

## Running into the Arms of Expatriation: America's Failure Addressing the Rights of Unaccompanied Migrant Children From Central America

Rebeca Garcia Gil

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>

---

### Recommended Citation

Rebeca G. Gil, *Running into the Arms of Expatriation: America's Failure Addressing the Rights of Unaccompanied Migrant Children From Central America*, 32 Md. J. Int'l L. 346 (2017).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol32/iss1/13>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Running into the Arms of Expatriation: America's Failure Addressing the Rights of Unaccompanied Migrant Children From Central America

REBECA GARCIA GIL<sup>†</sup>

## INTRODUCTION

Kendra and Roberto crossed the Rio Grande alone and, when their tiny boat reached the shore, they started walking into Texas.<sup>1</sup> They were seven and ten years old, respectively. For three months, they walked all day and slept outdoors at night.<sup>2</sup> They traveled with other migrants into the back of an eighteen-wheel truck for twenty-seven hours without any food.<sup>3</sup> Roberto was afraid of the snakes and crocodiles he saw in the river as they crossed.<sup>4</sup> The siblings are two of the 60,000 Central American children who arrive at the U.S. border each year.<sup>5</sup>

Unlike most undocumented migrants crossing the border into the

---

© 2017 Rebeca García Gil.

<sup>†</sup> J.D. Candidate (2018), University of Maryland Francis King Carey School of Law. The author thanks the Executive Board at the Maryland Journal of International Law for all their support and Professors Peter Danchin and Michael Van Alstine for their guidance. She also thanks her mother, family, and friends for their constant encouragement, and Hughston Vasil for his unending love and support. She would like to dedicate this article to her grandfather, Jose Gil Macias, who was briefly an immigrant in Cleveland, Ohio and St. Louis, Missouri in the 1940s.

1. Sonia Nazario, *These Are Children, Not Bad Hombres*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/opinion/sunday/these-are-children-not-bad-hombres.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

United States, unaccompanied migrant children generally do not evade apprehension. They run towards the Border Patrol in need of help.<sup>6</sup> Some children, traveling from countries such as Honduras or El Salvador, have suffered immense violence and injustice in their home countries, and describe the “constant threat of being killed, kidnapped, or abused by criminal organizations.”<sup>7</sup> Many of the children say they are going to the United States because they believe the U.S. treats migrant children travelling alone more leniently than those traveling with adult migrants.<sup>8</sup> Little do the children know that these perceptions are misleading and that, by running towards Border Patrol agents, they are running into the arms of expatriation because of a broken immigration system that is not designed to adequately care for them, let alone help them escape the conditions of their home countries.<sup>9</sup>

This Note focuses on an Advisory Opinion issued by the Inter-American Court of Human Rights (“the Court”) regarding the rights and guarantees of migrant children and their need for international protection.<sup>10</sup> The Advisory Opinion provides a framework of analysis for judging the effectiveness of the United States’ approach to the 2014 humanitarian crisis, when the United States apprehended over 56,000 unaccompanied minors from Mexico and Central America.<sup>11</sup> This Note compares the Court’s findings regarding the basic conditions for places

---

6. See Eleanor Dearman & Travis Putnam Hill, *Illegal Central American Immigration Surges at U.S. Border*, THE TEX. TRIB. (Sept. 15, 2016), <https://www.texastribune.org/2016/09/15/central-american-illegal-immigration-us-border-look/> (Unaccompanied child migrants from Honduras voluntarily turned themselves in to the U.S. Border Patrol Agents near Roma, Texas); American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> (Many women and children are turning themselves over to Border Patrol agents upon arrival and are not seeking to evade apprehension).

7. Kayla Burkisher Reynolds, *And the Melting Pot Bubbles: A Call For Compromise in Addressing the Child Migrant Crisis*, 64 Drake L. Rev. 189, 191 (2016) (citing Jessica Jones & Jennifer Podkul, *Forced from Home: The Lost Boys and Girls of Central America*, Diana Quick & Fred Hamerman eds. (2012)).

8. Frances Robles, *Waves of Minors on Their Own Rush to Cross Southwest Border*, N.Y. TIMES (June 4, 2014), [https://www.nytimes.com/2014/06/04/world/americas/wave-of-minors-on-their-own-rush-to-cross-southwest-border.html?\\_r=0](https://www.nytimes.com/2014/06/04/world/americas/wave-of-minors-on-their-own-rush-to-cross-southwest-border.html?_r=0).

9. See Fernanda Santos, *It’s Children Against Federal Lawyers in Immigration Court*, N.Y. TIMES (Aug. 20, 2016), <http://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html> (describing how children have to represent themselves in immigration law when they are unable to secure legal representation).

10. 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 Aug. 19, 2014.

11. See generally Meyer *infra* note 11; see also Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?\\_r=0](http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0)

to accommodate migrant children<sup>12</sup> and the children's guarantees of due process<sup>13</sup> to the United States' actual response to the crisis.<sup>14</sup> This comparison demonstrates that the United States has failed to adapt its immigration laws and policies to comply with standards for the international rights of children according to the Advisory Opinion. Though the United States has not ratified the American Convention nor accepted the Court's contentious jurisdiction,<sup>15</sup> the Court's Advisory Opinion on this matter is useful for creating a proper framework for addressing the unaccompanied migrant children crisis because there is no current legal framework in the United States, and a great number of children from the Northern Triangle, a region in Central America encompassing El Salvador, Guatemala and Honduras, are migrating to the United States.

This Note is divided into four parts. Part I presents an overview of the Advisory Opinions' place in international law.<sup>16</sup> Part II reviews the 2014 Advisory Opinion's conclusions regarding proper due process guarantees and basic living conditions for detained immigrant children.<sup>17</sup> Part III discusses the United States' response to the humanitarian crisis, both regarding living accommodations of migrant children and due process guarantees.<sup>18</sup> Part IV compares the Court's conclusions to the United States' actions to safeguard the rights of children and argues that the United States should adopt at least some, if not all, of the Advisory Opinion's recommendations in order to safeguard immigrant children fleeing poverty and violence.<sup>19</sup>

## I. THE IMPORTANCE OF ADVISORY OPINIONS IN INTERNATIONAL LAW

An advisory opinion is an authoritative but nonbinding statement or interpretation of international law by an international tribunal or

---

12. I/A Court H.R., *supra* note 10 at 65.

13. *Id.* at 70.

14. See generally Sural Shah, *The Crisis in Our Own Backyard: United States Response to Unaccompanied Minor Children From Central America*, HARV. PUB. HEALTH REV., VOLUME 7 – REFUGEE HEALTH (2016), <http://harvardpublichealthreview.org/the-crisis-in-our-own-backyard-united-states-response-to-unaccompanied-minor-children-from-central-america/>.

15. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L. 1, 30 (2001) (Although a member of the Organization of American States, the United States has not ratified the American Convention of Human Rights).<sup>7</sup>

16. *Infra* Part I.

17. *Infra* Part II.

18. *Infra* Part III.

19. *Infra* Part IV.

arbitral body.<sup>20</sup> Advisory opinions are an important and useful tool for international courts.<sup>21</sup> They are less confrontational than a contentious case, are not limited to the specific facts placed in evidence,<sup>22</sup> and often serve to give judicial expression to the underlying principles of law.<sup>23</sup> Advisory proceedings “clarify or establish basic doctrines” of international law and “make important contributions to the conceptual evolution of international law”<sup>24</sup> by serving to enforce human rights obligations that would otherwise be left unenforceable because there is no central organism to oversee their implementation.<sup>25</sup> Most treaties that provide for tribunal oversight endow the tribunal with advisory jurisdiction,<sup>26</sup> and national courts in many countries also possess advisory jurisdiction given to them by their own laws and governments.<sup>27</sup>

Advisory opinions must encourage States to behave in a certain manner given that there is no binding legal obligation to these decisions.<sup>28</sup> For this reason, advisory opinions are said to be “soft” law: in most instances, States have not given the court jurisdiction to issue binding opinions.<sup>29</sup> On the other hand, judicial decisions in contentious cases are considered “hard” law because States have given the Court jurisdiction to be bound by its opinion.<sup>30</sup> An analysis comparing advisory opinions of the International Court of Justice (ICJ) and the Inter-American Court of Human Rights (IACHR) concluded that both courts’ jurisprudence indicated that their opinions could have

---

20. Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Law*, 38 *Stan. J Int’l L.* 241, 245 (2002).’

21. Mary Caroline Parker, “*Other Treaties*”: *The Inter-American Court of Human Rights Defines Its Advisory Jurisdiction*, 33 *Am. U.L. Rev.* 211, 217 (1983).’

22. Pasqualucci, *supra* note 20, at 242.

23. *Id.*

24. *Id.* (citing Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 *Am. J. Int’l L.* 1, 18 (1985)).’

25. Julie Calidonio Schmid, Note, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 *Duke J. Comp. & Int’l L.* 415, 453 (2006).’

26. Pasqualucci, *supra* note 20, at 246. For example, the Charter of the United Nations authorizes the International Court of Justice (ICJ) to render advisory opinions; the European Convention on Human Rights and Fundamental Freedoms now accords the European Court of Human Rights a restricted advisory jurisdiction; the Law of the Sea Convention provides the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea with advisory jurisdiction.

27. *Id.* at 247. Courts in Colombia, Ecuador, Honduras, Panama, El Salvador, Norway, and Sweden, among others, have long had this authority; *see generally* Manley O. Hudson, *Advisory Opinions on National and International Courts*, 37 *Harv. L. Rev.* 970 (1924).

28. Calidonio-Schmid, *supra* note 25.

29. Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *Tex. Int’l L.J.* 405, 427 (2003).’

30. *Id.*

binding effects through the courts' development of human rights custom and treaty norms.<sup>31</sup> Although the advisory opinions themselves are non-binding, the courts interpret treaties that are usually binding on the parties involved.<sup>32</sup> An example of this is the Rights of the Undocumented Migrants opinion,<sup>33</sup> where the IACHR interpreted the United States' obligations under the International Covenant of Civil and Political Rights, a treaty with binding obligations which the United States had signed and ratified.<sup>34</sup> This instance exemplifies how an advisory opinion exerted pressure on the United States, and how advisory opinions can enforce human right obligations in situations where States refuse to do so.<sup>35</sup>

The American Convention on Human Rights (the "Convention") was adopted in 1969 under the auspices of the Organization of American States (OAS) in an attempt to provide "effective judicial institutions capable of protecting the human rights of American Nation State citizens."<sup>36</sup> The Convention<sup>37</sup> establishes two specialized and autonomous organs that comprise the Convention's enforcement mechanism: the Inter-American Commission on Human Rights (the "Commission") on Human Rights and the Inter-American Court of Human Rights (the "Court").<sup>38</sup> The Convention charges the Commission with promoting the protection of human rights within the inter-American system and with responsibility for investigating and attempting to settle complaints that allege violations of the Convention.<sup>39</sup> The Convention charges the Court with interpreting the provisions of the Convention and with trying complaints the Commission is unable to settle.<sup>40</sup> In the 1982 Advisory Opinion, "*Other Treaties*" *Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, the Court determined the scope of its advisory jurisdiction and concluded "that the advisory jurisdiction of the Court can be exercised with regard to any provision dealing with the protection of human rights set forth in

---

31. *Id.* at 452.

32. *Id.* at 453.

33. I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003.

34. *Id.*

35. *Id.*

36. Parker, *supra* note 21, at 212.

37. The second part of the Convention is comprised of articles 33 to 82.

38. Parker, *supra* note 21, at 213.

39. *Id.*

40. *Id.* (citing American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123).

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 351

any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral.”<sup>41</sup>

The Court’s advisory jurisdiction allows it to issue a legal opinion even when no controversy between two or more parties actually exists.<sup>42</sup> Article 64 of the Convention<sup>43</sup> grants to the Court the broadest advisory jurisdiction possessed by an international tribunal<sup>44</sup> It allows all OAS Member States,<sup>45</sup> regardless of whether they have ratified the Convention, and all OAS organs listed in Chapter VIII of the OAS Charter<sup>46</sup> to request the Court to issue an advisory opinion.<sup>47</sup>

## II. ADVISORY OPINION’S FINDINGS REGARDING ACCOMMODATION OF CHILD MIGRANTS AND THEIR GUARANTEES OF DUE PROCESS

On July 7, 2011, Argentina, Brazil, Paraguay, and Uruguay (collectively “Applicant Countries”) requested an Advisory Opinion on multiple issues regarding migrant children’s rights.<sup>48</sup> The Americas hosted around 27% of the migrant population worldwide<sup>49</sup> and, in light of the regional situation and the great number of migrants in the continent, the Applicant Countries sought to establish precise standards to preserve the rights of migrant children. Part A includes an overview of these issues, as well the reasons given by the Court to

41. I/A Court H.R., “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982. “”

42. Parker, *supra* note 21, at 217.

43. Organization of the American States, American Convention on Human Rights, Nov 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

44. Parker, *supra* note 21, at 218.

45. *Member States*, ORG. OF AM. STATES, [http://www.oas.org/en/about/member\\_states.asp](http://www.oas.org/en/about/member_states.asp) (last visited May 16, 2017). (All 35 independent countries of the Americas have ratified the OAS Charter and are Members of the Organization: Antigua y Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts & Nevis, Suriname, Trinidad y Tobago, United States of America, Uruguay and Venezuela).

46. *Charter of the Organization of American States*, ORG. OF THE AM. STATES, [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp#Chapter\\_VIII](http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp#Chapter_VIII) (last visited May 16, 2017). (The organs listed in the OAS Charter are: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations).

47. Parker, *supra* note 21, at 218.

48. I/A Court H.R., *supra* note 10 at 3; the complete text of the request can be consulted via the following link to the Court’s website: [http://www.corteidh.or.cr/solicitudoc/solicitud\\_eng.pdf](http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf).

49. *Id.*

establish its jurisdiction over the matter. Part B discusses the Court's specific findings regarding basic conditions for places to accommodate migrant children.<sup>50</sup> And Part C describes the Court's relevant findings regarding proper due process guarantees for all migrant children in immigration proceedings.

A. THE ISSUES SET FORTH BY APPLICANT COUNTRIES AND THE ESTABLISHMENT OF THE COURT'S ADVISORY JURISDICTION

The Applicant Countries set forth various issues for the Court to determine in its Advisory Opinion.

It was for the Court to determine the precise obligations of the States in relation to the possible measures to be adopted regarding children, their immigration status or the status of their parents in light of the interpretation of [various articles] of the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and Article 13 of the Inter-American Convention to Prevent and Punish Torture.<sup>51</sup>

The Applicant Countries indicated that around twenty-five million people from Latin America and the Caribbean have migrated to countries in North America and Europe.<sup>52</sup> An increasing number of these migrants are children and adolescents, either migrating together with their parents or unaccompanied.<sup>53</sup> Children migrate for many reasons, including: family reunification, hope for better economic or social conditions, environmental degradation, or in an attempt to escape poverty, violence, abuse and persecution.<sup>54</sup>

The Applicant Countries noted that migrants, especially migrant children, were vulnerable social groups that required a special commitment on the part of the receiving countries to respect, protect, and guarantee the migrants children's fundamental rights.<sup>55</sup> In light of the vulnerability of migrant children, it was essential for the Court to "clearly define precise standards, principles, and obligations that States

---

50. The Court's Advisory Opinion has numerous issues in its discussion; however, this Note focuses specifically on the places of accommodation for child migrants and their due process guarantees. *See* I/A Court H.R., *supra* note 10 at 2 (table of contents setting forth the issues discussed by the Court).<sup>7</sup>

51. *Id.*

52. *Id.* These figures correspond to U.N. studies and trends done in 2013. They are not current.

53. *Id.*

54. *Id.*

55. *Id.*

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 353

must comply with in relation to the human rights of migrants, especially in relation to the rights of migrant children.”<sup>56</sup> The Applicant Countries raised various issues, which included the need for procedures to determine the needs and international protections of migrant children, standards for precautionary measures in a migratory proceeding, due process guarantees, and principle of *non-refoulement*<sup>57</sup> in relation to migratory proceedings.<sup>58</sup>

Before beginning its analysis, the Court established its jurisdiction over the matter because of Article 64(1) of the American Convention.<sup>59</sup> The Applicant Countries were OAS Member States and, therefore, had the right to request the Court provide an advisory opinion interpreting the Convention or other treaties concerning the protection of human rights in the States of the Americas.<sup>60</sup> Additionally, the Court held that, as an organ with jurisdictional and advisory functions, it had the authority inherent in its attributes to determine the scope of its own jurisdiction<sup>61</sup> (*compétence de la compétence*).<sup>62</sup>

#### B. THE COURT’S FINDINGS REGARDING BASIC CONDITIONS FOR PLACES TO ACCOMMODATE CHILD MIGRANTS

The Court recognized that the international migration of unaccompanied children is currently growing significantly.<sup>63</sup> States may establish mechanisms to control the entry into and departure of immigrants from and into their territory, but these policies should comply with the norms for the protection of human rights established by the American Convention.<sup>64</sup> However, the Court recognized there was an urgent need to adopt a human rights approach to immigration

---

56. I/A Court H.R., *supra* note 10, at 3.

57. The principle of *non-refoulement* prohibits a State to expel or return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership to a particular social group, or political opinion. Alice Farmer, Article, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 *Geo. Immigr. L.J.* 1, 5 (2008).

58. I/A Court H.R., *supra* note 10, at 3.

59. *Id.* at 9; *see supra* note 26.

60. *Id.*

61. *Id.*

62. The principle of *compétence de la compétence* provides that the court itself is competent to decide the question of its own jurisdiction. Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Law*, 38 *STAN. J INT’L L.* 241, 250 (2002).’

63. I/A Court H.R., *supra* note 10, at 14.

64. *Id.* at 15, ¶ 39.

policies, particularly in the case of migrant children, in order to safeguard the children's fundamental rights.<sup>65</sup>

The Court was asked to determine the basic conditions that places in which child migrants are accommodated must have, and the States' obligations to children who are in custody for migratory reasons.<sup>66</sup> The Court reiterated that persons in a country's care should, as a positive obligation, be provided the necessary conditions for a decent life and receive humane treatment consistent with personal dignity.<sup>67</sup> Countries must prioritize actions that tend to the care of the child and provide comprehensive protection when the child is involved in immigration proceedings.<sup>68</sup> In special circumstances, when the child is unaccompanied or separated from family or legal guardians and there is no possibility of placing the child in a family or community accommodation, the State may place the child in a shelter or other accommodation for as long as it is necessary to resolve the child's immigration status.<sup>69</sup> The Court also noted that, in a previous opinion, it ruled that persons accused or convicted of criminal offenses must be separated from other migrants<sup>70</sup> and that this holding must also apply to centers accommodating children.<sup>71</sup> The States were also obligated to regulate and monitor the places where migrant children were lodged and to have a system to supervise such accommodations.<sup>72</sup>

In addition, the Court maintained that children should be separated from adults because not doing so created conditions that were "extremely prejudicial for the children's development," and made the children vulnerable to adult third parties who may abuse them.<sup>73</sup> The separation should occur unless the contrary is considered to being the best interest of the child, such as if the child was ever found traveling with any adult family members or legal guardians.<sup>74</sup>

---

65. *Id.* at 16, ¶ 41.

66. *Id.* at 65, ¶ 171. The applicant States asked this question in light of Articles 1, 2, 4(1), 5, 7, 17, and 19 of the American Convention and Articles I and XXV of the American Declaration of the Rights and Duties of Man.

67. *Id.* at 66 ¶ 172. Pursuant to Articles 4(1) and 5 of the American Convention and Articles I and XXV of the Declaration of the Rights and Duties of Man.

68. I/A Court H.R., *supra* note 10 at 67, ¶ 173.

69. *Id.*

70. *Id.*; see I/A Court H.R., *Case of Velez Looz v. Panama*, Merits, Reparations, and Costs, Judgment of November 23, 2010.

71. *Id.*

72. *Id.* at 67, ¶ 174.

73. I/A Court H.R., *supra* note 10 at 67-68, ¶ 176; (citing I/A Court H.R., *Case of the "Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 2, 2004).

74. I/A Court H.R., *supra* note 10 at 68, ¶ 177. Accompanied children should be lodged

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 355

The Court found that it was an international obligation to ensure that the places where unaccompanied children were lodged be divided according to the specific needs of age groups and differentiated from centers for families, and that human and material resources were assigned accordingly.<sup>75</sup>

In the Court's opinion, accommodation for children should be provided in an environment where there is not a deprivation of liberty<sup>76</sup> and should permit the children's holistic development.<sup>77</sup> The diversity of the children's ethnic, cultural, linguistic, and religious backgrounds should be taken into account in each case.<sup>78</sup> These centers must guarantee the children lodging, maintenance, medical care, legal assistance, and educational support.<sup>79</sup> A series of specialized care services addressing the specific needs of children with disabilities, HIV/AIDS, pediatric needs, or psychological or physical injuries due to being victimized by human traffickers should be offered.<sup>80</sup> In addition, States must do everything in their power to ensure that the children cannot be subjected to violence, exploitation, or abuse while in the State's care.<sup>81</sup>

In addition, where children are accommodated, the State must ensure that the children's privacy is respected; the living quarters are safe enough for children to keep their possessions; all meals are provided during the child's stay and meet his or her nutritional needs; there is access to healthcare services, both physical and psychosocial; there is continuous access to education outside the center; and there is a place for recreation and play.<sup>82</sup> Furthermore, the center's personnel must be specialized and receive training in child psychology, protection of the child, and human rights of the child.<sup>83</sup>

### C. THE COURT'S FINDINGS REGARDING GUARANTEES OF DUE PROCESS FOR UNACCOMPANIED MIGRANT CHILDREN

The Applicant Countries asked the Court to determine the due

---

with family members unless it is more appropriate to separate them in application of the principle of the child's best interest.

75. *Id.* at 68, ¶ 179.

76. *Id.* at 68-69, ¶ 180.

77. *Id.* at 69, ¶ 181.

78. *Id.*

79. I/A Court H.R., *supra* note 10 at 68, ¶ 182.

80. *Id.*

81. *Id.*

82. *Id.* at 69-70, ¶ 183.

83. *Id.* at 70, ¶ 184.

process guarantees<sup>84</sup> that should apply in immigration proceedings involving children.<sup>85</sup> The Court defined “restriction of personal liberty” as any measure that impaired the right of personal liberty, either through total deprivation by reclusion in a closed place or any other lesser restriction that, owing to its form, duration, effects, and method of implementation, interfered with the universal right to personal liberty.<sup>86</sup>

In the case of children, Article 37(d) of the Convention on the Rights of the Child (CRC) stipulates that:

[E]very child deprived of her or his liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of her or his liberty before a court or other competent, independent, and impartial authority, and to a prompt decision on any such action.<sup>87</sup>

Migrant children, detained in a different social and legal environment from their own, experience a situation of extreme vulnerability.<sup>88</sup> In the Court’s view, these unfair conditions made it necessary to adopt measures that helped reduce or eliminate the obstacles and deficiencies that impeded the effective defense of the children’s interests.<sup>89</sup>

The Court prohibited arbitrary detention or imprisonment, as “no one may be subjected to detention or imprisonment for reasons and by means that—although they are classified as legal—may be considered incompatible with respect for the fundamental human rights, because

---

84. *Id.* at 72-73, ¶ 188. The guarantees of due process constitute a series of substantive and procedural requirements that must be met by States to ensure that an individual is able to legally defend his rights adequately in the face of any act of the State that may affect his personal liberty. The Court also mentioned the crucial role played by Article 7 of the American Convention and Article XXV of the Declaration: these provisions contain the normative mandates that prohibit illegal and arbitrary detention and establish procedural rights and guarantees in favor of the person who has been retained or detained, including: to be informed of the reasons for the detention; to be tried within a reasonable time or to be released; and others.

85. I/A Court H.R., *supra* note 10 at 70, ¶ 185. Applicant States asked this question in light of Articles 1, 2, 7, 8, 19, and 25 of the American Convention and Article XXV of the America Declaration of the Rights and Duties of Man.

86. *Id.* at 72, ¶ 187. The Court also noted that the difference between deprivation of liberty and restriction of liberty stems from the level of intensity of the measure.

87. I/A Court H.R., *supra* note 10 at 73, ¶ 189 (citing Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3).

88. I/A Court H.R., *supra* note 10 at 73, ¶ 190; *see also id.* at 58, ¶ 152.

89. *Id.* at 73, ¶ 190.

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 357

they are, *inter alia*, unreasonable, unpredictable or disproportionate.”<sup>90</sup> For migrants, the Court emphasized that detention should not have a disproportionate effect on a specific racial, religious, or any other group or social condition, without a reasonable and objective justification.<sup>91</sup> The laws, policies, and practices relating to the deprivation of liberty may not establish *de jure* or generate *de facto* discrimination against any nationality.<sup>92</sup> More specifically, these practices cannot discriminate against anyone for reasons such as race, color or national origin.<sup>93</sup>

The Court has also consistently held that information on the “motive and reasons” for the arrest or the detention must be provided when the arrest or detention occurs, which “constitutes a mechanism to avoid illegal or arbitrary detentions from the very moment of the deprivation of liberty and, in turn, ensures the individual’s right to defend himself.”<sup>94</sup> A person must understand she or he is being arrested or detained, and the agent making the arrest must provide information, in a simple language, on the essential facts and legal grounds on which the measure is based.<sup>95</sup> In the case of children, a language that is adapted to their maturity and age should be used.<sup>96</sup> Children must be provided with all the necessary information on their rights, the services available to them, and the procedures they may assert to receive assistance.<sup>97</sup> In addition, States must guarantee that any child subjected to immigration proceedings be assisted by a translator or interpreter if the child does not understand or speak the language of the receiving country.<sup>98</sup>

The Court noted in the opinion the importance of an efficient judicial process, and how this mechanism helps control illegal or arbitrary detentions and ensures the detainee’s effective enjoyment of his or her rights.<sup>99</sup> Additionally, the detainee has the right to notify a

---

90. *Id.* at 74, ¶ 192. The arbitrary nature of detention is referred to in Article 7(3) of the American Convention and Article XXV of the Declaration.

91. *Id.* at 74, ¶ 193.

92. *Id.*

93. *Id.*

94. I/A Court H.R., *supra* note 10 at 74, ¶ 195; (citing I/A Court H.R., *Case of Juan Humberto Sanchez v. Honduras*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of June 7, 2003, ¶ 117); *see also* I/A Court H.R., *Case of Chaparro Alvarez and Lapo Iniguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007; *id.* at 15, ¶ 70.

95. I/A Court H.R., *supra* note 10 at 75, ¶ 196.

96. *Id.* at 75, ¶ 197.

97. *Id.*

98. *Id.*

99. *Id.* at 75-76, ¶ 198 (Court finds this in light of Articles 7(5) of the American

third party that she or he is in the custody of the State.<sup>100</sup> The right to establish contact with a family member, guardian, or legal representative is particularly important in the case of children, especially if the children are unaccompanied.<sup>101</sup> Information on the right to establish contact with a family member, etc., must be provided at the time of the detention.<sup>102</sup> Children must be able to communicate with and receive visits from their family, friends, legal representatives and, if applicable, their guardian.<sup>103</sup> When appropriate, the child must be able to contact international agencies such as the United Nations High Commissioner for Refugees, the International Committee of the Red Cross, the United Nations Children's Fund, or the International Organization for Migration.<sup>104</sup> Additionally, child migrants enjoy the right to consular assistance available to any individual detained outside her or his country of origin.<sup>105</sup>

States, as recommended by the Court, must also offer State legal representation services to all children detained for immigration matters to help them legally defend themselves.<sup>106</sup> Specifically, States must provide detained children with prompt and free access to a legal representative who can give them legal assistance.<sup>107</sup> The assistance must be provided by a legal professional that can advise the person subject to proceedings, *inter alia*, about the possibility of filing remedies against decisions that affect the detained person's rights.<sup>108</sup> In the case of children who are unaccompanied, it is extremely important to appoint a guardian for them in order to defend their interests and to ensure their well-being.<sup>109</sup> States should appoint a guardian until the child has either reached the age of majority in that State or has permanently left the territory or jurisdiction of the State.<sup>110</sup> The

---

Convention and XXV of the American Declaration).

100. I/A Court H.R., *supra* note 10 at 76, ¶ 199. This notification shall be given, for example, to a family member, guardian, or legal representative, as appropriate.

101. *Id.* at 76, ¶ 200.

102. *Id.*

103. *Id.* at 76-77, ¶ 201.

104. *Id.*

105. I/A Court H.R., *supra* note 10 at 77, ¶ 202; *see Vienna Convention on Consular Relations* Art. 36, 24 Apr. 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

106. *Id.* at 77-78, ¶ 204; *see also* Convention on the Rights of the Child Art. 37(d), Nov. 20, 1989, 1577 U.N.T.S. 3.

107. *Id.* at 77-78, ¶ 204.

108. *Id.*

109. I/A Court H.R., *supra* note 10 at 78, ¶ 205 (citing Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, at 11, ¶ 33).

110. Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, at 11, ¶ 33, Thirty-

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 359

guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings and care arrangements.<sup>111</sup>

### III. UNITED STATES' RESPONSE TO THE 2014 HUMANITARIAN CRISIS OF UNACCOMPANIED CENTRAL AMERICAN MIGRANT CHILDREN

Approximately 69,000 children, mostly from Guatemala (25%), El Salvador (24%) and Honduras (27%), crossed into the United States through Texas' Rio Grande Valley in 2014.<sup>112</sup> These children represented the peak of unaccompanied minors arriving to the U.S. from these three countries since October 2011.<sup>113</sup> The forthcoming section analyzes the general immigration processing of unaccompanied migrant children in the United States and discusses what the United States did specifically in terms of accommodating unaccompanied migrant children, the conditions of the shelters where children were housed, and what due process guarantees migrant children had in removal proceedings.

#### A. IMMIGRATION PROCESSING OF UNACCOMPANIED MIGRANT CHILDREN IN THE UNITED STATES

The immigration term “unaccompanied alien child” (UAC) describes a child who: (A) has no lawful immigration status in the United States; (B) has not attained eighteen years of age; and (C) has (i) no parent or legal guardian in the United States or (ii) no parent or legal guardian in the United States available to provide care and physical custody.<sup>114</sup> As applied by the Department of Homeland Security (DHS), the term “unaccompanied” does not describe the way in which the child entered the country, but instead speaks to DHS's policies for processing the child.<sup>115</sup>

---

Ninth Session (2005).

111. *Id.*

112. Sural Shah, *The Crisis in Our Own Backyard: United States Response to Unaccompanied Minor Children From Central America*, Harv. Pub. Health Rev., Vol. 7, at 2 (2016) (citing Montgomery D., *These children have crossed the U.S. border, but their journeys are far from over*, THE WASHINGTON POST (Aug. 21, 2014), <http://www.washingtonpost.com/sf/style/2014/08/21/departures-2/>).

113. *Id.*

114. Kayla Burkisher Reynolds, *supra* note 7, *And the Melting Pot Bubbles: A Call For Compromise in Addressing the Child Migrant Crisis*, 64 Drake L. Rev. 189, 196 (2016) (citing 6 U.S.C. § 279(g)(2) (2012)).

115. *Id.* Children are “accompanied” when the adults with whom they are traveling are able to “prove their relationship to the child.”

When Customs and Border Patrol (CBP) apprehends a UAC, the CBP agents divide the apprehended UACs into two categories: those from countries contiguous to the United States and those from non-contiguous (or third-country) nations.<sup>116</sup> Children from Mexico and Canada, contiguous countries, must be screened by CBP officers pursuant to repatriation agreements with those countries to determine whether the children are victims of human trafficking or have fears of persecution in the child's home country.<sup>117</sup> If these conditions do not apply, children from contiguous countries are returned to their home countries through a "voluntary return" program negotiated with the home country by the U.S. Department of State.<sup>118</sup> The children from non-contiguous countries, like the Northern Triangle countries, are transferred by DHS's Immigration and Customs Enforcement (ICE) to the custody of the Department of Health and Human Services (HHS) within seventy-two hours of their apprehension.<sup>119</sup> HHS places the children in the custody of its Office of Refugee Resettlement (ORR), which provides for the custody and care of the UACs while they await adjudication.<sup>120</sup> Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 requires that the government places unaccompanied children in the "least restrictive setting that is in the best interest of the child."<sup>121</sup> ORR evaluates the particularities of the children's situation and places them in a shelter or a foster home.<sup>122</sup> Most children are cared for through placement in facilities with "state licensed ORR-funded care providers," which provide education, medical services, mental health services, recreation, and family reunification services.<sup>123</sup> ORR strives to place children with family members located in the United States when possible.<sup>124</sup>

#### B. ACCOMMODATION OF UNACCOMPANIED MIGRANT CHILDREN IN THE UNITED STATES

Currently, most detained immigrant children are housed in private facilities operated by the Department of Unaccompanied Children's

---

116. *Id.* at 199.

117. *Id.*

118. *Id.* (Voluntary return does not carry the same consequences as deportation).

119. *Id.* at 206.

120. Burkisher Reynolds, *supra* note 7, at 206.

121. *Id.* at 206-07 (citing 8 U.S.C. § 1232(c)(2)(A)).

122. *Id.* at 207.

123. *Id.*

124. *Id.*

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 361

Services (DUCS), a division created by ORR.<sup>125</sup> However, as the 2014 crisis escalated, many UACs were being housed in emergency shelters due to a lack of space.<sup>126</sup> A number of Department of Defense facilities<sup>127</sup> became emergency detention centers to hold the large number of children arriving at the border.<sup>128</sup> Many UACs were placed in shelters that were icebox-cold cells—nicknamed “hieleras,” Spanish for freezers—with no access to food or medical care while DHS attempted to establish which children had an available sponsor in the United States to whom they could be released and concurrently initiated proceedings against each child that did not have a valid immigration status.<sup>129</sup> Even with these massive emergency centers at full capacity, on any given day in June 2014 there were as many as 3,500 children stuck on the border awaiting placement in an ORR facility.<sup>130</sup> While awaiting transfer, the children were only provided with food, clothing, and a roof over their heads.<sup>131</sup> This led many to observe that these facilities had essentially become prison camps for children.<sup>132</sup>

Given that DUCS maintains a dual role of “prosecutor and caretaker,”<sup>133</sup> the shelters to house UACs were found in remote

125. Megan Smith-Pastrana, Note, *In Search of Refuge: The United States’ Domestic and International Obligations to Protect Unaccompanied Immigrant Children*, 26 Ind. Int’l & Comp. L. Rev. 251, 256 (2016).

126. Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 Harv. Latino L. Rev. 53, 82 (2015); see also Editorial Board, *Innocents at the Border: Immigrant Children Need Safety, Shelter and Lawyers*, THE NEW YORK TIMES (June 16, 2014), [http://www.nytimes.com/2014/06/17/opinion/immigrant-children-need-safety-shelter-and-lawyers.html?\\_r=0](http://www.nytimes.com/2014/06/17/opinion/immigrant-children-need-safety-shelter-and-lawyers.html?_r=0).

127. Corcoran, *supra* note 126. Such facilities include the Lackland Air Force Base in Texas, Fort Still in Oklahoma, and Naval Base Ventura County in California. Aronson, *infra* note 128.

128. Lauren R. Aronson, *The Tipping Point: The Failure of Form over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 Harv. Latino L. Rev. 1, 15 (2015).

129. Corcoran, *supra* note 126.

130. Aronson, *supra* note 128, at 15.

131. *Id.* at 15-16.

132. *Id.* at 16 (citing Michael Kiefer, *First Peek: Immigrant Children Flood Detention Center*, AZ CENTRAL (June 19, 2014), <http://www.azcentral.com/story/news/politics/immigration/2014/06/18/arizona-immigrant-children-holding-area-tour/10780449/>); *U.S. to Open Third Military Base to Illegal Child Immigrants*, YAHOO! NEWS (June 9, 2014), <http://news.yahoo.com/u-open-third-military-illegal-child-immigrants-200234608.html>; Matt Cantor, *U.S. Grapples with Huge Influx of Migrant Kids*, NEWSER (June 21, 2014), <http://www.newser.com/story/188800/us-grapples-with-huge-influx-of-migrant-kids.html>.

133. Smith-Pastrana, *supra* note 125 (citing ”Orrick, Herrington & Sutcliffe, LLP, *Halfway Home: Unaccompanied Children in Immigration Custody*, WOMEN’S REFUGEE COMMIS’N, 6-8 (2009), available at

locations to facilitate the transfer between DHS and DUCS.<sup>134</sup> These remote areas provided the UACs little, if any, access to medical and legal services.<sup>135</sup> The shelter facilities also ranged in level of security and services offered.<sup>136</sup> Overwhelmed DUCS facilities more closely resembled the restrictive settings of prisons or juvenile detention centers rather than the facilities envisioned by the Court's Advisory Opinion.<sup>137</sup> Additionally, due to a lack of oversight, many private DUCS facilities failed to comply with proper policies and procedures, which subjected the UACs to harsh living conditions and the likelihood of physical and mental abuse.<sup>138</sup>

In response to the alleged extreme treatment and despicable housing conditions, the American Civil Liberties Union's (ACLU) Border Litigation Project, along with other immigrant advocacy organizations, filed an administrative complaint against DHS.<sup>139</sup> The complaint, filed on behalf of 116 UACs<sup>140</sup> who experienced abuse and mistreatment<sup>141</sup> while in the custody of CBP, alleged that one in four children included in the complaint reported some form of physical abuse, including sexual assault and beatings.<sup>142</sup> More than half of these children reported various forms of verbal abuse, including racially and sexually charged comments and death threats.<sup>143</sup> The complaint also alleged that the state of the detention facilities was disgraceful<sup>144</sup> and

---

[http://womensrefugeecommission.org/docs/halfway\\_home.pdf](http://womensrefugeecommission.org/docs/halfway_home.pdf)).

134. *Id.* at 256-57.

135. *Id.* at 257.

136. Aronson, *supra* note 128, at 16. Some centers are intended exclusively for "tender-aged" children (under 13 years old), pregnant and parenting teens, while others are designed specifically for children with behavioral problems and/or criminal records.

137. Smith-Pastrana, *supra* note 125, at 257.

138. *Id.*

139. *Id.*

140. Burkisher Reynolds, *supra* note 7, at 200. The children in the complaint were of ages 5 to 17 years old.

141. Smith-Pastrana, *supra* note 125, at 259. Some of the reports of abuse referenced in the ACLU complaint include: an asthmatic fourteen-year-old girl forced to stay in an unsanitary holding cell, whose asthma medication was confiscated by CBP agents who refused to assist her when she suffered multiple asthma attacks; a seventeen-year-old girl placed in a freezing cold cell (*hielera*) which prevented her clothes from drying in three days and was not provided with drinking water; and a seven-year-old boy who was developmentally disabled and severely malnourished, yet CBP held him in custody for five days and refused him medical treatment.

142. Burkisher Reynolds, *supra* note 7, at 200 (citing Letter from Ashley Huebner, Nat'l Immigrant Justice Ctr., et al. to Megan H. Mack & John Roth, Dept. of Homeland Sec., on Systematic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Prot. 1 (June 11, 2014), <http://www.acluaz.org/sites/default/files/documents/DHS%20Co>).

143. *Id.*

144. *Id.*

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 363

that the CBP failed to provide adequate medical care to the UACs.<sup>145</sup> These children's stories shed light on the horrendous abuses of children within the United States immigration system, which unfortunately were not limited to the 2014 surge of UACs.<sup>146</sup> From January 2009 through January 2012, approximately 809 complaints of alleged abuses were lodged against Border Patrol agents.<sup>147</sup> These complaints were made because of physical, sexual and verbal assault.<sup>148</sup> Although it is not possible to determine which cases had merit and which did not, among those cases in which a formal decision was issued, 97% resulted in "No Action Taken."<sup>149</sup> As the influx of UACs continues to grow, the failures of the United States' current immigration system, especially relating to UACs, have become more apparent.<sup>150</sup>

### C. DUE PROCESS GUARANTEES OF UNACCOMPANIED MIGRANT CHILDREN IN THE UNITED STATES

Once in DHS custody, DHS agents give a child his or her Notice to Appear (NTA), a document filed with the immigration court to institute civil removal proceedings against a noncitizen.<sup>151</sup> The NTA states the civil infractions against the child, which usually involves charging the child with inadmissibility for entering the United States without inspection—for being a noncitizen present in the United States without first having been properly admitted at a designated port of entry.<sup>152</sup> Once DHS institutes removal proceedings, the child must

---

145. *Id.* A Washington Post video, confirmed by CBP agents, revealed conditions at the McAllen Border Patrol Station in Texas. The station was overcrowded, with people sprawled over the concrete floor and makeshift quarantines taped off for detainees suffering from scabies and chickenpox. Nick Miroff & Joshua Partlow, *Central American Migrants Overwhelm Border Patrol Station in Texas*, WASH. POST (June 12, 2014), [https://www.washingtonpost.com/world/the\\_americas/central-american-migrants-overwhelm-border-patrol-station-in-texas/2014/06/12/7359534e-2e1b-4a6b-b010-f622f1cac3f0\\_story.html?utm\\_term=.5dcb7b650f16](https://www.washingtonpost.com/world/the_americas/central-american-migrants-overwhelm-border-patrol-station-in-texas/2014/06/12/7359534e-2e1b-4a6b-b010-f622f1cac3f0_story.html?utm_term=.5dcb7b650f16).

146. Smith-Pastrana, *supra* note 125, at 259.

147. *Id.* (citing *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, IMMIGR. POL'Y CTR. (May 4, 2014), <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-account-ability-responding-complaints-abuse>).

148. Daniel E. Martinez, et al., *No Action Taken: Lack of CBP Accountability In Responding to Complaints of Abuse*, AMERICAN IMMIGRATION COUNCIL (May 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken\\_Final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf).

149. *Id.*

150. Smith-Pastrana, *supra* note 125, at 259.

151. INA § 212(a).

152. INA § 212(a)(9)(B).

appear for a hearing before the immigration court to avoid an order by default, known as an *in absentia* deportation order.<sup>153</sup> At the immigration court proceeding, the child must explain to the immigration judge whether he or she wishes to be repatriated, argue for a grant of relief, or argue that he or she merits a favorable exercise of discretion<sup>154</sup> from the Immigration Court.<sup>155</sup> At the initial hearing, the child must argue against a prosecuting attorney for DHS, who is trained in substantive immigration law and procedure and presents factual and legal arguments against the child.<sup>156</sup> The child has the right to be represented by an attorney, but it must be at no expense of the government.<sup>157</sup> In the event the child cannot retain counsel, he or she must have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her behalf, and to cross-examine witnesses presented by the government.<sup>158</sup> Each side should be able to represent its own interests before the immigration judge.<sup>159</sup> This creates an imbalance that heavily favors the government, especially when the child is unrepresented.<sup>160</sup>

To ensure due process and fair proceedings, the U.S. Supreme Court has held that juveniles need the assistance of counsel to prepare a defense when facing delinquency charges.<sup>161</sup> However, in civil removal proceedings, noncitizens do not have a right to counsel at the

---

153. Ashley Ham Pong, *Humanitarian Protection and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 69, 75 (2014).

154. Prosecutorial discretion—the authority of an agency or officer to decide what charges to bring and how to pursue each case—may be exercised in an immigration case when deciding whether to: initiate removal proceedings; stop, question, or arrest a particular person; detain or release someone on bond, supervision, or personal recognizance; and settle or dismiss a removal case, among others. *Understanding Prosecutorial Discretion in Immigration Law*, AMERICAN IMMIGRATION COUNCIL (May 26, 2011), <https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law#1>.

155. Ham Pong, *supra* note 153, at 76; *see generally* Immigration Court Practice Manual, U.S. Dep't of Justice (Feb. 1, 2017), <https://www.justice.gov/eoir/office-chief-immigration-judge-0>.

156. *Id.* (citing 8 U.S.C. § 1229a(b)); *J.E.F.M. v. Holder*, No. 2:14-cv-01026 (W.D. Wa., filed July 9, 2014) (describing ICE trial attorneys as prosecutors and stating that “the Government continues to send children like the Plaintiffs in this case without lawyers to face off against ICE trial attorneys who argue for their deportation before Immigration Judges”).

157. 8 U.S.C. § 1229a(b)(4)(A).

158. *Id.*

159. Ham Pong, *supra* note 153, at 76.

160. *Id.* *See also* *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (“[i]mmigration laws have been termed second only to the Internal Revenue Code in its complexity. A lawyer is often the only person who could thread the labyrinth.”).

161. Ham Pong, *supra* note 153, at 76 (citing *In re Gault*, 387 U.S. 1, 36 (1967) (A child “requires the guiding hand of counsel at every step in the proceedings against him”).

government's expense.<sup>162</sup> The Fifth Amendment guarantees that “no person... shall be deprived of life liberty or property” without due process of law.<sup>163</sup> Courts have applied the Fifth Amendment as mandating that a noncitizen have access to counsel at his or her own expense but it does not mandate government-appointed counsel.<sup>164</sup> Similarly, the Sixth Amendment's right to Assistance of Counsel at the government's expense ensures that indigent persons are afforded free counsel in criminal proceedings, but does not apply to civil removal proceedings.<sup>165</sup> There is no mandated requirement for indigent children, either accompanied or unaccompanied, to have appointed counsel during their removal hearings at no cost to the child.<sup>166</sup> The American Bar Association's Commission on Immigration found it is highly unlikely for an unrepresented child to prevail in immigration court, even if he or she has a bona fide claim for protection.<sup>167</sup> A recent study found that represented children have a 73% success rate in immigration court, as compared to only 15% of unrepresented children.<sup>168</sup> Additional studies show that children who are represented have a much higher appearance rate in immigration court, 92.5% versus 27.5% for unrepresented children.<sup>169</sup>

#### IV. EXAMINING THE UNITED STATES' RESPONSE TO THE 2014 UNACCOMPANIED MIGRANT CHILDREN CRISIS

The fact that most unaccompanied children in the United States go through removal proceedings without legal representation and are housed in government facilities where they are vulnerable to abuse, are two serious flaws in the U.S. immigration system.<sup>170</sup> This section

---

162. Ham Pong, *supra* note 153, at 76.

163. U.S. CONST. amend. V.

164. Ham Pong, *supra* note 153, at 77.

165. *Id.* at 77.

166. *Id.* at 79.

167. American Bar Association Commission on Immigration, *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings Present a Critical Need for Legal Representation*, AMERICAN BAR ASSOCIATION (May 2016), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.athcheckdam.pdf>.

168. *Id.* (citing Transactional Records Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>).

169. *Id.* (citing *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, AMERICAN IMMIGRATION COUNCIL (July 29, 2014), <https://www.americanimmigrationcouncil.org/research/taking-attendance-new-data-finds-majority-children-appear-immigration-court>).

170. See Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331 (2013) (describing the compelling

analyzes how the United States failed to provide adequate care for children housed in government facilities during immigration proceedings and how this lack of safety goes against the principles set forth by the Inter-American Court of Human Rights' Advisory Opinion.<sup>171</sup> It also analyzes how the lack of due process guarantees for migrant children does not allow the children to defend their best interests, an important aspect emphasized by the Court in its opinion.<sup>172</sup> Finally, it argues how adopting the Court's measures or other international obligations regarding the well-being of children would ultimately lead to more humane treatment of unaccompanied migrant children.<sup>173</sup>

A. PLACES OF ACCOMMODATION FOR UNACCOMPANIED MIGRANT CHILDREN IN THE UNITED STATES ARE NOT SUITABLE FOR THEIR WELL-BEING

In its Advisory Opinion, the Court said that States must provide children with the necessary conditions for a decent life and ensure their humane treatment.<sup>174</sup> Given the complaints of unaccompanied migrant children regarding the treatment of Border Patrol agents and the conditions of the shelters and places of accommodation,<sup>175</sup> the United States has not complied with providing either conditions for a decent life or of humane treatment that the Court envisioned. For example, many of the emergency shelters where DHS housed unaccompanied children were freezing cold and the children had no access to medical care or legal resources.<sup>176</sup> This does not comply with the Court's vision of providing migrant children with adequate accommodations and services.<sup>177</sup>

The Court emphasized the importance of adopting measures that would keep children safe.<sup>178</sup> Overcrowded shelters filled with people sleeping on the floor, barely separated from others suffering infectious diseases, as evidenced by videos on news media outlets, do not keep

---

humanitarian reasons that support the appointment of free legal counsel unaccompanied minors).

171. *Infra* Part IV.A.

172. *Infra* Part IV.B.

173. *Infra* Part IV.C.

174. I/A Court H.R., *supra* note 10, at 66-67.

175. See Smith-Pastrana, *supra* note 125, at 257 (the ACLU filed a complaint on behalf of more than a hundred unaccompanied migrant children).

176. Corcoran, *supra* note 126, at 82.

177. I/A Court H.R., *supra* note 10, at 67-69.

178. *Id.* at 67-68.

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 367

children safe.<sup>179</sup> For instance, in a Texas Border Patrol station, there were at times as many as 1,300 migrants occupying a station with a capacity for 500 people, where about 100 people “cover[ed] every inch of floor space” in holding cells with one toilet.<sup>180</sup> The amount of people being housed in these facilities makes it impossible for children to have any privacy and likely diminished their feelings of safety.

The Court also noted the importance of separating children from adults to avoid possible instances of abuse against children.<sup>181</sup> The Court emphasized that States must ensure that they do not create a situation where children are subjected to violence, exploitation, or abuse.<sup>182</sup> The ACLU Complaint recounted incidents where migrant children suffered physical and verbal abuse at the hands of CBP agents in shelters, including sexual abuse, refusal of medical treatment, and lack of basic necessities like drinking water.<sup>183</sup> Children also suffered racially or sexually charged comments and death threats.<sup>184</sup> It is clear from these instances of mistreatment that the United States did not ensure that the places of accommodation where unaccompanied migrant children were housed were safe enough to avoid violence or abuse against them.

Finally, the Court also noted that States must place the child in a familiar or community environment whenever possible, and only use shelter accommodations when placing the child in other environments is not possible.<sup>185</sup> To an extent, the United States has aimed to do that, given that ORR tries to place children with family members whenever possible.<sup>186</sup> This was a result of the Flores Settlement Agreement, reached in 1997 in the case of *Flores v. Reno*, which laid out the standards for detention of unaccompanied children in the United States.<sup>187</sup> The Flores Settlement created multiple mandates, including to “place each detained minor in the *least restrictive setting*

---

179. See Miroff and Partlow, *supra* note 145 (A Washington Post video showing the conditions of the McAllen Border Patrol Station in Texas).

180. *Id.*

181. I/A Court H.R., *supra* note 10, at 67.

182. *Id.*

183. Smith-Pastrana, *supra* note 125, at 257-60; see also *Sexual Abuse in Immigration Detention Facilities*, AMERICAN CIVIL LIBERTIES UNION, [https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities](https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities?redirect=maps/sexual-abuse-immigration-detention-facilities) (Information on sexual abuse complaints since 2007).

184. Burkisher Reynolds, *supra* note 7, at 200.

185. I/A Court H.R., *supra* note 10, at 67.

186. Burkisher Reynolds, *supra* note 7, at 207.

187. Joseph Carlton Elliott, Comment, *Sleeping with One Eye Open: The Result of Non-Transparent Oversight by the Office of Refugee Resettlement on Facilities Sheltering Unaccompanied Alien Children*, 68 ADMIN. L. REV. 153, 159 (2016).

*appropriate* to the minor's age and special needs."<sup>188</sup> Overall, however, the conditions of places of accommodation for unaccompanied migrant children in the United States do not ensure the well-being of children that the Court envisioned in its Advisory Opinion.

B. DUE PROCESS GUARANTEES THAT DO NOT PROTECT  
UNACCOMPANIED MIGRANT CHILDREN DURING IMMIGRATION  
PROCEEDINGS

The main issue regarding an unaccompanied child's due process is the lack of legal representation. The Court established that States must offer legal representation services and provide children with prompt and free access to a representative who can give them legal assistance.<sup>189</sup> It also noted that States should appoint a guardian to defend the children's best interests and ensure their well-being.<sup>190</sup> The United States does not follow the Court's view because there is no requirement for unaccompanied migrant children to have appointed counsel during immigration proceedings at no cost to the child.<sup>191</sup>

In spite of this, many non-profit organizations in the United States receive federal funding to provide limited free legal services to unaccompanied children currently in the custody of DHS and facing removal.<sup>192</sup> For the most part, these programs are not funded to provide direct representation to resolve the child's case from start to finish.<sup>193</sup> Most commonly, they provide direct representation to a child in court when DHS is seeking removal to his or her home country.<sup>194</sup> However, with unprecedented and growing numbers of unaccompanied children crossing into the United States, DHHS has turned its efforts, and budget, toward housing and detention, thus significantly reducing the funding for legal services.<sup>195</sup> To supplement federal funding, some city and state actors have allocated funds to provide legal services to these

---

188. *Id.* at 160 (citing Stipulated Settlement Agreement (Flores Settlement), No. CV 85-4544-RJK(Px) (C.D. Cal. filed Jan. 17, 1997)).

189. *VA Court H.R.*, *supra* note 10, at 50.

190. *Id.* at 50-51. A guardian should be appointed until the child comes of age or leaves the State's territory.

191. Ham Pong, *supra* note 153, at 79.

192. *Id.* at 77. Some of these organizations include: The Capital Area Immigrants' Rights (CAIR) Coalition's Detained Children's Program in Washington, D.C.; Kids in Need of Defense (KIND) in Newark, New Jersey; National Immigrant Justice Center in Chicago, Illinois; and Legal Services for Children in San Francisco, California.

193. *Id.* at 78.

194. *Id.*

195. *Id.*

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 369

children, but this funding is inconsistent.<sup>196</sup>

Despite these programs, because there is no mandated requirement for unaccompanied migrant children to have appointed counsel during their removal hearings at no cost to the child, children as young as six years-old may appear before a judge without a parent, guardian, or an attorney<sup>197</sup> and face federal prosecutors at adversarial court hearings that can have life-or-death consequences.<sup>198</sup> In remarks to the Hispanic National Bar Association in 2014, then United States Attorney General, Eric H. Holder Jr., said, “[t]hrough these children may not have a constitutional right to a lawyer, we have policy reasons and a moral obligation to ensure the presence of counsel.”<sup>199</sup> Generally, having legal representation enhances the effectiveness and efficiency of immigration proceedings, making the issue of legal counsel for unaccompanied migrant children a moral and legal matter.<sup>200</sup> This becomes even more significant because having a lawyer makes a substantial difference in these children’s cases: only one in ten children who had legal representation were removed from the United States.<sup>201</sup> Even with federal- and state-funded initiatives, the fact that a significant number of unaccompanied migrant children must act as their own lawyers, pleading for asylum or other types of relief that they do not understand, goes against an important aspect of the Court’s Advisory Opinion: that States where unaccompanied migrant children are detained should provide children with access to free legal assistance and appointed counsel.<sup>202</sup>

---

196. *Id.* at 79. California governor Jerry Brown signed into law a bill allocating \$3 million to non-profit organizations to provide representation to children in federal immigration court; the New York City Council allocated \$1 million of its fiscal 2015 budget to immigration services for children.

197. Ham Pong, *supra* note 153, at 80; see Julia Preston, *Young and Alone Facing Court and Deportation*, THE NEW YORK TIMES (Aug. 26, 2012), <http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html> (describing the situation of Juan David Gonzalez, a 6-year-old immigrant in immigration court in Harlingen, Texas, without a parent or a lawyer).

198. Santos, *supra* note 9.

199. *Id.*

200. *Id.* (citing Kathryn Mattingly, a spokeswoman for the Executive Office of Immigration Review).

201. *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>

202. I/A Court H.R., *supra* note 10, at 50.

C. HOW THE UNITED STATES CAN ADHERE TO THE COURT'S FINDINGS  
AND IMPROVE ITS TREATMENT OF UNACCOMPANIED MIGRANT  
CHILDREN

One of the primary reasons why the United States' immigration policies are not consistent with what the Court deemed necessary to maintain the well-being of migrant children is that United States immigration law often sees children primarily as illegal migrants, and "the law enforcement approach towards [these] migrants is to prioritize their 'alien' status over their status as children."<sup>203</sup> Policies that see children as illegal immigrants first and foremost disregard the child's rights and needs.<sup>204</sup> The United States has not made special provisions for children within its immigration system and has treated children in the same manner as adults.<sup>205</sup> This means that the system often falls short of considering the "best interests of the child."<sup>206</sup> The inadequacies in U.S. immigration law and policy, including the inadequate facilities where migrant children are housed<sup>207</sup> and the lack of free legal counsel to children in removal proceedings,<sup>208</sup> could be remedied by implementing some of the Court's findings in its Advisory Opinion by applying the Convention on the Rights of the Child (CRC).<sup>209</sup>

The United States signed the CRC on February 16, 1995, but did not ratify it and, therefore, is not bound by its terms.<sup>210</sup> Although the United States has not ratified the CRC, the expansive international acceptance has allowed the CRC to rise to the level of customary international law.<sup>211</sup> Customary international law is a term of art used to describe a type of law that arises from the particular practices that

---

203. Corcoran, *supra* note 126, at 56.

204. *Id.* at 84.

205. Smith-Pastrana, *supra* note 125, at 270.

206. *Id.*

207. *See id.* at 258-59 (describing the ACLU Complaint submitted on behalf of unaccompanied migrant children who suffered mistreatment in overcrowded shelters).

208. *See Representation for Unaccompanied Children in Immigration Court, supra* note 201 (a study found that only 1 in 10 children who had legal representation were removed).

209. Convention on the Rights of the Child, Nov. 10, 1989, 1577 U.N.T.S. 3, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [hereinafter CRC].

210. Smith-Pastrana, *supra* note 123, at 263. Ratification, as opposed to signature, "signifies an agreement to be legally bound by the terms of the Convention." *Signature, Ratification and Accession*, UNICEF, [http://www.unicef.org/crc/index\\_30207.html](http://www.unicef.org/crc/index_30207.html).

211. Smith-Pastrana, *supra* note 123, at 265. '

2017] FAILURE ADDRESSING RIGHTS OF MIGRANT CHILDREN 371

the majority of States engage in “from a sense of legal obligation.”<sup>212</sup> Customary international law is one of the three sources of international law, in addition to international agreements and general principles of law.<sup>213</sup> In contrast to treaties, which bind only their parties, customary international law is obligatory to all States.<sup>214</sup>

The CRC provides that “[i]n all actions concerning children, whether undertaken by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>215</sup> This provision of the CRC is known as the “best interest of the child” principle, and is used to refer to the factors that courts must consider when determining appropriate actions for the care, protection, and well-being of children.<sup>216</sup> By incorporating the CRC’s “best interest of the child” principle into the sphere of immigration law, the United States would ensure that unaccompanied migrant children are treated humanely. The United States would not be able to summarily deport children seeking sanctuary without first conducting a case-by-case assessment of each child’s best interests and determining whether or not the child would face irreparable harm if returned to his or her country of origin.<sup>217</sup> The adoption of this specific principle would enable unaccompanied children to be treated more compassionately in immigration proceedings, which would safeguard their best interests and not simply view them as illegal immigrants.

There are concerns that United States taxpayers should not pay for an attorney to represent a person—regardless of whether that person is an adult or a minor—who came to the United States illegally.<sup>218</sup> For instance, a number of people in California opposed a bill that argued that, at a minimum, children and people with certain disabilities should have government appointed attorneys during

---

212. *Id.* (citing Jeffrey L. Dunoff, et al., *Int’l Law Norms, Actors, Process: A Problem-Oriented Approach*, 77 (3d ed. 2010)).

213. Bart M.J. Szewczyk, *Customary International Law and Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1188, 1120 (2014).

214. *Id.*

215. Article 3, clause 1. CRC, *supra* note 209, at 2.

216. Smith-Pastrana, *supra* note 125, at 267.

217. Corcoran, *supra* note 126, at 73.

218. See Sarah D. Wire, *‘We have a moral obligation’: Lawmakers want the U.S. to provide attorneys for immigrant children*, LOS ANGELES TIMES (March 22, 2016, 3:05 AM), <http://www.latimes.com/politics/la-pol-ca-lofgren-immigrant-children-20160322-story.html> (Some California taxpayers opposed a bill that would allow children to government appointed attorneys to help them with an asylum process).

immigration proceedings.<sup>219</sup> However, people in favor of this bill argued that costs should not trump due process, and that allowing migrant children to have access to free legal representation would help avoid delays and streamline the immigration process, which would save money.<sup>220</sup> Many immigration judges delay and postpone hearings as they wait for children to look for an attorney, which ultimately costs money and time.<sup>221</sup> In the end, giving migrant children free legal counsel is not only a matter of morality but also a matter of efficiency in the immigration process, which is already backlogged and overwhelmed.<sup>222</sup>

The CRC has another guiding principle: the right to life, survival, and development, which compels States to protect children in their custody from violence.<sup>223</sup> Children exposed to violence, including sexual abuse and exploitation, can suffer serious negative effects on their development.<sup>224</sup> If the United States ratifies the CRC, it could begin to remedy the gross human rights violations that have taken place in shelters where migrant children are housed, and it would implement immigration policies that ensure that migrant children's due process rights are safeguarded.<sup>225</sup> Additionally, by providing migrant children with access to legal counsel, it would ensure that their immigration proceedings carried on efficiently because hearings would not be continuously delayed to allow children to find representation.<sup>226</sup> All of these measures fall in line with the Court's views on safe places to accommodate migrant children that enable their development.

---

219. *Id.*

220. *Id.*

221. *Id.*; see also Jerry Markon, *Can a 3-year old represent herself in immigration court? This judge thinks so*, THE WASHINGTON POST (March 5, 2016), [https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d\\_story.html?utm\\_term=.2dbb3deeac3b](https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.2dbb3deeac3b) (Not all judges follow this protocol: an immigration judge stated that he has taught immigration law to three and four year-olds and that, by doing so, there is a fair hearing).

222. See Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, THE NEW YORK TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> (“Weighed down by a backlog of more than 520,000 cases, the United States immigration courts are foundering, increasingly failing to deliver timely, fair decisions to people fighting deportation or asking for refuge.”).

223. Corcoran, *supra* note 126, at 73.

224. *Id.*

225. See Smith-Pastrana, *supra* note 125, at 257-260 (describing instances of abuse in shelters where unaccompanied migrant children were housed).

226. Wire, *supra* note 218.

## CONCLUSION

The 2014 Advisory Opinion of the Inter-American Court of Human Rights set forth a framework to properly safeguard the rights of migrant children. Two of the main issues the Court dealt with involved standards for basic conditions of places to accommodate migrant children and proper guarantees of due process for children detained during immigration proceedings. The Court emphasized that it was necessary to accommodate unaccompanied migrant children in places that enabled their development, provided necessary conditions for a decent life, and treated the children humanely. When dealing with the 2014 surge of unaccompanied migrant children from Central America, the United States failed to provide these conditions. Migrant children were placed in overcrowded shelters where mistreatment and abuse was common. Regarding proper due process guarantees, the Court noted the importance of providing children with free legal assistance and a guardian that looked out for their best interests. The United States did not provide migrant children with appointed counsel during removal proceedings, thus letting children defend themselves in front of a judge and against an experienced government attorney. These two particular issues demonstrate the inhumane treatment of unaccompanied migrant children, which results from treating children like adult illegal immigrants, without any regard or consideration to their specific vulnerability.

For humanitarian, policy, and cost-related reasons, the United States should adopt at least some of the measures set forth by the Court in the 2014 Advisory Opinion in order to protect migrant children from abuse and provide the children adequate legal assistance in the immigration process. Migrant children are more vulnerable to abuse than adult migrants, and their specific status should be taken into consideration in immigration proceedings. The United States should adopt the framework given by the Court or adopt the principles set forth in the Convention on the Rights of the Child, which similarly ensure that a child's best interest is the most important aspect in any immigration proceeding. This will ensure that the child's needs and rights are not disregarded and will give rise to more humane treatment of this vulnerable group in need of help.