

Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Working Group of Experts on People of African Descent and the Special Rapporteur on the human rights of migrants

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Mr. Moeling,

We have the honour to address you in our capacities as Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Working Group of Experts on People of African Descent and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 43/36, 45/24 and 43/6.

We would like to bring to the attention of your Government information we have received concerning allegations of **systematic forcible expulsion of Haitian migrants under authority granted by Title 42 of the U.S. Code (42 U.S.C. § 265)**.

Special Procedures mandate holders already expressed to your Government on a number of occasions concerns about the referenced U.S. forcible return policies that threaten to violate the principle of *non-refoulement*, most recently through communications dated 19 June 2018 (USA 12/2018) and 19 October 2017 (USA 23/2017). In addition, the forcible return of Haitian migrants was the subject of a communication to your Government dated 10 July 2015 (USA 15/2015), with a reply received on 11 September 2015.

According to the information received:

Since 2010, a confluence of natural disasters, environmental crises aggravated by climate change, high levels of inequality and widespread poverty, food insecurity, political instability and insecurity has caused the forced migration of thousands of Haitian nationals and a humanitarian crisis. The situation has only worsened since the assassination of Haitian President, Jovenel Moïse, in July 2021, which prompted the U.S. Department of Homeland Security to acknowledge that “Haiti is grappling with a deteriorating political crisis, violence, and a staggering increase in human rights abuses” and to designate Haitian nationals as eligible for Temporary Protected Status. The earthquake that struck the south of the country on 14 August 2021 and the tropical storm “Grace” two days later further aggravated this situation.

Despite this recognition, the United States has recently pursued a policy of collective expulsion of migrants, including those who might be eligible for international protection and who have sought to enter the country at its Southern and Northern borders. Invoking public health authority under Title 42 of the U.S. Code, U.S. immigration officials are alleged to have asserted that they are legally authorized to summarily deport migrants attempting to enter the United States without any procedural due process. Reportedly, this systematic expulsion of migrants on public health grounds has been taking place without individualized evaluation of each person’s protection needs under international refugee law and international human rights law. Recently,

migrants of Haitian origin seem to have been the most affected by the implementation of this policy.

Title 42 authority was invoked by the former administration in March 2020 to authorize the collective expulsion of migrants encountered by the U.S. border police and the Office of Field Operations at the borders with Mexico and Canada. U.S. authorities have continued using Title 42 to carry out collective expulsions, despite credible claims that this policy rests on tenuous public health grounds. Between October 2020 and August 2021, 937,628 expulsions reportedly took place. Several thousand Haitians have reportedly been forcibly and arbitrarily expelled under this policy, which is ostensibly meant to stem the spread of the COVID-19 pandemic. However, prominent public health experts have contested claims that the current policy of collective expulsion achieves that aim or protects public health in the United States.

Reportedly, Title 42 has been used to intentionally prevent thousands of Haitians, among migrants with other origins, from seeking asylum, and it has resulted in their immediate removal to Haiti or Mexico, with no individualized analysis of whether the expelled individuals would be at risk of persecution, torture or other irreparable harm if returned to either country. The use of Title 42 in this manner has been a continuous occurrence since 2020, culminating with highly publicized large expulsions, which took place in September 2021.

It is reported that this policy of collective expulsion particularly harms women, children, families and LGBTQI+ migrants, due to their vulnerability to intolerance, exclusion and violence based on racial and gender identity.

In addition, the use of Title 42 to systematically expel Haitian migrants and refugees is an alleged continuation of earlier U.S. policies that targeted Black Haitians for interdiction and rapid expulsion. Reportedly, these policies have continued to deter Haitians and other asylum seekers by turning applicants back at ports of entry and forcing them to remain in Mexico. At the same time, in Mexico and other Latin American nations, Haitian migrants face anti-Black racism, gender violence and xenophobia. According to the allegations received, Haitian asylum seekers are subject to exclusion and discriminatory treatment, which has led to a failure of refugee protection, family separation, and human rights violations. Furthermore, the information received alleges that the United States Border Patrol allows institutional impunity for violent acts, racial slurs, sexual comments, and other offensive language espoused by agents toward migrants. This fosters xenophobic narratives regarding Haitians. Within this context, the collective expulsion of Haitians, whether to Haiti, Mexico or elsewhere, without individualized evaluation of each migrant's protection concerns to be part of a broader history of racialized immigration enforcement against Haitians and other migrants.

While we do not wish to prejudge the accuracy of these allegations, we are deeply concerned that the collective expulsion of Haitian migrants and migrants of other origins from U.S. territory without individual assessment of their protection needs under international human rights and refugee laws, or of any actual threat to public health violates the prohibition of collective expulsion and the principle of *non-refoulement*. The principle of *non-refoulement* is firmly enshrined in both conventional and customary international law. Further, we caution that U.S.

immigration policies which effectively prevent Haitians from entering the country and asserting asylum claims could constitute racial discrimination under the International Convention on the Elimination of Racial Discrimination (ICERD) international human rights law.

International law prohibits blanket deportations or collective expulsions; States cannot label all migrants and refugees from a certain nationality *per se* as threats to national security, and all migrants, no matter their nationality or race, must be guaranteed the protections and respect for human rights called for under international law. Collective expulsions, even during public health emergencies, are not permissible under the “national security exception” of the Refugee Convention, and they, by definition, lack the adequate safeguards against *refoulement* mandated by the Convention against Torture (CAT). These non-derogable obligations require an individualized evaluation of each case in order to ensure compliance with international refugee law and international human rights law.

While other human rights instruments, such as the ICCPR, allow derogations of certain rights in times of public emergency, such measures must be strictly necessary and proportional to the requirements of the situation.

With respect to our concerns regarding the racialized collective expulsions of Haitians and other migrants, we are particularly concerned that the systematic targeting of Haitians for forcible expulsion could further violate the fundamental human rights principles of equality and non-discrimination and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which the United States is a party to. In expediting the collective expulsion of Haitian migrants, the United States has been subjecting a group of predominantly Black migrants to impermissible risks of *refoulement* and human rights abuse. We note that, to the extent that the same policies are enforced at the Southern border against migrants from other majority non-White countries, similar concerns about the racialized deterrence of legal asylum claims are warranted.

We are especially concerned by allegations that Title 42 is the latest chapter of a decades-long history of U.S. immigration policy targeting Haitian migrants for interdiction, rapid expulsion, and deterrence of legal asylum claims. In the backdrop of this reported history, we found images and footage of U.S. border agents on horseback roughly apprehending and degrading Haitian migrants deeply troubling.

In connection with the information and concerns mentioned above, please refer to the **Annex on Reference to international human rights law** attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comments you may have on the above mentioned allegations;
2. Please provide disaggregated information by age, sex, and national origin on the number of migrants who have been expelled.
3. Please provide information on the steps taken by your Excellency's Government to safeguard the rights of the migrant(s) affected by the Title 42 immigration policy in compliance with international human rights instruments.
4. Please provide detailed information on the procedural and substantive safeguards in place to prevent the *refoulement* of Haitian migrants and migrants of other origins who are subject to Title 42 deportation;
5. Please explain how your Excellency's Government intends to observe its international human rights obligations in accordance with the relevant international human rights instruments and apply them in a non-discriminatory fashion to the individuals apprehended and forcibly expelled as a result of the implementation of the Title 42 policy;
6. Please detail the measures your Excellency's Government has taken to provide gender-responsive protection to Haitian women, LGBTQ+ individuals, and other individuals with vulnerabilities, including those who have been apprehended and detained at the Southern border and subsequently expelled under Title 42;
7. Please provide information on the steps taken to ensure that migrants, including those seeking to assert asylum claims and other protections at the Southern border are not subjected to arbitrary detention or arbitrary use of force;
8. Please explain how judicial, legislative, or administrative measures are geared toward guaranteeing family reunification, protection, and non-discrimination for Haitian migrants and refugees;
9. Please provide additional information on migrants and asylum seekers currently detained at the border pending implementation of expulsion under Title 42 and legal protections provided for these migrants, including Haitian migrants;
10. Please list policies and measures which ensure that Haitians and other migrants subject to Title 42 have equal access to effective remedies, including the right to challenge the lawfulness of their detention, expulsion orders, and are allowed effectively to pursue such remedies.

This communication and any response received from your Government will be made public via the communications reporting [website](#) within 60 days. They will also

subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations and that all migrants are treated with the dignity and respect owed all human beings.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will also indicate that we have been in contact with your Government's to clarify the issue/s in question.

Please accept, Mr. Moeling, the assurances of our highest consideration.

E. Tendayi Achiume
Special Rapporteur on contemporary forms of racism, racial discrimination,
xenophobia and related intolerance

Dominique Day
Chair-Rapporteur of the Working Group of Experts on People of African Descent

Felipe González Morales
Special Rapporteur on the human rights of migrants

Annex

Reference to international human rights law

We remind your Government of its obligations under the **1951 Convention on the Status of Refugees**, which the United States adopted via its accession to the **1967 Protocol on the Status of Refugees** on 1 November 1968. Under article 1(A)(2) of the Refugee Convention, a refugee is any person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” States parties to the Refugee Convention and Protocol have accepted binding legal commitments which limit their power to forcefully expel individuals who meet the refugee definition. We direct your Government to article 33(1): “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This provision is non-derogable, and as such, the sole exception arises when there are “reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country” (the “national security exception” of article 33(2)).

Furthermore, the prohibition of return to a place where individuals are at risk of torture and other ill-treatment is enshrined in article 3 of the **Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**, ratified by the United States on 21 October 1994. This absolute prohibition against refoulement is stronger than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee or asylum status under the 1951 Refugee Convention or domestic law. Accordingly, *non-refoulement* under the CAT must be assessed independently of refugee or asylum status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. Like the Refugee Convention, the CAT requires individualized status determinations carried out via due process of law—under neither instrument is it permissible to forcibly expel migrants without allowing them to pursue asylum or *non-refoulement* claims.

We would like to direct your Government’s attention to the “**Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response**,” published by the United Nations High Commissioner for Refugees on 16 March 2020. UNHCR emphasizes that “imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against *refoulement*, would be discriminatory and would not meet international standards, in particular as linked to the principle of *non-refoulement*. In case health risks are identified in the case of individual or a group of refugees or asylum-seekers, other measures could be taken, such as testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner, while respecting the principle of *non-refoulement*. Denial of access to territory without safeguards to protect against

refoulement cannot be justified on the grounds of any health risk.” Further, the agency reminds States that “measures to protect public health may affect persons seeking international protection. While such measures may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in *refoulement*. Not only would this be at variance with international law, it could send the persons into ‘orbit’ in search of a State willing to receive them and as such may contribute to the further spread of the disease.”

We refer your Government to article 13 of the **International Covenant on Civil and Political Rights (ICCPR)**, ratified by the U.S.A. on 8 June 1992, which provides that “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” In addition, the Human Rights Committee has reaffirmed this principle in its **General Comment No. 15**, paragraphs 9 and 10.

We would also like to refer to paragraph 9 of **General Comment No. 20 of the Human Rights Committee** which states that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.” Your Government may also consider the thematic report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/25/60, ¶ 46), which states that the *non-refoulement* obligation is a “specific manifestation of a more general principle that States must ensure that their actions do not lead to a risk of torture anywhere in the world.”

Furthermore, we would like to bring to your Government’s attention **article 26 of the ICCPR** stating that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In regards to limitations and derogations of obligations under the ICCPR, we recall the **Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights**, which provide guidance to states on derogating from the Covenant in times of public emergency and stipulate that the “severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.” We reiterate that neither the Refugee Convention nor the Convention against Torture allow derogation of the principle of *non-refoulement*, and furthermore, the prohibition of torture and its accompanying *non-refoulement* principle is considered a peremptory norm of international law. For further information, see the “**Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**” of the United Nations High Commissioner for Refugees.

We would also like to remind your Government that, according to the **Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**, which the United States ratified in 1994, “racial discrimination” is defined in article 1(1) as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” In addition, article 2 of the Convention requires States to condemn racial discrimination and pursue policies to eliminate it. Further, article 5 of the Convention refers to “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.” Under these provisions, the equality guarantee of the international human rights framework is substantive, and ICERD therefore requires States Parties to take action to combat both intentional or purposeful racial discrimination as well as *de facto* or unintentional racial discrimination. This interpretation is confirmed by the Committee on the Elimination of Racial Discrimination’s authoritative **General Recommendation No. 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination**.

Further, we would like to direct your Government to **General Recommendation No. 30 relating to discrimination against non-citizens**, in which the Committee on the Elimination of Racial Discrimination recommends that States:

- “Ensure that legislative guarantees against racial discrimination apply to noncitizens regardless of their immigration status and that the implementation of legislation does not have a discriminatory effect on non-citizens”;
- “Ensure that non-citizens enjoy equal protection and recognition before the law”;
- “Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies”; and
- “Ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account.”

We would also like to direct attention to the report of the Special Rapporteur on the human rights of migrants, concerning border “pushbacks” of migrants (A/HRC/47/30, para. 40) and his report (A/76/257), which reiterates in paragraph 49 that even during states of emergency, “non-derogable rights must be respected, and ... measures need to be in conformity with other international obligations, including the principles of non-discrimination, *non-refoulement* and the prohibition of collective expulsions.”

Finally, we would like to recall paragraph 34 of the **Durban Programme of Action**, which urges States “to comply with their obligations under international

human rights, refugee and humanitarian law relating to refugees, asylum-seekers and displaced persons, and urges the international community to provide them with protection and assistance in an equitable manner and with due regard to their needs in different parts of the world, in keeping with principles of international solidarity, burden-sharing and international cooperation, to share responsibilities[.]”

For further detail on the intersection of the international equality framework and immigration, we encourage your Government to consult the report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance concerning “racial discrimination in the context of immigration” (A/HRC/38/52).