



AMERICAN UNIVERSITY

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CLINICAL PROGRAM

February 16, 2012

Inter-American Court of Human Rights
Pablo Saavedra-Alessandri
Secretary of the Court,
Apdo. 6906-1000
San José, Costa Rica

RE: CDH-OC-21/305

Dear Secretary Saavedra-Alessandri,

Enclosed please find a memorial on the *Request for an Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights*, addressing the detention of unaccompanied migrant youth in the United States. This memorial is submitted to the Inter-American Court of Human Rights on behalf of the Women's Refugee Commission, Kids in Need of Defense, and the National Center of Refugee and Immigrant Children. It is in support of the request of Argentina, Brazil, Uruguay, and Paraguay for a determination of minimum standards of treatment as per the American Convention on Human Rights and the American Declaration of Rights and Duties of Man.

Ongoing representation of WRC, NCIRC, and KIND will be provided by me, as director of the Clinic, or by Prof. David Baluarte, another faculty member in the Clinic. Law student interns Regina Verret and Anna Maitland prepared this submission, with my oversight. Dean's fellow Maria Leoni Zardo prepared the translation. Please direct future correspondence from the Court to my attention.

This memorial was submitted by electronic copy to <corteidh@corteidh.or.cr> on February 16, 2012 in Spanish and English.

Sincerely,

Prof. Richard J. Wilson

Enclosures

Richard J. Wilson
Professor of Law and Director
International Human Rights Law Clinic
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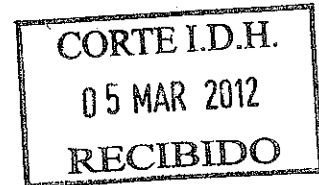
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WASHINGTON, DC

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INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE MATTER OF

REQUEST FOR ADVISORY OPINION

ON MIGRANT CHILDREN BEFORE THE INTER-AMERICAN COURT

OF HUMAN RIGHTS, SUBMITTED BY ARGENTINA, BRAZIL,

URUGUAY, AND PARAGUAY

MEMORIAL OF ORGANIZATIONS WORKING ON DETENTION RIGHTS OF UNACCOMPANIED MIGRANT
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*Counsel for Submitting
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I. INTEREST

This memorandum is submitted on behalf of the Women's Refugee Committee, the National Center for Refugee and Immigrant Children, and Kids in Need of Defense, all organizations focused on the rights of unaccompanied migrant children in the United States. The Women's Refugee Commission ("WRC") advocates to protect the rights of vulnerable migrants, including unaccompanied minors, in the United States through legislative and administrative advocacy. WRC researches conditions of immigration detention by conducting regular monitoring visits to places of detention throughout the country and interviewing detainees. WRC uses the information gathered through this research to devise and recommend appropriate changes that respect the rights of the most vulnerable migrants. The National Center for Refugee and Immigrant Children ("NCRIC") is a program of the U.S. Committee for Refugees and Immigrants. NCRIC provides pro bono legal and social services to unaccompanied migrant children throughout the United States. It also conducts trainings and disseminates information on working with immigrant children, with a focus towards ensuring that unaccompanied migrant children receive legal and social services conducive to navigating the United States immigration system. Kids in Need of Defense ("KIND") finds compassionate and dedicated pro bono attorneys in major law firms and corporations to represent unaccompanied children in removal proceedings. KIND has field offices in seven cities in the United States, and works to change law, policy, and practice to improve the care and treatment of these uniquely vulnerable children.

II. INTRODUCTION

Thousands of youth under the age of 18 migrate to the United States without documentation every year.¹ They come in search of family or opportunity, while others flee abuse and persecution, including by gangs, abandonment and other threats to their lives.² Thousands of additional children become unaccompanied when their parents are deported and they are left behind.³ Children seeking to cross borders are at special risk to trafficking, abuse, and other forms of victimization.⁴ Once they enter the United States, they may remain in a state of heightened vulnerability as they seek to stay hidden from authorities while finding family or work.⁵ Once detained, they often do not know their legal rights and some may even face abuse and mistreatment while detained.⁶

In 2009 alone, over 40,000 children were apprehended by the Department of Homeland Security (“DHS”) while attempting to enter the United States.⁷ Many other children are apprehended within the United States each year. Of the 40,000 children apprehended, approximately 6,000

¹ NCRIC estimates that as many as 85,000-115,000 children without documentation enter the United States each year.

“Migrant” here refers to the Commission’s use of the term, which is interchangeable with immigrant, and means an undocumented or unauthorized person who is not in his or her country of citizenship. Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II., Doc. 78, p. 18 (Dec. 30, 2010).

² Amanda Levinson, *Unaccompanied Immigrant Children: A Growing Phenomenon with Few easy Solutions*, MIGRATION INFORMATION SOURCE, available at <http://www.migrationinformation.org/Feature/display.cfm?id=823> (last visited Nov. 17, 2011).

³ See generally WOMEN’S REFUGEE COMMISSION, *TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION* (2010).

⁴ National Center for Refugee and Immigrant Children, U.S. Committee for Refugees and Immigrants, <http://www.refugees.org/our-work/child-migrants/about-ncric.html> (last visited Nov. 17, 2011).

⁵ Susan Ferris, *Border Patrol Scrutinized for Tactics with Minors Crossing into the U.S.*, CENTER FOR PUBLIC INTEGRITY, http://www.tucsonsentinel.com/nationworld/report/090211_immigration_children/border-patrol-scrutinized-tactics-with-minors-crossing-into-us/ (last visited Nov. 25, 2011).

⁶ *Id.*

⁷ LESLEY SAPP, FACT SHEET: APPREHENSIONS BY THE U.S. BORDER PATROL: 2005-2010, 2 (July 2011).

unaccompanied migrant children were transferred into the care and custody of The Department of Health and Human Services (“HHS”).⁸ Without a parent or a guardian to advocate on their behalf, these children must navigate the immigration system on their own, with little to no help. Children’s due process rights are compromised by the lack of legal advocates in an immigration system designed for adults. Moreover, the United States overuses restrictive detention and underutilizes diversionary methods.⁹ Despite numerous advances in the treatment of unaccompanied children in the United States, including increased use of foster care and transferring care to the more age appropriate services provided by HHS, serious problems with legal representation and the process of detention remain.

This memorial on the *Request for an Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights* will focus on the detention of unaccompanied migrant youth in the United States. For this purpose, it will focus solely on questions 2-6 of the submitting parties, and address briefly the key issues identified as preventing these children from accessing their full rights. The WRC, the NCRIC, and KIND ask that the Court consider these rights in particular should the Advisory Opinion be issued:

- Limited use of Detention and Protections During Detention

⁸ ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF REFUGEE RESETTLEMENT-DIVISION OF UNACCOMPANIED CHILDREN’S SERVICES, DHS UAC APPREHENSIONS PLACED IN ORR/DUCS CARE, FY 2009 BY STATE *available at*

http://www.acf.hhs.gov/programs/orr/programs/FY2009UAC_ApprehensionsMap.pdf.

⁹ *See generally* WOMEN’S REFUGEE COMMISSION & ORRICK HERRINGTON & SUTCLIFF LLP, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY* (2009) [HALFWAY HOME]; THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO & CHICAGO APPLESEED FUND FOR JUSTICE, *VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT*, 16, 54 (2005).

- Detention of unaccompanied migrant children remains common in the United States. Alternatives to detention should be used wherever possible consistent with Articles 1, 7, 8, 19, and 29 of the American Convention on Human Rights (“American Convention”), and article 25 of the American Declaration of Rights and Duties of Man (“American Declaration”).¹⁰
- The use of overly restrictive detention measures remains a key feature of United States practices concerning unaccompanied migrant children. As detention should be a last resort, for the shortest period possible, and this Court has determined that detention cannot be used as a punitive measure against migrants, these policies violate Articles 1, 2, 7, 8, 19, 22, 25, and 29 of the American Convention and article 1 and 25 of the American Declaration.
- Due Process
 - The United States officials apprehending children, especially along borders, are often the same ones charged with screening them to determine if they are being trafficked or have fear of persecution if they are returned to their home country. They are not child welfare experts and receive minimal training in identifying at-risk children. This often results in inadequate screening and can inhibit children from being able to claim asylum or seek protection from traffickers or other abusers. Further, pressure to accept removal before fully understanding their right to seek asylum or other legal relief can cause children to return to dangerous and

¹⁰ American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, 9 I.L.M. 673; American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, at 38; reprinted in Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979); 1 Annals of the O.A.S. 130 (1949); Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); and 43 Am. J. Int'l L. Supp. 133 (1949).

life threatening circumstances. This results in a violation of non-refoulement, protected under article 22 of the American Convention and article 27 of the American Declaration.

- Unaccompanied migrant children are not guaranteed access to representation by counsel at government expense. Many lack even the minimal protection of a guardian *ad litem* and they must navigate an immigration system designed for adults alone. This violates article 8 of the American Convention.
- Furthermore, the United States is relying on the use of video conference court proceedings for some detained children. Prevention of in-person proceedings before a judge contravenes American Convention articles 1, 2, 7, 8, 19, and 25 and articles 1, 18, and 26 of the American Declaration.

III. Overview of United States Law

Immigration law in the United States is a function of the federal government. While states have begun to take a more active role in immigration enforcement, this is usually achieved through collaboration with the Department of Homeland Security agencies or linking state laws to federal requirements. The Immigration and Naturalization Act (“INA”) is the most important statute in the United States governing immigration. It determines who can enter the country, how they can enter, and under what circumstances they may be barred from entry or removed from the country.¹¹

¹¹ Deportable Aliens, 8 U.S.C.A. § 1227 (2008).

In 1996, the United States federal government was forced to amend its policies on the detention of unaccompanied migrant children as the result of the settlement of a lawsuit under the name of *Flores v. Reno*.¹² This settlement mandated the government to establish new policies and programs to protect the rights of children, including ensuring that migrant children be held in the “least restrictive setting appropriate to the minor’s age and special needs . . .”¹³ Further, the settlement required the United States government to promptly process and divert unaccompanied migrant children to child-specific settings, that children be explained their rights, and that minors be held in safe and clean facilities with access to food, water, and medical assistance if necessary.¹⁴ Later, the Homeland Security Act of 2002 required that the Department of Homeland Security transfer all unaccompanied migrant children to the Department of Health and Human Services’ custody.¹⁵ The William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”) of 2008 further requires the Department of Homeland Security to screen a child within 48 hours of apprehension and to determine whether the child might be admissible to the United States before attempting to return that child to their country of nationality.¹⁶

¹² Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996) [*Flores*]. There is a dearth of judicial decisions regulating immigration in the United States. The United States Supreme Court has generally taken a stance known as the “plenary powers doctrine,” finding that “Congress and the Executive branch have exclusive decision-making authority without judicial oversight for the constitutionality.” “Power and authority of United States, as attribute of its sovereignty, to either prohibit or regulate immigration of aliens, are plenary; and Congress may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt, and, so long as such agencies do not transcend limits of authority or abuse discretion reposed in them, their judgment is not open to challenge or review by courts.” See *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903). See, also, *Choy Gum v. Backus*, 223 F. 487, certiorari denied 239 U.S. 649 (1916).

¹³ *Flores*, *supra* note 12, IV ¶11.

¹⁴ *Id.*, V ¶12.

¹⁵ Homeland Security Act of 2002, 6 U.S.C.A. §462(g)(2) (2002).

¹⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2011, H.R. 7311, 110th Cong., 2nd Sess. (2008) §1232 [TVPRA].

The United States Homeland Security Act of 2002 (“HSA”) defines an unaccompanied alien child (“UAC”) as a child with no lawful immigration status in the United States, who is under the age of 18, and who is without a parent or legal guardian in the United States who can provide care and physical custody.¹⁷ As per this definition, legal safeguards for UACs apply to a narrow group, precluding such beneficiaries as children who are unaccompanied but have legal status.¹⁸ For the purposes of this submission, the focus will remain only on those children in the United States who qualify as UACs.

Two federal government bodies detain UACs in the United States: the Department of Homeland Security (“DHS”) and the Department of Health and Human Services (“HHS”). DHS is responsible for enforcing U.S. immigration law. The two enforcement agencies responsible for this task are the Immigration and Customs Enforcement (“ICE”) and the United States Border Protection.¹⁹ DHS is the agency that initially comes into contact with UACs in the course of their

¹⁷ The term ‘unaccompanied alien child’ means 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.

Children’s Affairs, 6 U.S.C. §279(g)(2) (2002).

For the purpose of this memorial, UAC will be used interchangeably with unaccompanied migrant child, unaccompanied migrant children, migrant children, and children.

¹⁸ While KIND provides services to children who may have an adult who could act as a guardian here in the United States, WRC has identified that some children with potential guardians are, problematically, not classified as UACs. *HALFWAY HOME*, *supra* note 9, p. 7.

¹⁹ For the purposes of this memorial, these agencies will all be included under the more general heading of DHS.

Homeland Security, <http://www.dhs.gov/files/programs/immigration-enforcement.shtm> (last visited on Nov. 21, 2011).

enforcement activities.²⁰ They are tasked with determining if the migrant child is under 18 and qualifies for the legal definition of “unaccompanied.”²¹ Once a migrant is found to be an UAC, DHS is legally required to transfer the care of the UAC to HHS within 72 hours of detention.²²

HHS houses the Office of Refugee Resettlement (“ORR”), which in turn oversees the Division of Children’s Services (“DCS”).²³ DCS was created in 2003 as part of an attempt to reform the treatment of unaccompanied children in the United States.²⁴ HHS has created a variety of custody options for unaccompanied migrant children, ranging from foster care to secure, jail-like facilities for children suspected of coming into conflict with the law.²⁵

HHS defines DCS’s mission as to “consider the best interests of the child in all decisions and actions relating to the placement of each” unaccompanied migrant child, whether in a facility or with a sponsored care provider.²⁶ These providers are supposed to ensure educational, mental

²⁰ U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, CBP’S HANDLING OF UNACCOMPANIED ALIEN CHILDREN 24 (2010) *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

²¹ *Id.*

²² *Id.* at 2.

²³ For the purposes of this memorial, these agencies will be referred to throughout under the general heading of HHS. UNACCOMPANIED CHILDREN’S SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm (last visited Nov. 21, 2011).

²⁴ Homeland Security Act of 2002, 6 U.S.C.A. §462(g)(2) (2002). In November, 2011 the United States Federal Register announced that the Department of Health and Human Services was renaming the Division of Unaccompanied Children’s Services (DUCS) as the Division of Children’s Services (DCS). Due to this recent change, many of the documents cited herein continue to reference DCS as DUCS. Department of Health and Human Services, 60 Fed. Reg. 218, 70149 (Nov. 10, 2011).

²⁵ Esperanza Immigrant Rights Project, http://www.esperanza-la.org/index.php?option=com_content&view=article&catid=9:for-immigrants&id=69:the-different-types-of-childrens-immigration-detention (last visited Nov. 21, 2011).

²⁶ Unaccompanied Children’s Services, Administration for Children & Families, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm (last visited Nov. 17, 2011).

health, and medical services, as well as case management and recreational services.²⁷ While the transfer of the child in custody to a human services agency is a vast improvement over past practices of holding migrant children in DHS custody, there remain significant systemic problems in implementing a child protection approach in the care and custody of unaccompanied migrant children in the United States. Many children remain in overly penal custody placement, are not given adequate educational opportunities, or have restrictions placed on their rights to due process.²⁸

While institutionalized facilities offer some educational opportunities, not all of them are subject to the same regulations or requirements as government-run public schools. Further, children are often not given any transcripts or similar documents upon release. This prevents children from advancing in accord with non-detained peers.²⁹ Moreover, if a child is eventually released to a family member in the United States, he or she is not given any document stating that he or she attained a certain level of competence in a subject or a list of the grades earned in his or her classes.

IV. Overview of International Law

Protections for unaccompanied migrant children are found in international instruments defining protections for migrant adults and resident children. Although not ratified by the United States, the Convention on the Rights of the Child (“CRC”) has been nearly universally ratified and

²⁷ *Id.*

²⁸ HALFWAY HOME, *supra* note 9, p. 18.

²⁹ *Id.*, p. 25.

provides a standard for detention of youth.³⁰ Specifically, Article 37 of the convention requires that states refrain from unlawful or arbitrary detention of a child, and that the detention be for the shortest appropriate period.³¹ It further requires that, when detained, children should be given legal assistance, should be treated with dignity while detained, and shall be separated from adults except under limited circumstances.³² Exceptional circumstances are the only reason to bar children from correspondence and visits with family.³³ Beyond Article 37, the CRC also provides a series of additional obligations to the child, including the right to be treated with dignity, recognition of the child's needs based on his or her age and best interests, and freedom from all forms of mental and physical abuse.³⁴ The Commission and the Court have found that the CRC obligations should be incorporated as an obligation to all state parties to the American Convention where the CRC is part of a "comprehensive international corpus juris for the protection of the child."³⁵

In addition to the CRC, three prominent international documents on detention of juveniles exist: the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Principles"), the United Nations Guidelines for the Prevention of Juvenile Delinquency ("Riyadh

³⁰ United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Nov. 25, 2011). While not a party, the United States Supreme Court has cited to the CRC twice in determining that children under 18 cannot be subject to the death penalty and that life sentences without parole cannot be imposed on children under 18 who have not committed a homicide. *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 78 U.S.L.W. 4387 (2010).

³¹ Convention on the Rights of the Child, art. 24, Dec. 12, 1989, G.A. Res. 44/25, art. 37(b), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989)[CRC].

³² The CRC allows children to be detained with adult family members. *Id.*, art. 37(b)

³³ *Id.*, art. 37 (b)(c).

³⁴ See Generally CRC, *supra* note 31.

³⁵ *Case of Villagrán-Morales et al ("Street Children") v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 63, para 194 (Nov. 19, 1999); This Commission also looks to United Nations declarations that define the obligations of the CRC. *Minors in Detention v. Honduras*, Case No. 11.491, Inter-Am. C.H.R., Report 41/99, para 72 (March 10, 1999).

Guidelines”), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“JDLs”). These principles set out a series of guidelines for the detention and protection of youth.³⁶ These guidelines also urge that detention be a last resort, and establish a series of protections that should be available to those children who are detained. These protections include the right to privacy, education, adequate psychological and physical medical care, freedom from corporal punishment, the right to legal assistance, and sufficient oversight for all detention facilities.³⁷ The Beijing Rules and the Riyadh Guidelines provide that the best interests of the child must be the primary concern of any form of detention,³⁸ while the JDLs urge detention as an extraordinary measure employed for the shortest possible amount of time.³⁹

Other international instruments that can be applied to the deprivation of liberty of migrants include the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which guarantees migrant workers and their families “the right to liberty and security of person.”⁴⁰ It also guarantees consular assistance and legal aid pending court or adversarial proceedings.⁴¹ Further, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the United Nations Convention Against Torture all guarantee specific rights to detained migrants, including unaccompanied children.

³⁶ See Generally Kristina Touzenis, *Human Rights of Migrant Children*, INTERNATIONAL MIGRATION LAW (2008).

³⁷ United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec. 14, 1990)[Riyadh Guidelines]; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990)[JDL Rules]; A/RES:40:33. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, A/RES/40/33 (Nov. 29, 1985)[Beijing Rules].

³⁸ Beijing Rules, *supra* note 37, art. 14.2; Riyadh Guidelines, *supra* note 37, art. 4 & 5.

³⁹ JDL Rules, *supra* note 37, art. 13.

⁴⁰ This Convention has not been ratified by the United States. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, art. 16, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

⁴¹ *Id.*

These rights include the right to be treated with dignity, freedom from torture and other inhumane treatment, non-refoulement, and due process.⁴²

The Inter-American Court and Commission on Human Rights have issued several decisions and reports relating to the detention of migrants and children. Article 19 of the American Convention establishes the right of children to protections specific to their age by their families, society, and the state.⁴³ The Inter-American Commission has found a violation of Article 19 where the state fails to “take all appropriate . . . measures to protect the child from all forms of physical or mental violence . . .”⁴⁴ In the 2003 Advisory Opinion on the Legal Status and Rights of Undocumented Workers, the Inter-American Court found that immigrants who have unlawfully entered another country cannot be treated solely as law-breakers, but must still be recognized as rights-holders.⁴⁵ Thus, basic human rights such as the right to dignity, due process, and non-refoulement still apply to migrants regardless of their status as illegal entrants.

The 2002 Advisory Opinion on the Juridical Condition and Human Rights of the Child (OC-17) in turn found that a legal measure, employed by the state, that affects minors, must be created according to the best interests of the child.⁴⁶ The best interests of the child were defined as a “regulating principle regarding children’s rights based on the very dignity of the human being,

⁴²The United States is a signatory to both the ICCPR and the UNCAT. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 7, 10, 21 U.N. Doc. A/6316 (Mar. 23, 1976) [ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 13, U.N. Doc. A/810 (Dec. 10, 1948) [UDHR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (June, 26, 1987).

⁴³American Convention on Human Rights, *supra* note 10, Art. 19.

⁴⁴*Quintanilla v. El Salvador*, Inter-Am. C.H.R., Report 6/94, para 3(d) (Feb. 1, 1994)

⁴⁵Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers’ Rights for the Hemisphere: A Comment on Advisory Opinion 18*, pg 550.

⁴⁶Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2, ¶¶58, 59 (August 28, 2002) [OC-17].

on the characteristics of children themselves, and on the need to foster their development . . .⁴⁷

This approach is consistent with the CRC, which asserts that custody and juvenile justice proceedings should be in the best interest of the child.⁴⁸ The Committee on the Rights of the Child has also asserted that, under the CRC, the protection of the best interests of the child includes the right to be heard directly and through a representative and that “best interests does not mean for the convenience of State’s Parties.”⁴⁹ Further, the Court affirmed in the OC-17 that children are full rights holders under the law, but need help in exercising those rights through the assistance of a parent or a guardian.⁵⁰ The CRC further asserts the right of children to actively participate in the fulfillment of their rights, specifically the right to be heard and represented.⁵¹ Thus, both the OC-17 and the CRC use a best interest of the child evaluation that includes a fundamental respect for the child’s involvement in his or her rights as well as his or her right to express his or her needs and preferences throughout state proceedings. Consistent with international law, the Court has found that depriving a child of liberty for immigration violations is only justified in the most extreme of circumstances. Further, the child is guaranteed due process rights as well as the assistance of a guardian to ensure access to his or her due process rights.⁵²

⁴⁷ *Id.* ¶56.

⁴⁸ CRC, *supra* note 31, articles 3, 9, 18, 20, 21, 37, 40.

⁴⁹ Gen. Comm. No. 10 Children’s Rights and Juvenile Justice, Committee on the Rights of the Child, Rep. on 45th sess. Jan. 15- Feb.4, 2007, UN Doc. CRC/C/GC/10 (April 25, 2007).

⁵⁰ *See Generally* OC-17, *supra* note 46.

⁵¹ CRC, *supra* note 31, art. 9 & 12.

⁵² Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II., Doc. 78, p. 18 (Dec. 30, 2010).

V. DISCUSSION

A. **The United States has failed to Optimize Alternative Measures for Unaccompanied Migrant Children where use of Detention in Secure Facilities should be a Last Resort**

Bryan, a 16-year-old from Honduras, was apprehended by DHS in 2011. While arresting him, DHS officers pushed him to the ground, causing him to cut his leg and lose his shoe. They did not let him retrieve his shoe before transporting him to a cold cell, where he was denied a blanket. Instead, Bryan was given some toilet paper, which he tried to use to keep himself warm by laying it on the ground to form a barrier between himself and the concrete floor. The only food he received while detained was still frozen and the DHS officers threw it on the floor when giving it to him.⁵³

Children are often first identified and detained by DHS. As seen in Bryan's story, this initial custody can be highly punitive or abusive.⁵⁴ Most facilities where children are kept by DHS are short-term holding cells along the U.S./Mexico border. Children report sleeping on the ground on bug-infested sheets in facilities purposefully kept cold.⁵⁵ Others are detained with adults, with no protections or supervision to ensure their safety.⁵⁶ Of great concern, the non-governmental

⁵³ Information provided by Women's Refugee Commission (Dec. 3, 2011).

⁵⁴ HALFWAY-HOME, *supra* note 9, p. 9-10; NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT TERM U.S. BORDER PATROL CUSTODY 5 (2011), *available at* <http://www.cultureofcruelty.org/wp-content/uploads/2011/09/CultureofCrueltyFinal.pdf>.

⁵⁵ "There are no appropriate sleeping accommodations for children in Border Patrol stations. Like adults, children sleep on cold floors, thin mats, plastic sheets, cement benches, newspaper or plastic boat beds." At some temporary shelters, children were not provided with sheets at all. When asked about this, Border Patrol responded that initially blankets were provided, but soon became infested with bugs. HALFWAY HOME, *supra* note 9, p. 10.

⁵⁶ *Id. at 9.*

organization No More Deaths has found that DHS officers often refuse UACs access to water and provide them with only the most basic sustenance while in detention.⁵⁷

HHS-sponsored facilities are considered “alternative measures” to DHS detention.⁵⁸ HHS has increased the use of foster care, created residential treatment centers, and reduced the use of some secure facilities.⁵⁹ However, despite efforts to minimize punitive detention practices, HHS still relies too heavily on jail-like facilities. Many of these secure facilities are located far from urban areas that would have appropriate legal and social services for these children.⁶⁰

HHS offers four main housing options. These options are based on a review for placement conducted by HHS and on the availability of a space in a facility, not on the proximity of the facility to where the child was detained or how close this shelter is to extended family or appropriate services.⁶¹ Foster care can be long-term or short-term, but remains the most limited option.⁶² Foster care programs range from short-term programs for children who are expected to

⁵⁷ NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT TERM U.S. BORDER PATROL CUSTODY 5 (2011), *available at* <http://www.cultureofcruelty.org/wp-content/uploads/2011/09/CultureofCrueltyFinal.pdf>

(explaining that children were more likely than adults to be denied water or given insufficient water).

⁵⁸ Citing to measures used in furtherance of “the best interests of the child.” U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES :OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED CHILDREN’S SERVICES http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm (*last visited* Nov. 25, 2011).

⁵⁹ HALFWAY-HOME, *supra* note 9, p. 14.

⁶⁰ “...despite the best efforts of a number of nonprofit organizations and pro bono services to provide legal representation to unaccompanied minors in detention, the sheer number of children, most of whom are in facilities far from urban centers, means that the majority receive no counsel at all.” Levinson, *supra* note 2.

⁶¹ For instance, to qualify for long-term foster care, the child must have been in detention for over four months, have a reasonable possibility to qualify to remain in the United States legally, and have a good behavior record. ESPERANZA IMMIGRANT RIGHTS PROJECT, http://www.esperanza-la.org/index.php?option=com_content&view=article&catid=9:for-immigrants&id=69:the-different-types-of-childrens-immigration-detention (last visited Nov. 21, 2011).

⁶² *Id.*

reunify with their families, and long-term foster care programs are for children who will likely gain some legal status and remain in the United States. Children in long-term foster care programs often attend public school along with their American peers.

Shelter care, in turn, is where the largest number of UACs are placed. These shelters generally offer limited educational opportunities, and offer counseling and medical care. Despite these efforts, not all counselors are qualified for the work and there is insufficient oversight of some of the facilities. Further, educational opportunities do not correspond to those outside the detention centers, preventing children from progressing with their age group.⁶³ Indicative of this, a large shelter in Los Fresnos, Texas holds classes for children for up to 5 hours a day. However, certified teachers do not teach these classes, nor do the classes conform to any formal educational requirements.⁶⁴ Some shelters allow children to enter and leave on their own, while others are “locked down” meaning they are closed facilities, often surrounded by barbed wire, and limit or monitor a child’s communication with anyone from the outside.

The most controlled placement is in the secure facilities and staff-secure facilities.⁶⁵ These facilities are designed like penal facilities, use restraining mechanisms such as handcuffs, require the children to wear jumpsuits common in American jails, and impose punitive measures such as solitary confinement against migrant children.⁶⁶ While these facilities are primarily for children believed to be a flight risk or a safety risk, placement in to these programs can be arbitrary. Secure and staff-secure facilities for UACs are often juvenile detention facilities used to house

⁶³ Information provided by Women’s Refugee Commission (Dec. 3, 2011).

⁶⁴ *Id.*

⁶⁵ Information provided by Women’s Refugee Commission (Dec. 3, 2011).

⁶⁶ HALFWAY HOME, *supra* note 9, p. 12, 27-28.

youth convicted of a crime.⁶⁷ In these facilities, many children complete a criminal sentence or rehabilitation and are slated for reunification with family, but instead get turned over to DHS, resulting in time in another secure, jail-like facility. Effectively, they serve time twice for one conviction. Other children sent to these facilities have never been convicted of a crime, nor is there any evidence that they are a danger to the community.⁶⁸

These facilities can be highly invasive of privacy and use harsh disciplinary measures. For example, while representing children in a secure facility, an attorney from NCRIC noticed that a number of children were being strip-searched after every meeting with their attorney, presenting a serious impediment and deterrent to the children's choice to access legal representation.

Because these facilities are often shared with juvenile detention facilities for non-immigrant youth convicted of crimes, they require non-criminal immigrant children to live in close proximity with juvenile delinquent offenders adjudicated for sometimes serious criminal behaviors.⁶⁹ Migrant children may be denied exercise privileges, may be restrained using handcuffs, or placed in isolation for extended periods.⁷⁰ This is inappropriate punitive detention, especially for a child who is only detained due to his or her irregular immigration status. The UN Special Rapporteur on the Human Rights of Migrants has urged that “the detention of migrants on the ground of their irregular status should under no circumstances be of punitive nature.”⁷¹

Where detention should already be a measure of last resort, and punitive detention is completely

⁶⁷ “Secure facilities are the highest level of restrictiveness in the D[]CS placement continuum. The D[]CS Manual considers secure placement to be appropriate for children ... charged with or convicted of a crime or adjudicated as delinquent....” HALFWAY-HOME, *supra* note 9, p. 57.

⁶⁸ Ferris, *supra* note 5.

⁶⁹ While a serious problem, only fraction of UACs are now held together with juvenile offenders. HALFWAY-HOME, *supra* note 9, p.35.

⁷⁰ HALFWAY-HOME, *supra* note 9, p.27-28.

⁷¹ Report of the Special Rapporteur on the Human Rights of Migrants, E/CN.4/2003/85, para. 54 (2002).

barred, staff-secure and secure facilities' detention is a serious violation of these international, regional and domestic laws. During a recent visit to a secure facility, WRC was told by staff that typical punishment for violation of any rules, including refusing to walk with your hands behind your back or resistance to 5:00 AM exercise sessions, included being kept alone in a cell for up to three days.⁷²

Question 3 of the Advisory Opinion requests a response to “The non-detention of children. Standards for the application of precautionary measures in a migratory proceeding” while Question 4 of the Advisory Opinion asks the court to respond to “Measures of protection of rights that do not entail restrictions on freedom.” The overuse of detention facilities for detained UACs in the United States where other options are, or should be made available, creates an environment that is adverse to the development of the child as an active and fully engaged member of the community.⁷³ Detention should be used as a last resort, and when it is necessary it should be in the least restrictive setting possible.

⁷² Information provided by Women's Refugee Commission (Dec. 3, 2011).

⁷³ Reintegration and active community participation are a focus of both international and domestic juvenile justice advocacy. The Convention on the Rights of the Child calls for community reintegration (Art. 40.1) and the promotion of the ability to “fully assume . . . responsibilities within the community” (Preamble). The Beijing Rules further call for the active promotion of the minors “meaningful life in the community” and urges strong community reintegration policies (Articles 6, 25, & 29). In the United States, the Juvenile Justice and Delinquency Prevention Act of 2002 (JJDP A) calls for juvenile detention programs and facilities that help the minor become a “responsible and productive member” of the community (§5601). While none apply specifically to UAC detention, the protections governing detention of youth generally can be extended to UAC detention. Convention on the Rights of the Child, art. 24, Dec. 12, 1989, G.A. Res. 44/25, art. 37(b), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989); A/RES/40:33. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, A/RES/40/33 (Nov. 29, 1985); The Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C 5601 (2002).

B. The United States Government Agencies and Policies Fail to Ensure Adequate Care in Detention Facilities, Violating Due Process and Basic Human Rights of Unaccompanied Migrant Children.

Due to a lack of facilities, money and capacity, detained UACs are sometimes placed in juvenile detention centers.⁷⁴ Further, HHS policy allows children who have not been convicted of a crime to be placed together in a secure facility with those who have, where they “(i) [have been] charged with or convicted of a crime or adjudicated as delinquent; (ii) ... have committed or threatened acts of crime or violence while in DCS custody; (iii) ... have engaged in unacceptably disruptive acts; (iv) ... are a flight risk; or (v) ... need extra security for their own protection.”⁷⁵ Under this rule, children who are not currently or who have never been convicted and sentenced to jail time as the result of a crime are housed with those who have been. This can be quite dangerous for children who are housed with violent offenders, and can cause further psychological harm to children who have already suffered greatly when coming to the United States. Disturbingly, this policy allows children who are on suicide risk to be placed in secure and staff-secure facilities alongside youth in conflict with the law.

The Inter-American Commission has stated that “[p]ersons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges.”⁷⁶ Detention in this type of institution is incompatible with basic human rights guarantees. A clear example of this indiscriminate placement in secure facilities is the case of Jacob. Local police arrested Jacob, who suffers from mental disabilities, with a group of boys.

⁷⁴ HALFWAY-HOME, *supra* note 9, p.12, 13.

⁷⁵ See HALFWAY-HOME, *supra* note 9, *DUCS Displacement Procedures and Conditions*, p. 57.

⁷⁶ INTER-AM. COMM’N H.R., REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS, 25, (2010) *available at* <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.

The government learned he had no lawful immigration status and transferred him to HHS custody before he was ever criminally charged. He has no family in his home country or the United States, and despite having no criminal conviction and a high needs disability, he was detained in one of HHS's most secure facilities. Luckily, Jacob was able to get legal status and be released from the jail-like facility through the help of a free legal aid attorney.⁷⁷

Unaccompanied migrant children are not always provided with adequate medical and psychological assistance, and are not always provided with educational opportunities that meet their needs.⁷⁸ The lack of psychological counseling can influence a child's custodial experience, contributing to bad behavior while detained, or making it hard for him or her to connect to foster parents.⁷⁹ It can further impede the child's ability to communicate honestly with his or her legal advocate.⁸⁰ Medical care can also be insufficient or applied latently in some detention facilities, most especially care offered during the DHS detention period.⁸¹

Distressingly, multiple allegations of sexual and physical abuse have been raised against detention facility staff.⁸² While some U.S. facilities have responded to allegations with efficiency and insight, including the adoption of special counseling measures for all children in the facility,

⁷⁷ Information provided by Women's Refugee Commission (Dec. 3, 2011).

⁷⁸ HALFWAY-HOME, *supra* note 9, p. 16.

⁷⁹ *Id.*

⁸⁰ Levinson, *supra* note 2.

⁸¹ HALFWAY-HOME, *supra* note 9, p. 6.

⁸² CATHERIN RENTZ, LOST IN DETENTION, <http://investigativereportingworkshop.org/investigations/immigration-detention/story/new-documents-detail-sex-abuse-detained-immigrants/> (last visited Nov. 25, 2011); DAVID KAISER & LOVISA STANNOW, IMMIGRANT DETAINEES: THE NEW SEX ABUSE CRISIS, <http://www.nybooks.com/blogs/nyrblog/2011/nov/23/immigrant-detainees-new-sex-abuse-crisis/> (last visited Nov. 25, 2011).

others have failed to even respond to the allegations.⁸³ An especially egregious case occurred at a Texas facility, where, despite numerous reports by children in the facility of physical abuse, the federal government was slow to respond. Though this detention facility was eventually closed, it is clear that the federal government exercised insufficient oversight of this detention facility.⁸⁴ Moreover, in a preliminary draft of the Prison Rape Elimination Act regulations, intended to protect those in U.S. government custody from sexual assault, immigration detainees, including children in HHS custody, were excluded from protections.⁸⁵

In Question 5, the requesting States asked that an Advisory Opinion provide information on “State obligations in the case of custody of children based on migratory reasons.” As established in the OC-17, detention of children must meet standards set by authorities “in the areas of safety, health, in the number and suitability of their staff, as well as supervision.”⁸⁶ The deprivation of basic detention rights is not only a violation of children’s rights found in the CRC and the JDL principles, but also of the IACHR Principles and Best Practices of People Deprived of Liberty in the Americas, among other instruments or norms of international law.⁸⁷

⁸³ HALFWAY-HOME, *supra* note 9, p. 27-28.

⁸⁴ *Id.* at 25-26.

⁸⁵ National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, (Feb. 3, 2011) (to be codified at 28 C.F.R. part 115), DOJ Access, available at http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf.

⁸⁶ OC-17, *supra* note 46, para. 78.

⁸⁷ INTER-AM. COMM’N H.R., PRINCIPLES RELATED TO THE CONDITIONS OF DEPRIVATION OF LIBERTY (2008) *available at* <http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>.

C. Protections of Migrant Children in Detention are Inadequate Because Due Process Guarantees and Free Representation are not Ensured

UACs are rarely in the position to navigate a legal system unassisted and may be unable to access their full due process rights without any guidance from an attorney or guardian *ad litem*.⁸⁸ While UACs do have a legal right to an attorney, the United States government does not provide one at government expense. Many children are not notified of their right to seek asylum when they fear return to their country of origin.

Under the 2008 TVPRA, DHS agents encountering unaccompanied migrant children from contiguous countries trying to enter the U.S. are now required to screen children who may be trafficked or fearful of returning home.⁸⁹ However, DHS' law enforcement branches receive minimal training on this new screening system, which has caused the TVPRA changes to be insubstantial in protecting vulnerable children.⁹⁰ Overall, DHS officers have been found to be inadequately trained, have limited child welfare expertise, and often use screening techniques that are insufficient to detect whether a child is a victim of trafficking or abuse.⁹¹ Instead of relying on armed and uniformed law enforcement agents to conduct the screenings of the children they have apprehended, which can be intimidating and deter the children from fully sharing their experiences, the children should be screened by child welfare experts who have not participated in their apprehension and detention.⁹² Many border agents report never encountering in their entire career an

⁸⁸ HALFWAY-HOME, *supra* note 9, p. 5-7, 23, 24.

⁸⁹ TVPRA, *supra* note 16.

⁹⁰ APPLESEED, CHILDREN AT THE BORDER REPORT: THE SCREENING, PROTECTION, AND REPATRIATION OF MEXICAN MINORS, 12, (2011) available at: <http://appleseednetwork.org/LinkClick.aspx?fileticket=8PM-o8WHN1Q%3D&tabid=157>.

⁹¹ *Id.*

⁹² *Id.* at 33.

asylum seeker or victim of trafficking, leaving advocates worried their inadequate training on screening has left many victims unidentified.⁹³

Some UACs accept voluntary return to their home country based on insufficient and poorly communicated information by DHS immigration officials.⁹⁴ Without some form of guardian, children often have no one to advocate for their best interests throughout the detention process, further inhibiting the child's right to due process.⁹⁵ Generally, asylum seekers who have legal representation have higher rates of success versus unrepresented parties.⁹⁶ The protection of legal representation is especially important for children, who may not be able to understand the immigration process, the forms of relief for which they may be eligible, or be able to read and comprehend the necessary paperwork.

A number of HHS facilities rely on video conferencing for the children's court hearings instead of transporting them to attend their hearings in person. Video conferencing can come with a myriad of problems including, but not limited to, exacerbation of interpretation and technological issues.⁹⁷ Even if an unaccompanied migrant child has legal representation, the child is severely

⁹³ U.S. Government Accountability Office Report to Congressional Requesters *BORDER SECURITY Additional Steps Needed to Ensure That Officers Are Fully Trained*, December 2011, available at <http://www.gao.gov/products/GAO-12-269>.

⁹⁴ HALFWAY-HOME, *supra* note 9, p. 5-7.

⁹⁵ NATIONAL CENTER FOR REFUGEE AND IMMIGRANT CHILDREN, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, <http://www.refugees.org/our-work/child-migrants/about-ncric.html> (last visited Nov. 17, 2011).

⁹⁶ TRAC IMMIGRATION: ASYLUM DENIAL RATE REACHES AN ALL TIME LOW: FY 2010 RESULTS , A TWENTY-FIVE YEAR PROSPECTIVE available at <http://trac.syr.edu/immigration/reports/240/> (last visited January 18, 2012).

⁹⁷ THE LEGAL ASSISTANCE FOUNDATION & CHICAGO APPLESEED FUND FOR JUSTICE, VIDEO CONFERENCING IN REMOVAL PROCEEDINGS: A CASE STUDY IN CHICAGO IMMIGRATION COURT, 54 (2005) available at <http://appleseeds.net/Portals/0/Documents/Publications/Center%20Pubs/Chicago%20Videoconferencing%20Report.pdf> [VIDEO CONFERENCING IN REMOVAL PROCEEDINGS].

restricted from communicating with his or her attorney when the hearing is conducted through video conferencing. Furthermore, video conferencing impedes a child from effectively presenting his or her case.⁹⁸ Unaccompanied migrant children should have the option to opt out of a video conference and be granted a chance to state their case through physical presence in the court.

Organizations such as the NCRIC and KIND work to ensure that children, and especially UACs, are provided with pro bono attorneys and other forms of aid such as “Know Your Rights” presentations, to help children navigate the complex U.S. legal system. While KIND and NCRIC are able to help many children, their services rely on the availability of volunteer attorneys. Without a system in which children are guaranteed a pro bono attorney, many children go through the system without counsel, as the demand far outweighs volunteer availability. Without representation, a child could be pressured by a DHS official to make a choice that is contrary to his or her own interests. This includes convincing children to agree to immediate deportation, sharing information with HHS and other service providers, and in some instances, using children to help them identify other undocumented immigrants and traffickers.⁹⁹ Most children in immigration proceedings are unable to present their case for immigration relief without counsel and may be returned to their home country as a result, where their well-being, or even their lives, may be in danger. Minimal protections, such as ensuring children benefit from the aid of a guardian *ad litem*, or appointed counsel, would help these children through the complex legal process and go a long way to ensuring their due process rights are respected.¹⁰⁰

⁹⁸ VIDEO CONFERENCING IN REMOVAL PROCEEDINGS *supra* note 97, p. 56.

⁹⁹ HALFWAY-HOME, *supra* note 9, p. 5-10; Ferris, *supra* note 5.

¹⁰⁰ WRC has identified an innovative and effective pilot program called the Immigrant Children’s Advocacy Project (“ICAP”), which works to ensure the rights of UACs by appointing a Guardian *ad*

The Submitting States ask the Court to address Question 2, “System of due process guarantees” as well as Question 6, “Due process guarantees before measures that entail restrictions on the personal freedom of children based on migratory reasons.” Due process guarantees for detained children would include guarantees by the government to a lawyer free of charge; the right to be informed of all rights, in a language and format that the child can understand; and adequate consideration of the best interests of the child. It would further include the right to appear before a judge in person to have their cases heard.¹⁰¹ Without guarantees to basic due process rights, with special protection for children, unaccompanied migrant children remain vulnerable to systematic rights’ abuses.

VI. CONCLUSION

In light of the above discussion WRC, KIND, and NCRIC join the submitting States in requesting that the Court issue an Advisory Opinion addressing the application of the American Convention and American Declaration to:

- **Question 2: What are the specific due process guarantees that should govern the immigration proceedings in which migrant children are involved?**

Litem to kids. Most importantly, it helps ensure children placed outside of institutionalized detention are in secure and healthy situations. However, this program is limited in size and reach. Until the U.S. actively funds and encourages the growth of alternative programs such as ICAP, diversion will likely be unattainable. *HALFWAY-HOME*, *supra* note 9, p.24.

¹⁰¹ EOIR, INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 04-07: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN (Sept. 16, 2004) *available at* <http://www.justice.gov/eoir/efoia/ocij/oppm04/04-07.pdf>. *See* VIDEO CONFERENCING IN REMOVAL PROCEEDINGS *supra* note 97.

- We request that the Court find that, consistent with the American Convention, all States guarantee the right to representation by a qualified professional, increase access to such representation, and require that States offer free representation to unaccompanied migrant children.
- **Question 3: In what way should the principle of detention as a last resort be interpreted in the framework of immigration proceedings for Unaccompanied Migrant Children?**
 - The United States has passed many positive laws to ensure that UACs have more protection and access to better services. However, these laws remain poorly implemented or inadequately enforced. In addition, the interpretation of what constitutes detention versus protection is unclear. For this reason, we ask that the Court clarify the parameters of what constitutes detention, and urge all States to fully implement and enforce laws that have been put into place for the protection of unaccompanied migrant children, thereby ensuring compliance with the duties owed to child migrants.
- **Question 4: Under what circumstances are restrictions on freedom for migrant children allowed and where are adequate alternative measures required for protection of the rights of the child? Further, what due process guarantees must be offered to migrant children in the decision-making process regarding alternative measures to detention?**
 - We ask that the Opinion prioritize the need for migrant children who require detention to be held in locations that have easy access to services such as legal

aid, social services, including mental health care, and education opportunities, as well as access to the nearby community and community services.

- We further ask that the Court address issues related to housing migrant children on the border, thereby limiting their access to the above mentioned vital services.
- We further ask that the Opinion set minimum standards under which children may be detained.

- **Question 5: What are the basic conditions that accommodation facilities for unaccompanied migrant children must satisfy?**

- Specifically, we request that the Opinion encourage the use of less restrictive and alternative forms of detention of migrant children, including emphasizing foster care and family reunification.

- **Question 6: What are the due process guarantees that should govern immigration and custodial proceedings for migrant children?**

- We request that the Opinion encourage greater collaboration with civil society organizations that can provide unaccompanied migrant children with much needed advocacy and services they might not otherwise know about or have access to.
- We request that the Opinion determine if due process guarantees are violated by denial of in-person hearings before a judge, as opposed to video conferencing.

Respectfully Submitted

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