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SUBMITTED INPUT

An NGO Input for the Office of the High Commissioner for Human Rights on the rights of the child and family reunification, jointly submitted by the Center for the Human Rights of Children, Loyola University School of Law & the Young Center for Immigrant Children's Rights, et al.

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I. Introduction

The United States is the only nation on earth that has failed to ratify the Convention on the Rights of the Child (CRC)¹: the instrument universally recognized as “establishing global standards to ensure the protection, survival, and development of all children, without discrimination.”² With the availability of reservations in the ratification process, the failure to ratify the CRC cannot be justified as a matter of state sovereignty. Instead, this failure represents a feature of purported U.S. exceptionalism. As drafters of the Universal Declaration of Human Rights and coordinators of the UN Charter, the United States Government (USG) presumes that human rights accountability is an issue reserved for other nations.

The United States’ human rights record, however, is far from exceptional. The USG has increasingly ignored or violated the rights of migrants and refugees—including children. Over the last several years, the USG has invoked increasingly racist rhetoric to support immigration policies that violate both international and U.S. laws and which place migrants directly in harms’ way. The USG has propelled deterrence and advanced anti-immigrant political agendas despite evidence that these policies lead to severe rights violations, including gross violations of the rights of migrant children. In light of the increasing frequency and severity of the human rights violations perpetuated by the USG against migrants and migrant children in particular, accountability has become critical.

The Center for the Human Rights of Children and the Young Center for Immigrant Children’s Rights, in collaboration with First Focus on Children, Kids in Need of Defense, and the National Immigrant Justice Center, submit this input in response to the call for submissions made by the Office of the United Nations High Commissioner for Human Rights to prepare a report to the Human Rights Council on the rights of the child and family reunification. This input will focus specifically upon the USG’s failure to acknowledge and protect the human rights of migrant children and families in cross-border situations, the USG’s abject disregard for migrant children’s right to family unity—despite laws that clearly protect this right for domestic children, and the USG’s categorical failure to consider the best interest of migrant children in the immigration process, including decisions to return children to their country of origin. The signatories to this input are national and international organizations that provide a range of services related to migrant children, including direct legal services, social services, advocacy, research, and scholarship.

II. Legal Framework

Under the US immigration law framework, the rights of most migrant children are tied to that of all migrants—perpetuating the idea that migrant children can be treated as adults in miniature or merely as an invisible extension of their migrant guardian. This construction is incompatible with the most fundamental rights of children. The CRC demands that all state actors account for the best interests of the child and that the best interest of the child must be applied in all decisions concerning the child.³ A child’s right to have their best interests considered⁴ is the “single most universally adopted principle” among all articles in the

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

² HUMAN RIGHTS WATCH, 25TH ANNIVERSARY OF THE CRC (Nov. 17, 2014), <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child#:~:text=The%20Convention%20on%20the%20Rights%20of%20the%20Child%20is%20an,of%20all%20children%2C%20without%20discrimination.>

³ UN CRC art. 6

⁴ UN CRC art. 3

CRC.⁵ The right of a child to have their best interests considered has become a preemptory norm recognized by treaty, custom, and the general principles of law.⁶

International law also recognizes specific obligations of the state with respect to separated or unaccompanied migrant children. Family reunification is the paramount goal for any unaccompanied or separated child⁷—recognizing that “family is the fundamental unity of society and the natural environment for the growth and well-being of its members, particularly children.”⁸ Family separation, on the other hand, is strictly forbidden “except where the situation is necessary for the best interests of the child.”⁹

While the USG does not require immigration officials to consider the best interests of the child in immigration decisions, the USG defends the right to family integrity and the best interests of the child standard in all other domestic child-serving systems. The right to family life has long been robustly protected from interference by the U.S. Constitution.¹⁰ As a result, the separation of a child from their family can only be predicated upon a finding that it is consistent with the best interest of the child in both the child protection and juvenile justice contexts. In 2018, to fortify protections for family unity, the US Congress passed the Families First Prevention Services Act (Family First Act), which requires states to support families with prevention services prior to child welfare removals and ties federal funding to the implementation of statewide preventions procedures.¹¹ The Family First Act acknowledged that “children fare best in families,” family separation is inherently damaging to children, and that the right to family life should be protected.¹²

III. Human Rights Concerns Affecting Migrant Children Separated from their Families

Treated as adults in miniature, a child’s access to family reunification in the immigration context can only be characterized as a procedural hurdle rather than a closely guarded right. The refusal of the USG to see migrant children as children *first* has led to an abject failure of the system to account for the best interests of children and, consequently, for the myriad human rights violations that inevitably occur in the absence of a child-protection standard.

A. The USG Categorically Fails to Consider the Best Interests of Migrant Children

The USG has categorically failed to apply the best interest of the child standard to migrant children. The best interest of the child is not considered at the border, upon apprehension, for services while in custody,

⁵ U.N. CHILDREN’S FUND [UNICEF], CONVENTION ON THE RIGHTS OF THE CHILD: A STUDY OF LEGAL IMPLEMENTATION IN 12 COUNTRIES (2012), <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/>

⁶ *Id.* (Recognizing that every country in the world, apart from the United States, has ratified the UN CRC, and that pursuant to a UNICEF study of the UN CRC, “[t]he right of the child to have their best interests considered is the single most universally adopted principle of the CRC,” the right of a child to have their best interests considered has become a preemptory norm as recognized by treaty, custom and general principles of law recognized by civilized nations.)

⁷ CRC/C/GC/6, 76 (2005). “The ultimate aim in addressing the fate of unaccompanied children is to identify a durable solution that addresses all their protection needs, takes into account the child’s view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.”

⁸ CRC/C/GC/14, 2 (2013).

⁹ UN CRC art. 9(1); *see also* CRC/C/GC/6, 81 (2005).

¹⁰ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹¹ Family First Prevention Services Act, 42 USCS §1305 (2018).

¹² Children’s Defense Fund, *FFSPA Thank You Letter*, CHILDREN’S DEFENSE FUND (Mar. 15, 2018) <https://www.childrensdefense.org/wp-content/uploads/2018/08/ffpsa-thank-you-letter-1.pdf>

in proceedings before the immigration court, upon removal and repatriation¹³ or when deporting the parents, siblings, or primary caregivers of U.S. citizen children.¹⁴ While a best interest standard is theoretically applied in placement decisions during the time that unaccompanied children are in federal custody,¹⁵ there is no policy or regulation defining the relevant factors for a best interests consideration or requiring documentation of the placement decision. Of even greater concern, there is no policy designating how government officials are to make best interest determinations generally.¹⁶ Even in the face of the Trump Administration’s policy of family separation as part of Zero Tolerance (detailed below), US courts have ignored the best interest of the child standard choosing instead to give broad discretion to USG immigration authorities¹⁷ in separating families when the migrant parent presents with *any* past criminal history—regardless of a nexus of the criminal conduct to the safety, health and well-being of the child.¹⁸

B. The USG Actively Engages in Various Forms of Family Separation

US citizen children are routinely separated from their non-citizen parents via deportation. Family separation has been a function of USG law and policy for decades. Undocumented parents have been routinely removed and deported without their U.S. born children or when evidence demonstrates that the parent’s deportation was contrary to the child’s best interests.¹⁹ Roughly 5 million children in the U.S. have at least one undocumented parent.²⁰ Studies have shown that children of undocumented parents exhibit startling adverse health outcomes attributed to the stress of potential separation including negative education outcomes, increased risk of economic instability, and increased risk of ending up in the child welfare system.²¹

Children were separated under Zero Tolerance. In April of 2018, the USG formalized the categorical separations of parents and children at U.S. borders and ports of entry in order to prosecute unauthorized entry and other immigration offenses of all arriving parents under a policy known as “Zero Tolerance.”²² As a result, thousands of children were taken from their parents by the USG, forcibly rendered unaccompanied, and scattered across the country into a byzantine system of child detention facilities intended only for short-term care and designed for children who arrive at the U.S. border without a parent

¹³ SUBCOMMITTEE ON THE BEST INTERESTS OF THE INTERAGENCY WORKING GROUP ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN, 6-11 (May 2016) <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf>

¹⁴ See generally, the Immigration and Nationality Act 8 USC 12 (1952) which either does not consider the existence of US citizen children at all in a decisions affecting removal or requires a demonstration that the parent’s removal would cause extreme hardship or exceptional and extremely unusual hardship to the US citizen child.

¹⁵ Trafficking Victims Protection Reauthorization Act, 22 USC Ch. 78 §1232(c)(2)(A) (2008) (requiring the Department of Health and Human Services to place unaccompanied children in the least restrictive setting in their best interests”). <https://www.law.cornell.edu/uscode/text/8/1232>

¹⁶ Jennifer Nagda & Maria Woltjen, *Best Interests of the Child Standard: Bringing Common Sense to Immigration Decisions*, FIRST FOCUS (2015).

¹⁷ See *Ms. L et al., v. U.S. Immigration and Customs Enforcement*, 302 F.Supp.3d 1149 14 (2018).

¹⁸ See *Ms. L. et al., v. U.S. Immigration and Customs Enforcement*, 18-cv-00428-DMS-MDD, Memorandum in Support of Motion to Enforce, Affidavit of Jennifer Nagda, exh. E, (86).

¹⁹ Texas et al., v. United States et al, 14-cv-00254 (S.D. Tex. 2015).

²⁰ Randy Capps et al. *A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRANT POLICY INSTITUTE (Jan. 2016). <https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf>

²¹ American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement*, AIG (Jun. 2021) https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf

²² See Memorandum for Federal Prosecutors Along the Southwest Border, OFFICE OF THE ATTY GEN., (Apr. 6, 2018) <https://www.justice.gov/opa/press-release/file/1049751/download> (“Zero-Tolerance” Policy Memo).

or legal guardian.²³ While those separations were largely halted, a mandate to ensure policies conform with a best interests of the child standard would have prevented the policy and the atrocities that followed. Without such a mandate, separations continue even today. Under a court order, immigration authorities have been granted unacceptably broad authority to separate children from parents solely on the basis of a vague, undefined “criminal history” standard.²⁴ Children have been separated from parents for mere allegations of “bad acts” as well as mere charges (much less convictions) for actions unrelated to a parent’s ability to safely care for a child.²⁵ Today, thousands of children remain separated from parents who were deported before they could reunify with their children; and even though a new administration is working to reunify those families (now separated for years), those families have not been offered any permanency (*e.g.*, the right to remain together) in the United States.

Children are separated under the “Migrant Protection Protocols.” In January 2019, the USG began to implement a policy known as the “Migrant Protection Protocols” (“MPP”) which forces all asylum seekers to remain in Mexico for the duration of their immigration proceedings.²⁶ Tens of thousands of asylum seekers have been forced to wait in “MPP camps” composed of crude makeshift tents and plagued by crime, abuse, and poverty.²⁷ In addition to the reported cases of murder, rape, torture, kidnapping and assault, the introduction of the COVID-19 pandemic has only increased the dangers faced by migrant children under MPP. MPP has fostered the creation of conditions which pose direct threats to life, survival and development of migrant children. Pursuant to the intolerable living conditions, MPP forces parents to send their children to seek asylum alone in the relative safety of the US.²⁸ While the Biden Administration attempted to halt MPP, a recent court order defied this effort and required the USG to continue the inhumane policy.²⁹

Children are separated under Title 42 expulsions. Migrant family separations also continue under the ongoing implementation of a policy referred to as “Title 42.”³⁰ This policy has categorically denied migrants access to asylum proceedings as required by U.S. obligations under the Refugee Convention.³¹

²³ Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding up Deportation of Children* (Jan. 17, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811>.

²⁴ See *Ms. L et al., v. U.S. Immigration and Customs Enforcement*, 302 F.Supp.3d 1149 14 (2018).

²⁵ See *Ms. L. et al., v. U.S. Immigration and Customs Enforcement*, 18-cv-00428-DMS-MDD, Memorandum in Support of Motion to Enforce. <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>

²⁶ See Policy Guidance for Implementation of the Migrant Protection Protocols, U.S. DEP’T OF HOMELAND SEC., (Jan. 25, 2019) available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; see also *Innovation Law Lab v. Nielsen*, 19-cv-00807, Doc. 73, (N.D. Cal. 2019).

²⁷ See Policy Guidance for Implementation of the Migrant Protection Protocols, U.S. DEP’T OF HOMELAND SEC., (Jan. 25, 2019) available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; see also *Innovation Law Lab v. Nielsen*, 19-cv-00807, Doc. 73, (N.D. Cal. 2019).

²⁸ Young Center for Immigrant Children’s Rights, *Family Separation is Not Over: How the Trump Administration Continues to Separate Children from their Parents to Serve its Political Ends*, 13-14 (Jun. 2020), <https://static1.squarespace.com/static/597ab5f3beafb0a625aaf45/t/5f032e87ff32c80f99c7fee5/1594044048699/Young+Center+Family+Separation+Report-Final+PDF.pdf>

²⁹ Peter Margulies, *The Courts Restore the ‘Remain in Mexico’ Program: An End to Judicial Deference?* LAWFARE (Sept. 3, 2021) <https://www.lawfareblog.com/courts-restore-remain-mexico-program-end-judicial-deference>

³⁰ See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, U.S. CUSTOMS AND BORDER PROTECTION (last modified Jan. 7, 2021) <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>; see also Zolan Kanno-Youngs, *Judge Halts “Public Health” Expulsions of Children at the Border*, N.Y. TIMES (updated Jan. 20, 2021) <https://www.nytimes.com/2020/11/18/us/politics/trump-migrant-children.html>

³¹ *United Nations Protocol Relating to the Status of Refugees* art. I, 31 January 1967, *United Nations Treaty Series*, vol. 19, No. 6223; *Convention Relating to the Status of Refugees* art. 33(1), 28 July 1951, *United Nations Treaty Series*, vol. 189, No. 150, p. 152; see also Refugee Act of 1980 § 208, 8 U.S.C. § 1158, (c)(1)(A) (2018)

The policy is widely understood to have exploited an archaic public health statute as there is no demonstrable nexus of the policy to beneficial public health outcomes, and the policy has been condemned by public health experts and experts in international human rights law.³² Pursuant to the policy, thousands of people have been returned to the very harm they fled, with no opportunity to seek protection; many of these people are children fleeing with families, including Haitian children.³³ While Title 42 is no longer being applied directly to unaccompanied children, the policy is still applied to families in violation of international guidelines on child protection during time of public emergency as it forces some families to send children to the US alone to receive proper assistance.³⁴

Children are routinely separated from family members who cannot demonstrate legal guardianship. Children who are encountered by immigration authorities and determined to be “unaccompanied”—under 18, without legal status, and without a parent or legal guardian³⁵—must be transferred to federal child custody.³⁶ This applies even to children who are encountered in the custody of adult family members or other trusted caregivers if that family member or caregiver is not the legal guardian. For years, USG officials have interpreted the “transfer to child custody” to require physical separation and transfer of the child to facilities across the country, where it may take months or years to reunify the child with a trusted adult. This process should be facilitated at the border with the encountered trusted adult/family member. A system that meaningfully considers a child’s best interests would provide rapid evaluations of children’s safety in, and relationships to, trusted adults—and would prevent thousands of unnecessary, traumatizing, and harmful separations every year.

C. The USG Fails to Provide Due Process to Children Seeking Family Reunification

In addition to actively separating families under the policies outlined above, the USG also fails to provide due process for unaccompanied migrant children seeking to reunify with their families upon reaching the United States. Contrary to international guidance—which calls upon states to use detention only as a measure of last resort³⁷—the USG utilizes *pro forma* detention for all undocumented migrant children who arrive at our borders without a parent or legal guardian. As noted above, this includes children arriving with adult family members or other traditional caregivers, from whom they are separated in order to be detained in facilities licensed for children. As a general rule, unaccompanied children in these facilities are not routinely provided access to bond proceedings regardless of the duration of detention; most decisions to deny or delay release are made by administrative officials and are not reviewed by immigration judges. Since 2017, courts have recognized the right of children to pursue a bond hearing in front of an immigration judge³⁸ instead of the agency detaining them. However, the custodial agency is able to use information children disclose in counseling sessions and their unaddressed trauma and mental health to argue for the children’s continued detention. Children who are assumed to have links to terrorism or gang affiliation can be detained indefinitely. In *Saravia v. Barr*, advocates contested USG’s practice of using unsubstantiated

³² Sarah Diaz & Malachi Schrobilgen, *The Role of Public Health in the Rule of Law: The Cautionary Tale of Title 42 Expulsions*, 30 HARV. PUB. HEALTH REV. 1, 6 n.xix (2021). See also Jonathan Blitzer, *How Biden Came to Own Trump’s Policy at the Border*, THE NEW YORKER, (Oct. 6, 2021) <https://www.newyorker.com/news/daily-comment/how-biden-came-to-own-trumps-policy-at-the-border>

³³ Wildlore Mérandcourt et al., *Haitian Migrants Thought Biden Would Welcome Them. Now Deported to Haiti, They Have One Mission: Leave Again*, THE WASHINGTON POST (Oct. 1, 2021) <https://www.washingtonpost.com/world/2021/10/01/haiti-deportees/>

³⁴ United Nations High Commissioner for Refugees, *Emergency Handbook: Child Protection*, (last visited Oct. 15, 2021) <https://emergency.unhcr.org/entry/43381/child-protection>

³⁵ 6 U.S.C. § 279(g).

³⁶ 8 U.S.C. § 1232(b)(3).

³⁷ UN CRC, art. 6

³⁸ Rachel Prandini & Alison Kamhi, *Practice Alert on Flores v. Sessions*, IMMIGRANT LEGAL RESOURCE CENTER (Jul. 2017) https://www.ilrc.org/sites/default/files/resources/flores_v._sessions_practice_alert_final.pdf

gang allegations to place children in severely restrictive conditions in distant detention facilities without notice to their parents or lawyers and did not afford the accused children a chance to challenge the charges against them.³⁹

IV. Strategic Priorities to Prevent Family Separation & Uphold the Rights of Separated or Unaccompanied Migrant Children

Preventing family separation and prioritizing family reunification is imperative to uphold the human rights of separated or unaccompanied migrant children. The following list of strategic priorities would promote an immigration system that enforces children’s rights and recognizes their inherent dignity.

The USG Must Ratify the CRC and Recognize the Guiding Principle of Child Protection: The Best Interests of the Child Standard. The United States must ratify the CRC and adopt the best interest of the child standard for all policies and practices impacting children in immigration proceedings. This effort would force the USG to end its discriminatory practice of protecting children in all other child-serving systems while ignoring the best interests of migrant children.

The USG Must Provide Universal Attorney Representation for Migrant Children. The USG should provide all unaccompanied or separated children with an attorney. In any other legal contexts, allowing children to navigate an adversarial court system alone—when the stakes are so high—would be patently rejected as a violation of due process. Child migrants must be provided with counsel whose ethical obligation is to represent each child’s expressed wishes and zealously advocate on their behalf.

The USG Must Provide Universal Appointment of Independent Best Interests *Guardians Ad Litem* (Child Advocates) for Unaccompanied and Separated Children. Robust adoption and implementation of the best interest of the child standard requires appointing an independent child advocate to present such recommendations to the court. A best interests *guardian ad litem* performs an integral function in voicing the child’s best interests in a legal setting. In immigration proceedings, where the right to life and safety, the right to be free from detention, and the right to family unity are all at issue in the case, the universal appointment of a best interests *guardian ad litem* would help insulate a child’s substantive rights from erroneous deprivation.

The USG Must Prevent Kinship Separations While Maintaining Child Protection Standards. 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. This can be accomplished by detailing staff from the federal Department of Health and Human Services to the border to evaluate family relationships, the child’s safety, and trafficking risks in real time and in less than 72 hours, before the child is permanently separated from the adult who is critical to the child’s sense of safety, attachment, and identity.

The USG Should Expand the Central American Minors Protection and Reunification Program. The “Central American Minors” program (“CAM”) was established in 2014 to provide some children in Central American countries with an opportunity to seek protection and reunify with parents in the United States without making the often-dangerous journey to the southern border. The program was limited to children whose parents were lawfully present in the United States. Those parents could apply to have children who were still residing in Central American countries considered for relocation to the U.S. as refugees or, if

³⁹ *Saravia v. Barr*, No. 18-60532 (5th Cir. 2020).

found ineligible for refugee status, as parolees. CAM was initially developed as an “in-country” processing program, meaning that child applicants remained in their home countries while their applications were processed. As the USG re-initiates the CAM program, it should be developed and implemented to focus on family reunification, recognizing the best interests of the child standard and allowing for attorney representation.

The UN High Commissioner for Human Rights Must Condemn the USG for its Failure to Protect All Children, Regardless of Immigration Status. The United Nations must condemn the USG for its discriminatory child protection standards. The USG’s discriminatory treatment of migrant children makes the state an outlier of the Global west. We call upon the United Nations to condemn the disparate treatment of migrant children.

The UN High Commissioner for Human Rights Should Encourage States to Work Together to Effectuate Transfers from One State to Another in the Best Interests of Migrant Children, whether Transnational or Transcontinental. For example, Safe Third Country Agreements should be required to include safety clauses that permit the transit of children through either country to effectuate family reunification in a third country. Similarly, all countries should be encouraged to work together towards family reunification during time of public emergency (*i.e.*, reunifying Afghan children amidst evacuations) or in routine cross-border situations anytime it is in the best interests of the child (*i.e.*, encouraging the USG and Mexico to coordinate reunification efforts to reduce migration through the world’s most dangerous corridor).

V. Conclusion

As advocates, legal representatives, and social service providers for migrant children, we are deeply concerned with the increasing violations of the human rights of migrant children in the United States. We urge the High Commissioner for Human Rights and the Human Rights Council to call upon the United States to commit itself to protecting the human rights of children through adoption of a best interests of the child standard in all policies, practices, and decisions impacting children.