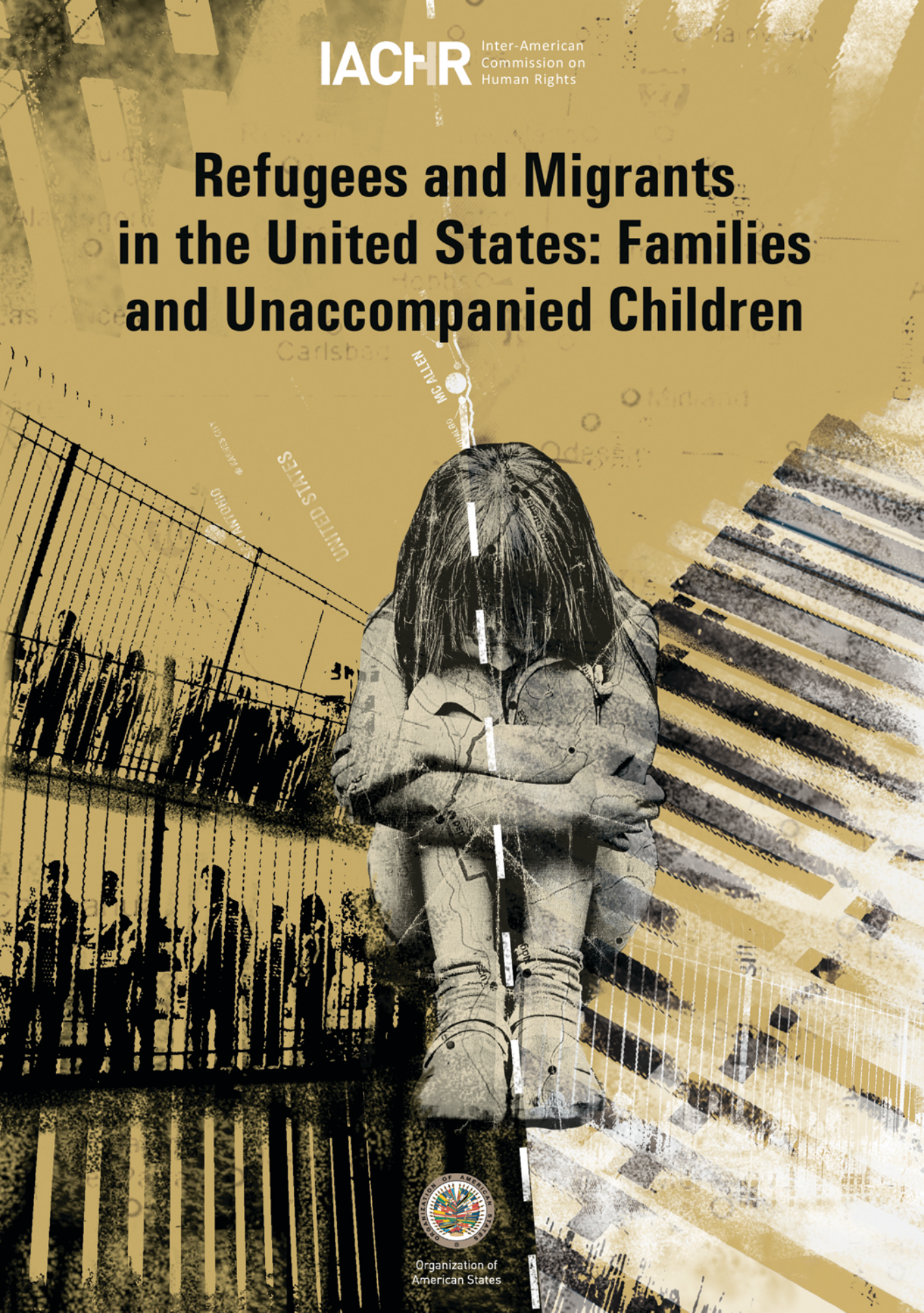
IACHR Inter-American Commission on Human Rights

Refugees and Migrants in the United States: Families and Unaccompanied Children



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Approved by the Inter-American Commission on Human Rights on July 24, 2015

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EXECUTIVE SUMMARY

1. This report addresses the situation of migrant and refugee families and unaccompanied children arriving to the southern border of the United States of America. It analyzes the context of humanitarian crises that have been taking place over the past several years in the countries of the Northern Triangle in Central America - El Salvador, Guatemala, and Honduras – as well as in Mexico. These crises have been generating increased migration northward, principally to the United States, and to a lesser extent Mexico and Canada. This report offers recommendations geared towards assisting the United States in strengthening its efforts to protect and guarantee the rights of the diverse group of persons in these mixed migratory movements – among them, migrants, asylum-seekers and refugees, women, children, families, and other vulnerable persons and groups in the context of human mobility.

2. In recent years, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," "Commission," or "IACHR"), through its various mechanisms, has documented with concern the increasing number of persons, including children, fleeing various forms of violence in countries of the Northern Triangle of Central America – El Salvador, Guatemala and Honduras – and Mexico. This violence, along with other factors, such as poverty, inequality, and various forms of discrimination, has led to the current state of humanitarian crises in the region. In its report on the *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico* (2013), the Commission documented, among other issues, the serious violence, insecurity, and discrimination that migrants in an irregular situation in Mexico encounter, in addition to troubling State responses such as immigration detention and deficiencies in due process guarantees for migrants and other persons in human mobility. In its *Report on Immigration in the United States: Detention and Due Process* (2011), the IACHR documented with concern the United States' response to increasing mixed migratory movements. Since the mid-1990s, this response has consisted of stepped up efforts to detect, detain, and deport migrants in an irregular situation.

3. Some of the most dramatic spikes seen yet in the number of arrivals of unaccompanied children and families to the United States occurred between October 1, 2013 and September 30, 2014 ("U.S. fiscal year 2014"), and specifically in the months of May and June 2014. According to official data, during U.S. fiscal year 2014, the U.S. Border Patrol apprehended a total of 68,541 unaccompanied children and 68,445 families, which represented a 77% increase in the number of arrivals of unaccompanied children and a 361% increase in families over fiscal year 2013. The majority of the arrivals of unaccompanied children and families were to the U.S. southwest border and particularly to the Rio Grande Valley of the state of Texas. The Commission considers that this drastic uptick in the number of arrivals signals a worsening human rights situation in the principal countries of origin. Official data shows that the top four

countries of origin for both unaccompanied children and families were El Salvador, Guatemala, Honduras, and Mexico.

4. The IACHR conducted the visit to the U.S. southern border from September 29 – October 2, 2014. The visit was planned and carried out in the context of monitoring the human rights situation of arriving families and unaccompanied children with respect to their apprehension; immigration detention, in many cases over long periods of time; immigration proceedings; as well as deportations and removals. To this end, the Commission visited the Rio Grande Valley area, including McAllen and Harlingen, as well as Karnes City and San Antonio, Texas.

5. According to the information received, families for whom there is capacity at an immigration detention center are automatically and arbitrarily being detained for the duration of the immigration proceedings initiated against them, even in cases where the mother has passed an initial asylum screening. Other information received by the Commission indicated that unaccompanied children of Mexican origin are, in some cases, being turned around before entering U.S. soil (a practice called a "turn-back") or U.S. officers are failing to correctly identify Mexican unaccompanied children who may have protection needs. While the Commission considers that aspects relating to the overall legal regime in place for unaccompanied children from non-contiguous countries are consistent with international standards, it remains concerned over the lack of due process guarantees and access to mechanisms of international protection for these children in immigration proceedings.

6. For all the sub-groups identified herein, the Inter-American Commission is concerned over allegations of sexual, physical, and verbal abuse by U.S. border officials committed while migrant and refugee children and families are in the State's custody as well as the inadequate detention conditions at border and port of entry stations and family immigration detention centers. The Commission is also deeply concerned over expedited processing of these groups and the lack of access to legal representation in the immigration proceedings initiated against them.

7. The Charter of the Organization of American States (OAS) and the American Declaration of the Rights and Duties of Man constitute sources of legal obligation for OAS Member States including the United States. The organs of the international and regional human rights systems have developed jurisprudence that recognizes the rights of children, families, migrants, and refugees and asylum-seekers. International standards protect the right to equality and non-discrimination, the principle of the best interests of the child, the right to personal liberty, humane treatment during detention, due process and access to justice, consular notification, protection of the family and family life, seek and receive asylum, principle of *non-refoulement*, and the prohibition on collective expulsions.

8. The IACHR stresses that measures taken to securitize the border will not bring these crises to an end. Rather, the underlying factors generating the crises in the principal countries of origin must be comprehensively addressed. This approach must tackle the poverty, economic and gender inequality, multi-sectorial discrimination, and high levels of violence in El Salvador, Guatemala, Honduras, and Mexico. Without national and regional efforts to address such factors, mixed migratory movements will only continue. Without the ability to migrate safely and through more open or regular

channels, these persons will be forced to take even more dangerous and clandestine routes in order to bypass increasingly securitized borders. Such new routes increase the likelihood that persons in the context of human mobility will fall victim to violence and exploitation at the hands of organized crime groups.

9. Based on its close analysis of the situation of migrant and refugee unaccompanied children and families arriving to the southern border of the United States of America, in the present report the Inter-American Commission issues a series of recommendations to the State. The IACHR notes and commends the United States for its sustained efforts to receive and resettle thousands of asylum-seekers and refugees from all over the world, year after year. In light of the State's global position as a leader on protecting the rights of persons in need of international protection, it is the IACHR's hope that the conclusions and recommendations contained in this report will assist it in upholding its human rights obligations and its commitment to serve as a refuge for many thousands of persons each year. In this regard, the Commission urges the State to end its practice of automatic and arbitrary immigration detention of families; to treat Mexican unaccompanied children with the same safeguards and procedures applicable to unaccompanied children from non-contiguous countries; to investigate claims of abuses and mistreatment committed by U.S. border agents and to prosecute and punish, where necessary, the agents responsible; to ensure that the best interests of the child principle is the guiding principle in all decisions taken with respect to children, including in immigration proceedings; and to ensure migrant and refugee children and families enjoy due process guarantees and are provided with a lawyer, if needed, at no cost to them if they cannot cover the costs on their own; among other recommendations developed in this report.

Map of the Commission's Visit to the U.S. Southern Border
(September 29-October 2, 2014)

The IACHR visited the Rio Grande Valley area in Texas, which was the section of the international border between the United States and Mexico with the highest number of border crossings of unaccompanied children and families over the past fiscal year (October 1, 2013 - September 30, 2014). The Commission carried out activities in the following locations:

MCALLEN
Briefing on operations of the McAllen Border Patrol Station and visit to section of the border with Border Patrol agents where the most families crossed.

SAN JUAN
Meeting with civil society organizations and migrants.

HIDALGO
Visit to Hidalgo International Bridge.

HARLINGEN
Teleconference at Harlingen Immigration Court with Court Administrator and Officials from EOIR headquarters. Meeting with Consulates of Honduras, Guatemala, and El Salvador.

KARNES CITY
Visit to Karnes County Residential Center.

SAN ANTONIO
Visit to Saint PJ's Children's Home (HHS-ORR grantee); meeting with civil society organizations; and press conference concluding the visit.

CHAPTER 1
INTRODUCTION

INTRODUCTION[1]

A. Scope and Objectives of the Report

1. The Inter-American Commission on Human Rights (hereinafter "IACHR," "the Commission," or the "Inter-American Commission") presents this report to analyze the human rights situation of refugee and migrant families and unaccompanied children in the United States of America.[2] This analysis provides the basis for the Commission to make recommendations to the United States in order for it to bring its immigration policies, laws, and practices into conformity with international human rights standards, with regard to the protection of migrants[3], asylum seekers, refugees, victims of human trafficking, and other vulnerable groups in the context of human mobility.

2. This report's particular focus is on the lack of adequate screening and identification of persons arriving to the United States who may have international protection needs, the arbitrary and automatic regime of immigration detention being applied to families and children, and serious deficiencies in terms of due process guarantees in immigration proceedings. The report looks especially at the rights of children in this

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[1] In keeping with Article 17(2) of the Commission's Rules of Procedure, Commissioner James L. Cavallaro, a national of the United States, did not participate in the discussion of, research and deliberations on, and approval of this report.

[2] According to international law, under Article I of the 1951 Convention Relating to the Status of Refugees, a "refugee" is someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." The Commission recognizes that the United States implements the definition of a "refugee" as that contained within the 1967 Protocol Relating to the Status of Refugees to which it is a State Party, and the Protocol incorporates the definition of a "refugee" as contained in the 1951 Convention. The IACHR is additionally aware that, in the United States, arriving persons who fear persecution in their country of origin and seek international protection are formally recognized as "asylees" through its asylum process, in accordance with section 208 of the Immigration and Nationality Act.

[3] Throughout the report, the Commission will use the term "migrant." The Commission will also use the expression "migrant in an irregular situation" to refer to those persons who have entered U.S. territory without the necessary documentation or have stayed past the time that they were authorized to stay. The Commission recommends that OAS Member States avoid the expressions "illegal," "illegal [im]migrant," and "illegal [im]migration" to refer to migrants whose immigration status is irregular. The use of the expressions "illegal" or "illegal [im]migrant" reinforces the criminalization of migrants and the false and negative stereotype that migrants, due to their irregular situation, are criminals. The Commission considers it necessary to specify that the irregular entry or stay of a person in a State are not criminal offenses but administrative infractions. In addition to the above, "legal" or "illegal" are not qualities that can be ascribed to human beings. For the sake of clarity, the actions of human beings can be described as "legal" or "illegal," but not the persons *per se*. A person's immigration status may not comply with what a given State's legal system requires, but it may not be extrapolated from that status the 'legality' or illegality' of that person.

context and the serious risks they face. This report also examines the securitization, or the integration of migration and border control issues into security frameworks[4], of the southern border of the United States and the inadequate conditions of immigration detention.

3. Since the Commission's last report on the United States of America (*Report on Immigration in the United States: Detention and Due Process,* 2011[5]), the U.S. has remained the principal destination of international migrants in the world.[6] According to the Department of Economic and Social Affairs of the United Nations Population Division, in June 2013, the United States had a total of 45,785,090 international migrants.[7] The United States is also one of the leading countries for granting asylum and resettling refugees: in 2013, the United States granted asylum to 25,199 persons and resettled 69,909 refugees.[8] The IACHR commends the United States on its efforts to provide refuge to thousands of persons in need of such protection, and notes that, in terms of refugee resettlements, of the countries that reported to the United Nations High Commissioner for Refugees (UNHCR), the United States resettled the most of any country.[9]

B. Actions of the Inter-American Commission on Human Rights Including the Visit to the Southern Border of the United States of America

4. The Inter-American Commission has been closely monitoring the situation of migrants, asylum-seekers and refugees, and other persons in the context of human mobility in the Americas since its conception. Its monitoring activities were enhanced and further specialized in 1996, when the Rapporteurship on the Rights of Migrant Workers and Their Families was created [currently the "Rapporteurship on the Rights of Migrants"], and, with respect to the rights of children in this context, in 1998 when the Rapporteurship on the Rights of the Child was created.[10]

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4 Securitization emphasizes the defense of the border and enforcement of immigration laws over human rights approaches to managing mixed migratory movements and contributes to the criminalization of irregular migration.

5 IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II, Doc 78/10, December 30, 2010, (Hereinafter "*Report on Immigration in the Unites States: Detention and Due Process*") http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf.

6 *See, e.g.*, Pew Research Social & Demographic Trends, "Top 10 Destination Countries of International Migrants, 1990 and 2013," (December 16, 2013), http://www.pewsocialtrends.org/2013/12/17/changing-patterns-of-global-migration-and-remittances/sdt-2013-12-17-global-migration-02-02/.

7 Department of Economic and Social Affairs, United Nations Population Division, "Trends in International Migrant Stock: Migrants by Destination an Origin. Table 10: Total migrant stock at mid-year by origin and by major area, region, country or area of destination, 2013," (September 2013).

8 U.S. Department of Homeland Security, "Refugees and Asylees: 2013," http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf. *See also*, UNHCR, Global Trends 2013 (June 20, 2014), http://unhcr.org/trends2013/.

9 UNHCR, Global Trends 2013 (June 20, 2014), http://unhcr.org/trends2013/.

10 During its 144th regular period of session, and in order to respond to the multiple challenges that human mobility in the region poses and to institutionalize a common practice, the IACHR decided to expand the mandate of the Rapporteurship on the Rights of Migrant Workers and Their Families to focus on the respect and guarantee of the human rights of migrants and their families, asylum seekers, refugees, stateless persons, victims of human trafficking, internally displaced persons and other vulnerable groups in the context of human

5. In July 2009, the IACHR conducted an on-site visit to the southern border of the United States. In the years leading up to the visit, the United States had been dramatically increasing its practice of detaining persons in an irregular migratory situation. The Inter-American Commission was of the view that this increase in immigration-related detention warranted investigation to ascertain whether the immigration policies and practices were compatible with the United States' international human rights obligations. Following the visit, the Commission published a report in 2011, mentioned above, analyzing the way immigration detention, among other practices, was being carried out violated human rights standards and offering recommendations to assist the State in bringing its practices into line with its international obligations.[11]

6. In the context of the region, among other visits, the IACHR also conducted a visit to Mexico from July 25 – August 2, 2011, to attend to the situation of migrants and other persons in the context of human mobility in Mexico, as a country of origin, transit, destination, and return. The Commission's subsequent report, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*[12], addressed the push and pull factors of migration, the use of immigration detention, and the situation of child migrants, among other issues and concerns[13].

7. In addition to the multiple hearings the Commission has held on this topic over the years, it convened hearings on the human rights conditions in all seven Central American countries during its 152nd Extraordinary Period of Sessions, held in Mexico City the week of August 11-15, 2014. During the hearings on El Salvador, Guatemala, and Honduras, civil society organizations presented information on the situation of children and adolescents in their respective countries, stressing the need to take a multidimensional approach to the situations of humanitarian crises in the region driving these children to migrate. The organizations also highlighted the need to take steps toward providing international protection for child migrants while in transit and at their destination, through bilateral and regional agreements that ensure family reunification without risk. In addition, the participants emphasized the need to implement public policies designed to help those children who are deported back to the region.

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mobility (under the new label of the "Rapporteurship on the Rights of Migrants"). Since 2008, the IACHR's Rapporteur on the Rights of Migrants has been Commissioner Felipe González. For more information on the Rapporteurship on the Rights of Migrants, please see: http://www.oas.org/en/iachr/migrants/default.asp.

The Rapporteurship on the Rights of the Child was created during the IACHR's 100th regular session held in Washington D.C. from September 24 to October 13, 1998, for the purpose of bolstering respect for the human rights of children and adolescents in the Americas. The IACHR's Rapporteur on the Rights of the Child, since 2012, has been Rosa María Ortiz.[10] For more information on the Rapporteurship on the Rights of the Child, please see: http://www.oas.org/en/iachr/children/.

11 IACHR, *Report on Immigration in the United States: Detention and Due Process*..

12 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II, Doc. 48/13 (December 30, 2013). (Hereinafter "*Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*").

13 In more detail, push factors in Mexico are understood as including the following: robberies and extortion of migrants in an irregular situation; kidnapping of migrants in an irregular situation; human trafficking; murder of migrants; disappearances of migrants; disappeared and missing migrants and unidentified remains; sexual violence against migrant women; migrant children; discrimination, abuses of authority and excessive use of force against migrants; access to justice and impunity; internal displacement in Mexico; and defenders of migrants' human rights.

8. The most recent visit of the Commission to the U.S. southern border, from September 29 – October 2, 2014, was planned and carried out in the context of monitoring the human rights situation of arriving migrant and refugee families and unaccompanied children with respect to their apprehension; immigration detention, in many cases over long periods of time; immigration proceedings; as well as deportations and removals.

9. The legal framework guiding the Commission's visit was the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"), which constitutes a source of international legal obligation for all Member States of the Organization of American States (OAS). As a source of legal obligation, States must implement the rights contained in the American Declaration in practice within their jurisdiction.[14] The Commission has indicated that the obligation to respect and ensure human rights is specifically set forth in the provisions of the American Declaration, in light of the OAS Charter and the Statute of the IACHR.[15] International instruments in general require State parties not only to respect the rights enumerated therein, but also to ensure that individuals within their jurisdictions are able to exercise those rights.

10. The Commission's visit was organized in the context of the dramatic increase in the number of families with children and unaccompanied children, in particular those from the countries of the Northern Triangle of Central America – El Salvador, Guatemala and Honduras – and Mexico arriving to the United States of America during the 2014 U.S. fiscal year.

11. The delegation was composed of Commissioner Felipe González, Rapporteur on the Rights of Migrants and the Country Rapporteur for the United States; Commissioner Rosa María Ortiz, Rapporteur on the Rights of the Child; and lawyers of the Executive Secretariat, Álvaro Botero and Leah Chavla of the Rapporteurship on the Rights of Migrants, and Ángels Simon of the Rapporteurship on the Rights of the Child. During the visit, the IACHR delegation visited Hidalgo, McAllen, San Juan, Harlingen, Karnes City, and San Antonio in the Rio Grande Valley of the state of Texas.

12. The Commission expresses its appreciation to the Government for its support in planning the visit. Regarding the Department of State, the IACHR conveys its gratitude to Mr. Timothy Zuñiga-Brown, Coordinator of the Unaccompanied Children's Task Force, for his efforts in coordinating the visit with the many federal departments and agencies involved. The IACHR met with Mr. Zuñiga-Brown at the southern border.

13. With respect to the Department of Homeland Security (DHS), the IACHR met with agents Abel Gonzalez and Phillip Barrera of the Office of Field Operations, Customs

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[14] *See, as reference,* Statute of the Inter-American Commission on Human Rights (1979), Article 1, providing that the Commission was created "to promote the observance and defense of human rights" and defining human rights as those rights set forth both in the American Declaration and the American Convention. *See also*, American Convention on Human Rights, Article 29 (d), stating that no provision of the Convention should be interpreted "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have;" *See also,* Rules of Procedure of the Inter-American Commission of Human Rights (2009), Articles 51 and 52, empowering the Commission to receive and examine petitions that allege violations of the rights contained in the American Declaration in relation to OAS members states that are not parties to the American Convention.

[15] IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002, (Hereinafter "*Report on Terrorism and Human Rights*") para. 339. The report cites as examples Articles XVIII and XXIV of the American Declaration.

and Border Protection (CBP), at the Hidalgo International Bridge in McAllen, Texas, which is a Customs and Border Protection Port of Entry and station; Oscar Zamora, Cliff Skilbert, and Daniel Martinez, agents of the Office of the Border Patrol ("Border Patrol"), CBP, who gave the Commission a tour along a section of the border in the Rio Grande Valley where most families crossed into the United States in 2014; Border Patrol Agent John Lopez who gave the Commission a briefing on the operations at the McAllen Border Patrol Station; Matthew Navarrete, Senior Advisor and Detailee at the Office of International Affairs; and officials from the U.S. Immigrations and Customs Enforcement (ICE) agency and staff of the GEO Group (an ICE contractee) who guided the tour of the facilities at the Karnes County Residential Center in Karnes City.

14. Regarding the Border Patrol and ICE in particular, the IACHR considers unacceptable and regrets their decision to deny the delegation free and full access to the McAllen Border Patrol Station and the Rio Grande Valley Central Processing Center. Based on the provisions of its Rules of Procedure that govern on-site visits, in particular Article 57, any on-site visit accepted by a State shall be carried out in accordance with the following: a. the Special Commission or any of its members shall be able to interview any persons, groups, entities or institutions freely and in private; b. the State shall grant the necessary guarantees to those who provide the Special Commission with information, testimony or evidence of any kind; […] e. the members of the Special Commission shall have access to the jails and all other detention and interrogation sites and shall be able to interview in private those persons imprisoned or detained; […] g. the Special Commission shall be able to use any method appropriate for filming, photographing, collecting, documenting, recording, or reproducing the information it considers useful; h. the State shall adopt the security measures necessary to protect the Special Commission; i. the State shall ensure the availability of appropriate lodging for the members of the Special Commission; j. the same guarantees and facilities that are set forth in this article for the members of the Special Commission shall also be extended to the staff of the Executive Secretariat; […].

15. Regarding operations overseen by the Department of Justice, the IACHR was scheduled to observe immigration hearings, specifically master calendar hearings, for a docket comprised of the cases of unaccompanied children. Unfortunately, due to forces outside of the Commission delegation's control, this activity was not held as scheduled. At the Harlingen Immigration Court, the Commission met with Celeste Garza, the Court Administrator of the U.S. Immigration Court in Harlingen, Texas and held a teleconference with representatives from the headquarters of the Executive Office for Immigration Review (EOIR), the agency within the Department of Justice in charge of managing U.S. Immigration Courts and, concretely, the interpretation and application of federal immigration laws.

16. The IACHR also met with Jose Gonzalez, a representative of the Department of Health and Human Services (HHS), in addition to the directors and other staff at an HHS grantee facility for unaccompanied children, Saint PJ's Children's Home, in San Antonio, Texas. The Commission additionally visited a family shelter run by the Sacred Heart Church in McAllen, Texas.

17. During its visit, the IACHR met with representatives of the Consulates of El Salvador, Guatemala, and Honduras based in McAllen, Texas in order to receive information on the situation of unaccompanied children and families of these nationalities.

18. The Commission held two meetings with a diverse array of civil society organizations during the visit – one in San Jose (just outside of McAllen) on September 29, 2014 and another in San Antonio, Texas, on October 1, 2014. The Commission also received information from many organizations that were unable to attend these meetings. The organizations who attended these meetings and/or provided information included: ChildFund International, Kids in Need of Defense (KIND), ProBAR, Texas Rural Legal Aid (TRLA), American Civil Liberties Union (ACLU) and ACLU of Texas, South Texas Civil Rights Project, International Detention Coalition (IDC), Human Rights Watch (HRW), Rio Grande Valley Equal Voice Network, LUPE, Crossroads Academy, Apasionados por la Lectura, Save the Children, Domésticas del Valle (Fuerza del Valle), Avance, RAICES, University of Texas School of Law Immigration Clinic, Bread for the World, Center for Justice and International Law (CEJIL), Covenant House International, Guatemala Human Rights Commission, International Rescue Committee, Women's Refugee Committee (WRC), Jesuit Conference of the United States, Jesuit Refugee Service- USA, Latin America Working Group (LAWG), Oxfam America, Lutheran World Relief, Washington Office on Latin America (WOLA), World Vision, Asociación de Servicios para el Inmigrante, the American Bar Association, Mexican American Legal Defense and Educational Fund (MALDEF), Workers Aid, Programa de Defensa e Incidencia Binacional (PDBI), Centro de Estudios Legales y Sociales (CELS), Albergue Cristiano Senda de Vida (Mexico), Fundar Centro de Análisis e Investigación, National Immigrant Justice Center (NIJC), attorneys Virginia Raymond and Linda Brandmiller, The Bernardo Kohler Center Inc., The Young Center for Immigrant Children's Rights, Southwest Workers Union (SWU), the Georgetown Law Human Rights Institute, and the International Migrant Bill of Rights Initiative (IMBR).

19. In addition, during the visit, the Commission interviewed a large number of persons who had recently arrived to the United States and alleged having suffered violations of their human rights, including detained mothers and unaccompanied children, as well as with medical experts who have been working with the migrant population.

20. Following its visit, the IACHR held two thematic hearings during its 153rd Period of Sessions on the human rights situation of migrant and refugee children and families, in which it received additional and updated information. The first hearing had a thematic focus on the situation of these groups arriving to and in the United States. The following were the requesting organizations for this hearing: NIJC; National Alliance of Latin American and Caribbean Communities (NALACC); WRC; ACLU; Professor Sarah Paoletti, University of Pennsylvania Transnational Legal Clinic; Professor Denise Gilman, University of Texas School of Law Immigration Clinic; WOLA; and CEJIL.[16] The United States government participated in the hearing and sent as representatives: Michael Fitzpatrick, Deputy Permanent Representative of the U.S. Mission to the Organization of American States; Timothy Zuñiga-Brown, Coordinator of the Unaccompanied Children's Task Force of the Department of State; Megan Mack, Officer for Civil Rights and Civil Liberties at DHS; Tricia Schwartz, Associate Deputy Director for Children's Services of the Department of Health and Human Services; and Barbara Leen, Counsel to the Director of the Executive Office for Immigration Review of the Department of Justice.

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[16] For the information presented during this hearing by the requesting organizations, please refer to: ACLU, Human rights situation of migrant and refugee children and families in the United States, https://www.aclu.org/human-rights-immigrants-rights/human-rights-situation-migrant-and-refugee-children-and-families-unit.

21. The second hearing had a regional focus, covering the human rights situation in the four principal countries of origin of migrant families and unaccompanied children – Mexico, El Salvador, Guatemala, and Honduras – as well as the situation in transit and upon repatriation. The following were the requesting organizations for that hearing: Centro de Derechos Humanos Fray Matías de Córdova A.C. de México (CDH Fray Matías), Universidad Centroamericana José Siméon Cañas de El Salvador (UCA), Pastoral de Movilidad Humana del Arzobispado de Guatemala (PMH), Asociación Pop No'j Guatemala, Casa Alianza Honduras, Universidad de California Hastings College of Law (CGRS), Centro de Justicia y Derechos Humanos de la Universidad de Lanús de Argentina (CDHUNLa), KIND, Programa de Defensa e Incidencia Binacional de la frontera norte de México (PDIB), Red de Casas YMCA de Menores Migrantes del norte de México, Women's Refugee Commission (WRC), IDC, CELS, and Save the Children's Regional Office for Latin America and the Caribbean.[17]

C. Structure and Methodology

22. The Commission has prepared this report in accordance with Article 60 of its Rules of Procedure. The report is divided into four chapters. The first is the introduction, which provides an overview of the report, the actions taken by the Commission and detailed information on its visit to the U.S. southern border, the structure and methodology used to draft the report, the preparation and approval of the report, and the observations of the United States of America on the report.

23. The second chapter provides the relevant standards on the human rights of migrants, asylum-seekers, and refugees with which the United States, and all other Member States of the OAS, must comply.

24. The third chapter is sub-divided into three sections. The first sub-section provides more specific contextual information on the circumstances surrounding the dramatic increase in the number of arrivals of migrant and refugee unaccompanied children and families in the United States. The Commission observes that U.S. law subjects families with children, unaccompanied children from Mexico, and unaccompanied children from non-contiguous countries to the United States to distinct legal regimes with respect to their detention and immigration processes. Given that the regimes vary greatly, the Commission will address families in the second sub-section and both groups of unaccompanied children in the third. Therefore, each sub-section will provide a description of the legal regime and practices employed by the State followed by the Commission's main observations and concerns stemming from information and testimonies gathered during the visit. This report is narrow in focus and therefore does not pretend to be an exhaustive analysis of every situation affecting the human rights of refugee and migrant unaccompanied children and families in the United States

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[17] For more information on these hearings, please refer to: IACHR, Multimedia section (videos available of the hearings in the original language of transmission), http://www.oas.org/es/cidh/multimedia/sesiones/153/default.asp; IACHR Press Release No. 131/14, "IACHR Wraps up 153rd Session," (November 7, 2014) (providing a summary of the session); and IACHR Photo Gallery of 153rd Session, https://www.flickr.com/photos/cidh/collections/72157648581374169/.

25. The last chapter provides the Commission's conclusions and recommendations. The Inter-American Commission hopes that the recommendations contained in this report will be used to improve State laws, policies, and practices regarding the treatment of refugee and migrant children and families arriving to the United States.

26. The assessments set forth in this report are based on two main elements. The first is primary sources such as the testimony of unaccompanied children and of migrant mothers being detained with their children as well as persons linked to various institutions, including the executive branch, academia, and members of intergovernmental and non-governmental organizations. To guarantee the balance and impartiality of its reports, as a general rule the IACHR always meets with the broadest possible array of individuals and organizations from both the state and civil society sectors. In this way, it seeks to guarantee that it obtains the most representative, reliable, and exhaustive vision possible. Similarly, in preparing its reports, the IACHR ensures that all the parties interviewed are cited in the report, unless the source has requested otherwise or there is a security or confidentiality concern. Moreover, the reports also draw on secondary sources such as intergovernmental, expert and academic studies, reports, and documents. As in the case of primary sources, the IACHR and the Rapporteurships are always careful to ensure that those sources are credible and serious.

27. Furthermore, this report has been prepared based on a broad array of information, and the Rapporteurships conducted research prior to the visit. During and after the visit, the Commission corroborated and complemented the information obtained. On this point, the Commission highlights that the problems with the detention of migrants or other persons in human mobility, even those arriving in an irregular situation, have been documented previously not only by the Commission – particularly in its recent reports on the United States and Mexico[18], but also by numerous U.S. civil society organizations[19]. The contents and comments contained in this report are the result of a lengthy research effort that was carried out by the Rapporteurs and their teams, and then submitted to the plenary of the IACHR for its deliberation and approval.

D. Preparation and Approval of the Report

28. The Commission considered and approved the draft version of this report on March 26, 2015. In keeping with Article 60(a) of its Rules of Procedure, it sent the draft report to the government of the United States of America on April 14, 2015 and asked it to present its observations within 30 days of that date. After an extension was

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[18] IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*; IACHR, Rep*ort on Immigration in the United States: Detention and Due Process*.

[19] *See, e.g.,* UNHCR, *Arrancados de Raíz* ("Uprooted") (November 11, 2014); International Rescue Committee, *The plight of unaccompanied children* (October 23, 2014); HRW, *'You Don't Have Rights Here': US Border Screening and Returns of Central Americans to Risk of Serious Harm*, (October 2014); Adam Isacson, Maureen Meyer, and Gabriela Morales, M*exico's Other Border: Security, Migration, and the Humanitarian Crisis at the line with Central America*, WOLA (June 17, 2014) ; UNHCR, *Children on the Run* (March 2014); KIND, *A Treacherous Journey* (February 2014); Adam Isacson and Maureen Meyer, *Border Security and Migration: A Report from Arizona*, WOLA (December 2013); ACLU of Georgia, *Prisoners of Profit* (2012); Amnesty International, *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in US Southwest* (2012); and Appleseed Network, *Children at the Border* (2011).

requested and granted by the Inter-American Commission, the State filed its observations on July 1, 2015. Once the Commission analyzed these observations, it proceeded to include those it deemed pertinent in the present report.

E. Observations of the United States of America on the Report

29. In its response, the United States expresses its appreciation for the opportunity to comment on the draft report and that it is pleased to have been able to facilitate the Commission's visits to immigration detention facilities, a shelter for unaccompanied children, and its various consultations that took place during 2014.

30. The United States highlights its pride in being a nation of immigrants. The State underscored President Barack Obama's Immigration Address on July 1, 2010, in which he declared that:

> It is this constant flow of immigrants that helped to make America what it is. … To this day, America reaps incredible economic rewards because we remain a magnet for the best and brightest from across the globe. … And in an increasingly interconnected world … being an American is not a matter of blood or birth. It's a matter of faith. … 'E pluribus unum.' Out of many, one. That is what has drawn the persecuted and impoverished to our shores. That's what led the innovators and risk-takers from around the world to take a chance here in the land of opportunity. That's what has led people to endure untold hardships to reach this place called America.

31. The State points out "without hesitation" that migrants and their families have made immeasurable contributions to the United States since the nation was established and can be found in top positions in the government, business, media, and the arts.

32. The State, however, then goes on to express its opinion that, "contrary to the Commission's assertions, neither the American Declaration of the Rights and Duties of Man nor international law establishes a presumption of liberty for undocumented migrants who are present in a country in violation of that country's immigration laws." The United States stresses that States assume legal obligations, or undertake political commitments, to "protect the right of freedom of movement to persons *lawfully* within a State's territory" (emphasis in original). The United States also maintains that, "[n]on-nationals seeking to enter a State are bound to respect the State's immigration laws and may be subject to various measures, including detention, as appropriate, when they fail to obey the law," and indicates that:

> [I]mmigration detention can be an important tool employed by States in ensuring public order and safety and removing as expeditiously as possible individuals who are not eligible to remain or who may pose a threat to the security of the country or the safety of its citizens and lawful residents. Accordingly, immigration detention, provided it is employed in a manner consistent with a State's international human rights obligations, is permitted under international law.

33. The State stresses the importance and necessity that immigration laws and policies be enforced in a "lawful, safe, and humane manner that respects the human rights of migrants regardless of their immigration status." The State also considers that many of the sources referred to by the Commission do not give rise to binding legal obligations on the United States. According to the position of the State, the American Declaration is a "non-binding instrument that does not itself create legal rights or impose legal obligations on signatory States." It is also the State's opinion that Article 20 of the Statute of the Inter-American Commission "sets forth the powers of the Commission that relate specifically to OAS Member States which, like the United States, are not parties to the legally binding American Convention on Human Rights," which includes "pay[ing] particular attention to the observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted."

34. The United States reiterates its respect and support for the Commission and the "strong sense of integrity and independence which historically has characterized its work." Likewise, it recognizes the work of the Commission in researching and compiling the present report. The State requests, however, that the Commission "in keeping with its mandate under Article 20 of the IACHR Statute, [ ] center its review of applicable international standards on the American Declaration and U.S. observance of the rights enumerated therein." The United States considers that the jurisprudence of the Inter-American Court of Human Rights, including its advisory opinions, interpreting the American Convention does not govern U.S. "political" commitments under the American Declaration.

35. In its response, the State highlights its swift response to the "humanitarian crisis involving unaccompanied children" during the months of summer [May – July] 2014. The United States considers that the Commission has not "adequately address[ed] the extraordinary efforts undertaken to address the dramatic rise in the flow of migrants into the United States last year" in the present report. The State maintains that its response was tailored to "comprehensively address the [crisis] in a fair and humane manner" and that the protections afforded to both unaccompanied children and families by the United States under federal law – both "then and now" – are "extensive and implemented by multiple federal agencies[20]. Regarding the reallocation of resources to make such a response possible, the State cites a $7.6 million grant to the International Organization for Migration (IOM) through which the U.S. Agency for International Development (USAID) is "enhancing Central American countries' ability to process and provide assistance to children and families." Further, the State reports that it "establish[ed] a cross-government working group to address the needs of these [arriving, unaccompanied] children" at the direction of President Barack Obama, called the "Unified Coordination Group," led by DHS' Federal Emergency Management Agency (FEMA).

[20] To see an organizational chart of the various U.S. departments involved, please refer *infra* to p. 56-58.

36. In addition to the above-mentioned efforts, the State lists other steps it has taken to respond to humanitarian needs and to ensure appropriate treatment in custody and appropriate consideration and adjudication of claims to humanitarian protection under applicable U.S. law. The measures the State emphasizes are:

a. Creation of a Dangers of the Journey awareness campaign, to discourage parents from putting their children's lives at risk by sending them on a dangerous journey to an illegal crossing of the U.S. border;

b. Initiating an in-country refugee and parole processing program for certain children in El Salvador, Honduras, and Guatemala;

c. President Obama's assigning FEMA Administrator to coordinate the federal government's response;

d. Opening new processing centers, increasing DHS/CBP's capacity to appropriately house children and adults following apprehension;

e. Expanding efforts to prosecute criminal human smuggling organizations;

f. Encouraging increased efforts to prosecute human trafficking offenses, including the forced criminal activity of children by gangs, through bilateral diplomatic engagement with Central American countries;

g. Working with partner governments and civil society in Mexico and Central America, including through ongoing dialogue in the Regional Conference on Migration;

h. Reassigning immigration judges and DHS attorneys to prioritize the cases of these recent entrants, including consideration of claims for asylum or other forms of protection;

i. Providing legal services to unaccompanied children through a DOJ grant program, enrolling lawyers and paralegals in the justice AmeriCorps national service program to provide legal services to unaccompanied children;

j. Reducing the length of stay for unaccompanied children in HHS care and custody through streamlined release policy and procedures;

k. Arranging for juvenile dockets in the immigration courts to help promote *pro bono* representation by allowing non-governmental organizations and private attorneys to have predictable scheduling and to represent multiple children without multiple hearing dates, with the advent of a juvenile docket in every immigration court; and

l. Ensuring appropriate Legal Orientation Programs at DHS/ICE's family residential facilities.

37. The Inter-American Commission appreciates the response of the State and its positive engagement with the inter-American human rights system (hereinafter the "inter-American system" or "IAHRS"). However, with respect to the position of the United

States interpreting the nature of the American Declaration, it must be reiterated that the American Declaration is an instrument that generates international legal obligations in the framework of the OAS Charter, taking into account the IACHR's Statute. The IACHR has held previously and repeatedly, including in its 2011 report on the United States, that for Member States that have yet to ratify the American Convention, the expression of their obligations in the sphere of human rights is set forth in the American Declaration. The IACHR has also explained that it may interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law:

> The international law of human rights is a dynamic body of norms evolving to meet the challenge of ensuring that all persons may fully exercise their fundamental rights and freedoms. In this regard, as the International Covenants elaborate on the basic principles expressed in the Universal Declaration of Human Rights, so too does the American Convention represent, in many instances, an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to Member States that have yet to ratify that treaty, its provision may well be relevant in informing an interpretation of the principles of this Declaration.[21]

38. The considerations summarized above represent the State's general observations. The more specific observations to the present report will be reflected as appropriate in the respective sections below.

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[21] IACHR, *Report on Immigration in the Unites States: Detention and Due Process* at para. 30; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*. OEA/Ser.L/V/II.106 Doc.40 rev., February 28, 2000, para. 38. *See also*, IACHR, Report No. 113/14, Case 11.661, Merits, Manickavasagm Suresh, Canada, November 7, 2014, para. 51; IACHR, Report No. 44/14, Case 12.873, Merits, Edgar Tamayo Arias, United States, July 17, 2014, para. 214; IACHR, Report No. 78/11, Case 12.586, Merits, John Doe et al., Canada, July 21, 2011, para. 71.

CHAPTER 2

RELEVANT INTERNATIONAL STANDARDS ON THE HUMAN RIGHTS OF MIGRANTS, ASYLUM-SEEKERS, AND REFUGEES

RELEVANT INTERNATIONAL STANDARDS ON THE HUMAN RIGHTS OF MIGRANTS, ASYLUM-SEEKERS, AND REFUGEES

39. As a Member State of the OAS and pursuant to the OAS Charter and the American Declaration, the United States has an obligation to ensure the human rights of every person under its jurisdiction[22], irrespective of his/her nationality, migratory situation, or other social condition. This obligation extends to the rights to: personal liberty; due process and access to justice; the right to seek and receive asylum; humane treatment during detention; equality before the law; protection of family life and the family unit; the principle of *non-refoulement* and the right to be free from persecution or torture. The IACHR has held on numerous occasions that States have the right to establish their immigration policies, laws and practices, which may include provisions for the control of their borders and the requirements for entering and remaining in their territory, and the right to expel or deport foreign nationals.[23] Nonetheless, all immigration policies, laws, and practices must be respectful of and guarantee the human rights of all persons, including migrants and other non-nationals and persons in an irregular migratory situation.[24]

40. The American Declaration is part of the human rights framework established by the OAS Member States, one that refers to the obligations and responsibilities of States and mandates them to refrain from supporting, tolerating or acquiescing in acts or

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22 The IACHR understands a State's jurisdiction to include its international borders or any place a State executes border governance actions.

23 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, at para. 327. *See, in general*, IACHR, Application filed with the Inter-American Court of Human Rights, Case No. 12,271, *Benito Tide Méndez et al*. (Dominican Republic). March 29, 2012, para. 260; IACHR, Application filed with the Inter-American Court of Human Rights, Case No. 12,688, *Nadege Dorzema et al.: Guayubín Massacre* (Dominican Republic). February 11, 2011, para. 208; IACHR, *Report on Immigration in the United States: Detention and Due Process*. para. 32; IACHR, *Report on Terrorism and Human Rights*. para. 377; IACHR, *Annual Report of the IACHR 2000*: *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*. OEA/Ser./L/V/II.111 doc. 20 rev., April 16, 2000, para. 6; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*. OEA/Ser.L/V/II.106 Doc.40 rev., February 28, 2000, para. 166; IACHR, *Annual Report 1991*, Chapter V, *Situation of Haitians in the Dominican Republic*. OEA/Ser.L/V/II.81 Doc. 6 rev. 1, February 14, 1992. *See also*, I/A Court H.R., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2012. Series C No. 218, paras. 97, 169; I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 39; I/A Court H.R., Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003, Series No. 18, paragraph 168; I/A Court H.R., *Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding the Dominican Republic*. Provisional Measures. Order of the Inter-American Court of August 18, 2000, Consideranda four.

24 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, at paras. 580-81 ("the rights recognized in the Inter-American instruments apply to all persons, regardless of their nationality, their immigration status, statelessness or any other social condition").

omissions that contravene their human rights commitments. According to the well-established jurisprudence and practice of the IAHRS, the American Declaration is recognized as constituting a source of legal obligation for OAS Member States, including those States that are not parties to the American Convention on Human Rights.[25] These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter.[26] Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration,[27] as well as the customary legal status of the rights protected under many of the Declaration's core provisions.[28]

41. As a source of legal obligation, States must implement the rights contained in the American Declaration in practice within their jurisdiction.[29] The Commission has indicated that the obligation to respect and ensure human rights is specifically set forth in the provisions of the American Declaration, in light of the OAS Charter and the Statute of the IACHR.[30] International instruments in general require State parties not only to respect the rights enumerated therein, but also to ensure that individuals within their jurisdictions are able to exercise those rights.

42. Consonant with this principle, the Commission has repeatedly interpreted the American Declaration as requiring States to adopt measures to give legal effect to the rights contained in the American Declaration.[31] The Commission has not only required States to refrain from committing human rights violations contrary to the provisions of the American Declaration,[32] but also to adopt affirmative measures to guarantee that the individuals subject to their jurisdiction can exercise and enjoy the

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25 The organs of the IAHRS have moreover held that the American Declaration is a source of international obligation for all OAS Member States, including those who have ratified the American Convention. *See* I/A Court H.R., Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights", July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45; James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, *Annual Report of the IACHR 1986-87*, paras. 46-49.

26 Charter of the Organization of American States, Articles 3, 16, 51.

27 *See e.g.* OAS General Assembly Resolution 314, AG/RES. 314 (VII-O/77), June 22, 1977 (entrusting the Inter-American Commission with the preparation of a study to "set forth their obligations to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 371, AG/RES (VIII-O/78), July 1, 1978 (reaffirming its commitment to "promote the observance of the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 370, AG/RES. 370 (VIII-O/78), July 1, 1978 (referring to the "international commitments" of OAS member states to respect the rights recognized in the American Declaration of the Rights and Duties of Man).

28 IACHR, Report Nº 19/02, Case 12.379, *Lares-Reyes et al.* (United States), February 27, 2002, para. 46.

29 *See* Statute of the Inter-American Commission on Human Rights (1979), article 1, providing that the Commission was created "to promote the observance and defense of human rights" and defining human rights as those rights set forth both in the American Declaration and the American Convention. *See also*, American Convention on Human Rights, article 29 (d), stating that no provision of the Convention should be interpreted "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have;" *See also,* Rules of Procedure of the Inter-American Commission of Human Rights (2009), articles 51 and 52, empowering the Commission to receive and examine petitions that allege violations of the rights contained in the American Declaration in relation to OAS members states that are not parties to the American Convention.

30 IACHR, *Report on Terrorism and Human Rights*, para. 339. The report cites as examples Articles XVIII and XXIV of the American Declaration.

31 IACHR, Report Nº 40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, para. 162; IACHR, Report Nº 67/06, Case 12.476, *Oscar Elías Bicet et al.* (Cuba), October 21, 2006, paras. 227-231.

32 *See, e.g.,* IACHR, Report No. 63/08, Case 12.534, *Andrea Mortlock* (United States), July 25, 2008, paras. 75-95; IACHR, Report 62/02, Case 12.285, *Michael Domingues* (United States), October 22, 2002, paras. 84-87.

rights contained in the American Declaration.[33] The Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to OAS Member States.[34]

43. As a principal organ of the OAS by virtue of the Charter and the terms of its Statute, OAS Member States, including the United States, must comply in good faith with the Inter-American Commission's recommendations, in order for Article 106 of the OAS Charter to have an *effet utile*. Further, pursuant to general principles of treaty law, Member States are required to apply good faith in efforts to comply with the recommendations of supervisory bodies such as the Commission.

A. Principles of Equality and Non-discrimination

44. Article II of the American Declaration provides that, "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."[35] As stated at the outset of the present section, States have the right to establish immigration policies, laws and practices, which may include provisions for the control of their borders; the requirements for entering and remaining in their territory; and the right to expel or deport foreign nationals.[36] Treatment that is differential in nature may be justified in controlling the entry in and residence of non-citizens in their territory[37]; however, all such policies, laws, and practices must be respectful of and guarantee the human rights of all persons.[38] Consistent with the principles underlying Article II of the Declaration, any distinctions in the policies, laws, and practices must be shown by the State to be objective, reasonable, and proportionate to the objective sought in the circumstances.

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33 *See, e.g.,* IACHR, Report Nº 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz, et al.* (United States), July 12, 2010 paras. 61-65; IACHR, Report Nº 40/04, Case 12.053*, Maya Indigenous Community* (Belize), October 12, 2004, paras. 122-135, 162, and 193-196; IACHR, Report Nº 75/02, Case 11.140, *Mary and Carrie Dann* (United States, December 27, 2002, paras. 124-145.

34 *See, generally*, IACHR, Report Nº 81/10, Case 12.562, *Wayne Smith, Hugo Armendariz, et al.* (United States), July 12, 2010; IACHR, Report Nº 63/08, Case 12.534, *Andrea Mortlock (United States),* July 25, 2008; IACHR, Report Nº 40/04, Case 12.053, Maya Indigenous Community (Belize), October 12, 2004; IACHR, Report Nº 75/02, Case 11.140, *Mary and Carrie Dann* (United States, December 27, 2002; IACHR, Report Nº 62/02, Case 12.285, *Michael Domingues* (United States), October 22, 2002.

35 American Declaration, Article II (1948).

36 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, at para. 580 (citing the United Nations Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" in: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty. HRI/GEN/1/Rev.9 (Vol. I), 2008, p. 189).

37 I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 119.

38 IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, at paras. 580-81 ("the rights recognized in the Inter-American instruments apply to all persons, regardless of their nationality, their immigration status, statelessness or any other social condition").

45. In this regard, the Commission has established that States must therefore remain vigilant in ensuring that their laws and policies are not developed or applied in a manner that encourages or results in discrimination; that their officials and agents conduct themselves fully in conformity with these rules and principles; and that policies and practices are prohibited upon a showing that they discriminate against a certain category of persons, even when lacking proof of discriminatory intent.[39]

B. Principle of the Best Interests of the Child

46. The American Declaration contains general provisions from which children and adolescents are entitled to benefit, such as Articles II (right to equality before law) and VII (right to protection for mothers and children). In light of developments in the field of international human rights law since the American Declaration was first composed, the Commission has previously held that in interpreting and applying the American Declaration, its provisions should be considered in the context of the broader international and Inter-American human rights systems to include the incorporation of the principle of the best interests of the child.[40]

47. In this regard, the IACHR has previously held that the international *corpus juris* on human rights embodied in other recognized international and regional human rights instruments can be a source when interpreting and applying the American Declaration, including the American Convention on Human Rights ("American Convention"). The Commission does not apply the American Convention in relation to Member States that have yet to ratify that treaty; nonetheless, the provisions of the American Convention may be regarded as an authoritative expression of the fundamental principles set forth in the American Declaration and therefore be particularly relevant in informing its interpretation.[41]

48. The Commission takes note that Article 17 of the American Convention establishes that in the case of the dissolution of a marriage, "provision shall be made for the necessary protection of any children *solely on the basis of their own best interests* (emphasis added)." Further, in Article 19, the American Convention sets forth the right of the child to measures of protection on the part of his family, society, and the State, as required by a child's vulnerable situation. The Commission deems it pertinent to mention here that Article 19 of the American Convention (Rights of the Child) is non-derogable, as established in Article 27 (2) of the same instrument.

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39 IACHR, *Report on Terrorism and Human Rights*, para. 412; IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, at para. 358.

40 *See, e.g.*, IACHR, Report 62/02, Case 12.285, Merits, *Michael Domingues* (United States), October 22, 2002, paras. 44-45.

41 *See, e.g.* IACHR, Report No. 52/01, Case No. 12.243, Merits, *Juan Raul Garza* (United States), April 4, 2001, paras. 88-89.

49. The Commission shares the considerations established by the Inter-American Court in its most recent Advisory Opinion on the *Rights and guarantees of children in the context of migration and/or in need of international protection*:

> In view of the special condition of vulnerability of child migrants in an irregular situation, States are obliged, under Articles 19 of the American Convention and VII of the Declaration, to choose measures[42] that promote the care and well-being of the child to ensure its comprehensive protection, rather than the deprivation of her or his liberty[43] (*infra* Chapter X). The Court considers that the parameter for the State's actions should, therefore, aim at ensuring, insofar as possible, the prevalence of the *best interest of the child migrant* and the guiding principle of respect for the child's right to life, survival, and development [ ] by measures adapted to the child's needs (emphasis added).[44]

50. Other developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from various sources of international law, including the provisions of other international and regional human rights instruments and customary international law.

51. In this sense, the Commission finds it useful to take into account the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR), to which it is a State Party.[45] Article 2 provides that State Parties must "respect and ensure to all individuals within its territory and subject to its jurisdiction" the rights recognized in the ICCPR "without distinction of any kind." Article 23 provides that the family is entitled to societal and state protection as well as for the protection of children upon the dissolution of a marriage. In turn, Article 24.1 provides that, "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State."

52. The Commission also takes note that the principle of the best interests of the child itself has been a guiding principle in U.S. law for more than 125 years, and that Article 3 of the UN Convention on the Rights of the Child (CRC) is said to have been cited from the "best interests of the child" standard in U.S. law.[46] In fact, the Commission observes that in all fifty states of the United States there are statutes in various areas

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42 *Cf.* Working Group on Arbitrary Detention, Report of the Working Group, *Civil and political rights, including questions of Torture and Detention*, UN Doc. E/CN.4/1999/63/Add.3, 18 December 1998, para. 33, and Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, *Specific Groups and Individuals: Migrant Workers,* pursuant to Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85, 30 December 2002, paras. 39-40.

43 *Cf.* Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, supra,* para. 63.

44 I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 155.

45 The United States ratified the ICCPR on June 8, 1992.

46 Jonathan Todres et. al, *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (2006), p. 123. *See generally*, Lynne Marie Kohm, *Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 347-48 (2008) (tracing the contemporary best interests of the child standard to U.S. influence on English, common law jurisprudence in the late 18th and early 19th century). The Commission observes that the United States and South Sudan are the only countries as of January 20, 2015 that have not ratified the CRC. *See* "UN lauds Somalia as country ratifies landmark children's rights treaty," http://www.un.org/apps/news/story.asp?NewsID=49845.

of law that incorporate this principle, including: adoption, dependency proceedings, foster care, divorce, custody, criminal law, education, and labor, among others.[47]

53. Thus, in view of the above and the special condition of vulnerability of children – and particularly of child migrants in an irregular migratory situation, the Commission reaffirms the notion that the Member States of the OAS – including the United States – are obligated under Article VII of the American Declaration and as a norm of international law to uphold the principle of the best interests of the child in actions taken with respect to the child's life, survival, and development, by measures adapted to the child's needs.[48]

54. To this end, the IACHR considers that an accurate determination must be made of what the best interests of the child are in each specific context or situation, based on the objective assessment and verification of the conditions in which the child finds him or herself, and the effect that those conditions have on the enjoyment of his or her rights, well-being, and development.[49] Such a determination, consisting of the observance and evaluation of the conditions and circumstances that may affect the rights of the child, his/her well-being and protection, must be conducted by professional personnel duly trained for those purposes.[50] This requirement ensures that these evaluations are conducted by persons with the competence and experience to do so, as "analysis and assessments in the framework of special measures of protection require the use of expert opinions and technical criteria that objectively assess the welfare of the child and identify the most effective way of serving the child's interest in a given case."[51]

55. In terms of procedural guarantees to uphold the best interests of the child principle, the Commission considers the recommendations developed by the United Nations Committee on the Rights of the Children very useful, specifically that: a non-exhaustive and non-hierarchical list of elements[52] should be included in a best interests assessment to provide guidance for the decision-maker; that the weight each element carries depends on the specific circumstances in each case; assessments should be flexible and allow for re-adjustment as the child develops; and formal processes should have safeguards in place[53] to ensure that children are informed about processes that affect them and that their views are taken into consideration.[54]

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47 Cynthia Price Cohen and Howard A. Davidson, *Children's Rights in America: United Nations Convention on Rights of the Child Compared with United States Law* (1990), p. 4.

48 *See also*, I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 155.

49 Committee on the Rights of the Child, General Comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 48-84.

50 Committee on the Rights of the Child, General Comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14, May 29, 2013, sixty-second session, paras. 47, 92, 94-95.

51 IACHR, *Report on the Right of Boys and Girls to a Family* (October 2013), para. 158.

52 Elements to consider include: the child's views and identity; preservation of the family environment and maintaining extended family and community relations; care, protection, and safety of the child; situation of vulnerability; and the child's right to education and health. *See* UN Committee on the Rights of the Children, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14 (adopted January 14 – February 1, 2013), paras. 50-79.

53 Safeguards should include: the seeking, facilitation, and inclusion of children as participants in the process; a careful and thorough investigation of the facts; the case should be treated as a priority for resolution; qualified personnel working on the case; the child should be provided with his or her own counsel and a guardian, where necessary or appropriate; the decision taken must be justified in a corresponding writing; and mechanisms

56. Finally and importantly, the Commission has established that the best interests of the child cannot be used in an attempt to justify decisions that: (a) may be against a child's rights[55]; (b) discriminate against other persons and their rights[56]; and/or (c) are based on nothing more than social stereotypes, preconceptions, and prejudices regarding certain behaviors or groups of people.[57]

C. Right to Personal Liberty

57. Articles I and XXV of the American Declaration provide that every human being has the right to liberty and the right to protection against arbitrary arrest. In addition, Article XXV of the American Declaration provides that "no person may be deprived of liberty for non-fulfillment of obligations of a purely civil character."

58. For the purposes of this report, when referring to "detention," the Commission is employing the term broadly to be synonymous with the concept of deprivation of liberty.[58] The Commission understands that the measure of immigration detention is one that prevents a person, including a child, from leaving or abandoning at will the place or establishment where he or she has been placed.

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should be in place to review or revise a decision, in order to account for evolving needs or changes in factual circumstances. *See* UN Committee on the Rights of the Children, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14 (adopted January 14 – February 1, 2013), paras. 85-99.

54 UN Committee on the Rights of the Children, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14 (adopted January 14 – February 1, 2013).

55 IACHR, *Report on the Right of Boys and Girls to a Family* (October 2013), para. 158 (citing the Committee on the Rights of the Child, General Comment No. 13, *The right of the child to freedom from all forms of violence*, CRC/C/GC/13, April 18, 2011, para. 61).

56 *See, generally*, IACHR, *Karen Atala and daughters* (Chile), Application to the Inter-American Court on Human Rights, Case 12.502 (September 17, 2010), paras. 133-135; I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, para. 111.

57 *See, generally*, IACHR, *Karen Atala and daughters* (Chile), Application to the Inter-American Court on Human Rights, Case 12.502 (September 17, 2010), paras. 133-135; I/A Court H.R., *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012, Series C, No. 239, para. 111.

58 For the purposes of the present report, the concept of "deprivation of liberty" is understood as: ""Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non- compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty." IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (approved during the IACHR's 131st Period of Sessions, March 3-14, 2008). For a greater discussion on the use of these terms, please refer to para. 145 of the Inter-American Court's Advisory Opinion OC-21/14 I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 154.

59. The Inter-American Commission notes that the right to protection from arbitrary arrest and detention is concerned with the exercise of physical freedom[59] and has established that, when a State is considering the deprivation of liberty, the presumption must be of liberty rather than detention.[60] The Commission has monitored with concern the increase in the use of immigration detention in the Americas over the past two decades. In the case of the United States, the Commission has observed that the State employs immigration detention as a measure to discourage migration, especially irregular migratory flows.[61] The Commission considers that the recent expansion of family immigration detention represents a step backward from earlier progress in 2009 in eradicating the measure for generalized use.[62]

60. In this regard, the Commission echoes the statement made by the United Nations' Special Rapporteur on the Human Rights of Migrants who wrote that:

> there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum. Despite increasingly tough detention policies being introduced over the past 20 years in countries around the world, the number of irregular arrivals has not decreased. This may be due, *inter alia*, to the fact that migrants possibly see detention as an inevitable part of their journey.[63]

The Commission also shares the view of the United Nations Office of the High Commissioner for Human Rights ("OHCHR") that "[p]olicies 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."[64]

61. Combined with claiming that migration poses a threat to national security, the United States has sought to justify its now automatic regime of family immigration detention upon arrival and/or apprehension as a measure of deterrence against irregular migration. The practice of immigration detention also works to criminalize migration, which has multiple, negative effects on the protection of migrants' rights and society's perception of migrants, and may encourage xenophobia.

62. The Commission has consistently confirmed that immigration violations should not be construed as criminal offenses.[65] To this end, the Commission shares the view of

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59 *See* Yoram Dinstein, *Right to Life, Physical Integrity, and Liberty, in The International Bill of Rights – The Covenant On Civil And Political Rights*, paras. 114, 128 (Louis Henkin ed., 1981).

60 IACHR, Report No. 51/01, Case 9903, Admissibility and Merits, *Rafael Ferrer-Mazorra et al*. (The Mariel Cubans) (United States). April 4, 2001, para. 219.

61 *See* IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 5. For a full discussion on the extent of immigration detention in the United States as well as the evolution of human rights standards on immigration detention, please refer to Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 Fordham Int'l L.J. 243 (2013).

62 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 368 (citing ICE's decision to discontinue use of the T. Don Hutto facility for the detention of families).

63 United Nations General Assembly – Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Twentieth Session, April 2, 2012, para. 8, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf.

64 UN OHCHR Rep. 69th Sess., *Recommended Principles and Guidelines on Human Rights at International Borders*, U.N. Doc. A/69/CRP.1 (July 23, 2014), para. 4.

65 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 38.

the United Nations Special Rapporteur on the Human Rights of Migrants, that "irregular entry or stay should never be considered criminal offences: they are not *per se* crimes against persons, property, or national security."[66] For this reason, the Commission has established that the use of the deprivation of liberty must be an exceptional measure, and even more so in the immigration context.[67] Nonetheless, the Commission has observed that, in practice, States have continued to apply detention as both a punishment for irregular entry and as a disincentive to future arrivals of migratory movements. The Commission notes with concern that, as numerous studies have shown, detention has not been proven to be an effective measure to deter irregular migration[68]; rather, migrants accept that it may be a part of the process.

63. In the Inter-American Principles on the Protection of Persons Deprived of Liberty in the Americas, the Commission confirmed that the use of the deprivation of liberty must be an exceptional measure. Principle III (2) establishes that:

> the law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments.[69]

64. The Commission considers that detention may only be permissible following an individualized assessment of the need to detain. This assessment must consider the employment of alternatives to detention and conclude in a corresponding, individualized decision that the measure is necessary to serve certain legitimate interests of the State.[70]

65. As detailed above, the Commission has established that the standard for exceptionality of detention must be even higher in the case of immigration detention because immigration violations should not be construed as criminal offenses. [71] According to the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, this higher standard should comply with the principles of legality, need, and proportionality to the extent strictly necessary in a democratic society.[72]

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66 United Nations General Assembly – Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Twentieth Session, April 2, 2012, para. 13, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf; see also, United Nations, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, E/CN.4/2003/85 (December 30, 2002), http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf (citing former Special Rapporteur Pizarro, who stated that, "Irregular migrants are not criminals per se and should not be treated as such").

67 IACHR, *Report on Immigration in the United States: Detention and Due Process*, paras. 34, 38.

68 *See e.g.*, UNHCR/OHCHR, Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions (July 2011).

69 IACHR, *Inter-American Principles on the Protection of Persons Deprived of Liberty in the Americas.* (approved during the IACHR's 131st Period of Sessions, March 3-14, 2008). (*Hereinafter "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas").*

70 IACHR, *Report on Immigration in the United States: Detention and Due Process.* paras. 219, 221, and 242.

71 IACHR, *Report on Immigration in the United States: Detention and Due Process*, paras. 34, 38.

72 IACHR, *Principles on the Protection of Persons Deprived of Liberty in the Americas*, Principle III.

66. Further, the Commission has held that, when justified, "States must avoid the prolongation of detention and must ensure that it is a brief as possible."[73] In this regard, the IACHR reiterates the importance of the judicial review of detention, as provided in Articles XVIII (prescribing a fundamental role of the courts in ensuring and protecting the legal rights of the individual) and XXV (the right to have the legality of detention ascertained without delay) of the American Declaration. Any detained migrant should be afforded simple, prompt access to judicial oversight and periodic review of the continued need to detain.

67. For its part, the United Nations Working Group on Arbitrary Detention has also summarized the instances in which immigration detention may and may not be used:

> States should be reminded that detention shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible. Grounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed time limits. Established time limits for judicial review must even stand in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State. Provisions should always be made to render detention unlawful if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory does not lie within their sphere, for example, when the consular representation of the country of origin does not cooperate or legal considerations - such as the principle of *non-refoulement* barring removal if there is a risk of torture or arbitrary detention in the country of destination - or factual obstacles - such as the unavailability of means of transportation - render expulsion impossible.[74]

1. Standards Applicable to Members of Vulnerable Groups within Mixed Migratory Movements

68. International instruments have established more specific provisions regarding restrictions on the detention of certain persons who are members of vulnerable groups within mixed migratory movements, such as asylum-seekers, families, and unaccompanied children (the latter will be discussed in sub-section 2, below).

a. Asylum-seekers

69. In the case of asylum-seekers, the Convention relating to the Status of Refugees of 1951 (hereinafter "the Convention on Refugees" or "the 1951 Convention") allows very little margin for restrictions on freedom of movement. Article 31(1) of the Convention on Refugees provides that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in

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[73] IACHR, *Human Rights of Migrants, International Standards and the Return Directive of the EU*, Resolution 03/08 (July 25, 2008), p. 2.

[74] United Nations Working Group on Arbitrary Detention, "Report of the Working Group on Arbitrary Detention," Doc. A/HRC/10/21, para. 67 (February 16, 2009), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement.

> their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

70. The Office of the United Nations High Commissioner for Refugees (UNHCR) has indicated that, when interpreting the Convention on Refugees, "the right to seek asylum, the non-penalization for irregular entry or stay and the rights to liberty and security of person and freedom of movement mean that the detention of asylum-seekers should be a measure of last resort with liberty being the default position."[75]

71. The Commission has previously elaborated on the above, specifically finding that:

> [m]easures aimed at the automatic detention of asylum seekers are therefore impermissible under international refugee protections. They may also be considered arbitrary and, depending upon the characteristics of persons affected by any such restrictions, potentially discriminatory under international human rights law.[76]

72. In the Commission's view, the detention of asylum seekers, refugees, applicants for and beneficiaries of complementary protection and stateless persons must be an exceptional measure of last resort that the authorities can only use in the cases prescribed by domestic law[77], which must be compatible with the norms and principles of international human rights law. Given that it is an exceptional measure, authorities may only resort to it once they have determined that this measure meets the following tests: 1) necessity, 2) reasonableness, and 3) proportionality. This means that immigration detention must be necessary in a given case, that its use must be reasonable, and proportionate to achieve the ends being sought. If detention is deemed necessary, it may not be based on discriminatory motives and must be limited to the briefest period possible.[78]

b. Families

73. With regard to families, Article V of the American Declaration provides that, "Every person has the right to the protection of the law against abusive attacks upon . . . his private and family life." Article VI sets out that, "Every person has the right to establish a family, the basic element of society, and to receive protection therefore." Article VII further establishes that, "[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." These Articles form the core of the protection of family life within the American Declaration,

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75 UNHCR, "Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum- Seekers and Alternatives to Detention," (September 2012), Guideline 2.

76 IACHR, *Report on Terrorism and Human Rights*, para. 380.

77 The Commission takes note of a study on the effects of detention on asylum seekers, which found that the severity of anxiety, depression, and post-traumatic stress disorder (PTSD) symptoms was significantly correlated with the length of time in detention and that 70% of those interviewed stated that their overall mental health had worsened substantially while in detention (with 95% of the interviewees having been diagnosed as clinically depressed and 86% as suffering clinically significant anxiety). *See* Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum-Seekers* (June 2003) at p. 63. In addition to aggravating the symptoms of these illnesses, detention has even been shown to cause them. This can be the case even if a detained asylum-seeker does not present any symptoms at the time of detention.

78 UNHCR, "Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum- Seekers and Alternatives to Detention," (September 2012), Guidelines 5-6.

and, as the Commission explained in its 2011 *Report on Immigration in the United States: Detention and Due Process*, the need to guarantee these rights has direct implications on the appropriateness of detaining migrant families.[79]

74. Specifically regarding the detention of families, the Court has established the following:

> when the child's best interest requires keeping the family together, **the imperative requirement not to deprive the child of liberty extends to her or his parents** and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children. Evidently, this entails a correlative State obligation to design, adopt and implement alternative measures to closed detention centers in order to preserve and maintain the family unit and to promote the protection of the family without imposing an excessive sacrifice on the rights of the child by the deprivation of liberty of all or part of the family (emphasis added).[80]

75. Additionally, Principle X of the Commission's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas provides that, where families with children are detained, "the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interests of the child."[81]

76. Finally, the IACHR shares the standard set forth in the UNHCR's guidelines that, if, for some extraordinary reason migrant or refugee children, families, or pregnant women are detained, they should not be detained in prison-like conditions.[82] Important to mention here are the concluding observations of the United Nations Committee Against Torture on the third to fifth periodic reports of the United States of America.[83] In its observations, the Committee expressed concern over the United States' continued use of a system of mandatory detention to automatically hold asylum seekers and other migrants on arrival in "prison-like detention facilities, county jails, and private prisons."[84] The Committee recommended to the United States that it halt the expansion of family detention, "with a view to progressively eliminating it completely."[85]

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79 IACHR, *Report on Immigration in the United States: Detention and Due Process*, paras. 49-50.

80 I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 158 (citing *cf*. Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, UN Doc. A/HRC/11/7, May 14, 2009, para. 62; Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, UN Doc. A/65/222, 3 August 2010, para. 48; and ECHR, *Case of Popov v. France*, Nos. 39472/07 and 39474/07, Judgment of 19 January 2013, paras. 140, 141 and 147. *See also*, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Addendum: Mission to the United States of America, UN Doc. A/HRC/7/12/Add.2, 5 March 2008, para. 125).

81 IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

82 UNHCR, "Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum- Seekers and Alternatives to Detention," (September 2012), Guideline 8.

83 U.N. Committee Against Torture, Concluding observations on the third to fifth periodic reports of the United States of America, November 20, 2014, CAT/C/USA/Co/3-5, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=930&Lang=en.

84 U.N. Committee Against Torture, Concluding observations on the third to fifth periodic reports of the United States of America, November 20, 2014, para. 19.

85 The Committee also observed that, "despite the increased use of foster care for unaccompanied children and separated children, many of them continue to be held in group homes and secure facilities, which closely

2. Principle of the Non-deprivation of Liberty of Children

77. Stemming from the principle of the best interests of the child is the principle of the non-deprivation of liberty of children. This principle is one established in international human rights law and has been developed in the case law of the Commission in relation to the right to personal liberty in cases concerning juveniles in conflict with the law.[86] In such cases where the deprivation of liberty of children and adolescents is applied as a punishment, this may be done only as a measure of last resort and be used for the shortest appropriate period of time.[87]

78. As the Commission has previously stated, "the principle of exceptionality governing deprivation of liberty in general and deprivation of liberty for immigration violations, carries even more weight when children are involved," maintaining that "*[o]nly in the most extreme cases* could such a measure be justified (emphasis added)."[88]

79. Further, according to the Principle III of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, "Deprivation of liberty of children shall be applied as a measure of last resort and for the minimum necessary period, and shall be limited to strictly exceptional cases."[89]

80. The Commission finds that, in addition to the above, the deprivation of liberty of a child for migratory motives would not be understood as a measure that responds to the child's best interests.[90] Multiple students have documented that detention has negative and lasting effects on children's physical and mental development, and lead to the development or worsening of conditions such as anxiety, depression, and psychological and emotional damage.[91]

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resemble juvenile correctional facilities." U.N. Committee Against Torture, Concluding observations on the third to fifth periodic reports of the United States of America, November 20, 2014, para. 19.

86 For a more complete discussion, please refer to IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78 (July 13, 2011).

87 IACHR, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 78 (July 13, 2011), para. 339. *Cf.* Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 77, 79-80. *See also*, Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, supra*, para. 61.

88 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 51.

89 IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

90 *See also* United Nations General Assembly – Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Twenty-eighth session, March 5, 2015, A/HRC/28/68, para. 80 (concluding that "Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children. Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status").

91 *See* Human Rights Watch, "US: Halt Expansion of Immigrant Family Detention," (July 29, 2014), http://www.hrw.org/news/2014/07/29/us-halt-expansion-immigrant-family-detention; American Immigration Council, "Children in Danger: A Guide to the Humanitarian Challenge at the Border," (July 2014) http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border. *See also*, Alice Farmer, Human Rights Watch, "The impact of immigration detention on children," 44 Forced Migration Review 14 (September 2013); International Detention Coalition, *Captured Childhood* (2012), Chapter 5: "Impacts of Detention on Children."

D. Right to Humane Treatment during Detention

81. Under Article XXV of the American Declaration, every person who has been deprived of his liberty "has the right to humane treatment during the time he is in custody." Therefore, in those exceptional cases in which deprivation of liberty for migrants is necessary and complies with the standards outlined above, States must respect the human rights of those in its custody, ensure that they are treated humanely, that conditions of detention are dignified, and that immigration detentions, which are civil in nature, do not become punitive.

82. The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas are illustrative in this area and offer specific guidelines on the treatment that persons in the custody of a State must receive to ensure that they are being treated humanely. This includes: the right to food, drinking water, sleeping quarters, hygiene, clothing, educational activities, recreation, religious freedom, and visits.[92]

83. Additionally, the organs of the inter-American system have identified specific rights that follow from the obligation to ensure humane treatment, which include the following: right to medical care, right to be separated from inmates held under criminal jurisdiction, right to be notified of transfer to other detention centers, right to have duly trained and qualified personnel and independent supervision at the place of detention, right to an effective procedure for petition and response, specific rights of asylum-seekers in detention, and adherence to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Guidelines on the Detention of Asylum-Seekers, among other instruments and guidelines.[93]

E. Right to Due Process and Access to Justice

84. Under Article XXVI of the American Declaration, "[e]very person accused of an offense has the right to be given an impartial and public hearing . . ." The IACHR has maintained that Article XXVI also applies to immigration proceedings:

> to deny an alleged victim the protection afforded by Article XXVI simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the State's jurisdiction are established.[94]

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92 IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008).

93 For a more in-depth discussion, *see* IACHR, *Report on Immigration in the United States: Detention and Due Process*, paras. 71- 93.

94 IACHR, Report No. 63/08, Case 12.534, Admissibility and Merits, *Andrea Mortlock*, (United States), para. 83 (July 25, 2008), http://www.cidh.org/annualrep/2008eng/USA12534eng.htm.

85. During any proceeding that can result in a penalty of any kind, all persons are equally entitled to the following minimum guarantees: the right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal; prior notification in detail to the accused of the charges against him; the right not to be compelled to be a witness against oneself or to plead guilty; the right of the accused to be assisted without charge by a translator or interpreter; the right of the accused to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; the right to provision of free legal representation to indigent persons in immigration proceedings[95]; the right of the defense to examine witnesses present in the court and to obtain the appearance of witnesses, experts or other persons who may throw light on the facts; and the right to appeal the judgment to a higher court.[96] While many of these guarantees are articulated in language that is more germane to criminal proceedings, the Commission has deemed that these basic due process protections must be strictly enforced in immigration proceedings as well, given the interests at stake of such proceedings and their consequences.[97]

86. The Commission has previously recognized and reiterates that migrants are at a real disadvantage that can adversely affect the enjoyment of due process guarantees unless States take special countervailing measures to reduce or eliminate the procedural handicaps with which migrants are encumbered.[98]

F. Right to Consular Notification

87. In evaluating a State's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration, the Commission has previously determined that is necessary and appropriate to consider the extent to which a State party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations ("Vienna Convention")[99], providing for the right to consular notification.[100]

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95 The Commission in this sense shares the view of the Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, that States have the obligation to ensure that any child involved in immigration proceedings has the right to the provision of free legal counsel. *See* Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development,* UN Doc. A/HRC/20/24, 2 April 2012, para. 38.

96 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 57 (affirming that the rights recognized in Article XXVI [right to due process of law] of the American Declaration are reaffirmed in Article 8 of the American Convention); IACHR, *Second Progress Report of the Rapporteurship on Migrant Workers and Members of their Families*, OEA/Ser./L/V/II.111 doc. 20 rev., April 16, 2001, para. 99(d). *See also*, I/A Court H.R., *Rights and guarantees of children in the context of migration and/or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, paras. 130-31; ICCPR, Article 14; United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10-18 (1988), http://www.un.org/documents/ga/res/43/a43r173.htm.

97 *See, e.g.,* IACHR, Report No. 56/06, Case 12.562, Admissibility, *Wayne Smith* (United States), July 20, 2006, para. 51.

98 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 58.

99 The United States ratified the Vienna Convention on Consular Relations on November 13, 1972.

100 IACHR, Report No. 44/14, Case 12.873, Merits, *Edgar Tamayo Arias* (United States), (July 17, 2014), paras. 136-139; IACHR, *Medellín, Ramírez Cardenas and Leal García*, (United States), Report No. 90/09, Case 12.644 Admissibility and Merits (Publication), August 7, 2009, paras. 124-132. *See also*, IACHR, Report No. 91/05, *Javier Suarez Medina* (United States), *Annual Report of the IACHR 2005*; Report No. 1/05, Roberto Moreno Ramos

88. Article 36 ("Communication and Contact with Nationals of the Sending State") of the Vienna Convention establishes:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a. consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> c. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

89. Therefore, when interpreting and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by a State, the IACHR considers compliance with Article 36 of the Vienna Convention.[101] The Commission has had the opportunity to analyze the importance of the consular notification obligation through its petition and case mechanism and has characterized the assistance of consular officials in certain cases to be "instrumental" in gathering evidence that would have a "decisive impact" on the evaluation of the cases.[102]

(United States), *Annual Report of the IACHR 2005*; and *Ramón Martinez Villarreal* (United States), Report 52/02, Case 11.753, *Annual Report of the IACHR 2002*.

101 IACHR, Report No. 44/14, Case 12.873, Merits, *Edgar Tamayo Arias* (United States), July 17, 2014, paras. 136-139; IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), *Medellín, Ramírez Cardenas and Leal García*, (United States), August 7, 2009, paras. 124-132. *See also*, IACHR, Report No. 91/05, *Javier Suarez Medina* (United States), *Annual Report of the IACHR 2005*; Report No. 1/05, Roberto Moreno Ramos (United States), *Annual Report of the IACHR 2005*; and *Ramón Martinez Villarreal* (United States), Report 52/02, Case 11.753, *Annual Report of the IACHR 2002*.

102 IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), *Medellín, Ramírez Cardenas and Leal García*, (United States), August 7, 2009, para. 128.

90. Within the inter-American human rights system, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Commission in 2008, establish that:

> Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.[103]

91. The Commission additionally takes note of the United States' own protocol on consular notification, as documented in the Bureau of Consular Affairs, Department of State, Manual on Consular Notification and Access. The Manual provides that "immigration, civil, and criminal detentions" are all types of detentions that create consular notification obligations.[104] If a person does not wish to notify the consulate of his or her detention, then the officer must make a note in the case file and must not inform the consulate.[105]

92. Thus, the Commission affirms the United States' obligation under the American Declaration, as well as other international instruments, to inform non-nationals of their rights and, upon request, to notify without delay the consular officials of the corresponding State.

G. Rights to Family Life and Protection of the Family Unit

93. The IACHR has previously highlighted the fact that the principle objective of Articles V, concerning the right to the protection of the law against abusive attacks upon private and family life, and IX, providing that "every person has the right to the inviolability of his home," of the American Declaration is to protect individuals from unwarranted intrusion by the State.[106] The IACHR has highlighted that the principal objective of these rights is to "protect individuals from arbitrary action by State authorities which infringes in the private sphere," where "arbitrary action" has been determined to mean elements of injustice, unpredictability, and unreasonableness.[107]

94. These rights, therefore, have important implications on immigration enforcement actions and require that States refrain from enforcing immigration laws in the home,

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103 IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* Principle V (Due Process).

104 Bureau of Consular Affairs, Department of State, *Consular Notification and Access Manual*, 4th Ed. (Revised March 2014), http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf, p. 16-17.

105 Bureau of Consular Affairs, Department of State, *Consular Notification and Access Manual*, 4th Ed. (Revised March 2014), http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf, p. 5.

106 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 97 (where unnecessary intrusion is equated with the concept of 'arbitrary interference' understood as elements of "injustice, unpredictability, and unreasonableness").

107 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 97.

as immigration violations ought not to be construed as criminal offenses, and to consider and employ alternatives to detention, protect migrant parents from losing custody of their children on the sole basis of the parent's detention, and factor the best interests of the child into the decision on whether to remove a migrant parent.[108]

H. Right to Seek and Receive Asylum

95. Article XXVII of the American Declaration provides that, "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."

96. Further, the Commission has repeatedly established that, in order to comply with Article XXVII, domestic procedures by which a refugee seeks asylum must be adequate and effective.[109] At a minimum, the Commission has held that Article XXVII ensures an asylum seeker a hearing that complies with basic due process standards to determine refugee status.[110] The Commission has previously expressed that the "act of hearing the person," who claims to be at risk of persecution, is "the most fundamental element of the right to seek asylum."[111] In this regard, the Commission has also paid close attention to ensuring that States properly inform migrants of the possibility and process for presenting a claim for international protection.

I. Principle of Non-refoulement and the Right to be Free from Persecution or Torture

97. In accordance with Articles I, XXV, and XXVII of the American Declaration, Article 22(8) of the American Convention, and Article 33(1) of the United Nations Convention relating to the Status of Refugees (1951) ("the 1951 Convention")[112], the principle of *non-refoulement* constitutes the cornerstone of the international protection of refugees and asylum seekers and other persons in similar situations. In pertinent part, Article 33(1) of the 1951 Convention establishes that "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The Commission has previously applied this definition of *non-refoulement* and has found it, in conjunction with Article 22(8) of the

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108 IACHR, *Report on Immigration in the United States: Detention and Due Process*, paras. 38, 98.

109 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 63 (citing I/A Court H.R., *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, para. 24 (October 6, 1987), http://www1.umn.edu/humanrts/iachr/b_11_4i.htm; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, para. 104: ". . . the effective protection of substantive rights requires an adequate procedural framework for their implementation").

110 IACHR, Report No. 78/11 (Merits), Case 12.586, *John Doe* (Canada), (July 21, 2011), para. 90.

111 IACHR, Report No. 78/11 (Merits), Case 12.586, *John Doe* (Canada), (July 21, 2011), para. 92.

112 The United States is not a State Party to the 1951 Convention, but it is a State Party to the 1967 Protocol relating to the Status of Refugees, which in its Article 1 provides that the States Parties "undertake to apply Articles 2 to 34 inclusive of the [1951] Convention." The United States acceded to the Protocol on November 1, 1968.

American Convention[113], to be instructive in interpreting Article XXVII of the American Declaration, which by its own terms takes into account developments in the corpus of international refugee law[114]:

> Article XXVII. Every person has the right, [], to seek and receive asylum in foreign territory, in accordance with the laws of each country and with **international agreements** (emphasis added).

98. Subsequent to the 1951 Convention, international law has incorporated *non-refoulement* protection to all individuals, regardless of whether the individual qualifies for international protection. Article 3(1) of the UN Convention Against Torture, to which the US is a State Party[115], provides:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

99. The Inter-American Commission reaffirms that, under international law, States must have effective substantive and procedural safeguards in place to identify and protect the rights of individuals eligible for asylum. To this end, the Commission has outlined the contours of the obligation of *non-refoulement* to require that States do not return persons at risk of persecution to the country of persecution, as well as to ensure that State policies and practices provide sufficient mechanisms to identify such claims and make the relevant administrative and judicial determinations with the corresponding due process guarantees.[116]

100. Further, the Commission has established that the right to *non-refoulement* obligates a State not only to prevent the removal of a refugee directly to a country of persecution but also indirectly through a third country (referred to as "indirect *refoulement*" or "chain *refoulement*").[117]

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113 Article 22(8) of the American Convention provides that: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

114 IACHR, Report No. 78/11, Case 12.586, Merits, *John Doe et al*. (Canada), (July 21, 2011), paras. 99, 101; IACHR, *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system*, OEA/Ser.L/V/II.106. Doc. 40. Rev. 1, February 28, 2000, para. 24.

115 The United States ratified the Convention Against Torture on October 21, 1994 (notwithstanding its reservation in regards to the interpretation of Article 3, in understanding the phrase `where there are substantial grounds for believing that he would be in danger of being subjected to torture,' to mean `if it is more likely than not that he would be tortured').

116 IACHR, Resolution 03/08, *Human Rights of Migrants, International Standards and the Return Directive of the EU* (July 25, 2008), p. 2.

117 IACHR, Report No. 78/11, Case 12.586, Merits, *John Doe et al.* (Canada), July 21, 2011, para. 103 (citing, UN CCPR Human Rights Committee, "General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States parties to the Covenant," CCPR/C/21/Rev.1/Add.13, para. 12 (May 24, 2004) (stating, "the article 2 obligation requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel, or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm . . . either in the country to which removal is to be effected or in any country to which the person may subsequently be removed"). This position is consistent with the decision in *T.I. v. United Kingdom*, of the European Court of Human Rights, which found that the U.K. would not be absolved from violations of the principle of non-refoulement by sending a refugee claimant to another Member State of the Dublin Convention – an agreement governing the Safe Third Country policy in the European Union. See Eur. Ct. H.R., *T.I. v. the*

1. Principle of *Non-refoulement* at International Borders

101. The principle of *non-refoulement* also applies to asylum seekers and refugees whose status has not yet been determined; refugees who have not yet been recognized officially as such; as well as by those who assert their right to seek and receive asylum and who are either on an international border or have crossed it without being admitted officially or legally into the territory of the State.[118] Importantly, the Commission has highlighted that the principle of *non-refoulement* "necessarily requires that such persons cannot be rejected at the border or expelled without an adequate and individualized examination of their claim."[119]

J. Prohibition on Collective Expulsions

102. The Commission has previously defined an expulsion as collective when "the decision to expel is not based on individual cases but on group considerations, even if the group in question is not large."[120] As such and with regard to the above-mentioned prohibition on *non-refoulement*, the Commission considers that, in cases where more than one person is expelled from a country without first being provided an individual analysis or afforded judicial guarantees or access to effective remedies (including mechanisms of international protection), a State may violate the prohibition on collective expulsions.[121]

103. The Commission reaffirms that collective expulsions violate a number of human rights of the persons subjected to it – not only the right to residence and freedom of movement (Article VIII of the American Declaration), but may also place at risk the rights to: life, liberty, and personal security (Article I); seek and receive asylum and the principle of *non-refoulement* (Article XXVII); due process and fair trial (Articles XXVI and XVIII); family life and protection of the family unit (Articles V and VI); private life (Article V); and the right of the child to special protection, care, and aid (Article VII).[122]

104. The Commission also highlights that the prohibition against collective expulsion is established in the American Convention (Article 22 (9)), as well as other international legal instruments, such as the Universal Declaration of Human Rights (Articles 9, 13.1

United Kingdom, App. No. 43844/98 (Mar. 7, 2000); Eur. Ct. H.R., *K.R.S. v. the United Kingdom*, App. No. 32733/08 (Dec. 2, 2008) (affirming the principle established in *T.I. v. the United Kingdom*).

118 IACHR, *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system*, OEA/Ser.L/V/II.106. Doc. 40. Rev. 1, February 28, 2000, para. 25. *See also*, UNHCR, Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, published on 26 January 2007, para. 8.

119 IACHR, *Report on the situation of human rights of asylum seekers within the Canadian refugee determination system*, OEA/Ser.L/V/II.106. Doc. 40. Rev. 1, February 28, 2000, para. 25.

120 IACHR, *Report on Terrorism and Human Rights*, para. 404.

121 *Cf*. IACHR, Report No. 51/96, Case 10.675, Merits, *Haitian Interdiction Case* (United States), March 13, 1997. Following the issuance of this report, the Commission has addressed other cases involving the collective expulsion of persons, including children, such as: *Benito Tide Mendez and others* (Dominican Republic), Report No. 64/12, Case 12.271, Merits, March 29, 2012; *Nadege Dorzema et. al (the "Guayubin Massacre")* (Dominican Republic), Report 174/10, Case 12.688, Merits (November 2, 2010).

122 *Cf*. IACHR, Report No. 51/96, Case 10.675, *Haitian Interdiction Case,* Merits, (United States), March 13, 1997.

and 13.2); the ICCPR (Articles 12 and 13), to which the US is a State Party[123]; Protocol 4 of the European Convention on Human Rights (Article 4); and the International Covenant on the Elimination of All Forms of Racial Discrimination (Article 5), among others.

105. Lastly, the Commission shares the view of the European Court on Human Rights expressed in *Hirsi Jamaa and others v. Italy* that the prohibition on collective expulsions applies to any measure which has the effect of preventing migrants from reaching the borders of States or to push them to another State.[124] This would include interdiction measures taken by a State, even those carried out extraterritorially, to prevent persons from arriving at its borders when this means they are prevented from presenting a claim for asylum or *non-refoulement*.[125]

123 The United States ratified this Covenant June 8, 1992.

124 Eur. Ct. H.R., *Hirsi Jamaa v. Italy*, App No. 27765/09 (February 23, 2012), para. 180.

125 Eur. Ct. H.R., *Hirsi Jamaa v. Italy*, App No. 27765/09 (February 23, 2012), para. 164 (citing *cf*. IACHR, *Haitian Interdiction Case* (United States), Report No. 51/96 (Merits), Case 10.675 (March 13, 1997); (Albuquerque, J., concurring) (finding that: the prohibition of *refoulement* is not limited to the territory of a State but also applies to extraterritorial State action, including actions occurring on the high seas; and that discharging the non-refoulement obligation requires an evaluation of the personal risk of harm, making collective expulsions not only illogical but also unacceptable).

CHAPTER 3

SITUATION OF MIGRANT AND REFUGEE FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA

SITUATION OF MIGRANT AND REFUGEE FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA

A. Background on Recent Shifts in Immigration in the United States

106. To give general context on the situation of migrants in the United States, since the Commission's last report on this topic (*Report on Immigration in the United States: Detention and Due Process,* 2011), the U.S. has remained the principal destination of international migrants in the world.[126] According to the Department of Economic and Social Affairs of the United Nations Population Division, in June 2013, the United States had a total of 45,785,090 international migrants.[127]

107. The United States also remains one of the leading countries for granting asylum and resettling refugees: in 2013, the United States granted asylum to 25,199 persons and resettled 69,909 refugees.[128] The Commission commends the United States on its continued efforts to provide much-needed protection to thousands of persons each year.

108. Over U.S. fiscal year 2014, which ran between October 1, 2013 and September 30, 2014, the number of arrivals of families with children and unaccompanied children to the southern border of the United States increased dramatically, even over already-increasing levels dating back to 2011.

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126 *See, e.g.*, Pew Research Social & Demographic Trends, "Top 10 Destination Countries of International Migrants, 1990 and 2013," (December 16, 2013), http://www.pewsocialtrends.org/2013/12/17/changing-patterns-of-global-migration-and-remittances/sdt-2013-12-17-global-migration-02-02/.

127 Department of Economic and Social Affairs, United Nations Population Division, "Trends in International Migrant Stock: Migrants by Destination an Origin. Table 10: Total migrant stock at mid-year by origin and by major area, region, country or area of destination, 2013," (September 2013).

128 U.S. Department of Homeland Security, "Refugees and Asylees: 2013," http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf. *See also*, UNHCR, Global Trends 2013 (June 20, 2014), http://unhcr.org/trends2013/.

Apprehensions of Unaccompanied Children in the Southwest Border Sectors of the United States[129]
Fiscal Years 2011 – 2014

Country	2011	2012	2013	2014
Honduras	974	2,997	6,747	18,244
Guatemala	1,565	3,835	8,068	17,057
El Salvador	1,394	3,314	5,990	16,404
Mexico	11,768	13,794	17,240	15,634
Other countries	248	463	714	1,202
Total	**15,949**	**24,403**	**38,759**	**68,541[130]**

Apprehensions of Families in the Southwest Border Sectors of the United States [131]
Fiscal Years 2013-2014

Country	2013	2014
Honduras	Not available	34,495
Guatemala	Not available	12,006
El Salvador	Not available	14,833
Mexico	Not available	5,639
Other Countries	Not available	1,472
Total	**14,855**	**68,445**

109. As illustrated in the tables, the principal countries of origin for arriving unaccompanied children to the United States were those of the Northern Triangle of Central America – El Salvador, Guatemala and Honduras – and Mexico. However, as can be observed in the first table, much of the recent increase in arrivals has come from Honduras, Guatemala, and El Salvador. For example, according to U.S. government data, in 2009 the U.S. Customs and Border Protection agency (CBP) apprehended 19,668 unaccompanied children, of whom Mexican unaccompanied children accounted for 82% and unaccompanied children from El Salvador, Guatemala, and Honduras together accounted for 17%. In contrast, in the first eight months of fiscal year 2014 (October 2013 – May 2014), CBP reported having apprehended 47,017 unaccompanied children, of whom Mexican children accounted for 25% while children from the other three aforementioned countries accounted for 73%.[132] The numbers of arriving unaccompanied children to the United States increased so drastically that at the end of June 2014, CBP had apprehended more

129 U.S. Customs and Border Protection Agency, "Southwest Border Unaccompanied Alien Children," http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

130 In its response to the present report, the United States cited the total number of apprehensions of unaccompanied children in the United States as 68,631.

131 U.S. Customs and Border Protection Agency, "Southwest Border Family Unit Apprehensions," http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf.

132 U.S. Congressional Research Service, "Unaccompanied Alien Children: An Overview," 7-5700, R43599 (September 8, 2014), at *Summary*.

unaccompanied children than in any of the previous five years and apprehended nearly three times as many unaccompanied children as in 2012.[133]

110. The United States points out, in its observations on the draft of this report, that the majority of the arriving unaccompanied children were between the ages of 15 and 17, but many were younger. The Commission adds that, according to a Pew Research Center analysis, there was a 117% increase in the number of arrivals of children 12 years of age and younger between U.S. fiscal year 2013 and part of fiscal year 2014 (through the month of May 2014).[134]

111. To understand the current influx of families and children migrating to the United States of America, it is essential to take into consideration the push and pull factors of migration occurring in the countries of the migratory corridor between the Northern Triangle of Central America, Mexico and the US. Many of the persons who are migrating to the United States are fleeing from intersectional discrimination resulting from various forms of violence, poverty, gender and economic inequality, and also the effects of natural disasters in their countries of origin. These push factors combine with pull factors, such as family reunification, better job and educational opportunities, higher levels of human security, and the chance for a better standard of living. The multi-causal nature of migration in the countries of the Northern Triangle and Mexico explains why migratory movements are mixed, consisting of migrants, asylum-seekers and refugees, victims of human trafficking, and other persons in need of international or complimentary protection.[135]

112. In providing the IACHR delegation their testimonies, some of the most common reasons the asylum-seekers and migrants[136] gave for leaving their countries included: the violence in their communities, especially that caused by organized crime; the poverty in which they lived; the lack of educational and work opportunities; and family reunification. The United States, in its response, echoed these reasons as some of the most common it receives from arriving migrants and asylum-seekers. Central

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133 U.S. Congressional Research Service, "Unaccompanied Alien Children: An Overview," 7-5700, R43599 (September 8, 2014), p. 2. Projections of arrivals of unaccompanied children and families to the U.S. for fiscal year 2015 remain high: as of March 2015, studies have arrivals of unaccompanied children at 40,000 and members of families at 35,000. Although both figures would represent a decrease from fiscal year 2014, if accurate, these [projected] arrivals would represent the second highest year to date – following 2014 – for both groups. MPI, Webinar on Child and Family Migration to the United States: Continuing Flows and Evolving Responses (March 31, 2015), http://www.migrationpolicy.org/events/child-and-family-migration-united-states-continuing-flows-and-evolving-responses.

134 The Pew Research Center analyzed the U.S. Customs and Border Protection's Enforcement Integrated Database records. Jens Manual Krogstad, Ana Gonzalez-Barrera and Mark Hugo Lopez, "Children 12 and under are fastest growing group of unaccompanied minors at U.S. Border," Pew Research Center, FactTank (July 22, 2014), http://www.pewresearch.org/fact-tank/2014/07/22/children-12-and-under-are-fastest-growing-group-of-unaccompanied-minors-at-u-s-border/.

135 For more information, *see, e.g.*, Center for Gender & Refugee Studies and Justice and Migration & Asylum, Human Rights Center of the National University of Lanús, Argentina, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015).

136 The IACHR interviewed approximately 39 persons during its visit to the southern border of the United States, of whom approximately 30 were detained mothers at the Karnes County Residential Center and nine were unaccompanied children in the custody of Saint PJ's, a HHS-grantee facility.

America is one of the sub-regions of the world with the highest levels of income inequality.[137] In fact, there is a strong correlation between income inequality and violence in the region. The Commission takes note that, according to the United Nations Office on Drugs and Crime, the country with the highest homicide rate in the world was Honduras, with 90.4 homicides per 100,000 persons; El Salvador and Guatemala also figured in the list, at fourth and fifth with 41.2 and 39.9 murders per 100,000 persons, respectively.[138] The correlation among inequality, poverty, violence and migration plays an important role in explaining why such a large percentage of migrants and refugees are from Honduras, El Salvador, and Guatemala.[139] In this regard, the UNHCR documented a 435% increase from 2005-2013 in the number of requests for asylum brought by persons from these three countries in other countries in the region besides the US, such as Mexico, Panama, Nicaragua, Costa Rica, and Belize.[140] Many U.S. government officials also cited some of the same, above-mentioned factors as reasons they receive from persons trying to enter the country. Referring to the spike in arrivals in May and June 2014, these officials also cited a rumor reportedly spread by human smuggling and trafficking rings that unaccompanied children and families would receive a *permiso* (a permit), which would allow them to stay in the US.

113. The IACHR expresses its deep concern that some of the responses given by the United States of America to this "humanitarian crisis," as labeled by President Barack Obama, do not correspond to the human rights and protection challenges posed by this protracted crisis. In general, these responses have included the tightening of immigration policies, the application of generalized and automatic detention especially for persons in an irregular migratory situation, the use of expedited removals for families, the securitization of the border, and the externalization of U.S. border control to the migratory corridor between the Northern Triangle and the United States, through measures such as interdictions.[141]

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137 *See* United Nations Development Programme, Human Development Reports, Table 3: Inequality-adjusted Human Development Index (2013) (ranking the Northern Triangle countries of El Salvador at 115, Guatemala at 125, Honduras 129, out of 187 countries in numeric order of least unequal income to most unequal income); *see also* International Monetary Fund Working Paper, "What is Behind Latin America's Declining Income Inequality?," WP/14/124 (July 2014), p. 11 (explaining that while there is a declining income inequality trend in Latin America as a whole, the region remains the "most unequal [ ] in the world" and that income inequality has risen in Honduras and Mexico); Pew Research Center, FactTank: "5 facts about Honduras and Immigration," (August 11, 2014), http://www.pewresearch.org/fact-tank/2014/08/11/5-facts-about-honduras-and-immigration/ (citing data showing that, in 2013, the percentage of persons living in poverty in Honduras was 64.5%, in El Salvador – 34.5%, Guatemala 53.7%, and in Mexico 52.3%).

138 United Nations Office on Drugs and Crime, *Global Study on Homicide* (April 2014), http://www.unodc.org/gsh/.

139 In this regard, *see also*, IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II, Doc. 48/13 (December 30, 2013), para. 74.

140 UNHCR, *Children on the Run* (March 2014), p. 4. In Mexico, for example, of the 50 children and adolescents who were recognized as refugees between 2008 and 2013, 44 were from the Northern Triangle (19 children from El Salvador, 16 from Honduras, and 9 from Guatemala). *See* UNHCR, *Uprooted (Arrancados de raíz)* (2014), p. 30-31.

141 In the second half of 2014, starting around the peak in arrivals of refugee and migrant families and unaccompanied children to the United States, the primary countries of origin and transit of these persons initiated programs, supported by the United States, to intercept persons in their own territories who may have been trying to migrate to the United States. In Honduras, these programs were known as Operations Rescue of

114. As documented in its 2011 *Report on Immigration in the United States*, the Commission again raises the issue of the effects of certain immigration border control measures. In 2011 the Commission explained that:

> One of the most harmful effects of the physical barriers erected along the border is that their deterrent effect is temporary, as they merely steer immigrants in the direction of those border areas where no physical barriers have been erected and where conditions tend to be so extreme as to make the crossing highly dangerous. Summing up, this type of measure increases the death rate among undocumented migrants, as various organizations have confirmed.[142]

115. During the Commission's most recent visit, it was clear that the lack of a comprehensive approach that takes into account the push and pull factors generating mixed migratory movements in the region combined with immigration control practices (such as physical barriers and other new tools) create a "funnel effect." Just as was observed in the IACHR's visit in 2009, this funnel effect pushes mixed migratory movements to more dangerous and clandestine routes in order to try to evade border controls and enter the United States. More dangerous routes mean that deaths of persons *en route* increase. As it stands, the International Organization for Migration (IOM) has found that the Mexico-United States border is the zone of the most border deaths in the Americas, due in large part to the "harsh conditions of the arduous desert trek[143]," and is the third-highest zone of border deaths in the world (the first being along Europe's external borders and the second in East Africa, excluding the Horn of Africa).[144] Between the January 1998 and September 2014, the IOM recorded 6,259 reported deaths along the U.S. southern border.[145]

116. The United States, in its response to the draft of this report, stated that to address these push and pull factors, it continues to partner with Honduras, Guatemala, and El Salvador on "key concerns that led to expanded migration in 2014 and to better address the long-term underlying factors that lead to migration in the first place." The State cites as an example the U.S. Department of Labor's April 2015 announcement that it will fund a $13 million project designed to help at-risk youth in El Salvador and Honduras develop marketable skills and secure and retain good employment in their

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Angels (*Rescate de Ángeles*) and Coyote; in Guatemala, it was through Safe Passage (*Paso Seguro*); and in Mexico, it was through the Southern Border Program (*Plan Frontera Sur*). In all three States, these programs have entailed an increase in the securitization and militarization of border control operations with significant involvement of joint military and police forces. *See* The Jesuit Conference of the United States and the Washington Office on Latin America (WOLA), U.S. Support and Assistance for Interdictions, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to International Protection, (October 2014) p. 3-6 (on file with the IACHR).

142 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 107.

143 But also due to: suffocation in cargo compartments of commercial trucks, drowning in irrigation canals or rivers, motor vehicle accidents, freezing to death in mountains of Arizona or California, heat stroke and dehydration, and also due to being killed by human or drug smugglers, and a small "but concerning number" have died at the hands of U.S. Border patrol agents. *See* International Organization for Migration (IOM), *Fatal Journeys: Tracking Lives Lost During Migration* (2014), p. 50.

144 IOM, *Fatal Journeys: Tracking Lives Lost During Migration* (2014), p. 18, 22.

145 IOM, *Fatal Journeys: Tracking Lives Lost During Migration* (2014), p. 18, 24 (between 1998-2013, the IOM recorded 6,029 deaths and between January and September 2014, it recorded 230 deaths).

home countries.[146] Likewise, the State emphasizes that its Strategy for Engagement in Central America, which seeks to promote three "interconnected objectives – prosperity, governance, and security," would serve as a complement to the Alliance for Prosperity Plan, developed by El Salvador, Guatemala, and Honduras in conjunction with the Inter-American Development Bank.[147] According to the State, its efforts in the region are aimed at "mitigat[ing] the underlying factors driving outbound migration." In this sense, the State assures that it has "committed significant resources to address the problem and will be increasing [its] funding to assist these countries with economic development, anti-corruption efforts, and institution building."[148]

117. Regarding the measures taken towards the securitization of the border, the Commission has documented with great concern the deaths of persons as a result of confrontations with CBP agents. From January 2010 to May 30, 2014, at least 28 persons have died due to such incidents.[149] Human rights organizations have reported that, of these incidents, 27 persons died as a result of the use of lethal force and one person died after not receiving medical attention, and relatives of the victims have argued that many of these deaths have been caused as a result of excessive and disproportionate use of force by Border Patrol agents.[150] Although an in-depth analysis of these reports is outside the scope of the present report, as in its 2011 report, the IACHR points again to the terrible effects of certain immigration policies along the border and to the abuses and excesses committed by officers charged with enforcing the law.[151] In this regard, the Commission takes note of an independent report conducted by the nonprofit Police Executive Research Forum (PERF) and released on May 30, 2014 that highlighted problems with the Border Patrol. In particular, the report set out areas "need[ing] significant change," especially that of use of force (specifically firing shots) at vehicles and rock-throwers in situations where less-lethal measures would have been more reasonable. In this regard, the

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146 On this point, the State asserts in its response that "without increased economic opportunity, the region cannot absorb the estimated six million people who will enter the workforce over the next decade" and that "over half the population in Guatemala and Honduras lives below the poverty line."

147 For more information on the Plan, please refer to: Inter-American Development Bank (IDB), Plan of the Alliance for Prosperity in the Northern Triangle: A Road Map (Sept. 2014), http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39224238. *See also*, The White House, "Support for the Alliance for Prosperity in the Northern Triangle," (Mar. 3, 2015), https://www.whitehouse.gov/the-press-office/2015/03/03/fact-sheet-support-alliance-prosperity-northern-triangle.

148 The State mentions that it has requested $1 billion in funding from the U.S. Congress for U.S. fiscal year 2016 to support this Strategy. According to the State, these resources would go towards improving security, government accountability, and the foundations for economic growth. As of July 6, 2015, however, the Commission notes that this request has yet to be approved by the U.S. Congress. The Commission also points out that the duration of the Strategy was undefined in the State's response to this report as well as in publicly-available materials on the White House's website. Please refer to, e.g., https://www.whitehouse.gov/sites/default/files/docs/central_america_strategy.pdf.

149 See American Civil Liberties Union, "CBP Releases Deadly Force Report and Revised Use of Force Policy," (30 de mayo de 2014), https://www.aclu.org/news/cbp-releases-deadly-force-report-and-revised-use-force-policies. See also, Southern Border Communities Coalition, "Border Patrol Abuse Since 2010," (current through Mar. 19, 2015), http://soboco.org/border-patrol-brutality-since-2010/; The Arizona Republic, "Force at the Border," (updated through Mar. 25, 2014), http://www.azcentral.com/news/projects/border-deaths/.

150 IACHR, Press Release No. 18/14, "The IACHR Expresses Deep Concern over the Deaths of Migrants Caused by U.S. Border Patrol," (February 24, 2014); *see also* IACHR, Press Release No. 126/12, "IACHR Expresses Concern over Killing of Mexican Teenager by the U.S. Border Patrol," (October 23, 2012).

151 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 108.

PERF Report emphasized the need to improve "initial reporting, investigation, incident review, weapons, personal protective equipment, and training."[152]

118. Another facet of the U.S. response to the humanitarian crisis is the lack of screening or of effective screening conducted at the border to detect persons in need of international protection or with special protection needs. As explained in more detail below, the Commission is concerned that Mexican unaccompanied children in particular are not being adequately screened at the border by U.S. border officials, and that, for those being screened, agents do not properly inform them of their rights. For example, the Commission has learned of incidents in which U.S. border agents responding to claims of fear of persecution, including from children, with comments such as: "I do not believe you" or "On the basis of your claim(s), you will likely not be [granted asylum/allowed to stay], so, if I were you, I would just leave."

119. On the use of immigration detention, the Commission notes, at the outset, that the practice of detaining families in the US was ended in 2009, with the closure of the T. Don Hutto Residential Treatment Center in Taylor, Texas. However, in this visit, the Commission observed that the State is not only employing the measure but is also seeking to expand it. Of particular concern, the Commission witnessed the State's arbitrary and automatic application to families arriving in the United States. The Commission observed that families for whom there is space at an immigration detention center, and may not or do not have other family in the US, are being immediately detained and kept detained for the duration of the immigration proceedings initiated against them. With regard to those families for whom there is no space in any immigration detention center and who have a relative in the United States, they are being sent to stay with that relative for the duration of their immigration proceedings. If there is no space nor does the family have an eligible relative or sponsor, an alternative to detention may be applied.[153] The Commission considers the application of detention to be detrimental to the welfare of persons seeking protection under international mechanisms, in addition to hampering persons' access to such mechanisms, as well as to legal representation. Given that, beyond considerations of space and the presence of relatives in the US, no substantive criteria are being assessed in order to determine if detention is necessary, the Commission considers that this automatic application is arbitrary. The Commission will discuss this issue below in more detail, as well.

120. With regard to the right to consular access and notification, in the IACHR's meeting with the Consulates of El Salvador, Guatemala, and Honduras, it learned of some difficulties they had experienced in receiving notification that nationals were being detained in immigration detention facilities. Among the difficulties mentioned were failures to be promptly notified of the detention of nationals – in some cases, until the Consulates called holding facilities to check – and the lack of updated information on where a national was transferred, once out of DHS's custody. Some of the persons the

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152 The Police Executive Research Forum, *U.S. Customs and Border Protection, Use of Force Review: Cases and Policies* (February 2013), http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf, p.2.

153 ICE employs two major alternatives to detention programs: (1) Electronic Monitoring Device (EMD), which requires telephone reporting or radio frequency monitoring (such as an ankle bracelet); and (2) Intensive Supervision Appearance Program (ISAP), in which a case specialist closely supervises a small caseload of participants and may use a wide variety of control and supervision tools that include home visits, weekly schedules, and ankle bracelets, among others. *See generally*, U.S. Department of Homeland Security, ICE, Eligibility Criteria for Enrollment into the ISAP and EMD Program Memorandum (May 11, 2005), p. 1-2.

Commission interviewed who had been in detention indicated that they were either unaware of their right to consular assistance or of the potentially negative consequences of exercising that right, particularly in regard to asylum claims in the United States[154].

121. While the IACHR encourages all governments involved in this issue to work together to improve communication, the Commission expresses its concern with how the mechanism of consular notification is being applied in this context. The notification provisions of the Vienna Convention require that the person under the authority of the securing State be informed of his or her right to consular notification, and if that person so requests, the sending State be notified. Thus, the obligation of the securing State is to inform, and the detained person may then opt to request notification or not depending on his/her circumstances. This is important for persons who may be fleeing persecution to know and understand, prior to requesting consular assistance. The testimonies received by the Commission from both the consulates and detained persons, however, indicate that there are notable communication problems and a lack of a sufficient explanation of rights by U.S. authorities, principally those at DHS who are generally first to come into contact with persons arriving in an irregular migratory situation and who also manage holding centers and other immigration detention facilities.[155]

122. In the following sub-sections, the Commission will proceed to analyze the applicable legal regime and practice for each group of persons affected, starting with that of families with children, followed by unaccompanied children from Mexico, and lastly, unaccompanied children from countries not contiguous to the United States. Following a brief explanation of the legal process, the Commission will proceed to share its observations made during the visit and analyze the potential or observed human rights violations. The Commission's recommendations on how to improve on the identified problems are included in the report's final chapter.

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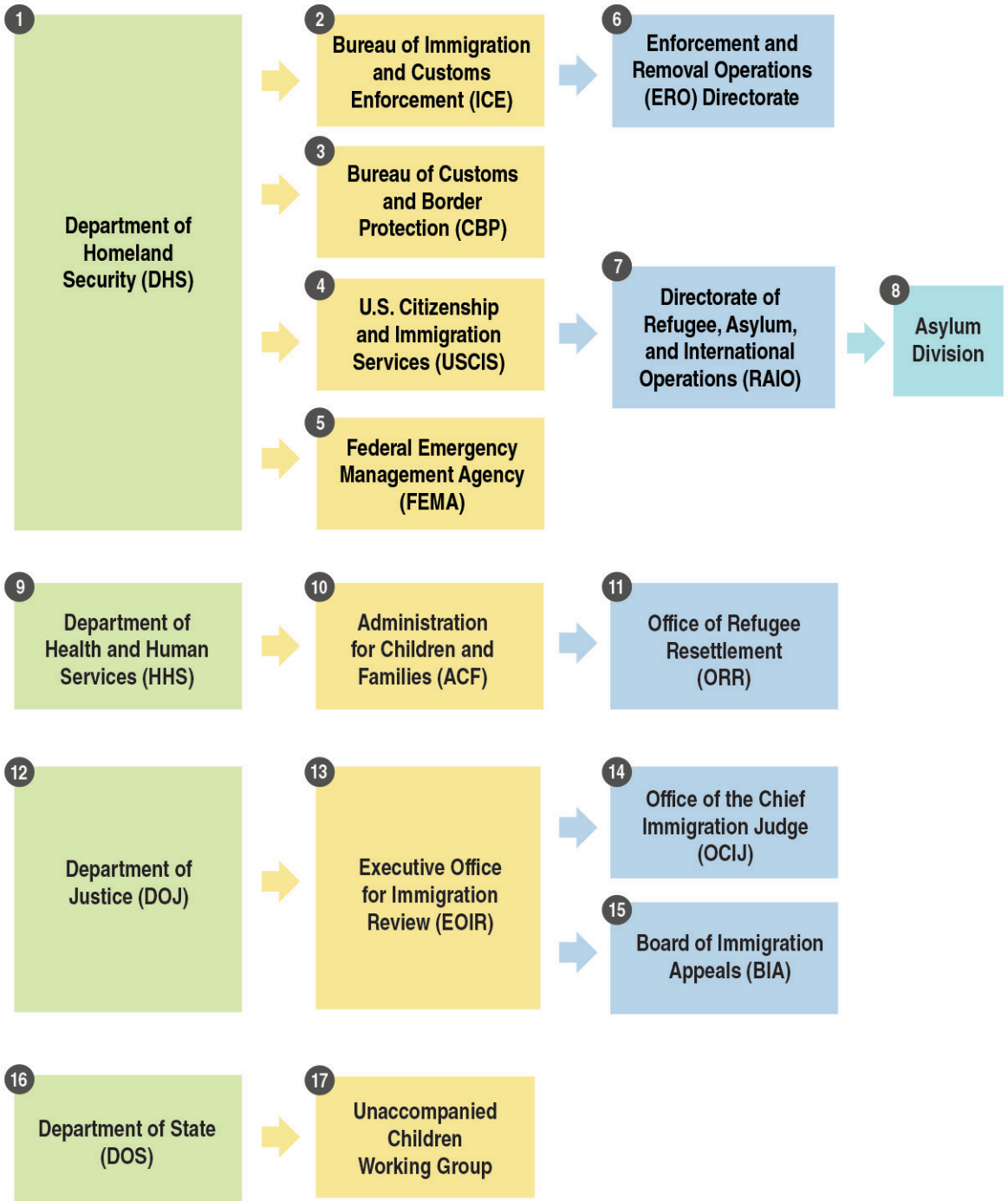
154 Contact with the consulate of the person's country of origin may later be used as evidence against him/her, specifically to refute his/her claim of fear of persecution, which constitutes the basis of an asylum claim.

155 Bureau of Consular Affairs, U.S. Department of State, *Consular Notification and Access Manual*, 4th Ed. (Revised March 2014), http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf, p. 25 (recommending that notification be given within 24 to 72 hours of the arrest or detention).

Organizational Chart for United States Departments, Agencies, and Offices in Charge of Implementing Immigration Law as Pertains to Families and Unaccompanied Children



Duties

(All information taken from the official websites of each entity)

1. **Department of Homeland Security** –Prevent terrorism and enhance security; secure and manage our borders; enforce and administer U.S. immigration laws; safeguard and secure cyberspace, and ensure resilience to disasters.

2. **Bureau of Immigration and Customs Enforcement**- Promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration.

3. **Bureau of Customs and Border Protection**- Charged with securing America's borders to protect the U.S. against terrorist threats and prevent the entry of inadmissible persons and contraband, while protecting lawful travel, trade, and immigration.

4. **U.S. Citizenship and Immigration Services-** Provide accurate and useful information, grant immigration and citizenship benefits, promote an awareness and understanding of citizenship, ensure the integrity of the U.S. immigration system. Services provided: citizenship and naturalization, immigration of family members, working in the US, verifying an individual's legal right to work in the US, humanitarian programs, international adoptions, civic integration, and genealogy.

5. **Federal Emergency Management Agency**- Coordinate the federal government's role in preparing for, preventing, mitigating the effects of, responding to, and recovering from all domestic disasters, whether natural or man-made, including acts of terror.

6. **Enforcement and Removal Operations Directorate** - Identify, arrest, and remove non-nationals who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of US immigration laws and border control efforts.

7. **Directorate of Refugee, Asylum, and International Operations** – Provide immigration, protection, and humanitarian services for people who are: fleeing oppression, persecution, or torture; facing urgent humanitarian situations; and, best served in the Directorate's international offices, such as military members who are serving overseas and permanent residents who need replacement documents to return to the US.

8. **Asylum Division** – Manage the U.S. affirmative asylum process.

9. **Department of Health and Human Services** – Protect the health of all Americans and provide essential human services, especially for those who are least able to help themselves.

10. **Administration for Children and Families** – Promote the economic and social well-being of families, children, individuals and communities through a range of educational and supportive programs in partnership with states, tribes, and community organizations.

11. **Office of Refugee Resettlement**- Help new populations maximize their potential in the US by linking them to critical resources that assist them in becoming integrated members of American society.

12. **Department of Justice** - Enforce the law and defend the interests of the United States according to the law; ensure public safety against threats foreign and domestic; provide federal leadership in preventing and controlling crime; seek just punishment for those guilty of unlawful behavior; and ensure fair and impartial administration of justice for all Americans.

13. **Executive Office for Immigration Review**- Adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.

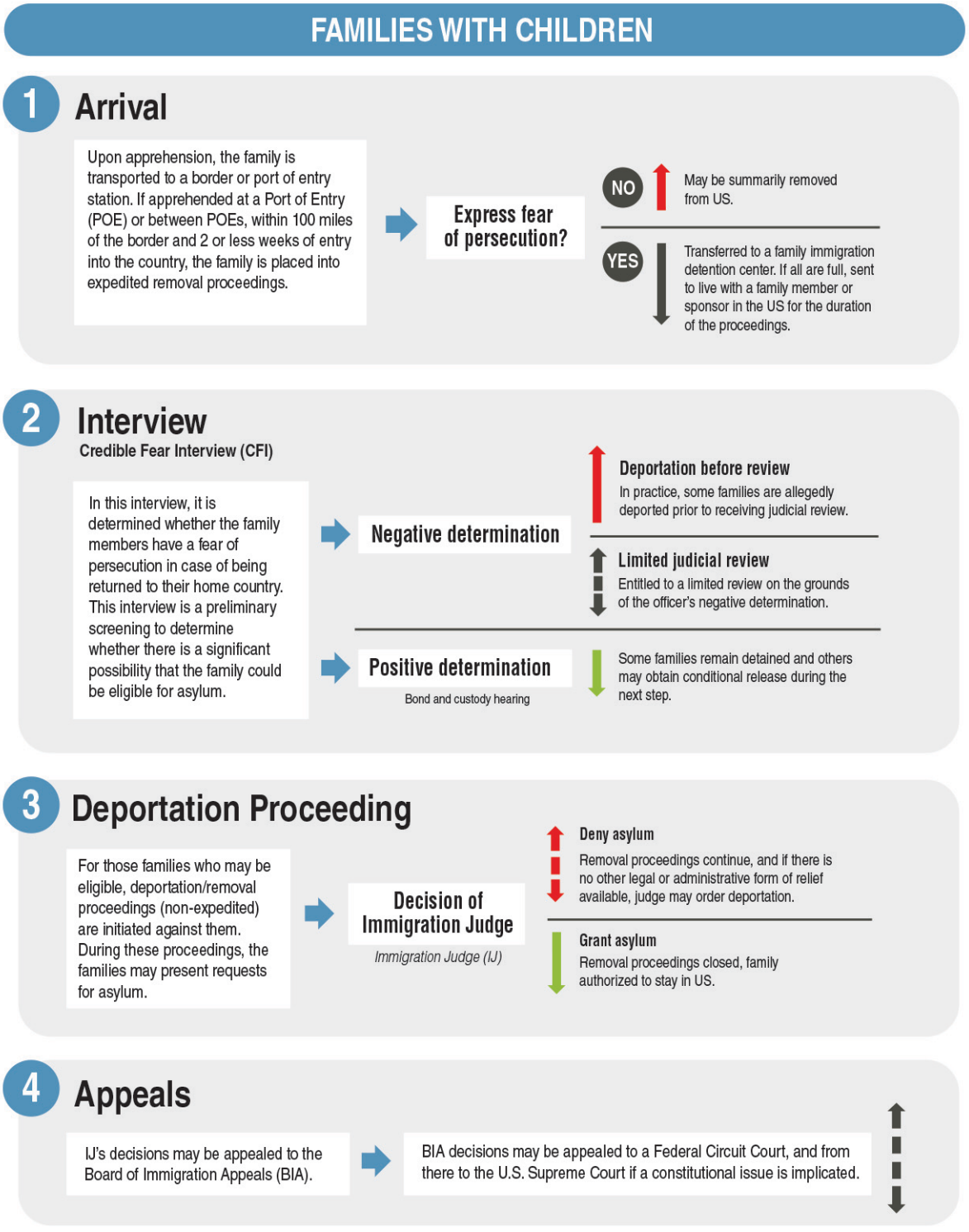
14. **Office of the Chief Immigration Judge**- Provide overall program direction, articulate policies and procedures, and establish priorities for over 260 immigration judges in 58 immigration courts throughout the Nation. (Immigration Judges determine whether an individual from a foreign country (an alien) should be allowed to enter or remain in the United States or should be removed.)

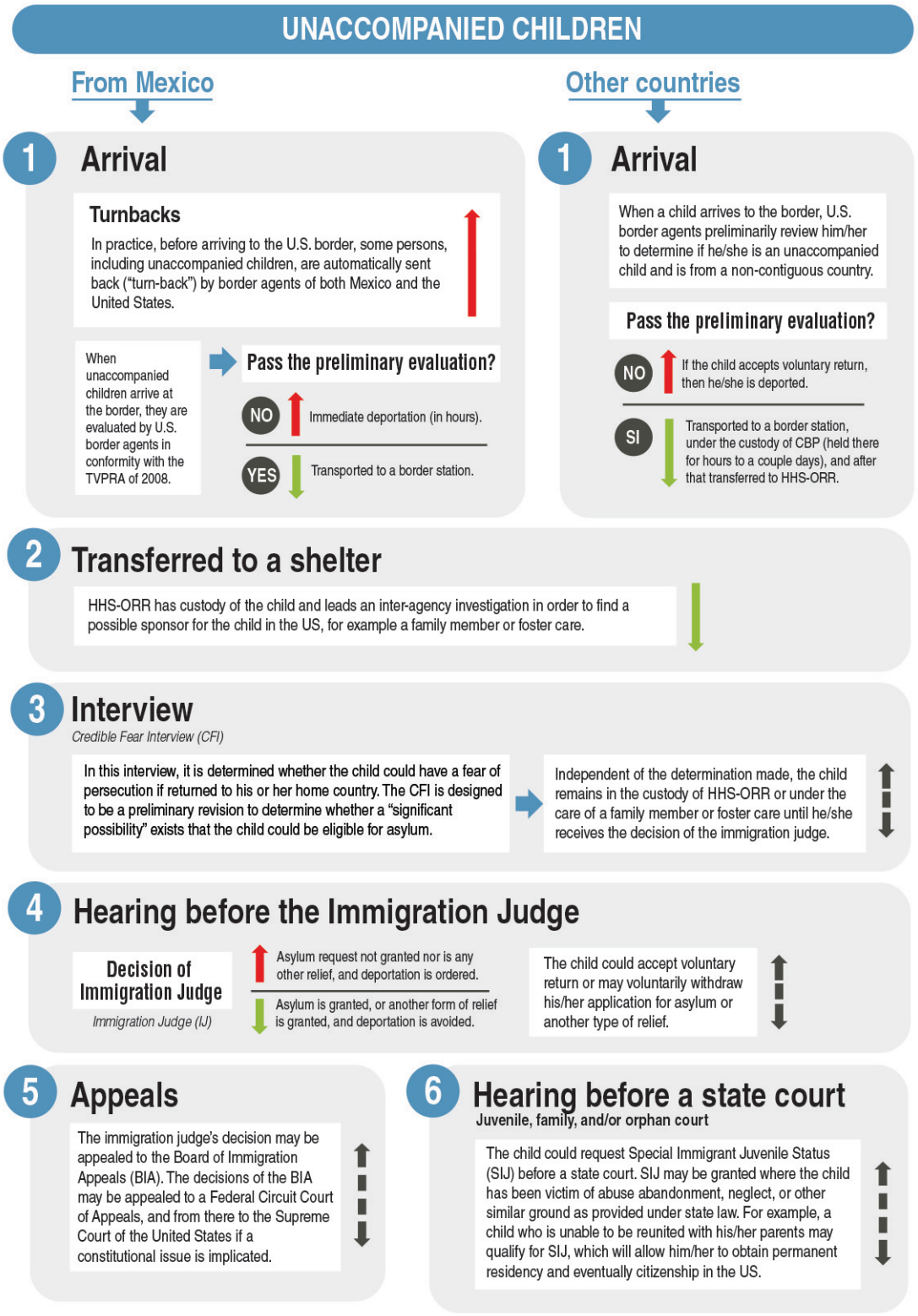
15. **Board of Immigration Appeals**- Hear appeals from certain decisions rendered by immigration judges and by district directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm.

16. **Department of State**- Shape and sustain a peaceful, prosperous, just, and democratic world and foster conditions for stability and progress for the benefit of the American people and people everywhere.

17. **Unaccompanied Children Working Group**- [Created to coordinate the response to increase in arrivals of unaccompanied children to the U.S.'s southern border. The Commission was unable to obtain a full description of the Group's duties.]

Process for each sub-group arriving to U.S. border




UNACCOMPANIED CHILDREN
From Mexico
Other countries
1 Arrival
Turnbacks
In practice, before arriving to the U.S. border, some persons, including unaccompanied children, are automatically sent back ("turn-back") by border agents of both Mexico and the United States.
When unaccompanied children arrive at the border, they are evaluated by U.S. border agents in conformity with the TVPRA of 2008.
Pass the preliminary evaluation?
NO
Immediate deportation (in hours).
YES
Transported to a border station.
1 Arrival
When a child arrives to the border, U.S. border agents preliminarily review him/her to determine if he/she is an unaccompanied child and is from a non-contiguous country.
Pass the preliminary evaluation?
NO
If the child accepts voluntary return, then he/she is deported.
SI
Transported to a border station, under the custody of CBP (held there for hours to a couple days), and after that transferred to HHS-ORR.
2 Transferred to a shelter
HHS-ORR has custody of the child and leads an inter-agency investigation in order to find a possible sponsor for the child in the US, for example a family member or foster care.
3 Interview
Credible Fear Interview (CFI)
In this interview, it is determined whether the child could have a fear of persecution if returned to his or her home country. The CFI is designed to be a preliminary revision to determine whether a "significant possibility" exists that the child could be eligible for asylum.
Independent of the determination made, the child remains in the custody of HHS-ORR or under the care of a family member or foster care until he/she receives the decision of the immigration judge.
4 Hearing before the Immigration Judge
Decision of Immigration Judge
Immigration Judge (IJ)
Asylum request not granted nor is any other relief, and deportation is ordered.
Asylum is granted, or another form of relief is granted, and deportation is avoided.
The child could accept voluntary return or may voluntarily withdraw his/her application for asylum or another type of relief.
5 Appeals
The immigration judge's decision may be appealed to the Board of Immigration Appeals (BIA). The decisions of the BIA may be appealed to a Federal Circuit Court of Appeals, and from there to the Supreme Court of the United States if a constitutional issue is implicated.
6 Hearing before a state court
Juvenile, family, and/or orphan court
The child could request Special Immigrant Juvenile Status (SIJ) before a state court. SIJ may be granted where the child has been victim of abuse abandonment, neglect, or other similar ground as provided under state law. For example, a child who is unable to be reunited with his/her parents may qualify for SIJ, which will allow him/her to obtain permanent residency and eventually citizenship in the US.

B. Families with Children

1. General Considerations

123. In order to monitor the human rights conditions of families with children arriving to the United States, the Commission visited the Hidalgo Bridge Port of Entry Station, accompanied the Border Patrol to hot spots along the border, including to the area where the most families crossed into the US this past year, and visited a shelter managed by the Sacred Heart Church in McAllen, Texas. At the shelter, families not being detained passed through on their way to a bus station, receiving food, a change of clothes, and a shower, before embarking on bus journeys to their final destination, where they would stay with a family member already residing in the United States for the duration of the immigration proceedings initiated against them. The Commission also visited the Karnes County Residential Center ("Karnes"), an immigration detention center for families run by the GEO Group, a private contractor of the U.S. Immigration and Customs Enforcement (ICE) agency. The Commission notes that the other immigration detention center located in Texas, the South Texas Family Residential Center, is operated by the Corrections Corporation of America (CCA), another private contractor of ICE.[156]

124. CBP defines a "family unit" as "represent[ing] the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member by the U.S. Border Patrol."[157] Based on that observed in practice, it appears to the IACHR that the U.S. government is using the term "family unit" to describe families with children arriving to the United States.

125. Despite the potentially broad definition of a "family unit," the Commission received information prior to the visit indicating that the authorities had established a more clear treatment for family units consisting of mothers with children. As civil society organizations indicated and the Commission observed during the visit, the treatment for men with children remains unclear. For families consisting of mothers with children, if there is sufficient capacity in an immigration detention center, then they are detained. If there is insufficient capacity to detain the family and the family has a

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156 The Corrections Corporation of America (CCA) and the GEO Group, Inc. are the first and second largest private prison companies in the United States, respectively. CCA was awarded the contract for the United States' newest family immigration detention center in Dilley, Texas, while GEO Group was awarded the contract for Karnes. Publicly available information places the average cost per day per bed in immigration detention centers around $120. In Karnes, officials cited that the cost was $137 plus an additional $75 a day for school-age children to cover the costs of their on-site schooling. *See* Brianna Lee, "Migrant Family Detentions on the Rise, and Private Companies Stand to Profit," International Business Times (July 30, 2014), http://www.ibtimes.com/migrant-family-detentions-rise-private-companies-stand-profit-1643650. The Detention Watch Network (DWN) reports that, in 2012, the U.S. government spent more than $1.7 billion on immigration detention, and or around $5 million daily, according to Human Rights First and the NIJC. Mounting evidence shows that community-based alternative programs are effective and "significantly cheaper," as some programs cost as little as $8-12 USD per day. *See* DWN, "About the U.S. Detention and Deportation System," http://www.detentionwatchnetwork.org/resources; *see also, e.g.*, Human Rights First, Fact Sheet: Immigration Detention (January 2013), http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf; Lutheran Immigration and Refugee Service, (Backgrounder) "Alternatives to Detention: History and Recommendations," (March 2013), http://lirs.org/wp-content/uploads/2013/04/LIRS-Backgrounder-on-Alternatives-to-Detention-3-12-13.pdf; NIJC, "Eliminate the Detention Bed Quota," http://www.immigrantjustice.org/eliminate-detention-bed-quota.

157 U.S. Customs and Border Protection Agency, "Southwest Border Unaccompanied Alien Children," (accessed on January 27, 2015), http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

relative in the United States with whom they could stay, then the family is released.[158] In fact, approximately two weeks after the Commission's visit to the U.S. southern border, a number of U.S. Senators wrote a letter to the Secretary of the DHS, Jeh Johnson, to express their deep concern over the decision to build a new immigration detention center in Dilley, Texas. In the letter, the Senators use the term "family unit" and the phrase "women and children" synonymously, and in pertinent part, the Senators cautioned:

> This decision [to build a new facility] threatens to make permanent a practice of presumptive detention for families and marks a reversal of this administration's family detention policy. We fear that the result will be the ongoing detention of asylum-seeking women and children who have shown a credible fear of being returned to their home country and pose no flight risk or danger to the country. We are particularly concerned with the negative consequences of long-term detention on the physical and mental well-being of young children.[159]

2. Legal Regime and Actions Taken by the State in Regard to Families

126. Almost all of the women and children detained at Karnes have been apprehended by CBP near the land border between the United States (in the state of Texas) and Mexico. After being taken into CBP custody, families are taken to a Border Patrol or Port of Entry station (separately or collectively referred to herein as "holding facilities") and processed. Internal regulations of ICE stipulate that persons may not be held in such stations for more than 72 hours. At these holding facilities, some persons may have the opportunity to make initial claims for asylum.

127. Following processing and detention at holding facilities, the families are transferred elsewhere. If they are to be detained, they will be transferred to custody of ICE and sent to a family immigration detention center. If they are to be sent to live with relatives present in the United States, then, for families apprehended crossing into the Rio Grande Valley of Texas, they are sent to a bus station in McAllen, Texas from where they depart for various parts of the country.

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158 Publicly-available information only makes reference to family units as consisting of mothers with children. *See, inter alia,* Jennifer Rizzo and Ashley Kaper, "Human Rights First Tours Dilley Detention Center for Immigrant Mothers and Children," Human Rights First (January 16, 2015), http://www.humanrightsfirst.org/blog/human-rights-first-tours-dilley-detention-center-immigrant-mothers-and-children (detailing visit to Dilley and how the detention center is structured to accommodate mothers and children); Vivian Kuo and Jason Hanna, "Women allege sexual abuse at Texas immigration detention center [Karnes]," CNN (October 4, 2014), http://www.cnn.com/2014/10/03/justice/texas-immigrant-detention-allegations/ (quoting the Geo Group, which refuted allegations of sexual abuse and maintained that Karnes provides a "safe, clean, and family-friendly environment for mothers and children awaiting required processing by [ICE]"); *see also* Class-Action Lawsuit filed by the ACLU on December 16, 2014 challenging the Obama administration's policy of detaining asylum-seeking mothers and children, *RILR v. Johnson* (Complaint), https://www.aclu.org/immigrants-rights/rilr-v-johnson-complaint.

159 Letter from U.S. Senators Patrick Leahy, Harry Reid, Dick Durbin, Charles Schumer, Patty Murray, Richard Blumenthal, Robert Menendez, Michael Bennet, Mazie Hirono, and Mark Udall to Jeh Johnson, Secretary for the U.S. Department of Homeland Security (October 16, 2014) http://www.leahy.senate.gov/download/101614-to-johnson-re-dilley-detention-center, p. 1. All other references in the letter to "family units" are followed or modified by comments regarding mothers and children. No reference is made to fathers with children at any part in the letter.

128. The majority of families are, prior to their transfer from the holding facilities, also placed into expedited removal proceedings. These proceedings are a "fast-track" deportation process established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An adult or families with children may be subject to expedited removal if: he/she/they is/are arrested near a U.S. border within 14 days of entry[160]; or if, in attempted entry to the United States, a non-citizen declares an intent to seek asylum or if the person does not have valid entry documents[161]. Placement in expedited removal means that families will be deported summarily as the result of a proceeding conducted by an immigration officer, without any further review (including judicial review), unless found to have a "credible fear" of persecution or torture. The United States developed the credible fear standard in 1991 "to screen for possible refugees among the large number of Haitian migrants who were interdicted at sea during the mass exodus following a *coup d'etat* in Haiti."[162] Section 235 of the Immigration and Nationality Act (INA), defines the term "credible fear" to mean that:

> there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208 of the INA [or that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture.[163]

129. Per new guidelines in effect as of February 28, 2014, the Asylum Division of the U.S. Citizenship and Immigration Services agency is to interpret the "significant possibility" standard as requiring the applicant to "demonstrate a significant possibility and realistic possibility of success [on the merits of his or her claim for protection from persecution or torture]."[164]

130. Section 235 of the INA also provides that non-citizens subject to expedited removal are to be detained mandatorily and without the automatic review of their detention by an immigration judge.[165] If found deportable, the family is to remain in detention until their return is to be effectuated.[166]

131. After being transferred to Karnes or to another family immigration detention center, women who have asserted their intention to seek asylum are interviewed by an asylum officer to determine whether they have a "credible fear" of persecution in their home country.[167] Asylum Office Directors are authorized to exercise their discretion over the mode of interview employed – in-person, telephonic, or video-conference ("VTEL") – based on the consideration of a number of factors. Procedures in place prior to June 2013 required officers to end telephonic credible fear

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160 INA § 235 (b)(1)(A)(iii)(II); 8 U.S.C. § 1225 (b)(1)(A)(iii)(II).

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

162 U.S. Citizenship and Immigration Services, Asylum Division Officer Training Course, "Credible Fear Lesson" (February 28, 2014), p. 10.

163 U.S. Citizenship and Immigration Services, Asylum Division Officer Training Course, "Credible Fear Lesson" (February 28, 2014), p. 10.

164 U.S. Citizenship and Immigration Services, Asylum Division Officer Training Course, "Credible Fear Lesson" (February 28, 2014), p. 14-15.

165 INA § 235 (b)(1)(B)(iii)(IV).

166 INA § 235 (b)(1)(B)(iii)(IV).

167 8 U.S.C. § 1225 (b)(1)(A)(i); INA § 235 (b)(1)(A)(i).

interviews (CFIs) and re-schedule interviews in-person if there was any indication that the non-national did not understand the process or if the asylum pre-screening officer found that the non-national did not meet the credible fear threshold.[168] However, in June 2013, a new directive was issued that: 1) encouraged asylum officers to conduct more CFIs telephonically to cut costs and reduce travel time and 2) instructed asylum officers to complete telephonic interviews, even where they resulted in negative credible fear determinations, and end the practice of re-scheduling to in-person interviews in order to "gain efficiencies" in the credible fear process.[169] The directive provided for exceptions to the new policy on a case-by-case basis. For persons detained at Karnes, the practice in place is that CFIs are typically only conducted telephonically.

132. If an asylum officer concludes that the mother did not pass her CFI, the mother may only obtain a limited review of the grounds of the asylum officer's negative CFI determination before an immigration judge.[170] Should a judge also deny her case, there is no further review of her claim(s) or of the family's detention, and she and her children will remain detained until the moment of deportation. In practice, this entire process usually takes place in a number of weeks.[171]

133. If an asylum officer concludes that the mother passed her CFI, or if she passes on limited review with the immigration judge, then her asylum case passes to the immigration court for full removal proceedings and hearings (non-expedited), including on the asylum claim.[172] At this point, the mother and her children are eligible under the law for a bond hearing and custody review by an immigration judge if they were originally apprehended within 100 miles of the border and could not prove their physical presence in the United States for more than 14 days.[173]

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168 U.S. Citizenship and Immigration Services, Memorandum on Telephonic Interviews in Negative Credible Fear Determinations, HQRAIO120/9 .15a (June 4, 2013), p. 1-2. The Commission takes note of the dramatic increase in the number of credible fear referrals to the Asylum Division: according to USCIS, the number of referrals in fiscal year (FY) 2013 "surpassed total receipts for credible fear referrals over the five-year period from FY 2007 to FY 2011 and rose from FY 2012 by more than 250%." *See* p. 1. Human Rights First has documented that the number of CFIs conducted has increased from 7,917 in FY 2004 to 36,035 in FY 2013. *See* Human Rights First, Key Statistics and Findings on Asylum Protection Requests at the U.S. – Mexico Border (June 2014), http://www.humanrightsfirst.org/sites/default/files/Key-Findings-Asylum-US-Mexico-Border.pdf.

169 U.S. Citizenship and Immigration Services, Memorandum on Telephonic Interviews in Negative Credible Fear Determinations, HQRAIO120/9 .15a (June 4, 2013), p. 1-2.

170 The immigration judge is to be provided with the record of the credible fear determination, the asylum officer's notes, the summary of the material facts, and other materials upon which the negative determination was made. The purpose of this review is not to constitute a full asylum hearing, and the review process may or may not include an opportunity for the claimant or his/her legal representative to speak. The latter is decided by the presiding immigration judge, at his/her discretion. If the immigration judge finds that the person possesses a credible fear of persecution, the judge will vacate the order of the asylum officer. At this point, removal proceedings will commence, and the person may file an application for asylum in accordance with 8 C.F.R. § 1208.4(b)(3)(i). However, if the immigration judge concurs with the determination of the asylum officer, the case shall be returned to ICE to effectuate the person's removal. Per the law, the immigration judge's decision is final and may not be appealed. 8 U.S.C. § 1225 (b)(1)(B)(iii); INA § 235 (b)(1)(B)(iii)(III); 8 C.F.R. § 1208.30 (g)(2).

171 8 U.S.C. § 1225 (b)(1)(B)(iii)(IV); INA § 235 (b)(1)(B)(iii)(IV).

172 The asylum seeker is placed in removal proceedings before the immigration court, as provided under INA § 240.

173 *See* 8 CFR § 1003.19 (h)(2)(i). Conversely, those families who received a positive determination from their CFI yet who originally entered at a port of entry are not eligible for bond or a custody review. *See* IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II, Doc 78/10 (December 30, 2010), para. 118 (citing 23 I&N Dec. 731 (BIA 2005)).

3. Main Observations and Concerns Regarding the Treatment of Families

134. Regarding the treatment of families in the United States, the Commission has a number of serious concerns following the visit:

a. Laws, Policies, and Practices in Place to Arbitrarily and Mandatorily Detain Families

135. Prior to and following the visit, one of the Commission's top concerns has been the application of an automatic, arbitrary, and mandatory regime of family immigration detention for those families for whom there is space available at an immigration detention center. The Commission notes that, but for capacity limitations, all families would be detained under current policy; however, given the limitations, those families that have a relative present in the United States with whom they can stay for the duration of their immigration proceedings are sent to the custody of that relative when there is no space available at a detention center. No substantive criteria are used, nor is an individualized assessment conducted (beyond that limited to finding a host for the family), to determine which families will be detained versus those that will be released on recognizance to a sponsor.

136. In the State's response to the draft of this report, it notes that the relevant sections in the U.S. Code providing for the immigration detention of families are sections 1225, 1236, and 1241. The State disagrees with the Commission's findings that detentions of families are being carried out in an "automatic" and "arbitrary" manner and instead asserts that "individual assessments are made in accordance with U.S. law and legal processes." However, in a close analysis of the sections cited by the State, the Commission is still unclear as to the legal requirements for family detention and what grounds would allow for an individualized analysis of its need, as sections 1225 and 1236 provide in general terms for detention without enumerating clear criteria or factors to be taken into consideration, such as flight risk; prescribe no time limits for immigration detention; and make no mention of children, families, or the special needs of these groups in detention (i.e., the sections make no distinction between families with children and adults).[174]

137. Overall, the Commission observed that there was no automatic judicial review of the legality of the immigration detention nor was there a periodic review of its continued need. As mentioned above, detained mothers who had positive CFI determinations were eligible, following that determination, for bond and a custody hearing if they did not enter the country at a port of entry; however, those persons for whom the CFI determination was negative, had no right to bond or custody review.[175]

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[174] The Commission also notes that the U.S. Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), determined that ICE generally should not detain aliens with a final removal order for longer than six months if there is no significant likelihood of removal in the reasonably foreseeable future. However, DHS regulations would permit the continued detention of "certain classes of removable aliens" on account of special circumstances such as national security or public safety reasons. *See* DHS, Office of the Inspector General, *U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)*, OIL-15-122 (Feb. 4, 2015), p. 3.

[175] 8 CFR § 1003.19 (h)(2)(i); *see also,* IACHR, *Report on Immigration in the United States: Detention and Due Process*,) para. 118.

138. Further, for those families who were eligible for bond and a custody review, the Commission observed with concern that those families are usually being kept in detention for the duration of their immigration proceedings.[176] U.S. immigration law does not mandate continued detention for asylum-seekers whose cases are being adjudicated in the immigration court system; however, in evidentiary packets presented to immigration judges at statutory bond hearings, ICE attorneys have been arguing since the peak of arrivals in 2014 that every family at Karnes must remain detained because they "pose a danger to national security," as well as for "deterrence of mass illegal migration."[177] In return, at the culmination of bond hearings, immigration judges have been setting extremely high bond amounts, up to $15,000 or more, such that those who may qualify to be released are unable to meet the required amount.[178] The practical effect of setting the bond amount very high is to deny the possibility of release through the posting of bond.

139. The Commission considers these practices that lead to a prolonged detention to be arbitrary and incompatible with the principle of the exceptionality of detention. This is especially so when taking into account information presented before the IACHR by civil society organizations that represent detained persons at Karnes alleging that the periods of detention may stretch for months at a time, particularly if there is an appeal.

140. With regard to the deterrence factor mentioned above, the Commission values and recognizes a February 20, 2015 order and memorandum opinion of Judge James Boasberg of the United States District Court for the District of Columbia, which temporarily halts the consideration of this factor.[179] In *R.I. L-R et al. v.* Jeh *Charles Johnson, et al.*, Judge Boasberg granted a preliminary injunction requested by the Plaintiffs – "mothers and their minor children who escaped violence and persecution in [Honduras, Guatemala, and El Salvador] to seek asylum in the United States – to enjoin the Defendants – the Secretary of DHS, Jeh Johnson, and two ICE officials – from "detaining class members for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in such custody determinations." [180]

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176 Per USCIS internal regulations, the CFI should be conducted no sooner than 48 hours after arrival (unless waived) and most CFIs are conducted within 14 days of arrival. USCIS, "Questions & Answers: Credible Fear Screening" (last updated June 18, 2013), http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening; United States Commission on International Religious Freedom (USCIRF), Study on Asylum Seekers In Expedited Removal (February 2005), http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/conditionConfin.pdf, p. 180.

177 Ranjana Natarajan, Denise Gilman, et. al (Civil Rights Clinic and Immigration Clinic of the University of Texas), *Report Regarding Grave Rights Violations Implicated in Family Immigration Detention at the Karnes County Detention Center* (Updated October 20, 2014), p. 6-7.

178 The Commission notes that detainees may submit petitions for the writ of *habeas corpus*; however, lack of legal representation and other barriers to justice (such as the impact of transfers between detention centers on the naming of respondents, one of whom should be the detainee's immediate custodian) present significant obstacles to doing so.

179 *R.I. L-R, et al. v. Jeh Charles Johnson, et al.*, No. 2015-11 (D.D.C. Feb. 20, 2015). *See also*, *Matter of A.M.D.*, BIA (Jan. 30, 2015 unpub.) (upholding the immigration judge's bond memorandum, finding that the "extraordinary remedy of the continued detention" of an asylum-seeking family from El Salvador "without bond [and] in order to deter future waves of mass migration is not warranted," based on factors such as the family passed its credible fear of persecution interview and never tried to flee or escape from border officials who apprehended them).

180 Judge Boasberg provisionally certified the class as consisting of Central American mothers and children who:

141. In the memorandum opinion, Judge Boasberg held that the "deterrence of mass migration" as a justification for deprivation of liberty, predicated on the Defendants' claim that such migration implicates "national security interests," primarily economic in nature (the diversion of resources), is "simply not enough to justify significant deprivations of liberty" without further substantiation.[181] Judge Boasberg found that Plaintiffs demonstrated that the act of considering the factor of deterrence is "one by which rights or obligations have been determined, or from which legal consequences will flow" – or, in other words, "DHS's policy of considering deterrence has profound and immediate consequences for Central American asylum-seekers detained as a result."[182] He found that "unlike economic harm, the harm from detention pursuant to an unlawful policy cannot be remediated after the fact"[183], and that the channels the Defendants argued were appropriate to challenge this consideration – through *habeas corpus* or a *de novo* review of ICE's denial of release by an immigration judge – did not constitute "adequate remed[ies] for the period of unlawful detention members of the class suffer before receiving this review"[184]. The IACHR recognizes that this decision gives primacy to the right to liberty over generalized determinations of deterrence of future migration and in the absence of a truly individualized analysis of its appropriateness.

142. The Commission likewise highlights the importance of a ruling issued on July 24, 2015 by U.S. District Judge Dolly Gee of the Central District of California, in which she found that the U.S. government's policy of detaining mothers and children in immigration detention centers who claim to be fleeing violence in their home countries violates provisions of the 1997 Flores Agreement (explained in more detail below, starting at para. 186). In specific, she found that: a) the prolonged detention of families fails to minimize the duration of detention of children; b) children have been held in restrictive, prison-like facilities, such as the Karnes County immigrant detention center, that also lack licensing by appropriate state agencies to provide residential, group, or foster care services for dependent children; and c) the conditions inside CBP's temporary holding cells were "deplorable" and failed to even meet the lower standard of "safe and sanitary," in accordance with the Flores Agreement.[185] As a result, Judge Gee ordered the Defendants – DHS, DHS Secretary Jeh Johnson, and subordinate entities of DHS, ICE and CBP – to, among other remedies, release "female-headed" families with children in detention "without unnecessary

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(a) Have been or will be detained in Immigration and Customs Enforcement family detention facilities since June 2014; (b) have been or will be determined to have a credible fear of persecution in their home country; and (c) are eligible for release on bond, recognizance, or other conditions pursuant to [federal law], but (d) have been or will be denied such release after being subject to an ICE custody determination that took deterrence of mass migration into account.

See R.I. L-R et al v. Jeh Charles Johnson, et al., No. 2015-11 (D.D.C. Feb. 20, 2015) (order granting preliminary injunction) at 1.

181 *R.I. L-R et al v. Jeh Charles Johnson, et al.*, No. 2015-11 (D.D.C. Feb. 20, 2015) (memorandum opinion) at 37.

182 *R.I. L-R et al v. Jeh Charles Johnson, et al.*, No. 2015-11 (D.D.C. Feb. 20, 2015) (memorandum opinion) at 27.

183 *R.I. L-R et al v. Jeh Charles Johnson, et al.*, No. 2015-11 (D.D.C. Feb. 20, 2015) (memorandum opinion) at 39. In particular, prolonged detention causes major hardship to families and has negative consequences on mental health, especially for children, *see id.* at 38.

184 *R.I. L-R et al v. Jeh Charles Johnson, et al.*, No. 2015-11 (D.D.C. Feb. 20, 2015) (memorandum opinion) at 33.

185 Judge Gee affirmed that the Flores Agreement applied not only to unaccompanied children but also to accompanied children, as the language in the 1997 Agreement was unambiguous: its provisions apply to "all" children under 18 years of age. *See Jenny Flores, et al. v. Jeh Johnson, et al.*, CV-85-4544 DMG (AGRx) (C.D. Cal. July 24, 2015).

delay" or to show cause why this remedy should not be implemented within 90 days of the issuance of the judgement.[186]

143. In addition to the above-mentioned concerns, the Commission highlights its observation that immigration detention served as an obstacle to detainees' access to mechanisms of international protection as well as to obtaining legal representation. Aggravating circumstances at Karnes included its remote location, far from San Antonio and other major cities in Texas[187], and its private management under the GEO Group. In not being directly managed by ICE, the Commission observed that there was a lack of clarity regarding the corresponding responsibility and liability of both ICE and the GEO Group in regards to several procedures – among them legal representatives' access to the facility and the complaint mechanism (to be discussed in more detail below).

144. An additional concern – related to the U.S. Citizenship and Immigration Services agency – is that only the detained mothers at Karnes had CFIs. Their children were presumed to be dependents in the credible fear evaluation; however, the lack of CFIs for children indicates that, earlier in the process, children are not being informed of their rights, including the right to assert their own separate asylum claims.

145. The Commission is deeply concerned over the long-term impact detention has on persons who have experienced significant trauma, particularly with regard to children. In its interviews with medical personnel who have examined recently arrived families, in addition to the results of documented studies, the Commission takes note of consistent findings that being detained compounds previous traumatic experiences and generates new trauma for the detained families. In a recent report studying the impacts of family detention, one of the key findings was that "[d]etention traumatizes families, undermines the basic family structure, and has a devastating psycho-social impact."[188] These findings are especially worrisome in light of data from September 2014 showing that 98% of the families detained at Karnes at that time were seeking protection in the United States from persecution alleged in their home countries.[189]

146. Similar data is available for the women being detained with their children at a new immigration detention center in Dilley, Texas. The Commission regrets that the United States has expanded its immigration detention facilities and detainee capacity by 2400 additional beds in the new facility named the "South Texas Family Residential Center." Up to 480 women and children are to be initially housed at the facility, which was slated to partially open on November 8, 2014. The Commission notes that, as of January 23, 2015, it has received information that 80% of the women

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186 *Jenny Flores, et al. v. Jeh Johnson., et al.*, CV-85-4544 DMG (AGRx) (C.D. Cal. July 24, 2015), p. 24. The ruling requires the government to release these families in first order of preference to a parent, including a parent who either was apprehended with a class member [a child under the age of 18 years, according to the 1997 Flores Agreement] or presented herself or himself with a class member [at a point of entry along the U.S. border].

187 The distance from major cities has a negative impact on the availability and possibilities of obtaining legal representation, and it places detainees farther away from immigration courts, which diminishes the likelihood that the detainee will be brought to the court for his or her immigration proceedings.

188 Lutheran Immigrant Refugee Services (LIRS) and the Women's Refugee Commission (WRC), *Special Report: Locking Up Family Values, Again* (October 2014) (on file with the IACHR).

189 Lutheran Immigrant Refugee Services (LIRS) and the Women's Refugee Commission (WRC), *Special Report: Locking Up Family Values, Again* (October 2014) (on file with the IACHR).

being held at the new facility in Dilley have expressed a fear of returning home, primarily due to gang-related or domestic violence.[190] Rather than expanding immigration detention facilities, the United States should implement alternatives to detention that conform to human rights standards. [191]

> *A Honduran woman detained at Karnes with her 8-year-old son described her experience:* "One of the reasons why I came was because I was in danger. A gang wanted to recruit one of my older sons (…) I don't know where they picked me up because we were in the desert. We had been walking for three days and three nights. They took us to a *hielera*. They didn't treat us well. We arrived to the *hielera* and thirty minutes later they got me for an interview. A *migra* [border official] asked me why I came and told me 'And you think that only in your country there is crime? Here we are going to deport you.' After that, I didn't want to say anymore. Later, he came back and said 'Sign here.' I asked what I was signing and if I could make a [phone] call, and he said 'no,' that he only needed my signature. He didn't let me make any calls. After that, another *migra* came and told me that they were going to take me somewhere else and they brought me here [to Karnes]. People don't come to this country because they want to, but because necessity requires you to."

147. The State highlights in its response to the present report announced changes to "a number of its family detention practices as well as increased review and oversight." One such announcement was made on May 13, 2015, in which ICE committed to undertaking actions to improve family detention facility policies and coordination between detention facilities, in addition to implementing a review process for any family detained beyond 90 days and every 60 days thereafter to ensure that detention or the designated bond amount continues to be appropriate.[192]

148. Another announcement was made by DHS Secretary Jeh Johnson on June 24, 2015 and includes changes such as: the release of families who establish credible or reasonable fear of persecution on a monetary bond or other appropriate condition of release; and the setting of bond at a "reasonable and realistic level" that takes into account the family's ability to pay, risk of flight and public safety." Further, "reasonable and credible fear interviews will take place within a reasonable time frame" and "space in the family detention centers will, in general, be used to allow prompt removal of individuals who have not stated a claim for relief under applicable law." According to Secretary Johnson, these changes are based on the recognition that "once a family has established initial eligibility for asylum or other relief under U.S. law, long-term detention of the family is an inefficient use of detention resources."

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190 Linda Hartke, "LIRS Staff Member Shares her Heartbreaking Trip to Dilley Family Detention Center," LIRS (January 23, 2015), http://blog.lirs.org/lirs-staff-member-shares-her-heartbreaking-trip-to-dilley-family-detention-center/.

191 For examples of models of alternatives to detention, *see, e.g.*, International Detention Coalition, *Captured Childhood* (2012).

192 For more information on the announcement, please refer to: DHS, ICE, "ICE announces enhanced oversight for family residential centers," (May 13, 2015), https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers.

149. The Commission wishes to make note of the situation of families for whom there was insufficient capacity at an immigration detention center at the moment of their arrival and who have a family member that can sponsor them in the United States. These families are sent to live with that family member for the duration of the immigration proceedings initiated against them. The Commission highlights the practice of sending arriving families to live with sponsors – relatives or close family friends – as a good practice. It respects the families' right to personal liberty while immigration proceedings are being conducted and helps to avoid the negative mental and physical health impacts of detention, as well as provides a more suitable environment for healthy child development.

150. In the McAllen, Texas area, families in this track are first sent to the shelter at the Sacred Heart Church before boarding buses to travel to other parts of the country. The Commission commends the shelter for the holistic treatment it provides to arriving families, attending their basic and immediate needs with care, respect, and dignity.

151. Before continuing, the Commission deems it pertinent to call attention to the inadequate detention conditions observed in the holding facilities and the immigration detention centers. At the Hidalgo Bridge Port of Entry Station, the Commission observed that the holding cells available, in which children and families are held, were small and had painted cinder block walls, no windows, and no furniture that would facilitate sleeping. Officials stated that they had no beds or mats on hand to accommodate overnight stays, nor was the facility equipped with showers. The floors were linoleum, and the holding cells were cool in temperature.

152. The Commission considers that the conditions of detention at the holding facilities are inappropriate and unacceptable for detention beyond a few hours. However, at the peak of arrivals, in June 2014, the Commission takes note that unaccompanied children and families with children were being detained at these holding facilities for beyond the maximum 72 hours, as established by internal protocol, and for periods up to two weeks. Persons detained in these facilities have reported being denied food and water, toilet paper and other hygienic products, and that holding cells are extremely cold, commonly referred to as *hieleras*, or "freezers" in Spanish.

> *A detained mother at Karnes described her experience at a border patrol station:* "I'm 18 years old, and I left El Salvador because I was in danger. I came here in hope for a better life for me and my son [1 year old]. I was kept in the *hielera* for four days, shivering the whole time but they didn't give us any blankets. They didn't give me milk for my baby, and they even threatened to take him away from me. The food is not good and they didn't give us a lot of it. When we asked for more, they say we are 'stealing' it. They laughed at us and humiliated us, mocking us in English (…) It was horrible."

153. At the Karnes County Residential Center, the Commission observed inadequate and disproportionately restrictive conditions, akin to a penal incarceration center. Prior to being opened for the immigration detention of families with children, Karnes was used for the immigration detention of adult men awaiting immigration proceedings or deportations. Despite the brightly-colored walls and painted murals, the facility otherwise resembled a low-security prison, which should never be the case in regards

to civil detention measures, such as immigration detention. At the time of the visit, the Commission found the detention center to be very secure and noted that movement within and access to certain portions of the center was restricted. For example, guards subjected detainees to head counts before being served meals, requiring the children to stand single-file in a line outside of the cafeteria until completed. In addition to the observations of the delegation, the Commission received the testimonies of 30 detained mothers at Karnes (20 in interview rooms and 10 on the grounds).

154. Beyond the penal-like structural conditions at Karnes, other principal complaints received by the Commission included:

a. *Inadequate food for children and infants* – Healthy and nutritious snacks are reportedly unavailable to children between meals, and the quality of food at meal time is poor;

b. *Allegations of sexual abuse of detained women by Karnes' guards, who are predominantly men* – In a complaint submitted to U.S. federal authorities at the end of September 2014, human and civil rights organizations allege that there is "substantial, ongoing sexual abuse" of women detainees at Karnes.[193] Allegations of specific conducts carried out by Karnes' guards include: removing women detainees from their cells late in the evening or early in the morning to engage in sexual acts; calling women their "girlfriends" and using their respective power over these women to request sexual favors in exchange for money and/or promises of assistance with their immigration cases or upon release; and kissing and groping women in front of other detainees, including children[194] (*see "f" below for issues with reporting sexual abuse*);

c. *Limited access to communications* – Karnes' officials provide detainees with a re-loadable calling card that includes three minutes of calling time. In order to make calls, the person has to dial his or her assigned identifying number, the exit number for the facility, the calling card number, and the phone number of the call recipient. The Commission observed that the cost per minute of the calling cards was high, ranging from $.10 to $.25 per minute depending on the call destination. Persons interviewed by the Commission explained that they had a hard time reaching non-governmental organizations providing free legal services, as the toll-free numbers provided on the a calling sheet were out of date or no one at the organizations answered the phone. Additionally, if a legal representative wishes to call a detainee at Karnes, he or she may only call the facility and leave a message. Finally, the Commission observed that there was no private place to make a phone call. The phone booths at the center were in public locations and had no privacy safeguards, such that any person nearby could overhear their conversations;

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193 Letter from MALDEF, Immigration Clinic and Civil Rights Clinic of the University of Texas School of Law, Human Rights First, and two attorneys from the Law Office of Javier N. Maldonado, P.C. to the Secretary of Homeland Security Jeh Johnson and other high-level U.S. federal government authorities (September 30, 2014), http://www.maldef.org/news/releases/maldef_other_groups_file_complaint_ice_family_detention_center_karnes_city/.

194 *See* para. 207, below, for the State's response to these and other allegations of abuse and mistreatment.

d. *Disciplinary measures and alleged threats to separate a mother from her children* – Some of the detained mothers expressed worry over threats received personally or by other mothers to separate them from their children, as a disciplinary measure. Additionally, in the interviews at Karnes, mothers relayed threats made by guards to share disciplinary actions with the immigration judge presiding over the case;

e. *Insufficient medical services* – According to Karnes' officials, there are 22 persons in total, both full and part-time, on the medical staff, including one psychologist. The Commission appreciates the efforts made to provide integral health services, including mental health care, but notes that the total capacity of Karnes is 532 persons, of whom the majority of those detained as of September 2014 were seeking protection in the United States from persecution. As such, having only one psychologist on staff would not meet the potential demand. Additionally, in the testimonies received by the Commission, some detainees alleged having been informed by Karnes officials that use of the medical facilities is for emergencies only and that they were unable to access even common medicines, such as painkillers, for chronic ailments; and

f. *Non-confidential complaint mechanisms and unclear complaint process* – Complaint forms and a drop box are located in the cafeteria at Karnes. The Commission noted that, at the top of the form, there were spaces for the complainant to enter his or her name and identifying number. The complaint review process, as explained by officials and later clarified in a hearing following the visit, consists of a third-party review by a company not housing detainees.[195] Further, as informed in the hearing, ICE conducts its own annual review of complaints for facilities with more than 25 persons detained; smaller facilities have less frequent reviews.[196] It is very concerning to the Commission that detainees are unable to submit confidential complaints, either because they fill out the top portion of the form or because the drop box is located in an open and very public location.

In order to report sexual abuse, the Commission took note of signs providing a hotline number, which were posted over the phone booths in the communal room and had instructions in English and Spanish. However, the Commission noticed that the hotline number was that of the DHS Office of the Inspector General, and the signs contained no explanation of who the receiving entity was, how this information would be used, or the steps that are followed once a complaint is received. Further, despite stating that the call to the hotline could be made anonymously, the Commission noticed that the detainee must still enter his/her personal identifying number into the phone system in order to be able to place the call.

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195 IACHR, 153rd period of session, Hearing on the human rights situation of migrant and refugee children and families in the United States (October 27, 2014) (testimony of Megan Mack, Officer for Civil Rights and Civil Liberties at DHS).

196 IACHR, 153rd period of session, Hearing on the human rights situation of migrant and refugee children and families in the United States (October 27, 2014) (testimony of Megan Mack, Officer for Civil Rights and Civil Liberties at DHS).

> *A mother detained at Karnes with her daughter [11 years old] and her baby son described her experience:* "We left El Salvador because of the gangs. My daughter couldn't attend school because the gangs threatened the teachers and it made us very afraid. The economic situation was very complicated. I could only find work selling phone credit in the street, but even that was dangerous. Gang members would come up to me and make me pay a *renta* ("protection money") so that I could keep working there (…) We suffered a lot on the journey here, hunger, cold, many dangers. We crossed the river [Rio Grande] around 5pm near McAllen, after walking for six days. The *migra* [border officials] arrested us and asked us what we were doing here, and told us we were going to be deported. After, they put us in the *hielera*. Sometime later, another *migra* came and asked me who I was, where did I come from, who are my parents. But he didn't ask me why I came. It's the way they talk to you. They asked me if I wanted to talk to my consulate, but the [consular official] never came to talk to me. There [in the *hielera*] they gave us a frozen sandwich to eat, and [gave] the children juice boxes. I slept with my daughter on the floor, and there were about 30 or 40 more people in there, too. It was very cold. We covered ourselves with this thing they give you that's like plastic. My daughter cried all the time, and they never gave me diapers for my baby. The next day they told me 'You're going to be deported,' but they never told me where I was going. Now I am here [at Karnes]. I don't have a lawyer because I can't pay one and I don't have money for a bond, either. The food is not good here…"

155. A positive feature at Karnes worth mention was its law library, which is separated from the regular library. The law library consists of legal databases with immigration case law. The Commission commends efforts to maintain an up-to-date legal database; nonetheless, a remaining concern of the IACHR is that the information may not be in a format that is accessible to a lay audience or in a language that may be understandable, especially for persons recently-arriving to the United States, who may not speak English. It must also be noted that while persons subjected to immigration proceedings may benefit from access to legal information, such information in no way reduces the need or substitutes for access to legal representation.

156. The Commission would also like to highlight that, following its visit, the EOIR initiated a Legal Orientation Program (LOP) at Karnes.[197] Through the LOP, partner civil society organizations provide "comprehensive explanations about immigration court procedures along with other basic legal information to large groups of detained individuals."[198] The Commission salutes this first step and would welcome additional and enhanced efforts in the future.

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[197] U.S. Department of Justice, Executive Office for Immigration Review, "EOIR Expands Legal Orientation Program Sites," (October 22, 2014), http://www.justice.gov/eoir/press/2014/EOIRExpandsLOP.html.

[198] U.S. Department of Justice, Executive Office for Immigration Review, Office of Legal Access Programs, "Legal Orientation Program" (updated June 2014), http://www.justice.gov/eoir/probono/probono.htm#LOP. The LOP typically consists of an interactive group orientation, an individual orientation, and a referral/self-help component. In its response to the present report, the State also informed the Commission of another program – the Legal Orientation Program for Custodians (LOPC) – which is also coordinated by the EOIR and executed by

b. Lack of Due Process and Fair Trial Guarantees

157. Despite advances being made in the area of legal education at Karnes, another major concern of the Commission is that of access to legal representation.[199] 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 detained families, and likewise notes the difficulties described by organizations and individual attorneys who represent detained families to reach Karnes, as it is located far from major cities; to enter the center; and to be able to bring in with them tools such as phones and computers in order to work more efficiently on cases. At the time of the Commission's visit to Karnes, officials cited that one-third of the families had legal representation.

158. The Commission highlights the importance that children, even when accompanied by a parent or legal guardian, are able to obtain their own counsel and have access independent of that of their parent to international protection mechanisms, as well as to any hearing before an immigration judge during the immigration proceedings. As it stands, many children are only being considered as dependents for their parents' application for protection and are not provided with the opportunity to present testimony before an immigration court. This may deny them the right to seek and receive asylum and to be heard and have their views taken into consideration in immigration proceedings.

159. Without knowledge of rights and immigration proceedings, and particularly without legal representation, the Commission observes that many families – who may have valid claims for protection in the United States – are falling through the cracks. U.S. border agents' failure to inform migrants and refugees of their rights, dissuasion of persons from entering the country based on predictions of unfavorable outcomes at the immigration court, and the lack of private areas for interviews at holding facilities are all practices with respect to which the Commission has received consistent complaints and information. These practices at the initial processing stage in the US have the potential to cause a significant and negative impact on a claim for protection, as persons are less likely to recount traumatic experiences in this environment. Further, if a mother receives a negative credible fear determination as a result of her CFI, she and her children are placed in expedited removal proceedings. Although the family has a right to limited review of that decision, civil society organizations have alerted the Commission to instances in which families have been deported without ever having had the opportunity to be seen and heard by an immigration judge.

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non-governmental organizations in multiple states. The LOPC, first launched in 2010, is designed to provide custodians of unaccompanied children with information on the custodians' roles and responsibilities and on the immigration court process in general.

199 A recent study conducted by the Northern California Collaborative for Immigrant Justice (NCCIJ) found that detained immigrants were three times as likely to prevail on their claims if they had legal representation that those who did not. The study also found that approximately two-thirds of detained immigrants have no legal representation at any point in their removal proceedings. *See* NCCIJ, *Access to Justice for Immigrant Families and Communities* (October 2014), https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf. This study echoes findings of previous studies conducted on the impact of legal counsel in immigration proceedings.

160. The Commission also expresses its profound concern over the new guidelines issued to USCIS officers in February 2014 on the interpretation of the "significant possibility" standard within the determination of credible fear. The Commission is concerned that the new guidelines require asylum officers to apply a higher bar or seek a more complete assessment of claims – departing from the CFI's purpose of serving as an initial screening for asylum claims – and may thereby impede access to protection mechanisms.[200] Of additional concern are the government's cutbacks, which have eliminated follow-up interviews following negative CFI determinations, and the alleged practice, in certain cases, of deporting families before they have an opportunity for limited review of a negative CFI determination before an immigration judge. Relatedly, the IACHR is concerned over the increase in the use of telephone CFIs, as the Commission understands is the normal practice for the persons detained at Karnes, especially in light of the aforementioned changes. The IACHR notes that telephonic CFIs limit the types and quality of interaction between the interviewer and interviewee, and inhibit asylum officers from observing body language and demeanor, important factors in the determination of the interviewee's credibility.

C. Unaccompanied Children

1. From Mexico

161. The Commission has a number of concerns regarding the treatment of unaccompanied children from Mexico, which it will address below following a description of the U.S. legal regime applicable to unaccompanied children from Mexico.

a. Legal Regime and Actions Taken by the State

162. Under U.S. law, an "unaccompanied alien child" is defined as a child who

(a) has no lawful immigration status in the United States;
(b) has not attained 18 years of age; and
(c) with respect to whom—
  (i) there is no parent or legal guardian in the United States; or
  (ii) no parent or legal guardian in the United States is available to provide care and physical custody.[201]

163. Prior to 2008, and "as a matter of practice," Mexican unaccompanied children arriving to the United States were automatically removed to Mexico through the nearest port of entry. This removal was to take place "during daylight hours" and within 24 hours of arrival.[202] After the enactment of the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA), U.S. border officials are required to determine whether an unaccompanied child from Mexico may present certain protection needs prior to

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200 *See generally*, Letter to John Lafferty, Chief, Asylum Division, USCIS, from American Immigration Lawyers Association, et. al. (June 16, 2014), http://aila.org/content/default.aspx?docid=51215.

201 Homeland Security Act of 2002, 6 U.S.C. § 279, § 462(g).

202 U.S. Congressional Research Service, *Unaccompanied Alien Children: An Overview*, R43599 (September 8, 2014), p. 5.

initiating his/her return to Mexico. Concretely, officials must determine within 48 hours of apprehension that the child:

(a) has not been a victim of a severe form of trafficking and there is no credible evidence that the child will be at risk of being trafficked upon return to Mexico;
(b) does not have a fear of returning to Mexico owing to a credible fear of persecution; and
(c) is able to make an independent decision to withdraw the child's application for admission to the United States.[203]

164. If officials cannot make a determination as to a risk of trafficking or persecution, or if the child is unable to make an independent decision to withdraw his or her application for admission to the United States, the officer is to follow the same procedure as regards unaccompanied children from non-contiguous countries (discussed in detail below). In short, the officer is to treat the child with more protections to ensure that he or she is not a victim of human trafficking nor has a "credible fear" of persecution in his/her country of origin before any attempt is made to deport the child.

165. The conditions and mechanisms of the repatriation of Mexican unaccompanied children are governed by a bilateral agreement between the United States and Mexico. This agreement is implemented via local agreements at various areas along the mutual land border. In addition,

> CBP has given Mexican consular officials office space in many of the Office of Field Operations and Border Patrol stations so that a local consular official can come to the facility to interview the migrant and help facilitate repatriation. When CBP wants to return a child to Mexico, the consular official will often coordinate the return of the child with Mexico's national child welfare agency [the National System for Integral Family Development, or "DIF" by its acronym in Spanish] to ensure the safe repatriation of the child.[204]

b. Main Observations and Concerns Regarding the Treatment of Unaccompanied Children from Mexico

166. During its visit to the U.S. southern border, the Commission was unable to observe the detention conditions at the McAllen Border Patrol Station and the Rio Grande Valley Central Processing Center. In this regard, the Commission reiterates that the decision of the Border Patrol and ICE to refuse to grant the delegation free and full access to these centers is unacceptable. This refusal not only hampers the Commission's efforts to independently monitor the United States' compliance with its obligations under the legal instruments of the OAS, but it also undermines these same instruments and the protections afforded to every person under them.

167. The Commission also regrets that it was unable to observe master calendar hearings at the immigration court for a docket containing the cases of unaccompanied children due to circumstances beyond its control; however, it held a teleconference with the Harlingen Court Administrator and with officials from the Department of Justice's

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203 TVPRA, 8 U.S.C. § 1232 (a) (2); Appleseed Foundation, *Children at the Border* (2011), p. 23.

204 Women's Refugee Commission, *Step-by-Step Guide on Apprehension and Detention of Juveniles in the United States*, (July 2014), p. 2.

Executive Office for Immigration Review (EOIR) headquarters in Falls Church, Virginia. In addition, the Commission visited a HHS grantee facility, where children are cared for while family members or foster homes are identified and screened for later placement. More detail on both of these activities is provided below, under section 2 ("Unaccompanied children from non-contiguous countries").

i. U.S. practice of "turn-backs" violate the human rights of Mexican unaccompanied children

168. For persons at risk who require protection, the screening process is a critical first step to entering the United States and ultimately receiving the protection needed. These procedures only take place if a person can reach a U.S. land border or port of entry. In this regard, the Commission has received troubling information that some unaccompanied children and other persons are being sent back before ever reaching the border, a practice civil society organizations call a "turn-back."

169. Information received by the Commission during the hearing on the "Human Rights Situation of Migrant and Refugee Children and Families in the United States," held during in its 153rd Period of Sessions, indicates that 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."[205] These migratory policies include "interceptions and turn-backs of persons seeking to leave their country of origin and interdictions of people in Mexico" and have been "supported, funded and praised by the U.S. government which has aggressively pursued the externalization of its borders to broadly restrict the arrival of Honduras, Salvadorans, and Guatemalans, including those with protection needs, to U.S. territory."[206]

170. In their submission to the Commission, the organizations that requested that hearing further documented claims to the effect that:

> The Gendarmerie [Mexico's new 5,000-strong division of its Federal Police with military and police training] have been deployed along Mexico's Northern Border with the U.S. to intercept migrants and refugees before they reach U.S. territory, helping to explain reports by deported migrants and media of turn-backs at the U.S./Mexico border followed by deportations by Mexican authorities. [207]

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205 The Jesuit Conference of the United States and the Washington Office on Latin America (WOLA), U.S. Support and Assistance for Interdictions, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to International Protection, (October 2014) p. 1 (on file with the IACHR).

206 The Jesuit Conference of the United States and the Washington Office on Latin America (WOLA), U.S. Support and Assistance for Interdictions, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to International Protection, (October 2014) p. 1 (on file with the IACHR). *See also*, The White House, "The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border," (August 1, 2014), http://www.whitehouse.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american-.

207 The Jesuit Conference of the United States and the Washington Office on Latin America (WOLA), U.S. Support and Assistance for Interdictions, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to International Protection, (October 2014) p. 1 (on file with the IACHR); "Deportan a 5 mil niños a Honduras [5 thousand children deported to Honduras]," *Hilo Directo,* (June 19, 2014), http://hilodirecto.com.mx/deportan-a-5-mil-ninos-a-honduras/; MPI, Webinar on Child and Family Migration to the United States: Continuing Flows and Evolving Responses (March 31, 2015),

ii. Incorrect application of the law: Mexican unaccompanied children as subjects who may require international protection

171. With regard to unaccompanied Mexican children, the Commission, based on the information gathered during the visit, finds that the Department of Homeland Security applies a presumption of an absence of protection needs for these children. The United States assured the Commission in its observations that, "whether or not required by law, all unaccompanied children are screened by CBP for risks." The Commission notes, however, that when it asked CBP officials if they have encountered trafficked persons, including children, and how they identify signs of human trafficking, their response was that they had not seen any human trafficking, and regarding children who may work for drug trafficking organizations, that they have never seen any children or adolescents who were "forced" to smuggle drugs or persons across the border.

172. In its report entitled *Children on the Run*, the UNHCR found that of 404 children surveyed from Mexico and Central America who were in an irregular migratory situation in the United States, 58% indicated that they were "forcibly displaced" due to: violence by organized armed criminal actors, including drug cartels and gangs; domestic abuse; and in the case of Mexico alone, 38% due to forced recruitment into human smuggling networks.[208] The United Nations Children's Fund (UNICEF) has found that the homicide rate almost tripled for Mexican men between 2007-2011, and that it more than doubled for male adolescents under the age of 18.[209] According to UNICEF, "[Mexican] children and adolescents are impacted by the upsurge in social violence resulting from the rivalry among organized crime groups, and the consequent security operations."[210] A report by the Washington Office on Latin America (WOLA) found that a common thread among returned Mexican unaccompanied children is that some prefer to keep trying to cross the U.S. border instead of getting involved with organized crime and drug trafficking groups. Clearly, Mexican children face risks of persecution in their home communities.

173. Given the importance of the initial processing and screening conducted by U.S. border officials, especially for Mexican unaccompanied children, the Commission is concerned over the low numbers of Mexican unaccompanied children who are able to access the process to present claims of risk. In particular, the Commission is concerned that CBP officials may act as *de facto* adjudicators of a Mexican child's potential claims for protection according to applicable United States' laws and regulations, and that failing this initial screening, the child may be subjected to immediate removal (within hours).[211] Further, given the complexity of human trafficking, particularly its manifestations in trafficked children, as well as the forced recruitment of children and adolescents in drug trafficking organizations,

http://www.migrationpolicy.org/events/child-and-family-migration-united-states-continuing-flows-and-evolving-responses (citing a threefold increase in child migrant apprehensions in Mexico and a twofold increase in deportations of child migrants from Mexico since the height of arrivals in 2014 to early 2015).

208 UNHCR, *Children on the Run* (April 2014), p. 6-7.

209 UNICEF, *Mexico: Country programme document* 2014-2018 (February 6, 2014), http://www.unicef.org/about/execboard/files/2013-PL15-Mexico_CPD-final_approved-English.pdf, para. 11.

210 UNICEF, *Mexico: Country programme document* 2014-2018 (February 6, 2014), http://www.unicef.org/about/execboard/files/2013-PL15-Mexico_CPD-final_approved-English.pdf, para. 11.

211 Under U.S. law, border officials' determinations are not subject to judicial review.

the Commission was alarmed by the simplified responses it received to its questions ondetection of protection issues.

174. Despite the officer's affirmative duty under section 1232 of the TVPRA (set forth above) and the way the law is framed to protect the child, the IACHR notes with great concern that current operational practices applied by DHS result in placing the burden of establishing a need for international protection upon the unaccompanied Mexican child.[212]

175. As an impact of this burden, the IACHR observes that although 23% of all apprehended children in fiscal year 2014 were from Mexico, very few unaccompanied Mexican children were transferred to HHS.[213] Similarly, in 2013, 17,240 Mexican unaccompanied children were apprehended at the border, yet the Office of Refugee Resettlement ("ORR"), the responsible entity within HHS for the care and custody of unaccompanied children during their immigration proceedings, reported only 740 Mexican unaccompanied children in its custody.[214] This amounts to approximately 96% of Mexican unaccompanied children who were turned away at or shortly after arriving to the U.S. border and sent back to Mexico.[215] The UNHCR has also corroborated this figure, having estimated that around 95.5% of Mexican children arriving alone to the United States are returned without ever having the opportunity to see an immigration judge.[216]

176. To put timing into perspective, the majority of unaccompanied children do not formally file their asylum applications until several months after their arrival to the United States[217], which evidences a child's need to gain confidence in his or her representative or caretaker before disclosing past traumatic experiences and/or future fears.

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212 *See also* 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* (June 2014), at 14 (on file with the IACHR)(arriving at the same conclusion after UNHCR field missions to the southern border, and additionally that: "UNHCR observed a predominant bias, influenced by a range of valid and invalid factors, desensitizing officers to any protection needs of Mexican children. In all sectors visited, CBP communicated to UNHCR that Mexican [unaccompanied children] are always returned to Mexico", at p. 5).

213 The exact figures for fiscal year 2014 were not yet released by the U.S. government at the time of publication.

214 U.S. Department of Health and Human Services, "About Unaccompanied Children's Services," http://www.acf.hhs.gov/sites/default/files/orr/uac_statistics.pdf (last accessed November 30, 2014).

215 Mexican unaccompanied children represented 3% of the total population of unaccompanied children in ORR's custody in 2013. In comparison, unaccompanied children from Guatemala accounted for 37%, Honduran children accounted for 30%, and children from El Salvador accounted for 26%. U.S. Department of Health and Human Services, "About Unaccompanied Children's Services," http://www.acf.hhs.gov/sites/default/files/orr/uac_statistics.pdf (last accessed November 30, 2014).

216 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* (June 2014), at 14 (on file with the IACHR).

217 Dara Lind, "You can't understand the child migrant crisis without understanding asylum. Here are 6 facts," Vox (July 30, 2014), http://www.vox.com/2014/7/30/5947909/asylum-children-border-refugees-apply-home-embassies-explain.

177. To close the cycle, the Commission received information to the extent that repatriations of unaccompanied children were taking place at night[218]; children were occasionally being placed in handcuffs by U.S. border agents to effectuate their return; and that many Mexican children are being sent to other parts of Mexico, including to places located on the opposite side of the country from their home community. This information indicates practices that would directly violate children's rights and the repatriation treaty itself between Mexico and the United States. Repatriation of any person, but especially a child, should never take place at night. Doing so increases the vulnerability of migrants, as safe reception places and government entities are normally closed during these hours.

2. From Non-Contiguous Countries

178. The northward migration of unaccompanied children from countries of the Northern Triangle to the United States is not new and has been occurring for years. Over the most recent years, however, the Commission has observed a steady rise in the number of unaccompanied children coming from Central America. Since October 2013, these numbers have sharply risen and represent some of the most dramatic increases yet. As outlined above, the real crisis causing this migration has its roots in the poverty, violence, inequality, and discrimination afflicting particularly the countries of the Northern Triangle in Central America. The cause(s) behind the drastic increase in unaccompanied children leaving their home countries and arriving in the United States signals something worse, representing a "turning point" since 2012 that "shin[es] a light on a *growing child protection crisis* in these countries (emphasis added)."[219]

179. The Commission has received additional contextual information as to a number of new or growing trends that cause the flight of children from their home countries. These trends include the following: (1) children are the victims of violence that is individualized and targeted, most commonly as a result of evasion or refusal to cooperate with gang members; (2) gangs and organized crime have spread beyond major urban areas and, as a result, violence has become more widespread; (3) children feel unprotected by local authorities and cite infiltration of organized crime into police forces and government service; (4) girls are increasingly being targeted for forcible recruitment into a gang in addition to fears of sexual violence by gangs; (5) younger children are increasingly targeted by gangs, which may explain why younger and older siblings migrate together; and (6) parental absence, which increases the vulnerability of children to targeting for gang membership and/or abuse by the hands of extended family caretakers.[220]

180. In its observations to this report, the State calls attention to a new in-country refugee and parole processing program that it launched in December 2014. According to the State, "The program allows parents from El Salvador, Guatemala, and Honduras who are lawfully present in the United States to request access to the U.S. Refugee

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218 Testimony by Jessica Jones, Child and Youth Policy Associate at Lutheran Immigration and Refugee Service (LIRS) for Congressional Progressive Caucus Ad-Hoc Hearing "Kids First: Examining the Southern Border Humanitarian Crisis (July 29, 2014)(transcript on file with the Commission).

219 International Rescue Committee, *The arrival of unaccompanied minors from Central America to U.S. border - IRC Field Visit to Texas and Arizona: Key findings and recommendations to policy makers*, (October 23, 2014) p. 1.

220 International Rescue Committee, *The arrival of unaccompanied minors from Central America to U.S. border - IRC Field Visit to Texas and Arizona: Key findings and recommendations to policy makers*, (October 23, 2014), p. 2-3.

Admissions Program for their children who are under the age of 21 who are still in one of these three countries." The United States explains that it established this program to "provide a safe, legal, and orderly alternative to the dangerous journey that some children are undertaking to join parents in the United States." The State stipulates that children who are found ineligible for refugee admission, but are still at risk of harm, may be considered on a case-by-case basis for parole, defined as "a discretionary mechanism under U.S. law [that] allow[s] someone to come to the United States for urgent humanitarian reasons or significant public benefit."

181. The Commission recognizes the State's efforts to extend refugee protection to children in their home countries. However, it has concerns over other information received indicating that the process is lengthy (may take months to complete) and that the associated application costs may be burdensome to some families.[221] The Commission also notes that, according to publicly-available information, as of July 6, 2015, no child has been granted refugee or parole status through the in-country program.[222]

182. Before continuing to the relevant legal framework, the Commission considers it important to provide a snapshot of the current contextual and operating situation of U.S. immigration courts. Once children are in the United States and removal proceedings are initiated against them, they are confronted with the backlog in the system, which has resulted in long wait times. To give an idea of the numbers, publicly available information indicates that the backlog in immigration cases reached 375,000 in June 2014, including 41,640 cases of children waiting for a hearing date.[223] As of the end of U.S. fiscal year 2014 (as of September 30, 2014) the backlog was at 408,037 cases, and by the end of October 2014, this number reached 421,972.[224] The average wait time for all cases, including that of unaccompanied children, was estimated in June 2014 to be 587 days, or more than one year and seven

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221 For more information on the requirements (including a $650 fee for genetic testing to establish the veracity of the parent-child relationship alleged, reimbursable only if all claimed biological relationships are confirmed, and multiple interviews to establish eligibility for refugee status) may be found at: USCIS, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)," http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam. The Commission also deems pertinent to mention that the number of children who may be successfully processed and granted refugee status will be subtracted from the total allotted number of 4,000 refugees from the Latin America and Caribbean region for U.S. Fiscal Year 2015. *See* U.S. State Department, Fact Sheet (Nov. 14, 2014), http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm.

222 *See, e.g.*, Bill Frelick, "New U.S. policy of little help to Central American families who live in fear," Los Angeles Times (July 6, 2015), http://www.latimes.com/opinion/op-ed/la-oe-0706-frelick-central-american-refugees-20150706-story.html. The Commission also notes that between December 1, 2014 and April 23, 2015, 461 applications from the three countries had been received; however, as of April 23, 2015, all of these applications were in "various stages of prescreening before they are ready for [an asylum] interview." *See* DHS, Written testimony of USCIS Refugee, Asylum, and International Operations Associate Director Joseph Langlois for a Senate Committee on the Judiciary, Subcommittee on Immigration and The National Interest, "Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program," (Apr. 23, 2015).

223 TRAC Immigration, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (last accessed on December 4, 2014).

224 *Id*.

months.[225] By April 2015, the backlog was at 445,607 cases, including 70,035 involving unaccompanied children.[226]

183. One of the chief factors and causes for the backlog is that of greatly increased numbers in a context of funding constraints. In testimony provided by Juan Osuna, Director of the EOIR, before a U.S. Senate Committee hearing in July 2014, he cited funding constraints beginning in January 2011 that effectively froze the hiring of new immigration judges and "had a negative and worsening impact upon EOIR's core mission, and increased the number of cases pending adjudication and extending court dockets further into the future."[227] He also alerted the Committee to the fact that "more than 100 immigration judges – more than one-third of the immigration judge force – are eligible to retire in [fiscal year] 2014 alone."[228]

a. Legal Regime for Unaccompanied Children from Non-Contiguous Countries and Actions Taken by the State

184. The US handles unaccompanied children from countries other than Mexico and Canada in accordance with the TVPRA of 2008. The TVPRA provides that unaccompanied children from non-contiguous countries must be treated with more protections to ensure that they are not victims of human trafficking and/or do not have "credible fears" of persecution in their home countries, before any attempt to deport them.

185. The processing of unaccompanied children may be summarized in a nutshell as the following:

> CBP apprehends, processes, and detains the majority of [unaccompanied children] arrested along U.S. borders. [Following apprehension, a CBP agent must take the children to a holding facility for processing. Once there, the official(s) must determine whether each child meets the definition of an unaccompanied child. If yes, then] ICE [must] physically transport [any unaccompanied children] from CBP to [the] HHS Office of Refugee Resettlement (HHS-ORR) custody [within 72 hours of apprehension]. HHS-ORR is responsible for detaining and sheltering [unaccompanied children] who are from non-contiguous countries and those from contiguous countries (i.e., Canada and Mexico) for whom there is a concern that they may be victims of trafficking or have an asylum claim, while they await an immigration hearing. USCIS is responsible for the initial adjudication of asylum applications filed by

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225 *Id*.

226 TRAC Immigration, Immigration Court Backlog Keeps Rising: Latest Figures as of April 2015 (May 15, 2015), http://trac.syr.edu/immigration/reports/385/. The Commission also notes that at the end of 2013, the United States had 84,343 asylum cases pending; while at the end of 2014, this figure jumped to 187,826. UNHCR, *UNHCR Global Trends 2014: World At War*. Table 1: Refugees, asylum-seekers, internally displaced persons (IDPs), returnees (refugees and IDPs), stateless persons, and others of concern to UNHCR by country/territory of asylum, end-2014, p. 47; *UNHCR Global Trends 2013: War's human cost*. Table 1: Refugees, asylum-seekers, internally displaced persons (IDPs), returnees (refugees and IDPs), stateless persons, and others of concern to UNHCR by country/territory of asylum, end-2013, p. 43.

227 Statement of Juan Osuna, Director of the EOIR, before the Committee on Homeland Security and Governmental Affairs of the U.S. Senate hearing on "Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border," (July 9, 2014).

228 Statement of Juan Osuna, Director of the EOIR, before the Committee on Homeland Security and Governmental Affairs of the U.S. Senate hearing on "Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border," (July 9, 2014).

> [unaccompanied children]. The EOIR conducts the immigration proceedings that determine whether the [unaccompanied child] is allowed to remain in the United States or is deported to his/her home country. If an [unaccompanied child] is ordered removed from the United States, ICE is responsible for returning the [child] to his/her home country.[229]

186. As may be observed, unaccompanied children enjoy a number of additional safeguards and protections that adults and families arriving to the United States do not. These safeguards came about largely due to allegations that surfaced in the 1980s of mistreatment by immigration officials (acting under the former Immigration and Naturalization Service), and gave rise to a series of lawsuits that resulted in the Flores Settlement Agreement ("Flores Agreement") in 1997.[230] This Agreement set a nationwide policy for the treatment, detention, and release of unaccompanied children. The Agreement recognized the "particular vulnerability" of children, and within it, the INS was to ensure the continued treatment of children "with respect, dignity, and special concern [for their vulnerability]."[231]

187. Regarding detention, the Flores Agreement established that children and adolescents must be held in the least restrictive setting appropriate to their age and special needs to ensure their protection and well-being.[232] In this respect, the ORR has four kinds of detention facilities to hold unaccompanied children, and, ranging from least to most restrictive, these include: short and long-term foster care, shelters and group homes, therapeutic foster care and residential treatment centers, and staff-secure and secure facilities.[233]

188. As to the conditions of detention, the Flores Agreement stipulated that when unaccompanied children are detained, the detaining immigration officials must provide: (1) food and drinking water; (2) medical assistance in emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect children from others; and (6) separation from unrelated adults whenever possible.[234]

189. The Flores agreement also established that children and adolescents should be released from custody "without unnecessary delay" to, in order of preference, a(n): parent, legal guardian, adult relative, an adult designated by parent or legal guardian, licensed program, or adult individual seeking custody (includes foster care) when there is no other likely alternative to long-term detention and family reunification does not appear to be a reasonable possibility.[235] At present, HHS is the agency in

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229 U.S. Congressional Research Service, *Unaccompanied Alien Children: An Overview*, R43599 (September 8, 2014), p. 4.

230 *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal. 1997). Stipulated Settlement, http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf. *See also*, U.S. Congressional Research Service, *Unaccompanied Alien Children: An Overview*, R43599 (September 8, 2014), p. 3.

231 *Flores v. Reno*, No. 85-cv-4544, para. 11.

232 *Flores v. Reno*, No. 85-cv-4544, para. 11.

233 Women's Refugee Commission, *Step-by-Step Guide on Apprehension and Detention of Juveniles in the United States*, (July 2014).

234 *Flores v. Reno*, No. 85-cv-4544, para. 12.A.

235 *Flores v. Reno*, No. 85-cv-4544, paras. 11, 14. Approximately 95% of the unaccompanied children are sent to live with family present in the United States. ChildFund, *Unaccompanied and Accompanied Child Migrant Crisis: Emergency Rapid Assessment* (August 2014), p. 9.

charge of leading the investigations on potential "sponsors" (custodians), who must also undergo background checks in several databases maintained by the U.S. Federal Bureau of Investigation.[236]

190. Regarding immigration proceedings that involve unaccompanied children, internal, non-binding policy, as established in the EOIR's Operating Policies and Procedures Memorandum 07-01 ("OPPM 07-01"), sets out "guidelines and suggestions" for immigration judges on how to handle and modify the processing of immigration cases when the respondent is an unaccompanied child.[237] In order to ensure that there is an appropriate courtroom setting and given that the proceeding is adversarial (the government is represented by ICE), suggested modifications include: giving children courtroom orientations prior to a scheduled hearing; conducting cases involving unaccompanied children on a separate docket or fixed time each week or month; allowing children to use booster seats if seated with counsel and/or bring a toy or other personal item into the courtroom; allowing for video or teleconferencing; and that judges not use their robes.[238] To ensure appropriate courtroom procedures, OPPM 07-01 also provides that judges should consider (in summary form): (a) explaining the proceedings at the outset (purpose of the proceeding, introduce the parties and each party's role, and explain operational procedures, such as note taking); (b) ask questions in English at an age-appropriate level and watch for any indication that the interpreter and child are having difficulty communicating; (c) try to limit the times a child must come to court, his or her time on the witness stand, and be cognizant that children may require more breaks; (d) prepare the child to testify; (e) use child-sensitive questioning, ensuring proper language and tone; (f) make proper credibility assessments, keeping in mind that children will usually not be able to present testimony as precisely as adults; and (g) restrict access to the courtroom, as children may be reluctant to testify about traumatic incidents in front of many people.[239]

191. In terms of factors that may influence the outcome of the proceeding, under U.S. law there is no normative framework requiring or calling for the consideration of the best interests of the child in decisions taken by immigration judges. OPPM 07-01, for its part, provides that, "this concept [of the best interests of the child] is a factor that relates to the immigration judge's discretion in taking steps to ensure that a 'child-

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236 Among the databases, the National Crime Information Center database, the Central Index System, and the Deportable Alien Control System. HHS, Office of the Inspector General, Division of Unaccompanied Children's Services: Efforts to Serve Children (March 2008), OEI-07-06-00290, p. 6, http://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf. The Commission is, however, concerned over the lack of guarantees in place for sponsors, particularly those present in the United States in an irregular migratory situation. For more discussion on this topic, see below, *infra*.

237 U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007) (replacing OPPM 04-07, emitted September 16, 2004).

238 U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court Operating Policies and Procedures Memorandum (OPPM) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007) (replacing OPPM 04-07, emitted September 16, 2004), p. 5-6.

239 U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court Operating Policies and Procedures Memorandum (OPPM) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007) (replacing OPPM 04-07, emitted September 16, 2004), p. 6-8.

appropriate' hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim."[240] OPPM 07-01 further clarifies:

> Issues of law – questions of admissibility, eligibility for relief, etc. – are governed by the Immigration and Nationality Act and the regulations. The concept of "best interest of the child" does not negate the statute or the regulatory delegation of the Attorney General's authority, and cannot provide a basis for providing relief not sanctioned by law.[241]

192. Regarding the scheduling of immigration proceedings, the EOIR policy – starting in July 2014 – has been to "fast-track" hearings for unaccompanied children and families.[242] In accordance with this policy, immigration courts are to schedule the initial hearing for the abovementioned persons and/or groups between 10-21 days of ICE's initiation of removal proceedings. A subsequent EOIR memorandum from Brian O'Leary, Chief Immigration Judge, directs all immigration courts across the country to place the new arrivals ahead of other cases on the docket in order to address these new priorities.[243] There are 26 immigration courts country-wide that have "specialized juvenile dockets,"[244] and this sped-up process is in effect in several states, including Arizona, California, Florida, Maryland, New York, and Texas.[245]

193. Non-nationals in the United States, who are not permanent residents or were not granted a visa,[246] are required by U.S. law to register themselves and be fingerprinted within 30 days of arrival.[247] The law also requires that they report to USCIS each change of address and new address within 10 days of a change.[248] Non-nationals (or their parents or guardians) are additionally required by law to separately notify the Immigration Court of address changes and to do so within 5 days of a change.[249] The Immigration Court sends notification of hearings and other official correspondence to the address on record. As the EOIR explained to the Commission during its teleconference – and is also laid out in its Immigration Court Practice Manual – if a non-national does not update this address information, and as a consequence, misses

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240 U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court Operating Policies and Procedures Memorandum (OPPM) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007) (replacing OPPM 04-07, emitted September 16, 2004), p. 4.

241 U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court Operating Policies and Procedures Memorandum (OPPM) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007) (replacing OPPM 04-07, emitted September 16, 2004), p. 4.

242 U.S. Department of Justice, Office of Public Affairs, "Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.," (July 9, 2014), http://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us.

243 U.S. Department of Justice, Executive Office for Immigration Review, Memorandum from the Chief Immigration Judge to All Immigration Judges: Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities (September 10, 2014).

244 Statement of Juan Osuna, Director of the EOIR, before the Committee on Homeland Security and Governmental Affairs of the U.S. Senate (July 9, 2014).

245 Muzaffar Chishti and Faye Hipsman, "Unaccompanied Minors Crisis has Receded from Headlines but Major Issues Remain," Migration Policy Institute (September 25, 2014), http://www.migrationpolicy.org/article/unaccompanied-minors-crisis-has-receded-headlines-major-issues-remain.

246 Or, in the case of a child or adolescent, their parents or guardians. *See* INA §§ 262; 221 (b).

247 INA § 262.

248 8 C.F.R. 265.1.

249 8 C.F.R. § 1003.15(d)(2).

a hearing, he or she may be ordered removed "in absentia."[250] Persons who later learn of this hearing and the "in absentia" removal order against them may later make motions to re-open the proceeding, and it is within the immigration judge's discretion to grant or deny that motion.

194. As pertains to custodians of unaccompanied children who are in an irregular migratory situation in the US, a recent EOIR memorandum warns immigration judges that, "It is never appropriate to order that the parent or custodian appear in court while indicating that they need not fear apprehension while doing so," and that "judges should not make assurances as to whether ICE will or will not apprehend parents or guardians before or after an immigration court appearance."[251]

195. Finally, if removal is ordered, but a person (the complainant) has filed a suit against a federal agent, the complainant must inform the immigration judge that a separate case is pending and request a stay of the removal order. It is in the immigration judge's discretion whether to grant a stay of removal pending the resolution of the other case.

b. Main Observations and Concerns Regarding the Treatment of Unaccompanied Children from Non-Contiguous Countries

196. The Commission considers many aspects of the overall legal framework in place for unaccompanied children to be consistent with international standards. The Commission noted that the authorities' goal, in line with the essence of TVPRA, was to proceed at a deliberate speed in order to remove children from the State's custody within a reasonable time frame in order to place them with a family member or other approved care arrangement, after an investigation and vetting of the potential sponsors. This legal regime favors placing children in liberty for the duration of immigration proceedings and in a custodial situation that would be in the child's best interests.

197. Regarding the Commission's visit to Saint PJ's, a HHS grantee facility located in San Antonio, Texas, the Commission observed a number of good practices for replication. As stated above, unaccompanied children are placed in HHS care following their processing by DHS while the former attempts to locate family members in the United States and make determinations on whether the child may be placed in the custody of such family members, a foster home, or other option. At the time of the IACHR's visit, the stay at an HHS or grantee shelter was between 7 and 35 days.[252] In this regard, the State assures that it has made efforts at reducing the length of stay for

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250 8 C.F.R. § 1229 (b) (C). *See also* U.S. Department of Justice, Executive Office for Immigration Review, *Immigration Court Practice Manual*, Chapter 2.2(c) "Address Obligations" (revised June 10, 2013), http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=25. According to a study conducted by the Transactional Records Access Clearinghouse Immigration ("TRAC Immigration") at Syracuse University, from fiscal year 2005 through June 2014, 31% of closed cases were marked "in absentia," and those persons were consequently ordered removed. "New Data on Unaccompanied Children in Immigration Court," (July 15, 2014), http://trac.syr.edu/immigration/reports/359/.

251 U.S. Department of Justice, Executive Office for Immigration Review, Memorandum from the Chief Immigration Judge to All Immigration Judges: Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities (September 10, 2014).

252 According to testimony received by the Commission during its visit; *see also*, ChildFund, *Unaccompanied and Accompanied Child Migrant Crisis: Emergency Rapid Assessment* (August 2014), p. 9.

unaccompanied children in HHS care and custody through streamlined release policies and procedures.

198. At Saint PJ's, the Commission met with the owner and senior management of the facility as well as other federal government personnel and civil society organizations, who represent children there, to learn more about how the facility is managed, how custodial determinations are made (the types of investigations that are carried out), and the daily activities at the facility. The Commission then visited the living areas and the on-site school, where it interviewed a schoolteacher as well as nine children.

> *A 14 year-old unaccompanied child from Guatemala described his experience:* I lived in Guatemala with my grandparents. The thing I liked most there was going to school. I have two other younger brothers. My mom is here [referring to the US] working. I came here by bus, with a Mexican friend. They deported my friend. The [border officials] detained us after walking in the desert for three days. When they arrested us, they treated us well. They took us by car to a *hielera*. They asked me my name, age, birthday, and where I came from. I spent the whole night in the *hielera*, sleeping on the concrete floor. It was really cold at night there. They gave me crackers to eat at night and two burritos in the morning, also milk but it was spoiled. After that, they took me to another place where I took a bath. Now I've been here at this shelter for more than 10 days, and I'm going to fly to [a different state] maybe this week or the next. The social worker here treats me well (…) but I still don't have a court date."

199. In terms of good practices, the Commission observed that, although the children were being detained at the center – i.e., they could not freely come and go from the facility, the center had large grounds for walking and recreation spaces available for the children to use. The living quarters were spacious, clean, and friendly, with a common area in the middle and decorations on the walls, including some artwork created by the children. In the meeting with senior management of the facility as well as in the interview with a teacher at the school, it was apparent that the facility's administrators were trained and conversant in how to work with children, especially children who may have suffered some type of trauma. The schoolteacher interviewed explained how he creates a safe space in the classroom, fostering a climate of mutual respect and peace, which encourages his students to learn. Finally, the children interviewed all appeared to be healthy and well-cared for, with many of the children expressing that they felt safe at Saint PJ's and that, if they had a problem or issue, they felt comfortable in reaching out to a staff member to seek help or guidance. The children also expressed satisfaction with the meals they received and the quality of their schooling at the center.

200. The Commission commends this model and the practices it observed at Saint PJ's.

201. However, not all facilities and processes meet these standards, and the Commission highlights some major points of concern from its visit:

i. Deficiencies in detention conditions at holding facilities

202. First, the Commission reiterates concerns it previously reported after its 2009 visit to the southern border of the United States, specifically that there are still reports that many holding facilities – including the Hidalgo Bridge Port of Entry Station visited by the Commission – are not equipped with facilities to provide the most basic necessities, such as food, water, and sleeping accommodations[253], nor is the temperature adequate[254], as required by the Flores Agreement.

203. The Commission also observed during its visit and received reports that the holding facilities are not equipped with shower or other bathing facilities. Hygienic facilities are prescribed by the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas as well as by the UN Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers.[255] The lack of bathing facilities became especially critical during the peak months of arrivals in 2014 of unaccompanied children to the United States, who may have been walking for days or even weeks before arriving: CBP officials confirmed that during the early summer months of 2014 (May – July), when the number of children arriving was at its highest, they were unable to transfer unaccompanied children to HHS within the time frame established by ICE protocol (maximum of 72 hours in ICE custody). Civil society organizations and other advocates alleged that, in some instances along the border, children and families were kept up to 15 days in holding facilities before being transferred. At the Hidalgo Bridge Port of Entry Station, officials informed the Commission that in at least one instance, a girl stayed at the facility for 10 days, and that the average amount of time spent there during the peak was between 7-8 days.

204. In regard to current processing times for unaccompanied children, the officials who briefed the Commission during its visit on the situation regarding the McAllen Border Patrol Station cited that station's processing times, as of September 2014, at an average of 18 hours, from the moment a child is apprehended to when he or she is released to the custody of ICE, which transfers the children to HHS.

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253 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 375.

254 As mentioned above, persons detained in holding facilities have complained of very cold temperatures inside holding facilities. The Commission takes note of reports and allegations that there have been cases where detainees' lips and fingers turn blue from the cold and has received testimony from persons who described the extreme cold they experienced in the holding cells, adding that CBP officers failed to raise the temperature or provide blankets and required detainees to remove outer layers of clothing, such as sweaters and sweatshirts. *E.g.*, Complaint to DHS agents Megan Mack, Officer for Civil Rights and Civil Liberties, and John Roth, Inspector General submitted by ACLU, NIJC, Esperanza Immigrant Rights Project, Americans for Immigrant Justice, Florence Immigrant and Refugee Rights Project, "Re: Systematic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection" (June 11, 2014), http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf; *see also* Molly Redden, "Why Are Immigrant Detention Facilities So Cold?," Mother Jones (July 16, 2014); Cindy Carcamo and Richard Simon, "Immigrant groups complain of 'icebox' detention cells," Los Angeles Times (December 5, 2013), http://articles.latimes.com/2013/dec/05/nation/la-na-ff-detention-centers-20131206.

255 *Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XII(2); UN Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, Guideline 8 (2012), http://www.unhcr.org/505b10ee9.html.

ii. Allegations of abuse and mistreatment of children while in CBP custody

205. The Commission also takes note of complaints regarding the treatment of unaccompanied children by CBP officials. On June 11, 2014, the NIJC, the ACLU Border Litigation Project, Americans for Immigrant Justice (AI Justice), Esperanza Immigrant Rights Project (Esperanza), and the Florence Immigrant and Refugee Rights Project (Florence Project), jointly filed a complaint with the DHS Office for Civil Rights and Civil Liberties and the DHS Office of the Inspector General. The complaint alleges that 116 unaccompanied children, between the ages of 5 and 17, had suffered some type of abuse or mistreatment while in the custody of CBP:

> [A]pproximately one in four children included in this complaint reported some form of physical abuse, including sexual assault, beatings, and the use of stress positions by CBP officials. More than half of these children reported various forms of verbal abuse, including racially- and sexually-charged comments and death threats. More than half reported the denial of medical care, including two young mothers whose infant children became sick while detained in freezing temperatures, and another child whose asthma medication was confiscated while she suffered multiple asthma attacks. Children consistently reported being held in unsanitary, overcrowded, and freezing-cold cells, and roughly 70 percent reported being held beyond the legally mandated 72-hour period. Many reported being detained without blankets and having to sleep on the floor, with the lights left on. More than 80 percent described denial of adequate food and water in CBP custody, including a child whose only available drinking water came from a toilet tank and others who received only frozen or spoiled food and subsequently became ill.[256]

206. The children in this same complaint, some of whom experienced sexual violence in their home countries and/or en route to the United States, reported feeling humiliated by having to use filthy restrooms in full view of other detainees and security cameras. In terms of other alleged violations:

> approximately 15 percent of these children reported being separated from other family members, and 30 percent reported that their money and/or personal belongings were confiscated by CBP officials and not returned. Many children reported being shackled—sometimes painfully—during transport.[257]

207. The complaint stressed that these abuses have been "been documented and reported to DHS for years," yet the organizations insisted no changes have been made, nor have

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256 Complaint to DHS agents Megan Mack, Officer for Civil Rights and Civil Liberties, and John Roth, Inspector General, "Re: Systematic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection" (June 11, 2014), http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf.

257 Complaint to DHS agents Megan Mack, Officer for Civil Rights and Civil Liberties, and John Roth, Inspector General, "Re: Systematic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection" (June 11, 2014), http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf.

DHS agents been held accountable for these violations.[258] In its observations, the State insisted that it "takes very seriously any allegations of mistreatment and has launched numerous investigations." In this regard, the State mentions that the DHS Inspector General conducted unannounced inspections of various DHS/CBP holding facilities as well as the family detention centers of Artesia, New Mexico (no longer in existence) and Karnes, Texas. Likewise, the State cites that DHS's Office for Civil Rights and Civil Liberties has investigated numerous allegations regarding CBP and ICE in contexts of apprehension and custody of both unaccompanied children and families.

iii. Due process and fair trial violations

208. A final, major concern of the Commission regards due process guarantees in immigration proceedings as they pertain to unaccompanied children. As mentioned above, the Commission was unable to observe immigration proceedings before the Harlingen Immigration Court, but, in its teleconference with the Harlingen Court Administrator and officials from the EOIR, the Commission was informed on measures taken by the immigration courts and judges to adjust the proceedings to make them more appropriate for children. After a careful review of the information presented to it, the Commission shares concerns relayed to it by civil society organizations prior to and during the visit: despite guidelines (a), (c), and (e), unaccompanied children are still subject to an "inherently adversarial" and "intimidating environment" in the courtroom, in which they may be examined and cross-examined and that, overall, USCIS officers (as well as officers of other federal agencies involved) lack sufficient training on issues regarding child development and child-sensitive, age-appropriate questioning.[259]

209. The Commission expresses its deep concern over the absence of a requirement in law or policy to consider the principle of the best interests of the child in the immigration judge's decision. This failure to incorporate the principle into the laws governing immigration proceedings is contrary to the rights and principles established within the Inter-American human rights system and the universal human rights system. The Commission considers that the incorporation of the "best interests of the child" standard into law and policy is not only required to bring them into conformity with international standards; the incorporation of this standard would also provide the framework for measures to address and redress the deficiencies in existing processes and conditions applicable to children.

210. In addition, the Commission is also concerned over the way in which immigration hearings are being "fast-tracked." While the IACHR appreciates efforts to prioritize the cases of unaccompanied children in its dockets, such expeditious processing may not provide less due process protection to the children involved. The IACHR received several reports that hearings are being held quickly after arrival, with short or no

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[258] ACLU, "Unaccompanied Immigration Children Report Serious Abuse by U.S. Officials During Detention" (June 11, 2014), https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during.

[259] *See, e.g.*, KIND, *A Treacherous Journey* (February 2014), https://www.supportkind.org/joomlatools-files/docman-files/macArthur_report_A_Treacherous_Journey.pdf.

notice. Both factors greatly impede the child's chances of obtaining counsel, already difficult due to factors discussed immediately below, as well as being able to put together their claim. Further, children in a new environment may not feel comfortable immediately expressing fears and disclosing past traumatic experiences, which also serves as an obstacle for children to receive the protection they may need in "fast-track" proceedings.

211. As alluded to above, these procedural and environmental factors are heightened by the lack of legal representation provided by the State and the shortage of lawyers who are willing to represent these children for no or very little cost for the many migrants who lack the resources to pay for a lawyer.[260] In certain areas, the ratio of persons seeking representation to that of attorneys available to provide it is 120:1.[261] As explained previously, persons in immigration proceedings have the right to legal representation but are not provided with it at the State's own expense (despite the seriousness of the potential outcomes), so if they wish to have counsel, they must find a way to retain counsel on their own. The Commission notes the impact that legal representation has on the outcome of cases:

- From October 1, 2004 (start of fiscal year 2005) through June 2014, 47% of the children who had lawyers in immigration proceedings were allowed to stay in the United States; whereas only 10% of children who appeared in immigration court without a lawyer were permitted to stay.[262]

- In the 63,721 cases of unaccompanied children pending as of October 31, 2014, only 20,691 (32%) have legal representation, while the other 43,030 children have not yet been able to hire an attorney or find *pro bono* representation. This percentage is even lower than the previous rate: "[f]or the 21,588 children's cases filed and already decided since the surge of unaccompanied [children] from Central America began three years ago, [ ] 41% had representation."[263]

- In those cases decided since the increase in arrivals of unaccompanied children began in 2012, 73% of children represented by an attorney were allowed to remain in the U.S., and 15% of children who had no representation were allowed to remain the U.S.[264]

212. Further, of available statistics provided by the EOIR to the IACHR at the time of drafting this report, from July 18, 2014 through October 14, 2014, only 179 unaccompanied children were allowed to stay in the United States out of a total of

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260 *See* Amy Taxin, "Backlogged Immigration Courts Speed up Children's Cases," AP (July 31, 2014), http://bigstory.ap.org/article/immigration-courts-speed-childrens-cases; Rebecca Kaplan, "For unaccompanied immigrant children, a shortage of lawyers," CBS News (August 7, 2014), http://www.cbsnews.com/news/for-unaccompanied-immigrant-children-a-shortage-of-lawyers/.

261 Dara Lind, "9 ways detaining immigrant families is turning into a 'shitshow'," Vox (August 6, 2014), http://www.vox.com/2014/8/6/5971003/artesia-immigrants-detention-due-process-families-lawyers-asylum-court-border.

262 TRAC Immigration, "New Data on Unaccompanied Children in Immigration Court," (July 15, 2014), http://trac.syr.edu/immigration/reports/359/.

263 TRAC Immigration, "Representation for Unaccompanied Children in Immigraton Court," (November 25, 2014), http://trac.syr.edu/immigration/reports/371/.

264 TRAC Immigration, "In Two out of Three Cases Pending Cases, Unaccompanied Children Have No Representation in Immigration Court," (November 25, 2014), http://trac.syr.edu/whatsnew/email.141125.html.

1,637. Almost all of the children – 1,456 – were either ordered removed (1,415) or accepted voluntary departure (41).

213. The Commission recognizes that in response to the demonstrated shortage of *pro bono* lawyers the U.S. government and the Corporation for National and Community Service, which administers AmeriCorps[265], jointly announced on June 6, 2014, the launch of "Justice AmeriCorps."[266] According to official sources, this grant program is designed to:

> enroll approximately 100 lawyers and paralegals as AmeriCorps members to provide legal services to the most vulnerable of these children. This program [ ] responds to Congress' direction to EOIR "to explore ways to better serve vulnerable populations such as children and improve court efficiency through pilot efforts aimed at improving their legal representation." In addition, DOJ believes the AmeriCorps members will help identify unaccompanied children who have been victims of human trafficking or abuse to assist in the investigation and prosecution of those who perpetrate such crimes on those children.[267]

214. In its response, the State also references HHS's announcement on September 30, 2014, in which the Department pledged to provide $9 million in funding over two years to non-governmental organizations to provide additional representation for children following their release from HHS custody. The IACHR adds that, in the first year, starting at the end of September 2014, HHS awarded $4.26 million to the U.S. Conference of Catholic Bishops and the U.S. Committee for Refugees and Immigrants. The balance of the $9 million will be awarded in 2015.[268]

215. The Commission welcomes the creation of the Justice AmeriCorps and HHS's grant to non-governmental organizations, but would encourage the United States to make greater efforts yet to ensure that unaccompanied children have access to legal representation, given the numbers and the myriad disadvantages with which unaccompanied children may approach the system.

216. Lastly, as regards due process and fair trial guarantees, the Commission is concerned over the lack of a provision under U.S. law providing for automatic stays in cases where removal is ordered yet the subject of removal is involved in an active civil case against a federal agent. The Commission is concerned that the lack of such a provision impedes the access to justice of persons in the context of human mobility, as continuing a legal proceeding in the U.S. after repatriation presents significant

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265 For information on AmeriCorps, please refer to: http://www.nationalservice.gov/programs/americorps.

266 *See* The Corporation for National and Community Service, Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors," (June 6, 2014), http://www.nationalservice.gov/newsroom/press-releases/2014/justice-department-and-cncs-announce-new-partnership-enhance.

267 Statement of Juan Osuna, Director of the EOIR, before the Committee on Homeland Security and Governmental Affairs of the U.S. Senate (July 9, 2014). According to the State, the DOJ and the Corporation for National and Community Service awarded the $1.8 million in grants to make Justice AmeriCorps possible on September 12, 2014.

268 *See* U.S. Department of Health and Human Services, Administration for Children and Families, "Advance Copy of ORR-Notice Providing $9M for Direct Representation of UACs," LexisNexis (Oct. 1, 2014), http://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2014/10/01/advance-copy-of-orr-notice-providing-9m-for-direct-legal-representation-of-uacs.aspx.

obstacles to retaining counsel, attending proceedings, and ultimately obtaining justice and a remedy.

iv. Post-release follow-up and assistance with orientation and integration

217. The Commission received troubling information that, following placement with a family member or other sponsor in the U.S. (i.e., following transfer from the physical custody of HHS), follow-up assessments are rarely conducted by the government.[269] The Commission considers that this lack of follow-up exposes children to new risks, especially if issues arise with sponsors or if the child is not receiving sufficient psycho-social support in his or her adjustment to a new environment and in dealing with past trauma.

[269] *See e.g.*, ChildFund, *Unaccompanied and Accompanied Child Migrant Crisis: Emergency Rapid Assessment* (August 2014), p. 10.

CHAPTER 4
CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

218. Throughout this report, the Inter-American Commission has expressed its concern with the arbitrary and automatic regime of immigration detention being applied to some families arriving to the United States, the overall conditions of detention at both the holding facilities and family immigration detention centers, the "turn-backs" and failure to properly assess protection needs of Mexican unaccompanied children, and the speeding up of immigration proceedings – among other due process issues – to the detriment of the families and unaccompanied children involved. The IACHR remains concerned, as it previously detailed in its 2011 report on the United States, over the lack of an oversight and accountability system to ensure that federal agents who commit human rights violations are held accountable, a situation which has only become aggravated in family detention settings due to the privatization of ICE family immigration detention centers in Texas.

219. Taking into consideration the government's decision to impose generalized and automatic family detention, the Commission reminds the State that the detention of migrants in an irregular situation, asylum seekers, refugees, and other persons in need of international protection is an intrinsically undesirable measure. The Commission reiterates that deprivation of liberty should not be the presumption – rather the presumption should be of liberty. The Commission maintains that detention is a disproportionate measure in the majority of these cases and that the United States should immediately develop and implement alternatives to detention and desist from creating any more immigration detention facilities. In the case of vulnerable persons like asylum seekers, refugees, victims of human trafficking, crime victims, children and adolescents, survivors of torture and trauma, pregnant women, nursing mothers, senior adults, persons with disabilities or those with physical or mental health needs, the United States should adopt legislative measures to ensure that these persons are not placed in immigration detention.

220. Further, in those extraordinary cases in which it is necessary to detain a person present in an irregular migratory situation in the U.S., the person should be detained in the least restrictive setting necessary, not in punitive or jail-like conditions, for the shortest time possible, and in a facility owned and operated by the State, not a private company. Privatizing the function of immigration detention places additional strains on those detained to find counsel, report allegations of abuse or wrongdoing, and, ultimately, hold the State accountable for any rights violations committed by the State or a third party while in detention.

221. Given the mixed migratory movements arriving to the United States and 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 better measures to identify persons who may be refugees or who, due to their vulnerable

condition, may have special protection needs, such as in the case of families and migrant children. The Commission reiterates its recommendation contained in its 2011 report that the United States should create a specialized unit to conduct screenings in order to effectively identify persons with potential protection needs.[270] Such screenings should take place in a conducive environment and be age-appropriate. The Commission also reminds the State that the principle of *non-refoulement* is absolute in international human rights law, as is the prohibition on the collective expulsion of non-citizens, and must be guaranteed at all times and in all places regardless of the migratory situation of persons or the applicability or not of another protection regime.

222. The Commission additionally urges the United States to provide attorneys at the States' expense[271] to unaccompanied children and to families who require this and are unable to cover the costs, as well as *guardians ad* litem to children should they so require, in order to ensure that those persons, including children, who have protection needs are able to access protection mechanisms. Providing legal representation will also help to reduce some of the case backlog, in making immigration proceedings more efficient. Further, the IACHR recommends to the State that it invest more in its immigration courts – hiring more judges and court administrative support, to start – so that judges can have manageable dockets and provide the necessary time and focus on the cases before them. Doing so will also help to reduce the backlog, reduce wait times and favor more expeditious processing.

223. The following are more specific recommendations as to improving the human rights situation of migrant and refugee unaccompanied children and families in the United States:

A. Recommendations with regard to the Treatment of Families

224. The Commission observed a number of human rights violations during its visit to the U.S. southern border as pertains to the situation of families with children. With regards to the regime of arbitrary and automatic detention (as there is no substantive criteria being applied nor an individualized analysis of the need to detain) the Commission considers that this practice amounts to a violation of the right to personal liberty, Article I of the American Declaration, and of the principle of the non-deprivation of the liberty of children.

225. The Commission welcomes the changes to family immigration detention policies announced by Secretary Johnson, as detailed in the related section above, in seeking to reduce the time spent at immigration detention centers for families who have passed initial credible fear interviews; however, it urges the State to desist from detaining families at all, unless it is an exceptional case – following an individualized analysis with a corresponding, written decision – and there are no suitable alternatives available.

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270 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 451 (providing, in pertinent part, that "The screening should not be conducted by agents in ICE's Customs and Border Protection or any other uniformed police unit").

271 In addition to the 100 attorneys in the AmeriCorps Justice program.

226. In the same sense, the Commission reminds the State that when families are detained for immigration purposes, detention facilities must maintain certain minimum conditions as provided by the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and Article VII of the American Declaration. The detention conditions observed at Karnes fell below these standards, as the facilities were more punitive and jail-like in nature and failed to provide an environment that would foster healthy child development.

227. The regime of immigration detention is also having deleterious effects on the structure and integrity of the family unit, in violation of the right to protection of the family unit (Article VI of the American Declaration).

228. In conformity with the right to seek and receive asylum, as provided under Article XXVII, and the principle of *non-refoulement* and the right to be free from persecution or torture, the Commission highlights the importance of the State desisting from placing families into expedited removal proceedings. Similarly, the State should end the practice of deporting families in expedited removal proceedings before they have had the opportunity to present their claims to an immigration judge.

229. When families do reach the stage of immigration proceedings before an immigration judge, the Commission emphasizes the importance of the State's observance of due process and fair trial guarantees, in order to ensure that families receive access to mechanisms of protection or other forms of relief. The Commission reiterates that, in failing to conduct separate immigration proceedings for children, the United States may be violating the right to seek and receive asylum (Article XXVII) and the principle of the best interests of the child, as children may have claims for protection that are independent of those of their parent(s).

230. With a view to contributing to the protection of the human rights of detained migrant and refugee families in light of these observed gaps in protection, the IACHR recommends to the United States that it:

1. *End the practice of arbitrary immigration detention of families, which is being applied automatically to families in an irregular migratory situation crossing the border for whom there is space at a family immigration detention center.* The State must conduct individualized assessments of the need to detain, provide a written decision at the conclusion of the assessment with the justifications for detention clearly spelled out, and provide for review of the legality of the detention as soon as practicable with periodic reviews of its continued need. In such individualized assessment, the application of alternatives to detention must be seriously considered and attempted before resort to immigration detention.

2. *Desist from creating new family immigration detention centers and implement alternatives to detention.* The Commission salutes the United States' closure of the immigration detention center in Artesia, New Mexico[272] and would welcome the expanded use and implementation of alternatives to detention.

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[272] David McCabe, "Administration to close immigration detention center at month's end," The Hill (November 18, 2014), http://thehill.com/news/administration/224626-administration-to-close-immigrant-detention-center; ICE, "ICE's new family detention center in Dilley, Texas to open in December," (November 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december.

3. *Improve screening procedures for families seeking protection.* Families should have full and fair access to appropriate screening processes and information on their rights and legal options.

4. *Ensure that children have access independent of that of their parent(s) to international protection mechanisms.*

5. *End the practice of telephone CFIs and video-conferenced immigration hearings.* As outlined above, by failing to have the person whom immigration proceedings are initiated against in-person with a USCIS official or in the courtroom inhibits due process. By being conducted remotely, neither the USCIS official nor the immigration judge is able to see full body language during proceedings, which may have an effect on credibility determinations. Further, attorneys are unable to speak privately with their clients to discuss any issues or questions that arise during the course of the proceedings, which in turn impedes an effective attorney-client relationship and may also impede the effectiveness of the legal representation provided.

6. *Ensure access to counsel.* Access to legal counsel makes immigration proceedings more efficient and also ensures adequate attention to the protection needs of persons, ensuring access to mechanisms of international protection.

7. *Allow civil society and other independent monitoring of the human rights conditions of immigration detention centers.*

8. *Improve the complaint mechanism in immigration detention facilities and holding centers.* Such improvements should include the ability to make anonymous calls in a private setting or anonymous complaints in writing, and that an independent body, in charge of investigating, following up with ICE and the private contractor (if applicable), and resolution, receives the complaints. Detained migrants should be informed of complaint policies and processes (including step-by-step breakdowns), which should also be posted in communal and other public spaces in immigration detention centers. Reports should be made public on actions taken in response to complaints. If a person has voluntarily identified him or herself in the complaint as the complainant, then this person should be kept notified of all updates and any results of the investigation, to include disciplinary measures (where warranted) applied to personnel.

9. *Investigate allegations of sexual abuse at Karnes and punish those public servants or those acting on behalf of the government (at Karnes, GEO Group employees) where wrongdoing is found.* Such investigation and relevant judicial and/or disciplinary proceedings should be made public. The Commission also recommends that the numbers of women personnel and specifically women guards at Karnes should be increased.

10. *Ensure that, in the extraordinary case in which family immigration detention is deemed warranted, such detention is in the least restrictive setting possible and that the conditions of detention are improved.* The detention facility should strive to provide a favorable environment for child development. In line with

its recommendation in its 2011 report on the United States, the Commission recommends that the custody of the family should be with ORR-HHS not ICE.[273]

B. Recommendations for Unaccompanied Children from Mexico

231. As applied specifically to the case of unaccompanied children from Mexico, the Commission would remind the State of its obligation to comply with the right to seek and receive asylum, as established in Article XXVII of the American Declaration; the principles of *non-refoulement*, *non-refoulement* at borders, the best interests of the child; and the obligation to carry out all immigration control policies in conformity with human rights standards. Throughout this report, the IACHR has documented that the biggest obstacle faced by unaccompanied children from Mexico upon arrival to the United States is accessing mechanisms of international protection or other types of relief from deportation available under U.S. law.[274] As outlined above, the Commission observed that this obstacle is created by a number of factors, among them U.S. border agents' misapplication of the law (in placing the burden upon Mexican children to prove at the border their case for asylum or relief in the United States), lack of training of U.S. border agents on the identification of trafficked children, the practice of turn-backs in collaboration with Mexican officials, and the terms of the bilateral agreement between the U.S. and Mexico regarding the return of Mexican nationals.

232. In this regard, the IACHR offers the following, specific recommendations with a view to contributing to the protection of Mexican unaccompanied children's human rights upon arrival and/or apprehension by U.S. authorities. The IACHR recommends to the United States that it:

11. *Apply the legal framework that the State applies to unaccompanied children from non-contiguous countries to all arriving unaccompanied children, without distinction.* Having different legal regimes for unaccompanied children based solely on country of origin is *discriminatory* and, in the case of unaccompanied children from Mexico, may be unjustifiably and disproportionately impeding access to mechanisms of protection.

12. *Conduct trainings for border agents on human rights and how to interact with vulnerable populations in the conduct of human mobility.* Such trainings must seek to ensure that officers understand the risks particular to Mexican unaccompanied children, such as forced participation in drug or human smuggling and human trafficking rings controlled by organized *crime* groups, as well as how to identify signs that a child may be trafficked. Trainings should be conducted with regularity, to ensure that the legal regime remains fresh and to serve as a space where agents can ask questions that arise in the line of duty.

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273 IACHR, *Report on Immigration in the United States: Detention and Due Process*, para. 448.

274 Once an unaccompanied child from Mexico passes this first screening on the border, he or she is treated as an unaccompanied child from a non-contiguous country. As such, the Commission's concerns for both Mexican unaccompanied children and unaccompanied children from elsewhere are shared and can be found in section (C), below.

13. *Place the responsibility to screen Mexican unaccompanied children (and all other unaccompanied children) for potential protection needs with a specialized, independent agency.* Any determinations on whether a child may have protection needs should be made by an entity that has expertise in working with children (i.e., staff is well-trained on children's rights, developmental needs, and how to work with child survivors of violence and other trauma, etc.). Children should be transferred to child-appropriate facilities without delay where the screening should take place by staff of this specialized unit. These facilities should provide children with a sense of protection and privacy. The screening should also be conducted in a way that takes into account the child's age, maturity, psychological development, language, gender, and needs. The specialized agency should be independent of CBP, and DHS generally, as the department's mission is to "ensure a homeland that is safe, secure, and resilient against terrorism and other hazards,"[275] and not to assess the potential protection needs of vulnerable populations arriving at the U.S.'s borders.

14. *Ensure the implementation of the obligation of non-refoulement in the case of Mexican unaccompanied children.* Failure to conduct a screening on the protection needs of arriving persons and summarily deporting them may constitute a collective expulsion of non-citizens, which is prohibited under international law.

15. *Immediately end the practice of turn-backs and U.S. support for them in other countries.* Turn-backs hamper the *access* of persons who may need protection from arriving and entering U.S. territory and may constitute a violation to an individual's human rights or place a person at risk of having their human rights violated.

16. Allow civil society and other independent monitoring of the screening of Mexican children.

17. *Ensure that the best interests of the child are the primary consideration in any action taken in relation to the child, whether at the border, in custody arrangements, during immigration proceedings, or otherwise***.**

[275] U.S. Department of Homeland Security, "Our Mission," (last published date December 17, 2012), http://www.dhs.gov/our-mission.

C. Recommendations for Unaccompanied Children from Non-Contiguous Countries

233. In applying the outlined standards to the human rights situation observed with regard to the regime in place for unaccompanied children, the Commission commends the State for its efforts to respect and protect the child's right to personal liberty (Article I of the American Declaration), in attempting to minimize the time that a child spends in the custody of the State. The Commission urges the State to continue its practice of detaining unaccompanied children in centers like Saint PJ's while the State thoroughly investigates the suitability of potential sponsors.

234. Regarding the other rights protected under Article I and in relation to the complaint lodged on behalf of over 100 unaccompanied children during their custody under CBP, the Commission urges the State to promptly and thoroughly investigate these and all claims of abuse, and to prosecute and sanction those federal agents found to have violated the human rights of any of the unaccompanied children.

235. In addition to the State's international obligation to consider the best interests of the child at all stages, the Commission would point to the United States' own practice and longstanding tradition of incorporating the principle of the best interests of the child in other comparable contexts, such as family law, education law, and juvenile justice.

236. With regard to the State's obligation to ensure special protection to children under Article VII of the American Declaration, the Commission considers that the State should strive to improve its immigration procedures and operational practices in order to guarantee the fair and equal treatment of children. Children are in a situation of particular vulnerability, and may be at a significant disadvantage in immigration proceedings. In this regard, free legal representation and enjoyment of other due process guarantees are essential to ensure that children have access to the appropriate, substantive relief that may apply to them under U.S. law or international law.

237. The IACHR offers the following, more specific recommendations with a view to contributing to the protection of unaccompanied children's human rights upon and following arrival and/or apprehension by U.S. border officials. In this sense, the IACHR recommends to the United States that it:

18. Provide legal assistance at no cost to children for the gathering of documents and evidence, preparation of a defense, and representation at hearings before the immigration court.

19. Provide each child with a guardian ad litem to help him or her adjust to the United States as well as to assist the child in making decisions in line with the child's best interests.

20. *Modify immigration court proceedings to make them child-sensitive.* The Commission values the suggestions contained in OPPM Memorandum 07-01, but it recognizes that more changes and modifications must be made in order to ensure that a child may have effective participation in the proceedings initiated against him or her, that the child's interests are being taken into

consideration by the immigration judge, and that immigration judges and other authorities receive training on how to conduct proceedings in a child-sensitive way and on how to work with persons, including children, who have experienced trauma. The adjustments to ensure that children have due process should be made mandatory – i.e., judges should be required to modify proceedings where children are involved in accordance with the child's age, gender, development, and maturity level.

21. Ensure that the best interests of the child are the primary consideration in any action taken in relation to the child.

22. *Conduct periodic reviews of custodial arrangements of children.* Following transfer from HHS custody to that of a family member or a foster home, the State should conduct follow-up and random check-ins to ensure that the environment continues to be a safe and proper one for children.

23. *Guarantee that a family member(s), who is present in the US in an irregular migratory situation and with whom the unaccompanied child is residing for the duration of the immigration proceedings initiated against him or her, will not be deported or otherwise negatively affected by the proceedings concerning the child.* Despite evidence that the majority of unaccompanied children are attending their immigration hearings, the Commission believes that it is essential to provide more safeguards to family members and other caretakers present in an irregular migratory situation in the United States, so that children's immigration cases will not be negatively impacted and so that the child will have a stable home.

D. Shared Recommendations with regard to the Three, above-identified Groups

238. The Commission recommends that the State:

24. *Improve the conditions of detention for short term holding facilities and in longer-term immigration detention centers.* Such changes should include, among others, raising the temperatures in the so-called *hieleras* or holding facilities. If no component of DHS controls the temperature of the facility, then DHS should coordinate immediately with the entity that does, in order to ensure that the rooms are maintained at appropriate temperatures for persons who may have been walking in the desert or extremely hot weather for days prior to apprehension. The Commission recommends that State agents be more sensitive to the particular needs of persons detained in their custody and provide blankets or outer layers of clothing. The State should require all holding facilities to have mattress pads or cots on hand to accommodate over-night stays, and shower or bathing facilities should be added to all holding facilities immediately. Lastly, officials should turn the lights down at night, so that detained persons are able to sleep.

25. *Ensure that persons detained in all holding facilities and immigration detention centers are provided with plenty of clean, potable water as well as healthy, nutritious food on a regular basis (three meals a day).*

26. *Provide on-going trainings for U.S. border officials on how to deal with children and adults who have experienced trauma.*

27. *Improve access to medical services, treatments, and medications or health aids in all holding facilities and immigration detention centers immediately.*

28. *Ensure a private and comfortable space for initial screenings and processing with CBP agents, due to the personal nature of the questioning.*

29. *Investigate all claims of abuse against U.S. officials and any private contractors acting on their behalf.* Ensure that the investigation is carried out by an independent agency, not affiliated or part of DHS, and *those* agents who have been found to have violated the rights of a detained person appropriately sanctioned. This process should be transparent, in which the detainee reserves the right to file a complaint against the agent in federal court.

30. *Conduct all deportations during daylight hours under all circumstances and in a respectful and dignified manner.* Officials should refrain from handcuffing children and adults during deportation processes unless absolutely necessary due to an individual, demonstrated risk presented by a person.

31. *Assist and collaborate with countries of origin to conduct monitoring and follow-up* to ensure that *repatriated* families and unaccompanied children are not placed in greater danger due to their return to host communities, where many of the push factors may still be exerting themselves.

E. Recommendations with regard to the U.S. Immigration System

239. The Commission recommends that the State:

32. *Adopt measures to facilitate the regularization of the situation of persons in an irregular migratory situation in the United States.* The Commission commends the executive action announced by President Obama on November 20, 2014, and encourages the United States' Congress to pass a comprehensive reform on its immigration laws, allowing for the regularization of migrants who have benefitted from this executive action as well as other groups *that* should be included. Any such enacted measures should take into consideration factors such as the circumstances under which the person in an irregular migratory situation entered the United States, the duration of his or her presence in the country, in addition to other pertinent considerations, such as strong familial or communal ties and contributions to society.

33. *Provide additional assistance, financial and otherwise, from the federal government to states that have received unaccompanied children and families.*

34. Facilitate greater and more regular communication between DHS and the consulates of concerned countries so as to improve consular access and notification.

35. *Grant an automatic stay of removal proceedings or a removal order in cases where unaccompanied children or families have filed lawsuits against U.S. immigration officials* for alleged abuses, mistreatment, or other causes, so that he/she/they may have access to justice. Removal to a third-country while proceedings outside of the immigration context are ongoing severely inhibits the participation of the claimant and may deprive the person(s) of access to a remedy through the courts.

F. Recommendations with regard to Regional Collaboration

240. While the Commission recognizes that the United States bears primary responsibility for guaranteeing the observance and protection of the human rights of the persons who compromise the mixed migration flows that enter its territory, the Commission also recognizes that the countries of origin, principally Mexico, El Salvador, Guatemala, and Honduras, must work as its partners in tackling the risk and hardship factors that caused the migrants to uproot themselves. In this regard, the Commission recommends that the States of the region:

36. *Provide the means so that persons are able to migrate through regular channels and not in violation of the State's immigration laws.* States should work together to adopt all the policies, laws, and practices necessary to guarantee the individual's right to migrate in a safe and orderly manner and to comply with the other international obligations pertaining to the protection of the human rights of migrants who leave, travel through or are headed for their territory. Co-responsibility of States in managing migratory movements shall, under no circumstances, mean that States are derelict in the obligations they have to persons within their jurisdiction.

37. *Adopt the policies and measures necessary to address the risk and hardship factors that caused their citizens to migrate elsewhere.* It is vital that conditions of inequality, poverty, violence, and discrimination be addressed.

38. Develop regional instruments and mechanisms to combat the criminal activities of transnational organized crime groups involved in the abduction of migrants, human trafficking, and the smuggling of migrants.

241. In concluding this report, the Inter-American Commission would like to thank all those persons who assisted in its preparation and drafting, including the many organizations of civil society, immigration advocates, experts, and individuals who supplied valuable time and information. The IACHR also once again expresses its appreciation to the government of the United States of America for its many efforts in facilitating this visit and for its detailed observations that contributed to the report's overall findings.

242. In light of the contents of this report and in following up on the hearing celebrated in its 153rd period of sessions on the human rights situation of migrant and refugee

children and families in the United States, the Commission proposes to the State that together the IACHR and the United States create a working group with civil society stakeholders in order to sustain the dialogue on the issues raised within and those that crop up in the future. The Commission places itself at the disposition of the State to explore this possibility.

243. The IACHR reminds the State that it must comply fully with international human rights obligations under the American Declaration, as interpreted and developed by the Inter-American human rights system. The IACHR looks forward to following-up with the State on the implementation of its recommendations within the framework of its functions and competencies and places itself at the disposition of the State for any collaboration or advice to that effect.