

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 63/2018**

Precautionary Measure No. 505-18

Vilma Aracely López Juc de Coc and others regarding the United States of America
August 16, 2018

I. INTRODUCTION

1. On May 31, 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 Texas Civil Rights Project, the Women’s Refugee Commission, the Immigration Clinic of the University of Texas School of Law and Garcia & Garcia Attorneys at Law, P.L.L.C. (“the applicants”), urging the IACHR to request that the United States of America (“the State” or “the United States”) adopt precautionary measures to protect the rights of five migrant families consisting of parents and their children identified as Ms. Vilma Aracely López de Cuc and others (“proposed beneficiaries”). According to the request, the proposed beneficiaries were separated by the authorities once they were detained upon their irregular entry into U.S. territory at the border with Mexico, in Texas. The children were reportedly held under custody of the Department of Health and Human Service Office of Refugee Resettlement (ORR), while their parents were being detained at different facilities, facing administrative and judicial proceedings.

2. The Commission requested information from both parties. The applicants replied on June 27, while the State did so on June 29. Furthermore, the Commission provided the applicants with the State’s report of June 29, 2018 and requested that they send in the observations that they considered relevant. No observations have been presented to date. The Commission requested information from the State on July 20, 2018, and received its report on August 10, 2018.

3. After analyzing the factual and legal allegations submitted by the parties, the Commission considers that Ms. Vilma Aracely López de Cuc and the rest of the proposed beneficiaries are *prima facie* in a serious and urgent situation, since their rights to personal integrity, family life and, in the case of children, their right to identity, are at 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 Ms. Vilma Araceli López de Coc and the other proposed beneficiaries identified in this request. Particularly, assuring that said rights are protected through the reunification of the above-mentioned families and caring for 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 proposed beneficiaries are the following Guatemalan migrant families, who were detained between May 21 and 22, 2018 in or near Hidalgo County, Texas, after irregularly crossing the U.S.-Mexico border: i) Ms. Vilma Aracely López Juc de Coc (29 years old) and her son S.V.C.L. (11 years old), from a remote indigenous village and who fled their country of origin after the father was allegedly murdered by criminals in February 2018; ii) Mr. Antonio Bol Pauu (40 years old) and his son R.B.S. (12 years old), from the predominantly indigenous community of Ixcán, Quiché; iii) Mr. Leonel Chub Cucul (37 years old) and his son L.D.C.I. (11 years old), who are also indigenous, from El Estor, department of Izabal; iv) Ms. María Andrés de la Cruz (30 years old) and her three children D.P.A. (7 years old), G.A.P.P. (8 years old) and D.M.P.A. (11 years old). In addition, Mr. Dagoberto A. Melchor Santacruz (39 years old) and his son K.A.M.A. (16 years old), a teenager with hearing impairment, from El Salvador, were detained in similar circumstances.

5. The request is based on the alleged damage caused by the implementation of the so-called “Zero-Tolerance” policy, adopted by the U.S. Attorney General on April 6, 2018, according to which it “[...] direct[ed] each United States Attorney’s Office along the Southwest Border – to the extent practicable, and in consultation with [the Department of Homeland Security] – to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under [8 U.S.C.] section 1325(a).”¹ According to the applicants, the separation of parents and children is not required by the law, as the Government assessed, but is rather based on a “deliberate official policy” adopted by the current Administration to prevent families from entering the U.S. without authorization. In this sense, they specified that “[a]lthough nothing in the memorandum specifically mentions separating children from their parents, [it] confirms that the new practice of prosecuting all first-time entrants (and separating children from parents traveling with them) is intended as a punitive deterrence tactic.” This would be applied both to asylum seekers and general migrants as well.

6. As the applicants indicated, adults are generally detained in a different detention facility awaiting their federal trials, usually under the U.S. Marshals Service, and in most cases, after being sentenced to “time served” under the above-mentioned section, they are transferred to an administrative detention center under the Immigration and Customs Enforcement (ICE). If such persons are also asylum-seekers, they are referred for a “credible fear interview”² in accordance with the law, while reportedly still being deprived of liberty. Should the interview fail (or an appeal be brought before an immigration judge), or if there is no request for asylum, the migrants may be subject to deportation absent any other claim for relief to remain in the U.S. Meanwhile, minors are placed under the custody of the ORR for an indefinite period of time, with no process in place for the children to communicate with their parents or for them to know where their parents are and vice versa. The request stated that children who were separated from their parents are then treated by the authorities as if they were “unaccompanied minors,” that is to say, those who crossed the border without being with any adult. Consequently, they are to be placed in shelters under the supervision of the ORR, although the

¹ U.S. Department of Justice, Memorandum on Zero Tolerance for Offenses under 8 U.S.C. §1325(a), April 6, 2018. Available at: <https://www.justice.gov/opa/press-release/file/1049751/download>.

See also, 8 U.S.C. §1325(a): Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both. Available at: <http://uscode.house.gov/browse.xhtml>.

² According to the applicants, Mr. Santacruz received preparation for a credible fear interview, but there is no further information as to whether it was already conducted and/or succeeded. Also, there is no information concerning the rest of proposed beneficiaries in this regard, except for Ms. López Juc de Coc.

applicants stressed that this happens “[...] only because of the government’s actions in prosecuting the parents, which rendered the children ‘unaccompanied.’”

7. Applicants alleged that there is no mechanism in place to allow families to be reunified in the U.S. while the procedures are still ongoing, or prior to being deported, and that there is no expedited or automatic release from detention of parents whose migration status has been cleared, thus prolonging the separation. Moreover, they pointed out that according to media accounts, some parents have already been deported to their countries of origin while their children remain in the U.S. and inversely, making reunification almost impossible.³ Thus, applicants claim that, when necessary, community-based alternatives to detention should be employed, and that this request for precautionary measures is also aimed at preventing deportations of parents without their children and vice versa, since it would result in further family separation.⁴

8. As it pertains to the situation of the proposed beneficiaries of this procedure, the applicants indicated that as of June 26, 2018, Ms. López de Coc is detained at the Northwest Detention Center in Tacoma, Washington,⁵ while her son was admitted at an ORR shelter in South Texas. According to the applicants’ last report, mother and son were able to communicate through a phone call only once, for about two minutes. On the other hand, they informed that she had a credible fear interview on June 28, 2018, and on July 2 she was notified that she had demonstrated a credible fear of torture, and that there is “[...] a significant possibility that the assertions underlying the applicant’s claim could be found credible in a full asylum or withholding of removal hearing.” Moreover, Mr. Santacruz is reportedly detained at the Stewart Detention Center in Lumpkin, Georgia, while his son K.A.M.A. was placed in a shelter “in Texas,” but his father has since not been able to contact him because he did not “[have] money in his account,” as an ORR instructed.⁶ According to an affidavit submitted by one of the applicants, Mr. Santacruz was told by Border Patrol agents that his son would be sent to his brother-in-law in California, but this information could not be confirmed, since another applicant called an ORR hotline number, where she was informed that K.A.M.A. was at a shelter.⁷ The father is also worried because K.A.M.A. is deaf from one ear and has frequent nose bleedings.

9. On the other hand, applicants reported that both the current situation and location of the rest of proposed beneficiaries are unknown to them. Indeed, neither the parents nor the children appear on the ICE’s Online Detainee Locator System, the ORR databases or the Executive Office for Immigration Review (EOIR) hotline. Initially, Mr. Bol Pauu and his son were detained at the Puerto Isabel Detention Center in Los Fresnos, Texas, while the latter was removed by the agents and all contact has been lost since then. Ms. de la Cruz and her three children were allegedly taken to a “[...] very cold holding cell, commonly known as ‘ice chest,’” and were separated after the mother was processed. The agents told the mother she would see them after her hearing, but this was not complied with. Lastly, no information officially appears about the situation of Mr. Chub Cucul and his son. Most alarming, applicants’ inquiries with ORR revealed that the minor is not in one of their shelters.

10. According to the applicants, the lack of information regarding the records kept on adults may

³ Houston Chronicle, “Immigrant families separated at the border struggle to find each other,” May 24, 2018. Available at: <https://www.houstonchronicle.com/news/houston-texas/houston/article/Immigrant-families-separated-at-border-struggle-12938759.php>. See also, Washington Post, “This is what’s really happening to kids at the border,” (May 30, 2018). Available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/30/this-is-whats-really-happening-to-kids-at-the-border/>

⁴ Applicants indicated that they interviewed additional 376 families at the U.S.-Mexico border, claiming that at least two children were deported without their parents, and three parents without their children, all of whom were already separated upon entry. Also, they reported that eight families were detained in residential detention centers, “[...] possibly with their children [.]” and confirmed that four families have been reunited and released.

⁵ Initially, she was reportedly detained at the Laredo Detention Center, Texas. She was not allowed to see her son since they were separated.

⁶ According to the applicants, parents may make phone calls from Monday to Friday at specific times, but they would have to pay for the calls.

⁷ No details were provided as if he was temporarily held at a shelter pending an eventual placement under a relative’s custody.

indicate the following possibilities: i) the parents are still under ICE custody but this has not yet been updated on the database, which seems unlikely since they were detained approximately five weeks ago; ii) the parents may have been released to a relative in the U.S. and given a “Notice to Appear” before an immigration court; iii) the parents have already been deported. As it regards the minors, applicants similarly alleged that: i) they may have been released to a family member or a sponsor in the U.S.; ii) they might have already been deported. In any case, applicants stressed that they were not able to confirm any of the above, and that the Government was better placed to provide such information. In particular, it should provide information regarding whether the families were deported together or were reunited, in any circumstance.

11. Applicants stated that at this time they were unable to assess whether the separated children will be reunited with their parents, nor the time or manner of the reunification. In this regard, they pointed out to a “Fact Sheet” issued by the U.S. Department of Homeland Security on June 23, 2018,⁸ claiming that “[...] the United States Government has disclosed very little information pertaining to its plans, if any, to reunite separated families and whether the separation is temporary in nature.” As to the “Fact Sheet,” the applicants stated that it mentions in general terms that the U.S. Customs and Border Protection (CBP) so far has reunited 522 children in custody, but whether this includes the proposed beneficiaries has not been confirmed through the available information. In addition, the document does not specify a clear procedure or plan to reunite families who have been separated under the zero-tolerance policy, except that the Government “[...] ‘is working’ to reunite children with adults ‘for the purposes of removal,’” primarily at the Port Isabel Detention Center.

12. Lastly, applicants informed that on February 26, 2018, the American Civil Liberties Union (ACLU) filed a class action lawsuit⁹ against ICE and others over the practice of family separation (the applicants are not named plaintiffs in this case), together with a motion for a class-wide preliminary injunction to prevent the Government from separating families. On June 26, 2018, the court of first instance 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, unless the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child in DHS custody [...].
- 3) 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; 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.
- 4) 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 [...].”

⁸ U.S. Department of Homeland Security, “Zero-Tolerance Prosecution and Family Reunification,” June 23, 2018. Available at: <https://content.govdelivery.com/accounts/USDHS/bulletins/1f98ad8>.

⁹ According to the injunction, the plaintiffs sought a certification of class, which was accepted by the judge with minor modifications. It is thus defined to include: “All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child [...]. The class does not include parents with criminal history or communicable disease, or those apprehended in the interior of the country or subject to the [Executive Order] [...].”

6) 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 [...]."

13. However, applicants stressed that this ruling is preliminary and thus not final, since the Government will likely appeal it first to the Court of Appeals of the Ninth Circuit and eventually to the Supreme Court of the United States. Consequently, they requested that the IACHR adopt precautionary measures so as to: i) reunite the five families immediately and ensure that, if ordered removed, no parent is deported without having first had the opportunity to decide whether the child shall return as well to its country of origin or remain in the U.S. to seek relief; ii) in the meanwhile, ensure that both parents and children know the whereabouts of each other and are able to establish a regular and free communication; iii) provide medical attention as appropriate to the trauma suffered; and iv) other measures concerning the general migrant population at risk, such as stopping the practice of criminally prosecuting migrants and separate families, among others.

2. Response of the State

14. The State firstly highlighted that the topic of migration "[...] is one 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,¹⁰ 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."

15. 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.¹¹ 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."

16. 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, 2018.¹² 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.

¹⁰ *Mortlock v. United States*, Case No. 12-534, Report No. 63/08, Admissibility & Merits, July 25, 2008, para. 78.

¹¹ 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.

¹² 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."

17. 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 expressed preference for leaving their children in the United States. 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 was declared “ineligible”– 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 litigation on the matter is currently being processed before the Judiciary, it is not in a position to provide further details.

18. 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

19. 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.

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.¹³ In the present matter, the Commission has followed the implementation of the “Zero Tolerance” policy and previously expressed its concern through a press release.¹⁴ 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 26.¹⁵

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.¹⁶ Consequently, the Commission shall present its determinations

¹³ IACHR, Francisco Javier Barraza Gómez regarding Mexico (MC-209-14), Resolution of August 15, 2017, available in Spanish at: <http://www.oas.org/es/cidh/decisiones/cautelares.asp>

¹⁴ IACHR, “IACHR Expresses Concern over Recent Migration and Asylum Policies and Measures in the United States,” press release of June 18, 2018. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp

¹⁵ 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”.

¹⁶ In a note dated July 23, 2018, the Commission requested from the State information on whether the proposed beneficiaries had been reunified and on whether the ruling of June 26, 2018 issued by the U.S. District Court for the Southern District of California had been implemented in favor of the proposed beneficiaries.

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.”¹⁷

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. 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.¹⁸

25. 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

¹⁷ IACHR, Resolution 31/2017, *Francisco Javier Barraza Gómez regarding 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 regarding 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.

¹⁸ 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.

and family life may be at serious risk, leading to the request for precautionary protection.¹⁹ 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 each particular case based on concrete circumstances. As a matter of fact, the prolonged separation of the children from their family is likely to seriously impact the affective ties with their relatives,²⁰ resulting in an emotional and psychological distress that could affect their personal integrity by placing the balanced development of their personality at risk.²¹ 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.²² 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. Personal factors of the children such as their age and level of development are also important. Both exogenous and endogenous aspects should be duly considered.

26. 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.²³ 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.²⁴ 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.²⁵ The Inter-American Commission and the Inter-American Court have indicated that “in principle, the family ought to 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

¹⁹ IAHR Court, Resolution of the Inter-American Court of Human Rights of July 1, 2011, Precautionary Measures regarding Paraguay. Matter of L.M., considerandum 16.

²⁰ IACHR, Request for Precautionary Measures to the Inter-American Court of Human Rights regarding boy L.M., 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 children to a family. Alternative care. Ending institutionalization in the Americas*. October 17, 2015, para. 316.

²¹ 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.

²² 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 Paraguay, L.M. Matter, Considerandum 15.

²³ See, IACHR *Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección*, para. 338 and ss. (Available in Spanish)

²⁴ See, IACHR, *Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección*, para. 388 and ss. (Available in Spanish). 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, particularly para. 49 to 64. (Available in Spanish)

²⁵ IACHR, *Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección*, para. 389. IACHR, *Informe sobre el Derecho del niño y la niña a la familia. Cuidado alternativo. Poniendo fin a la institucionalización en las Américas*, para. 57. (Available in Spanish)

also to favor, in the most comprehensive way, the development and the strength of the family.²⁶ Therefore, 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.²⁷

27. In the case of the 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 must be prevented, unless the best interest of the children dictates otherwise.²⁸ 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.²⁹ 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.³⁰

28. Additionally, the specific circumstances in migratory contexts which may lead to the separation of children from their families 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

²⁶IAHR 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](#), para. 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 condition, established in Article 24.1 of the same Pact, Human Rights Committee, General Observation No. 17, Article 24—Rights of the children, 35th period of sessions, U.N. Doc HRI/GEN/1/Rev.7 (1989). And General Observation No.19. Article 23 – The family, 39th period of sessions, U.N. Doc. HRI/GEN/1/Rev.7 (1990).

²⁷ IAHR 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 para. 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, para. 65 to 75. (Available in Spanish)

²⁸ IAHR 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

²⁹ IAHR 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

³⁰ 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.

migrant children.”³¹

29. In view of the foregoing, the Commission considers that just as it has stated in the aforementioned events (*see* para. 25), 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 an irreparable impact on those rights.

30. In the present matter and in relation to the requirement of seriousness, the Commission observes that at the moment of assessing the seriousness of the allegations submitted by the applicants, there is a series of particular circumstances to take into account when identifying the situation of risk the children proposed as beneficiaries are facing.

31. In that regard, the Inter-American system has learned that “[c]hildren, especially when they are foreigners detained in a different social and legal environment from their own and frequently in a country with a language they do not know, experience a situation of extreme vulnerability.”³² The Commission also highlights that among some of the children proposed as beneficiaries there are asylum seekers, which implies that some of the children proposed as beneficiaries could have faced events of persecution or violence that might have led to the migration. Such situation could be considered in the case of the child S.V.C.L who, according to the applicant, escaped from Guatemala with his mother after the murder of his father in February of the present year. Moreover, the adolescent K.A.M.A., due to his reported hearing impairment, may require the support or reasonable adjustments for his adequate integration in society, in the context of his migratory process, facing a more noticeable vulnerability situation.³³ Likewise, the impact would be particularly different in the case of the children proposed as beneficiaries, whose identity is intrinsically related to their belonging to an indigenous community, given that the balanced development of their personality, according to their world view, requires that the children be educated and raised within their natural and cultural context, linked among many factors to their culture, religion and language,³⁴ matters in which the family plays a vital role.

32. According to the information provided by the applicants, to date, as a result of the “Zero Tolerance” policy, the children, proposed as beneficiaries, who are facing the abovementioned situations of vulnerability, are separated from their father or mother accompanying them, who, except in the case of Ms. Lopez de Coc –who allegedly achieved it only on one occasion–, still had not succeeded in establishing any means of contact with them. Additionally, the Commission notes that the parents are still detained, and there is no information about the specific location of the totality of the children of the proposed beneficiaries, and their parents have not been informed whether there is a plan of the part of the competent authorities to proceed to their reunification and even about their general state of health or physical and psychological well-being.

33. The Commission observes that according to the information provided by the State, by means of the Executive Order, the separation of the families has been avoided and the reunification of those who were separated is reportedly in process. Notwithstanding the foregoing, and in spite of the ruling by the

³¹ 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

³² IAHR 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. 190.

³³ The IACHR has referred to the need for a model of social integration for people with disabilities under conditions of equality and under the principle of non-discrimination within the national systems of comprehensive protection of the rights of children and adolescents, with the purpose that they can overcome any obstacle or limitation that exists socially and manage to exercise their rights effectively.

IACHR, Request for Precautionary Measures No. 376-15, Resolution 38/2016, Irene regarding Argentina, July 7, 2016, para.24.

³⁴ IAHR 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. 168.

U.S. District Court for the Southern District of California of June 26, 2018 and the overdue deadline for the reunification,³⁵ out of the 2551 children affected, 572 have still not been reunified.

34. 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 if 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 disaggregated information provided by the State, the parents of 410 children may already be outside of the United States, and no detailed information was provided 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 a sponsor in the United States. Even though most of the times they are given to a family member, it is not always the case.

35. The Commission regrets the lack of specific information by the State, which is particularly relevant when assessing the seriousness of the situation of risk and takes into consideration that the information provided by the State is not sufficient to clarify whether some of the parents and children proposed as beneficiaries have been deported separately, even before the decision of June 26, 2018, making the reunification of these families difficult or impossible. Regarding this aspect, the applicants do not have information on the situation of Bol Pauu and his son, of Ms. de la Cruz and her three children, neither of the situation of Mr. Chub Cucul and his son, and it is particularly concerning that the investigations carried out with the ORR allegedly revealed that the child has not been located in any of the shelters.

36. 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 may 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.

37. 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 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.

38. 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

³⁵ 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.”

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 specific 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.

39. 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

40. The Commission declares that the beneficiaries of the present precautionary measure are all the people individualized in this proceeding as members of the aforementioned five migrant families: Ms. Vilma Aracely López Juc de Coc and her son S.V.C.L.; Mr. Antonio Bol Pauu and his son R.B.S.; Ms. María Andrés de la Cruz and her three children D.P.A., G.A.P.P. and D.M.P.A.; and Mr. Dagoberto A. Melchor Santacruz and his son K.A.M.A.

VI. DECISION

41. 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 safeguard the rights to family life, personal integrity and identity of Ms. Vilma Araceli López de Coc and the other proposed beneficiaries duly identified in this request. Particularly, guaranteeing that such rights are safeguarded by means of the reunification of the abovementioned families and the best in accordance with the best interest of the children;
- 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.

39. 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.

40. 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.

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

42. Approved on the 16th 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