

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
RESOLUTION 64/2018**

Precautionary Measure No. 731-18  
Migrant Children affected by the “Zero Tolerance” Policy regarding the  
United States of America  
August 16, 2018

**I. INTRODUCTION**

1. On June 18, 2018, the Inter-American Commission on Human Rights (“the Inter-American Commission,” “the Commission,” or “the IACHR”) received a request for precautionary measures presented by the National Commission of Human Rights of Mexico, the Ombudsman’s Office of Colombia, the Ombudsman’s Office of Ecuador, the Attorney General’s Office of Guatemala, the National Commissioner of Human Rights of El Salvador, the National Commissioner of Human Rights of Honduras, all of which are National Institutions of Human Rights (“the applicants”), in favor of migrant children that had been detained and separated from their families in the United States as a result of the implementation of the “Zero Tolerance” policy (“the beneficiaries”). Among other conditions, the applicants allege that the separation of parents from their children could cause irreparable harm to their rights, particularly in the context of the children’s best interest.

2. The Commission requested information from both parties on June 25, 2018 and received information from the applicants on June 28, July 4 and 6, and August 1, 2018. The State sent its report on June 29, 2018. On July 20, the Commission requested additional information from both parties. The applicants submitted their response on August 6, 2018. For its part, the State submitted its report on August 10, 2018.

3. After analyzing the factual and legal allegations submitted by the parties, the Commission concludes that the rights to family life and personal integrity, as well as the right to identity of the children, who are the proposed beneficiaries, are *prima facie* in a situation of risk. Consequently, in accordance with Article 25 of the Rules of Procedure, the Commission requests that the United States: a) Adopt the necessary measures to protect the rights to a family life, personal integrity, and identity of the proposed beneficiaries. Particularly, assuring that these rights are protected through the reunification of the children with their biological families and in support of the children’s best interests; b) Adopt the necessary measures, while the reunification is carried out, to immediately guarantee an appropriate, free, and regular communication between the beneficiaries and their families, in accordance with their best interests. Moreover, with the aim of protecting their rights, provide medical and psychological assistance, among others that might be necessary such as consular assistance. Also, provide interpreting services when necessary so that the proposed beneficiaries know their rights and have a good understanding of their situation and destination; c) In case any of the proposed beneficiaries was deported separately from their children, adopt immediately the necessary measures in the framework of international cooperation to guarantee their reunification, taking into account the child’s best interest and the necessary support and care; d) Suspend any migration procedure that may result in the separation of the children from their parents; and e) Agree upon the measures to be adopted regarding the proposed beneficiaries and their representatives.

## II. SUMMARY OF ALLEGED FACTS AND ARGUMENTS SUBMITTED BY THE PARTIES

### 1. Information provided by the applicants

4. The request was submitted on behalf of migrant children and adolescents who arrived with their families to the southern border of the United States of America and who were separated from their families by the authorities of that country. The applicants alleged that the universe of proposed beneficiaries may be determined in accordance with Article 25.6.b of the Rules of Procedure, based on their migration status, their geographical location, their age and the conditions of separation of their parents or families. The request is set in the context of the "Zero Tolerance" policy carried out by the current U.S. administration, which they claim is a way to prevent immigration and yet cause irreparable harm to the proposed beneficiaries:

In relation with this request, the Secretary of Homeland Security, Kirstjen Nielsen, before the Committee on Homeland Security and Governmental Affairs of the US, on May 15, 2018, expressed that the U.S. policy was to file criminal charges for the illegal crossing of the border. Consequently, if the defendants cross the border with their children, they must be separated. Secretary Nielsen stated that separation occurs every day. On the other hand, regarding migrants, Jeff Sessions, the Attorney General of the United States stated that if illegal immigrants do not want to be separated from their kids 'they should not bring them.'

5. The applicants alleged that the seriousness of the situation is based on three aspects. First, that the policy of the U.S. government is causing irreparable harm to family ties and ignoring the principle of the best interests of the child and, therefore, that it violates Article VII of the Rights and Duties of Man, which states that family is the natural and basic element of society, and as such it must be protected by society and by the State. As an example of the consequences of this policy, the applicants referred to a Honduran father who reportedly committed suicide in a Texas prison after being separated from his family.<sup>1</sup>

6. Second, the applicants argued that the separation itself adversely affects the right to personal integrity of the proposed beneficiaries, as established in Article V of the American Declaration. The applicants alleged that the stress, fear and suffering caused by the uncertainty of not knowing whether they could be reunited or seen again causes serious psychological damage, which in turn worsens by the fact that the detention of children has a more serious impact on their well-being, and because most of them do not even understand the language or the situation in general. Third, the separation policy affects the right of the proposed beneficiaries to personal liberty in accordance with Article VII of the Declaration, to the extent that leaving the children under the custody of the State has resulted in their arrest and in some cases their relocation to temporary homes, where, in some cases, they have disappeared. According to the applicants, the personal liberty of children and adolescents is affected, they are separated from their families and detained without any justification. Finally, according to the applicants, this leads to exposing the children to an increased risk of being subjected to violence, human trafficking and exploitation.

7. The applicants provided information regarding the location of some of the proposed beneficiaries. In that regard, the National Human Rights Commission of Mexico indicated that in the State of Texas, some children were being held in the following centers: BCFS Baytown, Shiloh, Southwest Key Casa Quetzal, Southwest Key Casa Moctezuma, Southwest Key Casa Mesa Shelter, Southwest Key Casa Houston, Catholic Charities and Southwest Key Casa Conroe. Similarly, the Human Rights

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<sup>1</sup> New York Times, "Honduran Man Kills Himself after Being Separated From Family at U.S. Border, Reports Say," Available at: <https://www.nytimes.com/2018/06/10/us/border-patrol-texas-family-separated-suicide.html>

Ombudsman's Office in El Salvador reported that as of June 27, 2018, about 145 children were being held by the Office of Refugee Relocation (ORR) in the following shelters in Texas: Upbring, El Tornillo, San Antonio Bokenkamp Old House, BCFS Paso Processing Center, Temporary Foster Care, Baytown Southwest Key, Quetzal House, Southwest Key Father's House, Southwest Key President, Brownsville, Border Patrol Detention Center known as Ursula, New Hope Hop Children, Southwest Key Combes, and Catholic Charities. Likewise, in the state of Arizona: Casa Phoenix, Las Palmas, Phoenix Southwest Key Kokopelli, Campbell, Hacienda el Sol and Estrella del Norte. In addition, Salvadoran authorities indicated they had located more citizens in Seattle, Washington and Atlanta, Georgia. In relation to Honduran children, applicants mentioned the following centers: Crittenton, Eloy Az, Conroe, Std, Prairieland, McAllen, Ehdc, Pidc Los Fresnos Texas, Puerto Isabel, Otero New Mexico, Pidc Los Fresnos Texas, Otero Texas, Epf Mcallen Texas, East Hidalgo Texas, West Texas, El Paso Texas, Brooks Texas, Pidc Los Fresnos Texas and La Salle Laredo Texas. In their latest report, the petitioners also mentioned that migrant children were allegedly detained in Florida, Michigan, Kansas City and Illinois.

8. In relation to the conditions of detention, the applicants reported that according to the Human Rights Commission of Mexico, children detained in the BCFS Baytown Detention Center have had telephone communications once a week. Nonetheless, they are only authorized to call consular personnel and sometimes to relatives who live in their country of origin, which means that they are not authorized to call their parents, several of whom are subject to criminal proceedings. On the other hand, parents are only authorized to make calls if they have sufficient credit in their respective accounts. In addition, the applicants indicated that parents cannot visit their children and vice versa. However, in some cases, consular staff can visit the detention centers, verify their conditions and then transmit information to each of them. Similarly, Salvadoran and Honduran authorities recently reported significant obstacles in telephone communication between families; however, there are attempts to fix it.

9. In their last communication, the applicants stated that, according to a United States government report of July 19, 2018, of the 2551 children under the age of five, only 1606 were eligible to reunify with their parents, while 900 were declared ineligible, since their parents had a criminal record or had waived the right to reunification at the time they were deported. Within the first group, the applicants indicated that around 848 parents have passed the investigation stage and could meet with their children, while other parents are awaiting the interview with the federal authorities or have been released by the United States Immigration and Customs Enforcement (ICE). In addition, with respect to the injunction issued on June 26, 2018 by the U.S. District Court for the Southern District of California,<sup>2</sup>

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<sup>2</sup> On February 26, 2018, the American Civil Liberties Union (ACLU) filed a joint complaint against ICE and others for the separation of the families, along with a resource for a collective preliminary injunction to prevent the government from separating families. On June 26, 2018, the trial court issued a preliminary injunction in the following terms:

- 1) Defendants [...] are preliminarily enjoined from detaining Class Members in DHS custody without and apart from their minor children, absent a determination that the parent is unfit or presents a danger to the child, child, unless the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child in DHS custody.
- 2) Unless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child:
  - a) Defendants must reunify all Class Members with their minor children who are under the age of five (5) within fourteen (14) days of the entry of this Order;
  - b) Defendants must reunify all Class Members with their minor children age five (5) and over within thirty (30) days of the entry of this Order.
- 3) Defendants must immediately take all steps necessary to facilitate regular communication between Class Members and their children who remain in ORR custody, ORR foster care, or DHS custody. Within ten (10) days, Defendants must provide parents telephonic contact with their children if the parent is not already in contact with his or her child.

the applicants indicated that until July 17 —one of the deadlines set by the judge for children under five— the government had only managed to reunite less than 60 children with their families, out of a total of 103. In general, the applicants emphasized that although the government has simplified the procedures and is trying to reunite the rest of the families, there are also serious administrative problems with respect to identification and location; also, some parents were allegedly forced or tricked into signing forms in which they agreed to be quickly deported without their children, including adults who did not understand the nature of the proceedings or only spoke an indigenous language or were even illiterate.

10. Consequently, the applicants asked the IACHR to issue precautionary measures to request the United States of America to complete the separation of migrant children and adolescents from their families, to take all necessary measures to reunite the children who have been separated from their parents, to protect the rights to personal integrity, health, family and personal freedom, related to the rights of migrant children.

## **2. Response of the State**

11. The State firstly highlighted that the topic of migration is of significant interest to the United States, as reflected by its ongoing engagement in several migration-related matters before the Commission and in other OAS bodies. Furthermore, while recognizing the legacy of immigrants – 1.1 million of which entered the U.S. during 2017 –, it must also be pointed out that the United States is a nation of laws. In this sense, the State referred to case law from the Commission itself,<sup>3</sup> according to which “[...] it is the sovereign right of States to control their borders and set migration policies in accordance with their domestic laws and policies, consistent with their international obligations [...]. States retain the discretion to determine whether to expand migration pathways, detain migrants who seek entry, impose criminal penalties for illegal immigration, or adjust the status of migrants. With this in mind, the United States will continue to exercise its sovereign authority over its immigration policy.”

12. Notwithstanding the aforementioned, the State also referred to its efforts and commitment to cooperate with other countries in the Hemisphere so as to tackle the root causes behind the current crisis.<sup>4</sup> Moreover, “[a]s to cases involving family separation during detention, on June 20 – after the Petitioners in the above-referenced matters submitted their respective petitions for precautionary measures –an Executive Order was signed, which directs the Administration to continue to protect the border, while simultaneously avoiding the separation of families to the extent we can legally do so. The U.S. Departments of Homeland Security and Health and Human Services are also working to reunify parents with their children. In light of litigation on these matters before our independent judiciary and recent court decisions, we are unable to provide the Commission with further details at this time.”

13. On July 20, additional information was requested from the State, specifically: a. If the judicial decision of June 26, 2018 that required the reunification of the families, had been fulfilled in relation to the proposed beneficiaries and the possible legal consequences of their non-compliance; b. how many families were reunited and how many would be scheduled to meet, in accordance with the terms of the June 26 decision; c. if the relevant authorities established means of communication between the parents and the children who remain separated; d. how many children or their parents have been deported

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4) Defendants [...] are preliminarily enjoined from removing any Class Members without their child, unless the Class Member affirmatively, knowingly, and voluntarily declines to be reunited with the child prior to the Class Member's deportation, or there is a determination that the parent is unfit or presents a danger to the child.

<sup>3</sup> *Mortlock v. United States*, Case No. 12.534, Report No. 63/08, Admissibility & Merits, July 25, 2008, para. 78.

<sup>4</sup> According to the State, approximately \$2.6 billion were destined to foreign assistance to address the security, governance, and economic challenges in Central America for Fiscal Years 2015 to 2018.

separately and, if applicable, the measures to ensure their reunification; e. how many children were placed in the United States in foster homes or under the care of State agencies.

14. In a note received on August 10, 2018, the State informed that, under the decision of the U.S. District Court for the Southern District of California, children reunification has been carried out, having submitted a progress report on August 2, 2018.<sup>5</sup> The State reassured that, by means of this process, the main objective of the government is to protect the security and well-being of the children under its custody and to reunite them with eligible parents. Additionally, it pointed to the fact that many employers from the administration have spent weeks to overcome the challenge of expedite reunification while ensuring the family relationships and security of the children.

15. According to the United States, in the forthcoming days and weeks, the government will continue with the reunification process between parents and their children insofar as they are located and are willing to be reunified. Moreover, it will continue to work on reuniting adults that have been deported, including those that have shown preference for leaving their children in the United States but who wish to be reunified. The United States highlighted that if the State is unable to reunify the children with their parents –given that the parent either decided not to be reunited with the child or may not be eligible– Homeland Security will continue to stand by its sponsorship process in order to place the children with a sponsor in the United States, generally a family member. The United States reiterated that in view of the fact that a litigation is being processed before the Judiciary regarding this matter, it is not in a position to provide further details.

16. Finally, the United States indicated that it is making efforts to develop solutions to the circumstances that underlie and lead to irregular migration in Central America. In that regard, it highlighted that it is working with regional governments, international organizations, the private sector and civil societies to enhance citizen security, improve governance and boost economic prosperity.

### **III. PRELIMINARY CONSIDERATIONS**

17. Prior to the analysis on compliance with the requirements set forth in the Rules of Procedure, the Commission deems it relevant to highlight that on this occasion it is not called upon to declare whether or not the State violated any rights contained in the American Declaration of the Rights and Duties of Man, nor to grant reparations, if it were the case. In this sense, and within the framework of precautionary measures, the Commission is competent to establish whether the proposed beneficiaries are at risk of serious, urgent and irreparable harm, as enshrined in Article 25 of its Rules of Procedure.

18. Moreover, the Commission wishes to highlight that it has previously requested protection of persons that have not been previously designated. This is set forth in Article 25.3 of the Rules of Procedure: “Precautionary measures may protect persons or groups of persons, as long as the beneficiary or beneficiaries may be determined or determinable through their geographic location or membership in or association with a group, people, community or organization.” In this sense, the Commission has granted precautionary measures for indigenous peoples and peasant communities and persons deprived of liberty in penitentiaries or in migratory detention centers.

19. The Commission notes that the persons proposed as beneficiaries by the applicants comprise the children who, due to the implementation of the “Zero Tolerance” policy announced this April 7, were

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<sup>5</sup> The report indicates the following data: “[t]otal number of possible children of potential class members originally identified: 2,551[...]; “[c]hildren remaining in care with ORR, where the adult associated with the child is either not originally eligible for reunification or not available for discharge at this time: 572”. Among these children the report states: “adult outside the US: 410 children”.

separated from their families and detained by U.S. authorities when crossing the border. In its last report, the United States noted that, as of August 1, 2018, there are 572 children who are in these conditions under the administration of the Office of Refugee Resettlement. The Commission takes note that the applicants have indicated the geographic location of the centers in which the persons proposed as beneficiaries are reportedly located (*see* para. 7). In view of the foregoing, and the exceptional situation presented by this case, the Commission will consider such children as proposed beneficiaries, given that, being under the custody of the State in specific centers, they are determinable and, therefore, may be identified by the latter in accordance with article 25.3 of the Rules of Procedure.

20. Furthermore, the Commission recalls that, under the principle of complementarity, the State, through its domestic authorities, is primarily responsible for protecting the human rights of the persons under its jurisdiction; in this sense, the nature of international jurisdiction is "auxiliary" or "complementary," without replacing it.<sup>6</sup> In the present matter, the Commission has followed the implementation of the "Zero Tolerance" policy and previously expressed its concern through a press release.<sup>7</sup> Subsequently, the Commission learned of an Executive Decree signed on June 20, 2018, which reportedly prevented any further separation of children from their migrant families. Also, after the filing of this request for precautionary measures, the Commission learned that, through the decision of the U.S. District Court for the Southern District of California of June 26, 2018, a series of measures were ordered, aimed at facilitating regular communication between children and their parents and achieving reunification of children in specific time frames, the last having just expired on July 26.<sup>8</sup>

21. In view of the complementary nature of the Inter-American system, the IACHR requested information from the State about the results of the previous measures regarding the situation of risk alleged by the proposed beneficiaries. Consequently, the Commission shall present its determinations in this resolution taking into account that "invoking the principle of complementarity, as a basis to consider that the implementation of precautionary measures is inadmissible, implies that the State concerned must bear the burden of proving that the applicants are not in the conditions established in Article 25 of the IACHR Rules of Procedure. The latter, in view of the fact that the measures adopted by the State have had a substantive impact in reducing or mitigating the risk, so that in assessing the situation, the requirements of seriousness and urgency that call for international intervention to prevent irreparable harm would not be identified."<sup>9</sup>

#### **IV. ANALYSIS OF THE REQUIREMENTS OF ARTICLE 25 OF THE RULES OF PROCEDURE**

22. The precautionary measures mechanism is part of the Commission's function of monitoring compliance with human rights obligations established in Article 106 of the Charter of the Organization of the American States, 1948. These general monitoring functions are established in Article 41 (b) of the American Convention on Human Rights, as well as in Article 18 (b) of the IACHR's Statute. The precautionary measures mechanism is described in Article 25 of the Commission's Rules of Procedure.

<sup>6</sup> IACHR, Resolution 31/2017, Francisco Javier Barraza Gómez regarding Mexico (MC-209-14), August 15, 2017, available in Spanish at: <http://www.oas.org/es/cidh/decisiones/cautelares.asp>

<sup>7</sup> IACHR, "IACHR Expresses Concern over Recent Migration and Asylum Policies and Measures in the United States," press release dated June 18, 2018. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/130.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp)

<sup>8</sup> The decision made on June 26, 2018, establishes, among others, that unless it is determined that the parent is unfit or poses a threat to the child, or unless he/she affirmatively, consciously and willingly refuses to reunite with the child, "(a) Defendants must reunify all Class Members with their minor children who are under the age of five (5) within fourteen (14) days of the entry of this Order; and (b) Defendants must reunify all Class Members with their minor children age five (5) and over within thirty (30) days of the entry of this Order."

<sup>9</sup> IACHR, Resolution 31/2017, Francisco Javier Barraza Gómez in relation to México (MC-209-14), August 15, 2017, para. 22, available at: <http://www.oas.org/es/cidh/decisiones/cautelares.asp>. See also, IACHR, Resolution 32/2017, Santiago Maldonado in relation to Argentina, August 22, 2017, para. 16, available at: <http://www.oas.org/es/cidh/decisiones/pdf/2017/32-17MC564-17-AR.pdf>; IACHR, Comprehensive Protection Policies for Human Rights Defenders, December 29, 2018, para. 68.

Pursuant to this article, the Commission grants precautionary measures in serious and urgent situations, and when said measures are necessary to prevent an irreparable harm to people.

23. The Inter-American Commission and the Inter-American Court on Human Rights (hereinafter “the Inter-American Court” or “IAHR Court”) have established repeatedly that precautionary and provisional measures have a dual nature, both precautionary and protective. Regarding the protective nature, these measures seek to avoid irreparable harm and to protect the exercise of human rights. Regarding their precautionary nature, the measures have the purpose of preserving legal situations being considered by the IACHR. Their precautionary nature aims to safeguard the rights at risk until the petition in the Inter-American System is resolved. The object and purpose are to ensure the integrity and effectiveness of an eventual decision on the merits, and, thus, avoid any further infringement of the rights at issue, a situation that may adversely affect the useful purpose (*effet utile*) of the final decision. In this regard, precautionary or provisional measures allow the State concerned to comply with the final decision and, if necessary, implement the ordered reparations. Regarding the process of decision making and, according to Article 25(2) of the Rules of Procedure, the Commission considers that:

- a. “serious situation” refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the Inter-American System;
- b. “urgent situation” refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
- c. “irreparable harm” refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

24. In analyzing those requirements, the Commission reiterates that the facts supporting a request for precautionary measures need not be proven beyond doubt; rather, the purpose of the assessment of the information provided should be to determine *prima facie* if a serious and urgent situation exists<sup>10</sup>.

25. Within the analysis of the regulatory requirements, regarding the requirement of seriousness, the Commission notes that according to the disaggregated information provided by the State, in view of the judicial decision of June 26, 2018 and of the expiration of the time-limit set forth for the reunification of the children and parents affected by the “Zero Tolerance” policy, out of the 2551 children affected, 572 have allegedly not yet been reunified for various reasons. In fact, according to the information from the State, the parents of 410 children may already be outside of the United States, and there is no detailed information indicating in which countries they may be or how the State intends to achieve reunification in the short term. In effect, the Commission notes with deep concern that, according to the State report, such reunification may be impossible and the children may be handed over to sponsors in the United States. Even though most of the times they are given to a family member, it would not always be the case.

26. The Commission recalls that the Inter-American system has made determinations on some processes, such as those related to adoption, guardianship or custody, in which there is a risk of children being separated from their biological parents, and has established that their rights to integrity, identity and family life may be at serious risk, leading to the request for precautionary protection.<sup>11</sup> In such matters, the Commission has learned that the passing of time inevitably constitutes a defining element when assessing the possible existence of a situation of risk, taking into account the protection needs in

<sup>10</sup> In that regard, for instance, in relation to the provisional measures, the Inter-American Court has considered that this standard requires a minimum of details and information that allow for the *prima facie* assessment of the situation of risk and urgency. IACHR, *Matter of the children and adolescents deprived of their liberty in the “Complexo do Tatuapé” of the Fundação CASA*. Request for extension of precautionary measures. Provisional Measures regarding Brazil. Resolution of the Inter-American Court of Human Rights of July 4, 2006. Considerandum 23.

<sup>11</sup> IAHR Court, Resolution of the Inter-American Court of Human Rights dated July 1, 2011, Precautionary Measures regarding Paraguay. L.M Matter, considerandum 16.

each particular case based on concrete circumstances.

27. As a matter of fact, the prolonged separation of the children from their family is likely to have a serious impact on the affective ties with their relatives<sup>12</sup>, resulting in emotional and psychological distress that could affect their personal integrity by placing the balanced development of their personality at risk<sup>13</sup>. In the same way, the Inter-American system has learned that in the case of children and adolescents, the right to identity is linked to the right to a family life, given the role that family plays in the combination of attributes and characteristics that allow for the individualization of the person in society<sup>14</sup>. Additionally, the concrete circumstances and the specific context of the separation of the children from their family have different impacts on their personal integrity and on their comprehensive and balanced development. The children's personal factors such as their age and level of development are also important. Both exogenous and endogenous aspects should be duly considered.

28. As regards the integrity of the children, the IACHR has learned that family contributes decisively to the well-being of the children and to their comprehensive and balanced development in the physical, mental, spiritual, moral, psychological and social dimensions. Therefore, the separation of the children from their families may place the development and evolution of their different abilities at risk<sup>15</sup>. In this regard, the Declaration and the American Convention, in Articles VI and 17.1 respectively, recognize family as the protective core of childhood and adolescence and confer upon it an important role in guaranteeing the care, well-being and protection of children and adolescents by being the natural space for their growth and development, particularly in the early stages of their lives<sup>16</sup>. The right to a family life established in Article 17.1 of the American Convention on Human Rights and VI of the American Declaration of Rights and Duties of the Man is strictly related to the effective validity of the rights of the children and, therefore, to Article 19 of the American Convention and VII of the American Declaration, because of the place the family has in the life of the children and its protective, care and upbringing role<sup>17</sup>. The Inter-American Commission and the Inter-American Court have indicated that "in principle, the family should provide the best protection to the children (...)." Moreover, the State has the obligation not only to establish and directly execute protective measures with regard to the children, but also to favor, in the most comprehensive way, the development and the strength of the family.<sup>18</sup> Therefore,

<sup>12</sup> IACHR, "Request for Precautionary Measures to the Inter-American Court of Human Rights regarding boy LM," May 18, 2011, para. 54. On this matter, the Commission has learned that "the age factor and the passing of time are vital in the establishment of affective bonds, the creation of family relationships, personality development and the development of the child's identity, particularly at an early age. Consequently, there is a duty of exceptional diligence given that the time factor may cause irreparable harm to the boy." IACHR, *The right of boys and girls to a family. Alternative care. Ending institutionalization in the Americas*. October 17, 2015, para. 316.

<sup>13</sup> IACHR Court, Order of the Inter-American Court of Human Rights of July 1, 2011, Provisional Measures regarding Paraguay. L.M. Matter, Considerandum 14 and 18.

<sup>14</sup> The Inter-American Judicial Committee has considered that the right to identity is a key human right that can be conceptualized, in general, as a group of attributes and characteristics that allow the individualization of the person in society and, in that sense, includes several other rights established in the Convention, according to the subject of law implied and the circumstances of the matter. Inter-American Judicial Committee, Opinion "about the scope of the right to identity," order IAJC/doc. 276/07 rev. 1, of August 10, 2010. The IAHR Court and the Commission have also established the relation that it has with the right to family life. IAHR Court, Order of the Inter-American Commission on Human Rights of July 1, 2011, Provisional Measures regarding to Paraguay, L.M. Matter, Considerandum 15.

<sup>15</sup> See, IACHR [Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección](#), paragraphs 338 and ss. (Available in Spanish)

<sup>16</sup> See, IACHR, [Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección](#), paragraphs 388 and ss. (Available in Spanish). IACHR, *Report on the Rights of Boys and Girls to a family. Alternative care. Ending institutionalization in the Americas*, OEA/Ser.L/V/II. Doc.54/13, 2013, particularly paragraphs. 49 a 64. (Available in Spanish)

<sup>17</sup> IACHR, [Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección](#), paragraph 389. IACHR, [Informe sobre el Derecho del niño y la niña a la familia. Cuidado alternativo. Poniendo fin a la institucionalización en las Américas](#), paragraph. 57. (Available in Spanish)

<sup>18</sup> IAHR Court. Legal condition y and human rights of the children. Advisory opinion AO-17/02, para. 66. See also, IACHR, [Informe sobre el Derecho del niño y la niña a la familia. Cuidado alternativo. Poniendo fin a la institucionalización en las Américas](#), paragraphs. 42 and 53. In the context of the universal system, the Human Rights Committee of the United Nations has also expressly related the protection that the family deserves, established in Article 23.1 of the International Pact on Civil and Political Rights in compliance to the duty of protection of the children due to their

children must remain with their families, unless there are compelling reasons, according to their best interests, that may justify the separation from their families. In any case, the separation should be exceptional and temporal.<sup>19</sup>

29. In the case of separation of children from their families in the migration context, the Inter-American system has established that it may lead to the disintegration of families. Articles 17 of the Convention and VI of the American Declaration establish that, in the right to family protection, as a rule, children must remain with their parents or those who act on their behalf, and that their separation should be prevented, unless the best interest of the children dictates otherwise.<sup>20</sup> In this sense, legal separations of children from their families must only proceed in an exceptional manner if they are duly justified according to their best interest and are temporary.<sup>21</sup> Regarding this last point, the Commission notes that, in its recent General Joint Observations 3/22 and 4/23, the Committee on Migrant Workers and their Families and the Committee on the Rights of the Child have determined that a rupture in the family unit can occur from the expulsion of one or both progenitors, in such a way that separating families due to the violation of immigration laws results in a disproportionate restriction.<sup>22</sup>

30. Additionally, the specific circumstances in migratory contexts in which separation of children from their families may occur could potentially have negative consequences in their personal integrity and comprehensive and balanced development. The physical and forced separation of the children from their biological parents and/or other close relatives—adults that are their immediate mentors and with whom they have a strict affective relationship of security and confidence—, is already negative. Moreover, if it occurs in a context of uncertainty about the current and future situation, lack of knowledge of their destination, and absence of any kind of contact—all of this in an unknown country and without a supporting network integrated by adults whom the children can trust—, the consequences are even more harmful to their personal integrity and development. The consequences of family separations that are carried out under these circumstances have the following effects on the children affected by it: stress, anxiety, frustration, incomprehension, sadness, depression and trauma that may result in physical, mental, spiritual, moral psychological and social harm on the children, and may even be of a long-lasting and irreversible nature, due to its evolutionary and growing state in all these facets. It is worth mentioning that the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated that “the deprivation of liberty of children based on their or their parents’ migration status [...] may constitute cruel, inhuman and degrading treatment of migrant children.”<sup>23</sup>

31. In view of the foregoing, the Commission considers that just as it has stated in the

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condition, established in Article 24.1 of the same Pact, Human Rights Committee, General Observation No. 17, Article 24—Rights of the children, 35<sup>th</sup> period of sessions, U.N. Doc HRI/GEN/1/Rev.7 (1989). And General Observation No.19. Article 23 – The family, 39<sup>th</sup> period of sessions, U.N. Doc. HRI/GEN/1/Rev.7 (1990).

<sup>19</sup> IACHR Court. Legal condition y and human rights of the children. Advisory opinion AO-17/02 August 28, 2002. Series A No. 17, resolution item No. 5 and paragraph 77. See also, IACHR, *Report on the Rights of Children to a family. Alternative care. Ending institutionalization in the Americas*, OEA/Ser.L/V/II. Doc.54/13, 2013, paragraphs. 65 a 75. (Available in Spanish).

<sup>20</sup> IACHR Court. Rights and guarantees of children in the migration context and/or in need of international protection. Advisory Opinion AO-21/14 of August 19, 2014. Series A No. 21, para. 177

<sup>21</sup> IACHR Court. Rights and guarantees of children in the in the migration context and/or in need of international protection. Advisory Opinion AO-21/14 of August 19, 2014. Series A No. 21, para. 273. Quoting Matter *Fornerón and daughter Vs. Argentina*. Merits, Reparations and Costs. Order of April 27, 2017. Series C No. 242, para. 116

<sup>22</sup> Joint general observation No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and their families and No. 23 (2017) of the Committee on the Rights of the Child on the duties of the States regarding children’s human rights in the context of international migration in the countries of origin, transit, destination and return. CMW/C/GC/4, CRC/C/GC/23, para. 29.

<sup>23</sup> Joint general comment No. 4 (2017) of the Committee for the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 (2017) of the Committee on the Rights of the Child on the obligations of States regarding human rights of children in the context of international migration in countries of origin, transit, destination and return. CMW/C/GC/4, CRC/C/GC/23, para. 9

aforementioned events (*see* para. 26), the rights to family protection, personal integrity and identity may require precautionary protection in the migration contexts when the separation, due to the specific circumstances in which they occur, may have *prima facie* an irreparable impact on those rights.

32. The Commission takes note that the United States did not provide information on the specific situation of the persons proposed as beneficiaries, nor on whether the reunification has effectively been planned for the short term, if there is a timeline for reunification in place, or whether effective means of communication have been enabled. Moreover, the United States has not provided detailed information on the specific circumstances of the proposed beneficiaries, their health or detention conditions. According to the State's report, in some instances reunification may be impossible and these children could be given to a sponsor in the United States, who in some cases may not be a family member.

33. The Commission regrets the lack of specific information by the State, which is particularly relevant when assessing the seriousness of the situation of risk. Regarding this aspect, the Commission notes that the separation of children originated from the actions of the State, without any justification that it was carried out on the basis of the children's best interest. The State, as the main guarantor of the rights of the proposed beneficiaries, must have the means to report to the Commission about their specific situation.

34. Consequently, in the abovementioned conditions described by the applicants and, given that the State was unable to provide a sufficient explanation to dismiss such allegations, the Commission concludes that the rights to life and personal integrity and, especially in the case of the children, their right to identity is *prima facie* in a situation of risk, and that the requirement of seriousness is met. By taking this determination, the Commission takes into account the risk as a whole, the possible loss of the relationship between the children and their biological family as a possible result of the separation, in the absence of concrete information provided by the State regarding their situation, as well as the actual possibilities of reunification. Moreover, in some cases, a deportation could have been materialized separately, which adds to the emotional and psychological impact that such situation of uncertainty regarding the reunification of the children may have in a defining moment in which family plays an important role in the development of their respective personalities and identities.

35. As regards the requirement of urgency, the Commission observes that in light of the situation of risk described, the State adopted measures in accordance with the judicial decision of June 26, 2018 which might mitigate the risk, given that the ruling that ordered the immediate adoption of the necessary measures to facilitate regular communication between children and their parents, telephone contact and others that would allow for reunification within the specific time-frames. In view of the complementarity of the Inter-American system, the Commission deemed it pertinent to request information from the State, particularly on the progress and efficiency of the ruling.

36. The Commission notes that even though the State has taken important steps towards mitigating the damage caused, the time-limit to reunify the children affected by the "Zero Tolerance" policy expired on June 26, 2018, and 572 are still awaiting reunification. In light of the alleged lack of effectiveness of the measures adopted by the State and the lack of explanation on the exact procedures by which the State intends to reunify the proposed beneficiaries, the Commission considers that the requirement of urgency is met due to the imminent risk of an impact on their rights in face of the lack of information on the whereabouts of some of the proposed beneficiaries, the alleged continuity of separations without concrete information about when reunification will be carried out, even though the time-limit of the judicial decision of June 26, 2018 has expired. In such circumstances, the immediate adoption of measures to safeguard the rights of the proposed beneficiaries is required.

37. Regarding the requirement of irreparability, the Commission considers that it is fulfilled, given

the severe impact that the situation described may have on personal integrity and the possible loss of family relationships that are part of family rights, which additionally, in the case of children and due to its own severity and impact, may inevitably persist and extend to adult life.

## **V. BENEFICIARIES**

38. The Commission declares that the beneficiaries of the present precautionary measure are the children that have been separated from their parents as a result of the “Zero Tolerance” policy, who are under the custody of the Office of Refugee Relocation, comprising 572 children to date, according to the State. With this information, the Commission estimates that these children are determinable and may be individualized in accordance with Article 25.3 of the Rules of Procedure.

## **VI. DECISION**

39. The Commission considers that this matter meets *prima facie* the requirements of seriousness, urgency and risk of irreparable harm set forth in Article 25 of its Rules of Procedure. Consequently, the Commission requests that the United States:

- a) Adopt the necessary measures to protect the rights to a family life, personal integrity, and identity of the proposed beneficiaries. Particularly, assuring that these rights are protected through the reunification of the children with their biological families and in support of the children’s best interests;
- b) Adopt the necessary measures, while the reunification is carried out, to immediately guarantee an appropriate, free, and regular communication between the beneficiaries and their families, in accordance with their best interests. Moreover, with the aim of protecting their rights, provide medical and psychological assistance, among others that might be necessary such as consular assistance. Also, provide interpreting services when necessary so that the proposed beneficiaries know their rights and have a good understanding of their situation and destination;
- c) In case any of the proposed beneficiaries was deported separately from their children, adopt immediately the necessary measures in the framework of international cooperation to guarantee their reunification, taking into account the child’s best interest and the necessary support and care;
- d) Suspend any migration procedure that may result in the separation of the children from their parents; and
- e) Agree upon the measures to be adopted regarding the proposed beneficiaries and their representatives.

40. The Commission also requests that the Government of the United States inform the Commission within a period of 10 days, as from the date of notification of the present resolution, about the adoption of the precautionary measures that have been consulted with and agreed upon and to periodically update this information.

41. The Commission highlights that, in conformity with Article 25(8) of its Rules of Procedure, the granting of precautionary measures and their adoption by the State do not constitute a prejudgment on

the possible violation of rights safeguarded in the American Declaration and other applicable instruments.

42. The Commission requests that the Secretariat of the Inter-American Commission notify the United States and the applicants of the present resolution.

43. Approved on the 16<sup>th</sup> day of the month of August, 2018 by: Margarete May Macaulay, President; Esmeralda Arosemena de Troitiño, First Vice-President; Luis Ernesto Vargas Silva, Second Vice-President; Joel Antonio Hernández García, Antonia Urrejola and Flávia Piovesan, members of the IACHR.

María Claudia Pulido  
Assistant Executive Secretary