

## Inter-American standards on migration, asylum and refugee law

Joel Hernández<sup>1</sup>

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### 1. The Inter-American System of Human Rights

The Inter-American System of Human Rights is composed by two bodies: the Inter-American Commission (hereinafter “the Commission”) and the Inter-American Court of Human Rights (hereinafter “the Court”). Whereas the Commission is a principal body of the Organization of American States (OAS), the Court is a treaty-body established as part of the institutional framework of the American Convention on Human Rights.<sup>2</sup>

The Inter-American System was inspired in the early European System. The Americas, however, kept the two-institution mechanism. The Commission hears cases at the first instance. If the violations are not fully repaired at that level, the

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<sup>1</sup> Joel Hernandez is a graduate from the Faculty of Law of the National Autonomous University of Mexico where he obtained a bachelor of laws degree. He also holds a master of laws (LLM) from New York University School of Law. He is currently member of the Inter American Commission on Human Rights for the period 2018-2021 and vice-President of the Inter-American Juridical Committee.

<sup>2</sup> American Convention on Human Rights, San José, Costa Rica, 22 November 1969, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm). The 23 OAS member States that have ratified the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Trinidad and Tobago and Venezuela also ratified the American Convention but later denounced having effects such complaints in 1999 and 2013 respectively.

Commission is empowered to sue the concerned State before the Court. The decisions of the Court are final and binding.

The Commission's mandate stems from the American Declaration on Rights and Duties of Man, the American Convention and other Inter-American human rights treaties. It exercises a *quasi*judicial role through its system of cases and petitions. The Commission issues orders of precautionary measures to protect the life and integrity of persons in danger. In addition, it hears complaints on violations of human rights protected by the instruments that are sources of the Commission's mandate. The Commission also enjoys conciliatory powers to solve cases by "amicable solutions".

The Commission's competence *rationae personae* includes cases submitted by any person or group of persons, or any nongovernmental entity legally recognized in one or more of the thirty-five Member States of the Organization. This power finds its main source in the OAS Charter and the American Declaration.

The competence *rationae materiae* is dual. For those States which are parties to the American Convention, the Commission applies both the American Declaration and the Convention for the consideration of complaints filed by individuals. Concurrently, it only applies the American Declaration to States that are not parties to the Convention.

Only the States Parties and the Inter-American Commission on Human Rights enjoy the right to submit cases before the Court, and the Court has only jurisdiction to hear a case, once the Commission has exhausted its quasi-judicial activity. Therefore, access to the Court depends on the decision of the Commission regarding the admissibility of the case and its decision on whether there are merits to recourse to the jurisdiction of the Court. In short, it is not possible to dissociate the recommendatory process before the Commission from the judicial process before the Court, since the former constitutes the obligatory access route to the latter.

The Court has both contentious and advisory jurisdictions. Through its advisory jurisdiction, the Court responds to inquiries made by Member States or organs of the OAS regarding the compatibility of domestic norms with the American Convention or the interpretation of the Convention or other Inter-American instruments. To date the Court has issued a total of 24 advisory opinions on different legal matters, including migrant rights.

In the exercise of its jurisdiction in contentious cases, the Court decides on the responsibility of States for violations of international human rights obligations. The Commission and the States parties to the American Convention that have recognized the jurisdiction of the Court are solely authorized to submit a case regarding the

interpretation or application of the American Convention for its decision, on condition that the procedure before the Commission had been exhausted. The declaration of recognition of the jurisdiction of the Court can be unconditional for all cases, or, on condition of reciprocity, for a given period or a specific case. As of today, 20 States party to the American Convention have recognized the Court's contentious jurisdiction.<sup>3</sup>

The Inter American instruments and the interpretation thereof by the Commission and by the Court have developed standards on human rights obligations of Member States under thresholds established by those bodies. Even though the State practice is an element in the creation of rules of international law, the Inter American law of human rights has been advanced by the decisions of the Commission and the Court moving States beyond the literal interpretation of the norms they are bound by.

The Commission and the Court have thus adopted an evolutive interpretation when developing their principles *vis-à-vis* the human rights of individuals in the context of migration. In this regard, the Court has written that the interpretation “must consider the changes over time and present-day conditions”.<sup>4</sup> It has also observed that the interpretation of other international norms cannot be used to restrict the enjoyment and exercise of a right; furthermore, the interpretation must contribute to the most favourable application of the provision whose interpretation is sought. To that end, the Inter-American system has relied on the general provisions of interpretation set forth in the Vienna Convention on the Law of Treaties, in particular the principle of good faith, to ensure that a provision is in keeping with the American Convention's object and purpose.

## 2. Migration in the Americas

Human mobility has been an inherent human condition throughout the history of humanity. From earliest human history, people have migrated in search of a better life, to populate other places on the planet, or to escape and survive human-made or natural dangers. Although human mobility has been a constant throughout all periods of human history.

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<sup>3</sup> The 20 States that have recognized the contentious jurisdiction of the Court are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

<sup>4</sup> Inter-American Court of Human Rights (I/A Court H.R.), *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, paras. 113-114.

Human mobility, whether it is international or internal migration is a multi-causal phenomenon. The Commission divides it into voluntary or forced migration. In the first case, the individual is migrating under his or her own volition, without any form of coercion.

A significant part of the voluntary migration is carried out by people who leave their places of origin fleeing from poverty and in search of a better quality of life attracted by the prevailing market conditions in the country of destination.

Frequently, this group of people enters the country of destination without documents and without authorization to work. This situation of vulnerability exposes migrants to conditions of labor abuse and violations of their human rights. Precisely, the Inter-American System has developed standards for the protection of migrants and members of their families without prejudice to their immigration status.

Undocumented migrants also face the abuses committed by migrant smugglers, exploiting their vulnerability and, at times, acting against their own lives. The international instruments have granted protection to smuggled migrants and obligations to the States to prevent and punish this crime.

Forced migration, on the other hand, encompasses all those situations in which the individual has been compelled to migrate because his or her life, safety or liberty is in jeopardy, whether because of various forms of persecution based on race, religion, nationality, membership in a given social group or political opinion, armed conflict, generalized violence or human rights violations, or because of other circumstances that have seriously disrupted public order, like disasters -natural and human-made- and other factors.

Although forced migration is a voluntary act, external causes, material or human, force people to leave their country of origin. In this case, we are faced with cases of asylum or refuge where the Inter-American System has established obligations for the States whose borders people reach seeking protection.

In addition to asylum seekers or refugees, forced migration includes victims of trafficking, people who are transported across borders without their consent or with their will coerced for exploitation purposes. In these cases, the Inter-American System has established protection obligations, both for the State of origin and the State of destination.

Human mobility is a phenomenon present in the Americas. Today, migratory flows are moving throughout the continent. Although, the major mobility is to the United States, there are also movements between the countries of the rest of the continent.

Numbers contained in the report of the UN Special Rapporteur on the human rights of migrants, 4 August 2016 give us a snapshot of the movement of people in the continent. The Americas account for close to 63 million international migrants. In percentage terms, 26% of the international migrants worldwide are in the Americas.<sup>5</sup> Some 54 million people are living in North America, mainly the United States at 47 million. In Latin America and the Caribbean there are 9 million of international migrants.<sup>6</sup>

Globally, the United States is the main country of destination for international migrants. In 2015, the United States had close to 47 million migrants, making it the country of destination for 20% of all international migrants.<sup>7</sup> Of the total number of international migrants in the United States in 2014, an estimated 11.1 million had an irregular immigration status.<sup>8</sup> Canada was estimated to account for close to 8 million international migrants in 2015, nearly 22% of the country's total population.<sup>9</sup>

On the other hand, Mexico is second largest country of emigration worldwide, with an estimated 13 million international émigrés, which means that more than 10% of the country's total population lives outside Mexican territory.<sup>10</sup> The region also has the most heavily travelled migration corridor in the world, which is between the United States and Mexico. Every year, hundreds of thousands of irregular migrants travel through Mexico to reach the United States. Most come from Central America, South America and the Caribbean, although some are from Africa and Asia as well.<sup>11</sup>

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<sup>5</sup> United Nations, Department of Economic and Social Affairs, Population Division, 'Trends in international migration, 2015', POPFACTS No 2015/4, p. 1.

<sup>6</sup> United Nations, Department of Economic and Social Affairs, Population Division, 'Trends in international migration, 2015', p. 1.

<sup>7</sup> United Nations, Department of Economic and Social Affairs, Population Division, 'Trends in international migration, 2015', p. 1.

<sup>8</sup> Jeffrey S. Passel and D'Vera Cohn, 'Unauthorized immigrant population stable for half a decade', Pew Research Center Fact Tank, 21 September 2016, <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/>.

<sup>9</sup> United Nations, Department of Economic and Social Affairs, Population Division, *International Migration Report 2015: Highlights*, (2016) p. 32.

<sup>10</sup> See Inter-American Commission on Human Rights (IACHR), *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/Ser.L/V/II.Doc.48/13, 30 December 2013, paras. 56 et seq.; United Nations, Department of Economic and Social Affairs, Population Division, 'International Migration 2013 Wall Chart', (2013), <http://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/wallchart2013.pdf>.

<sup>11</sup> IACHR, *Human rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 54.

The high level of mobility within the continent generates responsibilities for the States of origin, transit and destination. The vulnerability of the migrant in her or his journey to and in the host country, requires protection dedicated to preserve their dignity and address the particular situation they face as migrants.

### **3. Sovereignty and human rights**

The Commission has recognized that based on State sovereignty, States are entitled to regulate migration through policies, laws, judgments and practices.

States have developed standards and mechanisms at the international, regional, bilateral and unilateral levels to regulate the flow of persons. The Commission, however, has established that many laws, rules and regulations, fora and institutions through which States control international migration, have resulted in a lack of consistency in global, regional and national governance of international migration. That poses a challenge for the universal and regional codes developed for the protection of human rights.

The Inter-American System has consistently held that while states have the right to control their borders, define the requirements for admission, stay and expulsion of aliens in its territory and, in general, to establish their immigration policies; policies, laws and practices implemented on migration must respect and ensure the human rights of all migrants, which are rights and liberties that derive from human dignity and have been widely recognized by States as part of their international obligations.

National sovereignty thus finds its limit where the State's obligations to protect the human rights of migrants begin in accordance with international law. In this context, protection for migrants acquires a special character given the situation of vulnerability in which they find themselves in the host country. On the other hand, it is necessary for the receiving country to recognize the status of subject of law, as a natural consequence of her or his human right to legal capacity, so that it can organize her or his defense before the national courts.

With regard to various situations of vulnerability in which migrants frequently find themselves, the Commission has held that migrants and migrant workers find themselves in a vulnerable position. Often they are not familiar with the law and do not speak the language. At times they meet with outright hostility on the part of the local population, including authorities. Undocumented migrant workers find themselves in an especially difficult situation and even more exposed to abuse. In fact, the specific circumstances facing migrant workers show that they face a situation of structural vulnerability. Migrants constantly run up against roadblocks, including

arbitrary arrest and the lack of due process, collective deportation, discrimination in the granting of citizenship or in acceding to social services that foreigners have a right to by law, inhumane detention conditions, harassment on the part of authorities, including police and immigration officers, and the inability to defend themselves when exploited by unscrupulous employers. These problems become even more acute for women and children migrants, who must also deal with sexual harassment, beatings and below.

The Court has established: “Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.”<sup>12</sup>

One of the main human rights challenges the Commission has identified regarding migration within the region is the persistence of State policies, laws and practices that do not recognize persons in the context of migration as subjects of law, and subsequently violate their human rights.<sup>13</sup> Current developments in migration in the Americas have posed new difficulties for the protection of migrants.

#### 4. The work of the Commission

Since its creation in 1959, the Commission has monitored a number of situations involving individuals in the context of migration. It has done this through on-site visits to countries, thematic studies and country reports, requests of information, hearings and working meetings, petitions, cases and precautionary measures. In order to ensure recognition of individuals in the context of human mobility as subjects of rights and its effective enjoyment, the Commission has also focused part of its actions to ensure that victims of human rights violations can have equal access to international

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<sup>12</sup> I/A Court H.R., *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 112.

<sup>13</sup> The I/A Court H.R. has held that the immigration policy of a state is constituted by any act, measure or omission institutional (laws, decrees, resolutions, guidelines, administrative acts, etc.) that refers to the entry, stay or exit of national population or alien its territory. See I/A Court H. R., *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A, No. 18, para. 163.

justice through the mechanisms of individual cases and precautionary measures provided by the Inter-American Human Rights System.

In 1996, in response to the serious situation that internally displaced persons and migrant workers and their families were facing in various countries of the continent, the Commission decided to create the Rapporteurship on Internally Displaced Persons and the Rapporteurship on Migrant Workers and Members of their Families. In 2012, in order to respond to the multiple challenges of human mobility in the region from international and internal migration to forced and voluntary migration, the Commission decided to amend the mandate of the rapporteurships and establishing the Rapporteurship on the Rights of Migrants. The new mandate is focused on respecting and guaranteeing the rights of migrants and their families, asylum seekers, refugees, stateless persons, victims of human trafficking, internally displaced persons and other vulnerable groups of people in the context of human mobility.

One of the principal means by which the Commission and its Rapporteur on the rights of migrants have addressed the human rights violations has been by the development of standards based on decisions on petitions and cases, precautionary measures, country reports and thematic reports. The Commission has also been instrumental in developing the case law and advisory opinions that the Court has adopted with respect to these individuals.

Since the creation of the Organization of American States, its Member States have adopted international instruments which are the legal basis of the regional system for the promotion and protection of human rights. The central instrument and main reference of the work of the Commission of the Court is the American Convention on Human Rights.

## **5. The American Convention**

In its first section, the American Convention establishes the duties of the States and the rights protected under the Convention. With regard to people in the context of migration, especially those who are not citizens or who are stateless, Article 1.1 is particularly important since it establishes the obligation of States parties to respect and ensure the rights and freedoms recognized in the Convention to all persons subject to their jurisdiction without discrimination as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In turn, Article 24 of the American Convention stipulates that “all people” are



equal before the law. Consequently, they are entitled without any discrimination to equal protection of the law.

Article 22 of the American Convention is particularly relevant. It establishes the scope and content of the right of movement and residence, either to be exercised within the territory of which a person is a national or to be exercised in the context of international migration. Although Article 22 of the Convention is on “Freedom of Movement and Residence”, this provision contains rights and obligations of States beyond strictly freedom of movement and residence.

Article 22 also provides, *inter alia*, the prohibition of expulsion of nationals and their right not to be deprived of the right to enter the territory of which he/she is national (paragraph 5); the right to seek and enjoy asylum (paragraph 7); the principle of non-refoulement (paragraph 8); and the absolute prohibition of collective expulsion of aliens (paragraph 9).

## 6. The Inter American Standards

The Commission and the Court have developed standards on many aspects related to human mobility based mainly on the interpretation of the American Convention. A systematization of these standards can be found in the thematic report of the Commission entitled: “Human rights of migrants, refugees, stateless persons, victims of human trafficking and internally displaced persons: Norms and standards of the Inter-American Human Rights System.”<sup>14</sup>

The report makes an analysis of specific issues relating to: the right of equal protection and non-discrimination; the prohibition of slavery, servitude and human trafficking; freedom of movement and residence; the right to a fair trial in deportation and extradition procedures; the right to personal liberty and procedural guarantees in immigration detention; the right to seek and receive asylum and the principle of non-refoulement.

Due to their relevance, we will focus on the following items:

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<sup>14</sup> IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/Ser.L/V/II.Doc. 46/15, 31 December 2015.

### ***The Right of Equal Protection and Non-Discrimination***

The American Convention and other international instruments<sup>15</sup> recognize every person's right to equal protection and non-discrimination. Articles 1(1) and 24 of the American Convention read as follows:

#### **Article 1. Obligation to Respect Rights**

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

#### **Article 24. Right to Equal Protection**

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

The Commission and the Court have observed that the right to equal protection and non-discrimination is the “central, basic axis of the inter-American human rights system”.<sup>16</sup> The right to equality before the law and the obligation not to discriminate against any person constitute the basic foundation of the Inter-American system of human rights. The American Declaration states in its preamble that “all men are born free and equal in dignity and rights are endowed by nature with reason and conscience and should behave towards one another”. The same instrument provides in Article II that “all persons are equal before the law and have the rights and duties in this Declaration, without distinction of race, sex, language, creed or any other condition.”

Furthermore, the Commission has also articulated two concepts of the right to equal protection and non-discrimination: 1) one related to the prohibition of arbitrarily different treatment – with different treatment understood as meaning distinction,

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<sup>15</sup> See, *inter alia*, American Declaration of the Rights and Duties of Man, Bogotá, Colombia, 1948, Article II; Universal Declaration of Human Rights, Paris, France, 10 December 1948, Art. 7; International Covenant on Civil and Political Rights, New York City, USA, 16 December 1966, Art. 26; Convention on the Rights of the Child, New York City, USA, 20 November 1989, Art. 2(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York City, USA, 18 December 1990, Art. 7.

<sup>16</sup> See, *inter alia*, IACHR, Report on the merits No. 64/12, Case 12.271, *Benito Tide Méndez et al. v. Dominican Republic*, March 29, 2012, para. 226 (Citing, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters against the State of Chile*, September 17, 2010, para. 74).

exclusion, restriction, or preference;<sup>17</sup> and 2) the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination.<sup>18</sup>

The right to equal protection and non-discrimination is of particular importance in the defense of the rights of undocumented migrants. Their situation of special vulnerability requires that laws and national authorities recognize the legal equality of migrants regardless of their immigration status. In the landmark advisory opinion OC18 / 03,<sup>19</sup> the Court reaffirmed the principle of equality and non-discrimination in relation to migrants. The Court stated:

“The principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, since it rests on the whole legal structure of national and international public order and is a fundamental principle that permeates all laws. Today no legal act in conflict with this fundamental principle is supported, non-discriminatory treatment allowed the detriment of any person, gender, race, color, language, religion or belief, political or otherwise, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. This principle (equality and non-discrimination) is part of general international law. At the present stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens.”<sup>20</sup>

In addition, the Court also ruled that states cannot discriminate based on immigration status of a person, but could apply different treatment between nationals and foreigners, or between people in different immigration categories, provided that the objectives and treatments meet certain standards. The Court reiterated that not all differences in legal treatment necessarily constitute discrimination, since there are certain inequalities which can become unequal legal treatment.<sup>21</sup>

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<sup>17</sup> See, *inter alia*, UN Human Rights Committee, General Comment No. 18: Non-discrimination, 37th session, HRI/GEN/1/Rev.9 (Vol I), 10 November 1989, para. 7.; I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, para. 92; IACHR, Annual Report of the IACHR 2002, Fourth Progress Report of the Rapporteurship on Migrant Workers and Members of their Families, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, March 7, 2003, para. 87.

<sup>18</sup> See, *inter alia*, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters against the State of Chile*, September 17, 2010, para. 80.

<sup>19</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*.

<sup>20</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, para. 101.

<sup>21</sup> I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, para. 46.

A fundamental aspect for due protection is their legal capacity to be holders of rights and to be able to exercise their right to defense before national courts. The case of United States jurisprudence is a subject of analysis.

The Fifth Amendment to the United States Constitution establishes that no person can be deprived of life, liberty or property, without “due process” being followed. This could be translated as the guarantee of every person to have a process by which it is notified and heard before being affected in her or his rights

However, the Supreme Court of the United States indicated that “whatever the procedure authorized by Congress, will be the ‘due process’ in regard to the denial of the entry of a foreigner.”<sup>22</sup> Therefore the constitutional protection by the Judiciary Branch tends to be limited, since the Supreme Court has recognized the Executive and the Legislature broad powers in the regulation of migratory flows.

For foreigners, the scope of the guarantee of “due process” in immigration matters varies according to their immigration status. It will be different depending on whether they are in a situation of exclusion or deportation. When a foreigner has made an “entry” into the United States, it is placed in the normative hypothesis of deportation; if it has not been done, it is placed in the exclusion hypothesis.

The previous example of discrimination based on immigration status leads us to consider whether US jurisprudence meets standards of reasonableness. In our opinion, this differentiated treatment places a group of immigrants in a situation of defenselessness and diminishes their right to a fair trial.

### ***Due process guarantees in immigration detention and proceedings.***

Article 7 of the American Convention recognizes the right to personal liberty.<sup>23</sup> It also establishes the minimum guarantees for detention. The jurisprudence and practice of the Commission have broadened the scope of article 7 to protect migrants in detention. Article 7 reads as follows:

#### **Article 7. Right to Personal Liberty**

1. Every person has the right to personal liberty and security.

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<sup>22</sup> United States *ex Rel. Knaufl v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>23</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families enshrines the rights to liberty of the person and protection against unlawful and arbitrary detention at articles 16 (1) and (4).

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

In the jurisprudence and practice of the Commission and the Court, immigration detention is conceived as an exception and not the rule. Therefore, the migrant status is not, by itself, sufficient grounds to order his or her detention on the assumption that the person will not comply with the legitimate ends that an immigration proceeding serves. The legitimate and permissible ends of immigration detention must be procedural in nature, such as ensuring the immigrant's appearance for the proceeding at which his or her immigration status will be determined or to ensure enforcement of a deportation order. The Commission has also established that immigration detention must be ordered for the time strictly necessary to achieve the procedural end. Therefore, immigration detention for an unreasonable period of time is arbitrary and abusive.<sup>24</sup>

In recent years, the Commission has expressed its concern about the detention of minors. More recently, the concern has been on the separation of minors from their parents as part of the "zero tolerance" immigration policy announced by the United

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<sup>24</sup> IACHR, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, para. 458;

States authorities on 7 April 2018.<sup>25</sup> The Commission and the Court have interpreted the American Convention and other inter-American instruments progressively in accordance with the principle of the best interests of the child.

The Commission has joined the position of other international organizations that migrant children –whether accompanied by their families, unaccompanied or separated from their families– should not, as a general rule, be detained.<sup>26</sup> Where detention is exceptionally justified, it shall never be solely on the basis of the child being unaccompanied or separated, or on his/her migratory or residence status, or lack thereof.<sup>27</sup>

In its Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, the Court established and developed the principle of non-immigration detention of girls and children. In this regard, the Court held that the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime, and in recalling the different procedural purposes between migration and criminal proceedings. The Court also considers that the principle of ultima ratio of the imprisonment of children is not applicable in the arena of immigration proceedings.<sup>28</sup>

With regard to due process in immigration proceedings, the right to a fair trial recognized in article 8 of the American Convention is well in place. The exercise of this right implies the recognition of a minimum of fair trial guarantees for migrants who are in detention. Articles 8(2) of the American Convention reads as follows:

#### **Article 8. Right to a Fair Trial**

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

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OAS, 'IACHR expresses concern over recent migration and asylum policies and measures in the United States', 18 June 2018, [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>26</sup> See IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, para. 74.

<sup>27</sup> UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39<sup>th</sup> session, CRC/GC/2005/6, 1 September 2005, para. 61; UN, Report of the Working Group on Arbitrary Detention, Addendum, Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, E/CN.4/1999/63/Add. 3, p. 37.

<sup>28</sup> I/A Court H.R., *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14 of August 19, 2014, Series A No. 21, para. 150.

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court.

Although Article 8 (2) of the American Convention refers to guarantees that must be recognized to persons detained for criminal offenses, the jurisprudence of the Court has extended its scope to any person in detention.

Since its *Advisory Opinion on Exceptions to the Exhaustion of Domestic Remedies*, the Court has held that the minimum guarantees established in Article 8(2) of the Convention also apply to matters that concern the determination of a person's rights and obligations of a civil, labor, fiscal, or any other nature,<sup>29</sup> particularly those of a punitive character,<sup>30</sup> a category into which proceedings to establish a person's migratory status clearly fall.

The Commission has written that in proceedings that may result in a person's expulsion or deportation, fundamental rights are at stake, which requires the most expansive interpretation possible of the right to due process.<sup>31</sup>

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<sup>29</sup> I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A No. 11, para. 28.

<sup>30</sup> IACHR, Application to the Inter-American Court of Human Rights, Case 12.581, *Jesús Tranquilino Vélez Looz against the Republic of Panama*, October 8, 2009, para. 73; I/A Court H.R., *Ivcher Bronstein Case v. Peru*, Judgment of February 6, 2001, Series C No. 74, para. 103.

<sup>31</sup> IACHR, Report No. 49/99, Case 11.610, *Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz v. Mexico*, April 13, 1999, para. 70.

An analysis of inter-American jurisprudence and the thematic reports prepared by the Commission in this area leads to the conclusion that immigration proceedings should offer, *inter alia*, the following minimum procedural guarantees:

1. The right to prior notification in detail of the procedure for determining their legal status and, in the case of anyone who is detained, to be informed of the reasons for their detention and to be promptly notified of the charge or charges against them.

The right of any person detained to be brought promptly before a judge or other officer authorized by law to exercise judicial power and to a trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. Their release may be subject to guarantees to assure his appearance for trial.

The right to a hearing without delay, to adequate time and means for the preparation of their defense, and to meet freely and privately with their counsel.

The right that immigration proceedings are conducted by a competent, independent, and impartial adjudicator.

The right to be assisted without charge by a translator or interpreter.

The right to be assisted by legal counsel.

The right that the decision adopted is duly reasoned.

The right to be notified of the decision adopted in the proceeding.

The right to appeal the decision before a higher court, with suspensive effect.

The right to information and effective access to consular assistance.

### ***The right to seek and receive asylum***

The right of everyone to seek and be granted asylum was recognized in Article 22(7) of the American Convention, which provides:

#### **Article 22. Freedom of Movement and Residence**

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the States and international conventions, in the event he is being pursued for political offenses or related common crimes.

The Commission has determined that Article XXVII of the American Declaration (right of asylum) contains two cumulative criteria that must be satisfied. The first criterion is that the right to seek and receive asylum on foreign territory must be in “accordance with the laws of each country” [where asylum is sought]. The second



criterion is that the right to seek asylum in foreign territory must be “in accordance with international agreements.”<sup>32</sup> As regards “international agreements”, the Commission indicated the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. In relation to those treaties, the Commission noted that the 1951 Refugee Convention defined certain criteria by which an individual qualified as a “refugee” and that international law had developed to a level at which there was recognition of a right of a person seeking refuge to a hearing in order to determine whether that person met the criteria in the Convention.<sup>33</sup>

The standards examined in the preceding paragraphs indicate some of the more specific aspects of the Inter-American System for the protection of migrants. All have as their axis the protection of the dignity and legal capacity of the migrant to avoid situations of exploitation and when human rights violations are committed, to demand reparation from the responsible State.

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<sup>32</sup> IACHR, Report on the merits No. 51/96, Case 10.675, *Haitian Interdiction v. the United States of America*, March 13, 1997, para. 153.

<sup>33</sup> IACHR, Report on the merits No. 51/96, Case 10.675, para. 155.