Oct. 2, 2021

Re: Ending Title 42 return flights to countries of origin, particularly Haiti.

When the Trump Administration first issued its Title 42 order in March 2020 in response to the growing COVID crisis, it was the first time the CDC had invoked its authority under this statute. The extraordinarily broad order "suspend[ed] the right to introduce certain persons into the United States from countries where a quarantinable communicable disease exists" but limited that suspension to persons travelling from Canada or Mexico. DHS was made responsible for the implementation of the order at the border. But the breadth and subsequent implementation of Title 42 authority now raises significant concerns about whether the United States is living up to its binding obligations under international law.

I have spent much of my legal career, inside and outside the government, seeking to ensure that the United States abides by its non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), and the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol"), which modifies and incorporates the terms of the 1951 Convention relating to the Status of Refugees ("Refugee Convention"). Article 3 of the CAT categorically prohibits State Parties from expelling, returning, or extraditing any person, *without exception,* to any State where there are "substantial grounds for believing he would be in danger of being subjected to torture." Article 33 of the Refugee Convention, subject to certain narrow exceptions, flatly prohibits State Parties from expelling or returning ('refouler') refugees *in any manner whatsoever* to "the frontiers of territories" where their life or freedom would be threatened on one of [the designated grounds].

I write first, because I believe this Administration's current implementation of the Title 42 authority continues to violate our legal obligation not to expel or return ("refouler") individuals who fear persecution, death, or torture, especially migrants fleeing from Haiti. Second, my concerns have only been heightened by recent tragic events in Haiti, which had led this Administration wisely to extend temporary protected status (TPS) to Haitians already in the United States. Third, lawful, more humane alternatives plainly exist, and there are approaching opportunities in the near future to substitute those alternatives in place of the current, badly flawed policy.

I. Title 42 Returns Violate U.S. Non-Refoulement Obligations

Title 42 expulsions are currently being executed to return Mexican, Guatemalan, Honduran, and Salvadoran families and single adults to their countries of origin, and more recently, Haitians to Haiti. The numbers are startling: CBP statistics indicated that nearly 700,000 people have been expelled under Title 42 since February of this year, and that this past August alone, 91,147 were forcibly removed. In my judgment, Title 42 is currently being implemented in a manner that violates the Refugee Convention's Article 33 prohibition against direct expulsion or return to persecution and 8 U.S.C. 1231(b)(3)(A) ("the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group or political opinion.").

The current Title 42 expulsion policy applies to individuals who are already in the United States, and to whom our legal obligations under the Refugee treaties and parallel statutes have undeniably attached. Migrants who arrive at the border are not screened for fears of persecution upon return unless they affirmatively raise their fear, in what is informally known as the "shout test." To establish that fear, the migrant show more than a reasonable possibility of fear, but must instead meet a higher "more likely than not" standard, i.e., the standard for ultimately prevailing on the merits by showing that they have at least a 51% chance of being persecuted or tortured if returned. There have also been disturbing reports that some migrants were not even told where they were being taken when placed on deportation flights, learning only when they landed that they had been returned to their home country or place of possible persecution or torture, i.e. *the exact act of refoulement that is forbidden by the CAT and the Refugee Convention!* In my legal opinion, as former State Department Legal Adviser and as former Assistant Secretary of State for Democracy, Human Rights and Labor, the "shout test" and the higher screening standard inevitably create an unacceptably high risk that a great many people deserving of asylum will instead likely be returned to countries where they fear persecution, death, or torture.

When concerns were raised that the Trump Administration's initial implementation of Title 42 would violate these legal obligations, proponents at the Trump Administration's DHS, DOJ and the White House pointed to an exception to our Article 33 non-refoulement obligation for refugees for whom "there are reasonable grounds for regarding as a danger to the security of the country in which he is." First, there is no such exception to our obligations under the CAT. Second, there can be no basis for defending Title 42 expulsions on the ground that the "danger to security" exception in the Refugee Convention applies or allows the US Government to exclude individuals categorically on a public health basis, consistent with the international and statutory law nonrefoulement obligation. The Convention's text and *travaux préparatoires*, as well as subsequent State practice applying the "danger to security" exception, make clear that this narrow exception requires an *individualized, evidence-based assessment* into whether a particular asylum seeker himself or herself is an actual danger to the security of the country in which he or she seeks refuge. Categorically applying this exception on a group basis to all asylum seekers coming from a foreign country solely based on public health reasons is flatly inconsistent with a State's non-refoulement obligations under the Convention. Indeed the absence of meaningful nonrefoulement screening was one of the bases for the Ninth Circuit's decision in *Wolf v. Innovation Law Lab*, enjoining Trump's Migrant Protection Protocols (MPP), the so-called "Remain in Mexico" policy, as a likely violation of the principle of nonrefoulement in the Refugee Convention and 8 U.S.C. sec. 1231(b).

For that reason, the international refugee community has loudly and correctly challenged this use of Title 42 authority as inconsistent with international law and having dire humanitarian consequences. The U.N. Refugee Agency (UNHCR) explained in its March 2020 legal guidance on the COVID-19 response that state entry measures should not prevent people from seeking asylum from persecution and that states may not deny entry to people at risk of refoulement. In November 2020, the UNHCR Assistant High Commissioner for Protection warned that "measures restricting access to asylum must not be allowed to become entrenched under the

guise of public health." UNHCR High Commissioner for Refugees Filippo Grandi has repeatedly urged the United States to end Title 42 "and to restore access to asylum for the people whose lives depend on it, in line with international legal and human rights obligations." On September 17th, 71 civil society organizations, including Refugees International, Human Rights First, HIAS, and the International Rescue Committee sent a joint letter to President Biden, Secretary Mayorkas and Attorney General Garland on Title 42 calling on the administration "to immediately end its embrace, defense, and advancement of illegal and cruel Trump administration policies that harm families and people seeking protection and bolster xenophobic rhetoric by treating people seeking protection as threats."

Nor can continued implementation of the restrictions imposed by Title 42 be squared with the Biden Administration's own publicly stated policy objectives and values. The State Department's Bureau of Population, Refugees and Migration's (PRM) website states: "PRM promotes U.S. interests by providing protection, easing suffering, and resolving the plight of persecuted and forcibly displaced people around the world." On their face, the policy and implementation of Title 42 expulsions are inconsistent with that objective, and seriously degrade U.S. credibility when advocating for other countries to welcome refugees and respect the principle of nonrefoulement.

II. Title 42 Flights Especially Cannot Be Justified with respect to Haitians

Continuation of Title 42 flights to Haiti is particularly unjustifiable in light of its designation for TPS status due to "extraordinary and temporary conditions" that "prevent its nationals from returning safely." TPS applies to Haitians already present in the United States as of July 30, 2021, regardless of their immigration status. The Haitian TPS designation announcement in May cited "serious security concerns, social unrest, an increase in human rights abuses, crippling poverty, and lack of basic resources, which are exacerbated by the COVID-19 pandemic." And that was before the assassination of President Moïse thrust the country into even greater political instability and a devastating earthquake on August 14, 2021 and Tropical Depression Grace on August 16, 2021 further devastated the impacted area, degrading infrastructure throughout the country. Following the 2010 earthquake, the Obama Administration suspended deportations to Haiti for over a year and thereafter resumed them only on a limited basis for five additional years until 2016, when DHS found that "the situation in Haiti has improved sufficiently to permit the U.S. government to remove Haitian nationals on a more regular basis." Yet conditions in Haiti are far worse today than they were then.

Simply put, Haiti is a humanitarian nightmare. According to the United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), "[t]he back-to-back disasters are exacerbating preexisting vulnerabilities. At the time of the disaster, Haiti is still reeling from the 7 July assassination of President Jovenel Moïse and still facing an escalation in gang violence since June that has affected 1.5 million people, with at least 19,000 displaced in the metropolitan area of Port-au-Prince. The compounded effects of an ongoing political crisis, socio-economic challenges, food insecurity and gang violence continue to greatly worsen an already precarious humanitarian situation. Some 4.4 million people, or nearly 46 per cent of the population, face acute food insecurity, including 1.2 million who are in emergency levels ... and 3.2 million

people at crisis levels .... An estimated 217,000 children suffer from moderate-to-severe acute malnutrition." Persons targeted by Haitian gangs could easily have asylum claims as persons with well-founded fears of persecution because of their membership in a "particular social group" for purposes of the Refugee Convention and its implementing statute. Indeed, this is precisely the issue that faces the interagency group on joint DOJ/DHS rulemaking pursuant to President Biden's February 2, 2021 Executive Order, which directed examination of whether the United States is providing appropriate asylum "protection for those fleeing domestic or gang violence in a manner consistent with international standards."

Just last week, the head of Haiti's national migration office, Jean Negot Bonheur Delva, requested a humanitarian moratorium on the mass deportation of Haitian migrants from the United States. He emphasized that Haiti is in crisis after Moïse's July assassination and the August 2021 earthquake and that "ongoing security issues" made the prospect of resettling thousands of new arrivals hard to imagine, because Haiti cannot provide adequate security or food for the returnees.

Yet news sources suggest as many as 4600 have been returned to Haiti since September 19, 2021. Title 42 permits customs officers, with supervisor approval, to identify persons who should be excepted from expulsion based on the totality of the circumstances, including consideration of significant law enforcement, office and public safety, humanitarian and public health interests. But if Haiti is undeniably a humanitarian disaster area, the question should be: at this moment, *why is this Administration returning Haitians at all?*

III. The coming weeks provide significant opportunities to substitute better, more lawful, and more humane policy alternatives.

This unfortunate policy cannot be set in stone. What makes this situation all the more unacceptable is that more lawful alternatives exist. Given all of these concerns, this Administration should: (1) immediately suspend all Title 42 flights, but especially to Haiti; (2) for all people at the border or found inside, abandon the "shout" test and clearly announce to those asked to board such flights where they are going, so as to give them a lawful opportunity to affirmatively raise their fears; (3) institute for such persons individualized screening using the traditional "reasonable possibility of fear" test for screenings for withholding deportation, in lieu of the heightened standard currently being applied; and (4) determine whether certain of the recent Haitian migrants, mostly those recently resident in third countries such as Brazil or Chile, may have legal status and family ties in those countries, which could be an alternative to direct refoulement to Haiti. *If we cannot end these practices indefinitely for all countries to which Title 42 flights are being dispatched, at a minimum, we should suspend the application to Title 42 flights to Haiti, based on the dire humanitarian conditions there, taking all necessary health precautions, as has been done in the past.*

While these policies were undeniably adopted amid turmoil, this Administration need not persist in pursuing them. Secretary Mayorkas has indicated that of the Del Rio population of Haitians seeking to enter the United States, more than 12,000 migrants have been processed and placed in immigration proceedings in the United States as of September 26, where at least they should now

be able to assert asylum claims. This process should be applied to all similarly situated individuals.

Predictably, the United States now faces continuing litigation challenges to the implementation of Title 42. At present, in *Huisha-Huisha v. Mayorkas*, the ACLU, the Texas Civil Rights Project, RAICES, Center for Gender and Refugee Studies, Oxfam, ACLU of Texas and the ACLU of the District of Columbia have sued the United States, seeking an immediate halt to the implementation of Title 42 as applied to the identified class (families) based on what they call "an unprecedented and unlawful invocation of the Public Health Service Act." On September 16, 2021, the D.C. District Court (Judge Emmet Sullivan) granted the request for a preliminary injunction to go into effect October 1, 2021, which the government has appealed. The U.S. Court of Appeals for the D.C. Circuit just granted the government's request to stay the effectiveness of the injunction pending further appeal, but as the litigation proceeds, this Administration may well be required to exempt family units from the application of Title 42 expulsions. I urge that the various court filing deadlines, including possible Supreme Court litigation over the coming weeks, not be viewed as occasions for doubling down on the current misguided policy. Instead, those court filings present important opportunities for this Administration to announce that after reconsideration, we have prudently changed these policies for the better.

Upcoming changes in COVID immigration policies also provide opportunities to change for the better. The Presidential Proclamation pursuant to INA 212(f) issued on January 25, 2021 extended the COVID-related travel restrictions that applied to individuals who were present in the Schengen Area, the UK, Ireland, Brazil or South Africa 14 days before entry or attempted entry to the United States. But once this restriction is lifted effective in November, visitors can enter, subject to new testing and contract tracing procedures, focusing on whether the traveler has been vaccinated rather than banning individuals from entire countries. The availability of vaccines and other mitigation measures make this change possible; the ensuing processes and protections should serve as a basis for deciding to rescind or revise the breadth of the restrictions created by Title 42. In its most recent order extending the Title 42 authority, the "CDC recognize[d] the availability of testing, vaccines, and other mitigation protocols can mitigate risk in this area. As the ability of DHS facilities to employ mitigation measures to address the COVID-19 public health emergency, CDC anticipates additional lifting of restrictions." The Order further acknowledged that "[i]n light of available mitigation measures, and with DHS' pledge to expand capacity in a COVID-safe manner similar to expansions undertaken by HHS and ORR to address UC [unaccompanied children] influx, *CDC believes that the gradual resumption of normal border operations under Title 8 is feasible."* (emphasis added). With the requirement that all federal employees must be vaccinated by November 22, 2021, the increased availability of rapid testing and vaccines, the demonstrated effectiveness of masks and other mitigation measures, within weeks there should be sufficient mitigation of COVID risk to switch to immigration policies toward Haiti and Mexico that do not entail the pervasive risk of illegal refoulement caused by the current policy.

IV. **Conclusion: Is this who we are?**

In closing, I have been fortunate to serve in four presidential administrations. I have been proud to serve in this one for its first eight months. I was especially proud last week when President Biden told the United Nations that "a belief in the universal rights of all people …[is] stamped into our DNA as a nation" and when he criticized the Border Patrol Agents' mistreating Haitian migrants, saying, "It's wrong. It sends the wrong message around the world and sends the wrong message at home. It's simply not who we are." The same could be said of current illegal and inhumane policy of Title 42 expulsions. It simply is not worthy of this Administration that I so strongly support.

Our recent efforts to assist tens of thousands of vulnerable Afghans show the best that the United States can do to protect individuals at risk in a crisis. That effort reflects the U.S. commitment to a robust refugee admissions program that "is one of the most visible manifestations of a values-based foreign policy, demonstrating American humanitarian leadership." Yet our actions and approaches regarding Afghan refugees stand in stark contrast to the continuing use of Title 42 to rebuff the pleas of thousands of Haitians and myriad others arriving at the Southern Border who are fleeing violence, persecution, or torture.

I know you share many of my concerns. This Administration faces many challenges and everyone is working impossibly hard. But we all came into this Administration to give the American people a government as good as our national values. Like you, I applauded when Secretary Blinken declared in March that "President Biden has committed to putting human rights back at the center of American foreign policy, and that's a commitment that I and the entire Department of State take very seriously." In that spirit, I ask you to do everything in your power to revise this policy, especially as it affects Haitians, into one that is worthy of this Nation we love.

Sincerely,

Harold Hongju Koh