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Your excellency Mr. Felipe González Morales,

The Center for Victims of Torture (“CVT”), Oxfam America, and Refugee and Immigrant Center for Education and Legal Services (“RAICES”)<sup>i</sup> cordially respond to the *Questionnaire of the Special Rapporteur on the human rights of migrants: pushback practices and their impact on the human rights of migrants*.

The U.S. asylum system is primarily shaped by the Refugee Act of 1980, but other mechanisms also play part on how the law is implemented, including case-law and executive actions. The ability to make changes at the executive level allows the president to significantly affect the system, as we have more drastically witnessed during the Trump presidency. The U.S. asylum system also lacks uniformity in applying the law, as different courts have differing case-law and judges have considerably different grant rates throughout the different jurisdictions.

**A1.** Below we provide a summary of the key legislation for the US asylum system. However, we ask the Rapporteur to consider these texts as basic introduction. Asylum seekers’ experiences are filtered through the de jure and de facto implementation of administrative and executive actions. For further information on this rich topic, we refer you to additional resources.<sup>ii</sup>

U.S. Code, Title 8, Chapter 12, Section 1101, also known as The Refugee Act of 1980, created a system for the admission, resettlement, and absorption of refugees to the United States. Defines "refugee" as any person who is unable to return to their own country because of "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion".

U.S. Code, Title 8, Chapter 12, Section 1158 discusses the authority to apply for asylum and the conditions for granting asylum.

U.S. Code, Title 8, Chapter 12, Section 1225, requires the Department of Homeland Security to place certain asylum seekers into the “expedited removal” process wherein they must first establish *prima facie* eligibility for asylum, otherwise they are summarily deported without ever having an opportunity to apply for protection.<sup>iii</sup>

U.S. Code, Title 8, Chapter 12, Section 1231 prohibits those with prior orders of removal from asylum eligibility, even if they can seek protection with fewer benefits.<sup>iv</sup>

William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) Recognizing the vulnerability and special needs of unaccompanied minors (UACs), TVPRA grants USCIS initial jurisdiction over unaccompanied minors’ asylum applications, allowing children to present their cases in a considerably less confrontational scenario.

**A2.** Migrants and asylum seekers intending to enter the US face immense pushback from safely and lawfully doing so, and upon arrival, face multiple affronts to their human rights and basic dignities. Indeed, the following list of “existing good practices” should not be considered unequivocal, as many of these promising ideas are badly implemented, face gaps, and/or lack the funding to carry them out as intended.

#### Alternatives to detention:

Detention of asylum seekers in the United States, often [arbitrary and indefinite](#),<sup>v</sup> violates international human rights law and norms for protection of this vulnerable population as it leads to re-traumatization and inability to present a fair case before an immigration judge. In recognition of the adverse effects of detention, civil society organizations have been advocating for the use of alternatives, with varying degrees of success. From January 2016 through June 2017, ([instructed by Congress](#)<sup>vi</sup> until it was terminated by the Trump administration), ICE incorporated many of the [Family Case Management Program \(FCMP\)](#)<sup>vii</sup> principles into “ATD ISAP III”. Although this system is considerably better than detention, advocates note that they often fail to meet key human rights and legally established protection standards—one clear example of failure, is the [use of ankle monitors](#).<sup>viii</sup>

#### Training of asylum officers:

Asylum officers receive specialized training in topics such working with survivors of trauma and torture, inter-cultural communication, female asylum applicants and gender-based claims, and child asylum applicants. Asylum officers are required to “receive special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles.”<sup>ix</sup>

### Specific protections for unaccompanied minors:

Recognizing the vulnerabilities that unaccompanied children face, they cannot be placed into “expedited removal” (see answer 1 and 3 for more information on expedited removal) and instead must be placed into a full proceeding before an asylum officer, regardless of whether they can establish a *prima facie* claim to asylum.<sup>x</sup> Unlike adults or accompanied children, unaccompanied minors receive two opportunities to apply for asylum: they may apply with an asylum officer who screens their claim in a non-adversarial setting, and if denied, may reapply with an immigration judge, an intrinsically adversarial process.<sup>xi</sup> Unaccompanied minors are also exempt from several asylum bars, including to file their application within one year of arrival and that they be prevented from seeking asylum if they transited through a safe third country. Finally, unaccompanied minors may be appointed “child advocates”, who serve in a similar capacity to guardians *ad litem* and report on the child’s best interests.<sup>xii</sup>

### Refugee Resettlement Assistance:

Prior to traveling to the US, the Refugee Processing Center gives refugees a cultural orientation about life in their new home. Once they arrive, the resettlement with their case helps them navigate a new culture, language, and different system. They provide: cash assistance, support to gain financial independence, language lessons, loans for a business, etc. These usually last for a limited time, but help refugees to jumpstart a new life. In contrast, asylum seekers qualify for little to no assistance.

### Mental Health Services for Survivors of Torture:

Both refugees and asylum seekers in the U.S. whose experiences meet the definition of torture qualify to receive free mental health services. However, many more than only those who fall under this definition need assistance, a gap that civil society organizations must fill.

### Temporary Protected Status (TPS) and Deferred Enforced Departure (DED):

The executive, through the cabinet, may grant TPS or DED to nationals of certain countries who are already in the US depending on whether the nation can handle the return of individuals due to environmental, humanitarian, or other catastrophes. These programs protect individuals from deportation and permit them to work and can be implemented fairly fast. Unfortunately, because the designation is issued by the executive, the benefit can also be quickly taken away depending on the administration in power, and does not lead to more permanent forms of protection.<sup>xiii</sup>

**A3.** The Trump administration imposed several policies that have restricted, even eliminated for some, the ability to seek asylum at our international borders. As the Biden administration has promised to roll these back, and we have a good reason to believe that other partners also working with asylum seekers in the United States will explain these to your Excellency, the organizations herein have decided to focus

on “restrictions and limitations” that have prevented the right to seek asylum at our borders since before the Trump administration.

#### Expedited Removal:

A summary removal process which, first, requires an asylum seeker to express a fear of return to a border patrol officer, at which point the asylum seeker is referred to an asylum officer for a *prima facie* assessment of their fear claim.<sup>xiv</sup> If the asylum seeker establishes *prima facie* asylum eligibility, they will be permitted to apply for asylum. If an asylum seeker fails to establish *prima facie* eligibility for asylum, they may pursue limited review with an immigration judge.<sup>xv</sup> Use of expedited removal has significantly increased in the United States; in fiscal year 2019, over 164,000 people were deported from the United States under an expedited removal order, which accounts for 46% of all deportations. Numerous domestic and international organizations, including the [Inter-American Commission on Human Rights](#),<sup>xvi</sup> and the [U.S. Commission on International Religious Freedom](#),<sup>xvii</sup> have denounced the U.S.’s widespread use of expedited removal.

#### Detention:

Detention is known to harm the mental health of even healthy individuals and compound the trauma of asylum seekers. [Immigration detention](#)<sup>xviii</sup> in the US reports poor medical care and forced isolation. Besides these unconscionable practices, detention considerably impairs the due process of asylum seekers as it limits telephone access, and their ability to locate and retain counsel. In the first instance, asylum seekers are subject to detention while they undergo their expedited removal process.<sup>xix</sup> Then, if they establish *prima facie eligibility* they *might* be released, depending on additional factors<sup>xx</sup>. But a significant number of asylum seekers currently remain detained, even when the agency keeping them detained (Immigration Customs Enforcement-ICE) has discretion to release them.

#### Lack of timely access to work permit or other assistance:

Asylum seekers qualify for little to no benefits, even after establishing *prima facie* eligibility for asylum. As dictated by Congress, asylum seekers cannot receive an EAD until six months after they file their asylum applications (also subject to additional delays). The process of filing the asylum application can take several months, as asylum seekers may first try to find attorneys to represent them in their case<sup>xxi</sup>. This means they have no option but to work informally in the months before they qualify for an EAD, a situation that places them at risk of exploitation, trafficking, and abuse. *Anne Eichmeyer, MSW, LICSW and Vivienne Namujuzi, MSW, LGSW from the Center for Victims of Torture* recounted that “a client from a country in Southeast Asia has struggled with severe PTSD and Depression from his torture, including nightmares, flashbacks, inability to sleep, and significant suicidal ideation. His identity is strongly connected to his profession, and prior to receiving his work permit in the US he faced very high levels of stress and shame because he was unable to work. He faced multiple delays in receiving his work permit from the government. Once he received his work permit he received a job offer within a couple of weeks. He is now sleeping better because of reduced stress; which has increased his capacity to address

his PTSD, and he had learned coping skills to deal with flashbacks and anxiety. When he first came to the US he was forced to work illegally in order to provide for his basic needs. Since finding a job legally he expresses pride in being able to give back to the country that does not persecute and torture him for being who he is.”

#### Reinstatement of Removal:

The United States prevents those with prior orders of removal from ever applying for asylum – a policy known as reinstatement. Such a policy, however, violates the rights of migrants and asylum seekers as a significant number of removals from the United States are under expedited removal orders, wherein the asylum seeker has never had an opportunity to apply for asylum, and due to their removal order, will never be able to apply for asylum in the future.<sup>xxii</sup> For example, Sonya and her son Diego<sup>xxiii</sup>, citizens of El Salvador, witnessed a crime and after providing a statement to the police, began receiving death threats from the criminal perpetrators that forced her to flee to the US with Diego to seek asylum. Upon arrival, she and Diego expressed their fear of persecution and were detained and placed into expedited removal. Without an opportunity to speak to counsel, they completed their initial interview and were determined to lack a credible fear. Sonya retained a lawyer to represent them in front of an immigration judge to review the negative fear decision, but the immigration judge finalized the removal order. They were then deported back to El Salvador without an opportunity to apply for asylum. Upon their return, they were again targeted by the same perpetrators. After several months, they again made the journey to the US. After entering, they again expressed a fear of return, however, because they were previously ordered removed, their prior removal orders were reinstated which barred them from seeking asylum. While detained, and after obtaining counsel, they were determined to have a fear of torture and were allowed to apply for protection under CAT. However, they are forever barred from applying for asylum or obtaining permanent residency in the United States, even if they receive CAT protection.

**A4.** Given the state of US asylum and immigration process more broadly, characterized by institutionalized obstacles and active deterrence at every level, there are countless instances of “pushbacks” to cite, from flagrant individual violations to broader deterrence strategies that make due process effectively unattainable. At present, we will focus on Title 42 expulsions, as RAICES can present “concrete instances” of these pushbacks.

Despite lack of legitimate public health basis, migrants forced into Title 42 proceedings are summarily expelled from the United States. The “expulsions” return individuals to the countries they have fled as well as to dangerous Mexican border cities without appropriate screenings in violation of the principle of *non-refoulement* under CAT. [Reports<sup>xxiv</sup>](#) show that a significant number of migrants have been tortured in these Mexican cities. While internal guidance<sup>xxv</sup> indicated that survivors of torture might be referred to an asylum officer if the survivor makes an “affirmative, spontaneous, and reasonably believable claim” that they might be tortured, in practice this quasi-screening effort will be ineffectual, as it is extremely unlikely that someone who was tortured would communicate this effectively and without any prompting to a uniformed (and likely armed) officer. RAICES has worked with at least 150

people forced into Title 42 who contacted the organization while detained. They tell stories of horrific abuse and viable persecution claims, but may not quite meet the more stringent torture standard. Not a single person that RAICES has represented has successfully established torture. The vast majority of RAICES' current Title 42 clients are from Haiti and Ecuador.

**Q5.** In the context of COVID-19, the Trump administration steered away from heavy-handed measures to address the virus, except when it came to receiving asylum seekers at the US borders. Ignoring the recommendations of [public health experts](#),<sup>xxvi</sup> who have provided evidenced-based roadmaps for safe and humane processing at U.S. borders, the administration applied Title 42 (discussed above). Given that the administration did not use such extreme COVID-19 measures in other aspects and constantly undermined the gravity of the disease, advocates believe the administration used the pandemic as a justification to prevent asylum seekers from entering. In fact, UNHCR, has clarified in [guidance on COVID-19](#)<sup>xxvii</sup> that states cannot impose “blanket measure[s] to preclude the admission of refugees or asylum-seekers” in response to the COVID-19 pandemic. As of February 1, 2021 the Biden administration has not yet made a public announcement regarding the actions his administration will take to prevent these expulsions.

**Q6.** The following are examples of the challenges that Governmental institutions and civil society organizations are facing to protect asylum seekers.

- Fluid application of the law and regulations: Migrants, legal service providers, and government officials struggle to carry out their roles in the asylum process as a result of an unstable and politicized nature of immigration policy in the United States policies. This policy environment creates difficulties in implementation for officials and practices at the border, making it difficult for attorneys to properly represent asylum seekers claims.
- Small coalitions of civil society organizations have borne the largest burden for supporting asylum seekers (many living in informal refugee camps in Mexico) on America's southern border, facing immense resource and logistical strain and even [threats of violence](#)<sup>xxviii</sup>. Civil society capacity has been dwarfed by demand for shelter, healthcare, food, and legal support, including translation services; COVID has exacerbated each of these strains, limiting access of service providers due to border crossing restrictions.

Again, thank you for the opportunity to provide answers to the questions herein. If you have additional questions, do not hesitate to reach out to Andrea Carcamo at [acarcamo@cvt.org](mailto:acarcamo@cvt.org), Carly West at [Carly.West@oxfam.org](mailto:Carly.West@oxfam.org), or Manoj Govindaiah at [majon.govindaiah@raicestexas.org](mailto:majon.govindaiah@raicestexas.org).

Sincerely.

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<sup>i</sup> **The Center for Victims of Torture (CVT)** was founded in 1985 as an independent non-governmental organization, CVT is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the U.S., the Middle East, and Africa—involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses—CVT annually rebuilds the lives and restores the hope of more than 25,000 primary and secondary survivors of torture, other gross human rights violations, and severe war-related trauma. The vast majority of CVT’s clients in the United States are asylum seekers and refugees; **Oxfam** is a global development and relief agency dedicated to developing lasting solutions to poverty, hunger and social injustice. A centerpiece of this work involves supporting the world’s most vulnerable communities, which includes forcibly displaced populations. Given that nearly 80 million individuals are displaced across the globe, including 26 million refugees and 4.2 million asylum seekers – the highest number since World War II – ensuring that governments uphold migrants’ internationally guaranteed rights grows increasingly urgent. With operations spanning 67 countries, Oxfam supports displaced communities by tackling the drivers of migration, providing humanitarian aid to those fleeing persecution, and advocating that governments respect the human rights of migrants; **Refugee and Immigrant Center for Education and Legal Services (“RAICES”)**, a 501(c)(3) non-profit legal services agency based in San Antonio, Texas, defends the rights of immigrants and refugees, empowers individuals, families, and communities, and advocates for their liberty and justice. RAICES serves tens of thousands of non-citizens per year through direct immigration legal services, social services, advocacy, community engagement, and refugee resettlement. In 2019, RAICES closed over 28,000 immigration cases. With eleven offices throughout Texas, more than 200 staff members, and thousands of active volunteers, RAICES is one of the largest legal service providers for low-income immigrants, asylum seekers, and refugees in the country.

<sup>ii</sup> [DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES \(2020 ed. 2020\); DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE \(8th ed 2020\).](#)

<sup>iii</sup> Implementation regulations can be found at [U.S. Code of Federal Regulations, Title 8, Sections 208.30, 1003.42, 1208.30, and 1208.31.](#)

<sup>iv</sup> Implementing regulations are found at [U.S. Code of Federal Regulations, Title 8, Sections 208 and 1208.](#)

<sup>v</sup> AMNESTY INTERNATIONAL, USA: ‘YOU DON’T HAVE ANY RIGHTS HERE’ (2018), <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

<sup>vi</sup> *Immigration: Alternatives to Detention (ATD) Programs*, CONG. RES. SERVICE (July 8, 2019), <https://fas.org/sgp/crs/homsec/R45804.pdf>.

<sup>vii</sup> *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, WOMEN’S REFUGEE COMMISSION (June 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/The-Family-Case-Management-Program.pdf>.

<sup>viii</sup> *Stanford Immigrants’ Rights Clinic Uncovers New Details about the Government’s Use of Ankle Monitors and Other Alternatives to Detention*, THE STANFORD LAW SCHOOL IMMIGRANT RIGHT’S CLINIC, <https://law.stanford.edu/immigrants-rights-clinic/stanford-immigrants-rights-clinic-uncovers-new-details-about-the-governments-use-of-ankle-monitors-and-other-alternatives-to-detention/> (last visited Feb. 1, 2021).

<sup>ix</sup> [8 C.F.R. § 208.1.](#)

<sup>x</sup> 8 U.S.C. § 1232(a)(5)(D).

<sup>xi</sup> 8 U.S.C. § 1108(c)(3)(C).

<sup>xii</sup> 8 U.S.C. § 1232(c)(6).

<sup>xiii</sup> Every two or so years (how long the programs last), those under this form of protection are faced with the fear of whether the administration will renew their TPS.

<sup>xiv</sup> 8 U.S.C. § 1225(b).

<sup>xv</sup> 8 U.S.C. § 1225(b); *Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020)(holding that asylum seekers in expedited removal proceedings have no right to pursue habeas petitions to challenge expedited removal orders).

<sup>xvi</sup> *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMMISSION ON HUM. RTS. (Dec. 30, 2010), <http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf>.

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<sup>xvii</sup> *Report on Asylum Seekers in Expedited Removal*, U.S. COMMISSION ON INT’L RELIGIOUS FREEDOM (Feb. 8, 2005), <https://www.uscirf.gov/publications/report-asylum-seekers-expedited-removal>.

<sup>xviii</sup> *Immigration Detention Conditions*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-conditions> (last visited Feb. 1, 2021).

<sup>xix</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

<sup>xx</sup> If the asylum seeker establishes a positive credible fear and is able to apply for asylum, the asylum seeker is eligible for release from detention, potentially through humanitarian parole, or through the payment of a cash bond. In fact, a considerable number of asylum seekers remain detained during the pendency of their claim, which can last years, as they probably lack the funds for bond, which is often set too high for individuals who have nothing.

<sup>xxi</sup> Asylum seekers are 4 times more likely<sup>xxi</sup> to be successful in their asylum claim when represented, and even with an attorney, the application process is challenging

<sup>xxii</sup> 8 U.S.C. § 1231(a)(5).

<sup>xxiii</sup> In order to protect confidentiality, “Sonya” and “Diego” are pseudonyms.

<sup>xxiv</sup> *Marking One Year of the Horrific ‘Remain in Mexico’ Policy—Over 800 Violent Attacks on Asylum-Seekers*, HUM. RTS. FIRST (Jan. 22, 2020), <https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers>.

<sup>xxv</sup> Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA, April 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>xxvi</sup> Letter from Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions to HHS Secretary Azar and CDC Director Redfield (May 18, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

<sup>xxvii</sup> *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Mar. 16, 2020 (<https://www.refworld.org/docid/5e7132834.html>).

<sup>xxviii</sup> Letter for civil society organizations from the United States, Mexico, and Central America to U.S. Department of Homeland Security Secretary Kirstjen M. Nielsen (Feb. 14, 2019), <https://www.wola.org/wp-content/uploads/2019/02/NGO-MPP-Remain-In-Mexico-Letter-2.14.19-002.pdf>.