

**SUBMISSION OF THE REFUGEE AND IMMIGRANT CENTER FOR EDUCATION
AND LEGAL SERVICES TO THE UN SPECIAL RAPPORTEUR ON THE RIGHTS OF
MIGRANTS ON THE ISSUE OF ENDING IMMIGRATION DETENTION OF
CHILDREN AND SEEKING ADEQUATE RECEPTION AND CARE FOR THEM**

(15 May 2020)

The Refugee and Immigrant Center for Education and Legal Services (“RAICES”) respectfully submits these comments to the United Nations Special Rapporteur on the Human Rights of Migrants, Mr. Felipe González Morales, in response to his call for information relevant to his thematic report on ending immigration detention of children and seeking adequate reception and care for them that is scheduled to be submitted to the 75th session of the General Assembly.

RAICES envisions a compassionate society where all people have the right to migrate and human rights are guaranteed; it defends the rights of immigrants and refugees, empowers individuals, families, and communities, and advocates for liberty and justice. As a 501(c)(3) legal services agency based in San Antonio, Texas, in the United States of America, RAICES serves tens of thousands of noncitizens per year in direct immigration legal services, social services, advocacy, community engagement, and refugee resettlement. In 2019 RAICES closed more than 28,000 immigration cases free of charge. With ten offices throughout Texas, more than 200 staff members, and thousands of active volunteers, RAICES is one of the largest legal service providers for low-income immigrants, asylum seekers, and refugees in the United States.

For many years, RAICES has provided legal services to adults and children detained by U.S. Immigration and Customs Enforcement (“ICE”), an agency under the U.S. Department of Homeland Security (“DHS”), in Texas. RAICES established the Children’s Program in 2008 to provide free legal services to unaccompanied noncitizen children (“UCs”)¹ detained in custody of the Office of Refugee Resettlement (“ORR”), an Office of the Administration for Children and Families, Division of Unaccompanied Children’s Services, administered by the U.S. Department of Health and Human Services (“HHS”). In 2014 the program expanded, providing legal services to designated unaccompanied children who have been released and now reside within RAICES’s geographic areas of service, in an effort to ensure that no child faces the system alone.

¹ Although the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) sec. 235 defines the term “unaccompanied alien child, UAC,” we prefer to refer to this vulnerable class simply as “unaccompanied child” or “UC.” All references to UC in this comment submission references a statutory definition of UAC.

U.S. International Legal Obligations

The United States is a party to several international human rights treaties and is bound by customary international law, particularly the law applying to the member states of the Organization of American States. These sources of international law provide due process of fair trial for every person under the jurisdiction of the United States. The obligation extends to both rights under international law as well as rights provided in domestic law.

Though immigration proceedings are civil proceedings and “not subject to the full range of constitutional protections, [they] must conform to the Fifth Amendment’s requirement of due process.”² Indeed, “an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.”³ The rights to due process and fair trial are also found in International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) (“ICCPR”). This treaty has been ratified by the United States. The ICCPR provides in article 14 that in the determination of one’s rights, “. . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁴ This right requires access to a body that is not beholden to one of the parties before it and to a proceeding in which there is equality of harms between the parties. The right enumerated in article 14 also requires that a petitioner be allowed an opportunity to determine the fairness of his or her procedure.

The fundamental aspects of both the right to due process and the right to a fair trial are well-established in customary international law that is applicable to the United States. These rights are included in numerous human rights instruments that have been ratified by virtually every country in the world.⁵ In total, these treaties enjoy more than 300 ratifications.

The most important expressions of the customary international law rights to due process and fair trial are found in the Inter-American context, in which the United States is an important actor. As a Member State of the Organization of American States (“O.A.S.”), the United States has recognized and accepted its obligation to respect the Inter-American rules of customary international law. It has done this by joining the consensus of States that have adopted the

² *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended)

³ *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)

⁴ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976) at art. 14.

⁵ See, e.g., ICCPR, arts. 6, 7, 14 (ratified by 173 of 206 sovereign States in the international community); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 2, 3, 6, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953) (ratified by 47 European States); American Convention on Human Rights, Nov. 22, 1969, arts. 4, 5, 8, 114 U.N.T.S. 213 (*entered into force* Jul. 18, 1978) (ratified by 25 American States); African Charter of Human and Peoples’ Rights, Jun. 27, 1981, arts. 4, 5, 7, 1520 U.N.T.S. 217 (*entered into force* Oct. 21, 1986) (ratified by 54 African States)

regional Inter-American instruments that expressly endorse the rights to due process and fair trial. These instruments are interpreted by the Inter-American Commission on Human Rights (“IACHR”), a body whose “principal function [is] to promote the observance and protection of human rights.”⁶ The United States is party to the Charter of the Organization of American States, 119 U.N.T.S. 3 (1951), the instrument that created the Commission, and is subject to the jurisdiction of the IACHR.⁷

The IACHR has held that the provisions of the American Declaration of the Rights and Duties of Man (“American Declaration”), which enumerates the rights to due process and fair trial and was adopted by the 1948 inter-governmental Ninth International Conference of American States, in which the United States participated, are incorporated into the text of the Charter because they reflect customary international law.⁸ The IACHR reaffirmed the customary international nature of the American Declaration in its opinions in *White and Potter (Baby Boy) v. United States*⁹ and *Roach and Pinkerton v. United States*.¹⁰ In the latter case, the IACHR held unequivocally that the provisions of the Declaration are part of international law applicable to the United States.¹¹

Article XVIII of the American Declaration provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”¹² Article XXVI of the American Declaration states that “[e]very person accused of an offense has the right to be given an impartial and public hearing . . .”¹³ The IACHR, as the body authorized to interpret the obligations of O.A.S. Member States, has made clear that it understands these fair trial provisions to apply to immigration proceedings.¹⁴ The Commission stated that to deny an alleged victim these protections “simply by virtue of the nature of immigration proceedings would contradict the very object of this

⁶ Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, art. 112, O.A.S.T.S. 1-A (entered into force Mar. 12, 1970) (ratified by the United States on April 23, 1968)

⁷ See *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human, Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. ¶ 45 (Jul. 14, 1989).

⁸ O.A.S. Res. XXX, Apr. 1948, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)

⁹ Judgment, Inter-Am. Comm’n H.R. 25, OEA/ser.L/V/II.54, doc. 9, rev. 1 (Mar. 6, 1981)

¹⁰ Judgment, Inter-Am. Comm’n H.R. 147, OEA/ser.IJVII.71, doc. 9 rev. 1 (Sept. 22, 1987)

¹¹ *Roach and Pinkerton v. United States*, IAComm.HR Res. N° 3/87, Case 9647 (September 22, 1987) at ¶¶ 45–48.

¹² American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

¹³ *Id.*

¹⁴ See *Andrea Mortlock v. United States*, Admissibility and Merits, Judgment, Inter-Am. Comm’n H.R., Report No. 63/08, Case No. 12.534, ¶ 83 (2008).

provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the State's jurisdiction are established.”¹⁵

Both the Inter-American Court and IACHR have reiterated this understanding. In its “Report on Immigration in the United States: Detention and Due Process,” the IACHR noted that “[w]hile many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences.”¹⁶

Suppression in Immigration Court

Detained UCs are especially vulnerable to violations of these rights, particularly in the context of unlawfully obtained evidence used against UCs in their removal proceedings.¹⁷ Despite a right to due process and fair trial, immigration judges continuously deny claims to suppress DHS Form I-213, the record of deportable/ inadmissible noncitizen that contains a UC's alleged alienage and removability from the United States, obtained under coercion and/or duress. Immigration judges are bound to treat Form I-213 with a presumption of reliability that can be overcome only if refuted with legal sufficiency the inherent reliability of the Form.¹⁸ Despite due process violations, identity is not subject to suppression. This allows a UC's identity found on the first page of DHS's Form I-213 to serve as support to a charging document with a matching name.¹⁹

Age determinations

All detained minors have a right to be released from detention and to be placed in the least restrictive setting.²⁰ If there is a dispute over a child's status as a minor, age determination procedures are primarily carried out by HHS and ICE.²¹ Due process at the very least requires a child be given access to evidence or reasons for any charges to which they may be subject when

¹⁵ *Id.*

¹⁶ IACHR, “Report on Immigration in the United States: Detention and Due Process,” O.A.S. Doc. OEA/Ser.L/V/II.Doc. 78/10 (Dec. 30, 2010); *see also* IACHR, “Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report 2000,” para. 90 (Apr. 16, 2001); *Wayne Smith v. United States*, Admissibility, Judgment, Inter-Am. Comm'n H.R., Report No. 56/06, Case No. 12.562, ¶ 51 (Jul. 20, 2006); *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Randolph Izal Elorz v. Mexico*, Merits, Judgment, Inter-Am. Comm'n H.R., Report No. 49/99, Case No. 11.610, ¶ 46 (Apr. 13, 1999)

¹⁷ 8 U.S.C. 1229a

¹⁸ *Matter of J-C H-F*, 27 I&N Dec. 211, 212 (BIA 2018)

¹⁹ *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *See also, United States v. Noria*, 2019 WL 6885326 (5th Cir. 2019)

²⁰ 8 C.F.R. 1236.3(d); *Flores v. Johnson*, 212 F. Supp. 3d 864, 877-881 (C.D. Cal. 2015); Stipulated settlement agreement para. 6, *Flores v. Reno*, No. CV 85-4544-RJK(Px)(C.D. Cal. Jan. 17, 1997)

²¹ U.S.C. 1232(b)(4); *See* Section 1.6 of ORR's Children Entering the United States Unaccompanied (ORR Guide)

there is any doubt about their age.²² RAICES is currently challenging the unlawful detention of a child being held as an adult and whose full and fair evidentiary hearing of her age determination process ICE/DHS and ORR/HHS have denied.²³ This challenge is based on the fact that ICE/DHS and ORR/HHS make decisions concerning age determinations in a unilateral, *ex parte* manner. This prevents a minor who is subject to an age determination from any meaningful participation in the process. While the minor can submit information, there is no opportunity to question individuals evaluating that information and providing affidavits as to its value. As a result of the latter decisions are often made by persons who have little knowledge of a country from which the evidence comes or even understand the language of the documents. There is no ability to challenge the credentials of evaluators, nor to make oral arguments to reply to the arguments made by the government. And the process is not public. In other words, the procedure for making age determinations fail to meet basic fair trial or due process guarantees.

Existing domestic legislation and policy

RAICES attaches to this submission a copy of the TVPRA, the Flores Settlement Agreement (“FSA”), 45 CFR Chapter IV, and the ORR Guide: Children Entering the United States Unaccompanied, which collectively govern the legal responsibility for, and treatment of, UCs in the United States.

The TVPRA provides special protections to an unaccompanied noncitizen child, a term used to describe a child with no lawful status in the United States and “with respect to whom there is no parent or legal guardian in the United States or no legal guardian in the United States is available to provide care and physical custody.”²⁴ The TVPRA mandates that “any department or agency of the Federal Government that has an unaccompanied minor in custody” must transfer custody of the minor to HHS “no later than 72 hours after” the minor is determined to be a UC.²⁵

Responsible for the care and custody of UCs in the United States, HHS provides shelter and care to unaccompanied children by placing them in an ORR facility.²⁶ These facilities include staff-secure facilities, secure facilities and residential treatment centers, among others. ORR makes initial placement determinations with no opportunity for the UC to challenge the placement prior to their transfer.²⁷ Additionally, HHS may release a UC to a qualifying adult

²² *Kent v. United States*, 383 U.S. 541, 557 (1966)

²³ *Id.*

²⁴ 6 U.S.C. 279(g)(2)

²⁵ 8 U.S.C. § 1232(b)(3)-(4)

²⁶ 8 U.S.C. § 1232

²⁷ ORR Guide Children Entering the United States Unaccompanied 1.1 (Jan. 30 2015) available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.1> (“Orr Guide”)

sponsor “capable of providing for the child’s physical and mental well-being.”²⁸ Parent sponsors have a procedural due process right to a full and fair evidentiary hearing in ORR’s reunification determination for their child. However, a federal appellate court found the right of a parent to “control the upbringing” of a child is “neither absolute nor unqualified.”²⁹ This decision recognized children have a “familial right to be raised and nurtured by their parents” but rejected the contention that “due process automatically requires that [children] be accorded a more substantial hearing prior to the Office rejecting the family reunification request.”³⁰

However, in recent years the process of identifying and securing a family member or sponsor is often complicated by the Memorandum of Agreement entered between ICE and ORR that expanded sharing of information between the two agencies.

Sponsors

Under a current Memorandum of Agreement between ORR, ICE and CBP, ORR is to give ICE the name, date of birth, address, and fingerprints of a potential sponsor and of any household members with whom the UC may be placed, so the government can screen for a potential sponsor’s criminal history.³¹ Under the DHS Appropriations Acts, 2019 and 2020, no federal funds may be used to detain a sponsor or potential sponsor of an unaccompanied child.³² Nonetheless, ICE has used this information on numerous occasions to apprehend and detain sponsors.³³ In many cases these sponsors had no criminal history; but due to their undocumented status, they were detained by ICE and placed in removal proceedings. The sponsor’s detention often forces the UC to remain in detention for longer periods of time.³⁴ Indeed, some UCs have no other potential sponsor and are therefore forced to remain in ORR custody until they age out of care.

Influx Facilities

If there is insufficient space in licensed ORR facilities during an influx, which ORR defines as a period “in which the number of unaccompanied alien children (UAC) entering the United States

²⁸ 8 U.S.C. 1232 (c)(3)(A)

²⁹ *D.B. v. Cardall*, 826 F.3d 721,741(4th Cir. 2016)

³⁰ *Id.*

³¹ Office of Refugee Resettlement, U.S. Immigration and Customs Enforcement & U.S. Customs and Border Protection, Memorandum of Agreement (April 13, 2018)(available at <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>)

³² Department of Homeland Security Appropriations Act of 2020, H.R. 3931,116th Cong. §223 (2019)

³³ Letter from Bennie G. Thompson, Chairman,House Committee on Homeland Security, to Alex M. Azar,Secretary, U.S. Department of Health and Human Services, and Kevin McAleenan, Acting Secretary, U.S. Department of Homeland Security (Jul. 3, 2019) (available at <https://homeland.house.gov/imo/media/doc/190703%20T%20McAleenan%20%20Azar%20re%20Memorandum%20of%20Agreement%20between%20DHS%20%20HHS.pdf>)

³⁴ *J.E.C.M. by & Through His Next Friend Saravia v. Lloyd*, 352 F. Supp. 3d 559, 570 (E.D. Va. 2018).

exceeds the standard capabilities of ORR to process referrals in a timely manner and designate placements with existing resources,”³⁵ a UC may be transferred to an unlicensed temporary influx facility (“ERC”).³⁶ For a child to be transferred to an unlicensed facility during an influx, the UC must meet specific criteria, including: an expected “release[] to a sponsor within 30 days; no current set court date; speaking either English or Spanish as their preferred language; and the provision that transfer to this facility will not diminish the UC’s access to legal services.”³⁷ If, after transfer to an ERC, it becomes known that a child does not meet this criteria, ORR will transfer the child to the appropriate least restrictive setting “as expeditiously as possible.”³⁸

However, ORR does not respect these requirements. UCs who speak indigenous languages have been transferred to recent ERCs, and some children were forced to stay at the ERC “for months...waiting fingerprint results for their prospective sponsors.”³⁹ The remote location of most ERCs significantly diminishes a UC’s access to legal services. In a recent ERC many children were rushed through removal proceedings without an opportunity for counsel to review their cases to identify possible measures of immigration relief.⁴⁰ Even with all these violations ORR did not follow their own policy of transferring these children to the least restrictive setting in a timely manner. Many UCs were left either to age out of care or to spend several months in an unlicensed facility with severely limited access to counsel.

Conclusion

RAICES agrees with the Special Rapporteur that “[d]etention of children in the context of migration is never in the best interests of the child,” and appreciates efforts, like the TVPRA and FSA, to define and protect the rights of UCs.⁴¹ Even with these efforts, however, violations of their right to due process while detained, and interferences with identification and securing of sponsors add to the particular vulnerability of unaccompanied noncitizen children. With no way to guarantee the protection of these children’s rights in detention, the United States should

³⁵ ORR Guide, Section 7, Policies for Influx Care Facilities, available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-7>

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Laura C. Morel, Patrick Michels REVEL NO ONE ON THE INSIDE CAN TALK ABOUT WHAT’S HAPPENING AT THE TENT CITY FOR MIGRANT kids The Texas Tribune, November 28, 2018, <https://www.texastribune.org/2018/11/28/tent-city-texas-migrant-children/>

⁴⁰ *Id.*

⁴¹ Letter from Jerrold Nadler, Ranking Member, House Judiciary Committee, to Alex Azar, Secretary, U.S. Department of Health and Human Services (Nov. 29, 2018) (Available at <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/letter%20to%20azar%20re%20tornillo%2011.29.18.pdf>)

immediately halt the practice of detaining migrant children, giving priority to the release of detained unaccompanied noncitizen children.

Respectfully submitted,

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