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## An NGO Input for the Special Rapporteur for the Human Rights of Migrants to the Office of the United Nations High Commissioner for Human Rights Report on Human Rights Violations at International Borders: Trends, Prevention, and Accountability

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FEBRUARY 25, 2022

**SUBMITTED INPUT**

**An NGO Input for the Special Rapporteur for the Human Rights of Migrants to the Office of the United Nations High Commissioner for Human Rights Report on Human Rights Violations at International Borders: Trends, Prevention, and Accountability**



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## I. Introduction

The Center for the Human Rights of Children, in collaboration with Kids in Need of Defense (KIND) and the Young Center for Immigrant Children’s Rights (“Young Center”) submits this input in response to the call for submissions made by the Special Rapporteur on the Human Rights of Migrants to inform the forthcoming report to the 50th session of the Human Rights Council regarding the United States’ current border management policies that aim to prevent migration at the southern border. This input will focus on United States’ push back methods, namely the recently reimplemented Migrant Protection Protocols (MPP) otherwise known as “Remain in Mexico” and continuing Title 42 expulsions. 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, including at the U.S.-Mexico border.

Children are uniquely vulnerable, due to their age, development, and dependence on adults for their safety and well-being. The plight of migrant children has been tied to that of all migrants—perpetuating the unfortunate tradition of treating migrant children merely as adults in miniature or merely as an invisible extension of their migrant guardian. Migrant children must be given special attention, and all decisions concerning migrant children must be firmly centered around the best interests of the child. This input calls attention to the ways in which the USG continues to ignore the unique vulnerabilities of migrant children to achieve unlawful policy goals. As a result of these policies, migrant children continue to experience harm to their physical, mental, emotional, and developmental well-being.

## II. USG border management policies contravene peremptory norms for all migrants’ but particularly violate migrant children’s rights under international law.

This input specifically addresses the ways in which USG border management policies, MPP and Title 42, violate peremptory norms including the right of migrant children not to be returned to persecution and harm under the *jus cogen* imperative of non-refoulement.<sup>1</sup> We also evaluate the ways in which USG policies violate *jus cogens* principles of international law, such as a child’s inherent right to life, survival and development.<sup>2</sup> All border management policies violate the customary international right of the child to have their best interests considered.<sup>3</sup> The policies

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

<sup>2</sup> General Assembly resolution 44/25, *Convention on the Rights of the Child*, 20 November 1989, art. 6 [hereinafter “UN CRC”].

<sup>3</sup> UN CRC, at art. 3, *supra* note 2; See generally, U.N. Children’s Fund [UNICEF], *Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, available at <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/>. (Recognizing that every country in the world, apart from the United States, has ratified the UN CRC, and that pursuant to a UNICEF study of the UN CRC, “[t]he right of the child to have their best interests considered is the single most universally adopted principle of the CRC,” the right of a child to have their best interests considered has become a preeminent norm as recognized by treaty, custom and general principles of law recognized by civilized nations.)

result in manifest violations of children’s rights and has resulted in immense physical, emotional, developmental, and traumatic harm to migrant children.<sup>4</sup>

### III. USG Border Management Policy: Migrant Protection Protocol or “Remain in Mexico”

#### a. Migrant Protection Protocols from January 2019-January 2021

Beginning in January 2019, the USG implemented a policy known as Migrant Protection Protocols (MPP) which returned non-Mexican asylum seekers<sup>5</sup> to Mexico for the duration of their immigration proceedings rather than allowing them to remain in the United States while their asylum cases were processed.<sup>6</sup> Mexico permitted these unlawful policies to continue on Mexican soil, though admittedly, the USG exerted political and economic pressures over Mexico to influence compliance. Thus families languished in Mexico, many children became separated from their parents and were rendered unaccompanied. When separated children presented to U.S. officials asking for protection, they were placed in U.S. custody. Under the policy, tens of thousands of asylum seekers were forced to wait in self-built camps plagued by violence and extreme hardship.<sup>7</sup>

MPP asylum hearings were held in DHS tents at the Mexican border under circumstances that made it impossible to consider the proceedings “fair”. Conditions of the makeshift courts often resulted in *in absentia* removal orders for children and families who were unable to attend court due to the violent conditions of the encampments.

Asylum-seeking children and their families were often required to arrive at the international bridge between 3 and 4 a.m. This meant that these children had to leave their tents in the dark to walk and wait on the Mexican side of the border—the same places where asylum-seekers became victims of robbery, sexual assault, kidnapping, extortion, and other crimes. Because of these dangers, many asylum-seekers never made it to their hearings, as DHS recognized. Children and their families who failed to attend their hearings faced termination of their cases and orders of removal in absentia.<sup>8</sup>

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<sup>4</sup> Brief for *Amici Curiae* Young Center for Immigrant Children’s Rights et al., in Support of Appellant and Reversal, 17, *State v. Biden*, 10 F.4th 538 (2021) (No 21-10806) [Hereinafter Young Center et al., *Amici Brief*]

<sup>5</sup> MPP 1.0 only applied to Spanish-speaking, non-Mexican migrants and Brazilians. The Biden Administration’s recent expansion of the program (MPP 2.0) includes the entire Western Hemisphere, sweeping Haitian and Caribbean migrants into the program. AMERICAN IMMIGRATION COUNCIL, *The “Migrant Protection Protocols”* AMERICAN IMMIGRATION COUNCIL (last visited Feb 22, 2022)

<https://www.americanimmigrationcouncil.org/research/migrant-protection-protocleols>

<sup>6</sup> 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-protectionprotocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protectionprotocols-policy-guidance.pdf); see also *Innovation Law Lab v. Nielsen*, 19-cv-00807, Doc. 73, (N.D. Cal. 2019).

<sup>7</sup> See HUMAN RIGHTS FIRST, *Publicly Reported MPP Attacks*, (Dec. 2020) available at <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks12.15.2020FINAL.pdf>; See also Kristina Cooke et al., *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, REUTERS (Oct. 11, 2019) available at <https://www.reuters.com/article/us-usa-immigration-babiesexclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexicoidUSKBN1WQIH1> (Note here that the USG did not create or fund these camps for migrants. Nor does the USG make any efforts to protect migrants. Instead, migrants created their own encampment which has relied largely

<sup>8</sup> Young Center et al., *Amici Brief supra* note 4.

Those children who made it court faced additional hurdles in the makeshift court process. Many children felt unsafe and unsupported yet were expected to tell their stories if their asylum claim was to be successful. The following stories highlight the impossibilities children faced in the asylum process under MPP.

Ana<sup>9</sup> was a 16-year-old girl fleeing Honduras after she was sexually assaulted by her father and threatened for contacting law enforcement. Ana was technically given a chance to speak about her assault before an immigration judge, but the hearing took place in a tent over video with no privacy and ultimately, she was too afraid to speak.<sup>10</sup>

Two sisters, Alejandra and Rosa, El Salvadoran children who were forced to appear at their MPP hearing with their abusive father and prevented from retelling their story of abuse.<sup>11</sup> Moreover, only 7.5% of individuals subjected to MPP proceedings were able to hire a lawyer. Ultimately, of the 42,012 MPP cases heard before December 2020, only 521 people were granted asylum (less than 1.25% of all MPP cases).<sup>12</sup> MPP courts continue to lack adequate protections necessary to carry out a legitimate legal proceeding on behalf of an asylee, especially for a child.<sup>13</sup> The superficial proceedings designed under MPP undermine the basic guarantee of due process and the obligation of non-refoulement.<sup>14</sup>

In addition to the abject procedural deficiencies of the MPP legal process, children were placed squarely in harms way under MPP, compromising children's health, safety and right to healthy development.

In early 2021, KIND represented tender age children Oscar<sup>15</sup>, age five, Hilaria, age eight, and another six-year-old child who had all been unlawfully returned to Mexico with their grandmothers under the first iteration of MPP despite the fact they had available parent-sponsors in the United States. They resided in the dangerous areas of Ciudad Juarez, Monterrey, and Piedras Negras, shut in shelters with little ability to go outside and play.

All three children had to wait until late July or August of 2021 to reenter the United States. There are currently over 25,000 cases still pending from this round of MPP.<sup>16</sup> When the Biden Administration began to "wind down" the program, 13,000 people were allowed to reenter the United States while their asylum cases were processed.<sup>17</sup> Nonetheless, 12,000 asylum seekers, including children, remain unaccounted for and were unable to return to the U.S.<sup>18</sup>

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<sup>9</sup> All names are pseudonyms that correspond to those used in the Young Center's Amici Brief cited above.

<sup>10</sup> Young Center et al., *Amici Brief*, *supra* note 4 at 22-23.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> AMERICAN IMMIGRATION COUNCIL, *supra* note 5.

<sup>13</sup> See KIND, *Family Separation Two Years Later, the Crisis Continues*, Kids in Need of Defense (KIND) (Jul. 16, 2020), Available at: <https://supportkind.org/resources/family-separation-two-years-later-the-crisis-continues/> [Hereinafter, KIND Family Separation Report]; See also YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, *Family Separation is Not Over*, YOUNG CENTER FOR IMMIGRATION AND CHILDREN'S RIGHTS, (Jun. 25, 2020), Available at: <https://www.theyoungcenter.org/report-family-separation-is-not-over> [Hereinafter YOUNG CENTER report]

<sup>14</sup> See Brief of Local 1924 as Amicus Curiae, 19-cv-15716, ECF No. 39, Compl. ¶ 26, *Innovation Law Lab. v. Wolf*, 951 F.3d 1073 (9th Cir. 2019). [Hereinafter Brief of Local 1924 as Amicus Curiae] U.S. asylum officers stated that MPP "adds to the already overwhelming burden on our country's immigration judges, and further delays hearings for asylum seekers with meritorious claims."

<sup>15</sup> All proper names are pseudonyms provided by the organization representing the child.

<sup>16</sup> Cody Copeland, *'Calm Before the Storm' Remain in Mexico 2.0 on Track to Repeat Failings of First*, COURTHOUSE NEWS SERVICE (Feb. 22, 2022), Available at: <https://www.courthousenews.com/calm-before-the-storm-remain-in-mexico-2-0-on-track-to-repeat-failings-of-first/>

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

### ***b. Migrant Protection Protocols from January 2021-Present***

In light of public pressure denouncing the Trump Administration’s border policies, the Biden Administration initially halted the MPP program in January of 2021. In August 2021, a Texas federal court ordered DHS to reimplement MPP.<sup>19</sup> Notwithstanding the clear problems associated with MPP, this order was supported by the US Supreme Court on an administrative law technicality. As a result, on December 2, 2021, the Biden Administration announced it was reimplementing MPP and expulsions have resumed. The Biden Administration expanded the group of people placed under MPP to include families and young children from other countries including Haiti and Venezuela.<sup>20</sup> Despite purported efforts to make MPP “more humane” advocates are already troubled by a lack of transparency—noting that there are no publicly available plans to provide shelter and transportation for returned migrants.<sup>21</sup> Though the new MPP requires the program to check if a child has previously been in MPP with a family member, it does not require them to take any affirmative steps to locate or reunify the child with their family.<sup>22</sup> Some accounts also indicate that CBP is not conducting sufficient screenings to identify vulnerabilities meant to be exempted from the policy.<sup>23</sup>

Since early January 2022, KIND’s teams have been monitoring what appears to be increased numbers of tender age children sent to the United States on their own by desperate parents in MPP trying to protect them from harm. KIND has observed an increase in the number of families who cite lack of food, lack of housing, and lack of adequate medical care that is worsening lesser illnesses, as reasons for sending children into the United States unaccompanied. Other significant reasons cited for separating from and sending children to the United States alone include lack of protection from extreme violence perpetrated on parents or the children themselves. For example, mothers who send their children ahead after being subjected to sexual assaults do not feel they can keep their children safe.

Border cities are still recovering from conditions created under the first iteration of MPP. There remains a lack of access to basic humanitarian needs like housing food, and medical care. KIND represented a fourteen-year-old Afro-Mexican child fleeing cartel violence who was unable to care for kidney stones in a border city, such that he was ultimately hospitalized for a major kidney infection and a ruptured ulcer.<sup>24</sup>

The reimplementing of MPP is creating conditions that pose direct threats to the life, survival, and development of migrant children. Families are again forced to decide whether to send their child into the United States unaccompanied to seek asylum alone or risk disease, kidnapping, or

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<sup>19</sup> AMERICAN IMMIGRATION COUNCIL, *supra* note 5.

<sup>20</sup> *Id.*

<sup>21</sup> See AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *Featured Issue: Migrant Protection Protocols (MPP)* (last visited Feb. 22, 2022) <https://www.aila.org/advo-media/issues/all/port-courts> ; See also HUMAN RIGHTS FIRST, *Delivered to Danger: US Government Sending Asylum Seekers and Migrants to Danger* (last visited Feb. 22, 2022) <https://www.humanrightsfirst.org/campaign/remain-mexico>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Because this child was fleeing Mexico, he is not technically in the border cities under MPP, however, his harrowing experience shows that children in border cities face serious consequences due to the lack of medical access in these cities. The reimplementing of MPP will only exacerbate these conditions.

assault in MPP camps.<sup>25</sup> MPP courts continue to lack adequate protections necessary to carry out a legitimate legal proceeding on behalf of an asylee, especially for a child.<sup>26</sup> The superficial proceedings designed under MPP undermine the basic guarantee of due process and the obligation of non-refoulement<sup>27</sup> and pose an extraordinary danger to migrant children.

#### IV. USG Border Management Policy: Title 42 Expulsions

Beginning in March 2020, the USG authorized the expulsion of all undocumented noncitizens appearing at the border under the guise of preventing the spread of the COVID-19 pandemic.<sup>28</sup> This policy, known as Title 42, has categorically denied migrants access to asylum proceedings as required by U.S. obligations under the Refugee Convention.<sup>29</sup>

The use of rapid expulsion, regardless of a child's fear of return to home country, exemplified the failure of the USG to protect the preemptory norm of non-refoulement or to consider the best interests of the child. Reports indicated that expelled children have been subjected to persecution upon returning to their country of origin. In November 2020, the Biden Administration formally exempted unaccompanied children from Title 42 expulsions. While unaccompanied children are exempt from expulsions, families with children are once again forced to choose between separating their families to give their child a chance to stay in the relative safety of the United States. Consider the following:

One El Salvadoran mother made the heartbreaking choice to send her two young sons across the border unaccompanied after their asylum petitions were denied. At their MPP hearing, they had no lawyer, she struggled to understand the interpreter and her children were not interviewed by immigration judges. She made the impossible choice to send her sons to the U.S. unaccompanied because her two older sons had been murdered by gangs back in El Salvador.<sup>30</sup>

The United States continues to deny children access to its territory through practices such as keeping ports of entry closed under Title 42 and pushing children back into Mexican territory, placing children at grave risk of harm in Mexico or at risk of refoulement to their country. These pushbacks often occur without any coordination with Mexican authorities. Consider the following:

In February 2022, KIND met 'Ila' an eleven-year-old girl from Honduras. Ila and her thirteen-year-old aunt, had been dropped off at a port of entry. They walked to the middle section of the bridge to seek protection from U.S. authorities. The girls told a CBP officer that they were Honduran and didn't have anywhere to go in Mexico but according to the oldest girl, CBP

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<sup>25</sup> See Women's Refugee Commission, *Chaos, Confusion and Danger: The Remain in Mexico Program in El Paso*, at 3-4 (May 6, 2019) available at <https://www.womensrefugeecommission.org/research-resources/chaos-confusionand-danger/> [hereinafter "WRC Report on MPP"].

<sup>26</sup> See KIND Family Separation report, *supra* note 13; See also YOUNG CENTER report, *supra* note 13.

<sup>27</sup> See Brief of Local 1924 as Amicus Curiae, *supra* note 14.

<sup>28</sup> See Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 24, 2020); but see also Letter from Public Health Leaders to HHS Secretary Azar and CDC Director Redfield (May 19, 2020), available at <https://reliefweb.int/report/unitedstates-america/public-health-experts-urge-us-officials-withdraw-order-enabling-mass>. Many public health officials, doctors, and infectious disease experts have spoken out against the efficacy of Title 42 and have stated that it would not help control the spread of the virus in any meaningful way.

<sup>29</sup> *United Nations Protocol Relating to the Status of Refugees* art. I, 31 January 1967, *United Nations Treaty Series*, vol. 19, No. 6223, [hereinafter "Refugee Protocol"]; *Convention Relating to the Status of Refugees* art. 33(1), 28 July 1951, *United Nations Treaty Series*, vol. 189, No. 150, p. 152, [hereinafter "Refugee Convention"]

<sup>30</sup> Young Center et al., *Amici Brief supra* note 8 at, 27

signaled with his finger for them to turn around and the girls did as they were told. They returned into Mexico. Ila was crossing a busy street at the exit of the bridge and was hit by a car. She was taken to the hospital, where she and her aunt were subsequently transferred to the custody of Mexican DIF authorities.

That same month KIND met four Guatemalan siblings that had approached the U.S. authorities just outside the port of entry and identified themselves as being alone without their parents. Instead of processing the children as unaccompanied minors, they were told to wait. Approximately 30 minutes later, a bus pulled up and took them into the custody of Mexican DIF authorities.

Unfortunately, these stories are not unique. Long after the Trump Administration is gone, families continue to be forcibly separated by unconscionable government policies that leave families no other choice. Despite demonstrative evidence that these policies are resulting in family separations, there are no mechanisms to ensure there is tracking of separated family members, or ways to ensure eventual reunification.

## V. Conclusion and Recommendations

The USG continues to utilize border management policies expressly designed to reduce asylum and other relief formally available for migrant children.<sup>31</sup> These policies operate to control and prevent migrant arrivals and clearly transgress all migrants' fundamental human rights and due process protections including the rights of vulnerable migrant children.

In light of the egregious nature of the violations of migrant children's rights by the USG, we respectfully submit the following recommendations:

**First**, the Special Rapporteur should fully investigate the systemic human rights violations by the USG as applied to migrant children. Such investigation will provide transparency and insight into the state actions and institutional failures which enabled such abuses. These insights will protect this vulnerable population from being targeted through future abuses of executive power.

**Second**, the Special Rapporteur should also fully investigate all USG foreign policy actions that allow for violative border management policies. This investigation would necessarily include the role that Mexico and other countries play in receiving expelled citizens and non-citizens alike. Such investigation would underscore the responsibilities of each country to negotiate in good faith to support human rights and provide recommendations to prevent international collaboration that results in human rights violations and putting children at risk.

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

**Fourth**, the Special Rapporteur, in partnership with a USG committed to the CRC, must facilitate the development of a U.S. domestic law framework that treats migrant children as children.

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<sup>31</sup> See Kids In Need of Defense, What are the TVPRA Procedural Protections for Unaccompanied Children?, Policy Report (Apr. 1, 2019) available at <https://supportkind.org/wp-content/uploads/2019/04/KIND-TVPRA-talkingpoints-4.1.19-FINAL.pdf> (detailing how the Trump administration repeatedly mischaracterized statutory protections for unaccompanied migrant youth as "loopholes" in the immigration laws).