The United States has an obligation to ensure the human rights of all immigrants, documented and undocumented alike; this includes the rights to personal liberty, to humane treatment, to the minimum guarantees of due process, to equality and non-discrimination, and to protection of private and family life.


The number of unaccompanied children and families from Central America arriving at the U.S. border has seen ebbs and flows, though reports indicate it has been growing since 2011. While the attempted entry into the United States of immigrants along the Mexico border are at an all-time low, with women and children comprising a relatively small percentage of migration to the United States, between October 2013 and August 2014, as many as 68,541 unaccompanied children and 68,445 families were apprehended at the southwest border, largely fleeing “violence, domestic abuse and dangerous gang activity.” The United States government's response to the influx of arrivals of migrant children and families has resulted in egregious and ongoing human rights violations.

As noted by the Office of the High Commissioner for Human Rights, “the human rights of all persons at international borders must be respected in the pursuit of border control. International borders are not zones of exclusion or exception for human rights obligations.” Unfortunately, the United States government has functionally created such a “zone of exclusion” by implementing inadequate and inconsistent screening procedures that deny children and families a meaningful opportunity to make a claim for protection or relief, resulting in violations of the United States’ non-refoulement obligations by returning asylum seekers to danger; and by routinely detaining both children and families for long periods of time in often harsh and sometimes abusive conditions, resulting in both violation of their due process rights and additional rights violations such as the right to family integrity.

Such screening and detention practices and policies violate established human rights standards, case law, and guidelines for the treatment of migrant children and families. Detention is to be used only as a matter of last resort. In light of this, more specific human rights guidelines on the treatment of migrants at the border have emerged over the years. These include, among others:

2 Id.
● conducting thorough screening in fulfilment of the obligation of non-refoulement and humane receiving of migrants, especially unaccompanied children;
● ensuring properly trained staff apply the “best interests of the child” standard when screening minors;
● detaining individuals for immigration violations only as a last resort, and avoiding detention altogether for children and families except in exceptional circumstances after individualized consideration establishing a need to detain;
● providing adequate follow-up for children who leave government custody upon turning eighteen years of age;
● refraining from conducting collective expulsions or forced returns;
● preventing, investigating and punishing all human rights violations and abuses experienced by migrants during their journey and at borders; and
● providing migrants with effective and timely access to remedies, including access to legal orientation, counsel, and the courts.

Despite the recommendations in the Commission’s Report on Immigration in the United States: Detention and Due Process, the United States continues to violate its international legal obligations to unaccompanied and separated children seeking refuge within its borders, and to families who enter the United States seeking protection with their children. The United States’ response to these refugees seeking assistance has been to obstruct their access to justice, in violation of its obligations under the American Declaration of the Rights and Duties of Man and other domestic and international laws, by: (1) its use of interdictions or turnbacks; (2) failing to refer asylum seekers to assistance and returning them, instead, to danger without a hearing; (3) detaining unaccompanied children arriving in the United States in substandard and remote facilities upon their apprehension; (4) detaining families while cases proceed; (5) conducting hearings without necessary legal safeguards such as legal representation; and (6) obstructing access to justice through the use of truncated processes.

As observed by the Commission during its recent visit, allegations persist of grave violations of rights to: liberty, personal security (American Decl. art. i); family life and protection of the family unit (American Decl. art. vi); protection of the child (American Decl. art. vii); protection from arbitrary arrest (American Decl. art. xxv); fair trial and due process of law (American Decl. art. xviii and xxvi); equality before the law (American Decl. art. ii); seek and receive asylum (American Decl. art. xxvii); and the principle of non-refoulement and the right to be free from persecution or torture.

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In light of the foregoing, Petitioners respectfully request this Commission:

With respect to children from Central America who are apprehended with their mothers and other family members

- Urge the U. S. government to ensure that adults and children in need of protection are referred to asylum officers and given the opportunity to apply for asylum and that border officers are not inappropriately discouraging individuals from applying for protection (through incorrect, misleading, or coercive information) or else ignoring requests for assistance
- Urge the U.S. government to screen children detained with a parent to determine if they independently qualify for and are in need of protection, using procedures that conform to international and domestic standards for the protection of children and the right to non-refoulement
- Urge the U.S. government to end its policy of opposing bond for detained families, and instead release families on reasonable bond or place families on alternatives to institutional detention
- Urge the U.S. government to return to its previous longstanding policy of using family detention as a last resort and then only in extenuating circumstances
- Urge the U.S. government to reconsider and withdraw its current plans to expand family detention by almost 3,000 beds in Karnes and Dilley, Texas, as this expansion is inconsistent with the use of family detention as a last resort.
- Urge the U.S. government to expand the use of alternatives to detention if supervision is required for the family attendance in immigration court proceedings
- Urge the U.S. government to provide government-appointed counsel to all families and all unaccompanied children in removal proceedings
- Urge the U.S. government to ensure that no families or unaccompanied children will be deported unless they are represented by counsel

With respect to U.S. immigration control support activities in Central America and Mexico

- Urge the U.S. government to end assistance to law enforcement and military entities on the Honduran and Guatemalan borders engaged in activities that violate Article XXVII of the American Declaration, by restricting territorial access to countries of asylum
- Urge the U.S. government to end activities, including the funding, equipping and training of interdiction units that undermine Mexico’s international and domestic legal obligations to asylum seekers and other persons with international protection needs, including people at risk of torture or trafficking.
With respect to all children and their family members from Central America and children from Mexico who have been detained and/or released by U.S. authorities in the last year

- Request that the U.S. government provide information regarding the number of children and families who have been removed from the United States since June 2014, the number who are currently subject to immigration proceedings and whether those children and families have obtained legal counsel to represent them in immigration proceedings.

- Request that the U.S. government provide information regarding the outcomes in removal proceedings with respect to family and unaccompanied children, including requests for protection granted or denied, hearings closed due to non-attendance of respondents, effectuation of removals involving families and unaccompanied children who were unrepresented by counsel and other results.

With respect to children from Mexico apprehended at or near the US-Mexico border -

- Request that the US government provide information regarding the screening of children from Mexico, including manuals and guidelines used in interviews of children by U.S. authorities, statistics on numbers of children screened in the past two years, number of children returned to Mexico, and number of children admitted to the US for further status determination.

- Urge the U.S. government to conform its screening of Mexican children to international and domestic standards for the protection of children and the right to non-refoulement.

- Urge the U.S. government to allow domestic civil society organizations and international human rights entities to monitor the screening of Mexican children.

With respect to future activities regarding this Thematic Hearing and related activities of the Inter-American Commission for Human Rights

- Convene and oversee a joint working group – including the petitioners, other civil society stakeholders, and relevant United States government agencies – which will sustain continued dialogue to follow up on the object of this hearing

- Issue a final report on the situation of human rights of refugee and migrant children and families in the United States, and the extraterritorial Article XXVII obligations of the United States, within the framework established by the Inter-American Court Of Human Rights’ Advisory Opinion (OC-21/14) “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,” including the information, analysis, conclusions and recommendations gathered during its on-site visit, this hearing, and follow-up submissions from the petitioners and the State

- Monitor the implementation of the recommendations contained in the 2011 Detention and Due Process report

- Convene a Meeting of Experts during its next sessions – including petitioners, other civil society stakeholders, the UNHCR, the UN Special Rapporteur on the Rights of Migrants,
and relevant United States government representatives – to gather information and analysis in support of its final report on this matter

We also request that the Inter-American Commission issue the following request to the United States Government:

● Publish its written responses to any questions it is unable to answer in the October 27 Thematic hearing for public consultation.
HUMAN RIGHTS SITUATION OF MIGRANT AND REFUGEE CHILDREN AND FAMILIES IN THE UNITED STATES

Materials Submitted in Support of Hearing before the Inter-American Commission on Human Rights
153rd Ordinary Period of Sessions
October 27, 2014

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A. BACKGROUND AND RELEVANT STANDARDS ON THE TREATMENT OF MIGRANT AND REFUGEE CHILDREN AND FAMILIES.

1. Hearing Request on the Rights of Unaccompanied Minors and Migrant Families in Detention, submitted by the Center for Justice and International Law (CEJIL), the American Civil Liberties Union (ACLU), the Washington Office on Latin American (WOLA), the Women’s Refugee Commission (WRC), the University of Pennsylvania Law School, and the University of Texas School of Law; Follow up to Request for Precautionary Measures, Minors from Guatemala, El Salvador, Honduras and Mexico, Susan Gzesh, et al., Hughes Socol Piers Resnick & Dym, the University of Chicago Law School, and National Immigrant Justice Center, August 21, 2014

The submitted hearing request notes that by engaging in and potentially expanding expedited removal proceedings of children and families at the border, the United States violates Inter-American and international law principles that require children to receive full and fair screening and review of their case, mandate the opportunity to appear before a judge, and condemn detention of migrant children. (American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc 21 rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Se. L.V/II.82, doc. 6, rev. 1, art. vii; Press Release, IACHR, IACHR Expresses Deep Concern on the Situation of Children Migrants Arriving to the United States 67/14, available at http://www.oas.org/en/iachr/media_center/PRelases/2014/067.asp ) . The United States routinely sends children back to potentially life-threatening situations without making a proper determination of their eligibility for relief. While in detention, children and their families suffer often-abysmal conditions involving physical, sexual, and mental abuse, and do not have proper access to legal counsel and the courts. As a result, children and their families--the most vulnerable of migrants--are treated like criminals and are not afforded the special protections provided by the American Declaration.

2. Human Rights Situation of Child Migrants in the United States, Table of Applicable Inter-American Jurisprudence, Center for Justice and International Law (CEJIL)

This table provides an overview of relevant Inter-American jurisprudence related to the human rights situation of migrant children in the United States. The table includes a very recent case in which the court concludes that children arriving at the border, with or without their families, may not be detained for the purposes of guaranteeing the aim of migratory proceedings or on the basis of noncompliance with the requirements to enter or remain in the country. (IA Court HR. Case of Dominican and Haitian Persons Expelled, ¶ 357.)
3. Application of the Inter-American Court of Human Rights’ Advisory Opinion OC-21/14 (“Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”) to the Human Rights Situation of Migrant and Refugee Children and Families from Central America and Mexico in the United States, the University of Chicago Law School

This memorandum outlines why the “best interests of the child” standard is the appropriate standard for making determinations regarding child migrants, and argues that it should be applied by the United States government in response to the recent influx of child migrants from Central America and Mexico. It describes how the Inter-American Court of Human Rights’ formulation of “children in need of international protection” in the context of non-refoulement requires the U.S. government to provide positive measures of protection for children in the U.S. from Central America and Mexico.

B. THE UNITED STATES’ SCREENING PROCEDURES FAIL TO PROTECT IMMIGRANT FAMILIES AND CHILDREN FROM HARM AND VIOLATE DUE PROCESS.


The report finds that U.S. screening procedures for both families and unaccompanied minors seeking asylum prevent vulnerable migrant populations from presenting their claims, accessing courts, and finding legal counsel, in violation of the American Declaration’s right to asylum, the principle of non-refoulement, and domestic and international law. (See, e.g., American Decl. art. xxvii; William Willberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.) Officials at the border routinely fail to ask questions about fear of return, fail to screen for human trafficking, and misinform migrant families and children about their rights—often while doing little to remedy any language barrier. As a result, children and families eligible for protections are returned to dangerous conditions without seeing the inside of a courtroom. “The overwhelming majority of people expelled from the United States each year will never see an immigration judge and never have a hearing where they can present a defense or pursue claims to remain in the United States.” (ACLU, Written Statement Submitted to the IACHR, §ii, ¶ 1.) Further, even for those whose claims have been identified, legal counsel is rarely guaranteed. “[A]sking immigrants to defend themselves in such a complex proceeding [fails] to protect the human right to a fair hearing and also lead to violations of non-refoulement obligations where unrepresented asylum seekers cannot adequately present and support their claims.” (ACLU §iii, ¶ 4.)

2. U.S. Support and Assistance for Interdictions, Interceptions and Border Security measures in Mexico, Honduras, and Guatemala undermine access to International Protection, Report, Jesuit Refugee Services

The report highlights how the United States has supported the dramatic changes in the migratory policies of Mexico, Guatemala and Honduras, involving interceptions and turn backs of people seeking to leave their country of origin, which ultimately result in grave violations of the American Declaration’s right to asylum (art. xxvii). Despite reports of substantive concerns from civil society about the way these new
policies undermine access to asylum and harrowing evidence from real individuals turned away at the border, the U.S. nonetheless “aggressively pursues partnerships with regional migration authorities, military units and special operations police.” (Jesuit Refugee Services, *U.S. Support and Assistance for Interdictions, Interceptions, and Border Security measures in Mexico, Honduras, and Guatemala undermine access to International Protection*, 3.) Rather than saving children, these units “could very well entail forcing children back to the situation they are attempting to escape.” (Jesuit Refugee Services at 3.) This is reinforced by the fact that “the strategic priority of this operation is to “stem the flow” of migrants without concern or regard for the implications of cutting off territorial access to asylum for those displaced by violence.” (Jesuit Refugee Services at 5.) This is particularly worrying when it is children whose access to territory where they might access international protection is being particularly restricted, and the U.S. government is failing to afford special protection to mothers and children (American Decl., art. vii.).


The testimony recognizes that in passing the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the United States aimed to protect the best interests of the child migrant by 1) ensuring due process of law for unaccompanied children and preventing their removal without the opportunity to see an Immigration Judge, 2) limiting any custody on the border to seventy-two hours and only to “exceptional circumstances, and 3) putting in place custody release and post-release services for children with mental health needs, children who have been victims of crime, and other vulnerable children. Not only has the U.S. government agencies’ application of the TVPRA to the recent influx in migrant children failed to ensure these rights, but the TVPRA itself lacks safeguards to stop the current human rights violations on the border. All unaccompanied children still do not have systematic access to courts and counsel upon screening and are not guaranteed a safe return upon repatriation, contrary to international human rights principles.

4. **Forms of Protection Available for Migrant Children Under U.S. and International Law,**

Informational Sheet, National Immigrant Justice Center (NIJC)

Under both domestic and international law, unaccompanied migrant children are eligible for a range of immigration relief, from asylum to Special Immigrant Juvenile Status. If children are turned away at the border, placed in removal proceedings, and not allowed access to courts, they never have the opportunity to apply for one of these many forms of relief they may be eligible for, in clear violation of the American Declaration’s right to asylum (art. xxvii). Even if they are able to see an immigration judge, without access to counsel, children cannot apply for these existing forms of relief on their own.¹

¹ A recent [Human Rights Watch Report on U.S. Border Screening Summary](http://www.hrw.org/node/129879) presents testimonies from deported Honduran children, which evidence a complete lack of meaningful screening upon arrival at the U.S. border, denying them the right to asylum in accordance with the laws of the United States (*Article XXVII*). The use of accelerated procedures such as “expedited removal” or “reinstatement of removal” fails to effectively identify those facing serious threats to their lives, in violation of the right to life, liberty and security (*Article I*). All migrants interviewed expressed a fear of returning to Honduras, with many accounts evidencing the level of fear required for a successful asylum claim. In failing to effectively screen such migrants, the U.S. is denying these individuals the fundamental right to asylum, and returning them to a place where their lives or freedom may be threatened. See link for full report: “*You Don’t Have Rights Here*: US Border Screening and Returns of Central Americans to Risk of Serious Harm,” [http://www.hrw.org/node/129879](http://www.hrw.org/node/129879)
C. U.S. DETENTION POLICIES AND CONDITIONS DEPRIVE MIGRANT CHILDREN AND FAMILIES OF BASIC HUMAN RIGHTS, VIOLATE DUE PROCESS, AND FAIL TO PROTECT THE BEST INTERESTS OF THE CHILD.

1. From Persecution to Prison: Child and Family Detention: Backgrounder, Lutheran Immigrant Refugee Services (LIRS)

This report outlines the stark increase in unaccompanied minors and children from Central America arriving at the U.S. border, and provides important background information and statistics about the resultant increase in the use and expansion of family detention. Mothers and children are inappropriately detained without regard to the American Declaration’s Article VII. “While DHS claimed the [T. Don Hutto Correction Center (Hutto) in Taylor, Texas] was specially equipped to meet the needs of families, reports emerged that children as young as eight months old wore prison uniforms [and] lived in locked prison cells with open-air toilets.” (Lutheran Immigrant Refugee Services, From Persecution to Prison: Child and Family Detention, 1.) This shocking treatment, and other inhumane conditions, violate numerous Articles of the American Declaration, including the right to adequate medical care (art. xi), the right to be free from abusive treatment and neglect (art. i), and the right to due process for which meaningful access to legal services is provided to ensure due process (art. xxvi).


This overview of three U.S. detention programs for children and families outlines the U.S. government’s alarming response to the dramatic rise in unaccompanied children and families arriving at the U.S. border. Irrespective of their potential eligibility for asylum or related immigration relief, mothers and children are detained in these “prison-like” detention facilities, in violation of the government’s obligations against arbitrary detention under Article XXV of the American Declaration. As highlighted by the Women’s Refugee Commission, “this influx of children and families requires a comprehensive and coordinated government response, one that recognizes migrants’ traumatic experiences and honors their fundamental human rights.” (Women’s Refugee Commission, Confined Without Care: A Guide to the Detention of Mothers and Children in the U.S. Immigration System, 1). Instead, mothers and children are not afforded special protection and care (American Decl. art. vii), face grave difficulties in accessing legal representation (American Decl. art. xxvi), have inadequate access to medical care (American Decl. art. xi) and there have even been reports of sexual and physical abuse by facility staff (American Decl. art. i).

3. Report made to the Inter-American Commission on Human Rights Regarding Grave Rights Violations Implicated in Family Immigration Detention at the Karnes County Detention Center, Ranjana Natarajan, Denise Gilman, et al, Civil Rights Clinic, University of Texas School of Law, September 26, 2014

The report calls attention to the numerous human rights violations committed against and experienced by families at the Karnes County Detention Center. At Karnes, “the government detains women and their children needlessly” (University of Texas School of Law, Report Regarding Grave Rights Violations Implicated in Family Immigration detention at the Karnes County Detention Center, 1 (September 2, 2014).), even when they pose no danger or flight risk that cannot be addressed through alternative measures, in violation of the fundamental right to liberty (American Decl. art. i). Detention during the expedited removal process is “categorical rather than individualized, exceeds the brief period that might be permissible, and fails to recognize the special situation of women and children asylum-seekers” (University of Texas School of Law at 5) in violation of Article VII American Decl., particularly as “facility staff is not trained in childcare or the special needs of asylum-seekers.” (University of Texas School of Law at 5). The unavailability of adequate mental and physical health services violates the
United States’ obligations under the Article XI Right to Preservation of Health and to Well-Being American Decl. The conditions at the detention center, with “inadequate food and medical services” (University of Texas School of Law at 21). and “harsh restrictions on children’s movement to threats and discipline”) are prison-like” (University of Texas School of Law at 21). In light of these grave violations, the insistence of the government on expanding such detention facilities must be resisted.


The United States’ use of expedited removal and release once removal proceedings are initiated violates Article XXV of the American Declaration in failing to protect individuals from state-imposed arbitrary detention. As highlighted by the flow charts, immigrants are subject to mandatory detention throughout expedited removal and families often remain detained for many months even after they pass an initial screening interview demonstrating that they have viable asylum claims. The U.S. policy of placing women and children in expedited removal and detaining women and children asylum-seekers during the credible fear process fails to accord them due process (American Decl. art. xvi). Furthermore, the IACHR, in its Report on Immigration in the United States: Detention and Due Process, specifically indicated that “pre-trial detention is an exceptional measure” (OEA/Ser.L/V/II. Doc. 78/10. at 12 (Dec. 30, 2010).

5. Immigration Forms Demonstrating Violations of the Rights of Asylum Seekers

These forms highlight the harsh reality of the immigration procedures for one desperate mother fleeing El Salvador with her 2 year old child. Despite the fact that she was travelling with a child when she was apprehended at the border on 07/30/2014, and was determined to have a credible finding of fear of returning to her country of origin, she was processed for expedited removal via video conference in flagrant violation of due process (American Decl. art. xxvi) and denying her a right to asylum (American Decl. art. xxvii). Irrespective of this determination of credible fear, the mother and her child were detained in the custody of the Department of Homeland Security for over a month, until an Immigration Judge reversed the decision to needlessly detain them.

6. Letters of Complaint about Karnes County Residential Center: Complaints Regarding Conditions at Karnes County Residential Center, Ranjana Natarajan, et al., Civil Rights Clinic, The University of Texas School of Law, September 25, 2014; Complaints Regarding Sexual Abuse of Women in DHS Custody at Karnes County Residential Center, Marisa Bono, et al., Mexican Legal Defense and Educational Fund (MALDEF), September 30, 2014

The letters and complaints illustrate how mothers and children in detention at Karnes are deprived of adequate access to food and medical services, a violation of the right to preservation of health and well-being (American Decl. art. xi). Such access is fundamentally important in the cases of growing children and nursing mothers, and undoubtedly violates the right to special protection, care and aid for mothers and children outlined in the American Declaration (art. vii). Further violation of this right is evident where toys and playthings are not allowed in living quarters, women are not permitted developmental and educational aids for children under the age of four, guards are unduly restrictive of infants, childcare arrangements are inappropriate in the mother’s absences and some children are separated from their mothers. (Ranjana Natarajan, et al., Complain Regarding Conditions at Karnes County Residential Center, 2-3 (Sept. 25, 2014).)

Rather than being specially protected, some of these mothers and children are being subjected to sexual abuse while in DHS custody, in flagrant violation of their right to personal security (American Decl. art. i). “These incidents of sexual abuse and harassment and the hostile and unsafe environment for the women and children not only likely violate federal laws and regulations, but also likely subject the detained families to conditions that are punitive and unconstitutional under the Due Process Clause of the Fifth Amendment.”(Marisa Bono, et al., Complaints Regarding Sexual Abuse of Women in DHS Custody...
“It is deeply disturbing that women and children who have fled horrific violence in their home countries are subjected to further exploitation in the custody of the U.S. government.” (Marisa Bono, et al., at 4)

7. **Advocates for survivors of domestic violence and sexual assault call for an end to the use of detention centers for immigration women and children fleeing violence**, Lutheran Immigrant Refugee Services (LIRS)

This report calls attention to the cases of survivors of violence in family detention facilities and the harrowing impacts of the continued violation of the United States’ special obligations towards women and children under Article VII of the American Declaration. “Many of the women and their children arriving at the border have come to the United States fleeing horrific domestic and sexual violence at the hands of intimate partners and criminal gangs, as well as increased risks of human trafficking.” The terrible experiences of these individuals are exacerbated by arbitrary detention in violation of article XXV of the American Declaration. The report calls on the United States to “respond to this humanitarian crisis appropriately by denouncing these human rights violations and pursuing strategies to address the root causes, while at the same time offering protection to qualified individuals under asylum law, the Violence Against Women Act (VAWA), and the Trafficking Victims Protection Act (TVPRA).”

8. **Six Voices From Family Detention**, Testimonies from detainees at Berks Family Shelter; **Written Statement of Ms. Bridget Cambria, Esq.**, as told to the Child Advocacy Clinic at the University of Pennsylvania Law School

These testimonies from detainees, family members and an attorney serving the Berks family facility highlight the harrowing effects of arbitrary detention in violation of Article XXV of the American Declaration. Even though Berks is deemed to provide decent food and health care, the effects of any kind of detention on families can have terrible consequences, as evidenced by these testimonies. The very fact that children and families are needlessly detained violates the right to special protection for mothers and children (American Decl. art. xii). Mothers are not able to effectively parent their children, as they are subject to the rules of the detention center.


This summary of the forthcoming report on family detention (to be released on October 30, 2014) highlights the irreversible damage done to families held at detention centers in the United States. It outlines how family detention cannot be carried out humanely, as it violates many articles of the American Declaration. Families are detained arbitrarily (American Decl. art. xxv), conditions at facilities such as Artesia and Karnes are inappropriate for mothers and children (American Decl. art. vii), and family detention inherently violates due process (American Decl. art. xxvi).
August 13, 2014

Mr. Emilio Álvarez-Icaza  
Executive Secretary  
Inter-American Commission on Human Rights  
1889 F St. NW  
Washington, DC 20006

Re: Thematic Hearing Request  
Human Rights Situation of Child Migrants in the United States

Dear Mr. Álvarez-Icaza:

The American Civil Liberties Union (ACLU), Women’s Refugee Commission (WRC), University of Pennsylvania Transnational Legal Clinic, University of Texas School of Law Immigration Clinic, Washington Office on Latin America (WOLA), and the Center for Justice and International Law (CEJIL) (collectively, “Petitioners”) write to request a thematic hearing regarding the human rights situation of unaccompanied and separated child migrants arriving in the United States of America, and the expansion of family detention of immigrants, during the 153rd Period of Sessions of this Honorable Inter-American Commission on Human Rights (“IACHR,” “Commission”), in accordance with Articles 61 and 66 of the Rules of Procedure.

Petitioners recall this Honorable Commission’s important statement expressing deep concern on the situation of child migrants arriving in the United States issued on June 20, 2014, and recall that the IACHR highlighted that:

[At present, the primary obligation of the United States is to properly screen children migrants to identify those children that might require international protection or have other special needs for protection and to provide full access to such mechanisms of international or complementary protection. [...] As established in its Report on Immigration in the United States: Detention and Due Process, the Commission reminds all of the States in the region that the detention of a child due to his or her irregular migratory situation constitutes a violation of the rights of the child and is always against the principle of the best interests of the child.¹]

Since then, the human rights situation along the United States’ southern border has only worsened, which has generated extensive policy debates both in the United States and throughout the region. Currently U.S. law requires that unaccompanied children from countries other than Mexico and Canada be provided a “full and fair hearing” of their claims, and prevents them from being expelled based on a truncated process. However, Congress and the Executive Branch are currently considering proposals that would instead expand an accelerated removal (i.e. deportation) process—one that is already being applied to unaccompanied children from Mexico with unconscionable speed, preventing full and fair presentation of their cases and ensuring that mistakes are made in life-or-death determinations of future safety. It has also failed to protect children from abuse in detention. At the same time, over the past summer, the U.S. government has introduced plans to expand the administrative detention of families with children while their immigration cases proceed.

Petitioners believe that the IACHR’s valuable intervention will be of paramount importance in identifying and reinforcing the United States’ obligations under international law to unaccompanied and separated children seeking refuge within its borders, and to families who enter the United States seeking protection with their children.

To assist the Commission to further understand the acute situation and in crafting its recommendations to the United States government, Petitioners propose to present information and analysis regarding the following points, inter alia, during the hearing:

1. **Detention conditions and the need to consider the best interests of the child.**

   Despite an emerging consensus in international law that children should never be detained for administrative immigration infractions, which are of a civil nature by definition, unaccompanied children arriving in the United States are often placed in substandard detention conditions upon apprehension by U.S. authorities. The ACLU and other organizations have documented more than 100 cases where unaccompanied immigrant children detained by Customs and Border Protection were subjected to verbal, sexual and physical abuse; prolonged detention in squalid conditions; and a severe lack of essential necessities such as beds, food and water. Petitioners call on the State to ensure greater oversight of these detention operations, including through an overhaul of complaint procedures, investigation of potential abuses, and training for U.S. officials. In addition, reports have emerged that in shelters for children overseen by the Office of Refugee Resettlement (ORR), an agency within the Department of Health and Human Services (HHS), “youths inside the insular system have quietly suffered abuses by the people paid to protect them. The system has repeatedly failed to hold abusers

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accountable.”⁴ Petitioners will highlight the importance of ending administrative detention of children, and in every case ensuring that detention is only used as a last resort and for the briefest time possible, and ensuring that the United States designs and implements proper oversight mechanisms over private facilities contracted by federal authorities for those cases in which children cannot be released to family members’ custody, in line with the Commission’s recommendations in this regard.⁵

2. **Expansion of family detention.** Aside from the actual conditions of confinement in immigration detention facilities, Petitioners are concerned by the U.S. government’s decision to detain immigrant families while their cases proceed. In recent years, international opinion and human rights law have cautioned against the use of administrative immigration detention, particularly for children and families.⁶ Prior to this summer, the United States had begun to move away from family detention. In 2009, ICE stopped detaining families at the T. Don Hutto facility in Texas following ACLU litigation challenging the deplorable conditions of confinement and treatment of children there; and until this summer, the administration had reduced its detention of immigrant families to 96 beds at one facility. But in July 2014, the U.S. government reversed course and announced plans to expand family detention, creating up to 6,350 beds in the near future.⁷ Already, the government has opened a new 646-bed family detention facility in New Mexico; another family detention facility, run by a private prison company, opened August 1st in Karnes County, Texas, with almost 600 beds.⁸ The majority of the families detained in these facilities are seeking asylum in the United States, yet the U.S. government has imposed a no-bond policy for these mothers and children (including persons who pass credible fear interviews), despite individual circumstances supporting supervision in the community rather than jail detention.⁹ This Commission has long

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cautioned against the practice of family detention. The United Nations Working Group on Arbitrary Detention has stated that immigration detention should be abolished and only used as a last resort, and in May 2014, the U.N. Secretary-General expressed particular concern with administrative detention of young immigrant children. Indeed, detention of families raises tremendous concerns, and, regardless of the particular detention conditions, inhibits access to due process, harms children’s mental health, and damages the family structure.

3. Unfair hearings in the absence of adequate legal representation. The IACHR has previously urged the United States to appoint an attorney at the State’s expense to represent unaccompanied children. Because the United States has failed to provide lawyers for all children facing removal, at present unaccompanied children encounter serious obstacles to receiving a fair hearing. Without legal counsel, these children are forced to make complex legal arguments for their protection alone, up against trained government attorneys arguing for their deportation. The State should not deport any child who lacked counsel in his or her removal proceedings.

4. Limited access to justice. Petitioners have observed troubling limitations on children’s access to justice in U.S. immigration proceedings. At present, unaccompanied children of Mexican nationality, and accompanied children from all countries, can be repatriated without receiving a hearing. The United States must ensure that all children receive a full review of their case by a trained adjudicator that conforms to international standards of due process. Truncated processes that presume unaccompanied children should be returned—rather than assessed for their protection needs—could lead U.S. officials to fail to recognize some children’s legal claims and thereby result in systematic violation of U.S. non-refoulement obligations. Indeed, the UNHCR estimates that approximately

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16 The special rules for children originating from contiguous states (Mexico and Canada) include a presumption of immediate return to their home country with no hearing before an immigration judge, unless the child is identified as a victim of severe trafficking, demonstrates a credible fear of persecution, or is unable to make independent decisions about their options. Homeland Security Act (HSA) of 2002, (Pub.L. 107 296, 116 Stat. 2135, enacted November 25, 2002); Trafficking Victims Protection Act of 2000 (TVPRA), 22 U.S.C. § 7102. § 235(a)(2)(A).
64% of unaccompanied Mexican children attempting to enter the United States have potential international protection claims, and yet almost all these children—over 95%—are instead removed from the United States without seeing an asylum officer and without a hearing.

5. **Family separation.** Some children seeking refuge in the United States are also attempting to reunite with family members in the United States. In receiving countries, including the United States, the governmental authorities responsible for unaccompanied minors should make custody arrangements in adherence to the best interest of the child standard, guaranteeing family reunification whenever possible. This practice has not yet been implemented in the United States.

6. **Lack of adequate procedures to identify international protection needs of unaccompanied children.** In its recent report, *Children on the Run*, UNHCR determined that the majority of children interviewed coming to the United States from El Salvador, Guatemala, Honduras and Mexico “provided information that clearly indicates they may well be in need of international protection.” So that children can seek asylum and protection in the United States, unaccompanied and separated children must be properly interviewed and screened by individuals with expertise and training in child development, giving particular attention to the special protection needs of children deprived of their family environment and of children who are refugees or are seeking asylum. Recognizing unaccompanied children’s unique vulnerability and the challenges they face in identifying their protection needs for themselves, particularly after a long and often traumatic journey to seek safety in the United States, the State should abandon its current efforts to curtail the screening process for unaccompanied children from Central America, and ensure that essential safeguards and procedures are in place so that children are able to seek protection and are not returned to places where they face persecution, in violation of the U.S. non-refoulement obligations.

7. **Dangerous deportation or removal practices.** Since the Commission’s statements, large numbers of repatriated children began to arrive by plane in San Pedro Sula, Honduras this July. If, after fair hearings before immigration judges to ascertain whether a child may qualify for asylum or other forms of protection, U.S. authorities decide to repatriate individual children, it is important that this repatriation take place in a manner that does not put the children in harm’s way. According to U.S. guidelines, unaccompanied minors and other vulnerable individuals should be repatriated during

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daylight hours to ensure their safety. However, in general deportation practices, U.S. authorities, at the U.S.-Mexico border, frequently deport migrants at night, when most services are closed; deport migrants to cities with particularly high crime rates; and fail to return migrants’ belongings confiscated during detention in the United States. These practices unnecessarily put migrants in danger. Given the conditions in Honduras, El Salvador, and Guatemala, especially in certain cities, and given that children are particularly vulnerable, it is important to ensure that U.S. authorities develop and adhere to clear guidelines that ensure that any deportations of children are carried out in a manner that is safe.

8. Denying access to protection through interdictions or turnbacks. The United States has been increasing its support to other countries to try and turn around migrants before they ever reach the United States border. It is important that such increased enforcement does not amount to *refoulement* and prevent those seeking protection from accessing territorial protection from the United States. Interdictions, either through refusing to allow people to leave their country of origin, interceptions en route, or “turnbacks” at the U.S.-Mexico border, must not prevent persons fleeing persecution from accessing asylum or complementary forms of protection.

During the hearing, we will also address steps the IACHR can take to help address the root causes of the humanitarian crisis along the United States’ southern border, and will include important policy recommendations for the United States government. The IACHR has addressed citizen security and human rights in the region, describing many of the main factors driving the recent wave of migration of children toward the United States. Similarly the Commission formulated a series of important, specific recommendations pertaining to unaccompanied minors in its 2010 *Report on Immigration in the United States: Detention and Due Process*, for which Petitioners request follow-up from the IACHR during this hearing.

Petitioners believe that this hearing will provide valuable information and analysis to aid the Commission in its upcoming *in loco* visit to the United States southern border, and we request that the information gathered be consolidated into a thematic report on the matter.

Finally, Petitioners request that the United States delegation for the hearing include representation of government agencies with decision-making authority in the context of unaccompanied child migrants, including representatives from the Office of Refugee Resettlement (ORR), the Department of Health and Human Services (HHS), U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Department of Homeland Security (DHS), the Executive Office for Immigration Review (EOIR), and the Department of Justice (DOJ), in addition to Department of State (DOS).


This situation, which this Honorable Commission has rightly described as a “humanitarian crisis,” continues to worsen, and demands the urgent attention of the IACHR and the State. Petitioners thus consider this upcoming period of sessions a crucial and timely opportunity to engage in a constructive dialogue between the parties, and give needed attention to United States laws, policies and practices in light of its international human rights obligations.

Respectfully Submitted,

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Francisco Quintana
Charles Abbott
CEJIL

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Jamil Dakwar
ACLU

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Sarah Paoletti
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August 21, 2014

Emilio Alvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street N.W.
Washington, D.C. 20006

RE: FOLLOW UP TO REQUEST FOR PRECAUTIONARY MEASURES
MINORS FROM GUATEMALA, EL SALVADOR, HONDURAS AND MEXICO

Dear Secretary Alvarez Icaza,

Nine days ago on August 13, 2014, we submitted a request for precautionary members by Petitioners Mary Meg McCarthy, National Immigrant Justice Center; and Oscar Chacon, National Alliance of Latin American & Caribbean Communities on behalf of the Beneficiaries, minors from Guatemala, El Salvador, Honduras, and Mexico who are fleeing violence and other serious threats to their lives and personal security in their home countries, and who have been, are or will be apprehended on U.S. territory or near the U.S.-Mexico border by U.S. authorities. This week we heard that several Honduran children (possible Beneficiaries of this request for Precautionary Measures) were recently deported from the United States and were murdered after their return to Honduras, presumably for resisting gang recruitment.

Pursuant to Article 25 of the Rules of Procedure of the Inter-American Commission for Human Rights, we sought precautionary measures, urgently needed to protect the lives and security of the Beneficiaries who have been, are, or will be apprehended by United States authorities at or near the U.S.-Mexico border and subjected to expulsion and return to their home countries, without due consideration of their rights to protection to their lives, to humane treatment, the rights of children, and the right to asylum, established in articles I, VII, XXVII of the American Declaration of Rights and Duties of Man.
We requested that the Inter-American Commission for Human Rights order the United States to cease the expulsion and return to their home countries of Beneficiaries without due consideration of their rights to protection and their right to asylum.

Earlier this week, credible reports were published in the U.S. press that at least five Honduran children who had been deported from the United States were killed on their return to Honduras. As reported from San Pedro Sula, Honduras, by U.S. journalist Cindy Carcamo on August 16, 2014, in the Los Angeles Times,

“Like thousands of other undocumented Honduran children deported after having journeyed unaccompanied to the U.S., Sosa faces perilous conditions in the violent neighborhood from which he sought to escape."There are many youngsters who only three days after they’ve been deported are killed, shot by a firearm," said Hector Hernandez, who runs the morgue in San Pedro Sula. "They return just to die." At least five, perhaps as many as 10, of the 42 children slain here since February had been recently deported from the U.S., Hernandez said” 1

Our request for precautionary measures was based on an urgent situation; U.S. authorities were deporting Beneficiaries to their home countries without giving them a meaningful opportunity to apply for political asylum or other forms of humanitarian status. Some U.S. courts have recognized resistance to recruitment by criminal gangs to be grounds for a grant of political asylum or withholding of deportation under the Convention Against Torture. The Inter-American Commission should immediately ask the United States government to report on whether or not the murdered Honduran children were given an opportunity to apply to remain in the United States under political asylum or other humanitarian grounds.

The Beneficiaries face, within the meaning of the Commission’s rules, a “serious situation” in which the actions of a State will have “a grave impact… on a protected right” – in this case, the right to life. 2 The United States is continuing to deport children to Honduras, Guatemala, El Salvador, and Mexico, which constitutes an “urgent situation,” in which [a] “risk or threat… is imminent and can materialize, thus requiring immediate preventive or protective action.” 3 Continuing deportations can result in more deaths. The Beneficiaries herein are at risk of “irreparable harm,” defined as [an] “injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.”4 The death of a child forcibly returned – by a State - to a place he or she had fled in fear of his or her life is an “irreparable harm” and a moral outrage.

We, the attorneys for Petitioners Mary Meg McCarthy, National Immigrant Justice Center, and Oscar Chacon, National Alliance of Latin American and Caribbean Communities hereby request that the Inter-American Commission for Human Rights immediately investigate the specific incidents related to the return of the murdered children as well as the general measures by which

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2 Ibid, Article 25, Section 2.a.
3 Ibid, Article 25, Section 2.b.
4 Ibid, Article 25, Section 2.c.
U.S. authorities effectively deny the Beneficiaries a meaningful opportunity to remain in the U.S. as refugees or in other forms of humanitarian status. Due process is critical. Children’s lives are at stake.

We remain ready to supply the Commission with testimony regarding both general conditions and specific cases of Beneficiaries whose rights have been denied and whose lives are at risk. Please contact us at the earliest possible date.

Respectfully submitted,

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August 21, 2014
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<th>Topic</th>
<th>Case/Document</th>
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<td>Right of Children to Seek and Receive Asylum; Access to Legal Assistance; Specialized Screening Considerations for Children</td>
<td>Pacheco Tineo Family v. Bolivia, paras. 159.</td>
<td>“…asylum seeks must have access to proceedings to determine this status that permit a proper examination of their request in keeping with the guarantees contained in the American Convention and in other applicable international instruments, which, in cases such as this one, entail the following obligations for the States:</td>
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<td>a) They must guarantee the applicant the necessary facilities, including the services of a competent interpreter, as well as, if appropriate, <strong>access to legal assistance and representation</strong>, in order to submit their request to the authorities. Thus, the applicant must receive the necessary guidance concerning the procedure to be followed, in words and in a way that he can understand and, if appropriate, he should be given the opportunity to contact a UNHCR representative;</td>
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<td>b) The request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority, and <strong>requires a personal interview</strong>;</td>
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<td>c) The decisions adopted by the competent organs must be duly and expressly founded;</td>
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<td>d) In order to protect the rights of applicants who may be in danger, all stages of the asylum procedure must respect the protection of the applicant’s personal information and the application, and the principle of confidentiality;</td>
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<td>e) If the applicant is denied refugee status, he should be provided with information on how to file an appeal under the prevailing system and granted a reasonable period for this, so that the decision adopted can be formally adopted, and</td>
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<td>f) The appeal for review must have suspensive effects and must allow the applicant to remain in the country until the competent authority has adopted the required decision, and even while the decision is being appealed, unless it can be shown that the request is manifestly unfounded.”</td>
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<td>IACHR Advisory Opinion 21/14, paras. 84-85.</td>
<td>84. The Court considers that the initial evaluation process should include effective mechanisms for obtaining information following the child’s arrival at the entry place, post or port, or as soon as the authorities are aware of her or his presence in the country, in order to determine her or his identity and, if possible, that of the parents and siblings, in order to transmit this to the State agencies responsible for making the evaluation and providing the measures of protection, based on the principle of the child’s best interest. In this regard, the Committee on the Rights of the Child has stipulated that “[a] determination of what is in the <strong>best interest of the child requires a clear and comprehensive assessment of the child’s identity</strong>, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities, and protection needs.” This information should be obtained by a procedure that takes into account the difference between children and adults, and the</td>
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**Table of Applicable Inter-American Jurisprudence**

**Human Rights Situation of Child Migrants in the United States**
treatment should be in line with the situation.

85. This initial assessment procedure must be performed in a friendly environment and must provide guarantees of security and privacy, as well as be performed by qualified professionals who are trained in age and gender sensitive related interviewing techniques. In addition, States must take into account the basic procedural guarantees in keeping with the principles of the child’s best interest and comprehensive protection, which include, but are not limited to, the following: that the interview is conducted in a language the child understands; that it should **be child-centered, gender-sensitive, and guarantee the child’s participation**; that the analysis takes into account safety and possible family reunification; that the child’s culture and any reluctance to speak in the presence of adults or family members is acknowledged; that an interpreter is provided if required; that adequate installations and **highly qualified personnel are available for interviewing children**; **that legal assistance is provided** if required; that clear and comprehensive information is provided on the child’s rights and obligations and on the follow-up to the process.

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<td>If the right to defense arises as of the moment in which an investigation into an individual is ordered (supra para. 29), the accused must have <strong>access to a legal representation</strong> from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from being advised by a counsel means to strictly limit the right to defense, which leads to a procedural unbalance and leaves the individual unprotected before the punishing authority.</td>
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<th>Due Process for Migrants</th>
<th>Case of Cabrera García and Montiel Flores v. Mexico, Para. 155</th>
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<td>In particular, the Court emphasizes that the defense provided by the State must be effective, for which purpose the State must adopt all the appropriate measures. If the right to defense begins from the moment when an investigation into an individual is ordered, the accused must have <strong>access to legal representation</strong> from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from receiving assistance from a defense counsel is to severely limit his right to defense, which leads to a procedural imbalance and leaves the individual unprotected before the punitive authority. However, the appointment of a defense counsel for the sole purpose of complying with a procedural formality would be tantamount to not having a technical legal representation; therefore, it is imperative that the defense counsel act diligently in order to protect the procedural guarantees of the accused and thereby prevent his rights from being violated.</td>
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<th>Due Process for Migrants</th>
<th>Case of Vélez Loor v. Panama, para. 143.</th>
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<td>The <strong>right to due legal process</strong> must be guaranteed to everyone, regardless of their migratory status. This means that the State must ensure that every foreigner, even, an immigrant in an irregular situation, has the opportunity to exercise his or her rights and defend his or her interests effectively and in full procedural equality with other individuals subject to prosecution.</td>
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<td>Special Procedures for Children to Access Due Process</td>
<td>Case of the Pacheco Tineo Family v. Bolivia, para. 224</td>
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<td>Case of the Pacheco Tineo Family v. Bolivia, para. 220</td>
<td>Thus, the special protection derived from Article 19 should be extended to the judicial or administrative proceedings in which a decision is taken on a child’s rights, which entails a more rigorous protection of Article 8 and 25 of the Convention. Furthermore, the Court has already established in other cases that there is a relationship between the <strong>right to be heard</strong> and the <strong>best interests of the child</strong>, and it is this relationship that governs the essential role of children in all decisions that affect their life.</td>
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<td>Juridical Status and Human Rights of the Child, para. 96</td>
<td>It is evident that a <strong>child participates in proceedings under different conditions from those of an adult.</strong> To argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, it is indispensable to recognize and respect differences in treatment which correspond to different situations among those participating in proceedings.</td>
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<td>Special Measures of Protection Required for Children</td>
<td>Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, para. 147</td>
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<td>Case of the Río Negro Massacres v. Guatemala, para. 142</td>
<td>Furthermore, Article 19 of the American Convention establishes that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State.” In the Court’s opinion, “this provision must be understood as an additional, complementary right that the treaty establishes for individuals who, based on their physical and emotional development, require special protection.” Therefore, the State must assume a special position of guarantor with greater care and responsibility, and must take special measures based on the principle of the best interest of the child. This principle is founded “on the very dignity of the human being, on the inherent characteristics of children, and on the need to promote their development taking full advantage of their potential.” Hence, the <strong>State must pay special attention to the needs and rights of children</strong>, based on their special condition of vulnerability. In addition, the Court has repeatedly stated that “both the American Convention and the Convention on the Rights of the Child are part of a very comprehensive international corpus juris for the protection of children that must be used […] to establish the content and scope of the general provision defined in Article 19 of the American Convention.”</td>
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<td>Children’s Right to Be Heard</td>
<td>Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, supra, para. 66.</td>
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<td>Obligation of the State to Identify Needs of Protection for Children</td>
<td>Case of Velásquez Rodríguez v. Honduras, paras. 168 and 174</td>
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<td>Obligation of the State to Identify Needs of Protection for Children; Right to Seek and Receive Asylum</td>
<td>IACHR OC-21/14, para. 81.</td>
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<td>Rights Pertaining to Family</td>
<td>Case of Atala Riffo and daughters v. Chile, para. 170.</td>
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<td><strong>Principle of non-refoulment</strong></td>
<td><strong>Case of the Pacheco Tineo Family v. Bolivia, paras. 151-153</strong></td>
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<td><strong>Regarding the second aspect,</strong> in relation to the proceeding on the expulsion of the Pacheco Tineo family based on their situation as irregular aliens, the Court recalls the intrinsic relationship that exists between the right to protection of the family and the rights of the child. In this regard, the Court has found that the right to protection of the family, and to live in a family, recognized in Article 17 of the Convention, means that the State is obliged not only to establish and execute directly measures of protection for children, but also to promote, as extensively as possible, the development and enhancement of the family unit. Consequently, the separation of children from their family constitutes, under certain circumstances, a violation of the said right, because even legal separations of the child from its family are only admissible if they are duly justified in the best interests of the child, exceptional and, insofar as possible, temporary.</td>
<td>151. When recalling that, under the inter-American system, the principle of non-refoulment is broader in meaning and scope and, owing to the complementarity that exists in the application of international refugee law and international human rights law, the prohibition of refoulement constitutes the cornerstone of the international protection of refugees or asylees and of those requesting asylum. This principle is also a customary norm of international law, and is enhanced in the inter-American system by the recognition of the right to seek and to receive asylum. 152. In this way, such persons are protected from refoulement as a specific means of asylum under Article 22(8) of the Convention, regardless of their legal status or migratory situation in the State in question and, as an integral component of the international protection of refugees, under the 1951 Convention and its 1967 Protocol, Article 33(1) of which establishes that &quot;no contracting State shall expel or return (&quot;refouler&quot;) 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.&quot; 153. This necessarily means that such persons cannot be turned back at the border or expelled without an adequate and individualized analysis of their application. Before returning anyone, States must ensure that the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings in the country to which they would be expelling him. States also have the obligation not to return or deport a person who requests asylum where there is a possibility that he may risk persecution, or to a country from which he may be returned to the country where he suffered this risk (the so-called &quot;indirect refoulement&quot;).</td>
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<td><strong>Haitian Interdiction v. the United States of America (Case 10.675) paras. 156, 157, and 163.</strong></td>
<td>156. An important provision of the 1951 Convention is Article 33(1) which provides that: &quot;No Contracting State shall expel or return (&quot;refouler&quot;) 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.&quot; The Supreme Court of the United States, in the case of Sale, Acting Commissioner, Immigration and Naturalization Service, Et. Al. v. Haitian Centers Council, INC., Et. Al., No. 92-344, decided June 21, 1993, construed this provision as not being applicable in a situation where a person is returned from the high seas to the territory from which he or she fled. Specifically, the Supreme Court held that the principle of non-refoulment in Article 33 did not apply to the Haitians interdicted on the high seas and not in the United States.</td>
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157. The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.

163. The Commission finds that the United States summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as "refugees." The Commission also finds that the dual criteria test of the right to "seek" and "receive" asylum as provided by Articles XXVII in "foreign territory" (in accordance with the laws of each country and with international agreements) of the American Declaration has been satisfied. Therefore, the Commission finds that the United States breached Article XXVII of the American Declaration when it summarily interdicted, and repatriated Jeanette Gedeon, Dukens Luma, Fito Jean, and unnamed Haitians to Haiti, and prevented them from exercising their right to seek and receive asylum in foreign territory as provided by the American Declaration.

Canada maintains that the Refugee Convention and international practice does not create a right of asylum, but only a right of non-refoulement to a State of persecution. Canada submits that where an asylum-seeker is denied entry into, or deported from a State, that State is responsible for ensuring that person will not be exposed to a real risk of a violation of his right to life, or be exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment upon repatriation or re-direction to another country. Canada contends that “real risk” means that the violation of an individual’s rights must be the necessary and foreseeable consequence of the deportation. The State acknowledges that it would constitute a violation by the state of its international obligations to send an asylum-seeker to a country where there was this “real risk” that he would be refouled in a manner inconsistent with the Refugee Convention. However, Canada submits that the United States is not a country that poses a real risk of refoulement to asylum-seekers. In support of its position, Canada notes that the United States is a party to the 1967 Protocol to the Refugee Convention, and bound by several human rights instruments with a non-refoulement component including the American Declaration, the International Covenant on Social and Political Rights, and the United Nations Convention Against Torture. Canada argues that, on this basis its direct-back policy is consistent with Article 33 of the Refugee Convention, given that claimants are returned to the United States temporarily to await their appointment in Canada to process their asylum claims. The fact that some refugee claimants do not return to Canada to make their refugee claims does not result in the violation of the rights of the claimants because Canada is entitled to rely on the safety of the U.S. asylum system guarantees non-refoulement.
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<th>Detention; Civil Nature of Immigration Offenses; Exceptionality of Detention</th>
<th>Case of Hirsi Jamaa and others v. Italy, paras. 133 and 134.</th>
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<td>133. The Court observes firstly that that fact was disputed by the applicants, who stated that they had informed the Italian military personnel of their intention to request international protection. Furthermore, the applicants' version is corroborated by the numerous witness statements gathered by the UNHCR and Human Rights Watch. In any event, the Court considers that it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return (see, mutatis mutandis, Chahal, cited above, §§ 104 and 105; Jabari, cited above, §§ 40 and 41; and M.S.S., cited above, § 359). Having regard to the circumstances of the case, the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3.</td>
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<th>Detention; Civil Nature of Immigration Offenses; Exceptionality of Detention</th>
<th>Case of Vélez Loor v. Panama, paras. 208-209.</th>
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<td>208. Therefore, if in a specific case detention is necessary and proportionate, migrants should be held in facilities specifically designed for that purpose, in accordance with the migrant’s legal situation, and not in common prisons, the purpose of which is incompatible with the purpose of the possible detention of a person for his immigration status, or other places where they are placed together with those accused or convicted of crimes. This principle of separation clearly serves the different purposes of deprivation of liberty. In fact, when dealing with convicted persons, the conditions of imprisonment must pursue the “essential aim” of custodial measures, which is the “reform and social re-adaptation of the convicted prisoners.” In the case of migrants, detention and imprisonment of persons solely for their irregular migratory status should only be used as necessary and proportionate to a specific case, only for the shortest period of time possible and according to the legal purposes mentioned (supra paras. 169 and 171). Indeed, by the time Mr. Vélez Loor was imprisoned, several international organizations had ruled on the need to separate persons imprisoned for a violation of immigration laws from those persons accused or convicted of criminal offences. Therefore, the Court considers that States must provide separate public establishments specifically allocated for each purpose, and if the State does not have such establishments, it must provide other premises, which should never be prison.</td>
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2 Article 5(6) of the American Convention establishes that: [punishments consisting of deprivation of liberty shall have the reform and social re-adaptation of the prisoners as their essential aim.}
209. Although deprivation of liberty often entails, as an inevitable consequence, the violation of other human rights in addition to the right to personal liberty, in the case of persons detained exclusively for immigration issues, they should be accommodated in centers specifically designed for the purpose of guaranteeing “material conditions and a system appropriate to their legal status and staffed by appropriately qualified personnel,”\(^3\) avoiding as far as possible the disintegration of family groups. Consequently, the State must adopt certain positive, specific measures, aimed not only at guaranteeing the enjoyment and exercise of those rights whose restriction is not a collateral effect of the situation of imprisonment, but also at ensuring that the deprivation of liberty does not entail a greater risk to the infringement of rights, the integrity and the personal and family welfare of migrants.

**Civil Nature of Immigration Offenses; Lack of Transparency**


For those cases in which detention is strictly necessary, the IACHR is troubled by the lack of a genuinely civil detention system, where the general conditions are commensurate with human dignity and humane treatment, and featuring those special conditions called for in cases of non-punitive detention. The Inter-American Commission is also disturbed by the fact that the management and personal care of immigration detainees is frequently outsourced to private contractors, yet insufficient information is available concerning the mechanisms in place to supervise the private contractors.

**Deportation or Expulsion of Children**

IA Court HR. Case of Dominican and Haitian Persons Expelled, para. 357

La Corte encuentra necesario reiterar que en los procesos de expulsión en donde se encuentren involucrados niñas y niños, el Estado debe observar además de las garantías señaladas anteriormente, otras cuyo objetivo sea la protección del interés superior de las niñas y niños, entendiendo que dicho interés se relaciona directamente con su derecho a la protección de la familia y, en particular, al disfrute de la vida de familia manteniendo la unidad familiar en la mayor medida posible.\([\text{Page } 8 / 10]\) En este sentido, cualquier decisión de órgano judicial o administrativo que deba decidir acerca de la separación familiar, en razón de la condición migratoria de uno a ambos progenitores debe contemplar las circunstancias particulares del caso concreto, garantizando así una decisión individual, debe perseguir un fin legítemo de acuerdo con la Convención, ser idónea, necesaria y proporcionada\(400\). En la consecución de ese fin, el Estado deberá analizar las circunstancias particulares de cada caso, referidas a: a) la historia inmigratoria, el lapso temporal de la estadía y la extensión de los lazos del progenitor y/o de su familia con el país receptor; b) la consideración sobre la nacionalidad\(401\), guarda y residencia de los hijos de la persona que se pretende deportar; c) el alcance de la afectación que genera la ruptura familiar debido a la expulsión, incluyendo las personas con quienes vive la niña o el niño, así como el tiempo que la niña o el niño ha permanecido en esta unidad familiar, y d) el alcance de la perturbación en la vida diaria de la niña o del niño si cambiara su situación familiar debido a una medida de expulsión de una persona a cargo de la niña o del niño, de forma tal de ponderar estrictamente dichas circunstancias a la luz del interés superior de la niña o niño en relación con el interés público imperativo que su busca proteger\(402\).

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Table of Applicable Inter-American Jurisprudence

Human Rights Situation of Child Migrants in the United States

<table>
<thead>
<tr>
<th>Prohibition of family immigration detention</th>
<th>IA Court HR. Case of Dominican and Haitian Persons Expelled, para. 360.</th>
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<td>360. Además, a criterio de la Corte, los Estados no pueden recurrir a la privación de libertad de niñas y/o niños que se encuentren junto a sus progenitores, así como de aquellos que se encuentran no acompañados o separados de los progenitores, para cautelar los fines de un proceso migratorio, ni tampoco pueden fundamentar tal medida en el incumplimiento de los requisitos para ingresar o permanecer en un país, en el hecho de que la niña y/o niño se encuentre solo o separado de su familia, o en la finalidad de asegurar la unidad familiar, toda vez que pueden y deben disponer alternativas menos lesivas y, al mismo tiempo, proteger de forma prioritaria e integral los derechos de la niña o del niño.408</td>
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<td>The IACHR appreciates ICE’s decision to discontinue use of the T. Don Hutto facility for the detention of families. As the Inter-American Commission indicated in the press release571 it issued after its visit, conditions there had improved over the descriptions that predated the signing of the ACLU Settlement in August 2007.572 However, the IACHR is concerned that the practice of detaining immigrant families continues with no extraordinary reasons to justify it. Whatever the case, because of the terrible psychological impact that detention can have, the Inter-American Commission considers that when a family with children has to be detained, it ought to be transferred to the custody of the ORR, an office that is more experienced in addressing children’s needs. Furthermore, every effort must be made to ensure that the period of detention is as brief as possible.</td>
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<td>448. The Inter-American Commission is recommending that ICE codify its current practice of placing families apprehended at or near the border to normal immigration proceedings, pursuant to INA § 240. In the case of those few families that must be subjected to detention, the IACHR is recommending that the State transfer custody of the families to the ORR and implement a range of services comparable to those that currently exist for unaccompanied children. Finally, the Inter-American Commission is urging the State to transform the new guidelines for parole of asylum seekers into federal regulations.</td>
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<td>449. In an effort to respect the rights of the family and adhere to the &quot;best interests of the child&quot; principle, the IACHR further recommends that the federal government coordinate with state and local governments to ensure that detained immigrants are able to maintain custody of their U.S. citizen children while in detention (in light of other factors and unless there is an independent reason the parent is a risk to the child) and are permitted time and autonomy to make custody decisions with respect to U.S. citizen children if the parent is scheduled for removal from the United States.</td>
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<td>450. The Inter-American Commission recommends that the ORR ensure that the other contract shelters provide levels of care and a range of services similar to that observed at the Southwest Key Shelter in Phoenix, Arizona, and the International Educational Services, Inc. Shelter in Los Fresnos, Texas. The IACHR urges the State to provide sufficient funding and place more shelters in urban areas where the necessary qualified medical, mental health, social service, educational, and legal professionals can be identified and retained to provide consistent, quality care to the unaccompanied children. The Inter-American Commission recommends that the State codify the Flores standards into federal regulations, with a focus on the best interests of the child principle.</td>
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<td>451. The IACHR urges the State to earmark the necessary resources to fully implement the reforms introduced...</td>
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in 2008 under the TVPRA. In particular, the Inter-American Commission underscores the importance of screening unaccompanied children from Mexico and Canada for asylum seekers, victims of trafficking, and victims of other forms of persecution and criminal activity. To effectively identify possible victims, the IACHR urges the State to ensure that such screenings are conducted in a conducive environment, by trained personnel, with an age-appropriate screening template. This screening should not be conducted by agents in ICE’s Customs and Border Protection or any other uniformed police unit.

452. With respect to unaccompanied children’s due process rights, the Inter-American Commission urges the State to appoint an attorney, at the State’s expense, to represent unaccompanied children in immigration proceedings. The IACHR further urges the State to enact regulations that prohibit DHS or ICE officials from obtaining an unaccompanied child’s health records or records of other social service consultations.

453. With respect to unaccompanied minors repatriated to their home country, the Inter-American Commission recommends that the repatriation process be transferred to the exclusive jurisdiction of the ORR. The IACHR urges the State to continue to improve its repatriation protocols with other States Parties to ensure that unaccompanied minors are repatriated safely and into a safe home environment.
Briefing Paper to the Inter-American Commission on Human Rights

Application of the Inter-American Court of Human Rights’ Advisory Opinion OC-21/14 (“Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”) to the Human Rights Situation of Migrant and Refugee Children and Families from Central America and Mexico in the United States.

INTRODUCTION

On October 27, 2014, the Inter-American Commission on Human Rights ("the Commission," or "IACHR") will hold a thematic hearing on the Human Rights Situation of Migrant and Refugee Children and Families in the United States ("U.S.") as part of its 153rd Session. The University of Chicago Law School International Human Rights Law Clinic ("the Clinic"), a member of the group of Petitioners that will appear before the Commission, submits this memorandum to assist the Commission in its deliberations. Specifically, this memorandum applies the principles articulated by the Inter-American Court of Human Rights in its August 19, 2014 Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection” ("OC-21/14," or "Advisory Opinion"), to the situation of child migration to the U.S. from Central America and Mexico.1

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1 Advisory Opinions of the Inter-American Court serve as guidance for the Inter-American Commission for Human Rights, as well as all Member States of the Organization of American States Inter-American Court of Human Rights. Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August, 2014. Section III. Jurisdiction, page 13, para. 32 (“Given the broad scope of the Court’s advisory function, which, as previously indicated, encompasses not only the States Parties to the American Convention (supra para. 23), everything indicated in this Advisory Opinion also has legal relevance for all the OAS
As detailed in this briefing paper, OC-21/14 reinforces the Petitioners’ arguments that:

1. The United States should apply the “best interest of the child” standard to all proceedings regarding the custody, determination of need for protection, and decisions regarding the admission or deportation of Central American and Mexican children; and

2. The United States’ current practices deny child migrants from Central America and Mexico the broad non-refoulement protections that are reflected in OC-21/14, and the United States should adopt “best interests” procedural standards to facilitate child migrants accessing humanitarian protection under U.S. immigration law, in order to conform to this broader understanding of non-refoulement.

ARGUMENT

I. The “best interest of the child” standard should govern the United States government’s response to the recent influx of child migrants from Central America and Mexico.

The U.S. government should apply the “best interest of the child” standard in all aspects of its response to the recent influx of child migrants from Central America and Mexico for two reasons. First, the Inter-American Court of Human Rights (“Court”), drawing upon the Convention on the Rights of the Child and other authoritative sources, makes clear in its Advisory Opinion that the “best interest of the child” standard applies to all aspects of the child migration context, including asylum, due process, family unity, personal liberty, and the principle of non-refoulement. Second, the U.S. has a long tradition of applying the “best interest of the child” standard in other comparable contexts, such as family law, education law, and juvenile justice, and it is logical to extend this to the immigration context.

A. The Inter-American Court of Human Rights’ Advisory Opinion applies the “best interest of the child” standard to all aspects within the child migration context.

The Court has emphasized, in general, that the “best interest of the child” standard should be applied in the context of child migration. The Court’s Advisory Opinion also states that the

Member States that have adopted the American Declaration, irrespective of whether they have ratified the American Convention.”).
“best interest of the child” standard should be applied to the rights to asylum, due process, family unity, personal liberty, and the principle of non-refoulement.

1. The Advisory Opinion states that the “best interest of the child” standard should be used specifically in the context of migration.

The Court, drawing upon the principles found within Article 3 of the Convention on the Rights of the Child (“CRC”), has underscored the importance of applying the “best interest of the child” standard in the context of child migration. Although the CRC is a United Nations treaty, the Court and Commission may still look at it as a source of persuasive authority interpreting provisions of the American Convention on Human Rights and American Declaration of the Rights and Duties of Man. Furthermore, even though the U.S. is not a party to the CRC and thus is not bound by its provisions, the Court’s Advisory Opinion is relevant to the U.S.

Article 3 of the Convention on the Rights of the Child calls for the “best interest of the child” standard to be applied broadly, stating that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.” The Court’s Advisory Opinion identifies the “best interest of the child” standard, as stated by Article 3(1) of the Convention on the Rights of the Child, as one of the main guiding principles to be used in all actions concerning children. The Advisory Opinion then applies the “best interest of the child” standard to the specific context of child migration, explaining that any administrative or judicial decision concerning entry, stay or expulsion of a child, or the expulsion or deportation of the child’s

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3 See supra n. 1.

5 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section VI. General Obligations and Guiding Principles, page 26, para. 69 n. 92.
parents must give priority to the consideration of the best interest of the child concerned.\(^6\) 
Related to this, States must also respect the child’s right to be heard with regard to immigration and asylum proceedings.\(^7\)

2. The “best interest of the child” standard as applied in the context of the right to apply for asylum.

The Court’s Advisory Opinion recognizes that both Article 22(7) of the American Convention on Human Rights and Article XXVII of the American Declaration of the Rights and Duties of Man have enshrined the right of all persons to seek and receive asylum.\(^8\) This right includes specific obligations on the host State such as to allow children to request asylum or refugee status and to not return children to a country in which their life, freedom, security or personal integrity may be at risk (such as from organized crime, trafficking and new factors).\(^9\) It also calls for the State to grant international protection when children qualify for this right and to grant the benefit of this recognition to other family members.\(^10\)

In addition, this right to asylum requires that a child migrant receive an initial evaluation upon arrival at the entry place.\(^11\) The State needs to determine the child’s particular vulnerabilities, protection needs, identity and, if possible, the identity of his or her family, “in order to transmit this to the State agencies responsible for making the evaluation and providing the measures of protection, based on the principle of the child’s best interest.”\(^12\) Hence, the State should determine whether the child is unaccompanied or separated (as unaccompanied children are particularly vulnerable to child trafficking),\(^13\) determine the nationality of the child or if the child is stateless;\(^14\) and obtain information on the reason for the child’s departure and any element that may reveal or refute the need for international protection (such as fear of being recruited by organized crime structures).\(^15\) After this information has been gathered, the State

\(^6\) Id. at page 26-27, para. 70.
\(^7\) Id.
\(^8\) Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section VII. Procedures to Identify International Protection Needs of Migrant Children and, as Appropriate, to Adopt Measures of Special Protection, page 32, para. 78.
\(^9\) Id. at pages 32-33, paras. 80-81.
\(^10\) Id.
\(^11\) Id. at pages 33-34, paras. 82-83.
\(^12\) Id. at page 34, para. 84.
\(^13\) Id. at pages 36-38, paras. 89-93.
\(^14\) Id. at pages 38-39, paras. 94-96.
\(^15\) Id. at pages 39-40, paras. 97-102.
should adopt special measures of protection if necessary in view of the best interest of the child.\textsuperscript{16} This includes, but is not limited to: tracing family members for unaccompanied children, providing medical assistance, providing housing, and ensuring access to education.\textsuperscript{17}

U.S. government policies deprive Mexican and Central American children of a meaningful opportunity to present their claims for protection as refugees and violate their right to seek and receive asylum.\textsuperscript{18} One way that U.S. government policies are depriving children their right to seek and receive asylum is that there is no provision for separate consideration of asylum or Convention Against Torture claims by children who are detained with their parents.\textsuperscript{19} Moreover, unaccompanied children from El Salvador, Guatemala, and Honduras are placed in removal proceedings from the U.S., in which they can assert claims for protection under U.S. law regarding political asylum or the Convention Against Torture.\textsuperscript{20} However, there is no guaranteed right to government-appointed counsel for these hearings, resulting in missed opportunities for claiming a right to asylum.\textsuperscript{21}

Unaccompanied children from Mexico who are arrested by U.S. immigration authorities are merely given a screening interview without the benefit of counsel.\textsuperscript{22} The majority of these children are immediately returned to Mexico without seeing an asylum officer and without a hearing.\textsuperscript{23} In response, petitioners ask that there be proper screening measures implemented for all migrant children so that they can seek asylum and protection in the U.S.\textsuperscript{24} As the Commission stated after its site visit to the southern border of the U.S., the U.S. should, “establish appropriate

\textsuperscript{16} Id. at pages 41-107, paras. 103-107.
\textsuperscript{17} Id.
\textsuperscript{19} Id. at page 3.
\textsuperscript{20} Id. at page 6.
\textsuperscript{21} Id.; see also Press Release: IACHR Wraps Up Visit to the United States of America, para. 8 (October 2, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp (“Another major concern is that of access to legal representation and information on U.S. immigration proceedings. The Commission notes that there is a shortage of lawyers who are willing and able to provide legal representation at low or no cost to the families detained.”).
\textsuperscript{24} See Id.
measures to identify persons who may be refugees or who, due to their vulnerable condition, may have special protection needs, such as families and migrant children.”

3. The “best interest of the child” standard as applied in the context of the right to due process.

The Court’s Advisory Opinion states that there are due process guarantees, interpreted in conjunction with Articles 19 of the American Convention on Human Rights and VII of the American Declaration of the Rights and Duties of Man, which are applicable to migration proceedings. These include access to counsel, the right to be heard and participate in proceedings, and decisions that assess the child’s best interests and that are duly reasoned.

i. Access to counsel

The right to counsel is fundamental to the protection of all other due process hearing rights. The Court’s Advisory Opinion says States must ensure that any child involved in immigration proceedings has the right of legal counsel by the offer of free State legal representation services. Moreover, this type of legal assistance must be specialized regarding the rights of the migrant and specifically his or her age, in order to ensure “that the child’s best interest prevails in every decision that concerns the child.” Despite this requirement, the U.S. does not guarantee the right to government-appointed counsel in migration proceedings. As a result, migrant children from El Salvador, Guatemala, and Honduras are not guaranteed government-appointed counsel for migration proceedings. Also, unaccompanied children from Mexico are given a screening interview without benefit of counsel. Without legal representation, these children have a limited right to due process, resulting in the risk of a violation to a right to life, security of the person, and the rights of children.

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26 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section VIII. Guarantees of Due Process Applicable in Immigration Proceedings Involving Children, page 44, para. 110.
27 Id. at pages 49-50, paras. 129-131.
28 Id. at page 50, para. 130.
29 Id. at page 50, para. 131.
30 The University of Chicago, Request for Precautionary Measures, supra note 17, at page 6.
31 Id.
33 See Inter-American Court of Human Rights, Family Pacheco Tineo v. Plurinational State of Bolivia, Judgment,
ii. The child’s right to be heard and to participate in the different stages of the proceedings  

Children must have the right to be heard during migration proceedings. This right is interpreted in light of Article 12 of the Convention on the Rights of the Child, which ensures that the child’s participation does not result in unfairness to the child’s real interests. Children must be heard so that the decision accords to the child’s best interests and the child’s voice cannot be replaced by the opinions of the parents. As previously stated, Central American children who have arrived to the U.S. and are in custody with their mothers in so-called “Family Detention Centers” do not have access to any proceedings in which they can assert asylum claims that may be distinct from those of their mothers. More so, Mexican children who arrive unaccompanied at the U.S. border are subjected to summary questioning and expulsion and are deprived of any real possibility of asserting claims of asylum or other forms of humanitarian protection.

iii. The decision adopted must assess the child’s best interest and be duly reasoned

The Court’s Advisory Opinion declares that, “the decision must explain in detail the way in which the opinions expressed by the child were taken into account and also the way in which her or his best interest was assessed.” The decision must also show that the arguments of the parties have been taken into account. However, the Commission, during its on-site visit, observed a lack of legal representation, resulting in a failure to take the child’s best interest into account. This prompted the commission to urge the United States “to ensure that when families or unaccompanied children undergo removal proceedings, they will be represented by an

34 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section VIII. Guarantees of Due Process Applicable in Immigration Proceedings Involving Children, pages 47-48, paras. 122-123.
35 Id. at page 47-48, para. 122.
36 Id.
37 Id.
38 The University of Chicago, Request for Precautionary Measures, supra note 17, at page 3.
39 Id. at page 4.
40 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, Section VIII. Guarantees of Due Process Applicable in Immigration Proceedings Involving Children, pages 51-52, paras. 137-139.
41 Id. at page 52, para. 139.
42 Id. at page 51-52, para. 138.
attorney . . . to determine the best interest of the child.”  

43 This should be applied to U.S. migration proceedings.

4. The “best interest of the child” standard as applied in the context of the right to family unity.

Article 17 of the American Convention on Human Rights, as well as Article VI of the American Declaration of the Rights and Duties of Man, affirm the family’s right to protection and also state the mutual enjoyment of the cohabitation of parents and children is a fundamental element of family life.  

44 Thus, there is a right to family reunification and a right of children to not be separated from parents.

i. Right to family reunification

The Court’s Advisory Opinion requires that States adopt the necessary measures to determine the identity of the family of the migrant child and promote family reunification, taking into account the child’s views and best interest.  

45 Some children seeking refuge in the U.S. are attempting to reunite with family members in the U.S.  

46 Unfortunately, custody arrangements to reunite families in accordance with the best interest of the child have not yet been implemented in the U.S.  

ii. Right of children not to be separated from their parents

The Court’s Advisory Opinion explains two instances where the right of the child not to be separated from his or her parents needs to be protected. First, when the government places children in living quarters and if children are with families, then Article 17 of the American Convention on Human Rights and Article VI of the American Declaration of the Rights and Duties of Man require that the child remain with the family if possible, unless it is against the


44 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, Section XV. Right to Family Life of Children in the Context of Procedures for the Expulsion or Deportation of their Parents for Migratory Reasons, page 103, para. 264.

45 Id. at Section X. Characteristics of the Priority Measures for the Comprehensive Protection of the Rights of Child Migrants and Guarantees for their Application, pages 63-64, para. 167.

46 See American Civil Liberties Union, Thematic Hearing Request, supra note 22, at page 5.

47 Id.
best interest the child.\textsuperscript{48} Second, when determining the expulsion of one or both parents, there needs to be a balancing test that the State must follow.\textsuperscript{49} The State must balance: the immigration history, the scope of the harm caused by the rupture of the family from the expulsion, the scope of the disruption of the daily life of the child, and how this expulsion would affect the best interest of the child.\textsuperscript{50} This right and standard of “best interest of the child” should be applied in the U.S.

5. The “best interest of the child” standard as applied in the context of the right to personal liberty.

Personal liberty is recognized in Articles 7 of the American Convention on Human Rights and XXV of the American Declaration of the Rights and Duties of Man and detention is considered to be a deprivation of personal liberty.\textsuperscript{51} The Court identifies that there may be legitimate purposes for the deprivation of personal liberty.\textsuperscript{52} However, the Court underscores, the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity and can never be understood as a measure that responds to the child’s best interest.\textsuperscript{53} In the U.S., though, unaccompanied children are often placed in detention upon apprehension by U.S. authorities for administrative immigration infractions (which are civil by nature).\textsuperscript{54} As petitioners have underscored, the U.S. needs to consider the best interest of the children when deciding to detain children and detention should only be used for a brief period of time and as a last resort.\textsuperscript{55}

\textsuperscript{48} Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section X. Characteristics of the Priority Measures for the Comprehensive Protection of the Rights of Child Migrants and Guarantees for their Application, page 68, para. 177.
\textsuperscript{49} Id. at Section XV. Right to Family Life of Children in the Context of Procedures for the Expulsion or Deportation of their Parents for Migratory Reasons, page 108, paras. 278-79.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at Section IX. Principle of Non-deprivation of Liberty of Children Owing to their Irregular Migratory Situation, page 55, para. 145.
\textsuperscript{52} Id. at pages 58-59, para. 154.
\textsuperscript{53} Id.
\textsuperscript{54} See American Civil Liberties Union, Thematic Hearing Request, supra note 22, at pages 2-3.
\textsuperscript{55} Id.; see also Press Release: IACHR Wraps Up Visit to the United States of America (October 2, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp (“Taking into consideration the government’s decision to impose generalized and automatic family detention, the Commission reiterates that the detention of migrants in an irregular situation, asylum seekers, and other persons in need of international protection is an intrinsically undesirable measure. Hence, it must be used only as an exceptional measure, and then only as a last resort and for the shortest period of time possible.”).
6. **The “best interest of the child” standard and the required characteristics of places to accommodate child migrants.**

The Court’s Advisory opinion states that based on the best interest of the child as well as Articles 19 of the American Convention on Human Rights and VII of the American Declaration of the Rights and Duties of Man, a child should receive special protection, care, and aid within non-detention centers. This means that States must promote “the right to health, to adequate nutrition, to education, as well as to play and the recreational activities appropriate to the child’s age.”

However, children held in detention centers are often under restricted conditions of refinement and the children have described such facilities as “hieleras” or “refrigerators” where many have been subjected to physical abuse. The Karnes County Residential Center (Karnes), located in Karnes City, Texas is one example of an immigration detention center with many issues. Even though Karnes is designated as “residential facility,” the residents are locked in and attorneys and visitors are locked out unless they follow very specific rules for entry. There is also no right to come and go for the women and children detained there and only very limited mental health and medical services are available. In addition, guards sometimes threaten the separation of a mother and her child if the child is sanctioned for “bad” behavior.

7. **The “best interest of the child” standard as applied in the context of the right to protection provided by the principle of non-refoulement.**

The Court’s Advisory Opinion states that Article 5 of the Convention reveals the requirement of the State, “not to deport, return, expel, extradite, or remove in any other way to another State a person who is subject to its jurisdiction when there are grounds for believing that they would be in danger of being subjected to torture, or cruel, inhuman or degrading

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57 Id. at page 63, para. 164.
60 Id.
61 Id.
treatment.” Moreover, the Court’s Advisory Opinion then says that return to the country of origin shall only be arranged if such return is in the best interest of the child and not “if it would lead to a reasonable risk that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of non-refoulement applies.” Petitioners ask the U.S. to stop its current efforts to curtail the screening process of child migrants and ensure that safeguards are in place so that children are able to seek protection and are not returned to places where they face persecution. Petitioners request that unaccompanied and separated children be properly interviewed and screened, with particular attention given to the special protection needs of children deprived of their family environment and of children who are refugees or are seeking asylum.

B. The United States has a long tradition of applying the “best interest of the child” standard in comparable circumstances and so should apply this same standard to actions concerning a child’s immigration status.

The “best interest of the child” standard has been a guiding principal in U.S. law for more than 125 years. In fact, Article 3 of the Convention on the Rights of the Child borrows the language for “best interest of the child” directly from U.S. law. This “best interest of the child” language appears in thousands of state and federal court opinions in the U.S. covering a multitude of issues concerned with children, and all fifty states in the U.S. have statutes that incorporate this phrase. The areas covered in these statutes include: adoption, dependency proceedings, foster care, termination of parental rights, aid to families with dependent children, divorce, custody, juvenile delinquency, education, labor, evidence, and surrogate parenthood. This “best interest of the child” standard requires decision makers to afford special protection for

62 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section XIII. Principle of Non-refoulement, page 89, para. 226.
63 Id. at pages 91-92, para. 231.
64 See American Civil Liberties Union, Thematic Hearing Request, supra note 22, at page 5; see also Press Release: IACHR Wraps Up Visit to the United States of America (October 2, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp (“In order to respond appropriately to the increasing number of people fleeing their home countries as a result of various forms of violence or in search of better living conditions, the Commission calls upon the United States of America to establish appropriate measures to identify persons who may be refugees or who, due to their vulnerable condition, may have special protection needs, such as families and migrant children.”).
65 See American Civil Liberties Union, Thematic Hearing Request, supra note 22, at page 5.
68 Id.
children when they are particularly vulnerable. Likewise, in the migration context, the children are especially vulnerable. Thus, according to the history and tradition of the U.S. applying “the best interest of the child” standard in many areas of law involving the status of children, this standard should also be applied in immigration status matters.

II. The U.S. should apply the Court’s “children in need of international protection” non-refoulement standard when considering the best interest of child migrants from Central America and Mexico, as this standard would facilitate children’s access to humanitarian relief under U.S. immigration law.

The Inter-American Court of Human Rights’ formulation of “children in need of international protection” in the context of non-refoulement is broader than the traditional notion of refugee and it suggests the U.S. government provide positive measures of protection for children in the U.S. from Central America and Mexico. U.S. immigration law provides many options that would fulfill the U.S.’s obligation of providing positive measures to protect child migrants’ best interest, but due to lack of procedural safeguards, child migrants do not have de facto access to those options. The U.S. should provide child migrants access to counsel and due process to conform to the principle of non-refoulement under the “children in need of international protection” standard.

A. The Court’s formulation of “children in need of international protection” in the context of non-refoulement suggests that the U.S. government should provide positive measures of protection for children in the U.S. from Central America and Mexico.

The Court clearly states that the forms of protection that “children in need of international protection” receive should not be limited to the protections typically afforded to refugees and asylum seekers, because “children in need of international protection” is a broader concept than the traditional definition of refugees. In addition, The Court finds that in the case of non-

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69 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section IV. General Considerations, page 15, para. 37 (“While international protection of the host State is tied initially to the refugee status of the individual, various sources of international law – and in particular refugee law, international human rights law and international humanitarian law – reveal that this notion also encompasses other types of normative frameworks for protection. Thus, the expression international protection comprises: (a) the protection received by asylum seekers and refugees on the basis of the international conventions or domestic law; (b) the protection received by asylum seekers and refugees on the basis of the broadened definition of the Cartagena Declaration; (c) the protection received by any foreign person based on international human rights obligations, and in particular the principle of non-refoulement, as well as complementary protection or other forms of humanitarian protection, and (d) the protection received by stateless persons in accordance with the relevant international instruments.”).
refoulement, it is not sufficient that States merely abstain from violating this principle, but it is imperative that they adopt positive measures for protection of children.\footnote{Id. at Section XIII. Principle of Non-Refoulement, page 93, para. 235.}

1. **“Children in need of international protection” is a broader concept than the traditional notion of refugees in the international system.**

Under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, the criteria for making a determination of refugee status are: (a) to be outside the country of origin, namely the country of nationality or, in case of stateless persons, the country of habitual residence; (b) to have a well-founded fear; (c) of persecution or threat of persecution; (d) based on race, religion, nationality, membership of a particular social group, or political opinion; and (e) to be unable or, owing to such fear, to be unwilling to avail oneself of the internal protection of the country of origin.\footnote{Id. at Section VII. Procedures to Identify International Protection Needs of Migrant Children and, as Appropriate, to Adopt Measures of Special Protection, page 30, para. 75.} The protection provided by non-refoulement only applies to refugees, to asylum seekers whose status has not been determined yet, or to refugees who have not been recognized officially.\footnote{Id. at Section XIII. Principle of Non-Refoulement, page 82, para. 210.}

Non-refoulement in the Inter-American system, however, provides protection to aliens who do not fall into the traditional definition of refugees. First, the Cartagena Declaration on Refugees, which is not an agreement between States, but has been supported by the Organization of American States since 1985, expanded the definition of refugees.\footnote{Id. at Section VII. Procedures to Identify International Protection Needs of Migrant Children and, as Appropriate, to Adopt Measures of Special Protection, page 30, para. 76.} It added to the definition of refugees, “persons who have fled their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”\footnote{Id. at page 32, para. 77.} The Court considers that the obligations under the right to seek and receive asylum are operative with respect to those persons who meet the expanded definition of the Cartagena Declaration.\footnote{Id. at para. 79.}

Second, in the context of the principle of non-refoulement, the Court has interpreted the principle codified in Article 22(8) of the American Convention on Human Rights to provide protection to “any alien and not only a specific category among aliens, such as those who are
asylum seekers and refugees.”\textsuperscript{76} It offers complementary protection to aliens, including children, who are not refugees or asylum seekers in cases in which their right to life or freedom is threatened.\textsuperscript{77} Combined with the principle of “best interest for the child,” any decision the U.S. makes about child migrants’ return to their countries of origin or a safe third country may only be determined based on their best interest.\textsuperscript{78} That is to say, regardless of whether a child migrant falls into the traditional notion of a “refugee,” the expanded definition of a “refugee” in the Cartagena Declaration, or outside the category of refugees, he or she is entitled to the international protection of non-refoulement when their right to life or freedom is threatened.

2. Non-refoulement requires positive measures of protection from the U.S.

The principle of non-refoulement not only requires States to protect negative rights to “children in need of international protection,” but also imposes affirmative obligations on the States. In the case of child migrants, protecting negative rights means that child migrants cannot be rejected at the border without an adequate and individualized initial evaluation or returned to a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the State where they suffer this risk.\textsuperscript{79} In particular, child migrants can claim protection against removal based on the Convention Against Torture (CAT) with an immigration judge in a hearing if they can prove that their life or freedom would be threatened in a country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{80}

Affirmative obligations, as the Court noted in the Advisory Opinion, means that “an approach aimed at comprehensive protection and guarantee of their rights must prevail.”\textsuperscript{81} More specifically, for children who are seeking refugee status or who are considered refugees in accordance with applicable international or domestic law, States should take appropriate measures to ensure that they receive the appropriate protection and assistance to safeguard their

\textsuperscript{76} Id. at Section XIII. Principle of Non-Refoulement, page 85, para. 215.
\textsuperscript{77} Id. at page 84, para. 213.
\textsuperscript{78} Id. at pages 94-95, para. 242.
\textsuperscript{79} Id. at Section VII. Procedures to Identify International Protection Needs of Migrant Children and, as Appropriate, to Adopt Measures of Special Protection, page 33, para. 81.
\textsuperscript{80} 8 U.S.C. § 1231(b)(3).
\textsuperscript{81} Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section IV. General Considerations, page 16, para. 41.
rights. For children who do not meet the requirement of refugee status, they must be ensured “to the fullest extent, the enjoyment of all human rights granted to children in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory.”

However, although child migrants have a variety of forms of humanitarian relief (detailed below) available to them under U.S. immigration law in theory, they do not have de facto access to these forms of humanitarian relief because they do not receive adequate procedural safeguards, such as the access to counsel and due process.

B. U.S. immigration law provides many substantive options that would fulfill the U.S.’s obligation of providing positive measures to protect child migrants’ best interest and the U.S. should guarantee child migrants procedural safeguards, such as access to counsel and due process, so that they can have access to those options.

Child migrants may qualify for one or more forms of domestic humanitarian relief based on the condition from which they leave Central American and Mexico. While the U.S. provides many substantive options for child migrants, it does not provide adequate procedural safeguards for them to access these substantive rights. In order to ensure that they receive international protection in accordance with their best interest, it is pivotal that the U.S. guarantees their access to counsel and right to due process so that they have the opportunity to make their case under the assistance of free legal counsel who can navigate them through hearings and applications for different forms of humanitarian relief.

1. Because of the humanitarian conditions of their countries of origin from which they escape, child migrants can apply for refugee and asylum, “T” visa, “U” visa, or SIJ status.

U.S. immigration offers a variety of forms of humanitarian relief for non-citizens. The options for the protection of child migrants include, but are not limited to, refugee and asylum application, residence visas for victims of trafficking (“T” visa), residence visas for victims of certain crimes (“U” visa), or residence visas for abandoned children (Special Immigrant Juveniles (SIJ) status.

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82 Id. at Section XIII. Principle of Non-Refoulement, page 94, para. 241.
83 Id.
i. **Refugee and asylum**

Child migrants can apply for asylum\(^{84}\) and will be granted asylum if they qualify as refugees.\(^ {85}\) Although the Attorney General can determine that the alien may be removed to a third country in which the alien’s life or freedom would not be threatened and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection,\(^ {86}\) it does not apply to unaccompanied alien child.\(^ {87}\) Moreover, while the alien has to demonstrate by clear and convincing evidence that the application was filed within one year upon their arrival in the U.S.,\(^ {88}\) this time limit does not apply to unaccompanied alien children.\(^ {89}\) If child migrants are granted asylum, they can apply for permanent residency within one year.\(^ {90}\)

The dangers faced by children in the region render many of them eligible for protection as refugees because they have faced persecution or have well-founded fear of persecution due to

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\(^{84}\) 8 U.S.C. § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum...”).

\(^{85}\) 8 U.S.C. § 1101(a)(42)(A) (a refugee is “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”). 8 U.S.C. § 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.”).

\(^{86}\) 8 U.S.C. § 1158(a)(2)(A) (“Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.”).

\(^{87}\) 8 U.S.C. § 1158(a)(2)(E) (“Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).”).

\(^{88}\) 8 U.S.C. § 1158(a)(2)(B) (“Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.”).

\(^{89}\) 8 U.S.C. § 1158(a)(2)(E) (“Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).”).

their belonging to a particular social group.\textsuperscript{91} That is, there is no way that they can escape the threat of persecution from gang recruitment, threats of trafficking, or sexual assault.\textsuperscript{92}

ii. \textit{T visas}

Child migrants can apply for residence visas for victims of trafficking ("T visa") if they are or have been victims of a severe form of trafficking in person\textsuperscript{93} and would suffer extreme hardship involving unusual and severe harm upon removal.\textsuperscript{94} They would be required to comply with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or in any crime in which trafficking is a central reason for the commission of the crime.\textsuperscript{95} This obligation, however, does not apply to people under 18 years old.\textsuperscript{96} In addition, unmarried siblings, spouses, and children who are 18 years of age, and parents of the applicants can also apply for derivative T visas if they are under 21 years of age.\textsuperscript{97} The T visa has a four-year duration of status (extensions available), and then non-citizens with T visas may adjust their status to lawful permanent residents.\textsuperscript{98} The U.S. government issues 5,000 T visas each year for victims, with no limit on family members.\textsuperscript{99} Non-citizens with T visas are eligible to work in the U.S. and may receive federal refugee benefits.\textsuperscript{100}

Those child migrants who are victims of human trafficking and would suffer extreme hardship if they are returned to Central America or Mexico\textsuperscript{101} should be entitled to T visas. Because most of them are under 18 years of age, they are not obliged to assist in the investigation or prosecution of trafficking in order to qualify for this residence visa. Their family members, if meeting the age requirements stated above, can also receive derivative visas if the

\textsuperscript{92} Id.
\textsuperscript{93} 8 U.S.C. \textsection 1101(a)(15)(T)(i)(I).
\textsuperscript{94} 8 U.S.C. \textsection 1101(a)(15)(T)(i)(IV).
\textsuperscript{95} 8 U.S.C. \textsection 1101(a)(15)(T)(i)(III)(aa) (requiring that the alien “has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime”).
\textsuperscript{97} 8 U.S.C. \textsection 1101(a)(15)(T)(ii)(I).
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} See \textit{Children on the Run}, supra note 90.
child T visa recipient is under 21 years of age. Child migrants and eligible family members are entitled to any right or benefit accompanying the T visa listed above once they receive this visa.

iii. **U visas**

Child migrants can apply for U visa if they have suffered substantial physical or mental abuse as a result of having been victims of certain criminal activities, such as domestic violence or rape. The alien should (or in the case of a non-citizen child under the age of 16, the parent, guardian, or next friend of the non-citizen child) have been helpful, or is being helpful, or is likely to be helpful to a law enforcement official, judge, or authorities investigating or prosecuting such criminal activity.

In addition, unmarried siblings, spouses, and children who are 18 years of age and parents of the applicants can also apply for derivative U visas if the aliens are under 21 years of age. The U visa, very much like the T visa, has a four-year duration of status (extensions available) and non-citizens with U visas may adjust their status to lawful permanent residents. The U.S. government issues 10,000 U visas each year for victims, with no limit on family members. Non-citizens with U visas are eligible to work in the U.S.

Many child migrants are victims of sexual exploitation, domestic violence and gang violence, and thus should be entitled to U visas. Their family members, if meeting the age requirements stated above, can also receive derivative visas if child migrants have not reached 21

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103 8 U.S.C. § 1101(a)(15)(U)(iii) (the criminal activities include “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes” that violate federal, state, or local criminal law).
104 8 U.S.C. § 1101(a)(15)(U)(i)(III) (requiring that “the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii)”).
107 Id.
108 Id.
109 See Children on the Run, supra note 90.
years of age. Child migrants and eligible family members are entitled to employment opportunities once they receive this visa.

iv. **SIJ status**

Child migrants can obtain Special Immigrant Juveniles (SIJ) Status if they are under 21 years old, unmarried,\(^{110}\) and their reunification with one or both of their parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.\(^{111}\) They can apply for permanent residency as a Special Immigrant Juvenile (SIJ) and live and work permanently in the U.S.\(^{112}\)

As many child migrants from Central America and Mexico are abused, neglected, or abandoned by their parents,\(^{113}\) they may be eligible for U.S. permanent residency as SIJ and they have the right to live and work in the U.S.

2. **Access to counsel and due process are essential precursors to child migrants accessing domestic forms of relief under U.S. immigration law.**

As detailed above, due to the conditions in Central America and Mexico from which child migrants escaped, they may be eligible for different forms of humanitarian relief available to them in the U.S. While they have those substantive rights available to them, however, they do not receive adequate procedural protection for them to access those substantive options. They do not receive individualized and adequate evaluation, as suggested by the Court in accordance with the principle of non-refoulement, and they are not given free legal representatives who can facilitate them in making their individual humanitarian cases and applying for the aforementioned humanitarian relief. Therefore, although child migrants have a list of *de jure* options, they do not have *de facto* access to these options.

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\(^{111}\) 8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (the definition of children entitled to SIJS is “(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence”).

\(^{112}\) *Special Immigrant Juveniles (SIJ) Status, supra* note 109.

\(^{113}\) *See Children on the Run, supra* note 90.
i. **Access to counsel**

The U.S. should give the right to access to counsel to child migrants from Central America and Mexico so that they can receive the many forms of humanitarian relief already established in the U.S. The U.S. must ensure that any child involved in immigration proceedings has the offer of free State legal representation services. Moreover, this type of legal assistance must be specialized regarding the rights of the migrant and specifically his or her age, in order to ensure “that the child’s best interest prevails in every decision that concerns the child.”

However, the U.S. has failed to provide lawyers for all children facing removal and this greatly interferes with the child’s right to receive a fair hearing. The U.S. should grant all children free legal representation services to facilitate the children in applying for the possible forms of humanitarian status, conforming to this broader understanding of non-refoulement.

ii. **Due process**

The Court has affirmed the obligation that States enable the child to take part in each and every stage of the proceedings. To this end, children must have the right to be heard during migration proceedings. Allowing the children to be heard at every stage accords with their best interest and would help facilitate their application for all of the aforementioned forms of humanitarian relief, conforming to the broader understanding of non-refoulement. Currently, unaccompanied children of Mexican nationality, and accompanied children from all other countries, can be repatriated without a hearing. The U.S. needs to allow all children to receive a full review of their case and allow the children to be heard at every stage.

**CONCLUSION**

As the Court has explained in its recent advisory opinion, the “best interests of the child” standard is the appropriate standard for making determinations regarding child migrants. For

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114 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section VIII. Guarantees of Due Process Applicable in Immigration Proceedings Involving Children, page 50, para. 130.
115 Id. at para. 131.
116 See American Civil Liberties Union, Thematic Hearing Request, supra note 22, at page 4.
117 Inter-American Court of Human Rights, Advisory Opinion OC-21/14, supra note 1, at Section VIII. Guarantees of Due Process Applicable in Immigration Proceedings Involving Children, page 47, para. 122.
118 Id.
119 Id.
120 See American Civil Liberties Union, Thematic Hearing Request, supra note 22, at page 4.
decades and in multiple circumstances, the U.S. has been applying this standard and should be doing so in its response to the recent influx of child migrants from Central America and Mexico. Furthermore, when considering the best interest of child migrants from Central America and Mexico, the U.S. should determine whether such children are “children in need of international protection” and so are eligible for various forms of humanitarian relief as consistent with the broader understanding of non-refoulement articulated by the Court. The U.S. should guarantee child migrants access to counsel and the right to due process so that these forms of humanitarian relief are de facto available to them.
WRITTEN STATEMENT SUBMITTED TO THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Regarding
Access to Justice for Children and Families Seeking Asylum

October 27, 2014

Submitted by:
American Civil Liberties Union

I. Introduction

The American Civil Liberties Union (ACLU) welcomes the Inter-American Commission on Human Rights’ timely hearing on the situation faced by migrant families and children arriving in the United States of America. This hearing, along with this Honorable Commission’s recent visit to the southern U.S. border, is a critical and valued response to the human rights crisis unfolding for migrants arriving at the U.S. southern border.

Migrant families seeking protection in the United States face significant impediments to the realization and recognition of their rights under domestic and international law. In order for children and their families to claim asylum in the United States, they must first be recognized as asylum seekers, given the chance to present their claims, and defend against deportation. If their asylum claims are not recognized, these children and their families can and have been deported back to the danger they fled, despite U.S non-refoulement obligations. This submission focuses on access to justice for children and their families seeking protection and attempting to assert the right to be in the United States.

Both international human rights law and the domestic constitutional and statutory law of the United States guarantee certain basic legal protections to individuals attempting to claim asylum and to defend against removal. International human rights law includes particular protections for migrant children but also specifically recognizes the right of all immigrants to defend against deportation, to be represented in that proceeding, and to have their expulsion reviewed by a competent authority. In addition, human rights law guarantees that all persons appearing before a judicial proceeding receive “a fair and public hearing by a competent, independent, and impartial tribunal.”
has historically recognized the importance of fair deportation hearings. In 1903 the Supreme Court recognized that the Due Process Clause of the Fifth Amendment to the U.S. Constitution applied in cases where the government seeks to deport those who have already entered the United States. And the Supreme Court has repeatedly recognized that deportation often carries grave consequences, and therefore implicates the rights to life, liberty, and property, “or of all that makes life worth living.”

Nonetheless, the safeguards applicable when the government seeks to deport asylum seekers (adults and children) remain woefully inadequate and, if anything, have grown weaker in the last two decades even as the number of deportations has dramatically increased. Most individuals, including asylum seekers are turned away at the U.S. border with a deportation order but never receive a hearing before an immigration judge. Even those who do receive a hearing in immigration court typically have no attorney to represent them at that hearing. Our written statement today centers on two areas where basic human rights obligations have been ignored at tremendous cost to children and families seeking protection in the United States: (1) access to courts and (2) legal representation.

II. Access to courts

The overwhelming majority of people expelled from the United States each year will never see an immigration judge and never have a hearing where they can present a defense or pursue claims to remain in the United States. According to the most recent statistics released by the U.S. government, 83 percent of deportations in Fiscal Year 2013 were conducted by an immigration enforcement officer, not by an immigration judge. Those so deported include families with young children and asylum seekers who were never afforded an opportunity to present their claims.

As a result of changes to U.S. immigration law over the past two decades, hundreds of thousands of people are now expelled from the United States after proceedings in which officers of the Department of Homeland Security (DHS) – who are not necessarily even lawyers, let alone judges - conduct all of the functions normally associated with a judicial process. For these immigrants, DHS officers arrest, detain, charge, prosecute, judge, and deport. The penalties associated with their removal orders include not only expulsion, but also bans on reentering the United States, which in some cases last for the entire lifetime of the individual in question. This regime plainly violates the requirement under international law of an impartial and independent hearing, and presents significant dangers for asylum seekers who may, predictably but erroneously, be deported by a border official without the chance to present her claim.

Recognizing the danger that asylum seekers may be deported when they arrive at an international border seeking assistance, the Office of the High Commissioner for Human Rights (OHCHR) recently reiterated States’ obligations to ensure that migrants are given “access to information on the right to claim asylum and to access fair and efficient asylum procedures.” Moreover, it is a well-established international norm that only
“competent authorities” should be empowered to issue removal orders “following consideration of individual circumstances with adequate justification in accordance with the law and international human rights standards, inter alia the prohibition of arbitrary or collective expulsions and the principle of non-refoulement.”

Although the United States does have some procedures and policies in place to identify asylum seekers arriving at its borders so they can be referred to protection services, in practice, many individuals are quickly deported at U.S. borders by immigration enforcement officers without being provided the opportunity to request asylum or to present their claims. While some immigrant children are guaranteed a hearing under U.S. law, adults and other children who arrive without prior authorization or valid travel documents (including Mexican unaccompanied children and any child arriving with his or her family) are not and may be quickly repatriated. Asylum seekers apprehended by DHS officers are supposed to be referred to an asylum officer with expertise in asylum law who will determine whether their claims are sufficiently meritorious to warrant a full immigration hearing. However, in practice, many bona fide asylum seekers are not referred to an asylum officer and are instead quickly returned to danger in violation of U.S. non-refoulement obligations.

A. Families Arriving in the United States Seeking Asylum

Article 14 of the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” Similarly, the American Convention on Human Rights explicitly provides for the right of an individual “to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.” Thus, while not everyone may be eligible for asylum, all persons seeking such protection have the right to request it and, if eligible, to receive its benefits. Supporting this right to claim asylum, the OHCHR specifically called upon States to ensure that asylum seekers can access this protection by (1) adequately training border officials who apprehend and screen arriving migrants; (2) providing migrants with information in their own language about their right to seek asylum; and (3) investigating and disciplining officers who “obstruct access to protection and assistance services by failing to refer migrants to appropriate protection and assistance services.”

U.S. law also recognizes that asylum seekers arriving at a U.S. border should be provided with the chance to speak with an asylum officer and to make their claims. Individuals who arrive in the United States without valid travel documents can otherwise be ordered deported through the process of “expedited removal” by a border official without seeing a judge and with very little review. This includes both adults and children arriving with their parents who are not identified by border officials as asylum seekers. For example, one mother interviewed this Spring by the ACLU was issued with a deportation order, as were her two-year old and twelve-year old children when they arrived in the United
States seeking asylum; a border patrol officer, instead of referring them to an asylum officer, issued the three with deportation orders.\textsuperscript{16}

In order for individuals fleeing danger to claim protection in the United States, they must be identified as asylum seekers by immigration enforcement officers. However, in many instances, border officers do not ask questions necessary (and required\textsuperscript{17}) to identify an asylum seeker before ordering her deported. The ACLU recently completed a year-long investigation into expulsions that take place without a hearing, for which we interviewed and documented the cases of over 135 individuals deported by immigration enforcement officers. The ACLU found that DHS officials routinely fail to screen for asylum claims before issuing deportation orders; as a result, bona fide asylum seekers have been deported in violation of U.S. \textit{non-refoulement} obligations under the Convention against Torture and the Refugee Convention, the 1967 Protocol to which the United States is a party.\textsuperscript{18}

In the course of this investigation, the ACLU interviewed 89 individuals (including 11 unaccompanied Mexican children) who were deported or returned at the U.S. border without a hearing; 55 percent said they were not asked whether they had a fear of returning to their country of origin. Only 28 percent said they were asked about their fear of returning to their country of origin by a border officer or agent; and yet, 40 percent of those asked about fear said they told the agent they were afraid of returning to their country but were nevertheless \textit{not} referred to an asylum officer before being summarily deported. The overwhelming majority of these individuals were repatriated to Mexico, Honduras, El Salvador, or Guatemala. Many were women, fleeing gang and domestic violence, who may have had strong asylum claims in court, as suggested by a recent Board of Immigration Appeals decision, recognizing domestic violence as a basis for asylum.\textsuperscript{19}

For several asylum seekers interviewed by the ACLU and deported without a hearing, the danger of future harm (which \textit{non-refoulement} obligations are supposed to prevent) was not speculative. Some of these individuals were physically attacked, kidnapped, sexually assaulted, and in one case murdered when returned, without a hearing, to the very dangers they had fled. Others faced extortion and threats to their own and their families’ safety. These individuals, however, had been turned away by U.S. border officials without even the opportunity to explain their fears, sometimes with a deportation order they did not understand or had been coerced into signing.

These findings are not unexpected or unprecedented. In 2005, the United States Commission on International Religious Freedom (USCIRF) published a study on asylum seekers and border removals for which researchers observed the interviews between border officials and arriving migrants.\textsuperscript{20} The study found that in more than 50 percent of the interviews observed, border officials did not inform migrants of their right to seek protection if they feared being returned to their country. Two years later, USCIRF reported that its serious concerns about these practices had not been addressed and that these processes that bypass the courtroom were, instead, expanded.\textsuperscript{21}
International law recognizes the importance of providing a remedy when individuals are unjustly given a removal order that, if effectuated, would return them to places where they face persecution or torture. However, under the current U.S. system, a person wrongfully deported without the chance to seek asylum has very limited remedies and practically no way to challenge their deportation order in court. While some asylum seekers deported at the U.S. border without the chance to present their claims may return to try and claim protection, they may once again be denied that opportunity and instead prosecuted for the felony offense of illegal reentry. One such individual, Soledad, was incarcerated for many months in a federal prison before she was able even to apply for protection in the United States. Even children have been deported and subsequently prosecuted for returning without authorization, sometimes without ever having the chance to see an asylum officer or an immigration judge.

The Refugee Convention, recognizing that asylum seekers often must arrive without prior authorization or valid travel documents, provides that asylum seekers shall not be penalized for their illegal entry or presence. The UNHCR’s Detention Guidelines also require that detention not be “used as a punitive or disciplinary measure for illegal entry or presence in the country,” and yet that is exactly what prosecutions for illegal entry or reentry do. Criminalizing, prosecuting, and imprisoning asylum seekers for entering the United States without authorization directly contravenes their right to apply for asylum and to not be punished for the way they arrive when fleeing danger. Moreover, given the continued failure of the U.S. government to ensure asylum seekers are not rapidly returned to danger without the opportunity to present their claims, the emphasis on penalizing (instead of recognizing) asylum seekers is particularly unjust and abhorrent.

B. Unaccompanied children

Children arriving alone in the United States to seek protection remain at risk of being returned to danger without a hearing despite the “special care and protection” to which they are entitled under human rights law and standards, and the years of advocacy and some legal reforms aimed at providing necessary safeguards. Many of the relevant safeguards for immigrant children arose from two major cases, Perez-Funez v. INS, and Flores v. Reno. Some of these safeguards were codified in statute in the Trafficking Victims Protection and Reauthorization Act of 2008. This law requires that unaccompanied children from Central America (unlike those from Mexico) cannot be removed without a hearing. Some of these Central American children are denied this protection when they are misidentified as adults or as Mexican, resulting in some cases in their detention with adults and exclusion from critical hearings where they can present their cases. For unaccompanied Mexican children, however, this exclusion is the status quo – thousands of them are repatriated to Mexico without being given a proper screening to determine whether they have legitimate claims for relief that would allow them to stay in the United States.
1. Repatriation of Unaccompanied Minors—Historical Background

In 1985, the district court in Perez-Funez entered an injunction establishing that unaccompanied children must be advised of their right to a hearing before an immigration judge before they are presented with the option of taking “voluntary departure” – in other words, acceding to return to their country of origin (but without a formal deportation order). Under the injunction, children from noncontiguous countries – i.e., all countries other than Mexico and Canada – cannot agree to “voluntary departure” unless they have actually consulted with an adult friend or relative, or a legal services provider. Thus, such consultation is a mandatory prerequisite for these children before they can be repatriated. In contrast, the Perez-Funez injunction does not require mandatory consultation for children from Mexico and Canada who are offered voluntary departure; these children must merely be given the opportunity to consult with an adult friend or relative or with a legal services provider – but no such consultation is actually required. Thus, the injunction allows unaccompanied children from Mexico and Canada – and particularly from Mexico – to be given “voluntary departure” without ever having seen an immigration judge or having consulted with an adult friend or relative or a legal services provider.

In 1997, after over a decade of litigation, the Flores v. Reno settlement agreement (“the Flores settlement”) created nationwide standards on the treatment, detention, and release of all children – accompanied as well as unaccompanied. The Flores settlement marked the beginning of the U.S. government’s recognition (now unfortunately in decline) that immigrant children are entitled to due process rights, particularly with respect to the U.S. government’s ability to hold them in detention. The government was originally supposed to issue regulations to comply with the Flores settlement’s requirements, but unfortunately it never promulgated a complete set of such regulations.

2. Mexican Unaccompanied Children Arriving in the United States

In the years following Flores and Perez-Funez, the Homeland Security Act of 2002, among other provisions, transferred responsibility for the care and custody of unaccompanied children from DHS to the Department of Health and Human Services, specifically, the Office of Refugee Resettlement (“ORR”). Congress undertook this measure in order to entrust immigrant children to an agency with greater expertise in working with young people.

Nonetheless, Mexican children continued to be routinely turned around at the border, just like most adults, without any evaluation of the risks they faced if repatriated. Partly in response to this ongoing problem, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”). The TVPRA sets forth certain critical procedural safeguards for unaccompanied children seeking refuge in the United States. One of the most important, for present purposes, is that for unaccompanied children from noncontiguous countries (i.e. from all countries other than Mexico and Canada), the TVPRA requires that once federal department or agency determines that it
has an unaccompanied child in its custody, that child must be transferred to ORR custody within 72 hours. If the government wants to expel these children from the United States, the government must place them in regular removal proceedings before an immigration judge. This protection prevents unaccompanied children from noncontiguous countries from being expelled via any sort of streamlined or truncated removal procedures, such as expedited removal or pre-hearing voluntary departure.

Unaccompanied children from contiguous countries (Canada and Mexico), however, can still be returned without a hearing before an Immigration Judge. While the TVPRA created certain screening requirements for Mexican children to ensure they were not returned to danger, in practice, the screening process has been ineffective at best, as further described below.

Specifically, the TVPRA requires that any border officer who apprehends an unaccompanied Mexican child must interview the child and confirm that he or she (i) is not a potential victim or at risk of trafficking, (ii) has no possible claim to asylum, and (iii) has the capacity to voluntarily agree to go back home. Only if all three criteria are met can CBP repatriate the unaccompanied Mexican child without a hearing. Thus, as written, the TVPRA presumes that an unaccompanied Mexican child needs special protection, and requires CBP to ensure that the child does not need such protection before returning her to Mexico.

In practice, however, the child bears the burden to speak up and be heard while in detention and while being interviewed by a law enforcement officer. Several studies, including one completed by the UNHCR, have shown that these DHS officers are not asking the required questions, which may anyway be difficult for young children, arriving alone and afraid, to immediately comprehend or answer. As a result, for unaccompanied Mexican children, removal has become the default.

3. The TVPRA in Practice

According to U.S. government statistics from Fiscal Year 2013, 17,240 Mexican unaccompanied children were apprehended at the border. And yet, during the same time period, the U.S. Office of Refugee Resettlement (“ORR”), which is responsible for the care and custody of unaccompanied minors during their immigration proceedings, reported only 740 Mexican unaccompanied kids in its custody. These figures suggest that the overwhelming majority of Mexican children arriving alone and apprehended by DHS—around 96 percent—are turned away at the border, rather than given a hearing. UNHCR has similarly estimated that 95.5 percent of Mexican children are returned without seeing a judge.

The high rate of return for Mexican unaccompanied minors is not indicative of the merit of their claims. Rather, as the ACLU and others have found, U.S. immigration officers are not adequately conducting the required TVPRA screening to identify unaccompanied Mexican children with asylum or trafficking claims or who cannot independently consent
to being returned. Of the 11 Mexican unaccompanied children interviewed by the ACLU in Sonora, Mexico, ranging in age from 11 to 17, only one, Hector, said that he had been asked about his fear of returning to Mexico; the others said they were not asked anything but their age and a name. Hector recalls: “I asked if there was any benefit [to seeing a judge] and the migra said, ‘No, there is probably no benefit. You just crossed through the desert so you’re going to be deported.’” Brian, an unaccompanied child from Nogales, Mexico, whose father is in Tucson, said he had been trying to enter the United States since age 14 but in his three attempts, he had never been asked about his fear of returning to Mexico or if he wanted to see a judge.

Even where officers are attempting to conduct the screening, many do not speak Spanish despite working with a largely Spanish-speaking population. Most unaccompanied children interviewed this year by the ACLU said the CBP officers spoke only English and did not use an interpreter. None of the unaccompanied children interviewed by the ACLU for this report spoke any English at the time of their apprehension (and two of them spoke an indigenous language and knew very little Spanish).46

Two thorough investigations, one conducted by Appleseed between 2009 and 2011 and the other by the U.N. High Commission for Refugees (UNHCR), found that the majority of Mexican children arriving alone are quickly returned due to significant failures in the TVPRA screening.47 The 2013 UNHCR investigation concluded that the “virtual automatic voluntary return” of Mexican children is due to systemic problems, including DHS officers’ failure to understand and implement the TVPRA screening.48 According to the study, which was based on in-person observation of TVPRA interviews, “[t]he majority of the interviews observed by UNHCR involved what was merely perfunctory questioning of potentially extremely painful and sensitive experiences for the children. And in the remainder, the questioning, or lack of questioning, was poorly executed.”49

The report concluded that 95.5 percent of unaccompanied Mexican children apprehended by Customs and Border Protection (“CBP”) are returned across the border—not because they did not have claims but because “CBP’s practices strongly suggest the presumption of an absence of protection needs for Mexican UAC [unaccompanied children].”50 This is the exact opposite of what the TVPRA was designed to do—namely, to put the burden on U.S. immigration officials to show that a child would not be in danger if removed from the United States. The failures in screening inevitably lead to violations of U.S. non-refoulement obligations by denying unaccompanied Mexican children a meaningful way to seek protection and articulate their fears of persecution or torture if repatriated.

The U.N. Secretary-General recently called upon States to ensure that unaccompanied migrant children are provided with “an individualized, case-by-case, comprehensive assessment of their status and protection needs” conducted “in a child-rights-friendly manner by qualified professionals.”51 The current system in place in the United States—rather than providing the careful, rights-protective and individualized assessment called for by the Secretary-General—leads to the rapid return of unaccompanied Mexican children who may have claims to remain in the United States and may face danger upon their repatriation.
All asylum seekers, regardless of where they are from or whether they are children arriving alone or with their families, should be afforded their human right to seek asylum. To ensure that the United States provides asylum seekers with this essential opportunity and does not violate its non-refoulement obligations, the U.S. government must correct its screening processes at the border, which in practice lead to the rapid removal of parents and children with bona fide asylum claims. Border officials must be trained to honor and implement U.S. obligations under domestic and international law so that asylum seekers are not deported to danger without even the opportunity to present asylum claims to an independent authority.

III. Legal Representation

Even individuals who receive an immigration hearing, however, continue to be denied critical human rights protections—notably, legal representation. International law recognizes the importance of legal representation and assistance, including in deportation proceedings and for migrant unaccompanied children in particular. Although the U.S. Supreme Court has recognized the “drastic deprivation” that deportation may entail for individuals who face persecution or torture in their home countries, current U.S. law fails to provide a right to legal representation to all persons facing deportation regardless of their wealth. Instead, only those who can afford counsel can typically access it.

The Supreme Court interpreted the Sixth Amendment to the U.S. Constitution to establish a right to appointed counsel in most criminal cases over fifty years ago in Gideon v. Wainwright. Further strengthening this right, the Supreme Court held over forty years ago in Argersinger v. Hamlin that the Constitution prohibits a criminal prosecution resulting in any jail sentence, even for one day, without appointed counsel. Although government-funded defense services remain deeply flawed in their delivery of adequate representation, fifty years of U.S. case law have made clear that the right to appointed counsel plays a critical role as we strive to ensure that indigence is not an impediment to justice in our criminal system.

The operation of the federal government’s deportation system stands in stark contrast to the Supreme Court’s pronouncements in cases such as Gideon. Every day, immigration courts permanently separate people from their families, deport refugees who fled persecution or torture, and impose other consequences far more dire than a few days in prison. Yet they do so without affording immigrants the basic safeguard of appointed counsel.

There should be no dispute that immigrants often suffer significant harm because of this critical gap in available legal representation. A recent study of New York immigration courts showed that immigrants who are compelled to proceed without representation are
six times more likely to lose their cases than those who have counsel.\(^6^4\) While DHS always pays for an attorney to represent itself in removal proceedings, hundreds of thousands of immigrants, including children and detained asylum seekers, must defend against deportation without legal representation. A legal system that asks immigrants with no legal training to defend themselves in such a complex proceeding will fail to protect the human right to a fair hearing and also lead to violations of non-refoulement obligations where unrepresented asylum seekers cannot adequately present and support their claims.

Encouragingly, the Senate immigration reform bill introduced last year does provide for the appointment of counsel for children, persons with serious mental disabilities, and other vulnerable groups but to date, the U.S. government has failed to provide appointed counsel in any meaningful way for these and other noncitizens facing removal. At the same time, the U.S. government continues to deport Mexican and Central American families with children without necessary safeguards.\(^5^7\)

In July 2014, the ACLU and other advocacy organizations filed a lawsuit challenging the U.S. government’s failure to provide counsel for children facing removal.\(^5^9\) Children as young as five or six years old have been forced to represent themselves in notoriously complex legal proceedings without assistance, a human rights violation this lawsuit seeks to remedy.\(^5^9\) While the Obama administration recently announced a limited program to provide legal assistance to some youth facing deportation hearings,\(^6^0\) this proposal does not come close to meeting the urgent need for legal representation for all children whom the government wants to deport. This summer, for example, the U.S. government completed 345 cases of unaccompanied children; 90% of those children were unrepresented.\(^6^1\) In the meantime, children continue to appear alone in court every day.

The gap in legal representation is particularly stark for asylum seekers and other immigrants whom DHS chooses to detain, an issue of concern recently highlighted by the Inter-American Commission on Human Rights.\(^6^2\) Approximately 84% of immigration detainees are unrepresented in immigration court,\(^6^3\) a crisis that the federal government has previously acknowledged.\(^6^4\) In the absence of government-funded legal services it is inevitable that large numbers of people, including children, will go through immigration proceedings without legal assistance given the high cost of legal representation and the extremely limited availability of assistance in the remote areas where many detention centers are located.\(^6^5\) Immigration detainees are often incarcerated far from their families and from legal service providers who could provide representation at an affordable rate. Because phone services in detention facilities are limited, expensive, and often non-operational, many attorneys decline to represent immigration detainees because they cannot afford the time and expense needed to communicate with their clients.\(^6^6\)

The impediments to representation, stemming from the expansive U.S. immigration detention system, have deprived families and children of a fair hearing in immigration court. In August 2014, the ACLU and other advocacy groups filed a lawsuit to challenge the truncated and accelerated asylum proceedings at the makeshift detention facility in
Artesia, New Mexico. The policies in place at Artesia have effectively precluded women and children from contacting and receiving assistance from attorneys while detained in this remote facility. As documented in the complaint, immigration officers at Artesia actively obstructed access to counsel by severely limiting phone access; denying attorneys a confidential meeting space with their clients; refusing to allow attorneys and potential clients to meet; and by misinforming detainees about the role of an attorney. For example, an immigration officer told a mother seeking asylum that an attorney would facilitate her deportation rather than help her defend against it.

Absent a fair hearing where asylum seekers (adults and children) are provided with counsel and a meaningful opportunity to present arguments and evidence, these individuals may be erroneously deported with devastating consequences. In order to respect the human rights of migrants, the United States government should ensure that all persons facing removal are provided with an attorney, at government expense, and the chance to be heard so that asylum seekers are not unjustly deported back to the danger they fled.

***

We thank this Honorable Commission for its attention to the plight of migrants arriving at the southern U.S. border and endorse the recommendations to the Commission, collectively submitted by the petitioners, in particular, requests to:

1. Issue a final report on the situation of human rights of refugee and migrant children and families in the United States;
2. Convene and oversee a joint working group – including the petitioners, other civil society stakeholders, and relevant United States government agencies – which will sustain continued dialogue to follow up on the object of this hearing; and
3. Convene a meeting of experts during its next sessions – including petitioners, other civil society stakeholders, the UNHCR, the UN Special Rapporteur on the Rights of Migrants, and relevant United States government representatives – to gather information and analysis in support of its final report on this matter.

We further request that this Honorable Commission request that the United States publish its written responses to questions presented in today’s hearing and participate in the proposed joint working group and meeting of experts so that today’s conversations and suggested reforms can continue and materialize. Should you have further questions regarding the information in this submission, please contact Sarah Mehta at the American Civil Liberties Union at 212.519.7826 or smehta@aclu.org.

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1 For example, under the U.N. Convention on the Rights of the Child, which the United States has signed but not ratified, states are obliged to provide protection and care for unaccompanied children and to take into account a child’s best interests in every action affecting the child. Convention on the Rights of the Child (CRC), adopted Nov. 20, 1989, GA Res. 44/25, Annex, UN GAOR 44th Session, Supp. No. 49 at 166, UN Doc. A/44/49 (1989), arts. 3, 22.; see also I/A Court H.R., Juridical Condition and Human Rights of the Child,” Advisory Opinion OC17/02, paragraphs 58-59 (August 28, 2002), available at http://www.corteidh.or.cr/docs/opiniones/serie_a_17_ing.pdf. The decision to return a child to his or her country of origin, under international law, must take into account the child’s best interests, including his or her safety and security upon return, socio-economic conditions, and the views of the child. U.N. Committee on the Rights of the Child, General Comment No. 6, at para. 84. If a child’s return to their country of origin is not possible or not in the child’s best interests, under human rights law states must facilitate the child’s integration into the host country through refugee status or other forms of protection. Id. ¶79.


3 ICCPR, art. 14.

4 Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903).


7 ICCPR, art. 13, 14.


9 Id. Guideline 9 at paras. 4 & 6.


11 Universal Declaration of Human Rights (UDHR), supra n.564, art. 14.
detained in adult detention unaccompanied children who were repatriated had been classified as adults and, consequently, had been repatriated to Guatemala. In one three-week observation period alone, Somers found that 34 of the 61 unaccompanied children who were repatriated had been classified as adults and, consequently, had been detained in adult detention facilities in the United States. M. Aryah Somers, Draft, Preliminary Program

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12 American Convention on Human Rights, art. 22(8); see also Inter-American Court of Human Rights, Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration And/Or In Need of International Protection, Official Summary, Aug. 19, 2014.
13 OHCHR, supra note 8, Guideline 7.
14 8 C.F.R. § 235.3(b)(4).
16 Interview with Hilda, Los Angeles, CA, March 20, 2014 (on file with the ACLU).
17 The regulations governing expedited removal require that DHS officers use a form that includes a paragraph explaining asylum to individual processed for expedited removal. 8 C.F.R. 235.3(b)(2)(i).
22 OHCHR, supra note 8, Guideline 9, para. 6.
23 Judicial review of an expedited removal order otherwise virtually unavailable. See INA § 235.3(b)(1)(A)(i) and (ii); 8 C.F.R. §§ 235.3(b)(4) and (b)(5). Unaccompanied minors may also not be issued an expedited removal order; instead, unaccompanied minors from Mexico and Canada may be brought to an immigration judge or, under certain circumstances, permitted to take voluntary return. All other unaccompanied minors are given a full immigration hearing. Federal regulations recognize only the right to review for verification of status of U.S. citizens, LPRs, and refugees and asylees to whom DHS issues an expedited removal order. See 8 C.F.R. §§ 235.3(b)(5).
24 The federal government chooses to prosecute that crime in thousands of cases each year. Illegal entry and reentry are the most prosecuted federal crimes within the federal criminal justice system. See Transitional Records Access Clearinghouse (TRAC) “At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013” Nov. 25, 2013, available at http://trac.syr.edu/immigration/reports/336/.
25 Interview with Soledad, San Francisco, CA (on file with the ACLU).
26 Data received by The New York Times from Immigration and Customs Enforcement suggests that between 2008 and 2013, 383 children were prosecuted for illegal entry or reentry and had no more serious criminal history; 301 of those children were Mexican. FY 2013 DHS data provided to The New York Times through a FOIA request, analyzed by the ACLU (on file with the ACLU).
27 Refugee Convention, art. 31.
31 In 2012, for example, attorney Aryah Somers interviewed unaccompanied children who had been repatriated to Guatemala. In one three-week observation period alone, Somers found that 34 of the 61 unaccompanied children who were repatriated had been classified as adults and, consequently, had been detained in adult detention facilities in the United States. M. Aryah Somers, Draft, Preliminary Program
unaccompanied children in ORR custody anywhere in the United States, and so likely significantly overestimates the number of Mexican


40 8 U.S.C. § 1232(a)(2). In addition to Form 93, which is the TVPRA screening form used to determine the existence of a trafficking or asylum claim, Mexican children are still supposed to be presented with the I-770 form, to establish their consent to voluntary departure. It is not clear what standard officers are using to determine whether a child has an asylum claim or is at risk of being trafficked.


45 UNHCR, Confidential Report, FINDINGS AND RECOMMENDATIONS RELATING TO THE 2012-2013 MISSIONS TO MONITOR THE PROTECTION SCREENINGS OF MEXICAN UNACCOMPANIED CHILDREN ALONG THE U.S.-MEXICO BORDER (“UNHCR CONFIDENTIAL REPORT”), at 14, June 2014 (on file with the ACLU). This figure reflects all Mexican children in ORR custody, including those apprehended far from the border anywhere in the United States, and so likely significantly overestimates the number of Mexican unaccompanied children in ORR custody.

46 Interview on file with the ACLU, February 28, 2014, Agua Prieta, Sonora, Mexico.
Children as young as 5 facing an immigration judge with no representation.

UNHCR, Confidential Report, FINDINGS AND RECOMMENDATIONS RELATING TO THE 2012-2013 MISSIONS TO MONITOR THE PROTECTION SCREENINGS OF MEXICAN UNACCOMPANIED CHILDREN ALONG THE U.S.-MEXICO BORDER (“UNHCR CONFIDENTIAL REPORT”), June 2014 (on file with the ACLU).

58 UNHCR Confidential Report.
59 Id. at 36.
60 Id. at 14.

50 United Nations, Report of the Secretary-General, Promotion and protection of human rights, including ways and means to promote the human rights of migrants, para. 79 (d)(August 7, 2014).
51 See supra note 2; see also, OHCHR, supra note 8 at para. 14 (on “providing migrants in detention with unconditional access to competent, free and independent legal aid as well as any necessary interpretation services”); Convention on the Rights of the Child (“CRC”), adopted Nov. 20, 1989, GA Res. 44/25, Annex, UN GAOR 44th Session, Supp. No. 49 at 166, UN Doc. A/44/49 (1989), art. 37(d) (“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right as the challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”); Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside of Their Country, CRC/GC/2005/6 at para. 21 (Sept. 1, 2005) (“unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative”) and paras. 33, 36, 69, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en.
54 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial”).
59 For example, the U.S. government recently announced plans to provide $9 million to fund attorneys for child refugees, with the intention of providing initial representation for approximately 2,600 children


62 Inter-American Commission on Human Rights, Press Release, “IACHR Wraps Up Visit to the United States of America,” (Oct. 2, 2014) (“The Commission notes that there is a shortage of lawyers who are willing and able to provide legal representation at low or no cost to the families detained, and likewise notes the difficulties expressed by organizations and individual attorneys who represent detained families in entering the center and being able to bring in with them tools such as phones and computers in order to work more efficiently on cases.”), available at [http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp).


69 *Id.* at para. 117.
Sixty-ninth session
Item 69 of the provisional agenda*
Promotion and protection of human rights: human rights
Questions, including alternative approaches for improving the
effective enjoyment of human rights and fundamental freedoms

Recommended Principles and Guidelines on Human Rights
at International Borders

Conference room paper

* A/69/150
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I. Introduction

A. Human rights at international borders

1. International borders are not zones of exclusion or exception for human rights obligations. States are entitled to exercise jurisdiction at their international borders, but they must do so in light of their human rights obligations. This means that the human rights of all persons at international borders must be respected in the pursuit of border control, law enforcement and other State objectives, regardless of which authorities perform border governance measures and where such measures take place.

2. Migration discourse is replete with terminology used to categorize people who migrate, such as “unaccompanied or separated children”, “migrants in irregular situations”, “smuggled migrants” or “victims of trafficking in persons”. In the complex reality of contemporary mobility it can be difficult to neatly separate people into distinct categories as people may simultaneously fit into several categories, or change from one category to another in the course of their journey. Every individual who approaches an international border has different motivations and it is important to remember that under international human rights law, States have obligations towards all persons at international borders, regardless of those motives.

3. States have legitimate interests in implementing border controls, including in order to enhance security, to protect human rights, and to respond to transnational organized crime. The Office of the High Commissioner for Human Rights (OHCHR) has therefore put together these Recommended Principles and Guidelines (“The Guidelines”) with a view to translating the international human rights framework into practical border governance measures. The Guidelines assert a human rights-based approach deriving from the core international human rights instruments and anchored in the interdependence and inalienability of all human rights, seek to establish accountability between duty-bearers and rights-holders, emphasis participation and empowerment, and focus on vulnerability, marginalization and exclusion.

4. Further, underpinning these Guidelines is a recognition that respecting the human rights of all migrants regardless of their nationality, migration status or other circumstances, facilitates effective border governance. Policies aimed not at governing migration but rather at curtailing it at any cost, serve only to exacerbate risks posed to migrants, to create zones of lawlessness and impunity at borders, and, ultimately, to be ineffective. Conversely, approaches to migration governance that adhere to internationally recognized human rights standards, serve to bolster the capacity of States to protect borders at the same time as they uphold State obligations to protect and promote the rights of all migrants. Ultimately then, these Guidelines are recommended to States and other stakeholders not only because they are obliged to put human rights at the forefront of border governance measures, but also because they have an interest in doing so.

B. Scope and Purpose of the Principles and Guidelines

5. While States are required to protect and promote the human rights of all persons present at international borders, the focus of these Guidelines is primarily on international migrants, including migrants in an irregular situation.

6. These Guidelines are offered primarily to States to support them in fulfilling their obligations to govern their borders in accordance with international human rights law and
other relevant standards. They will also be of use to other actors including international organisations, civil society, and private actors concerned with border governance.

7. The principles that are offered at the outset of this document are derived from international human rights law and apply to the implementation of all the guidelines, whether on the basis of measures taken by individual States or private actors who perform border management functions for them, or undertaken on a collective basis with other States or entities.

8. The guidelines recommend practical measures for States, to achieve the human rights standards to which they are bound, vis-à-vis the rights-holders they encounter at international borders. The implementation of each guideline must adhere to the principles outlined.

9. These Guidelines shall not be interpreted as restricting, modifying or impairing the provisions of applicable international human rights law, international humanitarian law, international refugee law or other relevant legal instrument or rights granted to persons under domestic law.\(^1\)

10. For the purposes of these Principles and Guidelines:

   (a) The term ‘migrant at international borders’ is understood to mean all international migrants\(^2\) present at international borders.

   (b) The term ‘international borders’ refers to the politically defined boundaries separating territory or maritime zones between political entities and to the areas where political entities exercise border governance measures on their territory or extraterritorially (such areas include land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and so-called “no-man’s land” between border posts, as well as embassies and consulates).

   (c) The term ‘migrants who may be at particular risk at international borders’ includes but is not limited to migrants in irregular situations, migrants in smuggling situations, trafficked persons, as well as migrants who are; children (accompanied by family members as well as unaccompanied and separated children), women (including pregnant women and new and/or breastfeeding mothers), persons who have suffered abuse including sexual and gender based violence, victims of torture and cruel, inhuman and degrading treatment and victims of violence and trauma, persons with disabilities, older persons, stateless persons, indigenous peoples, persons who are members of minority communities, persons with HIV or particular health concerns, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, human rights defenders and political dissidents.

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\(^1\) In order to avoid duplication of authoritative guidance, the present Guidelines should be read in conjunction with the guidance provided by the Office of the United Nations High Commissioner for Refugees (UNHCR), including in the context of its 10-Point Plan of Action on Refugee Protection and Mixed Migration which emphasises the need for “protection sensitive entry systems” at international borders to identify, protect against non-refoulement and ensure access to asylum procedures for persons in need of international protection. For trafficked persons, the present Principles and Guidelines should be read in conjunction inter alia with OHCHR’s Recommended Principles and Guidelines on Human Rights and Human Trafficking.

\(^2\) For the purposes of these Principles and Guidelines, and in the absence of a universally accepted definition, an “international migrant” refers to any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations.
(d) The term ‘border authorities’ is understood to refer to border guards, consular and immigration officials, border police, staff at border detention facilities, immigration and airport liaison officers, coast guard officials and other front line officers and staff performing border governance roles.

(e) The terms ‘border governance’ and ‘border governance measures’ include but are not limited to legislation, policies, plans, strategies, action plans and activities related to the entry into and exit of persons from the territory of the State, including detection, rescue, interception, screening, interviewing, identification, reception, detention, removal or return, as well as related activities such as training, technical, financial and other assistance, including that provided to other States.

(f) The term ‘private actor’ includes non-State actors who perform border governance functions on behalf of States, including private companies employed to carry out border screening, border guard and other security functions, such as detention, at borders as well as personnel employed by private transport companies.

II. Recommended principles on human rights at international borders

A. The primacy of human rights

1. States shall implement their international legal obligations in good faith and respect, protect and fulfil human rights in the governance of their borders.

2. States shall ensure that human rights are at the centre of the governance of migration at international borders.

3. States shall respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially. The privatisation of border governance functions does not defer, avoid or diminish the human rights obligations of the State.

4. States shall ensure that all border governance measures protect the right of all persons to leave any country including their own and the right to enter their own country.

5. States shall ensure that measures aimed at addressing irregular migration and combating transnational organized crime (including but not limited to smuggling of migrants and trafficking in persons) at international borders, shall not adversely affect the enjoyment of the human rights and dignity of migrants.

6. The best interests of the child shall be a primary consideration applicable to all children who come under the State’s jurisdiction at international borders, regardless of their migration status or that of their parents. States shall ensure that children in the context of migration are treated first and foremost as children and ensure that the principle of the child’s best interest takes precedence over migration management objectives or other administrative considerations.

7. The right to due process of all migrants regardless of their status shall be protected and respected in all areas where the State exercises jurisdiction or effective control. This includes the right to an individual examination, the right to a judicial and effective remedy, and the right to appeal.
B. Non-discrimination

8. The principle of non-discrimination shall be at the centre of all border governance measures. Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation. Any differential treatment of migrants at international borders shall be in lawful pursuit of a legitimate and proportionate aim. Specifically, measures taken to address irregular migration, or to counter terrorism, human trafficking or migrant smuggling, shall not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds, and regardless of whether or not they have been smuggled or trafficked.

9. States shall ensure that border governance measures address and combat all forms of discrimination by State and private actors at international borders.

C. Assistance and protection from harm

10. States shall protect and assist migrants at international borders without discrimination. Human rights obligations, including in respect of civil, political, economic, social and cultural rights, must take precedence over law enforcement and migration management objectives.

11. States shall ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration and combating transnational organized crime, are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions.

12. States shall consider the individual circumstances of all migrants at international borders, with appropriate attention being given to migrants who may be at particular risk at international borders who shall be entitled to specific protection and individualized assistance which takes into account their rights and needs.

13. States shall ensure that all migrants who have suffered human rights violations or abuses as a result of border governance measures have equal and effective access to justice, access to effective remedies, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanism. States shall investigate and, where warranted, prosecute human rights violations and abuses, impose sentences commensurate with the seriousness of the offence, and take measures to ensure non-repetition.
III. Recommended guidelines on human rights at international borders

Guideline 1: Promotion and protection of human rights

States and, where applicable, international and civil society organizations, should consider:

Promotion of human rights

1. Requesting and offering, as relevant, technical and financial assistance to States and relevant international organisations, intergovernmental organizations and civil society actors, for the purpose of developing, implementing and strengthening human rights-based border governance measures.

2. Supporting the media to gather and share accurate and non-discriminatory information about migration and the human rights implications of border governance, while avoiding messages that are stigmatizing, xenophobic, racist, alarmist or inaccurate. Media outlets and journalists should be supported, through training where appropriate, to protect the right to privacy and the confidentiality of sources of information.

3. Implementing programmes for improving knowledge and addressing negative perceptions of migrants with the aim of protecting migrants from xenophobia, violence and discrimination at international borders.

4. Ensuring that terminology used in legislation, policy and practice to refer to migration is consistent with international human rights law and standards. In accordance with UN General Assembly resolution No. 3449 (9 December 1975), the term ‘illegal’ should not be used to refer to migrants in an irregular situation.

5. Undertaking information campaigns in cooperation with civil society organizations, the media and other relevant actors to, inter alia, illuminate the situation of migrants at international borders and raise awareness of the risks and dangers of transnational organized crime and precarious migration which could assist potential migrants to make informed decisions about approaching and crossing borders.

6. Engaging in effective consultations with relevant stakeholders including national judicial, legislative and human rights bodies, academia and civil society actors, including migrants’ organisations, in the development, adoption, implementation and review of border-related measures. The experiences of migrants should be drawn on in understanding the human rights impact of border governance.

Monitoring and accountability

7. Assessing the human rights-compliance of existing border governance measures, to ensure they do not adversely impact the enjoyment of the human rights and dignity of migrants at international borders. Particular attention should be given to policies and measures aimed at addressing irregular migration as well as combating transnational organized crime.

8. Encouraging independent monitoring of human rights at international borders and establishing or strengthening systematic reporting mechanisms, including through

3 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
facilitating cooperation between border authorities and other actors including police, national human rights institutions, parliamentarians, civil society and international organizations. Supporting all relevant actors to bring complaints in the event of violations of human rights at borders.


10. Establishing official mechanisms and/or procedures to provide effective remedies for violations of human rights at international borders, to provide reparation to victims and to bring State and private actors to account for such violations and abuses, including by investigation and prosecution when violations and abuses amount to criminal offences under national or international law.

Guideline 2: Legal and policy framework

**States and, where applicable, international and civil society organizations, should consider:**

*Non-discrimination, protection and assistance*

1. Harmonizing domestic legislation with international human rights law to explicitly ensure that international human rights are respected, protected and fulfilled in all border governance measures at international borders and in all encounters with migrants at international borders.

2. Ensuring that non-discrimination provisions in legislation are applicable to all border governance measures at international borders. In addition, pre-screening and visa processes such as visa application, issuance, refusal, revocation and renewal processes should be reviewed to ensure compliance with international human rights standards including the principle of non-discrimination. Adopting or amending legislation to ensure the effective accountability of private actors engaged by the State to carry out pre-screening and visa processes.

3. Adopting or amending legislation to ensure that respect, protection and fulfilment of all human rights, including mandatory protection and assistance provisions, are explicitly included in all border-related legislation, including but not limited to legislation aimed at addressing irregular migration, establishing or regulating asylum procedures and combating trafficking in persons and smuggling of migrants.

*Non-criminalization*

4. Adopting or amending legislation to ensure that irregular entry, the attempt to enter in an irregular manner, or irregular stay is not considered a criminal offence, given that border crossing is an administrative issue. Administrative sanctions applied to irregular entry should be proportionate and reasonable.

5. Adopting or amending legislation to ensure that administrative, civil and criminal sanctions imposed on migrant smugglers or others involved in the facilitation of irregular

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4. Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
border crossing are proportionate to any offences or human rights abuses committed by
them.

6. Adopting or amending legislation to ensure that private individuals including
shipmasters who carry out rescues of migrants in distress are not penalised or criminalised
for doing so.

Monitoring and accountability

7. Making legislative provisions for transparent, effective and proportionate
administrative, civil and where appropriate, criminal penalties, for offences committed
against migrants at international borders, including those committed by or involving the
complicity of border authorities. Appropriate sanctions should be applied to border
authorities who fail to report such criminal offences.

8. Adopting or amending legislation to ensure that powers exercised by border
authorities are clearly defined and subject to judicial authorization and review in
accordance with international human rights law.

9. Adopting or amending legislation to ensure that the use of force and use and
possession of firearms and other weapons by border authorities are strictly regulated in
accordance with international human rights law and that any misuse or excess thereof is
appropriately sanctioned.

10. Adopting or amending legislation for the investigation and prosecution of excessive
use of force (including lethal force) and any act of violence or violation of the human rights
of migrants at international borders.

11. Adopting or amending legislation for the investigation, prosecution and punishment
of corruption on the part of border authorities as well as the involvement or complicity of
border authorities in transnational organised crime.

12. Adopting or amending legislation to ensure that any delegation of border
management functions to private actors including private transport companies does not
undermine human rights, including the principles of non-discrimination, non-refoulement
and the right to leave any country including one’s own. Such legislation should include
concrete mechanisms to ensure accountability of private actors and remedies in the case of
human rights abuses.

13. Establishing effective and independent legislative and other mechanisms or
procedures to enable victims of human rights violations, violence and crime at international
borders to access justice, report abuses and access effective remedy and reparation,
irrespective of their migration status. Victims should be able to testify against perpetrators
regardless of whether they are in the jurisdiction of the State or not, and without fear of
detention or deportation as a consequence of seeking justice.
Guideline 3: Building human rights capacity

States and, where applicable, international and civil society organizations should consider:

**Investment and systems**

1. Allocating sufficient State budget resources to strengthen border governance including identification, screening and referral systems, and ensure facilities are equipped to provide human rights-based and proportionate responses to migrants arriving at international borders.

2. Requesting and offering financial, technical and other assistance from/to States and international organizations to strengthen human rights-based capacity for improving facilities and strengthening border governance in accordance with international human rights standards.

**Staffing and recruitment**

3. Reviewing and revising the role of border authorities to ensure that they are mandated to only perform tasks for which they have adequate training, capacity and resources in accordance with international human rights standards. Where border authorities cannot perform mandated tasks in accordance with international human rights law, appropriately trained personnel should be brought in to perform those functions.

4. Implementing rigorous recruitment and deployment procedures for border authorities, and ensuring that recruitment criteria include knowledge of or openness to learn relevant human rights law obligations. Consideration should be given to recruiting and deploying border authorities with capacity or willingness to learn to communicate with migrants in their own languages and to ensure non-discrimination.

5. Ensuring that border authorities are fairly remunerated, taking into consideration special factors such as the risks involved, their responsibilities as well as the demanding working hours, and providing free access to appropriate medical and psychological care, support and counselling services. Ensuring also that border authorities are regularly assessed for signs of professional fatigue, secondary trauma and other psychological conditions resulting from their work at international borders.

6. Equipping international borders with sufficient numbers of appropriately qualified personnel, specific to the situation at the border. Balanced numbers of male and female border authorities should be recruited and deployed (including on coastal patrol boats).

7. Recruiting specially trained personnel including, where appropriate, medical professionals and healthcare workers, child protection professionals, guardians for unaccompanied or separated children, legal aid providers, interpreters and cultural liaison officers. Consideration should be given to permanently posting such personnel at high-traffic international borders and/or maintaining an up-to-date list of qualified professionals to attend on a needs basis in person or, in exceptional cases when prompt access cannot be guaranteed, remotely by phone or video-conference.

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5 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
Training and capacity building

8. Training border authorities on international human rights law relevant to their work, including its practical implementation. Border-specific human rights and gender equality training materials should be tailored in cooperation with international organizations, civil society organizations and others, to practically build human rights capacity of border authorities in the performance of their day-to-day roles and responsibilities at international borders.

9. Mainstreaming human rights and gender equality training in all capacity building measures targeted at border authorities and private actors active at international borders. Such training should be ongoing to ensure that border authorities are kept abreast of emerging issues and human rights-based responses.

10. Mainstreaming non-discrimination in all training of border authorities to ensure that admission practices do not discriminate on prohibited grounds. Training should specifically aim to prevent discrimination against migrants, including as manifested in xenophobia, racism, racial discrimination and related intolerance.

11. Providing practical situational training to border authorities to ensure they are able to defend themselves effectively, with proportionate force and equipment, when strictly necessary, in accordance with international human rights law and related best practice, without causing disproportionate injury to migrants. Border authorities should be trained to intervene to stop their colleagues from using force that is not necessary and proportionate.

12. Sensitizing and training of border authorities to appropriately identify and support migrants who may be at particular risk at international borders. Border authorities should be sensitized to the fact that some migrants may be disproportionately exposed to a range of risks, including difficult and dangerous transportation methods, mistreatment by human traffickers, smugglers or others including public officials, and that their protection and assistance needs may change throughout the migration process.

Monitoring and accountability

13. Monitoring and periodically evaluating the impact of human rights training on border authorities, to evaluate effectiveness of such training in avoiding violations of human rights.

14. Developing and adopting binding codes of conduct for border authorities in accordance with international human rights standards and best practice, including the UN Code of Conduct for Law Enforcement Officials. Such codes of conduct should set out expected standards of behaviour and the consequences of failure to adhere to those standards.

15. Putting in place mechanisms through which border authorities and others can make complaints to appropriate authorities about conduct of their colleagues that is contrary to human rights standards, without fear for their own employment or reprisals from their colleagues, and ensuring fair hearings where complaints are made against them by their colleagues.

16. Monitoring the use of border surveillance technology to ensure that it is used to perform justifiable functions in accordance with human rights norms and standards, and does not unnecessarily and disproportionately interfere with the right to privacy where less intrusive alternatives are available, nor appropriately collect, store or share data in a way that could compromise human rights.
17. Preventing harmful practices by border personnel by investigating and prosecuting all instances of corruption, extortion, and exploitation and raising awareness among migrants at international borders that services of border personnel are free of charge.

18. Collecting comprehensive and disaggregated data on complaints, investigations, prosecutions, and convictions of all instances of excessive use of force, reports of assault, rape and other forms of sexual violence, torture, ill treatment, and other human rights violations and abuses perpetrated by border authorities and private actors, with a view to understanding causes, and sanctioning and preventing such practices.


Guideline 4: Ensuring human rights in rescue and interception

States and, where applicable, international and civil society organizations, should consider:

Ensuring protection of lives and safety

1. Amending and revising processes and procedures to rescue migrants at international borders to accord with international human rights and refugee law obligations as well as the international law of the sea and other relevant standards.

2. Providing and maintaining rescue beacons along dangerous migration routes to enable migrants whose lives and safety are in danger to signal for help and be rescued.

3. Training border authorities responsible for carrying out rescue (including coast guard officials and intergovernmental entities) to uphold mandatory obligations to relieve imminent danger to lives and safety as their first priority, and ensure the human rights, safety and dignity of all persons rescued. Persons at imminent risk of death and migrants who may be at particular risk at international borders should be immediately identified and afforded appropriate assistance, within the capabilities of the ship for those rescued at sea.

4. Encouraging private shipmasters to adhere to their obligation to render assistance, rescue migrants in distress, and disembark rescued persons at the nearest place of safety in accordance with the international law of the sea, international human rights law and other relevant standards. Disincentives for private shipmasters to rescue migrants in distress at sea should be removed, and consideration given to compensating those who incur financial losses for rescuing migrants.

5. Ensuring that all necessary steps are taken during border management operations to respect, protect and fulfil the human rights including lives and safety of all migrants at international borders. States should scrupulously avoid dangerous interception measures, including arbitrary or collective expulsions.

6. Ensuring the accountability of private transport companies and other private actors that are involved in implementing entry restriction measures such as pre-departure screening and decisions on access to transportation, and providing effective remedies for those unlawfully denied transport. Developing and encouraging the adoption of human rights-based codes of conduct for private actors in this regard that set out expected standards of behaviour and the consequences of failure to adhere to those standards.

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6 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
Strengthening rescue capacity

7. Sensitizing border authorities to the primacy of their obligation to protect human rights including lives and safety, to remove migrants rescued or intercepted from situations in which their lives and safety are compromised, and to address particular protection and assistance needs. Border authorities should be provided with regularly updated reference cards or pamphlets summarising relevant policies and guidelines concerning treatment of migrants in accordance with international human rights law.

8. Ensuring that border authorities carry out risk assessments and appropriately plan rescue operations with clear, human rights-based objectives. Planning should include the appropriate number and type of staff, necessary transportation, emergency health equipment, food and water supplies.

9. Establishing, operating and maintaining adequate and effective rescue services at all international borders (including search and rescue (SAR) at sea services in coastal States), in accordance with international human rights law, international law of the sea, and other relevant standards. Rescue vessels should be equipped with appropriate equipment and supplies to assist migrants, including during mass arrivals.

Protection from harm in rescue and interception operations

10. Sensitizing and training border authorities on the principle of non-refoulement and chain or indirect refoulement, including the extraterritorial application of the principle wherever the State exercises jurisdiction or effective control. Practical guidelines should be developed and disseminated to clarify the principle of non-refoulement in all border governance measures. In the specific context of rescue and interceptions that take place in territorial waters, on the high seas and in disembarkation that follows, ensuring that migrants are only delivered to places where their safety and human rights are no longer threatened, and that disembarkation does not lead to onward refoulement.

11. Ensuring that border authorities provide all rescued or intercepted migrants with accessible information about their rights in a language they understand and in accessible formats, including their right to consular assistance if they so wish. Border authorities should be aware of the particular risks posed to certain groups, such as asylum seekers and refugees as well as irregular migrants and LGBTI individuals, of being brought to the attention of consular authorities without their knowledge and informed consent.

12. Ensuring that any photographs, declarations, personal data and belongings of migrants are only taken and used in accordance with international human rights law, inter alia the right to privacy and data protection, and in a way that does not jeopardize the safety of the individual.

Coordination and cooperation

13. Agreeing within and between States what constitutes a situation of distress, nearest place of safety and safe ports with a view to enhancing human rights protection for migrants. At sea, disputes arising as to where migrants should be disembarked must be swiftly resolved in accordance with international human rights law and international refugee law, in particular the right to life and the principle of non-refoulement.

14. Requesting and offering assets, equipment and other assistance (for instance, through secondment of staff) to strengthen the search and rescue capacities of States in accordance with international human rights law, international law of the sea, and other relevant standards. Training in appropriate and human rights-compliant use of assets and equipment should be provided and its use monitored.
15. Suspending, amending and revising any rescue and interception cooperation agreements or arrangements, including ship-rider agreements and joint coastal patrols that may compromise human rights at international borders.

**Monitoring and accountability**

16. Holding border authorities accountable for human rights violations during rescue and interception operations, including those that occur extraterritorially. Data recording instruments should be used so intentional failure to rescue can be investigated and appropriately sanctioned.

**Guideline 5: Human rights in the context of immediate assistance**

*States and, where applicable, international and civil society organizations, should consider:*

**Immediate assistance**

1. Providing immediate assistance where necessary, including at or near places of rescue or interception, or disembarkation in the case of migrants who have travelled by sea. Such assistance should include in particular medical care, adequate food and water, blankets, clothing, sanitary items and opportunity to rest.

2. Providing individual health and medical screenings as a matter of priority. Competent medical staff should be present at the point of rescue or interception, or disembarkation for migrants at sea, to carry out screenings and refer persons for further medical attention including mental health referrals where appropriate.

3. Establishing or improving reception processes to ensure that necessary assistance is provided to all migrants, on a non-discriminatory basis regardless of their migration status or the circumstances in which they arrived at the border. Identifying and eliminating barriers to the ability of migrants with disabilities inter alia to access assistance at international borders and take appropriate steps to ensure that reasonable accommodation is provided.

4. Cooperating with national protection bodies, international organizations and civil society organizations in the provision of assistance, specifically in the identification and referral of migrants who may be at particular risk at international borders.

5. Ensuring that consular personnel are able, including through training where necessary, to provide assistance to their nationals at international borders.

**Criteria in respect of temporary reception facilities**

6. Ensuring that temporary accommodation does not last longer than strictly necessary to allow authorities to verify identity or other essential information and organize transfers or referrals as appropriate.

7. Ensuring that all temporary reception facilities comply with international human rights standards, including in respect of adequate space, nutritional and culturally appropriate food, clean water, sanitation, adequate medical care and access to legal aid.

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7 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
8. Ensuring that staff at temporary reception facilities are carefully selected and receive appropriate human rights training, including sensitivity on gender, culture and religion as well as basic language skills in languages of the majority of persons accommodated.

**Monitoring and accountability**

9. Cooperating with National Preventive Mechanisms, national human rights institutions, international organizations, parliamentarians, civil society organizations and other actors in the monitoring of reception conditions and arrangements and in the investigation and, where appropriate, prosecution of human rights violations during assistance and reception processes.

**Guideline 6: Screening and interviewing**

States and, where applicable, international and civil society organizations, should consider:

**Screening processes**

1. Assessing and amending screening and referral processes at international borders to ensure that each individual’s situation and reasons for entry are determined and that migrants who may be at particular risk at international borders are identified and appropriately referred.

2. Assessing and amending screening processes to uphold the right to privacy including in relation to searches and appropriate handling of property in accordance with international human rights law. Personal property (including travel and identity documents, documents authorizing entry or stay, residence or establishment in the territory, work permits, money, mobile phones, or personal documentation) should only be confiscated by border authorities when duly authorized by law and in accordance with international human rights standards in clearly defined, limited circumstances. Receipts shall be given for all confiscated property, and property should be returned as expeditiously as possible.

**Data collection**

3. Ensuring that the collection of data at borders (particularly biometric data) is proportionate to a legitimate aim, obtained lawfully, is accurate and up-to-date, stored for a limited time and disposed of safely and securely. Personal data should be anonymised when stored for statistical purposes.

4. Introducing technology only alongside training of border authorities on the risks, limitations and human rights impacts of such technology, to ensure that the use of technology, in particular biometric data, to identify migrants does not result in over-reliance on technology and reduced exercise of judgment in screening processes.

**Human rights-compliant entry restrictions**

5. Repealing any entry restrictions imposed on discriminatory grounds, including on the basis that people are living with HIV, are pregnant or on the basis of disability or their sexual orientation or gender identity. Prohibiting physical screenings or examinations at the border to make such determinations in order to apply entry restrictions.

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8 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
6. Ensuring that public health is only invoked as a ground to limit rights of entry where there are serious threats to the health of the population or to individuals, due regard being paid to the International Health Regulations of the World Health Organization.

7. Ensuring that any physical health screenings related to entry or stay restrictions, including testing for communicable diseases, conform with human rights standards by emphasising voluntary testing, obtaining informed consent, providing adequate pre- and post-test counselling, and upholding confidentiality. Prohibiting compulsory testing for conditions such as HIV, tuberculosis and pregnancy as part of migration policy.

8. Developing and putting in place procedures to inform those denied entry orally and in writing of the reasons for their exclusion and of their right to challenge their exclusion before a court or other independent and effective authority.

Interviewing

9. Developing interview guidelines and procedures in full respect for human rights and dignity. Interviews should be conducted by border authorities in a professional, open and non-threatening way, in a private and appropriate place with adequate facilities to meet basic needs, and with the clear objective of appropriately referring migrants who may be at particular risk at international borders to competent authorities. Interviews should only be recorded with the informed consent of the interviewee and border authorities should treat information provided in confidence and assure migrants of this.

10. Providing appropriate training and guidelines to border authorities conducting interviews. Border authorities should be trained in the use of non-coercive interviewing techniques and preparing appropriate questions.

11. Using interviewers with skills in languages that interviewees are known to understand, or using competent and impartial interpreters whose involvement will not endanger or harm the interviewee or compromise the interview process.

Age, gender and other considerations

12. Sensitizing border authorities to the risk of stereotypes and bias on behalf of both border authorities and interviewees that can be detrimental to the interview process and its outcomes, including negative stereotypes and perceptions about migrants.

13. Training border authorities to effectively communicate (both verbally and with body language) in a way that is age, culture and gender sensitive, and to assist migrants by use of easy-to-understand language and appropriate written communication.

14. Ensuring that border authorities do not presume women to be vulnerable or to lack agency, while also giving adequate attention to specific needs relating to their situation at the border. Border authorities should communicate separately with female members of family groups to facilitate identification of their distinct human rights situation.

15. Ensuring that persons with disabilities can access the interview process on an equal basis with others, through the provision of sign-language interpreters, documentation in Braille and other relevant measures, and guaranteeing that reasonable accommodation is provided.

16. Ensuring that border authorities are sensitized to the specific challenges and needs relating to the situation of LGBTI migrants at borders, and that they do not express through verbal or body language any judgment relating to the migrant’s sexual orientation, gender identity, or gender expression.

17. Limiting interviews carried out by border authorities with children to only gather basic information about the child’s identity. Children identified as being unaccompanied or
separated should be immediately referred to child protection agencies, and only be interviewed in the presence of an appropriately trained childcare worker. Children travelling with adults should be verified as being accompanied by or related to them, including through separate interviews with appropriately trained and qualified personnel.

**Monitoring and accountability**

18. Conducting regular independent monitoring and evaluation of border screening and interview processes to ensure that all migrants are treated in accordance with international human rights standards.

**Guideline 7: Identification and referral**

States and, where applicable, international and civil society organizations, should consider:

*Identification and referral of migrants who may be at particular risk at international borders*

1. Establishing or strengthening national referral mechanisms and communication channels between relevant State authorities, national human rights institutions, international and civil society organizations. Border authorities should be trained to use referral mechanisms and be provided with information and facilities to give them the means of doing so.

2. Developing practical guidelines and standardized procedures for border authorities to permit the rapid and accurate identification and referral of migrants who may be at particular risk at international borders. Such guidelines and procedures should be developed in cooperation with relevant national, international and civil society organizations.

3. Ensuring that relevant service providers are present at international borders, such as competent interpreters including sign-language interpreters, legal aid service providers, health service providers, guardians for separated children and others.

4. Creating expert units or rosters of human rights experts for deployment to international borders to assist in the identification of migrants who may be at particular risk at international borders and their referral to responsible authorities.

5. Ensuring that entry system regulations provide the opportunity for asylum seekers to access information on the right to claim asylum and to access fair and efficient asylum procedures.

6. Ensuring that measures taken in respect of women who are pregnant, new and/or breastfeeding mothers include access to maternal health services, pre- and post-natal care, emergency obstetric services and access to sexual and reproductive health information and services.

7. Ensuring that children are promptly identified and that anyone claiming to be a child is treated as such and where appropriate given access to proper age determination processes, appointed a guardian, and referred to child protection authorities and other relevant services. Age determination processes should be a measure of last resort and be carried out in a prompt, child-friendly, gender-sensitive and multi-disciplinary manner, and

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9 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
be conducted by child protection officials or officials with sufficient and relevant expertise and training. The benefit of the doubt should be given to the individual being assessed, who should have the opportunity to appeal the decision before an independent body.

8. Ensuring that survivors of torture, cruel, inhuman and degrading treatment, violence and trauma, including victims of sexual and gender-based violence, are referred to appropriate and competent medical and psycho-social services, and that any measures taken at international borders avoid re-traumatisation.

Providing information

9. Establishing procedures to ensure that persons are immediately informed in accessible formats and in a language they are known to understand, of the identification and referral procedures that will be followed, their rights and obligations during the procedure, possible consequences of their non-compliance and remedies available to them.

10. Ensuring that migrants are provided information about national and international organisations that provide legal and other assistance to migrants, including up-to-date contact information and means of making contact with such organisations. Also ensuring that all persons in need of international protection are provided information about organisations that provide relevant assistance.

Monitoring and accountability

11. Investigating and appropriately disciplining any border authorities who obstruct access to protection and assistance services by failing to refer migrants to appropriate protection and assistance services, and putting in place measures to ensure non-repetition.

Guideline 8: Avoiding detention

States and, where applicable, international and civil society organizations, should consider:

Prohibition of arbitrary detention

1. Amending legislation to establish a presumption against detention in law, and legally prescribing human rights-compliant alternatives to detention, so that detention is a last resort imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes.

2. Preventing arbitrary detention by ensuring that any deprivation of liberty that takes place at international borders (including transportation at or around border zones) is a measure of last resort and that the reasons for any detention are clearly defined in law, of limited scope and duration, necessary and proportionate, and that reasons for such detention are explained to migrants.

3. Individually screening and assessing migrants at international borders to ensure that detention is only imposed for limited lawful objectives in accordance with international human rights law, and only when no alternatives to detention are available.

4. Establishing and strengthening procedural safeguards on detention including judicial authorisation and oversight, possibility to appeal and legal aid, to ensure the legality,

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10 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
proportionality and necessity of any deprivation of liberty and to periodically review the necessity and proportionality of continued detention.

5. Repealing any legal provisions explicitly or implicitly allowing for indefinite detention so that persons in situations that may potentially lead to indefinite or protracted detention are not subjected to this type of deprivation of their liberty. Granting temporary residence status to all migrants who cannot be removed, to persons who are stateless and refused admittance into the territory of their former country of origin or residence, or for whom there are practical obstacles to return to their country of origin or residence.

6. Ensuring in legislation, policy and practice that children are never detained on the basis of their or their parents’ migration status, irregular entry or stay including through release or, where appropriate, adopting human rights-based, non-custodial, community-based alternatives to detention in accordance with the best interests of the child.

Conditions of detention

7. Ensuring that conditions in detention facilities adhere to the UN Standard Minimum Rules on the Treatment of Prisoners and all other relevant international standards on conditions of confinement.

8. Ensuring that staff at detention centres are carefully selected and receive human rights and gender training, as well as training on relevant cultural and religious practices and basic language skills in languages spoken by the detained migrants.

9. Ensuring that migrants in administrative detention are detained in appropriate and suitable facilities and are not detained with suspected or convicted criminal offenders.

10. Ensuring that men and women are detained separately unless they belong to the same family, and that adequate numbers of male and female staff are recruited and rostered at detention centres so that female staff members are always present where women are detained.

11. Ensuring that in the exceptional cases where children are detained, they are housed with their family members unless there are compelling reasons for separation; that unaccompanied children are not housed with unrelated adults; and that all children have access to adequate healthcare and education. Child protection agencies, rather than immigration agencies should take primary responsibility for children.

12. Ensuring that detention does not put migrants at risk of violence, ill-treatment or physical, mental or sexual abuse. When physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention.

Access to human rights-based assistance

13. Providing migrants in detention with unconditional access to adequate medical and health care. Such care should be age, gender, culturally and linguistically appropriate and provided by qualified staff whose primary role is to ensure the health of persons in detention. Persons with specific health needs, including those related to pre- and post-natal care, HIV and mental health, should receive appropriate care.

14. Providing migrants in detention with unconditional access to competent, free and independent legal aid as well as any necessary interpretation services, for the purpose of exercising their right to habeas corpus, to judicial review of the lawfulness of their detention or for other purposes such as accessing an effective remedy for human rights violations and abuses as well as asylum procedures.

15. Ensuring that unaccompanied children are provided with competent guardians who are able to assist children in all forms of decision-making.
16. Ensuring the right to consular assistance, by putting in place practical measures to facilitate contact between migrants in detention and their consular or diplomatic authorities, including access to information on consular assistance, contact information, and access to telephones and other means for the purpose of making such contact. Consular authorities should only be contacted if requested by or with the free, informed consent of the person concerned, in light of the risks posed to asylum seekers and refugees as well as other groups such as irregular migrants and LGBTI individuals, of being brought to the attention of their consular authorities without their knowledge and informed consent.

17. Providing timely access to fair and efficient asylum procedures for asylum-seekers in detention.

18. Facilitating contact and access to national human rights institutions, relevant international organizations, civil society organizations and others in the provision of legal and other assistance to migrants in detention, and informing migrants of their right to contact such organizations.

*Monitoring and accountability*

19. Facilitating independent monitoring and evaluation of detention at places of immigration detention, including by National Preventive Mechanisms, national human rights institutions, international organizations, parliamentarians, civil society organizations and others, and by allowing them to access detainees and places of detention.

20. Investigating and prosecuting allegations of violence, sexual abuse or other forms of ill-treatment at places of detention and putting in place measures to ensure non-repetition, and particularly ensuring that women, children, older persons, disabled persons and LGBTI individuals are supported to report such abuse.

**Guideline 9: Human rights-based return or removal**

*States and, where applicable, international and civil society organizations, should consider*: 11

**Human rights-based return or removal**

1. Ensuring that returns from all areas where the State exercises jurisdiction or effective control, including extraterritorially, are only carried out in accordance with international law and with due procedural guarantees. Arbitrary or collective expulsions that violate the principle of non-refoulment and/or the prohibition of collective expulsion should be strictly prohibited.

**Voluntary return**

2. Promoting voluntary return in preference to forced return, including by providing information about voluntary return processes in accessible formats and languages migrants are known to understand. Where appropriate civil society organizations should be involved in the provision of such information.

3. Ensuring that any consent given to voluntary return processes is fully informed and given free of any coercion, such as the prospect of indefinite detention or detention in inadequate conditions.

11 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.
Removal orders

4. Ensuring that returns are only carried out by competent authorities pursuant to removal orders that are provided in accessible formats and in writing in a language the concerned migrants are known to understand. Such orders should only be issued following consideration of individual circumstances with adequate justification in accordance with the law and international human rights standards, inter alia the prohibition of arbitrary or collective expulsions and the principle of non-refoulement.

5. Ensuring that migrants clearly understand the grounds on which removal orders are based, the execution of removal orders, remedies available to challenge the validity of removal orders, reasonable time limits to challenge the order, and other relevant information including consequences of non-compliance.

6. Affording remedies against removal orders where there are substantial grounds for believing that a migrant would be at risk of serious violations of human rights such as torture, cruel, inhuman or degrading treatment or punishment, or persecution, if returned to, readmitted to or subject to onward return to a place where they might be at such risk.

7. Ensuring that a guardian will accompany children throughout the return process, that the family or guardian has been identified, and that there is clarity about reception and care arrangements of children in countries to which they are being returned. Children should only be returned where it has been determined through an adequate and participatory process that it is in the best interests of the child.

Pre-removal detention

8. Ensuring that any legitimate and necessary pre-removal detention accords with international human rights law, and follows a determination in each individual case that non-custodial measures would not be appropriate. Detained individuals should be informed in accessible formats and in a language they understand of the grounds on which their pre-removal detention order is based, possible remedies against the order, and how to access legal aid.

Readmission

9. Carrying out return processes in accordance with the human right to freedom of movement, including the right to leave any country including one’s own, and by allowing returnees to choose the State to which they are returned, subject to the agreement of that State.

10. Ensuring that border authorities and migrants are aware of the documentation requirements of the country from and to which they are being returned and, where applicable, taking steps to issue documents to facilitate return.

11. Protecting the confidentiality of all information in any cooperation between States during return processes. Identification and documentation arrangements necessary to carry out returns should be made in accordance with international legal obligations to protect confidentiality, including data relating to irregular migration status, asylum claims, health status, disability and HIV status, and sexual orientation and gender identity.

12. Making reception arrangements to ensure returns only take place to safe places in the country of return. This means, for instance, that migrants should not be returned to situations of destitution or inhospitable conditions where their safety or human rights are threatened, such as through deportation to so-called “no-man’s land” between borders. Return should be avoided to situations where migrants’ human rights are threatened by a lack of adequate healthcare, food, water and sanitation. Returns should not be carried out at night. Cooperating States shall protect returning migrants and their families from reprisals.
by and retaliation from criminal groups, in the country they are returned to or from which they are being returned.

13. Ensuring children are never handed over to border authorities of receiving countries if it is unclear how they will be cared for. Families should not be separated during removal procedures. Unaccompanied and separated children should not be returned without ensuring that proper care and custodial arrangements are in place and that family members have been traced in the country of return.

Forced removal

14. Ensuring that expulsions of groups of migrants uphold the due process requirement to consider, with due diligence and in good faith, the full range of circumstances that may prohibit expulsion of each individual, in light of the international law prohibition against collective expulsions.

15. Ensuring that return procedures are not carried out at all costs, but are interrupted where the human rights of the migrant are compromised or where continuation of the return process would endanger the safety and dignity of the migrant or of the personnel carrying out the return.

16. Border authorities carrying out returns should comprise at least one person of the same sex as the migrant and where possible, efforts should be made to select personnel who can communicate with migrants in accessible formats and in a language they are known to understand, and providing interpretation services where this is not possible.

17. Carefully selecting and appropriately training border authorities, to ensure all return processes are carried out in a safe and dignified manner. Training should include good practices as well as practical situational training in the use of force or coercive measures that are lawful, strictly necessary and proportionate, and do not violate the human rights of the migrant.

18. Ensuring that any forms of physical restraint used are strictly necessary and proportionate to the actual or reasonably anticipated resistance of the migrants, and respect their dignity. The use of any means of coercion, restraint or force likely to obstruct the migrant’s nose or mouth, or force her or him into positions that risk asphyxiating her or him shall be strictly prohibited.

19. Ensuring that no migrant is removed unless they are medically fit to travel. Where there are known medical conditions, where medical treatment is required, or where the use of restraint techniques is foreseen, independent medical examinations should determine fitness to travel.

20. Prohibiting the use of non-medically justified measures or treatment, such as use of tranquillizers, sedatives or other medication to facilitate deportation. Medication should only be administered to persons during their removal on the basis of their informed consent and a medical decision taken in respect of each individual being returned, and only where there is a medical need on the part of the migrant unrelated to the State’s interest in removal.

Monitoring and accountability

21. Ensuring and facilitating independent monitoring of pre-removal processes, return processes, and reception of migrants in receiving States to guarantee they are carried out in accordance with international human rights law and standards including for the prevention of torture and ill-treatment and refoulement.
22. Ensuring that migrants are informed of their right to report violations and that those whose rights are violated during return processes can file complaints during or after the return process, remain contactable and able to testify against perpetrators of crimes and violations of human rights (for instance, through return to the country or by video link) and access an effective remedy in or from the returning country. Personnel who carry out return orders should be clearly identifiable to migrants through names or personal numbers and should not wear masks or otherwise hide their appearance, to ensure that violations of human rights can be reported to competent authorities.

**Guideline 10: Cooperation and coordination**

States and, where applicable, international and civil society organizations, should consider:

*Frameworks for cooperation*


2. Establishing platforms for cooperation on border governance, including by designating a central authority to facilitate human rights-based coordination of relevant actors at the domestic, bilateral, regional and international levels.

3. Cooperating across borders to promote human rights-based, equitable, dignified, lawful and evidence-based migration and border governance measures. Specifically, consideration should be given to coordinating policies and resources to ensure potential migrants have access to sufficient regular channels for migration, including in response to actual migrant labour needs at all skills levels as well as for family reunification purposes.

*Human rights guarantees*

4. Ensuring that bilateral, regional and international cooperation agreements, arrangements, laws and policies do not have a deleterious effect on the human rights of migrants at borders, in accordance with international human rights law.

5. Suspending any bilateral or regional cooperation agreements, arrangements or mechanisms in which human rights are not explicitly guaranteed, particularly where such

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12 Without prejudice to their obligations under applicable international law and/or relevant provisions of domestic law.

13 The ten core international human rights instruments are: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the International Convention for the Protection of All Persons from Enforced Disappearances, and the Convention on the Rights of Persons with Disabilities.
agreements violate human rights standards including the principle of non-refoulement. Agreements on border governance should be made public and transparent and not be upheld nor entered into with countries unable to demonstrate human rights respect, protection and fulfilment at international borders.

6. Suspending, amending and revising any cooperation arrangements, ship-rider agreements, joint patrols, data-sharing agreements and agreements concerning posting of border and airport liaison officers in extraterritorial jurisdictions that are not in accordance with human rights law and standards.

7. Including explicit human rights guarantees in operational agreements and arrangements, including border or airport liaison officer agreements and cross-border joint operation teams. Specifically, joint operations that violate, or assist in the violation of, human rights law and standards should be terminated with immediate effect.

Multi-stakeholder cooperation

8. Involving a range of relevant stakeholders including national human rights institutions, parliamentarians, international organizations and civil society organisations including migrants’ associations in the creation, amendment and implementation of border governance agreements or arrangements, to ensure human rights compliance.

Data collection and protection

9. Increasing cooperation with other States, as well as other relevant actors, including international organizations and civil society organizations, to collect and exchange data and information relevant to the human rights-based governance of migration at international borders.

10. Standardizing the collection and analysis of data on border governance, including on regular and irregular border crossings, smuggling of migrants and trafficking of persons, instances of deaths of migrants attempting to approach and/or cross borders, and complaints of discrimination, violence and abuse at international borders.

11. Including explicit data protection guarantees in information sharing and exchange agreements between States and within States, including through establishing ‘firewalls’ between immigration enforcement and public services.

Monitoring and accountability

12. Developing and implementing independent monitoring mechanisms to apply to all border authorities involved in border control operations that are carried out jointly with other States and other relevant entities.
Sixty-ninth session
Item 69 (b) of the provisional agenda*

Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights, including ways and means to promote the human rights of migrants

Report of the Secretary-General

Summary

The present report is submitted pursuant to General Assembly resolution 68/179. In that resolution, the Assembly requested the Secretary-General to submit at its sixty-ninth session a report on the implementation of the resolution, including an analysis on ways and means to promote and protect the rights of migrant children, particularly in the case of unaccompanied migrant children and children separated from their families.

Written submissions were received from States, intergovernmental organizations and non-governmental organizations in response to a note verbale from the Office of the United Nations High Commissioner for Human Rights on behalf of the Secretary-General requesting information on the implementation of the resolution.

The report contains an analysis of ways and means to promote and protect the human rights of migrant children, including unaccompanied children or those separated from their families, with a focus on the risks faced by adolescents. The report also addresses the challenges to and recent practices in promoting and protecting the human rights of all migrants at international borders.

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* A/69/150.
I. Introduction

1. In its resolution 68/179, the General Assembly requested the Secretary-General to submit at its sixty-ninth session a report on the implementation of the resolution, including an analysis on ways and means to promote and protect the rights of migrant children, particularly in the case of unaccompanied children and children separated from their families. In paragraph 4 (c) of the resolution, the Assembly also requested States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including at ports and airports and at borders and migration checkpoints, and train public officials working in those facilities and in border areas to treat migrants respectfully and in accordance with the law.

2. In response to a note verbale sent by the Office of the United Nations High Commissioner for Human rights (OHCHR) on behalf of the Secretary-General requesting information on the implementation of resolution 68/179, written submissions were received from States and intergovernmental and non-governmental organizations.¹

3. The present report focuses on the human rights challenges faced by unaccompanied adolescents and children separated from their families (sect. II). Section III examines the violations and abuses faced by migrants at international borders and examines recent practices aimed at promoting and protecting their human rights. The final part (sect. IV) contains conclusions and recommendations.

II. Promotion and protection of the human rights of migrant children and adolescents

4. It is estimated that there are 35 million international migrants worldwide under the age of 20, and 11 million between the ages of 15 and 19 years.² However, the lack of homogeneous criteria among countries for collecting statistics and the difficulty of gathering data on migrant children and adolescents in an irregular situation complicate the ability to assemble a more accurate picture of this dimension of migration. Even when data on migratory populations and flows are available, they are not adequately disaggregated and seldom provide any information on their human rights situation.

5. Migrant children and adolescents, in particular those in an irregular situation, are exposed to grave human rights violations and abuses at various points in their journey.

¹ The text of most of the submissions received are available from www.ohchr.org/EN/Issues/Migration/Pages/WSReportGA69.aspx.
A. Normative framework

6. Under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all human beings are entitled to civil, political, economic, social and cultural rights, without discrimination of any kind, including with regard to their migration status.

7. All human rights treaties contain relevant provisions, but the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are of particular relevance. The Convention on the Rights of the Child protects the rights of “every human being below the age of eighteen years” (art. 1), regardless of their status. It lists a number of rights relevant for migrant children and adolescents, such as registration immediately after birth, family reunification, protection from violence and abuse, access to health and education and rest and leisure, protection from exploitation, prohibition of child labour and protection from sexual abuse. It also establishes four overarching principles: non-discrimination; the best interests of the child; the right to survival and development; and the right of the child to express his or her views and to have them taken into account.

8. Under article 3 (1), the best interests of the child shall be a primary consideration in all actions of State or private institutions concerning children. The Committee on the Rights of the Child, at its day of general discussion on the rights of children in the context of international migration, held on 28 September 2012, recommended that States should make clear that the child’s best interests take priority in their legislation, policy and practice, including on migration.

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4 In Argentina, non-discriminatory treatment is guaranteed by law.

5 In Egypt, the principle of the best interests of the child is enshrined in the Constitution.


7 In Mexico, the Immigration Act establishes family unity and the best interests of the child as primary criteria for admission and residence.
9. The Committee on the Rights of the Child, in its general comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, stipulates that States should take all measures necessary to identify the child, carry out tracing activities and appoint a guardian to ensure respect for the child’s best interest (paras. 13 and 21). The Committee also recommends that States ensure that the rights enshrined in the Convention are guaranteed for all children under the State’s jurisdiction, regardless of their migration status (para. 12).

10. States are also called upon to “conduct individual assessments and evaluations of the best interests of the child at all stages of and decisions on any migration process”, “completely cease the detention of children on the basis of their immigration status” and “adopt alternatives to detention”.

11. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families prohibits the confiscation or destruction of identity documents and collective expulsions, and underscores the right of migrants to protection and assistance from consular or diplomatic authorities. It also particularly underscores the rights to education and health of migrants, among others.

12. The International Labour Organization conventions relevant to the situation of migrant workers include the Migration for Employment Convention (Revised), 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). Those two conventions establish rules regarding the equality of treatment of migrant workers in a regular situation with the nationals of the State party and the minimum age for employment, apprenticeship and training. Two additional conventions relate to the protection of the rights of children and work: the Minimum Age Convention, 1973 (No. 138), in which States commit themselves to abolishing child labour and raising the minimum age for employment, and the Worst Forms of Child Labour Convention, 1999 (No. 182), under which States parties are called upon to take measures to prohibit and eliminate the worst forms of child labour, including all forms of slavery, trafficking, debt bondage, prostitution and hazardous work.

13. The international human rights framework notwithstanding, migrant children and adolescents are at high risk of human rights violations and abuses. Migration laws, policies and practices often lack a child-rights approach and disregard the principle of the best interests of the child in decisions relating to migration governance policies on detention, deportation, restrictions on access to basic services and family unification.

B. Human rights challenges

1. Age assessments

14. Under national immigration policies, the lack of documents proving the age of child and adolescent migrants may result in an arbitrary determination. In such cases, States often employ such age assessment procedures as physical

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8 In Germany, the Youth Welfare Office appoints a guardian who represents unaccompanied children in all matters relating to residence and asylum. In Mexico, child protection officers are tasked with protecting the integrity and rights of unaccompanied children.

9 Report of the 2012 day of general discussion, paras. 72, 78 and 79.
examinations, including radiological or other determinations of bone development. However, in addition to being intrusive, such procedures can be inaccurate and therefore inadequate for determining age. Any error in this regard can have a profound impact on the child, depriving her or him of protective measures that are essential for well-being and development.

15. According to the Committee on the Rights of the Child, and reiterated by OHCHR in its study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration (A/HRC/15/29, para. 44), age assessment should be a measure of last resort. If conducted, the assessment should be scientific, safe, fair and child and gender sensitive. It should be carried out by an independent panel of experts or by child protection officials, who “should not only take into account the physical appearance of the individual, but also his or her psychological maturity”. Such assessment should avoid any risk of violating the physical integrity of the child and give due respect to the rights to privacy and dignity. In case of any uncertainty, the child should receive the benefit of the doubt\(^{10}\) and be treated accordingly. The opportunity to appeal against the decision should be ensured.\(^{11}\)

2. Transition to adulthood

16. The established legal threshold of 18 years of age for the application of the protective measures of the Convention on the Rights of the Child does not fully take into account the reality of the transition from childhood to adulthood. Research shows that the cognitive and socio-emotional development of the adolescent continues well beyond the age of 18.\(^{12}\)

17. Depriving adolescents of protection when it may still be needed can render them particularly vulnerable to human rights violations, abuse and exploitation and present significant psychosocial and development challenges at a critical stage of their lives.

18. Children and adolescents experience acute anxiety and fear of detention and uncertainty regarding continuing access to basic services and rights such as education and work. The incentive to pursue education or training is greatly reduced owing to the risk of detention or non-eligibility for education, skills training and work upon reaching the age of majority. Living with such uncertainty and fear of the future affects adolescents’ enjoyment of rights and well-being, in addition to their ability to contribute to society.

19. Accordingly, the protection provided by the provisions of the Convention on the Rights of the Child should not always automatically be withdrawn when a young person turns 18; adequate follow-up, support and transition measures should be considered.\(^{13,14}\)

\(^{10}\) In Malta, in case of doubt regarding the age of an unaccompanied child, it is the usual practice to give the child the benefit of the doubt.

\(^{11}\) Committee on the Rights of the Child, general comment No. 6, para. 31 (a).


\(^{13}\) Report of the 2012 day of general discussion, para. 69.

\(^{14}\) In Norway, municipalities provide care services until unaccompanied children reach the age of 20 years in order to ensure that those granted residence permits are properly settled.
3. Detention

20. In the context of stringent enforcement of border governance owing to rising criminalization, some countries systematically detain migrants on the grounds of irregular entry or stay within their territory. Children and adolescents in an irregular situation often end up in immigration detention as well, sometimes because of their parents’ irregular status.

21. The Convention on the Rights of the Child prescribes that “no child shall be deprived of his or her liberty unlawfully or arbitrarily” (art. 37 (b)). The Committee on the Rights of the Child has recommended that the “detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child … States should expeditiously and completely cease the detention of children on the basis of their migration status.” 15,16

22. The Committee further recommended that “States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life”. 17 Furthermore, the Convention extends to children the right not to be separated from their parents against their will (art. 9 (1)). Some alternatives to detention include release with non-onerous reporting conditions, supervision by non-governmental organizations or referral to shelters. When considering alternatives to detention, authorities should note their impact on the enjoyment of human rights and ensure that they are in line with, among others, the principles of necessity and proportionality. Thus, the individual circumstances of children or adolescents and the impact of these measures on their rights and well-being will need to be assessed.

23. The decision to detain a child or adolescent taken without individual and proper assessment is a matter of serious concern. Administrative and other relevant authorities need to take into consideration appropriate procedural safeguards and due process guarantees.

24. As the Special Rapporteur on the human rights of migrants has noted, research shows that the detention of children and adolescents, even for short periods, can be extremely detrimental to their physical and mental health (A/HRC/20/24, para. 48). 18 Children in immigration detention are often traumatized by the experience and have difficulty understanding why they are being “punished” despite having committed no crime (A/HRC/15/29, para. 51).

25. The conditions of detention, which may include overcrowding, forced separation from family, sharing cells with adults, exposure to sexual abuse and violence and lack of adequate food, have a negative impact, both from a human rights and a developmental perspective. In addition, children in detention are often deprived of access to education, health and play and leisure facilities.

15 Report of the 2012 day of general discussion, para. 78.
16 In Spain, detention of children is prohibited by law. In Estonia, unaccompanied children staying irregularly are not detained, but referred to substitute homes or foster care by the Social Insurance Board.
17 Report of the 2012 day of general discussion, para. 79.
18 OHCHR and others, “Human rights of undocumented adolescents and youth”, p. 9.
26. Article 37 of the Convention on the Rights of the Child establishes that detention of a child shall be used only as a measure of last resort and for the shortest period of time. Children should be treated with humanity and in a manner that takes into account their age-specific needs. They should be held only under conditions that meet the minimum standards of detention, as set out in human rights law. This includes ensuring a child-friendly environment, separation from adults who are not the child’s parents, child protection safeguards and independent monitoring.  

4. Access to economic, social and cultural rights

27. All children are entitled to the enjoyment of their economic, social and cultural rights without distinction, including age or migration status. However, some destination countries provide restricted or no access to services, including education, health, housing and decent work. Such a denial of rights may have a negative impact on children’s physical and mental health and development in the light of their specific psychosocial needs as a vulnerable group.

28. Even when migrant children and adolescents have access to public services, they may be unable to make use of them in practice, especially when they are in an irregular situation, owing to barriers created by fear of detection and deportation; administrative requirements (birth certificate, identity documents, social security number or proof of address); lack of information about their rights and entitlements; and financial and linguistic obstacles.

29. One of the main barriers faced by migrants in an irregular situation is the fear of deportation if they are reported to immigration authorities while seeking public services. Some States require public officials such as health workers or educators to report migrants in an irregular situation to the relevant authorities. Thus, the absence of firewalls between public services and migration authorities is a vital factor in the denial of basic rights (A/68/292, para. 63).

30. Given that human rights are interconnected and interdependent, the denial of one right has a negative impact upon the enjoyment of others. Even when a migrant child or adolescent has the chance to attend school, the lack of access to health care, adequate food, water, sanitation or adequate housing may effectively result, at best, in only a partial enjoyment of the right to education.

Education

31. Primary education should be free, compulsory and available to all children. States are also urged by the Convention on the Rights of the Child (art. 28) and the International Covenant on Economic, Social and Cultural Rights (art. 13) to make secondary and higher education accessible to all. The right to education should be

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19 Report of the 2012 day of general discussion, para. 80.
20 The Republic of Korea has established firewalls between immigration authorities and those providing education, medical treatment and support services to migrants in an irregular situation. Portugal has also established firewalls between educational and health institutions and law enforcement or border authorities.
21 In Portugal and Cyprus, all children, regardless of immigration status, have free access to public education.
enjoyed by all children, including those with irregular status.\textsuperscript{22} Failing to enrol children and adolescent migrants in school will have a life-long impact on their future.

32. The Committee on the Rights of the Child stresses that unaccompanied or separated children, irrespective of status, should have full access to education. They should be registered and assisted to maximize their learning opportunities and should be allowed to enrol in vocational/professional training.\textsuperscript{23}

33. In some countries, migrant children or adolescents in an irregular situation do not have access to public schools; in others, they have access only to primary education. Even in countries in which migrant children or adolescents are legally entitled to education, informal barriers, including lack of appropriate documents for enrolment, high financial costs (fees, uniforms and school materials), lack of information about their entitlements or the admission system and lack of language skills, may effectively curtail their enjoyment of the right to education.

34. Other challenges faced by migrant children and adolescents include xenophobia, hate speech, exclusion and racism at school, lack of firewalls between educators and migration authorities and pressure from families to earn an income or take care of siblings and perform household chores.

35. Access to secondary education is often problematic. Even when access is granted, adolescents may be unable to enrol for training or internships because these may be considered work and are therefore barred to migrants, especially if they are in an irregular situation.\textsuperscript{24} They may also encounter obstacles in taking official exams for lack of appropriate identification documents.

36. Adolescents over 18 years of age face similar challenges in gaining access to professional training or higher education. In addition to administrative barriers, they face legislative and policy impediments because in many countries higher or tertiary education is allowed only for migrants with a regular status. They also face financial barriers such as higher fees as international students, non-eligibility for financial aid or scholarships and inaccessibility of the formal job market to finance their studies. Financial issues are particularly relevant because, upon reaching the age of majority, a young migrant’s entitlement to accommodation, social assistance or other basic services may be withdrawn.

37. The continuous and successive obstacles faced by adolescent migrants and their limited educational and professional prospects (especially for those in an irregular situation) are key factors in their early school dropout rates. This situation is further exacerbated in the case of adolescent girls on account of pervasive gender bias.

\textsuperscript{22} Committee on Economic, Social and Cultural Rights, general comment No. 20, para. 30: “The ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care.”

\textsuperscript{23} Committee on the Rights of the Child, general comment No. 6, paras. 41-42.

\textsuperscript{24} In Spain, undocumented children can engage in internships. In Italy, migrant children can gain access to education and participate in vocational training and gain professional experience. With a view to their individual integration, children in an irregular situation are provided with the opportunity to remain in Italy once they turn 18 for reasons that include study or work.
Health

38. The Convention on the Rights of the Child (art. 24) and the International Covenant on Economic, Social and Cultural Rights (art. 12) entitle migrant children and adolescents to enjoy the highest attainable standard of physical and mental health.\(^{25}\)

39. Migrant children and adolescents are often exposed to traumatic events in their country of origin before departure, abuse and violence during a perilous journey and precarious living conditions and exploitation in destination countries. Consequently, their physical and mental health may be seriously affected. Mental and psychological health concerns of those in detention include depression, anxiety, post-traumatic stress syndrome and self-harm. There have been several instances of death in detention owing to suicide or lack of health services.\(^{26}\) The gender dimensions of physical and mental health require special attention because precarious journeys may be marked by sexual abuse, including rape, and other forms of gender-based violence against young girls and boys.

40. It is often difficult for migrant children and adolescents to have full access to health facilities, goods and services. They face legislative, policy and practical barriers, including prohibition of access owing to nationality or migration status, high service and medical costs, lack of firewalls and information about entitlements, language barriers and exclusion from health insurance and social security systems (A/HRC/15/29, para. 63). This view was echoed at an expert consultation on access to medicines as a fundamental component of the right to health (A/HRC/17/43, para. 34). Absence of culturally sensitive services, including female medical personnel, can deny girls and young women their right to health and medical services.

41. In circumstances in which only “emergency” health care is available for free, children and adolescents often wait until their health deteriorates significantly or rely on self-medication, unlicensed medical services or other unsafe channels. Other issues of concern relate to immunization against preventable diseases, care for victims of sexual violence, HIV and AIDS, reproductive health care and specialist care or continuous services.

42. States are obliged to ensure that all children, regardless of their migration status, have the same access to health as children who are citizens.\(^{27}\) In fact, unaccompanied and separated children may require additional, affirmative care and

\(^{25}\) In Portugal, migrant children have the same entitlements to health-care services as national children. In Argentina and Mexico, national legislation gives equal access to health-care services to migrants in an irregular situation. In Morocco, health services are free for all migrants.


\(^{27}\) The Committee on Economic, Social and Cultural Rights, in paragraph 37 of its general comment No. 19, noted that “all persons, irrespective of their ... immigration status, are entitled to primary and emergency medical care”. In paragraph 34 of general comment No. 14, the Committee underlined that “States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons”. See also Committee on the Rights of the Child, general comment No. 6, para. 46.
support services on account of their separation from family members and the loss, trauma, disruption and violence that they have endured.28

Adequate housing

43. Migrant children and adolescents in an irregular situation face several challenges with regard to the enjoyment of the right to adequate housing. Factors such as restrictions in access to public housing, forced evictions, limited access to the private market because of penalties for providing accommodation to irregular migrants and the lack of affordable housing push migrants in an irregular situation into insecure and low-quality housing, including run-down shanties where they lack the most basic of services.

44. Thus, migrants with irregular status find themselves in situations of great vulnerability. Some fall prey to unscrupulous landlords who charge exorbitant fees in exchange for unsanitary and overcrowded accommodation. Migrants do not report such abusive practices to the authorities for fear of deportation and eviction. If rendered homeless, they are even more vulnerable to xenophobic attacks and other forms of violence, including sexual violence, which particularly affects girls and female adolescents.

45. In some countries children and adolescents are offered accommodation, but their families are not. This results in forced separation, a condition that effectively contravenes the Convention on the Rights of the Child (art. 9). Adolescents, in particular those unaccompanied or separated from their families, may find themselves homeless when excluded from accommodation upon attaining the age of majority.

46. Those children and adolescents who live and work in factories and sweatshops or work as domestic workers are sometimes confined to the premises of their employers, working long hours with little rest. As the Special Rapporteur on the human rights of migrants has observed, they are also at added risk of physical, psychological and sexual abuse (A/HRC/26/35, para. 55), owing to their isolated workplaces.

Decent work

47. Adolescent migrants are entitled to safe and fair working conditions and to full respect of their labour rights according to the international human rights standards29 and instruments and the relevant ILO conventions.

48. Migrants, in particular those in an irregular situation, face several challenges to gaining access to the formal labour market because it is highly restricted, especially for those lacking qualifications or unable to comply with legal and

28 Committee on the Rights of the Child, general comment No. 6, para. 47.
29 Article 7 of the International Covenant on Economic, Social and Cultural rights recognizes “the right of everyone to the enjoyment of just and favourable conditions of work”. The Committee on the Elimination of Racial Discrimination, in paragraph 35 of its general recommendation No. 30, establishes that, “while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights”. The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), in article 2, provides that States parties shall undertake to “pursue a national policy designed to promote … equality of opportunity and treatment in respect of employment and occupation”.


contractual arrangements. Even when qualified, migrants face barriers to the recognition of their degrees and professional experience. In practice, very few migrants are able to obtain authorized employment in the formal labour market.

49. However, migrant adolescents in an irregular situation need to support themselves, and often their families, even if the work offers poor and exploitative conditions. They are exposed to abusive practices (including child labour and servitude), discrimination, salaries below the minimum wage, non-payment of wages, confiscation of passports, unfair dismissal and hazardous working conditions. They may also be exposed to physical and sexual abuse and to illicit activities. Their inability to gain access to redress mechanisms for fear of deportation enhances their vulnerability. Many employers exploit these vulnerabilities and feel no obligation to provide safe and fair working conditions. Gender discrimination adds an additional layer of vulnerability.

5. **Gender equality**

50. Migration can be an empowering experience for girls and adolescents, given that it exposes them to new horizons and possibilities. It can, however, also put them at risk of human rights violations and abuses. They may experience barriers to gaining access to their rights more acutely owing to gender discrimination and prescribed roles. Education of boys is often prioritized over that of girls in migrant communities and sometimes even by destination countries. Girls are also affected by their limited access to health services, especially sexual and reproductive health care.

51. Girls face additional risks owing to their limited access to employment. They often work in sectors that are largely unregulated, such as agriculture, sweatshops, the entertainment and sex industry or domestic work, with poor working conditions and the risk of exploitation and abuse. Migrant female adolescents routinely receive lower salaries than migrant men and native-born women.

52. Adolescent girls are also at particular risk when their migration status depends on their employer or spouse. They may be vulnerable to exploitation and abuse by their employer and to domestic violence by their spouse. They may also fear losing their migration status if the relationship breaks down.

6. **Xenophobia**

53. Human rights violations and abuses are often linked to discriminatory laws and practices and to attitudes of prejudice and xenophobia. Xenophobia can often manifest as indirect discrimination, whereby laws, policies or practices that appear to be neutral have a disproportionate impact on particular groups.

30 In the United Arab Emirates, programmes have been implemented to inform employees of their labour rights and duties and the procedures to follow in case of abuse.

31 Committee on the Elimination of Discrimination against Women, general recommendation No. 26, para. 15.

32 In Ireland, migrant victims of domestic violence can retain their residency in cases where the renewal of the immigration permission is dependent on the abuser who may be an employer or a spouse.
54. Attitudes that criminalize migrants and blame them for criminal acts, terrorism and economic hardships lead to hate crimes and encourage further restrictions on their economic, social and cultural rights.

55. Children and adolescents are at particular risk of xenophobia at school, having a negative impact on their education and health, including their mental health.

### III. Human rights at international borders

56. International migration, in particular irregular migration, is described by some States as a threat to national security (A/HRC/20/24, para. 8). States therefore give primacy to security concerns and to preventing the arrival of migrants at international borders. The Special Rapporteur on the human rights of migrants has pointed out that this perspective is at odds with a human rights-based approach that sees migrants first and foremost as human beings and as holders of rights rather than as a security threat (A/HRC/23/46, para. 31).

57. Prompted solely by considerations of national security, border governance without human rights safeguards can lead to human rights violations and a breach of international principles such as non-refoulement. Border governance often takes place in an environment that lacks transparency and accountability, contributing in turn to conditions of impunity and to the increased vulnerability of migrants. Some States mistakenly consider border areas as international zones or excised territory (such as airports, land entry points and islands off the coast of the mainland), where they can act as though they were not bound by legal regimes or their human rights obligations.

58. However, zones of exclusion from the rule of law and international human rights obligations at international borders cannot be lawfully sustained. States are bound under international human rights law to apply this framework to all human beings in all areas under their jurisdiction or effective control, including migrants.

59. The Special Rapporteur on the human rights of migrants (A/HRC/20/24, para. 13) and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families have clearly stated that the crossing of a national border in an unauthorized manner or overstaying a permit of stay does not constitute

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33 In Spain, an observatory against racism and xenophobia has been created, with one of its projects focusing on preventing and combating racism and xenophobia in schools.

34 For the purposes of the present report, the term “international borders” is understood broadly as the politically defined boundaries separating territory or maritime zones between political entities and to the areas where political entities exercise border governance measures in their territory or extraterritorially (such areas include land checkpoints, border posts at train stations, ports and airports, immigration and transit zones, the high seas and so-called “no-man’s land” between border posts, in addition to embassies and consulates).


36 For the international legal instruments of relevance to migration and human rights, see footnote 3 above.

37 General comment No. 2, para. 24.
a crime. Irregular entry and stay is not properly defined as a crime against persons or property, nor against national security. It may in some circumstances constitute an administrative offence, but it does not deprive migrants of their human rights entitlements. The Working Group on Arbitrary Detention has also stated that “immigrants in irregular situations should not be qualified or treated as criminals and be viewed only from the perspective of national security” (A/HRC/10/21, para. 68).

60. Increased border surveillance and securitization, together with a drastic reduction of avenues for legal migration, force migrants to seek alternatives. To enter destination countries, they are often compelled to travel routes using unsafe means of transport and relying on smugglers; sometimes, they fall prey to traffickers. Consequently, they are susceptible to human rights abuses and violations, including exploitation, trafficking, ill-treatment and sexual violence. States have an obligation to prevent, investigate and punish those responsible for these violations, provide protection to the vulnerable and remedies to those harmed.

A. Human rights challenges

61. Thousands of migrants tragically die every year trying to cross international borders. They are variously victims of the use of lethal or excessive force by border authorities, the violence of criminal gangs, push-back or interception operations, forced disappearances, refusal of vessels to rescue them when in distress, extreme conditions of travel (such as crossing deserts on foot) or fatal accidents, including the sinking of vessels.

62. If they do manage to reach an international border, migrants often endure ill-treatment at the hands of border officials, for example by the disproportionate use of force to prevent entry or when carrying out a forced return. Women and children are at particular risk of diverse forms of violence, including sexual violence. The border governance malpractices of States, sometimes under the rubric of migration governance, include arbitrary and systematic detention of migrants, ill-treatment, arbitrary and collective expulsions (including refoulement), lack of due process guarantees or procedural safeguards, discrimination and lack of humanitarian assistance which, in situations of humanitarian distress, have been seen to lead even to loss of life.

63. The systematic and arbitrary detention of migrants in an irregular situation for processing migration formalities is increasingly reported. Reports state that detention of migrants has a detrimental effect on their physical and mental health, and prolonged detention has been found to exacerbate the adverse effects of detention (A/HRC/20/24, para. 48). The harm caused by detention is even greater for some groups, including families, children and victims of trafficking or sexual violence or torture.

38 Consular officials of El Salvador and Guatemala assist in the search for missing migrants. Some missing migrants have been located and the remains of others identified.

39 Several countries, including Greece, Ireland, Lebanon and Malta, provide human rights training in the context of border control and migration.

40 In Italy, the Praesidium project provides legal counselling for migrants, identifies vulnerable groups and monitors reception procedures.
64. The international legal framework establishes that detention should be prescribed by law and necessary, reasonable and proportional (A/HRC/20/24, para. 9). The possibility of regular and timely judicial reviews that afford opportunities for release should be provided. The General Assembly, in its resolution 63/184, called upon all States to adopt, where applicable, alternative measures to detention. The Working Group on Arbitrary Detention has also stated that alternatives to detention of migrants in an irregular situation should be sought whenever possible (A/HRC/10/21, para. 67) and the Committee on the Rights of the Child has recommended that immigration detention of children should cease.41

65. Even where detainees under criminal law enjoy human rights guarantees and safeguards, migrants in administrative detention centres are often deprived of them. They have rare or limited access to information on the reasons for their detention, consular assistance,42,43 family contact, interpretation services, legal advice, individual and appropriate assessment of their cases, possibilities of legal review44 and access to remedies or independent decision-making bodies. The Working Group on Arbitrary Detention has adopted a list of guarantees for immigrants and asylum seekers in detention (E/CN.4/2000/4, annex II).

66. Conditions of detention in border areas are also of concern. Reports have pointed out shortcomings, including lack of medical care, insufficient and poor-quality food, poor sanitary facilities, overcrowding and lack of separate-sex facilities. Migrants in detention are also victims of ill-treatment, sexual abuse45 and other violence at the hands of border personnel or other detainees. Lack of monitoring of the conditions of detention, the behaviour of some border personnel and the lack of complaint mechanisms aggravate the plight of migrants in detention.

67. Every migrant is entitled to an individual and proper assessment of her or his circumstances by a competent official, including protection needs and human rights and other considerations, in addition to reasons for entry. However, migrants often endure collective expulsions and forced returns, which are arbitrary and lead to further multiple human rights violations. They violate the right to challenge the decision of expulsion, to have an individual determination of the case, and other procedural safeguards and due process guarantees.46 The expulsion or forced return of migrants who fear torture or ill-treatment or other human rights violations or of

41 Report of the 2012 day of general discussion, para. 78.
42 In contravention of article 36 of the Vienna Convention on Consular Relations.
43 Guatemala, El Salvador, Honduras, Nicaragua and the Dominican Republic concluded a memorandum of understanding with the objective of establishing a network to provide consular protection in Mexico. This network shares consular protection programmes for migrants during their transit and stay in Mexico.
44 In Malta, migrants in an irregular situation are provided with a pamphlet informing them of their rights, including the possibility of challenging removal orders and filing an asylum application.
45 The Special Rapporteur on violence against women, its causes and consequences, stated that “cases of custodial rape and other forms of sexual violence against undocumented immigrant women detained for deportation have been reported” (E/CN.4/2000/68, para. 66) and that “even if they are victimized, however, these undocumented migrants continue to be classified as criminals because of their immigration status and attendant offences which they may have committed” (ibid., para. 44).
46 Human Rights Committee, general comment No. 15, para. 10.
asylum seekers who fear persecution can also result in a violation of the principle of non-refoulement.47

68. Interception practices, where groups of migrants are pushed back to countries of origin or transit, can be arbitrary and lead to human rights violations, including the principle of non-refoulement.48 Such practices fail to address the protection needs of migrants, put their lives at further risk and disregard the humanitarian assistance needs of migrants who may have been on perilous journeys49 for a considerable time.

69. Some destination countries have established return and readmission agreements with countries of origin and transit, with the objective of facilitating the rapid expulsion of migrants in an irregular situation and asylum seekers whose claims have been rejected. Such agreements often do not include human rights guarantees and may lead to situations of serial refoulement, given that they do not include mechanisms to monitor the effectiveness of the protection provided or the human rights guarantees in the countries of return.

70. Some border personnel confiscate migrants’ personal property such as identity documents, money and mobile phones without returning them when the migrants are expelled. Without those documents, migrants may be at a greater risk of further detention, be unable to contact relatives or lack the means to begin the return journey.

71. Migrants are also vulnerable to acts of exploitation, kidnapping, extortion, violence and killing by gangs and traffickers. However, they often do not report such abuses to the authorities for fear of reprisals from those individuals or because authorities may be complicit with traffickers. Thus, some border zones are zones of impunity.

B. Principles and guidelines

72. To address these and other human rights violations faced by migrants at international borders and the gaps in the effective enjoyment of their human rights, OHCHR has prepared a set of recommended principles and guidelines on human rights at international borders.50 Deriving from core international human rights instruments, the principles and guidelines are offered primarily to States to support them in fulfilling their border governance obligations in accordance with international human rights law and other relevant standards. They are also recommended to other relevant stakeholders.


48 Italy has engaged to abandon “push-back” practices and has strongly committed itself to search and rescue activities at sea through its Mare Nostrum rescue operation, which began following the sinking of a ship off the island of Lampedusa in 2013 in which hundreds of migrants lost their lives.

49 Colombia has established offices in border areas where, in cooperation with the International Committee of the Red Cross, they provide humanitarian assistance to vulnerable returned migrants. El Salvador has established a reintegration of returned migrants programme to provide assistance in the reintegration of returned girls, boys and adolescents.

50 The text will shortly be available from www.ohchr.org/EN/Issues/Migration/Pages/WSReportGA69.aspx.
73. The principles establish the primacy of human rights in migration governance, which includes the duty to respect, protect and fulfil human rights wherever jurisdiction or effective control is exercised, including extraterritorially, the right to due process and the principle of the best interests of the child. They also recall that border governance measures must not be discriminatory and the obligation to provide assistance and protection from harm, in particular by respecting the non-refoulement principle, the prohibition of arbitrary and collective expulsions, the need to consider the individual circumstances of migrants and the entitlement to access justice and remedies for the human rights violations or abuses endured.

74. The guidelines stress the need to promote and protect human rights in the context of border governance and to include those rights in national legislation, international agreements and capacity-building activities. They also offer direction on how to implement human rights obligations in the different operations of border governance: rescue and interception, assistance, screening and interviewing, identification and referral, detention, return and removal.

IV. Conclusions and recommendations

A. Conclusions

75. The international human rights framework designed to provide protection to children and adolescents notwithstanding, migrants, in particular those in an irregular situation, are often victims of human rights violations and abuses at the hands of border and law enforcement officials at international borders. They also face multiple human rights violations from other actors, including smugglers and traffickers, in the course of their perilous journeys.

76. They are often detained on account of their irregular status, sometimes in deplorable conditions. Such detentions are a violation of their rights and contravene the principle of the best interests of the child. Detention is seen to have a detrimental impact on the overall health of migrant children and adolescents. These concerns are further aggravated in the context of gender-based discrimination and abuse.

77. In several countries, children and adolescents, especially those in a situation of irregular migration, face enormous restrictions, de jure or de facto, on their access to economic, social and cultural rights. Factors that prevent the enjoyment of their rights include discrimination, xenophobia and the absence of firewalls between service providers and immigration authorities. Of particular concern is the abrupt termination of the protective measures contained in the Convention on the Rights of the Child once children reach the age of 18. This is an age when the transition from childhood to adulthood has not been fully achieved and the cognitive and socio-emotional needs that require protection in line with the Convention may not have been fulfilled.

78. Destination countries often presumptively view migrants, especially those in an irregular situation, as security threats. Migrants routinely experience discrimination, systematic and arbitrary detention, ill-treatment, dangerous interception practices, unlawful profiling, collective expulsions and forced returns. The circumstances of and reasons for their entry into the country
(including protection or other human rights imperatives) are often not properly assessed, with little attention given to procedural safeguards and due process guarantees. A growing number of migrants are also victims of grave abuses at the hands of criminal gangs and traffickers. The gender- and age-related dimensions of these abuses are particularly egregious.

B. Recommendations

79. The Secretary-General welcomes the information received from Member States concerning legislation, regulations and policies to strengthen the protection of the human rights of all migrants and, in that regard:

(a) Encourages States to ratify all relevant international human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child;

(b) Underlines that States have an obligation under the core international human rights instruments to protect the human rights of all individuals under their jurisdiction or effective control, regardless of their nationality or legal status;

(c) Reminds States that the principle of the best interests of the child should guide their legislation, policies and practices relating to children, including in the context of migration and regardless of their status. Children should not be detained, and their rights to liberty and family unity should be respected;

(d) Calls upon States to determine the best interests of unaccompanied children by carrying out an individualized, case-by-case, comprehensive assessment of their status and protection needs. The assessment should be carried out in a child-rights-friendly manner by qualified professionals. Subsequently, a competent guardian should be appointed;

(e) Encourages States to implement the recommendations adopted by the Committee on the Rights of the Child at the 2012 day of general discussion on the rights of all children in the context of international migration;

(f) Calls upon States to provide adequate follow-up and support measures for children/adolescents when they reach 18 years of age, especially for those leaving a care context, by ensuring, among other things, access to regularization of their migration status and reasonable opportunities for completing their education and integrating into the labour market;

(g) Encourages States to establish effective safeguards and firewalls between public service providers and immigration enforcement authorities. Public service institutions should not be required to report to or otherwise share data with immigration authorities;

(h) Calls upon States to respect, protect and fulfil the human rights of all migrants, including through their border governance practices. States should consider applying the recommended principles and guidelines on human rights at international borders prepared by the Office of the United Nations High Commissioner for Human Rights;
(i) Calls upon States to combat xenophobia, racism and discrimination against migrants, including on the basis of gender. States should also refrain from criminalizing migrants in an irregular situation because they have committed no criminal act;

(j) Underlines the right of migrants to individual and proper assessment of their circumstances (including protection needs, human rights and gender considerations) with procedural safeguards and due process guarantees;

(k) Encourages States to implement alternatives to administrative detention guided by human rights considerations. Detention should be a measure of last resort and the reasons clearly defined in law. It should be of limited scope and duration, necessary, proportionate and with the possibility of regular and timely judicial reviews that afford opportunities for release. Detention conditions should comply with human rights obligations and be subject to independent monitoring;

(l) Calls upon States to abstain from carrying out collective expulsions or forced returns. Return and readmission agreements should contain human rights guarantees and respect for the principle of non-refoulement;

(m) Calls upon States to prevent, investigate and punish all human rights violations and abuses experienced by migrants during their journey and at borders. Migrants should be provided with effective and timely access to remedies;

(n) Encourages States to expand the opportunities for regular migration, including for low-skilled workers, taking into account the actual labour needs.
U.S. Support and Assistance for Interdictions, Interceptions and Border Security measures in Mexico, Honduras, and Guatemala undermine access to International Protection

Introduction

Over the last few years, and particularly over the last several months, the migratory policies of Mexico, Guatemala, and Honduras have undergone rapid changes in response to burgeoning numbers of citizens of countries in the Northern Triangle of Central America, particularly children and families, attempting to leave their countries of origin. Many of those attempting this journey express fear of remaining in their homelands stemming from record high incidences of violence, increasing disappearances, control of territory by organized crime, and the inability or unwillingness of State actors to address the needs of those targeted for abuse and persecution. These migratory policies, including interceptions and turn-backs of persons seeking to leave their country of origin and interdictions of people in Mexico, have been supported, funded and praised by the United States Government which has aggressively pursued the externalization of its borders to broadly restrict the arrival of Hondurans, Salvadorans, and Guatemalans, including those with protection needs, to U.S. territory.

Migratory policies implemented by the implicated States - the United States, Mexico, Guatemala, and Honduras - address the transnational movement of people, including children and families. The sovereign power of States to regulate transnational flows of people is limited by respect for migrants’ and refugees’ rights. The Inter-American Court for Human Rights has emphasized in advisory opinions and jurisprudence that the goals of migratory policies should take into account respect for human rights. Likewise, migratory policies should be implemented in a manner that respects and guarantees human rights. The actions taken by

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1 This chapter was prepared by the Jesuit Conference of the United States and the Washington Office on Latin America (WOLA).
3 According to the IAHCR, “the migratory policy of a State includes any institutional act, measure or omission (laws, decrees, resolutions, directives, administrative acts, etc.) that refers to the entry, departure or residence of national or foreign persons in its territory”. CIDH, AO. 18, (September 17, 2003). Par 163
4 CIDH, OC. 18 (September 17, 2003). Juridical Condition and Rights of the Undocumented Migrants, par. 129.
States must ensure migrants’ and refugees’ rights to humane treatment, personal liberty, due process, and an effective judicial remedy. These policies and actions must also respect the principles of equality before the law, equal-protection before the law and non-discrimination, foundational *jus cogens* principles of international law.⁵

Likewise, even as children enjoy the same rights as adults, they also require special protection, because of their heightened vulnerability.⁶ The Court finds that when designing, adopting and implementing immigration control policies for persons under the age of 18 years, States must accord priority to a human rights-based approach, from a crosscutting perspective that takes into consideration the rights of the child and, in particular, the protection and comprehensive development of the child following four guiding principles: a) non-discrimination; b) the best interests of the child; c) the respect for the right to life, survival and development; d) the respect for the opinion of the child in any procedure that affects her or him in order to ensure the child’s participation.⁷

In its December 2013 report on *Human Rights of Migrants and other Persons in The Context of Human Mobility in Mexico*, the Inter-American Commission established that the protection that the authorities afford to migrants from other countries who are either living in or are in transit through its territory must guarantee that immigration policies, laws and practices are based on a real and not purely formalistic approach to human rights. Thus, any immigration policy, law or practice should be premised on certain basic principles: 1) the right to migrate is a human right; 2) all persons in a state of human mobility—international immigrants, refugees, asylum seekers, persons applying for additional protection, stateless persons, victims and survivors of trafficking in persons, the internally displaced and domestic migrants—are the titulaires of human rights; 3) all the measures taken by States must be premised on a recognition of the human dignity of persons in a state of human mobility; and 4) in keeping with the above, all the measures that States take must be calculated to respect and ensure the human rights of persons in human mobility.⁸

It is in light of this framework that the actions of the government of the United States, which appears intent on externalizing its border to specifically prevent the arrival of Central Americans to U.S. territory,⁹ despite cognizable international protection concerns among this migratory population, should be evaluated. Even as civil society organizations in Mexico,  

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⁸ ICHR, Human Rights of Migrant and other Persons in The Context of Human Mobility in Mexico, (December 20, 2013), OEA/Ser.L/VII. Doc.48/13. Par.402
⁹ “The Guatemalan border with Chiapas, Mexico, is now our Southern border,” Assistant Secretary of Homeland Security for International Affairs Alan Bersin, in remarks at the Border Issues Conference hosted by U.S. Mexico Chamber of Commerce event, September 19, 2012, celebrating the level of cooperation achieved between DHS and INM. See also Mexico: U.S. Border Patrols’ Newest Hire. Al Jazeera America, http://alj.am/1vw7pVE October 4, 2014
Guatemala and Honduras report substantive concerns about the way in which new and/or intensified migration policies and actions are undermining access to asylum and other forms of international protection, the U.S. energetically partners with regional migration authorities, military units and special operations police. These partnerships take the form of training, equipping and funding law enforcement and military units in Guatemala, Honduras and Mexico that are instrumental in the confinement or deportation of people, often children, families, and asylum seekers who are pursuing access to international protection.

Honduran-Guatemalan border

In June of 2014, three Honduran law enforcement units trained by and supported with funding from the U.S. State Department’s Bureau of International Narcotics and Law Enforcement (INL) launched an operation to intercept children and families attempting to cross the border from Honduras into Guatemala. These Special Forces units (the Group of Special Tactical Operations (GOET), the Comprehensive Troup of Government Response for Special Security (TIGRES) and the Transnational Unit of Criminal Investigations (UTIC)) joined forces for two tactical operations, Operation Rescue Angel and Operation Coyote 1. All three units received equipment and special training from U.S. Border Patrol, U.S. Immigration and Customs Enforcement or other U.S. migration control and law enforcement entities.10

While the ostensible priority of these operations was to arrest smugglers and “rescue” children, in point of fact, civil society and press report actions by these units that, far from saving children, have entailed forcing children back to the situations they are attempting to escape.

Reports abound that the units routinely intercept and deny access to Guatemalan territory to people who express they are in flight for their lives. Civil society reports that there is no screening to see if children and families are fleeing to escape targeted violence, persecution, torture or are the victims of trafficking or other exploitation or abuse. Children intercepted by these units have been transported to San Pedro Sula, and may be held for 24 to 48 hours, but again, never receive any screening or follow-up visits from DINAF, the recently created Honduran child welfare agency, to verify their well-being or security situation after they are released.

This has been verified by civil society in Honduras, as well as by the governments of Honduras and the United States. For instance, in an official statement, the White House Press Secretary

reported: Honduran special operations police, with training and funding assistance from INL and CBP, stood up Operation “Rescue Angels” along the Honduran-Guatemalan border. The operation is designed to increase apprehensions of migrants attempting to illegally emigrate to the United States, often via smuggling organizations. The unit has rescued at least 90 children attempting to cross the border with smuggling organizations since the operation began on June 20 and turned them over to the appropriate Honduran authorities.\textsuperscript{11}

Children, both those traveling without and those traveling with their parent or guardian, as well as Honduran adults without government-issued identification, have been prohibited by Honduran authorities from crossing the border into Guatemala.\textsuperscript{12} Some media reports also indicate that the units are engaged in cutting off access to Nicaragua.\textsuperscript{13} This October 2014, the \textit{Los Angeles Times} reported on the continued operations by Honduran law enforcement entities on the border with Guatemala. The article described the case of one mother and child who were attempting to leave because of fear of gang recruitment and violence. They attempted to leave Honduras on two occasions and both times articulated their fear of violence at the hands of organized crime. The first time the mother attempted to cross into Guatemala with her son, she was told she had to seek a letter of permission from her child’s father, but when she returned to the border with just such a letter in hand, she was again denied the right to leave Honduras and forced to return to San Pedro Sula.”\textsuperscript{14}

\textbf{Guatemalan-Mexico border}

Another interception program, called “Paso Seguro”, is underway in Guatemala via an agreement between the Mexican and Guatemalan governments. This program has also been encouraged with funding, tactical training and equipment from the U.S. government, on the Guatemalan side of the border principally from the U.S. Department of Defense’s Southern Command. According to an official U.S. government statement, the interdiction part of this program has been in place since July 7th and is “a welcome step towards improving Mexico’s

\textsuperscript{11}U.S. Response to Central American Migrants at Southwest Border, The White House, Office of Press Secretary, \url{http://iipdigital.usembassy.gov/st/english/texttrans/2014/08/20140802304773.html?CP.rss=true#ixzz3GdKG8ic0} August 1, 2014
\textsuperscript{12}“Honduras amuralla con militares las fronteras hacia Guatemala” \textit{La Tribuna} \url{http://www.latribuna.hn/2014/07/29/honduras-amuralla-con-militares-las-fronteras-hacia-guatemala/} July 29, 2014.
ability to exercise greater control along its border with Guatemala.”¹⁵ This program has involved the construction of five comprehensive border transit care centers primarily used to detain migrants until they are repatriated, as well as improved coordination between the eight federal agencies related to migration, including the Guatemalan army and navy.¹⁶

Again, none of the training or funding from the U.S. Government has been aimed at ensuring that individuals who are intercepted are screened for protection concerns, nor have any intercepted individuals been referred to Mexico’s asylum process. The strategic priority of this operation is to “stem the flow” of migrants without concern or regard for the implications of cutting off territorial access to asylum for those displaced by violence.

Mexico

Mexico’s enhanced immigration controls

Starting in July 2014, the Mexican government significantly increased its efforts to intercept migrants traveling through its territory. On July 7, 2014, Mexican President Peña Nieto announced the Southern Border Program (Programa Frontera Sur) and established a new Coordination Office for Comprehensive Attention for Migration on the Southern Border (Coordinación de Atención Integral de la Migración en la Frontera Sur), led by former Mexican Senator Humberto Mayans.¹⁷

While there is no public document that lays out Mexico’s Southern Border Program, Peña Nieto has said that the program will include elements such as humanitarian assistance; an expanded temporary visa program for visitors from Guatemala, Belize, Honduras, and El Salvador to work in Mexico’s four southern border states; and improvements in the conditions in migrant detention centers and shelters for children. It will also include a greater focus on the biometric registration of migrants and enhanced intelligence operations to attempt to break up criminal groups that abuse migrants. Despite Peña Nieto’s statements about humanitarian assistance, the thrust of the program and its impact has been chiefly seen through increases in interdictions and repatriations of migrants, often without any of the safeguards required by Mexico’s domestic and international legal commitments to ensure people in need of humanitarian protection are identified and given meaningful access to asylum or another form of complementary protection.

¹⁶Report from Fr. Rafael Moreno, Jesuit Migration Mexico, 25 de Julio 2014
When the Coordination Office for Comprehensive Attention for Migration on the Southern Border was created, the Mexican government announced that part of the efforts would also include establishing Comprehensive Attention Centers for Border Transit (Centros de Atención Integral al Tránsito Fronterizo (CAITF), in order to better coordinate amongst Mexican agencies processing of persons and their belongings at the border between Guatemala and Belize. These centers may operate at the official ports of entry or at other locations.18

As of August 2014, the Mexican government has also prohibited migrants from riding on cargo trains to travel north to the U.S.-Mexico border through enforcement operations, increasing the speed of the train, and physical barriers in several areas that impede migrants from climbing aboard. Reports from migrant shelters also suggest that additional mobile checkpoints have been set up along the main highways headed north. New checkpoints have been established in Tehuantepec, Oaxaca, and in Veracruz State. In early September, elements of Mexico’s new Gendarmerie—a new 5,000-strong division of Mexico’s Federal Police with military and police training—also arrived in the southern border state of Chiapas, complementing the 400 Federal Police deployed there in 2013.19 Initial reports also indicate that the Gendarmerie have been deployed along Mexico’s Northern Border with the U.S. to intercept migrants, helping to explain reports by deported migrants and media of turn-backs at the U.S./Mexico border followed by deportations by Mexican authorities.20

This recent increase in enforcement builds upon efforts by the administration of Peña Nieto (and by former Mexican president Felipe Calderon) to have greater control by security forces of roads and terrain inland from Mexico’s southern border, principally through checkpoints, patrols, and surveillance.21 The augmented security presence has been complemented by efforts to improve documentation and record-keeping about border-crossers at the official ports of entry.

Increased immigration control in Mexico is evident in the number of migrants that have been apprehended and repatriated by Mexican officials in 2014. In October 2014, Mexico’s National Migration Institute (INM) reported that between January and August 2014 Mexico detained and repatriated to their countries of origin 63,092 Central American migrants. Of these, 12,038 were minors. This is significantly higher than the first eight months of 2013, where a total of 49,201 Central American migrants were repatriated, including 5,097 minors. In fact, in the first

18 Diario Oficial de la Federación, “Acuerdo por el que se instruye la constitución de los Centros de Atención Integral al Tránsito Fronterizo (CAITF)”, July 8, 2014.
20 “Deportan a 5 mil ninos a Honduras.” Hilo Directo http://hilodirecto.com.mx/deportan-a-5-mil-ninos-a-honduras/, June 19, 2014 (describing the apprehension and deportation of over 300 Honduran youth, intercepted as they attempted to cross the Border between Mexico and the United States)
21 For example, field research conducted by the Washington Office on Latin America found that in the 140 mile stretch between Tapachula and Tonalá in Chiapas, there were 11 checkpoints, each manned by one or more of the following agencies: Federal Police, Federal Ministerial Police, Chiapas State Police, Army, Navy, National Migration Institute, Customs, Federal Attorney General’s Office, Chiapas State Attorney General’s Office. http://www.wola.org/news/new_wola_report_mexicos_other_border
eight months of 2014 Mexico has repatriated more Central American children than it did for all of 2013 (8,446).^{22}

**U.S. support of Mexico’s immigration controls**

The United States government has been a significant supporter of the Mexican government’s border security operations. One of the “four pillars” of U.S. security assistance to Mexico through the Mérida Initiative is support to “create a 21st century border”, (pillar 3). This assistance is to “[fa]cilitate legitimate commerce and movement of people while curtailing the illicit flow of drugs, people, arms, and cash.”^{23} While this assistance has primarily focused on Mexico’s Northern border with the United States, much of the assistance currently being allocated will be delivered to Mexico’s Southern border. This shift in assistance also reflects stated priorities of U.S. foreign policy. In his testimony before the Senate Appropriations Committee on July 10, 2014, Counselor of the Department of State, Ambassador Thomas A. Shannon, affirmed that one of the five strategies developed to “stem the flow of migrants, screen them properly for international protection concerns, and then begin timely repatriation,” is to improve “the ability of Mexico and Guatemala to interdict migrants before they cross into Mexico and enter the established smuggling routes that move the migrants to our border.”^{24}

While a specific breakdown of all U.S. assistance provided to Mexico’s southern border area is not available, the following information, based on research conducted by the Washington Office on Latin America and included in the report, *Mexico’s Other Border: Security, Migration, and the Humanitarian Crisis at the line with Central America*, is an estimate of this assistance. This estimate does not include the additional $86.6 million in assistance through the Merida Initiative that the Bureau of International Narcotics and Law Enforcement (INL) announced in June 2014 for additional non-intrusive inspection equipment and communication technologies.

As of February 2014, the State Department reported that the Mérida Initiative has allocated $112 million in technology for border security, “including non-intrusive inspection equipment, improvement of infrastructure, and personnel training in the areas of border security.” An unknown, likely smaller, additional amount—much of it for Mexican Navy/Marine facilities and training—has come from the Defense Department’s counter-drug budget.

To date, U.S. assistance at the southern border includes, but is not limited to the following.

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^{22} Secretaría de Gobernación, “Eventos de extranjeros devueltos por la autoridad migratoria mexicana, según continente, país de nacionalidad y tipo de resolución, 2014” http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros_presentados_y_devueltos


Non-intrusive scanning equipment, like portable VACIS scanners, x-ray vans, and CT-30 contraband detection kits.

Biometric kiosks and technology.

Facilities construction for the INM, Customs, Marines, and Federal Police.

Training of above agencies, plus Chiapas State Police and state prosecutors.

Intelligence-sharing on drug shipments, terrorist risks, and organized-crime groups. Maintenance of a small ICE Homeland Security Investigations office “to build capacity in the identification of aliens from countries of national security concern who are released from the Tapachula detention facility.”

“Patrol boats, night vision equipment, communications equipment, maritime sensors, and associated training” from the U.S. Defense Department to improve coastal capabilities.

Donated helicopters, including UH-1H Huey and SAC-333 models, are occasionally stationed near the southern border in Tapachula, Chiapas; Ciudad del Carmen, Campeche; and Chetumal, Quintana Roo.


A “Document Verification for Travelers” program for the INM that, according to a State Department International Narcotics and Law Enforcement Affairs Bureau document, “provides technical assistance, equipment, hardware and other services,” like construction assistance, for an INM document and biometric laboratory and “a document issuance point at various Mexican entry points (beginning on southern border with Guatemala).” Nationwide, the program cost an estimated US$5 million in 2011 and US$5 million in 2012. Another US$6 million in those years (5 in 2011 and 1 in 2012) went to improve database management, biometric recording and comparison, document archives and

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25 U.S. Immigration and Customs Enforcement, "Meeting with Secretary Alejandro Poire Mexico's Secretariat of Governance (SEGOB)."

26 U.S. Congress, Senate, Committee on Armed Services, Department of Defense Plans and Programs Relating to Counterterrorism, Counternarcotics, and Building Partnership Capacity.


other services at Mexican entry points and internal checkpoints throughout the country.30

- Training on interdictions, operation of checkpoints, and capacity building by U.S. Customs and Border Protection.

Multiple U.S. agencies have been involved in providing training to state and federal Mexican officials to identify potential human traffickers and victims of human trafficking and other related crimes.31 Apart from these efforts, which are minimal in comparison to the prodigious support for immigration control measures including interdictions, checkpoints, detention and deportation, it is unclear whether any additional U.S.-provided training or funding has been directed at ensuring that migrants and refugees who are intercepted are screened for protection concerns. Tellingly, the Mexican Government’s Mexican Commission of Aid to Refugees (COMAR) has little presence along the 3,141 kilometer-long (1,952 mile-long) southern Mexican border, with only three offices in the region. Compared to the substantial resources at the disposal of INM and other Mexican law enforcement entities involved in the interdiction, apprehension and deportation of foreigners, COMAR’s presence and capability is anemic.

Screening for international protection in Mexico

Despite Mexico’s stated commitment to refugee protection within its domestic legal framework, particularly the 2011 Mexican Asylum and Subsidiary Protection Law, the asylum system in Mexico can best be described as inadequate to meet the burgeoning needs in the region. Under the Mexican asylum law, Mexico committed itself to offer asylum or other forms of humanitarian relief to persons forced to migrate to Mexico “because of circumstances which have emerged in their country of origin or as a result of activities carried out while in the national territory, their well-founded fear of being persecuted for reasons of race, religion, nationality, gender, membership in a particular social group or political opinion, or that their lives, safety or freedom could be threatened by generalized violence, foreign aggression,

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internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

This statutory language incorporates both the 1951 Geneva Convention Refugee Definition and the understanding of refugee articulated within the 1984 Cartagena Declaration. Importantly, articles 15, 16 and 20 of the Mexican asylum law require that every foreigner subjected to an immigration control process must be informed about the possibility of claiming asylum in Mexico. This obligation to provide information about humanitarian relief rests with COMAR or the migration officials present when the foreigners are detained.

While the letter of the Mexican Asylum Law is clear, it has yet to be fully implemented and many civil society organizations report that the last year has seen significant backsliding in authorities’ acknowledgement of their asylum and international protection obligations. Although Mexican migration authorities and other enforcement agencies are increasingly receiving trainings on how to detect migrants who may have been victims of crimes, including human trafficking, and affirmatively inform migrants of their right to seek protections under Mexican law, these trainings frequently fail to be reflected in practice. Further, U.S. Government interdiction and removal trainings implemented by U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) do not include reference to Mexican authorities’ obligations to affirmatively inform Central Americans of their right to seek asylum in Mexico. Mexico is routinely deporting children and families who would merit international protection. In fact, independent Fulbright researcher Elizabeth Kennedy reported that out of over 700 interviews with children deported to El Salvador and 300 Salvadoran adults, only one child reported having been referred to the COMAR for screening and evaluation.

Between 2002 and 2012, the Mexican state granted refugee status to only 1221 foreign-born nationals. In 2013, Mexico only accepted 23.5 percent of the requests for asylum made by Guatemalans, Salvadorans, and Hondurans. Not including the temporary border work visas available for Guatemalans and Belizeans, Mexico only granted 9028 new temporary or permanent residency permits to Central Americans in 2013 and only 142 of these were for humanitarian reasons.

Among the conclusions of the December 2013 report of the Inter-American Commission was the finding that despite progressive legislation which formally guarantees the human rights of migrants and the rights of asylum seekers and refugees, “rather than improve, the situation of migrants in an irregular situation in Mexico has become much worse as the years have passed. And yet, the State has not adopted a comprehensive public policy geared to preventing,

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punishing and redressing the acts of violence and discrimination of which migrants in Mexico are victims and to protecting them from that violence and discrimination. The measures the State is taking notwithstanding, the violence and discrimination that migrants in Mexico encounter is very troubling."\(^{35}\)

These findings echo concerns raised by civil society organizations in Honduras, Guatemala and El Salvador who report that many of those deported by Mexico in recent months have cognizable claims for asylum or other forms of humanitarian relief. While Mexico, with U.S. assistance, has rapidly increased its capacity to apprehend, detain and deport Central American migrants, these immigration control procedures are rarely accompanied by the sort of screenings and status determinations required by Mexico’s domestic legal infrastructure or international law \textit{jus cogens} and treaty obligations.

Routine screenings to determine if an individual has a well-founded fear of persecution or torture, or is the victim of human trafficking, are not part of the intake process when Central Americans children and adults are interdicted by Mexican migration authorities or federal police. This is particularly disturbing in light of the fact that civil society organizations and researchers that have interviewed returned migrants have found that many of those interviewed left their countries of origin due to antecedents that gave rise to credible claims for international protection. Many of the accounts documented by civil society organizations and researchers should have, at the very least, triggered a serious evaluation of the migrants’ cases for asylum status or other form of complementary humanitarian relief by Mexican authorities. The \textbf{following cases} are a sample of those collected by researchers and civil society groups working in Honduras and El Salvador from children and families who were deported from Mexico:

1) \textbf{Boy is deported from Mexico to El Salvador despite gang threats, Father is subsequently murdered\(^{36}\)}

A sixteen-year-old Salvadoran boy left El Salvador because he lived in a gang controlled neighborhood, faced daily threats from the gang, and several of his friends and classmates had been killed when they refused to join the gang. Additionally his father was a business owner who had received threats from the gang, and demands that he pay extortion fees, “la renta.” The child was intercepted in Mexico. He was never screened for protection concerns, nor offered the opportunity to apply for asylum. He was simply deported back to El Salvador. Two weeks after his return, his father was murdered by the gang. He lives in fear and extreme vulnerability in his family’s home and is afraid to go out on the street.

2) \textbf{Honduran boy is deported by Mexican authorities twice; Killed after second attempt to seek safety beyond Honduras’ borders\(^{37}\)}

\(^{35}\) IACHR, Human Rights of Migrants and other Persons in the Context of Human Mobility In Mexico, OEA/Ser.L/V/II, Doc.48/13, par. 399

\(^{36}\) Case on file with researcher, Elizabeth Kennedy.

\(^{37}\) Case on file with author, interview with Morgue Director Hector Hernandez, San Pedro Sula
A seventeen-year-old boy journeyed twice to Mexico fleeing threats from a gang in San Pedro Sula, Honduras. On both occasions he was deported without any evaluation of his potential claims for international protection. Not long after the second deportation from Mexico the child was found dead, presumably the victim of the gang that had pursued him.

3) Girl is pursued to be the girlfriend of adult gang leader, witnesses crimes and murder, flees to Mexico and is deported back to Honduras

A seventeen-year-old girl living in a gang-controlled territory in San Pedro Sula became the “love interest” of the chief of the gang that controlled the sector where her family lived. She was at first flattered by the attention and was convinced by the gang leader to move out of her family’s home. The gang leader moved her into a gang house, where she became terrified as she witnessed the gang’s operations as well as the abuse and murder by the gang of one of her friends, another girl her age. Her father helped her flee the gang house and to return to her family’s home. Then the entire family began to receive death threats. Her father sent the girl, her little brother and her mother North. They entered Mexico and sought help from a local NGO to try to acquire a humanitarian visa. Nonetheless, Mexican authorities detained the girl, her brother and mother and, though they clearly expressed their fear of return to authorities, deported them back to Honduras without giving them the option to apply for asylum. The girl and her family now live in fear in their colonia, afraid to leave the house. The children no longer attend school.

4) Mother deported to El Salvador from Mexico after receiving death threats from a gang when she sought justice after her daughter was raped

A family of three, a mother, and her daughters, a 16-year-old and a 2-year-old, were the victims of gang violence and threats in El Salvador. The mother was a business owner, operating a small store out of her home in a territory controlled by a local gang. The gang began demanding that she pay $50 to $100 a month in “renta”. The 16-year-old girl was raped by one of the gang members and she and her mother reported the crime to the police in El Salvador (PNC). Although the police would take no action to arrest the perpetrator, they referred the girl and her family to the Attorney General of the Republic (FGR). The Attorney General took the case but soon after, the girl and her family began to receive death threats from the gang. The mother sent her older daughter on ahead and she was able to reach the United States. Then the mother journeyed north with her 2-year-old. She was intercepted with her 2-year-old daughter in Mexico by Mexican migration authorities. She was never screened for protection concerns nor given the opportunity to apply for humanitarian relief, and was deported back to El Salvador. She continues to live in precarious circumstances, still the subject of threats by the gang and forced to pay exorbitant extortion fees. She only leaves her home to go to church.

38 Case # 1 on file with audio from Radio Progeso, Servicio Jesuita a Migrantes
39 Case on file with researcher, Elizabeth Kennedy, July 29, 2014 interview
5) Mother journeyed to Mexico from El Salvador with her 14-year-old son and her 11-year-old daughter to escape gang violence but all three were summarily returned.\textsuperscript{40} Several years earlier the boy was caught in the crossfire as gangs battled over territory in the urban sector where the family resided. The boy received severe injuries, underwent several surgeries and was unable to attend school for two years. The family then relocated to another neighborhood where they hoped they would find safety. Instead the situation in the new neighborhood proved even worse, with gang violence reaching critical levels and the children approaching prime recruitment age. Although police were present in the neighborhood, they “see nothing.” The mother feared for the lives of her children. The family ventured north to Mexico but was interdicted by authorities who never gave them the opportunity to seek asylum or another form of protection. They have been deported back to the dangerous situation they fled and now never leave their house.

6) 9-year-old girl deported to Honduras by Mexican authorities after fleeing kidnapping ring\textsuperscript{41} A nine-year-old girl journeyed North from Honduras with her aunt because she feared being the victim of a gang involved in the kidnapping of girls in her colonia. Over the last several months, a number of her friends had been kidnapped and held for ransom by the gang that controlled the settlement where she lived, a marginal colonia on the outskirts of San Pedro Sula. Girls whose families were not able to pay the ransom would be found dead and brutalized, a warning to other families to cooperate with the gang’s demands. The gang chose girls carefully and targeted them on their way to or from school. Those with family members living in the United States were particularly targeted because the gang assumed these families had extra resources available through their relatives. The girl’s mother has lived in the U.S. for over eight years and she and her family became increasingly afraid that the gang would come to know she had a U.S. connection. The family decided to send the girl North with her 27-year-old aunt and the aunt’s two children, as her aunt too had experienced gang threats in recent months. The four were interdicted near Palenque, Mexico and, although they attempted to tell their story to Mexican authorities, they were deported without ever having the chance to apply for asylum or other complementary humanitarian protection. The four attempted the journey again but with the same results. The girl now continues to live in fear, and while she is watched closely by her grandmother who accompanies her to and from school each day, the gang threats persist.

U.S. assistance to Mexico has significantly contributed to increasing the Mexican state’s ability to implement the interdiction, detention, and deportation of Central American migrants. The U.S. has continued to pursue this policy despite the above evidence and despite acknowledging

\textsuperscript{40} Case on file with researcher, Elizabeth Kennedy, July 29, 2014 interview

\textsuperscript{41} Case # 2 on file with audio from Radio Progreso, Servicio Jesuita a Migrantes
that Mexico has not established adequate mechanisms for screening migrants for international protection concerns. Providing such assistance in the face of demonstrable disregard for the protection policies required by the 2011 legislation enables practices that undermine Mexico’s domestic laws on the protection of asylum seekers and the human rights of migrants.

**Relevant Law**

In light of the aforementioned facts, we highlight the following relevant law and findings of the Inter-American Human Rights System.

*State authorities are intercepting and interdicting people who have international protection needs, particularly children, and restricting their access to territories where they might receive asylum.*

In the December 2013 report on Mexico, the Inter-American Court mentioned: “*while the principal international and regional instruments recognize one’s right to leave any country of one’s own free will, even one’s own country, in order for this right to materialize States have to take measures to facilitate and guarantee human mobility to all persons. The Commission believes that immigration policies, laws and practices that criminalize migration, or those that take a dual approach—on the one hand recognizing that migrants have human rights, but at the same time regarding them as a threat to national sovereignty or security—contain an inherent contradiction and are at odds with what a human-rights-based immigration policy should be. The prima facie assumption that migrants pose a threat to the national sovereignty and security of States implies a prejudgment that migrants are criminals; it also denies the right of all persons to leave their countries at will and fails to recognize the contributions that migrants make in their countries of destination.*”

Additionally, Article XXVII of the American Declaration provides:

> Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

In interpreting this language, the Commission found that “*the right to seek asylum protected under Article XXVII of the American Declaration encompasses certain substantive and procedural guarantees.*” The IACHR has held that Article XXVII ensures an asylum seeker at a

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42 ICHR, (December 30, 2013) Human Rights of Migrant and other Persons in the Context of Human Mobility in Mexico, (December 20, 2013), OEA/Ser.L/V/II. Doc.48/13. Par.403
minimum a hearing to determine his refugee status.\textsuperscript{44} The Inter-American Commission has further cited to other international organs for basic due process standards relevant to a refugee determination hearing.\textsuperscript{45}

The Commission has stated that Article XXVII would be meaningless if Member States could exclude broad classes of refugee claimants through domestic law without implementing their obligations under Article XXVII and international refugee law.\textsuperscript{46}

In the case of Haitian interdiction, the Commission found that international law has developed to a level at which there is recognition of a right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the Refugee Convention.\textsuperscript{47} In John Doe et al v. Canada, the Commission clarified that “the right to seek asylum requires that a person be heard to see if he or she is at risk of persecution”\textsuperscript{48}—it is the act of hearing the person that implements the most fundamental element of the right to seek asylum—and it was that essential procedural opportunity that was denied to the John Does.\textsuperscript{49} Consequently, the IACHR concludes that Article XXVII provides a baseline of due process for refugee claimants to seek asylum in foreign territory\textsuperscript{50}.

After examining if the responsibility to seek asylum in the context of Article XXVII of the American Declaration may be shared between States, the Commission established that even if this responsibility is not absolute in international law, “every Member State has the obligation to ensure that every refugee claimant has the right to seek asylum in foreign territory, whether it be in its own territory or a third country to which the Member State removes the refugee claimant. To the extent that the third country’s refugee laws contain legal bars to seeking asylum for a particular claimant, the Member State may not remove that claimant to the third country. To ensure that a refugee claimant’s right to seek asylum under Article XXVII is preserved, before removing a refugee claimant to a third country, the Member State must conduct an individualized assessment of a refugee claimant’s case, taking into account all the known facts of the claim in light of the third country’s refugee laws. If there is any doubt as to the refugee claimant’s ability to seek asylum in the third country, then the Member State may not remove the refugee claimant to that third country”.\textsuperscript{51}

Analogously, in the context of Article XXVII of the American Declaration, Member States must also be responsible for the manner in which their actions undermine the rights of refugee claimants to seek asylum in a foreign territory. In light of the Commission’s findings in John Doe,
Member States are surely obliged not to use resources and diplomatic pressure in a way that undermines the rights of refugee claimants to seek asylum. The manner in which the U.S. government has encouraged, supported and stood-up forces in the region engaged in intercepting, interdiction and deportation of persons without requisite safeguards are well outside the bounds of international law.

**Children’s access to territory where they might access international protection is being particularly restricted.**

With respect to children, paragraph 83 from the AC. 21/2014 established that “the border authorities should not prevent the entry of foreign children into national territory, even when they are alone, should not require them to produce documentation that they may not have, and should proceed to direct them immediately to personnel who are able to assess their needs for protection based on an approach in which their condition as children prevails. In this regard, it is essential that States allow a child access to the territory as a prerequisite to the initial assessment process. Furthermore, the Court considers that a database must be created to register children who enter the country in order to ensure an adequate protection of their rights.”

**Actions by State entities violate the principle of non-refoulement.**

In interpreting Article XXVII of the American Declaration, the Court has examined treaties, customary and soft law instruments, and found that the principle of non-refoulement constitutes a norm of customary international law, and therefore is binding on all States, whether or not they are parties of the international instruments in which the principle is enshrined. The principle of non-refoulement can be invoked by any person over whom the State is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State. Further, all States implicated in the interdictions and interceptions herein examined, including the United States Government, which has provided support, training, equipment and funding for these efforts, are parties to the 1951 Convention Relating to the Status of Refugees and/or its 1967 Protocol, and have ratified the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment within which the principle of non-refoulement is enshrined.

“Based on this principle, States are bound not to return ("refouler") or expel a person – asylum seeker or refugee – to a State where her or his life or liberty may be threatened as a result of persecution for specific reasons or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have

52 CIDH, AC. 21 (August 19, 2014). Rights and guarantees of children in the context of migration and/or in need of international protection, par 83.
53 CIDH, AC. 21 (August 19, 2014). Rights and guarantees of children in the context of migration and/or in need of international protection, par 211
54 CIDH, AC. 21 (August 19, 2014). Rights and guarantees of children in the context of migration and/or in need of international protection, par 219
seriously disturbed public order, nor to a third State from which she or he may later be returned to the State where she or he suffered this risk – a situation that has been called “indirect refoulement.” 55

According to this principle we argue States are not permitted to facilitate and support immigration control actions of other States, which 1) prevent persons from accessing territory where their international protection claims will be evaluated 2) lead to the refoulement of persons with protection concerns – a process which we would name refoulement-by-proxy.

It is important to mention that in the Canada Report, the Inter-American Commission concluded that: “The obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal. This necessarily requires that such persons cannot be rejected at the border or expelled without an adequate, individualized examination of their claim.” 56 The IACHR notes that the individualized assessment with respect to the risk of indirect refoulement does not necessarily involve the same level of due process required for a hearing on the merits of asylum claim or other claim for protection.” 57

In addition, the Court clarified that in the case of a child “the prohibition to return, expel, deport, repatriate, reject at the border, or not to admit or in any way transfer or remove a child to a State when the child’s life, security and/or liberty is at risk of being jeopardized because of persecution or threat, generalized violence or massive violations of human rights, among others, nor where the child is in danger of being subjected to torture or other cruel, inhuman or degrading treatment, or to a third State from which she or he may be sent to one in which these risks may be encountered, receives additional protection in other human rights norms, a protection that extends to another type of gross human rights violations, understood and analyzed from a perspective of age and gender, as well as under the rationale established by the Convention on the Rights of the Child itself, which makes the determination of the best interest surrounded by the due guarantees a central aspect when adopting any decision that concerns the child and, especially, if the principle of non-refoulement is involved.” 58

Therefore, the Court considers that some type of standardized protection should exist for children who have not been recognized as regular migrants nor qualifying under refugee status, but whose return would, however, be contrary to the general obligations of non-refoulement under international human rights law. 59 The Court found that some countries of the region such as Mexico, Nicaragua and Costa Rica, have established a mechanism that contemplates a type of protection that addresses the specific needs of children in this situation.

55 CIDH, AC. 21 (August 19, 2014). Rights and guarantees of children in the context of migration and/or in need of international protection, par 212.
of protection similar to that granted to asylum seekers and refugees that would prevent a person from being placed in a situation in which her or his life, liberty, safety or integrity would be endangered. Such a mechanism would be particularly suitable for separated or unaccompanied minors.

Under the international legal regime, migrants must be adequately screened by trained individuals to review protection concerns, including risks of persecution, torture and trafficking. The interdiction and deportation of migrants without such protections violates international law. The U.S. government’s involvement in interdictions and deportations from Mexico, and interceptions in Guatemala and Honduras, despite clear evidence and reports delineating the failures of these governments to evaluate whether persons (including children) are victims of persecution, torture or trafficking, or have well-founded fear that they are at-risk of persecution or torture, constitutes a violation of the principle of non-refoulement and U.S. international legal obligations.

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Thank you for the opportunity to speak to you about the child and youth crisis in Central America and our child protection and trafficking laws that serve to vouchsafe their freedom from persecution, trafficking and family separation.

I am Jessica Jones, Child & Youth Policy Associate at the Lutheran Immigration and Refugee Service (LIRS), and also co-author of the Women’s Refugee Commission research report Forced from Home, which first documented the beginning of the humanitarian crisis in 2011. During my time at the Women’s Refugee Commission, I conducted numerous monitoring visits to the Office of Refugee Resettlement (ORR) custodial placements for children: shelters, staff-secure, secure, and foster care. I have also visited Department of Homeland Security (DHS), Customs and Border Protection (CBP) stations operated by the Office of Field Operations (OFO) and Border Patrol (BP).

I would like to thank both Chairmen of the Congressional Progressive Caucus; Representative Grijalva and Representative Ellison, as well as the other organizers of this hearing, Representative Chu, Representative Clarke, Representative Schakowsky and Representative Polis—thank you for your leadership in holding this hearing and for your leadership you have shown in advocating on behalf of immigrants and refugees over the years. Most particularly, I would like to extend LIRS’s gratitude to Representative Roybal-Allard for her long history in introducing important legislation instrumental in bringing attention to the plight of children and youth who migrate to the U.S. alone and their unique protection needs.

With a 75-year history of serving refugees and migrants, LIRS has over thirty years of experience helping to resettle children from all over the world, including Central America. During this child refugee crisis, LIRS has been working alongside the government and with a national network of social service partners to address the needs of these children and youth. LIRS collaborates with the Office of Refugee Resettlement to provide services mandated under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 and the Homeland Security Act of 2002. These services safeguard unaccompanied migrant children’s best interests and recognize their vulnerabilities to exploitation and abuse. LIRS provides these services through established service networks of community-based agencies with expertise in professional child and family services and in serving immigrant communities. These services include:

- Finger-printing of potential non-parental sponsors
- Home studies and Post-release services to ensure safe release to sponsors and appearance in court.
- Foster care for pregnant teen moms, young children & children without any family in the U.S.
In response to the increase in refugee children and youth from Central America arriving in the U.S., we ask that the U.S. government protect the best interest of these children. Secondly, we ask that more resources be devoted to respond humanely to children affected by this crisis. A child’s safety and welfare should always come first.

The bulk of my testimony today will focus on the legislative intent behind the provisions related to unaccompanied migrant children in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), secondly, I will address why those provisions are critical to care and protection of these children. Lastly, I will suggest issue areas that need legislative attention to make it safe for Central American children to live in their home countries and to make our current system of care and legal processing compassionate, just, and more efficient.

A. A History of Unaccompanied Alien Children Provisions in the TVPRA

Prior to 2008, the legal and child protections existed primarily through the Flores v. Reno settlement agreement of 1997 and key provisions in the Homeland Security Act of 2002. The Flores litigation came about because the former U.S. immigration agency, the Immigration Naturalization Service (INS), persisted in treatment of unaccompanied migrant children that violated their best interests and due process. Under Flores, unaccompanied migrant children became entitled to minimum standards of treatment. Like our child welfare system, these children were determined to be entitled to the following:

1. Detention away from adults,
2. A form of custody other than secure juvenile facilities,
3. Humane conditions while in custody,
4. A policy favoring release to family members in order to prevent family separation and indefinite detention, and
5. Legal protections that included judicial review and access to representation, human rights monitoring, and courts.

Following the 1997 Flores settlement, the Homeland Security Act of 2002 built open these protections and created the definition of the “unaccompanied alien child” (“UAC”). The definition, rooted in child welfare principles, sought to ensure a child migrant not accompanied by a parent or legal guardian in the U.S. would be cared for by an agency with expertise in best interest of child principles—the Department of Health and Human Services. Conversely, it also ensured children traveling with parents, were not ripped apart from their family members.

Despite these important provisions, the Flores and Homeland Security Act framework for child protection remained incomplete. LIRS and other organizations providing services to this vulnerable population, such as the U.S. Conference of Catholic Bishops (USCCB) and the Women’s Refugee Commission (WRC), started educating Congress about the gaping holes in child welfare standards for unaccompanied migrant children. In response, Senator Feinstein first addressed this need with the Unaccompanied Alien Child Protection Act (UACPA) of 2000. Following this bill’s introduction, numerous versions of UAC protections were introduced in the ensuing years.
It is important to highlight the UACPA, as many of these provisions eventually made it into the TVPRA, while some key provisions were left out. Most notably the provisions for the appointment of a guardian ad litem (GAL) and attorney—at no expense to the government if necessary—never made it into the TVPRA. Additionally, important provisions on training for officials coming into contact with these children and safe repatriation for all children were left out. Nonetheless many of the UACPA provisions and the standards set forth in *Flores* were incorporated into the TVPRA.

The TVPRA became the vehicle for many of these UAC provisions because Congress recognized that many unaccompanied migrant children who have survived trafficking are afraid to come forward or may not understand that they were victimized and need protective services. They are often unaware of the illegality of the abuse or that laws and services exist to protect them. The TVPRA’s intent was to better identify trafficking survivors, provide services to children while in the custody of ORR, locate counseling and medical services, and identify those children in need of protective services or additional follow-up services after family unification. The TVPRA is a piece of legislation aimed at fulfilling our U.S. and international legal obligations towards refugees and asylum-seekers, protecting children from trafficking and ensuring appropriate and humane care that takes into account children’s best interests.

**B. TVPRA—Critical Protections & Systemic Problems**

The TVPRA put the onus on the U.S. government to ensure children are screened for potential trafficking before return to their home countries. It also reaffirmed the U.S. commitment to the best interests of the child for *all* children in the U.S.

**I. Ensuring the non-refoulement of Mexican Minors**

Under the Homeland Security Act, Mexican children were excluded from the best interest of the child protections and screenings for Refugee Act protections. Prior to the TVPRA, the U.S. automatically repatriated Mexican minors under contiguous country agreements without screening them for trafficking concerns or asylum claims. Additionally Mexican minors were sometimes dropped off at the U.S-Mexico border in the middle of the night and without any regard to ensuring their custody was transferred to Mexican child welfare officials. The TVPRA of 2008 sought to establish procedures to guarantee Mexican unaccompanied children were being screened for trafficking crimes and for asylum claims before being repatriated to Mexico. The TVPRA further required that if DHS could not make a determination within 48 hours, the Mexican child must be transferred to ORR.

Since the enactment of the TVPRA, the Department of Homeland Security has consistently failed to fully implement the legislation and fulfill its legal obligation of screening and non-refoulement of Mexican unaccompanied children. CBP, an agency tasked with law enforcement both at our ports of entry and between ports, does not have expertise in child welfare, trafficking or asylum protections and is ill-equipped to screen vulnerable children.

**II. Custody by CBP**
While CBP must comply with *Flores* minimum standards of care, the TVPRA sought to limit the custody of children in CBP to no more than 72 hours. The TVPRA recognized that border holding rooms were largely inappropriate for children. The TVPRA however did provide an exception for exceptional circumstances, which remains undefined. Historically the provisions in *Flores* regarding “influxes” and “emergencies” have informed its interpretation. Over the past several years, numerous human rights organizations and service providers have documented abuses by CBP of children in their custody.

Over a 3-month period this year, LIRS documented the following issues among children in transitional foster care, a program for short-term foster care pending release to a sponsor:

- Out of 29 children, 5 reported they were abused while in CBP custody. Reports of CBP abuse are compiled from Significant Incident Reports and weekly staffing calls. This information is self-reported and therefore, is likely subject to under-reporting. Of these 5 reports, two were of great concern. One minor reported that while in CBP care, CBP staff threatened to “cut off his finger if he did not behave”. He was ten years old. Another minor reported being apprehended after a high speed chase with CBP and then being physically pushed by an officer.
- Multiple children reported verbal abuse by CBP agents and an 8 year old child arrived at transitional care in a diaper because he reported bed wetting at night. It was later noted that the minor did have cognitive delays.
- One minor arrived into ORR Transitional Care with a severe laceration on his foot that had become infected due to inadequate care and treatment while in CBP custody.
- Four minors reported inadequate food and poor conditions while in CBP custody. They said that they were kept in “hieleras” or ice boxes, contracted scabies and did not have enough food to eat while in CBP custody.

III. *Access to Immigration Courts Rather than Expedited Removal*

Given the lack of maturity, development, and understanding of the legal process, under the TVPRA unaccompanied children are afforded due process and entitled to full proceedings before an Immigration Judge (IJ). Expedited removal proceedings are recognized as not offering the same procedural protections as a hearing before an IJ, including the opportunity to obtain legal counsel and receive information about available forms of legal relief.

Even prior to 2008, DHS has recognized the inappropriateness of placing children in expedited removal proceedings and in practice generally avoided the practice.

IV. *Custody—in the Child’s Best Interest & Safe Release*

The TVPRA codified some of the custody requirements under Flores. It reaffirmed the principle of placing a child in the “least restrictive” setting and utilizing secure detention only in cases where child and community risk required it. Additionally the TVPRA outlined procedures for release to immediate family members, extended relatives and other sponsors.
To safeguard against release of children into trafficking or other abusive situations, the TVPRA required ORR to put in place the following child welfare protections:

1. **Require all potential sponsors to have an identity verification and assessment for potential risk to the child through background checks.**

   LIRS conducts the majority of fingerprinting checks on behalf of ORR. Since the increase of children arriving from Central America, ORR has at times released children through an expedited process to their parents without conducting any background check for criminal and child protection concerns. LIRS maintains that all sponsors, including parents, should have background checks and identity verification. Such mechanisms help prevent child abuse and trafficking.

2. **For especially vulnerable children (who survived trafficking, child abuse or have special needs) safe release to a sponsor requires a home study and post-release follow-up services.**

   In LIRS’s experience, fingerprinting, home studies, and post-release services have proven invaluable to identifying and preventing child neglect, abuse and trafficking. These services also help the child and family link up to community support systems, orientate them towards legal obligations of attending court and school, and connect to specific services such as access to counsel.

   Among LIRS’s transitional foster care programs, we track trends of a child’s significant need or traumatic experience. Significant needs of children include behavioral or conduct issues, risks of suicide or self-harm, mental health concerns, medical needs, cognitive delays, parenting teens or pregnant children. Traumatic experiences include instances of kidnapping, CBP abuse, and separation from adult caregivers at the border, physical abuse, and sexual abuse and trafficking concerns. These significant needs and traumatic experiences are defined as those greater than what is normally found within the UAC population, present higher risk for family reunification, and have greater impact on a child’s level of care needs and program response.

   Of 252 children served in LIRS’s transitional foster care programming from January through March:

   - 71 or 28% of children were determined to have significant needs.
   - 61 or 24% children were determined to have traumatic experiences.

3. **Permits, but does not require, ORR to provide post-release services for children to better integrate into their homes and communities.**
Currently not every child receives post-release services. These services have been critical in orientating families to the immigration court process, identifying mental health and medical services, providing assistance with school enrollment and locating legal service providers. The below chart illustrates the role post-release service providers place in identifying legal service providers. LIRS believes every child should be eligible for a minimum of post-release follow-up services in accordance with current child welfare practice.

<table>
<thead>
<tr>
<th>Services</th>
<th>Success Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>EOIR hotline and court orientation</td>
<td>22</td>
</tr>
<tr>
<td>Attorney secured</td>
<td>14</td>
</tr>
<tr>
<td>Pending legal representation</td>
<td>3</td>
</tr>
<tr>
<td>Intake pending</td>
<td>3</td>
</tr>
<tr>
<td>No legal representation</td>
<td>1</td>
</tr>
<tr>
<td>Runaway (presumed in absentia)</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total children linked to legal services &amp; engaged in court proceedings:</strong></td>
<td><strong>21 out of 22 = 95% success rate</strong></td>
</tr>
</tbody>
</table>

4. **Allows ORR, but does not require, to appoint child advocates for trafficking victims or particularly vulnerable children.**

The Young Center for Immigrant and Children’s Rights currently provides these services to children. This service emerged from the realization that some children were particularly young, had disabilities, trafficking experiences or other vulnerabilities requiring assistance from someone who could make best interest recommendations. This model is based on the child welfare system.

**V. Safe Repatriation**

Another goal of the TVPRA was to ensure children were not repatriated to their home countries in unsafe manners. The TVPRA called on ORR, DHS and the Department of State to work together in running a pilot repatriation program. It also required that DHS consult human rights reports detailing country conditions and trafficking in person reports in assessing whether to repatriate a child. Unfortunately this is another area that has gone largely disregarded in practice. Human rights
groups have reported witnessing children flown back to home country airports and left unattended without proper reception by a child welfare official.

VI. Legal Orientation and Counsel

The TVPRA also requires ORR to ensure (to the greatest extent practicable) the legal representation of all unaccompanied children in legal proceedings and matters to protect them against trafficking, exploitation and mistreatment. Currently the Vera Institute for Justice, the ORR contractor who manages the contracts for legal orientations and screenings, estimates 70-90% do not have legal representation depending on the location of their immigration hearing and the lack of legal resources in the area.

Without attorneys children find it tremendously difficult to submit their legal claims for relief. Children should not be forced to navigate a difficult legal system alone. This means that many children who are eligible for relief—are not getting it. For many children who have experienced compounded trauma, it takes time to articulate the trauma. Often without legal assistance children cannot even identify what legal protections exist to them. Attorneys also assist with a child's appearance rates in court. EOIR and National Association of Immigration Judges (NAIJ) have also found attorneys for children greatly improves court efficiency, by allowing a judge to hear a case more expeditiously.

C. Final Recommendations

Finally, it is LIRS’s position that the TVPRA sets out important due process and protection schemes necessary to prevent children from being returned to persecution or falling prey to trafficking. These protections, however incomplete, provide critical protections to children. Instead of amending the TVPRA to prevent the reception and protection of children seeking refuge, we urge Congress instead to focus on filling the protection gaps of the TVPRA. If the following protection mechanisms are addressed, the current child refugee crisis and resource inequalities will be alleviated:

1. Legal protections: Guarantee children’s access to counsel by allowing courts to appoint counsel at no expense to the government. Provide adequate resources for immigration courts, judges and support staff so that cases can be heard in a timely and just fashion and with more efficiency.

2. Safe repatriation & rule of law support: Children should not be sent back to unsafe conditions or into the hands of traffickers and smugglers. Instead the U.S. should bolster reintegration and repatriation policies to make sure children can return home safely. Additionally, the U.S. should support greater development towards rule of law mechanisms in Central America.

3. In-country processing: For children who are displaced because of refugee situations, the Department of State should conduct in-country refugee processing so that children are not forced to make difficult and dangerous journeys to the U.S. alone.
4. **Greater access to post-release services**: All children should be entitled to some post-release social services to assist with basic protection needs. No child, especially a refugee child, should go without adequate care and preventative services.

5. **Contingency fund for ORR**: ORR must have a fund to provide for emergency care for situations where there are increased numbers of unaccompanied children. Such funding would prevent extremely costly use of “emergency shelters” and emergency child care workers. Such funds also ensure there is no gap in services and that medical and protection needs to not go unmet. Additionally, a contingency fund would alleviate the need to reprogram money away from critical needs for resettling refugees in order to shelter and care for unaccompanied children.

I would like to close with the following story of a girl LIRS had the privilege of serving:

> Maria a 12 year old girl from Central America was trafficked for labor and sex, she fled with her baby to escape slavery. Maria was 12 years old, when she was kidnapped at gunpoint and taken to a home where she was held captive. She was beaten and raped on an almost daily basis and eventually forced into prostitution. Because of this she became pregnant and gave birth to a girl while captive. Maria fled with her child, riding on top of trains so that they might escape the sexual bondage. Maria received LIRS foster care services. She eventually ended up qualifying for a T-visa and is currently doing well in the Unaccompanied Refugee Minor (URM) foster care program. She has now graduated high school.

Stories like Maria’s and the children who are testifying here today, stress how important it is for children to come first. Thank you again for the invitation to submit LIRS’s views on the child refugee crisis from Central America.

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Started by Lutheran congregations in 1939, LIRS walks with migrants and refugees through ministries of service and justice, transforming U.S. communities by ensuring that newcomers are not only self-sufficient but also become connected and contributing members of their adopted communities in the United States. Working with and through over 60 partners across the country, LIRS resettles refugees, reunites children with their families or provides loving homes for them, conducts policy advocacy, and pursues humanitarian alternatives to the immigration detention system. For more information, please visit www.lirs.org.

**Additional LIRS Resources:**
- Recent LIRS Policy Statements
- LIRS Backgrounder on services to Unaccompanied Children
- LIRS Backgrounder on Legal Protections for Unaccompanied Children
- LIRS Principles for Children and Families Seeking Refuge
If you have additional questions about this testimony, please feel free to contact Jessica Jones, LIRS Child & Youth Policy Associate, at jjones@lirs.org or (202) 643-8319.
From Persecution to Prison: Child and Family Detention

In the wake of a stark increase in the number of children and families from Central America seeking protection in the United States this year, the Obama Administration quickly opened a nearly 700-bed detention facility in Artesia, New Mexico in June 2014 to hold entire families, including young children. Another family detention facility opened at the beginning of August 2014 in Karnes County, Texas. These facilities are part of a larger plan to detain newly arriving families. President Obama’s emergency supplemental funding request as well as the Senate Emergency Supplemental Appropriations Act (S. 2648) and the final supplemental funding bill passed by the House of Representatives (H.R. 5230) included increased funding for the Department of Homeland Security (DHS) for the expansion of family detention.

LIRS is extremely concerned about the use and expansion of family detention. Families with children who have undertaken a dangerous and traumatic journey seeking safety are among the most vulnerable individuals in the United States and they deserve to be embraced in our homes, our churches and our communities. Detention is completely inappropriate for families. In addition to being extremely costly and inhumane, detention also prevents adequate access to legal services, opportunities for visitation, and long-term integration for vulnerable individuals. While the narrow purpose of immigration detention is ensuring compliance with immigration court proceedings, Alternatives to Detention (ATDs) have proven effective at ensuring such compliance while also maintaining respect for human dignity and upholding the United States’ legacy as a nation of welcome for those fleeing persecution.

Family Detention: History

The Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) currently detains adult immigrants in a sprawling nationwide system of over 250 immigration detention facilities, costing taxpayers almost $2 billion annually. Each year, ICE detains approximately 480,000 men and women in these facilities.

With regard to family detention facilities, ICE has operated the 96-bed Berks County Family Shelter (Berks) in Leesport, Pennsylvania since 2001. From 2006-2009, ICE also operated the 512-bed T. Don Hutto Correction Center (Hutto) in Taylor, Texas as a family detention center. While DHS claimed the facility was specially equipped to meet the needs of families, reports emerged that children as young as eight months old wore prison uniforms, lived in locked prison cells with open-air toilets, were subjected to highly restricted movement, and were threatened with alarmingly disciplinary tactics, including threats of separation from their parents if they cried too much or played too loudly. Medical treatment was inadequate and many children, some as young as one year old, lost weight. The Hutto facility was the subject of a lawsuit, a human rights investigation, multiple national and international media reports and a national campaign to end family detention and was ultimately forced to close in 2009.

In late 2007, ICE created family detention standards. However, these standards are not codified, meaning they do not have the force of law and do not confer a cause of action in court. In addition, family detention facilities are subject to insufficient oversight to ensure compliance with these standards.

Family Detention: Humanitarian Concerns

There is no humane way to detain families. New family detention facilities recently opened by ICE hold infants, toddlers, women, and children. Many of those detained are survivors of violence and trauma experienced in their home country or during the journey to the United States. Numerous reports by independent non-governmental organizations, government...
oversight agencies, and Congressional hearings have found that **DHS has not maintained safe or humane conditions in immigration detention facilities**. Documented problems - including serious concerns at the newly opened family facility in Artesia, NM - include substandard medical care, abusive treatment and neglect by personnel, inadequate access to legal services and law libraries, inadequate opportunities for visitation and outdoor recreation, inappropriate conditions and treatment for women, children, the mentally disabled, and those with medical issues, and lack of access to telephones. Detention has been documented as psychologically damaging and completely inappropriate for toddlers and children. Holding vulnerable individuals, such as women and children, in jails or jail-like settings poses a serious threat to psychological health and risks re-traumatizing victims of abuse, torture and human trafficking.

**The Alternatives**

DHS must place families with children in the least restrictive setting possible. There are Alternatives to Detention (ATDs) that have been proven to be more humane and cost-effective. These ATDs - ranging from most-restrictive electronic ankle bracelet monitoring to least-restrictive community-based support models - have been shown to ensure compliance with immigration court proceedings. While traditional detention can cost up to $164 per person, per day, DHS estimates have shown current alternatives can range in cost from 30 cents to $8.04 per person, per day.

LIRS has created a national model of community-supported release, the Community Support Initiative, which balances the government’s need for compliance with the human rights of justice and liberty. LIRS works with coalitions of service partners in seven communities—Arizona, Austin/San Antonio, Boston, Chicago, the New York Metro area, Seattle, and the Twin Cities—to provide legal services, case management, and housing for vulnerable migrants. We also track ICE referral practices and participants’ compliance rates with immigration court proceedings and study the program’s cost effectiveness.

**Recommendations**

LIRS continues to urge Congress and the Obama Administration to **uphold family values, liberty, due process, and the rights and dignity of women and children** whose lives are at risk. Specific recommendations include, but are not limited to:

- Reject the use of detention as an enforcement tool for reducing migration or preventing refugee flows, such as proposed in President Obama’s emergency supplemental appropriations request for Fiscal Year 2014
- End the use of family detention
- Make individualized assessments of each family for enrollment into ATDs including parole and bond
- Expand the use of alternatives to detention, including community-based models, that are more humane, cost-effective, and effective at meeting the goals of immigration detention
- Ensure that children are afforded the specialized medical, educational, and legal support that they require, which cannot be provided in secure detention facilities
- Ensure that detention is only used in cases where the U.S. government has proven that less-restrictive alternatives are not appropriate

If you have any questions, please contact Brittney Nystrom, LIRS Director for Advocacy at BNystrom@lirs.org or (202) 626-7943 or Liz Sweet, LIRS Director for Access to Justice at LSweet@lirs.org or (410) 230-2728.

**LIRS**

As the national organization established by Lutheran churches in the United States to serve uprooted people, Lutheran Immigration and Refugee Service (LIRS) has 75 years of expertise serving refugees and vulnerable migrants. LIRS works with a national network of partners to ensure migrants and refugees are treated humanely and with due process while they are in custody of immigration officials.

This backgrounder was updated August, 2014.

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CONFINED WITHOUT CARE: A GUIDE TO THE DETENTION OF MOTHERS AND CHILDREN IN THE U.S. IMMIGRATION SYSTEM

Since 2011, a steadily growing number of unaccompanied children and families from Central America have arrived at the U.S. border, fleeing violence, domestic abuse, and dangerous gang activity. Recently, these numbers have risen dramatically: U.S Customs and Border Protection (CBP) reports that between October 2013 and August 2014, 68,541 unaccompanied children and 68,445 families were apprehended at the southwest border—increases of 77% and 361%, respectively, over the previous year.

The U.S. government has responded to this heightened need, but with strained resources and a punitive stance. Despite evidence that many of these migrants may be eligible for asylum or other immigration relief, the U.S. government continues to detain children and families in prison-like detention facilities. In lieu of pursuing alternatives to detention, the government has converted existing family detention centers while planning to build another, held unaccompanied children in short-term facilities far longer than the lawful 72 hours, and housed migrants in makeshift shelters that lack needed social services.

This influx of children and families requires a comprehensive and coordinated government response, one that recognizes migrants’ traumatic experiences and honors their fundamental human rights. This guide describes three U.S. detention programs—Immigration and Customs Enforcement’s (ICE) family detention centers, CBP’s short-term holding facilities, and the Office of Refugee Resettlement’s (ORR) longer-term shelters—and highlights major concerns for the U.S. government to address.
ICE FAMILY DETENTION CENTERS

Families apprehended at the border are either released into the United States to await immigration court proceedings or transferred to Immigration and Customs Enforcement (ICE) custody and held in family detention centers. Migrant families are currently detained in three facilities: Berks, in Pennsylvania; Artesia, in New Mexico; and Karnes, in Texas. The U.S. government is set to open another 2,400 bed facility soon. Although ICE has addressed some concerns over conditions in these facilities—particularly in response to advocacy and legal action—significant concerns remain and as a fundamental matter there is no humane way to detain families for the purposes of deterring unauthorized migration.

Conditions of Confinement

• Family detention centers offer inadequate medical care. Mothers and children often receive substandard treatment or no treatment at all. Detainees in Artesia report being instructed to simply drink more water when suffering from diarrhea, for instance, and say they have received no treatment for fevers and similar conditions.

• Facilities are not appropriate for victims of trauma. Women and children at Artesia and Karnes have exhibited signs of extreme depression, as a result of both violence endured in their home countries and the detention itself. However, even repeated requests for psychological care are sometimes denied. Women also may be reluctant to share their stories with the predominantly male mental health care providers available.

• Children lack room to grow, learn, and play. Families have little space or opportunity for recreation. Culturally inappropriate or overly spicy food options have led to reports of weight loss in detained children in addition to the stress of being detained. In Artesia, no schooling was available for children until weeks after the facility opened.

• Childcare options are minimal and inadequate. Mothers often have no reprieve from caring for their children, even when they need to sleep or discuss sensitive matters with their lawyers. Moreover, many mothers do not feel comfortable leaving their child with a guard.

• Family detention interferes with the family unit. ICE detains only mothers and their children at Artesia and Karnes; fathers apprehended along with them are released or detained separately in one of ICE’s adult detention centers, sometimes in another state. Staff also direct mothers to punish their children or risk separation, or otherwise take disciplinary action themselves, stripping mothers of their parental authority.

• Detainees may be subject to sexual abuse and harassment from facility staff. A formal complaint to Homeland Security detailed allegations that guards and staff at Karnes sexually abused and harassed detainees—even requesting sexual favors in exchange for money or help with immigration cases. Reports of this conduct to Karnes personnel went unheeded.

Due Process Concerns

• Detainees face several obstacles in securing legal representation. Migrants have a legal right to an attorney, but not at the government’s expense. The facilities’ remote locations, inaccessibility of phones, and limited know-your-rights and legal orientation presentations converge with the cost of representation to make it extraordinarily difficult for families to secure legal assistance.
• Detention conditions make it difficult for families to consult with their lawyers. Pro bono attorneys have reported serious obstacles to communicating with their clients, including an inability to access them while they are detained. The lack of privacy in these facilities also interferes with preparation for credible fear interviews, as mothers may be reluctant to discuss issues like domestic or sexual violence with their lawyers in front of their children.

• Detainees may not be formally screened for credible fear of returning to their home countries. Migrant families have traditionally been very likely to seek asylum, and should be screened for fear of persecution at the CBP border stations. However, ICE does not formally question them again, so should this initial screening fail, families with reasonable asylum claims may not be referred for credible fear interviews.

• ICE policy keeps even asylum-seekers detained. ICE has instituted a blanket policy denying bond to families, arguing that the mass migration raises general “national security concerns.” For the relatively few families who are found eligible for bond, the amount may be set so prohibitively high—$25,000 in one case—that they must remain in detention.

• Immigration court proceedings are conducted via video- and teleconferencing. With this remote setup, the judge may be unable to see and hear a detainee while she shares her testimony, and many technical difficulties persist. In addition, counsel may not be physically with the client to help reassure and shepherd her through the proceedings.

Underutilized Alternatives

• Alternatives to detention lead to more successful outcomes. There are many viable alternatives to detention, including release with case management and community support programs. These options result in high rates of appearance at court hearings but do not confine families like criminals.

• Family detention is far costlier than community-based alternatives. The new facility to be built in Dilley, Texas will cost an estimated $298 per day for each person, while more humane alternatives cost an average of 30 cents to $8.49 a day.
CBP Short-Term Holding Facilities for UACs

When Customs and Border Protection (CBP) apprehends unaccompanied children (UACs) at the U.S. border or other ports of entry, the children are held in short-term CBP facilities. By law, ICE must transfer children to longer-term facilities within 72 hours, but due to the unprecedented number of arrivals and resulting bottlenecks, children have remained in CBP custody for far longer—even up to two weeks.

Conditions of Confinement

- Border patrol facilities were not designed for long-term detention. These facilities typically consist of a concrete room with concrete or metal benches, an open toilet, and a sink; there are no sleeping accommodations. The lights stay on for 24 hours a day, and the facilities are known as “hieleras” for their freezing temperatures. Children are held for days or weeks without sufficient food and water, blankets, showers, fresh clothes, and opportunities for recreation.
- CBP detention cannot meet the needs of the changing demographics of arriving children. For years, most UACs were older teenage boys. Today, almost half the children coming are girls, and they are getting younger (some as young as four). In many cases, these children have endured unspeakable trauma, which the harsh conditions and lack of social services in CBP facilities only exacerbate.
- CBP facilities do not offer adequate medical care. CBP facilities frequently lack trained medical staff, and children have reported being denied basic medical care.
- Border Protection staff require additional training to handle children. CBP does not have agents staffing their hold rooms with child welfare expertise to screen or care for children. Children in CBP custody have reported being treated worse by CBP agents than by the coyotes who smuggled them to the border.

Due Process and Oversight Concerns

- CBP agents may not adequately screen children for fear of persecution or human trafficking. Under the Trafficking Victims Protection Reauthorization Act of 2008, CBP must screen children from Mexico and Canada to determine whether they have been trafficked, fear persecution, or are incapable of consenting to return to their home country. If so, the child is transferred to ORR custody. Reports indicate that implementation is inconsistent and that agents may not be adequately trained to question vulnerable children.
- CBP has set no formal standards for conditions in its facilities. Though CBP has issued internal policy guidance, it has established no public, legally enforceable standards for the 700+ holding facilities it operates.
- CBP facilities may generally conform to the Flores agreement, but they still have tremendous work to do. The 1997 Flores v. Reno settlement agreement (resulting from lawsuits over the mistreatment of UACs when apprehended and detained by the government) stipulated several requirements for the treatment of unaccompanied migrant children in federal custody, in recognition of their unique vulnerability. In 2010, the Department of Homeland Security’s Office of Inspector General visited 30 CBP stations and found no “significant” violations, but did recommend several improvements, including better staff training and
greater availability and quality of medical care. Notably, this study was conducted before the most recent influx of UACs.

**ORR Longer-Term Shelters and Programs**

Once apprehended and processed, unaccompanied children (UACs) are transferred to the custody of the Office of Refugee Resettlement (ORR), an agency of the Department of Health and Human Services (HHS). ORR operates four kinds of detention facilities, varying in their restrictiveness: short-term and long-term foster care; shelters and group homes; therapeutic foster care and residential treatment centers; and staff-secure and secure facilities.

**Conditions of Confinement**

- Emergency facilities did not provide equal services to those provided in existing ORR facilities. During recent migration surges, temporary ORR facilities were set up but did not offer the same kinds of services, including know your rights presentations or recreation opportunities, children in regular facilities enjoyed.
- Deficient ORR resources prevent children from receiving a full spectrum of care. Children in ORR facilities should receive a broad array of social services, including: intake screening, legal orientation and screening, medical and dental care, case management, educational programming, access to telephones and help contacting family, and counseling and mental health services. During periods of influx, children received the bare minimums of care.
- Children report sexual and physical abuse at the hands of facility staff. Dozens of children have reported sexual or physical abuse by shelter staff, but these complaints are infrequently tracked or investigated. Further, investigations often collapse due to confusion over whether the FBI or local law enforcement is in charge.

**Due Process and Oversight Concerns**

- ORR has not established adequate internal and external oversight mechanisms. The failures to provide critical services during periods of unprecedented migration and ongoing allegations of abuse demonstrate a need for regular monitoring of ORR facilities, both by regional supervisors and by independent inspectors. To date there is no independent monitoring of these facilities.

**Underutilized Alternatives**

- Children are overwhelmingly placed in large residential confinement settings. There is an overreliance of placements in restrictive shelters, but community-based placements like foster families and group homes better align with child welfare best practices (such as respect for the “best interests of the child”).

**Exiting the System Safely**

- ORR facilities are clustered near the border, far from where children are ultimately released. Children are held in facilities near the US-Mexico border, where resources are scarce and the risk of trafficking is high. Instead, facilities should be established in “hub” locations where children are more likely to be released and where legal and social services are readily available.
- Children are not receiving crucial post-release social services. Though reducing the amount of time children spend in custody is a reasonable goal, children are currently being released
without post-release social services in place. Ongoing case management helps ensure children enroll in school and receive necessary medical care, and that they are not being placed in neglectful or harmful home environments.
REPORT MADE TO:
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER

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REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER

Introduction

The Karnes County Residential Center (Karnes), located in Karnes City, Texas, is an immigration detention center, which currently holds 535 mothers and children, almost all of whom are asylum-seekers from Central American countries. Karnes is the newest of three immigration detention centers in the U.S. detaining women and their children—the other two are in Artesia, New Mexico, and Leesport, Pennsylvania. Both the Artesia and Karnes facilities opened during the summer of 2014. The government has plans to expand family detention further with the opening of a 2400-bed family detention center in Dilley, Texas in November 2014. These detention centers represent the first effort at widespread immigration detention of families since 2009 when the government shut down family detention at the problem-ridden T. Don Hutto Detention Center in Taylor, Texas.

The situation at the Karnes facility demonstrates that family detention is a colossal mistake, which implicates numerous human rights violations under international law and civil rights violations under domestic law. At Karnes, the government detains women and their children needlessly, even when they pose no danger or flight risk that cannot be addressed through measures such as release on bond. Families remain detained even after they pass an initial screening interview demonstrating that they have viable asylum claims. They can remain detained for months, pending their asylum proceedings in Immigration Court. Detention drastically reduces these families’ ability to obtain and access counsel and effectively present their asylum claims.

In addition, the Karnes detention center is a secure facility from which detained women and their children cannot leave and which has many characteristics of criminal detention, such as regular body counts. Children as young as three months old are detained at Karnes. Yet, despite housing over 200 children, the facility is not licensed as a residential home for children. Facility staff is not trained in childcare or the special needs of asylum-seekers. Adequate mental and physical health services are not available.

International human rights bodies have already condemned the detention of asylum-seeking families in the United States.1 Yet, despite growing documentation of abuses and harsh conditions, and despite international and domestic laws that forbid or limit the detention of

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asylum-seekers and children, the government obstinately insists on expanding family detention. This report describes the process by which women and children came to be detained at the Karnes facility, and some of the challenges they face with respect to detention and the ability to pursue their asylum cases. The report then summarizes the relevant international and domestic protections that relate to the detention of asylum-seekers and immigrant children at Karnes. Finally, this report sets forth the numerous ways in which family detention at Karnes violates international and domestic human rights and civil rights protections for the women and children held behind bars.

I. Women and Children in Family Detention

A. Detention at the Border in CBP Holding Facilities

Almost all of the women and children detained at Karnes were apprehended by Customs and Border Patrol (CBP) near the Texas/Mexico land border and placed into expedited removal proceedings before transfer to Karnes. Expedited removal is a “fast-track” deportation process established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).\(^2\) Expedited removal may be imposed on an immigrant who is arrested near a U.S. border within fourteen days of entry.\(^3\) Immigration officers also may impose expedited removal on noncitizens upon their attempted entry to the United States at a “port of entry,” such as a bridge or airport, in two instances: (1) if the immigrant declares an intent to seek asylum; or (2) if the immigrant does not possess valid entry documents.\(^4\) The women and children detained at Karnes fall into the first category of expedited removal in almost all cases. Immigrants subject to expedited removal are detained mandatorily and without the right to seek review of their detention by an immigration judge, under Immigration and Nationality Act (INA) § 235, during the early stages of their proceedings.\(^5\)

Initially, after being taken into CBP custody, women and children encountered along the border are taken to a CBP station or holding facility. They remain at that holding facility for several days, typically in degrading conditions. Immigrants, including children, have reported


\(^3\) INA § 235(b)(1)(A)(iii)(II); 8 U.S.C. § 1225(b)(1)(A)(iii)(II); In August 2004, the U.S. Department of Homeland Security announced in the Federal Register that expedited removal applies to inadmissible “aliens… who are present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.” See 69 FR 48877 (Aug. 2004).

\(^4\) 8 U.S.C. § 1225(b)(1)(A); 8 U.S.C. § 1182(a)(7); 8 U.S.C § 1182(a)(6)(C); INA § 212(a)(6)(C); INA § 235(b)(1)(A); INA § 212(a)(7).

\(^5\) Immigrants may be eligible for release as a matter of discretion for a medical emergency or for reasons of law enforcement, but these circumstances are usually very limited. See 8 C.F.R. 1235.3(b)(2)(iii); 1235.3(b)(4)(ii).
being denied food and water in these holding facilities, sometimes for days on end. They complain that the facilities, which they dub “hieleras” or freezers, are extremely cold. CBP agents have also been accused of using excessive force, even resulting in the death of at least one immigrant who was hog-tied, tased and beaten to death. Immigrants have also told advocates that they were either discouraged from seeking asylum at the border, or not informed of their right to do so, and in some instances, they were coerced out of making asylum claims because of threatening comments by CBP officials. CBO officers take initial statements from the women and children during these first days in CBP custody, under coercive conditions, and these statements often plague asylum cases throughout the process, even after the asylum-seekers have left the CBP holding facilities. After their initial detention with CBP, women and their children are sent into Immigration and Customs Enforcement (ICE) custody at one of the family detention centers, such as the facility in Karnes City, Texas.

B. Continued Detention At Karnes Under Expedited Removal

After transfer to Karnes, the family remains in expedited removal proceedings. This means that they will be deported summarily, without further review of any kind, and will remain

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7 Americans for Immigrant Justice has reported that these “hieleras” are kept so cold that immigrants’ lips chap and split, their fingers and toes turn blue, and they shake uncontrollably, see Americans for Immigrant Justice, Border Patrol Continues to Abuse Immigrant Women (May 23, 2013), http://www.aijustice.org/news-release-border-patrol-continues-to-abuse-immigrant-women/.


10 See e.g. CBP Record of Deportable/Inadmissible Alien, Attached Exhibit.

11 Asylum applications are often scrutinized harshly by immigration officials (including judges) who view any denial of persecution made at any time or any inconsistency in an immigrant’s story as demonstrative of fraud or deception. If an asylum applicant fails to declare a fear of persecution on her initial apprehension by CBP, it makes it much more difficult for her to succeed on an asylum claim after leaving a CBP holding facility. Should she encounter threats or discouragement from CBP officials against making an asylum claim, or should fail to be advised about her right to an asylum claim, the potential damage to her application for asylum can be irreparable.

12 The women and children are generally not returned immediately to their home countries from the border even if they have not yet been able to articulate a claim to asylum, mainly because travel arrangements cannot be made for their return to Central America from the border in a prompt manner.

13 Since the end of family detention at the T. Don Hutto Residential Center (a family immigration detention facility located in Taylor, TX) in 2009, which effectively terminated family immigration detention until the summer of 2014, ICE’s general practice was not to detain women and children together in family facilities under expedited removal processes. Rather, the general practice was to place families automatically into full-fledged removal proceedings and to release families on the expectation that they would appear for future removal proceedings dates. See US Moves to Stop Surge in Illegal Immigration, NEW YORK TIMES, (June 20, 2014), http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0.
detained until the moment of deportation, unless they are found to have a credible fear of persecution.

Women detained at Karnes who assert their intention to seek asylum are interviewed by an immigration official to determine whether they have a “credible fear” of persecution in their home country. If they pass the credible fear interview (CFI), they will avoid immediate deportation and be permitted to pursue an asylum claim in full-fledged (non-expedited) removal proceedings before an immigration judge. The family must continue to remain detained while the CFI determination is pending, which takes from several weeks to a month.

At Karnes, immigration officials located at the Department of Homeland Security (DHS) Asylum Office in Houston conduct CFIs by telephone with the detained mothers, and only rarely do they conduct CFIs in person at Karnes. The government fails to provide CFIs to children at Karnes, even though many children have independent asylum claims as a result of threats and persecution in their home country, typically because of gang violence targeting children.

If an asylum officer concludes that a Karnes mother did not pass her CFI by demonstrating a credible fear of persecution, the asylum-seeking mother may obtain strictly limited review of the CFI determination before an immigration judge. If the asylum-seeker does not succeed in persuading the judge, then there is no further review. She will remain in expedited removal and will stay detained until she is deported to her home country, which usually happens in a matter of weeks. Families have already been deported from Karnes since it opened in August 2014.

If an asylum-seeker “passes” her CFI, either with the asylum officer or on review by the immigration judge, then her asylum case passes to the immigration court for full proceedings and hearings on the asylum claim. At this point, the asylum-seeker is no longer subject to expedited removal, and is placed in removal proceedings before the immigration court under INA §240. However, getting to the immigration judge has proven problematic for some immigrants who have not been afforded an adequate opportunity to assert a fear of persecution. Many mothers at Karnes have failed their CFIs because they were not informed of the purpose or the format of the interview beforehand, they were unable to divulge details of their trauma so soon after arriving in

the United States in the difficult context of detention with their children, and others were not allowed to elaborate upon their answers to particular questions. Moreover, the DHS Asylum Office recently published a policy memorandum urging asylum officers to be stricter in making credible fear findings, which has led to lower grant rates.

These practices limit the due process rights of asylum-seekers to an extent that is not acceptable under international human rights law. Further, the U.S. policy of placing women and children in expedited removal and detaining women and children asylum-seekers during the credible fear process does not comport with international human rights laws. As described below, very brief detention for purposes of an initial interview to establish identity and the contours of an asylum claim may be permissible in limited individualized circumstances. However, at Karnes, detention during the expedited removal process is categorical rather than individualized, exceeds the brief period that might be permissible, and fails to recognize the special situation of women and children asylum-seekers.

C. Detention After Passing CFI and During Removal Proceedings

If a woman detained at Karnes passes her CFI, she is referred to removal proceedings in immigration court, where she will pursue her asylum claim. U.S. immigration law permits but does not mandate continued detention for asylum-seekers whose cases are being adjudicated in immigration court. When an asylum-seeker is referred to immigration court, ICE makes a written determination regarding her custody, either releasing her on her own recognizance, releasing her upon payment of a bond, or deciding on continued detention.

At Karnes, ICE has issued custody determinations continuing detention during removal proceedings for every single woman and child. These determinations are not individualized; instead, ICE insists on a categorical basis that all of the women and children detained at Karnes must be detained on the grounds that they all pose a danger. ICE asserts that releasing any one

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20 See LIRS, supra note 6, at 16; see also Human Rights First, supra note 9, at 4. A 2005 study of expedited removal conducted by the governmentally-appointed U.S. Commission on International Religious Freedom (USCIRF) found that immigration officers did not provide immigrants with required information about CFIs and the possibility of protection under U.S. law for those fearing persecution or torture in their home countries. Immigration officers were also found to have discouraged immigrants from seeking asylum claims. See USCIRF Report on Asylum Seekers in Expedited Removal (Feb. 8, 2005) http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal. Women and children detained at Karnes report similar problems, which have been exacerbated by their detention with their children.


23 See Notice to Appear, Attached Exhibit.

24 8 C.F.R. 236.1(c)(8).

25 See e.g. Notice of Custody Determination, Attached Exhibit.

26 See Declaration of Philip T. Miller and Declaration of Traci A. Lembke, Attached Exhibit.
of these asylum-seeking families on bond would encourage mass illegal migration, despite evidence indicating that the women and children have arrived because they have legitimate refugee protections needs and further indicating that detention policy has little impact on the decisions that Central American women and children make when fleeing their home countries. ICE decisions to detain based on categorical assumptions of danger fail to take individual facts for each asylum-seeker into account in establishing whether detention is necessary based on flight risk or danger to public safety (the two main permissible justifications for detention without the possibility for release on bond or other alternatives to detention). This categorical policy eschews the obligation to engage in individualized determinations regarding the need for detention of asylum-seekers, in contravention of international human rights law.

Furthermore, ICE’s insistence on continuing detention explicitly invokes the need to use detention as a means of deterrence of future illegal migration. International human rights law specifically prohibits “detention policies aimed at deterrence,” because they are “not based on an individual assessment as to the necessity to detain.”

Detention of families at Karnes, who pose no flight risk or danger, also violates due process protections under international human rights law. Detention makes it harder to access counsel, gather evidence and prepare testimony. As a result of being detained, the women and children at Karnes thus have a more difficult time presenting and winning their asylum claims.

An asylum seeker at Karnes who seeks review of ICE’s decision to continue detaining her may ask for a redetermination of ICE’s custody decision before an immigration judge. In a

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30 See The Honorable Robert A. Katzmann, Bench, Bar and Immigrant Representation, 15 Legislation and Public Policy 585, 593 (2012) (reporting comprehensive study results which show detention to be one of the two most important variables determining success in Immigration Court, with representation being the other variable).

31 8 CFR 1236.1(d); Matter of X-K-, 23 I&N Dec. 731 (BIA 2005)(confirming that an asylum seeker may request release on bond with the immigration court after passing her CFI). Not all persons initially subjected to expedited removal are eligible to petition an immigration judge for release, even if they have passed a CFI. Individuals considered “arriving aliens” (meaning those who were apprehended before achieving entry to the US, such as in an airport or at a land border bridge) are not eligible to go before a judge for redetermination of custody at all. ICE may
custody redetermination proceeding before the immigration judge, the asylum seeker must establish that she does not pose a danger or flight risk. The judge may then order her released on personal recognizance or on payment of a bond, the amount of which must be at least $1,500. If the immigration judge does not grant release on recognizance or bond or if the asylum seeker disagrees with the bond amount set, the asylum seeker may appeal to the Board of Immigration Appeals; conversely, the government can appeal the immigration judge’s decision.

The redetermination hearings before the immigration court on custody status are not automatic, as required by international human rights law, and so often are not requested or are not effective without representation. In addition, until the custody hearing before the immigration judge, the families must remain detained. Thus the need to seek a hearing before the immigration judge in order to obtain review of ICE’s categorical decisions inherently makes the family’s detention lengthier than it would be if ICE made individual decisions in the first instance.

At Karnes, some women who have been fortunate enough to obtain pro bono or private counsel have sought redetermination of custody before immigration judges in San Antonio, Texas. In those cases, ICE has opposed release, including on reasonable bond, before the immigration judge. As a result, bond hearings have drastically changed. Previously, they were very brief proceedings requiring only basic evidence and argument on the issues of flight risk or danger to the community. Now, ICE attorneys arguing these bond cases are submitting lengthy evidentiary packets insisting that women must remain detained on “deterrence of mass illegal migration” grounds and that bond should be denied. ICE attorneys are also cross-examining the asylum-seekers on information they provided in their CFIs in a fishing expedition to find evidence of flight risk or some other justification for ongoing detention. This practice has lengthened bond hearings significantly and has made the role of legal counsel more important, even though the families do not receive government-funded counsel in the U.S. system.

In support of its arguments that immigration judges should order continued detention of women and children at Karnes, ICE has sought to justify its policy of detention as deterrence by invoking the decision in Matter of D-J-. In that case, the U.S. Attorney General held that national

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32 Some judges do not believe that they have the authority to release on personal recognizance, and so their inquiry does not consider the necessity of detention but only the bond amount to be assigned, if any. See EOIR, The Immigration Judge Benchbook, Bond Guide, available at: http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm.
33 8 U.S.C. § 1226(a); INA § 236(a). Moreover, the immigrant must prove that she is not a threat to persons, property, or national security, and must ensure that she will appear at all future immigration proceedings in order to be released on bond. Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006) (citing Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999)).
security interests, specifically related to preventing future mass illegal migration, constituted a valid justification for categorically denying release on bond to certain asylum seekers. The policy applied in Matter of D-J- is in stark contrast with domestic and international law, requiring individualized determinations of the need to detain based on flight risk or danger to the community. As explained above, international law specifically prohibits use of detention as a deterrent. In addition, as further described below, the UN Refugee Agency (UNHCR) guidelines on detention recognize national security as a legitimate government purpose for holding an asylum-seeker in detention, but only where an individual has presented an actual risk to national security, which has not occurred in the Karnes context.36

For the families in detention at Karnes, immigration judges have been ordering release on bond despite ICE’s attempts to keep them detained. However, since the amount of the bond an immigration judge can set is discretionary (though it may not be less than $1,500), judges in the same court have been wildly inconsistent in the amounts of the bonds they set for immigrants in similar circumstances and with similar asylum claims.37 These results put in doubt the likelihood that immigration judges are properly evaluating the permissible considerations of flight risk or danger in making custody decisions. In some cases, bonds are set so high that families are simply unable to pay and remain detained throughout their proceedings.

There also remains another possibility that a family will not be released even after bond is set. ICE can reserve the right to appeal the immigration judge’s decision, and within 24 hours may invoke a unilateral “automatic stay” power.38 Once invoked, ICE’s stay power means that the asylum seeker must remain detained while ICE appeals the immigration judge’s decision to grant release on bond; these appeals may take months to resolve. As a practical matter, ICE’s automatic stay power means that detained immigrants with asylum claims may end up remaining detained throughout the duration of their asylum cases in immigration court—despite the independent review of an immigration judge determining that such immigrants should be released on bond. This possibility effectively renders null the independent review of an immigration judge, and vests unreviewable authority in ICE to determine the length of detention of an asylum-seeker. As such, ICE’s automatic stay power directly conflicts with international standards that require independent review of detention decisions based on objective criteria. Thus far, ICE has reserved the right to appeal immigration judges’ decisions to grant bonds to Karnes detainees, but has not invoked the automatic stay power. Yet, the threat remains that ICE could deploy this tool at any point.

36 UNHCR Detention Guidelines, Guideline 4.1.3.
37 In the San Antonio Immigration Court, one judge has been generally setting $5,000 bonds for women detained at Karnes, while another has generally been setting $20,000 - $25,000 bonds.
38 Pursuant to 8 C.F.R. 1003.19(i)(2), ICE may halt release on bond during its appeal of the immigration judge decision where ICE originally declined to set bond, or where ICE set a bond of $10,000 or more. Because ICE has denied bond in all Karnes cases, this rule may be invoked in any case where the immigration court orders release.
D. Lack of Access to Counsel and Legal Information

Access to counsel for the families detained at Karnes is of utmost importance yet is severely lacking. The American Bar Association has found that “[a]ccess to legal services is critical to a fair and efficient immigration removal and detention system. Authorities should facilitate access to legal and consular services, legal materials and information, correspondence, and legal orientation presentations.” Without access to counsel and information about legal rights and processes, basic procedural protections required under international law are nonexistent or ineffective.

The families at Karnes have not had adequate information regarding the asylum process or their rights. When the facility was initially opened for families, no “Know Your Rights” presentations were given to the newly arrived mothers and children to inform them about the asylum process or the right to request bond from an immigration judge. Because of this, it is likely that many women underwent CFI’s without understanding why they were being questioned or that the interview was a pathway to either deportation or obtaining asylum. Some were likely deported as a result.

While non-profit service providers have now begun to provide legal presentations, the numbers of detainees are so great that it is difficult for these service providers to conduct “intakes” or “consultations” for immigration purposes to determine what immigration remedies exist for the more than 500 women and children. This shortcoming falls especially hard on children detained at Karnes, who are automatically assumed to be beneficiaries of their mothers’ asylum claims even if they might have their own claims.

Women and children detained at Karnes have an even more difficult time obtaining ongoing legal representation in their individual cases. Unlike criminal proceedings in the United States, asylum seekers do not have a right to publicly-funded appointed counsel in their removal proceedings. Instead, immigrants in removal proceedings have a “right to counsel” in that they may obtain representation by a private immigration attorney or by a pro bono immigration attorney if they can do so in time. If not, an immigrant in removal proceedings is forced to represent himself, without the aid of counsel, having no background in the complex realm of U.S. immigration law.

The women must rely on non-profit legal services providers and volunteers to offer representation, except in the unusual case where the family can afford to pay a private attorney.

40 Immigrants have a right to counsel so long as it is provided at “no expense to the government.” 8 U.S.C. § 1362 (1996); See also 8 U.S.C. § 1229a(b)(4)(A) (2006).
Yet, the location of Karnes provides a barrier to women obtaining counsel, as it is located in a rural area far removed from pro bono immigration attorneys. The nearest large metropolitan cities with such attorneys are San Antonio, located more than an hour away from the facility, and Austin, located about two hours away from the facility. This makes it difficult not just to get a pro bono attorney, but also for attorneys to access their clients as they have to commute a considerable distance to interview the detainees in person. The facility’s remote location also violates the ABA civil immigration detention standards, which state that a detention center should be near “[a]dequate non-profit, pro bono, or low-cost legal services.”

Additionally, even where a family obtains counsel, immigration officials do not always inform attorneys of important dates relevant to their cases (like the date of a woman’s CFI). Furthermore, difficulties with women making outgoing phone calls from Karnes have made it hard for women to alert their attorneys of these dates. The result is that attorneys are not always able to adequately prepare a client’s case before the deadline, and sometimes are unaware that an important step in the case has transpired until after the fact.

In general, the ability to seek representation and to effectively work with an attorney once represented has been greatly hindered by the difficulties in phone access. It is not possible for an attorney to call a client at Karnes and speak to her directly. Rather, the detainee must call out to the attorney. However, women detained at Karnes are only allowed to place outgoing phone calls if they have enough money in their commissary account to buy a phone card from Karnes—no outside phone cards are allowed. The only free phone calls permitted are to pro bono immigration attorneys and organizations, but women have repeatedly reported having a difficult time getting through on this free phone system.

Additionally, attorneys and other legal staff have reported encountering accessibility problems at Karnes. Staff at the facility imposes strict access rules on legal representatives other than attorneys (such as paralegals and even law student attorneys), requiring them to fax a sheet of intended clients 24 hours before the visit with an estimated time of arrival for the next day. If the representative arrives more than 30 minutes after her stated time of arrival, she is denied access to her clients. This poses a particularly difficulty for representatives commuting from long distances who might encounter travel or traffic delays. In addition, all non-attorney representatives and support staff, such as interpreters, must receive security clearance before being allowed admittance to Karnes. Attorneys have also reported waiting for long stretches of time after arriving at the Karnes facility before being allowed to speak with clients, sometimes even up to two hours. Some attorneys have been informed that they may only see a limited number of clients in a particular day, requiring additional travel on another day. These are all typical prison policies that should not apply to civil detention, where access to outside visitors, especially legal visitors, should be freely given.

41 ABA Civil Immigration Detention Standards at 11.
E. Conditions of Detention Not Civil

Immigration detention that is punitive in nature violates both domestic and international law. U.S. immigration officials have no authority to detain immigrants for purposes other than prevention, and outside a criminal process, punitive detention violates due process.\(^{42}\) Guiding principles for civil immigration detention have been addressed in a 2012 report published by the American Bar Association, which states that: “Residents should not be held in jails or jail-like settings...Civil detention facilities might be closely analogized to ‘secure’ nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities.”\(^{43}\) The UNHCR guidelines on detention specifically state that: “Detention of asylum-seekers for immigration-related reasons should not be punitive in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided.”\(^{44}\) Yet despite both domestic and international law on the issue, Karnes is largely punitive in the nature of its structure and conditions of detention.

Though Karnes is designated as “residential facility,” its so-called “residents” are locked in, and attorneys and visitors are locked out unless they follow very specific rules to gain entry. As a secure facility, there is no right to come and go for the women and children detained there. Karnes also looks like a correctional facility. The interior walls are painted cinderblock, and both interior and exterior doors are heavy, loud when slammed closed, and are most of the time left locked until a button is pushed and access through them is granted by Karnes staff. The facility is owned by a private prison corporation, GEO Group, whose website touts the corporation as being “the world’s leading provider of correctional, detention, and community reentry services.”\(^{45}\)

The staff is male-dominated and is not trained in proper interactions and care of women, children and asylum seekers. Only very limited mental health and medical services are available. Children must be placed in “daycare” at Karnes while their mothers attend court hearings, yet the care providers do not appear to have any training in working with children.

Guards give disciplinary write-ups to women and children alike, and multiple women have reported that children are written up for doing “children things,” like running or laughing loudly or playing too much. In addition, guards sometimes threaten separating a mother and her child if the child is sanctioned for “bad” behavior.

Women and children at Karnes are also required to participate in several daily body counts. During these times, all residents are required to remain in their designated indoor

\(^{42}\) Zadvydas v. Davis, 533 U.S. 678, 694-95 (2001); Wong Wing v. United States, 163 U.S.228, 241 (1896).
\(^{43}\) ABA Civil Immigration Detention Standards at 4.
\(^{44}\) UNHCR Detention Guidelines, Guideline 8.
locations. If children cannot remain still during this time, they may be written up for a disciplinary infraction.

Children are also not allowed to bring toys into their rooms. Reportedly, infants and toddlers may not be placed on the ground to engage in developmentally-appropriate activities such as crawling.

II. International Human Rights Law Protects Asylum-Seekers from Arbitrary Detention

A. The Right to be Free from Arbitrary Detention and the Rights of Asylum Seekers

International human rights law protects all people from state-imposed arbitrary detention.\textsuperscript{46} Thus, for example, the International Covenant on Civil and Political Rights (ICCPR)—which the United States has ratified—establishes that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”\textsuperscript{47} The right to be free from arbitrary detention means that detention must be based on grounds and procedures set forth in law, and it must be proportional—used only to the extent needed to meet an important governmental purpose, and ending when the need for it ends.\textsuperscript{48} Detention may not be discriminatory, based on race, gender, religion, or national origin.\textsuperscript{49} Treatment of detainees must be humane, with access to medical evaluation and treatment.\textsuperscript{50}

The Inter-American Commission on Human Rights (IACHR) has specifically indicated, including in the immigration context, “that pre-trial detention is an exceptional measure.”\textsuperscript{51} The IACHR has thus insisted that alternatives to detention should always be considered.\textsuperscript{52}

International human rights law further obligates states to respect the right of all people to seek and enjoy asylum.\textsuperscript{53} Anyone who is applying for refugee status holds the status of asylum

\textsuperscript{46} American Declaration of the Rights and Duties of Man art. 25, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949); Universal Declaration of Human Rights, Article 9 GA res. 217A (III), UN Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, Article 9(1) GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).
\textsuperscript{47} International Covenant on Civil and Political Rights. See also American Declaration of the rights and Duties of Man, at art. 1.
\textsuperscript{49} UNHCR, Detention Guidelines, Guideline 5.
\textsuperscript{50} UNHCR, Detention Guidelines, Guideline 4.1.2.
\textsuperscript{52} IACHR, Report on Immigration in the United States: Detention and Due Process, at 15.
\textsuperscript{53} American Declaration of the Rights and Duties of Man, at art. 27. See generally Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) (establishing international recognition of the
seeker for this purpose. Among the rights that refugees, and asylum seekers, enjoy are the right to non-refoulement, the right to freedom of movement, the right to liberty and security of person, and the right to family life.

With respect to the use of detention on asylum-seekers, the United Nations High Commission on Refugees (UNHCR)—the human rights body charged with leading and coordinating international action to protect refugees—has developed Detention Guidelines which are considered authoritative. The IACHR regularly references standards by the United Nations when establishing human rights norms.

The UNHCR Guidelines confirm a strong presumption against detention of asylum seekers. Since detention deprives asylum seekers of fundamental liberty for asserting their right to seek protection and causes “well-known negative and at times serious physical and psychological consequences,” international human rights law imposes stringent restrictions on the detention of asylum-seekers.
Under the UNHCR standards, detention of asylum-seekers should be used only as a last resort or “exceptional measure,” and must be based on previously existing law. Even then, the government must first consider alternatives to detention, such as release or release on bond. The IACHR has found that similar limitations apply to the detention of asylum seekers and other migrants.

The UNHCR standards further require that detention must be justified by a legitimate purpose and be proportional to that purpose. To determine if detention is proportional and reasonable, the UNHCR weighs its purpose against the asylum-seeker’s right to personal liberty, which must be given great weight. The only legitimate purposes that may justify detention are – public order, public health, or national security. With respect to public order, which is the most commonly invoked reason for immigration detention in the United States, the UNHCR has stated that detention is only justified when “1. the asylum-seeker is likely to abscond or refuse to cooperate; 2. detention is associated with accelerated procedures in narrow circumstances; 3. brief detention is necessary to carry out initial identity and security checks; or 4. an initial brief period of detention is necessary to allow for a ‘preliminary interview’ on the asylum claim.”

Even in those cases, there must always be an individualized determination that detention is needed in a particular case. National security grounds also must be narrowly interpreted and detention for national security reasons must be “necessary” and “proportionate to the threat.” Finally, detention may not be discriminatory, based for example on gender or a particular national origin.

In addition, detaining asylum-seekers in the name of deterrence is unlawful under human rights standards because it would violate the requirement that detention must be individualized—necessary, proportional, and reasonable “in all the circumstances” of the individual case. This goes hand-in-hand with the principle, reiterated by UNHCR, that detention of asylum seekers should not be punitive. Since asylum seekers are exercising their rights under international law to seek asylum, they may not be punished for doing so.

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64 UNHCR, Detention Guidelines, Guideline 4.1; see generally International Covenant on Civil and Political Rights (recognizing a right to be free from arbitrary detention).
67 UNHCR, Detention Guidelines, Guideline 4.2.
68 UNHCR, Detention Guidelines, Guideline 4.
69 UNHCR, Detention Guidelines, Guideline 4.1.
70 UNHCR, Detention Guidelines, Guideline 4.
71 UNHCR, Detention Guidelines, Guideline 4.1.3.
72 UNHCR, Detention Guidelines, Guideline 5.
73 UNHCR, Detention Guidelines, Introduction at 7.
In addition, when the extraordinary measure of detention is employed, international law imposes limits. Indefinite detention is arbitrary, and maximum limits on detention should be established.75 Decisions to detain or to extend detention must be subject to procedural safeguards such as notice of their rights, right to counsel and regular review of detention.76

The conditions of detention must be humane and dignified, for example with detainees provided adequate food, medical care, exercise, and regular contact with family.77 The conditions of detention must reflect its civil nature, and criminal-type detention is not appropriate.78 The special circumstances and needs of particular asylum-seekers, including those who have been traumatized or tortured, must be taken into account.79 Detention facilities must also provide for the particular needs of children and women.80

B. Protections for Children

Drawing upon international human rights instruments protecting children, such as the United Nations Convention on Rights of the Child, the UNHCR Guidelines make clear that “detention of children [should] be used only as a measure of last resort and for the shortest appropriate period of time.”81 The IACHR has also enshrined similar principles in several decisions.82

If detention is utilized, the facility must act in the child’s best interests and accommodate a child’s “fundamental right to life, survival, and development.”83 The facility must follow an “ethic of care” that respects the child’s rights to freedom of expression, to be in a family unit, and to be free from discrimination.84 Children have a right to an education and a right to play with other children of their age.85 The UNHCR standards recognize the “well-documented deleterious effects of detention on children’s well-being, including on children’s physical and mental development.”86

75 IACHR, Report on Immigration in the United States: Detention and Due Process, at 15. See also American Declaration the Rights and Duties of Man, art. 1; International Covenant on Civil and Political Rights, at art. 9.
77 UNHCR, Detention Guidelines, Guideline 8.
78 UNHCR, Detention Guidelines, Guideline 8.
79 UNHCR, Detention Guidelines, Guideline 9.
80 UNHCR, Detention Guidelines, Guideline 9.2-3.
81 UNHCR, Detention Guidelines, Guideline 9.2.
83 UNHCR, Detention Guideline, guideline 9.2.
84 UNHCR, Detention Guideline, guideline 9.2.
85 UNHCR, Detention Guideline, guideline 9.2.
86 UNHCR, Detention Guideline, guideline 9.2.
Children should also be afforded all the same procedural rights as other detainees. Efforts should be made to aid the child in the legal process of asylum by prioritizing the child’s claim. Also, an independent guardian and legal adviser should be appointed to aid the child navigate the complex legal webs the child must go through.

The IACHR has reached similar conclusions—namely, that families and pregnant women seeking asylum should not be detained, and if they are, the conditions must not be like prison; that facilities holding children should have less restrictive conditions than adult detention centers; and that “detention of children should be for the shortest appropriate period of time.”

C. Protections for Women

The UNHCR Guidelines also afford additional protections to women asylum-seekers in detention. Detention facilities should care for the women’s gender specific needs, and the use of female guards should be encouraged. Abused women should be given special counseling and attention. Women who report sexual abuse should be given appropriate medical care, counseling, and legal aid. Pregnant or nursing women should not be detained.

III. Domestic Law Protections Relating to Immigration Detention

International law requires that detention be consistent with pre-existing domestic law. In the case of Karnes, family detention violates basic precepts of domestic law that parallel the protections in international law.

Both the United States Constitution and domestic federal law impose certain restrictions on immigration detention, although these restrictions are not always respected in practice, including at the Karnes facility. Immigration detention is distinct from criminal detention within the United States. It is civil detention, because it pertains to non-citizens who have entered or have remained in the country unlawfully, which is a civil infraction under immigration law. Detention is related to immigration proceedings, to ensure appearance for proceedings or deportation, rather than to any criminal penalty imposed after a conviction.

The United States Supreme Court has held that detained non-citizens, including asylum-seekers, are entitled to certain substantive and procedural rights under the Due Process Clause of

87 UNHCR, Detention Guideline, Guideline 9.2.
88 UNHCR, Detention Guideline, Guideline 9.2.
90 UNHCR, Detention Guideline, Guideline 9.3.
91 UNHCR, Detention Guideline, Guideline 9.3.
92 UNHCR, Detention Guideline, Guideline 9.3.
93 UNHCR, Detention Guideline, Guideline 9.3.
the United States Constitution. The Due Process Clause states, in relevant part, that no state shall “deprive any person of life, liberty, or property, without due process of law.”

Many Constitutional due process rights for detained immigrants mirror international human rights standards. First, detention of non-citizens cannot be arbitrary. Detention must be based on a legitimate governmental purpose, and the detention of a particular individual must have a reasonable relation to that purpose. Typically, in the immigration detention context, the Supreme Court has noted that prevention of flight risk and danger to the community are legitimate governmental purposes. To the extent that the government has determined that flight risk or danger justifies the need for detention, that justification must be individualized.

Second, detention of non-citizens may not be indefinite or unduly prolonged. Unduly prolonged detention results when the reason justifying detention no longer applies. At that point, the Due Process Clause prohibits further detention. Third, civil immigration detention, including detention of asylum-seekers, cannot be punitive. Since immigration detention is regulatory and not based on violations of criminal law, it cannot be for the purpose of punishment.

Fourth, the initial decision to detain, as well as subsequent decisions to extend detention, must be accompanied by procedural safeguards to ensure that the detention rests on a legitimate governmental purpose and that the detention bears a reasonable relation to that purpose. When the individual is no longer a risk for the reason she was detained, then review of detention should be available so that release can be secured.

IV. Domestic Law Establishes Special Protections for Children, including Those in Detention

A. Due Process for Children in State Custody

The U.S. Supreme Court has held that the United States Constitution affords children the same basic rights and guarantees that it provides adults. Non-citizens in this country, regardless of their status, are also guaranteed fundamental due process protections under the

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96 See Kim, 538 U.S. at 515 (2003).
100 See Kim, 538 U.S. at 527 (2003).
101 See Breed v. Jones, 421 U.S. 529, 541 (1975) (stating juveniles are protected by the double jeopardy clause of the Fifth Amendment); In re Winship, 397 U.S. 358, 368 (1970) (requiring proof beyond a reasonable doubt in juvenile proceedings); In re Gault, 387 U.S. 1, 13 (1967) (Holding that the protections derived from the Fourth Amendment and Bill of Rights do not apply solely to adults and thus are extended to children).
Constitution’s Due Process Clause. Therefore, non-citizen children detained and placed in removal proceedings benefit from the Constitution’s fundamental due process guarantees.

Further affirming the strict limits on detention applicable to all children, the U.S. Supreme Court has held that pre-trial detention is restricted in the juvenile delinquency context. The state must have a compelling interest, detention must be necessary to prevent pre-trial crime by the child, the detention must not be punitive and must have short, strict time limits, and conditions of confinement must not be unduly severe. Even then, the decision to detain must be individualized, and the state must provide procedural safeguards, such as notice of charges, assistance of counsel, and an adversarial hearing on the record.

Likewise, with respect to medical confinement of children, the Supreme Court has held that when parents or guardians voluntarily commit their children to psychiatric institutions, procedural due process protections apply. Like adults, children have a substantial liberty interest in not being confined unnecessarily for medical treatment. To protect that interest and prevent erroneous confinement, the Court requires procedural due process protections such as a full factual inquiry made by a neutral fact-finder.

Regardless of the purpose for the confinement, the detention of a child triggers the Due Process Clause. Only a very important government interest particularized to the child, can justify deprivations of physical liberty, and strong procedural safeguards must exist to reduce the risk of error in decisions to detain.

B. Children Are Uniquely Vulnerable

Children have different needs and capacities than adults and care must be given to ensure those needs are met. Childhood is a particularly vulnerable time of life, and children erroneously institutionalized may bear scars for the rest of their lives. For these reasons, the Supreme Court has pointed out that children may require more legal protection than adults and

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102 See Landon v. Plasencia, 459 U.S. 21, 32 (1982); see also Plyler v. Doe, 457 U.S. 202, 210 (1981) (holding that “even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments”).


104 Id. at 275–77.


106 Id.

107 Id. at 606.

108 See In re Winship, 397 U.S at 367 (holding that regardless of the purpose of the incarceration, that fact remains that the children are incarcerated and thus a deprivation of a child’s liberty occurs.).


that Constitutional principles must be applied with sensitivity and flexibility to the special needs of children. The Court has also recognized three reasons why courts must be sensitive and flexible in determining the constitutional rights of children, rather than automatically equating them with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. Care must be taken when making the decision to detain a child as the consequences of erroneous commitment decisions may be more severe where children are involved.

Particular care should also be given when detention affects family relationships. The Supreme Court has recognized the unique role in our society of family, the institution by which “we inculcate and pass down many of our most cherished values, moral and cultural.” When state action impairs family unity and family decision-making, the state’s interests must be important, and state action cannot be arbitrary.

C. The State’s Duty to Protect Children and Parens Patriae

The State has both the power and the responsibility to protect the interests of children within its jurisdiction under the legal concept *Parens Patriae*. Where the custody of the parent or legal guardian fails, the government must exercise custody or appoint someone else to do so. However, the state must respect the parents’ primary right and duty to care for their children, and courts must assume – in the absence of evidence of abuse or neglect – that parents act in the best interests of their children. Without evidence of abuse or neglect, the state should not negate parental decision-making to exert control over the child.

When a state acts to take custody of a child, the Constitution imposes upon the State affirmative duties of care and protection for the child. The duty to protect arises from the limitation that is imposed on the child’s freedom to act on one’s own behalf. Federal statutes also elaborate on the governmental duty to protect the rights of children in the government’s care or custody.

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112 Bellotti v. Baird, 443 U.S. 622, 634-35 (1979) (stating that children generally are protected by the same guarantees against government deprivation as are adults and the State is entitled to adjust its legal system to account for the vulnerability of children).
113 *Bellotti*, 443 U.S. at 634-35.
114 Reno v. Flores, 507 U.S. 292 at 318 (O’Connor, J., Concurring).
118 *Flores*, 507 U.S. at 302.
119 *Parham*, 442 U.S. at 602.
120 *DeShaney* v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989).
121 *Id.*
122 *See* e.g., 42 U.S.C. § 5101–07 (2014) (The Child Abuse and Protection Act provides that the government is allowed to step in for the mistreatment of children due to parens patriae, a legal term meaning that the government has a role in protecting the interests of children); 125 Stat. 369 (2011) (listing the requirements for states receiving
D. State of Texas Protections for Children in State Custody

In Texas, where the Karnes Detention Center is located, the Texas Family Code provides for the protection of children from abuse and neglect. The Code defines abuse as causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning.\(^{123}\) The Code defines neglect as placing a child in a situation a reasonable person would realize requires judgment beyond the child's maturity, physical condition, or mental abilities, as well as failing to seek, obtain, or follow through with medical care resulting in a substantial risk of death, disfigurement, or bodily injury or observable and material impairment to the growth, development, or functioning of the child. The Code applies to persons responsible for a child's care, custody, or welfare.\(^{124}\) This includes personnel at a public or private child-care facility that provides services for the child or at a residential institution or facility where the child resides.\(^{125}\)

E. The \textit{Flores} Settlement Agreement Relating to Detained Children and Immigration Regulations on Detained Children

All children in DHS custody are entitled to certain procedural protections guaranteed to them by virtue of a federal court settlement agreement in a case entitled \textit{Flores v. Reno}.\(^{126}\) \textit{Flores} involved a challenge on behalf of unaccompanied undocumented children to the Immigration and Naturalization Service’s (“INS”) policies governing children’s release, and the conditions of confinement of children who were not released. In 1997, the government entered into a settlement agreement in the case, which requires the government to: (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the “least restrictive” setting appropriate to the age and special needs of minors; and (3) implement standards relating to improved care and treatment of children in U.S. immigration detention.

\textit{The Flores} settlement requires facilities where the children are detained to be “licensed” by the state as a residential facility for children, which the Karnes facility is not. The settlement also requires facilities housing children to provide education, counseling, and other services.

\(^{124}\) \textit{Id.}
\(^{125}\) \textit{Id.}
\(^{126}\) The \textit{Flores v. Reno} settlement agreement is available at http://immigrantchildren.org/Information/Flores%20Case.html.
Finally, an immigration regulation regarding minors in DHS custody requires DHS to consider whether to release a detained child along with a detained parent, on a case-by-case basis.127

CONCLUSION

The government’s detention of women and children at the Karnes detention center violates international human rights standards, as well as parallel domestic law protections, in numerous ways:

1. The government’s categorical determinations to continue detention of women and children at Karnes lack any individualized basis and therefore violate the human rights norm prohibiting arbitrary detention. ICE’s decision to keep families in detention even if they pose no individual danger or flight risk, based on purported deterrence of “mass illegal migration” is not a legitimate basis for family detention. Moreover, there is no relation at all between the detention of families at Karnes and mass illegal migration patterns.

2. The government’s decision to impose categorical family detention on asylum-seekers violates the international norms that detention of asylum-seekers and of children should be an exceptional measure, a last resort, and one that is imposed after consideration of alternatives. Here, the government uses family detention as a first resort, without consideration of non-detention alternatives such as community-based supervision and payment of bond.

3. The conditions at the Karnes detention center, as described herein, are punitive, disproportionate to the purpose, and are not the least restrictive, and therefore violate international norms. From inadequate food and medical services to harsh restrictions on children’s movement to threats and discipline, the detention conditions resemble prisons far too closely.

Under these circumstances, family detention at Karnes violates the rights of the detained mothers and children, and the practice of family detention should end. Family detention is an excessive and disproportionate response to a purported influx of children crossing the border.

Finally, the harms to children from detention in a secure facility are significant. Children need, among other things, abundant food, education appropriate to their age, ability, and language skills, unrestricted play, flexible schedules, and activities supervised by their parents. At Karnes, children lack each of these important necessities, and their parents lose virtually all control over their care and upbringing.

127 8 CFR 236.3(b)(2).
Given the virtually nonexistent security benefits from detaining children and their mothers, and the serious harms resulting from such detention, the government should end the practice of family detention at Karnes, and desist from building more family detention centers.
EXPEDITED REMOVAL AND IMMIGRATION DETENTION

Apprehended Near Border (within 100 miles of border and within 14 days of entry, with no or false documents)

- Expedited Removal
  - Expresses fear of persecution
    - Detained initially at Customs and Border Patrol holding facility at border
    - Detained at Karnes County Detention Center
      - Immediate deportation without further review
      - Removal proceedings on merits of case (including asylum)
    - Pass
      - Credible fear interview by officer
        - Pass
          - Review by Immigration Court
            - Pass
              - Removal proceedings on merits of case (including asylum)
              - Non-mandatory detention
            - Fail
              - Mandatory Detention (throughout expedited removal)
        - Fail
          - No fear of persecution stated
            - Mandated Detention (throughout expedited removal)
            - Expedites Removal
Removal proceedings on merits of case proceed simultaneously with review of detention

**Custody Decisions**

- ICE decides custody – no release at Karnes

**Merits of Case**

- Hearings in immigration court
  - (Possible appeal to Board of Immigration Appeals, US Circuit Court)

- Released on bond or recognizance
  - Final – released during merits
  - Appeal – released during merits and bond appeal
  - Appeal – not released during bond appeal
  - Appeal – not released
  - Final – No release and no release

- Ordered released, but ICE appeals and places mandatory stay

- No release – no bond or bond too high to pay

**Final order on merits in deportation proceedings**

- Asylum or other relief granted
  - Released if still detained
  - Final order of removal entered
  - Detained until removal if still detained

**Final order of removal entered**

- Board of Immigration Appeals decision on custody
Record of Deportable/Inadmissible Alien

- **Date of Action:** 09/30/2014
- **Location CODE:** Rio Grande

**Personal Information:***
- **Name:** Sonsonate, Sonsonate, El Salvador
- **Nationality:** El Salvador
- **Sex:** Male
- **Date of Birth:** 09/26
- **SSN:**
- **Race:** White

**Employment:***
- **Occupation:** Laborer
- **Employer:**

**Identification:***
- **Passport Number:**
- **Country of Issue:** El Salvador
- **Country of Birth:** El Salvador

**Contact Information:***
- **Address:**
- **Phone:**
- **Email:**

**Summary:**
- **Reason for Deportation:**

**Identity Verification:**
- **Fingerprint:**
- **Left Index Fingerprint:**
- **Right Index Fingerprint:**

**Family Information:***
- **Father's Name:**
- **Mother's Name:**
- **siblings:**

**Notes:**
- **Continued on I-831**

**Signature:**
- **Border Patrol Agent:**
- **Date:** 07/30/2014 at 1512

**Distribution:**
- **MCU/MCS:**
- **Stats:**

**Receiving:**
- **Officer:**
- **Expedited Removal with Credible Fear**

**Examiner Officer:**
- **Eric Sanchez**

**Form I-200 (Rev 08/01/06)**
U.S. Department of Homeland Security

Continuation Page for Form I-213

Alien's Name

File Number

Date 07/30/2014

Event No.

RECORDS CHECKED

- -----------

ABIS Neg
ATS-P Neg
BVS Neg
CIS Neg
CLAIM Neg
EARM Neg
IAFIS Neg
IBIS Neg
NCIC Neg
TECS Neg

Funds in Possession

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United States Dollar 10.00

Record of Deportable/Excludable Alien:

OTH ER - No Prosecution

IMMIGRATION HISTORY: See records

CRIMINAL HISTORY: See records

ENCOUNTER:

A Border Patrol Agent encountered the subject in the Rio Grande Valley, Texas Border Patrol Sector. A Border Patrol Agent determined the subject had unlawfully entered the United States from Mexico, at a time and place other than as designated by the Secretary of the Department of Homeland Security of the United States. After determining that the subject was an alien whom illegally entered the United States, the subject was arrested and transported to the McAllen Border Patrol Station for further processing.

IMMIGRATION/CRIMINAL VIOLATION:

At the McAllen Border Patrol Station, the subject was asked if they wanted to make a Sworn Statement as part of the Expedited Removal Proceedings. Service Form I-867 A/B was read and explained to the subject. The subject understood and was willing to answer questions and give a statement. The subject again stated they are a citizen and national of El Salvador without the necessary legal documents to enter, pass through, or remain in the United States. The subject also admitted to illegally crossing the international boundary without being inspected by an Immigration Officer at a designated Port of Entry.

CONSULAR NOTIFICATION:

The subject was notified of the right to communicate with a consular officer from their country as per Article 36(a) (b) of the Vienna Convention of Consular Relations. The subject acknowledged understanding the right and declined to speak with someone at this time. The subject further stated they do fear persecution or torture if returned to their country of citizenship.

DISPOSITION:

The subject is being processed for Expedited Removal. The subject was apprehended within fourteen days of their last entry into the United States and within 100 air miles from the United... (CONTINUED ON NEXT PAGE)

Signature

Title

BORDER PATROL AGENT

2 of 3 Pages
States/Mexico international boundary.

(FOR SALVADORANS): Subject was provided a modified Orantes Advisal. Subject indicated he did want an interview before an asylum officer and requested that they not be returned to El Salvador.

The processing of this Expedited Removal was conducted via video conference by Border Patrol Agent Manual Payan at San Diego Sector, Murrieta, California. The subject and witness Border Patrol Agent Fernando Cortez was present at the McAllen Border Patrol Station.

NOTE:
Subject is traveling with her 2 year old daughter
All statements in italics must be read to the applicant.

INTERVIEW PREPARATION

1.1 8/1/2014
Date of arrival [MM/DD/YY]

1.3 8/2/2014
Date of detention [MM/DD/YY]

1.5 8/2/2014
Date of AO orientation [MM/DD/YY]

1.7 8/11/2014
Date of interview [MM/DD/YY]

1.9 ☒ Applicant received and signed Form M-444 and relevant pro bono list on 8/2/2014

1.10 Does applicant have consultant(s)?
☐ Yes ☒ No

1.11 If yes, consultant(s) name, address, telephone number and relationship to applicant
None.

1.12 Persons present at the interview (check which apply)
☐ Consultant(s)
☒ Other(s), list: Interpreter (via telephone).
☐ No one other than applicant and asylum officer

1.16 Language used by applicant in interview:
☒ Spanish
☐ English

1.17 Lionbridge# 2785100
Interpreter Service, Interpreter ID Number.

1.18 Interpreter Service, Interpreter ID Number.

1.19 Interpreter Service, Interpreter ID Number.

1.20 ☒ Interpreter was not changed during the interview

1.21 ☐ Interpreter was changed during the interview for the following reason(s):
☐ Applicant requested a female interpreter replace a male interpreter, or vice versa
☐ Applicant found interpreter was not competent
☐ Officer found interpreter was not competent

1.22 ☐ Applicant found interpreter was not neutral
☐ Officer found interpreter was not neutral

1.27 ☐ Bad telephone connection

1.28 ☒ Asylum officer read the following paragraph to the applicant at the beginning of the interview:

The purpose of this interview is to determine whether you may be eligible for asylum or protection from removal to a country where you fear persecution or torture. I am going to ask you questions about why you fear returning to your country or any other country you may be removed to. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. Please feel comfortable telling me why you fear harm. U.S. law has strict rules to prevent the disclosure of what you tell me today about the reasons why you fear harm. The information you tell me about the reasons for your fear will not be disclosed to your government, except in exceptional circumstances. The statements you make today may be used in deciding your claim and in any future immigration proceedings. It is important that we understand each other. If at any time I make a statement you do not understand, please stop me and tell me you do not understand so that I can explain it to you. If at any time you feel I am not understanding, I will ask you to explain.

Form I-870 (Rev. 11/21/03) N Page 1
SECTION II:

2.1 Last Name/ Family Name [ALL CAPS]

2.2 First Name

2.4 Date of birth [MM/DD/YY]

2.6 None

2.7 El Salvador

Country of birth

2.9 Address prior to coming to the U.S. (List Address, City/Town, Province, State, Department and Country).

2.10 Latina

2.11 Christian

2.12 Spanish

Applicant's race or ethnicity

Applicant's religion

All languages spoken by applicant

Marital status:

Married

2.14 Did spouse arrive with applicant? □ Yes □ No

2.15 Is spouse included in applicant's claim? □ Yes □ No

2.16 If currently married (including common law marriage) list spouse's name, citizenship, and present location (if with applicant, provide A-Number):

Citizen Of El Salvador and currently living in El Salvador.

2.17 Children: □ Yes □ No

2.18 List any children (Use the continuation section to list any additional children):

<table>
<thead>
<tr>
<th>Date of birth (MM/DD/YY)</th>
<th>Name</th>
<th>Citizenship</th>
<th>Present location (if w/PA, list A-Numbers)</th>
<th>Did child arrive with PA?</th>
<th>Is child included in PA's claim?</th>
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<tr>
<td></td>
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<td>El Salvador</td>
<td>Kanes City, TX</td>
<td>□ Yes □ No</td>
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2.19 Does applicant claim to have a medical condition (physical or mental), or has the officer observed any indication(s) that a medical condition exists? If YES, answer questions 2.20 and 2.21 and explain below.

☐ Yes ☒ No

2.20 Has applicant notified the facility of medical condition?

☐ Yes ☐ No

2.21 Does applicant claim that the medical condition relates to torture?

□ Yes ☒ No

2.22 Does the applicant have a relative, sponsor or other community ties, including spouse or child already listed above?

□ Yes ☒ No

2.23 If YES, provide information on relative or sponsor (use continuation section, if necessary):

Uncle

Name

Maryland, U.S.A. (complete address

unknown)

Address

☐ Citizen ☐ Legal Permanent Resident ☒ Other

Telephone Number

SECTION III: CREDIBLE FEAR INTERVIEW

THE FOLLOWING NOTES ARE NOT A VERBATIM TRANSCRIPT OF THIS INTERVIEW. THESE NOTES ARE
RECORDED TO ASSIST THE INDIVIDUAL OFFICER IN MAKING A CREDIBLE FEAR DETERMINATION AND THE
SUPERVISORY ASYLUM OFFICER IN REVIEWING THE DETERMINATION. THERE MAY BE AREAS OF THE
INDIVIDUAL'S CLAIM THAT WERE NOT EXPLORED OR DOCUMENTED FOR PURPOSES OF THIS THRESHOLD
SCREENING.

The asylum officer must elicit sufficient information related to both credible fear of persecution and credible fear of torture to determine whether the applicant meets the threshold screening. Even if the asylum officer determines in the course of the interview that the applicant has a credible fear of persecution, the asylum officer must still elicit any additional information relevant to a fear of torture. Asylum officers are to ask the following questions and may use the continuation sheet if additional space is required. If the applicant replies YES to any question, the asylum officer must ask follow-up questions to elicit sufficient details about the claim in order to make a credible fear determination.

3.1 a. Have you or any member of your family ever been mistreated or threatened by anyone in any country to which you may be returned?

☒ Yes ☐ No

See Q & A and checklist

3.1 b. Do you have any reason to fear harm from anyone in any country to which you may be returned?

☒ Yes ☐ No

See Q & A and checklist

3.1 c. If YES to questions a and/or b, was it or is it because of any of the following reasons? (Check each of the following boxes that apply):

☐ Race ☒ Religion ☐ Nationality ☒ Membership in a particular social group ☐ Political Opinion

Family (Wife of unknown), See Q&A and Checklist.

3.2 ☒ At the conclusion of the interview, the asylum officer must read the following to applicant:
If the Department of Homeland Security determines you have a credible fear of persecution or torture, your case will be referred to an immigration court, where you will be allowed to seek asylum or withholding of removal based on fear of persecution or withholding of removal under the Convention Against Torture. The Field Office Director in charge of this detention facility will also consider whether you may be released from detention while you are preparing for your hearing. If the asylum officer determines that you do not have a credible fear of persecution or torture, you may ask an Immigration Judge to review the decision. If you are found not to have a credible fear of persecution or torture and you do not request review, you may be removed from the United States as soon as travel arrangements can be made. Do you have any questions? □ YES □ NO

3.3 □ At the conclusion of the interview, the asylum officer must read a summary of the claim, consisting of the responses to Questions 3.1-3.3 and information recorded in the Additional Information/Continuation section, to applicant.

****Typed Question and Answer (Q&A) interview notes and a summary and analysis of the claim must be attached to this form for all negative credible fear decisions. These Q&A notes must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear.

SECTION IV:

A. Credible Fear Determination:

Credibility

4.1 □ There is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing.

4.2 □ Applicant found not credible because (check boxes 4.3-4.5, which apply):

4.3 □ Testimony was internally inconsistent on material issues.

4.4 □ Testimony lacked sufficient detail on material issues.

4.5 □ Testimony was not consistent with country conditions on material issues.

Nexus

4.6 □ Race 4.7 □ Religion 4.8 □ Nationality 4.9 □ Membership in a Particular Social Group (Define the social group): Family (Wife of

4.10 □ Political Opinion 4.11 □ Coercive Family Planning (CFP) 4.12 □ No Nexus

Credible Fear Finding

4.13 □ Credible fear of persecution established.

OR

4.14 □ Credible fear of torture established.

OR

4.15 □ Credible fear of persecution NOT established and there is not a significant possibility that the applicant could establish eligibility for withholding of removal or deferral of removal under the Convention against Torture.

B. Possible Bars:

4.16 □ Applicant could be subject to a bar(s) to asylum or withholding of removal (check the box(es) that applies and explain on the continuation sheet):

4.17 □ Particularly Serious Crime 4.18 □ Security Risk 4.19 □ Aggravated Felon

4.20 □ Persecutor 4.21 □ Terrorist 4.22 □ Formerly Resettled

4.23 □ Serious Non-Political Crime Outside the United States

4.24 □ Applicant does not appear to be subject to a bar(s) to asylum or withholding of removal.

C. Identity:

4.25 □ Applicant's identity was determined with a reasonable degree of certainty (check the box(es) that applies):

4.26 □ Applicant's own credible statements. (If testimony is credible overall, this will suffice to establish the applicant's identity with a reasonable degree of certainty).

4.27 □ Passport which appears to be authentic.

4.28 □ Other evidence presented by applicant or in applicant's file (List):

4.29 □ Applicant's identity was not determined with a reasonable degree of certainty. (Explain on the continuation sheet.)
SECTION V: ASYLUM OFFICER / SUPERVISOR NAMES AND SIGNATURES

5.1 David Jung ZHN262
Asylum officer name and ID CODE (print)
Audrey McDonnell

5.2 [Signature]
Asylum Officer's Signature

5.3 8/11/2014
Decision date

5.4 [Signature]
Supervisory Asylum Officer
Supervisory asylum officer name

5.5 [Signature]
Supervisor's Signature

5.6 AUG 1 2 2014
Date Supervisor Approved decision

ADDITIONAL INFORMATION/CONTINUATION

U.S. Department of Justice

202 004 596
SNA
**CREDIBLE FEAR DETERMINATION CHECKLIST**

**FILE #:**

**OFFICER:** DAVID JUNG (ZHN 262)

**DATE:** AUGUST 11, 2014

- The factual summary (required by 8 CFR § 208.30) must be included at the end of the Q/A notes for each interview.
- **Torture:** If there is a significant possibility of torture, complete Part A and Part C.
- **Credibility:** If there is no significant possibility that assertions could be found credible, complete Part A and Part D.

### A. Harm

1. Has the applicant testified to past harm or mistreatment in his or her country?

   **If yes, identify Persecutor / Torturer / Other Individual:** The 18th gang.

   - **Past Harm:** The gang threatened to kill the applicant and her child, tried to extort money from her, hit her with their hands, and kicked her. A member of the gang also hit the applicant’s child.

   Yes ☒ No ☐

2. Has the applicant testified that he or she fears future harm if returned to his or her country?

   **If yes, identify Persecutor / Torturer / Other Individual:** The gang.

   - **Feared Future Harm:** The applicant fears being killed.

   Yes ☒ No ☐

3. If no to A.1 and A.2, STOP HERE and complete Form I-870. If yes, continue.

### B. Persecution

1. Is there a significant possibility that the applicant could establish in a full hearing that the claimed past or future harm is on account of one of the five protected grounds?

   - Race ☐ Religion ☐ Nationality ☐ Political Opinion ☒ Membership in a Particular Social Group

   **If yes, check applicable ground(s) above and specify:**

   - **Family** (Family member of the gang targeted her because she is the wife of her husband,)

   Yes ☒ No ☐

   **If no, specify motive of alleged persecutor, explain why a protected ground does not apply, and move to Part C:**

2. Is there a significant possibility that the applicant could establish in a full hearing that the claimed past or future harm did or would rise to the level of persecution?

   **If no, explain, and move to Part C:**

3. Is there a significant possibility that the applicant could establish in a full hearing that the entity that harmed or would harm the applicant is either an agent of the government or an entity that the government is unable or unwilling to control?

   **If no, explain, and move to Part C:**

(Version 3.0 April 11, 2013)
4. Is there a significant possibility that the applicant could establish in a full hearing that the applicant was persecuted or that his or her fear of future persecution is well-founded?

If no, **explain**, and move to Part C.

If yes, STOP HERE and complete Form I-870

<table>
<thead>
<tr>
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<th>Yes ☒ No ☐</th>
</tr>
</thead>
</table>

### C. Torture

1. Is there a significant possibility that the applicant could establish in a full hearing that s/he was or would be intentionally subject to serious physical or mental harm in a country of intended removal?

If no, STOP HERE, **explain**, and complete Form I-870:

<table>
<thead>
<tr>
<th></th>
<th>Yes ☐ No ☐</th>
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2. Is there a significant possibility that the applicant could establish in a full hearing that the person he or she fears is:

- a public official acting in an official capacity?
- or
- an individual(s) who would act at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity?

If no, STOP HERE, **explain**, and complete Form I-870:

If yes, STOP HERE and complete Form I-870.

<table>
<thead>
<tr>
<th></th>
<th>Yes ☐ No ☐</th>
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### D. Credibility

1) Explain each credibility issue in detail:
2) Explain materiality of each issue:
3) Provide the applicant's response for each material credibility issue:
4) Assess the reasonableness of applicant's response as to each material credibility issue:

(Version 3.0 April 11, 2013)
Notice of Custody Determination

KARNES COUNTY RESIDENTIAL CENTER
409 FM 1144
KARNES CITY, TEXAS 78118

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☐ released under bond in the amount of $_________
☐ released on your own recognizance.

☒ You may request a review of this determination by an immigration judge.
☐ You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

EULARIO DENT
(Signature of authorized officer)

Supervisory Det. & Dep. Officer
(Title of authorized officer)

Karnes City, TX
(Office location)

☒ I do ☐ do not request a redetermination of this custody decision by an immigration judge.
☒ I acknowledge receipt of this notification.

(Signature of respondent)  (Date)

RESULT OF CUSTODY REDETERMINATION

On _______________, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ DHS Official ☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld. ☐ Release - Order of Recognizance
☐ Detain in custody of this Service. ☐ Release - Personal Recognizance
☐ Bond amount reset to _______________
☐ Other: _______________

(Signature of officer)
DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

In removal proceedings under section 240 of the Immigration and Nationality Act:

In the Matter of: ________________________________

Respondent: ________________________________ currently residing at: Kames County Civil Detention Center, 409 FM 1144, Kames City, TX 78118

(Number, street, city and ZIP code) (Area code and phone number)

☐ You are an arriving alien.

☒ You are an alien present in the United States who has not been admitted or paroled.

☐ You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1) You are not a citizen or national of the United States.
2) You are a native of El Salvador and a citizen of El Salvador.
3) You entered the United States at or near Hidalgo, TX on 8/1/2014.
4) You did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document.
5) You were not then admitted or paroled after inspection by an immigration officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

☒ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

SNA Immigration Court 800 Dolorosa St, Suite 300, San Antonio, TX 78207

(Complete Address of Immigration Court, including Room Number, if any)

on To Be Determined at To Be Determined to show why you should not be removed from the United States based on the charge(s) set forth above.

Date: AUG 12 2014

Audrey McDonnell
Supervisory Asylum Officer

(Signature and Title of Issuing Officer)

Houston, TX
(City and State)

DHS Form I-862 (5/11) See reverse for important information
Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 1003.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in this Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the Immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court and the Department of Homeland Security immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to your local DHS office, listed on the internet at http://www.ice.gov/contact/ero, as directed by DHS and required by statute and regulation. Immigration regulations at 8 CFR 1241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Immigration and Nationality Act (the Act).

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office of Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before:

(Signature of Respondent)

Date:

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on 8/14/14, in the following manner and in compliance with section 239(a)(1) of the Act.

☐ in person    ☐ by certified mail, returned receipt # requested    ☐ by regular mail

☐ Attached is a credible fear worksheet.

☐ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

(Signature and Title of officer)
IN THE MATTER OF

RESPONDENT

IN REMOVAL PROCEEDINGS

DOCKET: KARNES CITY, TEXAS

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION COURT
800 Dolorosa Street, Washington Square, Suite 300
SAN ANTONIO, TX 78207

CUSTODY ORDER OF THE IMMIGRATION JUDGE

Requests having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. Part 1236 and having considered the representations of the Immigration and Naturalization Service and the respondent, IT IS HEREBY ORDERED that:

The request for a change in the custody status of the respondent is

DENIED.

The request for a change in the custody status of the respondent be

GRANTED and respondent be:

1. X Released from custody on respondent's own recognizance; or
   Released from custody upon posting a bond of $_________; (not less than $1,500).
       By agreement of both parties and:

2. X The conditions of the bond:
    remain unchanged; or
    are changed as follows: SEE BELOW

Other: RESPONDENT MAY ONLY BE RELEASED WITH HER CHILD

GLENN P. MCPHAUL
IMMIGRATION JUDGE
Date: SEPT. 15, 2014

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( )ALIEN ( )ALIEN c/o Custodial Officer ( )Alien's ATTY/REP ( )INS
DATE: 9/15/19 By: COURT STAFF
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( )Legal Services List ( ) Other

0198C
9/97
U.S. Department of Homeland Security

Order of Release on Recognizance

File No: ______________________
Date: September 16, 2014
Event No: ______________________

Name: ______________________

You have been arrested and placed in removal proceedings. In accordance with section 236 of the Immigration and Nationality Act and the applicable provisions of Title 8 of the Code of Federal Regulations, you are being released on your own recognizance provided you comply with the following conditions:

☒ You must report for any hearing or interview as directed by the Department of Homeland Security or the Executive Office for Immigration Review.

☒ You must surrender for removal from the United States if so ordered.

☒ You must report in (writing) (person) to ______________________ (Name and Title of Case Officer)ICE Duty Officer ______________________ (Location of DHS Office)

at 8940 Fourwinds Drive San Antonio, TX 78239 on 03/16/2015 at 1000 (Day of each week or month) (Time)

If you are allowed to report in writing, the report must contain your name, alien registration number, current address, place of employment, and other pertinent information as required by the officer listed above.

☒ You must not change your place of residence without first securing written permission from the immigration officer listed above.

☒ You must not violate any local, State, or Federal laws or ordinances.

☒ You must assist the Department of Homeland Security in obtaining any necessary travel documents.

☒ Other: ______________________ You must appear at all scheduled Immigration Court Hearings.

☐ See attached sheet containing other specified conditions (Continue on separate sheet if required)

NOTICE: Failure to comply with the conditions of this order may result in revocation of your release and your arrest and detention by the Department of Homeland Security.

________________________ (Signature of DHS Official)
Hilario Leal
Supervisory Detention Deportation Officer
(Printed Name and Title of Official)

Alien's Acknowledgment of Conditions of Release on Recognizance

I hereby acknowledge that I have (read) (had interpreted and explained to me in the Spanish language) and understand the conditions of my release as set forth in this order. I further understand that if I do not comply with these conditions, the Department of Homeland Security may revoke my release without further notice.

________________________ (Signature of Immigration Officer Serving Order)
________________________ (Signature of Alien) 9/14/11
(Date)

Cancellation of Order

I hereby cancel this order of release because: ☐ The alien failed to comply with the conditions of release.

☐ The alien was taken into custody for removal.

________________________ (Signature of Immigration Officer Canceling Order) (Date)

Form 1-220A (Rev. 08/01/07)
<table>
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<tr>
<th>Alien's Name</th>
<th>File Number</th>
<th>Date</th>
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<td>September 16, 2014</td>
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X

Alien's Signature

Alien's Address

Alien's Telephone Number (if any)

### PERSONAL REPORT RECORD

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<th>OFFICER</th>
<th>COMMENT/REMARKS</th>
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Form I-831 Continuation Page (Rev. 6/12/93)

Please note that all references in this order/addendum to "INS" or "Service" should now be considered to refer to U.S. Immigration and Customs Enforcement (ICE).
☐ That you do not associate with criminals or members of a gang that are known to be involved in criminal activity.

☐ That you register in a substance abuse program within 14 days and provide Immigration and Customs Enforcement (ICE) with written proof of such within 30 days. The proof must include the name, address, duration, and objectives of the program as well as the name of a program counselor.

☐ That you register in a sexual deviancy counseling program within 14 days and provide ICE with written proof of such within 30 days. You must provide ICE with the name of the program, the address of the program, the duration and objectives of the program, and the name of a program counselor.

☐ That you register as a sex offender, if applicable, within 7 days of being released, with the appropriate agency/agencies and provide ICE with written proof of such registration within 10 days.

☐ That you do not commit any crimes or be associated with any criminal activity while on this Order of Release on Recognizance.

☐ That you report to a parole or probation officer as required within 5 business days and provide ICE with written verification of the officer's name, address, telephone number, and reporting requirements.

☐ You must follow all reporting and supervision requirements as mandated by the parole or probation officer.

☐ That you continue to follow any prescribed doctor's orders whether medical or psychological, including taking prescribed medications.

☐ That you make good faith and timely efforts to obtain a travel document and assist ICE in obtaining a travel document.

☐ That you submit a complete application for a travel document to all appropriate Embassies or Consulates, including those representing the countries of El Salvador You must present ICE with evidence that each Embassy or Consulate to which you apply has received your request and all required documents. This may be done, for example, by mailing your application(s) with a request for return receipt and providing the signed return receipt to ICE, by obtaining a tracking number when you mail your application(s) and providing the number to ICE, or by submitting written confirmation of receipt issued by the Embassy or Consulate.

☐ That you submit your application(s) for a travel document to all appropriate Embassies or Consulates and provide proof of receipt to ICE on or before___.

☐ That you provide ICE a copy of your application(s) for a travel document that you submit to any Embassy or Consulate, including all supporting documents, photos, and other items provided to the Embassy or Consulate to support your application(s).

Please note that all references in this order/addendum to "INS" or "Service" should now be considered to refer to U.S. Immigration and Customs Enforcement (ICE).
That you provide ICE a copy of all correspondence related to your travel document application(s) that you send to, or receive from, an Embassy or Consulate.

That you contact the Embassy or Consulate within 21 calendar days of making your application(s) to confirm that the information you provided is sufficient.

That you comply with any requests from an Embassy or Consulate for an interview and make good faith efforts to submit further documentation if required by the Embassy or Consulate.

Every time you report in person under this order of Release on Recognizance, you must inform the local ICE office of all actions you have taken to obtain a travel document. You must provide any available written documentation to ICE regarding these actions and the status of your travel document application(s).

That you provide ICE, upon request, with any and all information relevant to application(s) for a travel document. This may include, but is not limited to, information regarding your family history, including dates of birth, nationalities, addresses, and phone numbers as requested for such persons, whether in your country of nationality and/or citizenship or elsewhere, and your past residences, schools attended, etc.

You will participate in a supervised release program, as described in the attached document. You will comply with the rules and requirements of this program, and cooperate with its administrators.

I agree to comply with the rules, requirements, and administrators in the supervised release program described in the attached document.

Alien's signature: X Date: 9/16/14

Other:
Your release is contingent upon your enrollment and successful participation in Alternatives to Detention (ATD) program as designated by the Department of Homeland Security. Electronic monitoring is a requirement and curfew may be imposed. Failure to comply with the conditions of your release or the requirements of the ATD program may result in redetermination of your release conditions or your arrest and detention.

Any violation of any of the above conditions may result in a fine, more restrictive release conditions, return to detention, criminal prosecution, and/or revocation of your employment authorization document.

Allen's Acknowledgement of Conditions of Release under an Order of Release on Recognizance

I hereby acknowledge that I have (read) (had interpreted and explained to me in the Spanish language), the contents of this order and addendum, a copy of which has been given to me. I understand that failure to comply with the terms of this order and addendum may subject me to a fine, more restrictive release conditions, detention, criminal prosecution, and/or revocation of my employment authorization document.

(Signature of ICE official serving order) X (Signature of alien) 9/16/14 (Date)

Please note that all references in this order/addendum to "INS" or "Service" should now be considered to refer to U.S. Immigration and Customs Enforcement (ICE).

Updated 4/25/2005
September 25, 2014

Via Email and Regular Mail

Enrique Lucero, Field Office Director
Sylvester Ortega, Assistant Field Office Director
San Antonio Field Office
U.S. Immigration and Customs Enforcement
1777 NE Loop 410, Suite 1500
San Antonio, TX 78217

Kevin Landy
Assistant Director
Office of Detention Policy and Planning
U.S. Immigration and Customs Enforcement
500 12th Street SW
Washington D.C. 20536

Re: Complaints Regarding Conditions at Karnes County Residential Center

Dear Mr. Lucero and Mr. Landy:

We are writing on behalf of women and children who are currently detained at ICE’s Karnes County Residential Center in Karnes City, Texas whom we represent or with whom we have consulted. Through our legal work and consultations at Karnes, we have received many complaints regarding the conditions at the Karnes facility, the most serious of which we have listed below. We urge you to take immediate steps to correct these issues, since the health and well-being of mothers and young children are at stake.

1. Inadequate Access to Food. Detainees have complained that the two refrigerators with snacks are not regularly restocked, or that their children do not have access to a variety of nutritious snacks during non-meal hours. Several families reported that the refrigerators are only fully stocked during facility tours or visits, and that families are not allowed to take food from the refrigerators on those days to ensure that the refrigerators remain visibly full. Finally, mothers are not allowed to warm milk at night for their children. Adequate and nourishing food is imperative to ensure the growth, development, and well-being of the children at Karnes. Children commonly eat more food, and at irregular times,
during growth spurts, whether as toddlers or adolescents. In addition, nursing mothers are held at Karnes; they also require access to healthy foods at irregular times and calories beyond those required by other adults.

2. Problems with Telephone Calls and Messages. Several women have complained that the cost of outgoing phone calls, including domestic calls within the United States, is exorbitantly high. One client reported that her domestic call cost her approximately five dollars for two minutes. Women at Karnes cannot afford these prices. In addition, women have stated that they have difficulties making free calls to pro bono legal services providers. Outgoing phone calls are essential in order for detained women to communicate with their attorneys, their consulates, and their family members. In addition, messages from attorneys and family members are not given to women in a timely manner. Because attorneys and family members cannot call women directly, it is essential that a messaging system function properly to ensure effective communication between women and their attorneys and family members.

3. Toys and Playthings Not Allowed in Living Quarters. Women have complained that their children are not allowed to keep a set of toys or playthings, even paper and crayons, in their living quarters. Children of all ages require such items to promote their cognitive and psychosocial development, engage in imaginative play, and develop executive function. Moreover, many of these children have endured trauma in their home countries or on their journeys, and need additional care and attention.

4. Developmental and Educational Aids for Children under the Age of Four. Women have stated that children age three and under do not attend school or receive any educational or developmental programming. Because these are formative years for crucial cognitive and emotional development, children must have opportunities for social interaction, play, and education, including in a structured setting with licensed child-care providers.

5. Unduly Restrictive Treatment of Infants. Women have stated that guards have required mothers to carry their infants at all times, and that infants are not allowed to crawl and move about freely. Infants must be able to crawl and move freely to develop their balance and mobility, and aid in their cognitive development.

6. Gender of Guards. Karnes has a high number of male guards who interact with the women and children. Given that this is a facility that detains only women and children, in which many women have suffered gender-based violence in their home countries, and where DHS has an obligation to prevent sexual abuse of any kind, the presence of male guards is intimidating and potentially harmful.
7. Inappropriate Child Care Arrangements During the Mother’s Absence. Women report that when they appear via televideo for their court hearings, facility guards are caring for their children in an open area. It is our understanding that the guards are not licensed child care providers, and they are not required to have coursework or certification in child development. Women have told us that guards are not able to properly attend to the large number of young children left in their care and do not make efforts to calm children who are crying or uncomfortable. This is particularly problematic because many of the children are suffering deteriorating mental health because of trauma in the home country and from the deleterious effects of detention. They may face emotional crises when separated from their mothers. Women also have complained that guards do not help young children to use the restroom, thereby increasing the risk of infection, and that guards do not timely feed children, so that children are ravenous when their mothers return.

8. Threats and Punishment against Detained Mothers and their Children. Women have reported that guards have told them that they will get “written up” if they have a messy room, if their child is being too loud, if the child wanders away out of line in the cafeteria, or if the child is separated from the mother too long. Guards have also told them that if they keep getting written up, the mothers will be separated from their children. Other guards have threatened to report disciplinary issues to the immigration judge hearing the families’ asylum case.

9. Separation of Children from their Mothers. Some children over the age of thirteen have been separated from their mothers and are in separate living/ sleeping quarters, presumably in order to accommodate the maximum number of detainees. This family separation is harmful to children and their mothers, resulting in psychological harm that could be severe and long-lasting.

10. Inadequate Medical and Mental Health Services. Women have reported that although they are able to see the facility nurse, there is no doctor on staff to handle larger medical issues, such as persistent coughs, possible respiratory infections, and chronic ailments. Likewise, some women and children have reported feeling depressed or having nightmares, and they have not been able to see the therapist on staff, either because of scheduling issues or because they have not been informed of the mental health resources.

We urge you to take immediate measures to correct these conditions, and we trust that there will be no retaliation against any of the women and children at Karnes for sharing this information with us. We look forward to your prompt response. Please contact me at 512-232-7222 if you would like to discuss these issues further.
Sincerely yours,

Ranjana Natarajan
Director, Civil Rights Clinic
The University of Texas School of Law

Along with:

Barbara Hines, Co-Director, Immigration Clinic, The University of Texas School of Law
Denise Gilman, Co-Director, Immigration Clinic, The University of Texas School of Law
Javier Maldonado, Law Office of Javier N. Maldonado, P.C.
Marisa Bono, Staff Attorney, MALDEF (Mexican American Legal Defense and Education Fund)

Cc: DHS Office of Civil Liberties and Civil Rights (via email: CRCLCompliance@hq.dhs.gov)
September 30, 2014

Via Email and Regular Mail

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20528

Department of Homeland Security
Office for Civil Rights and Civil Liberties
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Washington, D.C. 20528
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Sacramento Policy Office
PREA Coordinator
Sexual Abuse and Assault Prevention and Intervention Program Coordinator
Karnes County Residential Center
409 FM 1144
Karnes City, TX 78118

Advancing Latino Civil Rights for over 40 Years
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RE: Complaints Regarding Sexual Abuse of Women in DHS Custody at  
Karnes County Residential Center  

Dear Secretary Johnson, Ms. Shlanger, Mr. Lucero, and Mr. Landy:  

We, the undersigned, are attorneys who have met with and represent  
women and children who are in DHS custody at the Karnes County Residential  
Center (the “Karnes Center”). We have become aware of serious allegations of  
substantial, ongoing sexual abuse in the Karnes Center, in violation of the Prison  
Rape Elimination Act (PREA) of 2003, 42 U.S.C. § 15601 et seq.; the Department  
of Homeland Security’s (DHS) Standards to Prevent, Detect, and Respond to  
Sexual Abuse and Assault in Confinement Facilities, 6 C.F.R. Part 115; and U.S.  
Immigration and Customs Enforcement (ICE) Performance Based National  
Detention Standards (PBNDs), and Family Residential Standards. We ask that  
federal officials immediately investigate these allegations and implement  
protective measures for the women and children detained at the Karnes Center.  

Numerous women detained at the Karnes Center have alleged that sexual  
abuse has been ongoing since August 2014, including:  

1. Karnes Center guards and/or personnel removing female detainees from  
their cells late in the evening and during early morning hours for the  
purpose of engaging in sexual acts in various parts of the facility;  

2. Karnes Center guards and/or personnel calling detainees their “novias,” or  
“girlfriends,” and using their respective position and power over the  
highly vulnerable detained women within the detention facility by  
requesting sexual favors from female detainees in exchange for money,  
promises of assistance with their pending immigration cases, and shelter  
when and if the women are released; and  

3. Karnes Center guards kissing, fondling and/or groping female detainees in  
front of other detainees, including children.  

On information and belief, at least three Karnes Center employees are  
suspected as having engaged in this conduct. Although detained women have  
reported the unlawful conduct to Karnes Center personnel, to date, no action has
been taken to stop or prevent this abuse, or to prevent its escalation. In fact, the Karnes Center provides an environment that facilitates the abuse. For example, Karnes Center guards, who are predominantly male, have free access to the cells and the detained women and children at any time, day or night. Moreover, some children over the age of thirteen have been separated from their mothers in separate living/sleeping quarters without explanation.

These incidents of sexual abuse and harassment and the hostile and unsafe environment for the women and children not only likely violate federal laws and regulations as noted below, they also likely subject the detained families to conditions that are punitive and unconstitutional under the Due Process Clause of the Fifth Amendment.¹

PREA establishes a “zero-tolerance standard for rape in prisons in the United States.” 42 U.S.C. § 15601–02. Under 28 C.F.R. § 115.6, “sexual abuse” of a detainee by a staff member at the facility includes any sexual contact with a detainee or resident, regardless of whether such contact is consensual. It also includes any “attempt, threat, or request” by a staff member to engage in sexual acts with detainees. 28 C.F.R. § 115.6.

Under 28 C.F.R. § 115.111, DHS and ICE must have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency’s approach to preventing, detecting, and responding to such conduct. DHS’s Family Residential Standard for Prevention of Sexual Abuse mandates that all facilities must have protocols for responding to sexual abuse reported by detainees, and ensure proper follow up on such reports, including discipline and prosecution of assailants. It is clear from both the alleged continuing conduct and the failure to respond to reports of abuse that either there is no prevention plan in place for the Karnes Center, or the Karnes Center policy is not being properly implemented, overseen or enforced.

We call for an immediate investigation into these serious allegations of sexual abuse and the immediate protection of all women and children forced to reside in the facility, including but not limited to an investigation by the Office of Civil Rights and Civil Liberties (CRCL), pursuant to its authority under 6 U.S.C. § 345. Swift action must be taken to investigate the allegations and promptly implement protective and punitive measures, including disciplinary action, contract termination and staff dismissal as appropriate. Given the seriousness of the allegations and the poor management of the facility, DHS must provide direct oversight to ensure the complete safety and well-being of the detained families, including the immediate provision of appropriate medical and psychological services for victims.

We also demand that ICE bring the Karnes Center into compliance with PREA, its implementing regulations, and the Family Residential Standards by

developing, supervising, and enforcing a written policy to prevent, detect, and respond to unlawful sexual abuse by Karnes Center staff and ICE personnel. This includes an accessible and transparent complaint process for detained families, and proper training for all staff and management. All case records associated with claims of sexual abuse, including incident reports, investigative reports, offender information, case disposition, medical and counseling evaluation findings, and recommendations for post-release treatment and/or counseling should be maintained in appropriate files in accordance with the Family Residential Standards. Pursuant to 28 C.F.R. § 115.116, the Karnes Center must take appropriate steps to ensure that all detainees, including those who are not proficient in English, have an equal opportunity to benefit from all aspects of efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include providing access to interpreters.

Finally, we request a written response detailing what ICE and the Karnes Center has done and will do in order to address the grave concerns we have described here. We trust that women who have or will come forward with complaints will not suffer retaliation, and that proper steps will be taken to prevent possible reprisal from staff or other detained women.

As you are well aware, the detainees at Karnes Center are predominantly women and children who have fled horrific violence and conditions in their home countries, including sexual violence and extortion. It is deeply disturbing that their experience in the custody of the U.S. government is subjecting them to further exploitation. DHS simply cannot continue to detain vulnerable individuals whom they are unable or unwilling to protect.

Thank you for your prompt attention to these matters. If you have any questions, please contact Marisa Bono at (210) 224-5476 ext. 204.

Sincerely,

[Signature]

Marisa Bono
Staff Attorney
Mexican American Legal Defense
and Educational Fund (MALDEF)

Along with:

Barbara Hines, Co-Director, Immigration Clinic,
The University of Texas School of Law
Ranjana Natarajan, Director,
Civil Rights Clinic, The University of Texas School of Law
Andrea Guttin, Staff Attorney,
Refugee Protection Program, Human Rights First

Javier Maldonado,
Law Office of Javier N. Maldonado, P.C.

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Special Litigation Section, Civil Rights Division, U. S. Department of
Justice, Fax: (202) 514-0212; (202) 514-6273
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Warden, Karnes County Residential Center
409 FM 1144
Karnes City, TX 78118

Texas Department of Family and Protective Services
P.O. Box 149030, Austin, Texas 78714-9030

Texas Ranger, Texas Department of Public Safety
PO Box 4087, Austin, Texas 78773

Sheriff Dwayne Villanueva, Karnes County Sheriff’s Department
101 N. Panna Maria Avenue
Karnes City, Texas 78118
Advocates for survivors of domestic violence and sexual assault call for an end to the use of detention centers for immigrant women & children fleeing violence

Many of the women and their children arriving at the border, primarily from three Central America countries, have come to the United States fleeing horrific domestic and sexual violence at the hands of intimate partners and criminal gangs, as well as increased risks of human trafficking. These individuals undertake perilous journeys because their abusers are able to commit atrocities without accountability and government institutions fail to provide protections.

It is imperative that the Obama Administration respond to this humanitarian crisis appropriately by denouncing these human rights violations and pursuing strategies to address the root causes, while at the same time offering protection to qualified individuals under asylum law, the Violence Against Women Act (VAWA), and the Trafficking Victims Protection Act (TVPRA).

Since June 2014, the Department of Homeland Security (DHS) has exponentially increased the number of family detention beds and is opening more centers to detain women and their children in jail-like facilities. DHS recently announced that it will open a third such facility in Dilley, Texas with 2,400 beds at a cost of over $280 million annually. More than 125 organizations that work to end domestic violence, sexual assault and trafficking signed a letter urging DHS to close existing family detention facilities and invest instead in effective, humane, and far less costly alternatives to detention.\(^1\)

**Family detention centers are the wrong approach to dealing with this humanitarian crisis because:**

1. It is harmful and re-traumatizing for survivors of violence to be locked in jail-like facilities and to be denied bond or access to alternative to detention programs;
2. Families in remote detention facilities do not have adequate access to legal assistance and mental health services;
3. Without these services, families in detention are vulnerable to re-traumatization and are more likely to be unlawfully deported back to face further persecution or death;
4. Massive detention and rapid deportation are denying these survivors of violence meaningful access to asylum and other protection under U.S. and international law; and
5. There are reports of women in these detention centers experiencing ongoing sexual abuse at the hands of male guards, in violation of the Prison Rape Elimination Act (PREA).\(^2\)

**Crisis of Violence in Central America Against Women and Girls**

The detainees housed in the family detention centers are children and young mothers primarily fleeing three countries in Central America that have among the highest levels of violence in the world;\(^3\) in 2011, El Salvador had the highest rate of gender-motivated killing of women in the world, followed by Guatemala (third highest) and Honduras (sixth highest).\(^4\)

The vast majority of these women and children are fleeing domestic and/or gang violence and abuse, and present facts that may give rise to a claim for asylum or other forms of protection, including U and T visas for victims of domestic violence, sexual assault, and trafficking, or Special Immigrant Juvenile Status. (See attached case examples).

In July 2014 the UN Special Rapporteur on violence against women, Rashida Manjoo, released a statement following an eight-day mission to Honduras. She noted that incidents of violence against women are "widespread and

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systemic” and appear to be on the rise, with an increase of 263.4% in the number of violent deaths of women between 2005 and 2013. She also cited reports of a 95% impunity rate for sexual violence and femicide crimes in Honduras.\(^5\)

The Board of Immigration Appeals (BIA) recently published a decision in, *Matter of A-R-C-G-et al.*, recognizing that **survivors of domestic violence may merit refugee protection**, just like others who face persecution because of characteristics they cannot change, if the government is unwilling or unable to control the “private” actor.\(^6\) This decision underlines the need for due process protections as well as credible fear interviews for asylum that do not, by their very setting and circumstances, undermine a survivor’s potential eligibility for relief.

**Recommendations:**

1) **End the use of family detention centers.** The U.S. government essentially eliminated family detention except in rare circumstances in 2009 after a lawsuit challenged conditions.\(^7\) A return to warehousing vulnerable mothers and children in remote facilities is inhumane and wastes taxpayer dollars.

2) **Reverse current policies of no bond/high bond for families in detention.** ICE has not been recommending release on bond for families in detention and has been appealing bonds granted by immigration judges for mothers and children who have been found to have a credible fear of persecution, pose no public safety threat and have substantial ties to the United States. This is a reversal of prior policies and further compounds the trauma and undermines access to critical services for those found to have a credible fear of persecution.\(^8\)

3) **Expand the use of release and other alternatives to detention (ATDs).** Families can be released on their own recognizance, on orders of supervision and through other community-based alternatives to detention programs that have proven to be effective, more humane, and less costly than institutional detention.\(^9\)

4) **Ensure that asylum officers apply the appropriate legal standards in assessing credible fear during the credible fear interview, and that interviews are conducted appropriately with the vulnerabilities of survivors of violence in mind.** Screening for potential relief must consider recent gender-based asylum legal developments recognizing that survivors of domestic violence may qualify for asylum, VAWA self-petitions, U or T visas, or Special Immigrant Juvenile Status. DHS must ensure that adults and children are screened individually, and that credible fear interviews of children are conducted appropriately given their particular vulnerabilities as child survivors of physical or sexual violence.

5) **Ensure access to appropriate mental health and social services.** Survivors of violence need counseling to help them overcome the trauma they have experienced. This is important not only for their own well-being, but also to help them proceed with the legal process.

6) **End expedited deportations of families.** Many parents and children in family detention are survivors of violence who need time to recover from the trauma they have experienced in order to express themselves to adjudicators and representatives. Expedited processing denies them basic due process.

7) **Ensure access to counsel.** Individuals in detention particularly struggle to find counsel and navigate the complex immigration system. Access to legal counsel generates efficiencies for immigration courts by making sure that individuals understand the process and their rights. This ensures that each individual’s protection concerns receive adequate consideration.

For more information, contact Grace Huang at the Washington State Coalition Against Domestic Violence at grace@WSCADV.org or Rosie Hidalgo at Casa de Esperanza: National Latin@ Network at rhidalgo@casadesperanza.org.

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Case Examples of Survivors of Violence in Family Detention Facilities

The American Immigration Lawyers Association (AILA) has compiled an extensive list of Case Examples of Families in Detention and Subject to Rapid Deportation that illustrate the atrocities and violence that families currently held in family detention centers faced in their home country and the conditions in which they are currently being held. The following stories are excerpted from AILA’s case examples and show that many in family detention centers have suffered horrific domestic and sexual violence in their home country or en route to the United States.

- **Heidi** is a 23-year-old from Honduras. For 6 years, she endured mental and physical abuse from her husband, a drug trafficker from a powerful family. She was a prisoner in her own home, unable to leave without her husband’s permission. Even when her husband was in prison for taking part in a murder, she couldn’t escape as his friends and family were watching her. She tried to leave him and she and her two children’s lives were threatened at gunpoint. She fled to the United States on the advice of a Honduran police officer who told her they couldn’t protect her. Represented by pro bono counsel, she was recently granted asylum in what the judge called a “textbook case.”

- **Amy**, her 7-year old daughter, and her teenage brother fled El Salvador to seek protection from sexual assault, kidnapping and repeated violence by M18 gang members. Six years ago, she refused the advances of a gang member, which resulted in months of beating and gang-rapes. She fled to the United States and after attending several hearings over 4 years, she voluntarily returned to El Salvador, thinking she was safer. Within two weeks of returning, she was gang-raped. The next month her daughter was kidnapped for ransom, and she sold everything to get her daughter back. A few months later, her teenage brother was targeted and ended up in the emergency room. In the Artesia detention center, an asylum officer determined that Amy did not have a credible fear of returning to El Salvador. An Immigration Judge disagreed and found she did have credible fear. She remains in detention waiting to request bond from a judge.

- **Anita** and her 4-year-old son fled devastating violence. Anita has been beaten multiple times, threatened with rape, and suffered trauma during her pregnancy as gang members tried to cut her baby out of her stomach. She has a sponsor, a church community and a pastor who are willing to support her and her son financially in the U.S., yet DHS opposed bond. After nearly a 4-hour bond hearing before an immigration judge, Anita was given a $15,000 bond.

- **G.L.V.A.** fled El Salvador with her teenage and three-year-old daughters. G.L.V.A. suffered repeated violence at the hands of her ex-husband, who beat her when she was pregnant, assaulted her on repeated occasions, and threatened to kill her if she left him or tried to seek help from the police. She also was a target of gang members who controlled the area where she lived. Gang members demanded money from her and threatened her two daughters, then sexually assaulted the teenage daughter. Fearing for her daughters’ lives, G.L.V.A. decided to flee.
Six Voices From Family Detention

Berks County, Pennsylvania

In October 2014, two students from the Interdisciplinary Child Advocacy Clinic of the University of Pennsylvania Law School interviewed mothers detained at the Berks Family Residential Center. They also interviewed family members living outside of detention. The students requested permission to visit the detained mothers in person, to prepare statements for the October 27, 2014 hearing of the Inter-American Commission on Human Rights in Washington, D.C. They were told that it was unlikely the Department of Homeland Security would approve their visit; in fact, the students did not receive a response before submitting this statement. However, some of the mothers were able to place outgoing calls (at their own expense) to the students. Because these conversations could not be scheduled in advance, the students were unable to record the conversations or take verbatim testimony. The statements below use the speakers’ language whenever possible, but otherwise closely paraphrase what was expressed in these conversations. ¹

I feel so sick here. I always have headaches. I didn't have headaches before I was held in here. I have these headaches because I know my three children are trapped in [my country]. They can't go to school. My children can't go outside because every time they do, their father threatens them. They saw him hurt me. My children are very afraid. Who can care for them, and protect them? I can't bring them here until I'm released. I'm willing to wear an ankle monitor. I just need to get my children here, away from him.

No one has told us why we’re being held. No one has told us our rights or even when we can leave. For months I didn’t know anything about my case. Nobody here knew anything. Not the staff. No one. What did I know about why I was put here, instead of being released? Nothing. Nothing. Nothing!

—Mother detained with child at Berks Family Residential Center and separated from her U.S. citizen children who cannot return to the United States until she is released

My sister is extremely distressed. She does not know why she is being held for so long. Also she is worried for the safety of her children back in [our country]. Those children are U.S. citizens! She left them with our mother, and planned to send for them as soon as she arrived here. But now our mother cannot care for them because she is sick, and cannot

¹ Interviews conducted by Steph Albano and Rachel Kwon on October 21 and 22, 2014 via telephone. Notes on file with authors.
protect them from my sister’s husband, who abused her and who has threatened the children. As soon as she gets released, she will send for them to join her. I would send for them myself, but I cannot take care of them alone because I have to work too many hours just to make a living. But if she is released, even on an ankle monitor, she and her children could live in my house.

I wish the government could put themselves in the shoes of these mothers. My sister does not understand why she cannot be released; she just wants to be able to send for her children so that her family can be reunited in safety.

—Woman whose sister and niece are detained at Berks Family Residential Center

My kids are traumatized. My son gets headaches and my daughter vomits from the food. She is allergic to pork, and the food is too sweet. There are no other options to choose from, so it is either eat that food or starve. We know what it is like to starve – when we were detained in Texas, they only gave us ice cream or pudding and no water to drink. This is horrible, but not as horrible as being separated from my youngest son. He and my husband live hours away and cannot come to visit. Even if they could, I would not want them to. It would hurt too much. Please give me the option to be with my children; I am not here to cause problems, I am here for their futures.

—Mother detained with two tender-aged children (under 10) at Berks Family Residential Center, whose husband and third child live in the United States

Every time I talk to my family they are sick. The food and conditions within the facility are making them so, but they only receive medicine when they visit with the doctor. As hard as it is for me to deal with the separation, it is harder for my son. He was born here, and is a U.S. citizen, which is why he is not detained with his siblings. He looks at me and asks, “Where is my mom?” I tell her that she is working, and is on her way back to him. But he is smart, he knows something. They talk every day on the phone, but it is very hard for such a young boy to only speak with his mother over the phone, so he keeps asking, “Where is my mom?” “When will she come?” I wish I had the answer.

—Father whose wife and two children are detained at Berks Family Residential Center
It's hard to explain to my [toddler] son why we cannot leave the facility. He doesn't eat here because the food is so bad. He gets upset often and is afraid of being separated from me. I worry about him, and I also worry about my other children. I cry all the time. I worry about my other children who are still in my country. Their father has threatened to hurt them. I am desperate to bring my other children to this country.

—Mother Detained with toddler in Berks Family Residential Center, separated from her other children who cannot reunify with her while she is detained

There is no freedom at all for my children. We all have to follow the facility’s strict schedule – it tells us when we can eat, when we must sleep. If the facility’s staff members are in a bad mood, they take it out on the kids. If one of my children can’t keep still, the staff yells at the child. My children don't understand why the staff yells at them.

Everyone held at the facility is sick with colds and fevers. We are told that unless we have a 100-degree fever, we cannot see a doctor. They tell us to gargle with salt water.

I made two court appearances without a lawyer. I don’t understand English, but the Judge said I have to fill out all my forms in English.

I’m so tired of being locked up. I feel depressed. I just want to be out of here with my children.

—Mother Detained with two tender-aged children (under 10 years) at Berks Family Residential Center
Written Statement of Ms. Bridget Cambria, Esq.

I am a partner in the law offices of Cambria & Kline, P.C., specializing in immigration law located in Reading, PA. Since my admittance to the Pennsylvania bar in May of 2007, I have represented individuals with immigration detention issues, as well as those with asylum claims, removal defense and other family-related immigration matters. Prior to entering law school, I worked as a Shelter Care Counselor for the Berks Family Shelter in Reading, PA assisting those families and children detained by Immigration. Through this employment, I was able to work first-hand with Immigration and Customs Enforcement as well as detainees, enabling me to gain a unique perspective on the experience of the immigrant and their family while dealing with the complex immigration system. I have experience dealing with individuals and families from initial detention throughout the process to become a legal resident and then citizen of the United States.

Prior to the surge of unaccompanied children and families arriving to the US border this summer, it was the practice of the Berks facility to detain a parent and child for only a brief period (days, weeks) until they were reunified with family members or friends suitable to provide a home and care during the pendency of their removal proceedings. It was rare that a person would proceed far enough into their removal case that they would request an attorney or even appear before a judge because ICE was so effective at placing parents and children in suitable homes. This allowed for the detainees to be released and seek legal counsel close to their family, who are more capable of providing the financial and emotional assistance required during an immigration court matter.

Since mid-summer of 2014, Immigration and Custom Enforcement’s policies have drastically changed. It has become an arbitrary and capricious set of denials to anyone requesting release, without regard to the individual needs of the detainee. I have noticed that conditions worsened and ICE within Berks stopped permitting detainees to leave, even when they had relatives with legal status who were willing and able to sponsor them while they await their hearings. They have even prevented mothers from being reunited with their US citizen children (minor) who are elsewhere in the United States. Some of the detainees I work with have been at the facility since March, which
means they have been held at the detention center for over six months - vastly exceeding the previous average stay of a couple of weeks.

I currently deal with detainees thousands of miles away from home and who do not speak, read or write English. Many of them do not even speak Spanish, but rather rare dialects. Many are illiterate, and are unable to read or write in English or even their own language. They are fathers, mothers and children, many from rural mountain towns in Central America. They receive inaccurate and untranslated information regarding legal representation. They are told to ask to be released by an Immigration Judge, when many parents and children have no right to be released by a Judge, and their release is legally controlled by ICE at the agency’s sole discretion. Most of the paperwork, including asylum applications, were given to them in English, also without a translation. They are asked to complete the form in English. As I previously said, they cannot speak, let alone read or write in English. They are provided no assistance, no one to read them the papers they are given or are told to complete. They are told they can look on a computer for help, but many of these people have never even seen a computer, and many are unable to read what is on the screen.

I have seen that the cases for these “surge” detainees have been expedited. We are experiencing a 60 day time frame which the Immigration Courts are expected to have a case completed. Our courts have been accommodating, when confronted by the lack of legal access, which is apparent, but I do not know how long that will last. I have noticed that these courts are being forced to move cases to accommodate the expediting of the “surge” cases, which is terrifying once you realize that they are delaying cases for other people who are already detained at government expense, patiently awaiting their case in court.

The hearings themselves were also conducted in a way that does not comport with due process requirements. Detainees are kept in Berks, while the Immigration Judge and government attorney are in different locations. The hearing takes place by televideo. In my experience, trials have been held in three separate locations – the detainees and counsel in Berks County, the government officials sitting in York County, and the visiting judges sitting in various other counties throughout the state – so the trial would be conducted as a three-way televideo conference.
Another obstacle that these detainees face is that everyone who is considered an arriving alien is not entitled to a bond hearing, and anyone who is arbitrarily deemed part of the surge is automatically given a higher bond, often over $10,000. In my practice, I noticed that judges who consider a detainee part of the surge fail to perform a case by case analysis with regards to bond i.e. whether the individual is a flight risk or a danger to the community, constituting another violation of due process.

In addition to the lack of due process at these facilities, the structure of the facility also impinges the detainee’s rights to family autonomy. For example, my clients tell me that the facility sets guidelines for the families to live by and structures the time and manner in which to do so, but expects the mothers to enforce it. Children are told when to wake up, when to go to bed, when to eat, etc. and all of the mothers have to pool together and take care of all of the children – whether theirs, their neighbor’s, or unaccompanied minors – while the staff sits idly by. These detention conditions do not consider the best interests of the child.

My clients also state that they are required to keep their children calm at all times and feel judged and ridiculed about their inability to keep the children calm, even though they and their children had been through unspeakable trauma and were understandably frightened and confused by the arbitrary restrictions the staff put in place. For example, mothers are forced to put children of a certain age are forced to bed by 8 p.m. and then listen while they cried because they are scared, alone and not tired enough to fall asleep.

The arbitrary structure of the facility also forces the separation of blended families. For example, two of my clients detained at Berks have been separated from their US citizen children. One was separated from her citizen child while she was in detention with her other children. The US citizen child, whom has never lived apart from his mother, is now without a mother. He has been told that his mother is at “work” and will be home soon. He started his first day at kindergarten without his mother. He is without proper supervision, because his mother is detained.

Another was separated from her citizen children and they have been forced to remain in Honduras while she remained at Berks. Since they have been in Honduras, they have been unable to continue school because of the violence. They have been threatened and intimidated by their mother’s abuser as well as the gangs which plague
San Pedro Sula. ICE’s detention of their mother, has placed the lives of the USC children at risk.

Therefore, please accept this statement that in my professional opinion, the way in which immigration detention facilities operate constitutes a violation of the due process and family autonomy rights of the detainees and their citizen relatives.

s/ Bridget Cambria
October 22, 2014
Reading, Pennsylvania


**Locking Up Family Values, Again**  
Special Report from Lutheran Immigration and Refugee Service  
and The Women’s Refugee Commission  
October 2014

“The damage done to the families who were held at Hutto can never be reversed. But we can honor their suffering by learning from the mistake of family detention and ensuring that we never repeat it.” Michelle Brané, Director of Migrant Rights and Justice, Women’s Refugee Commission

In 2009, the Obama Administration closed what then was the United States’ largest family detention facility after years of controversy, media exposure, and a lawsuit. Conditions at Hutto, and the impact of detention on families and children, proved that family detention could not be carried out humanely. This summer, with an increase in the number of mothers and children fleeing violence and persecution in Central America, the Administration has returned to this widely discredited and costly practice. Part of a strategy to “stem the flow” and send a clear message of deterrence through expedited detention and removal, the expansion of family detention continues even with a high percentage of families seeking protection and posing no flight or security risks. With the conversion of existing detention facilities and plans for an additional facility, the United States will soon see roughly 40 times as many family detention beds as there were in Spring 2014.

Lutheran Immigration and Refugee Service (LIRS) and the Women’s Refugee Commission (WRC), leading experts on the intersection of families and immigration, have collaborated to show the harm family detention causes and outline sensible alternatives. The findings in *Locking Up Family Values, Again* are informed by our tours of the Artesia and Karnes facilities as well as interviews with facility and government officials, detained families, and legal and social service providers. Much like in our 2007 report, our findings again illustrate that large-scale family detention results in egregious violations of our country’s obligations under international law, undercuts individual due process rights, and sets a poor example for the rest of the world.

*Locking Up Family Values, Again* documents that many of the families detained – such as 98% at the Karnes facility based on September 2014 statistics – are seeking protection in the United States. The average age of children in the government’s Artesia facility as of October 2014 was six years old, and more than half of all children who entered family detention in Fiscal Year 2014 were six years or younger. Infants, pregnant women, and toddlers are detained at both locations. Families are detained on a “no bond, no release” policy. Thousands of women and children fleeing violence are at risk of permanent psychological trauma and return to persecution if these policies continue.

In addition to inadequate access to child care, medical and mental health care, and legal assistance, we find that family detention remains as rife for abuse – especially given the
vulnerability of this population – as we observed with Hutto. In October 2014, the Karnes facility was at the center of allegations of sexual assault by guards threatening or bribing detained women. In another example, a detained young mother at a family facility was suddenly accused of abuse, torn apart from her two small children and transferred to an adult facility without explanation or information on her children’s welfare or whereabouts.

Our conclusion is simple: there is no way to humanely detain families. This report recommends that the government close Artesia and Karnes and halt plans for opening a new facility, improve its screening procedures, and revise its policy of no or high bonds for families. The report calls on the government to implement the vast array of cost effective alternatives to detention that are successful in ensuring participants appear for scheduled court hearings.

Key Findings

• Family detention cannot be carried out humanely. Conditions at the Artesia and Karnes facilities are entirely inappropriate for mothers and children. Detention traumatizes families, undermines the basic family structure, and has a devastating psycho-social impact.
• Families are detained arbitrarily, without an individualized assessment of flight or security risk, and without due consideration for placement into alternatives to detention.
• Family detention inherently denies due process and impedes migrants’ ability to access the immigration legal system.
• The majority of mothers and children in detention have expressed fear of return to their home country, but the government often fails to properly conduct required credible fear assessments and screen mothers and children for protection concerns.

Key Recommendations

• **End the Expansion of Family Detention:** Close the Artesia, NM and Karnes, TX family detention centers and halt plans for a massive new detention facility in Dilley, TX.
• DHS should institutionalize a preference for release or community support programs for all families who can establish identity and community ties and who do not pose a security risk.
• **Fully implement and expand alternatives to detention:** A vast array of alternatives to detention exist that are not only cost effective but also succeed in ensuring participants appear for scheduled court hearings. Alternatives to detention should be available nationally, should include community-based support programs and meaningful case management. Enrollment in ATDs should be based on an individualized assessment of flight and security risk.
• **Improve screening procedures** for families seeking protection. Families should have opportunity at all stages of the apprehension and detention process to express a fear, and should have full and fair access to the appropriate screening processes and legal information.
• **Revise policies of no or high bonds for families:** To ensure detention is not excessively used, detained families should be considered eligible for parole or on individually determined and reasonable bond.