. This failure demands a greater response from the international community including recognition of the association of protectable characteristics with systemic patterns and practice of structural discrimination resulting in abject persecution.

⁵³ MI Varela-Silva, et al., *Deep Data Science to Prevent and Treat Growth Faltering in Maya Children*, 70 EUR. J. OF CLINICAL NUTRITION 679, 679-80 (2016).

⁵⁴ Boris Martinez, et al., *Field Report: Early Child Development in Rural Guatemala*, PERSP. IN INFANT MENTAL HEALTH 7 (2016).

⁵⁵ Sarah J. Diaz, Associate Director, Center for the Human Rights of Children, Loyola University Chicago, School of Law (previous professional experience).

⁵⁶ Dina Ionesco, *Let's Talk About Climate Migrants, Not Climate Refugees*, SUSTAINABLE DEV. GOALS (June 6, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/>.

V. Concluding Recommendations

Climate change and its effects are an injustice that disproportionately affects the states and peoples who have contributed the least to the problem.⁵⁷ As the effects of climate change worsen, the Global North will experience more and more migration directly resulting from climate inequity. The Global North, particularly the United States, must stop categorizing climate refugees under the narrative that they are unworthy of protection as economic or climate migrants. Instead, we all must take greater strides to research, understand and recognize the nexus between climate inequity and protection under the Refugee Convention. Our specific recommendations to the Office of the Special Rapporteur for the Human Rights of Migrants include:

First, the Special Rapporteur should strongly urge the Human Rights Council and the General Assembly to invest in comprehensive research related to structural racism and discrimination against protected groups and the impact of climate inequity.

Second, the Special Rapporteur should strongly urge the Human Rights Council and the General Assembly to invest in comprehensive research related to forced child migration due to climate inequity and protection under the Refugee Convention.

Third, the international human rights community, especially the Human Rights Council, must provide specific guidance for incorporating climate inequity—resulting in persecution—under the Refugee Convention. The Special Rapporteur should encourage member states of the Global North to reevaluate their narratives and policies related to climate migration to better understand the nexus between climate inequity, forced migration, and protectable characteristics under the Refugee Convention. In order to begin successfully applying for protection under the Refugee Convention, additional research and country conditions experts will be needed to illuminate, for human rights defenders and adjudicators alike, the socio-political underpinnings that give rise to persecution (violations of the right to life in the form of dispossession of land, misappropriation of resources, and deracination) and protection under the Refugee Convention.

Fourth, the Special Rapporteur must call upon the United States Government (USG) to recommit to its international obligations under the International Covenant on Civil and Political Rights especially as it relates to a global understanding of the right to life as a positive obligation of the USG. Bringing the United States in line with global human rights norms will help develop more robust domestic law protections for refugees.

Fifth, the Special Rapporteur, should call upon the USG to *finally* ratify the CRC so that migrant children will be entitled to the full scope of protections including, especially, the right to have their best interests considered in immigration proceedings. A USG committed to the CRC must facilitate the development of a domestic law framework that treats migrant children as children and ameliorates the risk of harm to children. The protection of a child's best interests is international customary law and will enable the United States to offer appropriate protections for children fleeing climate inequity, regardless of whether they can secure protection under the Refugee Convention.

⁵⁷ Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 402 (2020).

Sixth, while the focus of this input relates to deepening our understanding of the nexus between climate inequity and refugee eligibility, in the absence of protections for *all* climate migrants, we urge the Special Rapporteur to work with state parties to create a category of protection which upholds our obligations under the international principle of non-refoulement. “The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or *other serious human rights violations*.”⁵⁸ All climate migrants facing threats to their right to life via dispossession of land, misappropriation of resources, and deracination are entitled to protection under the jus cogens prohibition against non-refoulement.

⁵⁸ *The Principle of Non-Refoulement Under International Human Rights Law*, OFF. OF THE U.N. HIGH COMM’R FOR HUM RTS., <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (last visited Apr. 13, 2022).