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The Right to Legal Assistance for Unaccompanied Immigrant Children under the Inter-American System of Human Rights

Adriana Domingo Cabrera*

INTRODUCTION

From toddlers to teenagers, immigrant children are being detained throughout the American continents. Most alarmingly, children in the United States are facing judicial hearings without a lawyer to represent them and defend their rights. This is critical for two reasons: first, the United States is the country with the highest levels of immigration flow in the world; and second, the United States is part of a few international mechanisms that could hold the United States accountable for violating children’s human rights. Appalling as it may be, the United States is not the only country receiving immigrant children and forcing them to face administrative or judicial procedures without a lawyer to defend their rights. Other countries, studied here, such as Mexico and Guatemala, don’t provide counsel in removal proceedings either.1

The number of international migrants has grown rapidly in recent years.2 In the United States, the number of unaccompanied children rose to its highest level ever in 2015 with 76,000 minors arriving at the borders.3 When entering a new country, children are usually held in the custody of the state. Unaccompanied immigrant children, also known as unaccompanied alien children (“UACs”), are detained before being sent back to their countries of origin. Only in rare cases is due process guaranteed when children are facing removal proceedings. This absence of due process has given rise to a discussion of what due process rights children, especially UACs, possess and what judicial guarantees for children the custodial countries are obligated to enforce. As a matter of due process, the need for counsel has become more apparent.4

Currently, there are two sides of the regional American experience: the Latin American experience and the United States experience. On the one hand, the Latin American region is experiencing a great wave of human migration from Mexico and the poorest and most violent countries in Central America to the United States.5 That flow is encumbered by difficult, limited, outdated, and gapping domestic immigration laws and systems, which the Latin American countries apply to immigrant children. Those loopholes can often be filled by applying

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1 This is discussed in depth in Part II, D, “The Child’s Best Interest Regarding Access to Counsel/Justice.”
international law, such as the Inter-American standards.\textsuperscript{6}

On the other hand, immigration systems in Latin America highly differ from the United States’ system. The United States has a well-structured immigration apparatus that can handle the increased strain on resources that comes with an influx of immigrant children.\textsuperscript{7} However, this system rarely incorporates the Inter-American standards to its regulations since the United States has not recognized the Inter-American Court of Human Rights’ jurisdiction.\textsuperscript{8} Thus, because the United States is not a participant in this judicial tribunal, potential plaintiffs cannot make a contentious claim against the United States there.\textsuperscript{9} However, there are other sources of obligations, such as the American Declaration of Rights and Duties of Man, which should be considered when it comes to imposing human rights guarantees on the United States.

Legal assistance for unaccompanied immigrant children under the Inter-American System of Human Rights (\textit{Sistema Interamericano de Derechos Humanos}) (“SIDH”) is currently considered a standard of good practice and something a child may utilize in removal proceedings, although it’s not a right per se. However, countries should provide mandatory legal assistance to these minors because they are at a disadvantage when opposing the government and because a child’s rights and well-being are at issue in removal proceedings. Legal assistance provided by the custodial country could help reduce the arbitrariness of deporting these children by serving as a counterweight to the government’s actions. This article will address why unaccompanied minors have a right to legal assistance in removal proceedings—specifically in the context of the Inter-American human rights standards applicable to all members of the Organization of American States.

Recently, an exodus of Central Americans and Mexicans started to cross into the United States.\textsuperscript{10} Despite the existence of some federal and local programs that support legal assistance in the United States, Mexico, and the Northern Triangle, the provision of counsel is a discretionary act.\textsuperscript{11} Different from the United States, such countries as Guatemala and Mexico have purely administrative removal proceedings that involve neither a judge nor government-appointed legal counsel.\textsuperscript{12}

\textsuperscript{6} The Inter-American standards are a compendium on conventions, advisory opinions, case law and recommendation on reports published by the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights.

\textsuperscript{7} This is demonstrated by the fact that the U.S. immigration system has different agencies that handle different matters, such as the Department of Justice; Immigration and Customs Enforcement; Customs and Border Protection; and the U.S. Citizen and Immigration Services, among others. It also has different procedures to handle immigrant and non-immigrant issues, as well as a federal law, the Immigration and Nationality Act, which regulates the entire system. See generally \textit{HOW THE UNITED STATES IMMIGRATION SYSTEM WORKS}, AM. IMMIGRATION COUNCIL (Aug. 12, 2016), available at https://americanimmigrationcouncil.org/research/how-united-states-immigration-system-works.

\textsuperscript{8} \textit{Multilateral Treaties}, OAS, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Apr. 4, 2019)

\textsuperscript{9} Organization of American States, American Convention on Human Rights, Nov. 22, 1929, art. 61 [hereinafter American Convention on Human Rights].

\textsuperscript{10} \textit{Orozco, supra} note 5, at 1.

\textsuperscript{11} Pierce, \textit{supra} note 3.

\textsuperscript{12} In Mexico, removal proceedings depend on the Secretary of Foreign Affairs, an administrative agency. The review remedy is administrative in nature and is resolved by the same agency. See \textit{Ley sobre refugiados y protección complementaria y Asilo Político [Statute of Refugees, Complementary Protection and Political Asylum], Diario Oficial de la Federación [DOF] 27-01-2011, últimas reformas DOF 30-10-2014 (Mex.); Ley Federal de Procedimiento Administrativo [Statute of Federal Administrative Proceedings], Diario Oficial de la Federación [DOF] 04-08-1994, últimas reformas DOF 18-05-2018 (Mex.). In Guatemala, the proceedings are also decided by an administrative agency.
This article proposes that legal assistance should be considered a right instead of a “best practice” from the perspective of the Inter-American Human Rights System and immigrant children’s best interests, so it will create an obligation for the states. The article also prescribes how to hold the countries bound by those duties accountable for applying those obligations. Guatemala and Mexico are the focus here, as they exemplify how the right to a lawyer may become mandatory in countries that are bound by the decisions of the Inter-American Commission and Court of Human Rights. This article also examines the possible application of the Inter-American Standards in the United States.

I. THE ROLE OF THE INTER-AMERICAN SYSTEM IN THE RIGHT TO GOVERNMENT-APPOINTED COUNSEL

The Organization of American States (“OAS”) is the world’s oldest regional organization and international institutional system. As of today, thirty-five countries across the American continents are members. The OAS was formally created in 1948 upon the signing of the Charter of the OAS, the treaty through which the country members became part of the OAS.

It is worth mentioning that, on the same day the OAS Charter was signed, the American Declaration of the Rights and Duties of Man (the “American Declaration”) was also adopted. This matters because, although the American Declaration was not initially intended to be binding, later analysis and court opinions have concluded that it contains obligations and compromises acknowledged by the member states before signature. The reasoning behind this finding is that the American Declaration became binding as a matter of customary use and because its text was eventually incorporated in the Charter of the OAS.

After the first two instruments were promulgated, the Inter-American Commission on Human Rights (“the Commission”) was created to oversee the signatory states’ adherence to the Charter and the American Declaration. The Commission was later formalized and incorporated into the American Convention on Human Rights (the “American Convention”), the first Inter-American treaty on human rights.

The OAS has an Inter-American Human Rights System (“the system”), which is a regional system established for the promotion, protection, and monitoring of human rights throughout the

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13 Who we are, OAS, http://www.oas.org/en/about/who_we_are.asp (last visited Apr. 6, 2019).
14 Id.
15 Id.
16 Id.
17 Id.
18 Id. at 83.
19 Our History, supra note 16.
20 Id.
thirty-five member states.\textsuperscript{21} It is composed of two main entities: the Inter-American Commission and the Inter-American Court of Human Rights ("the Court").\textsuperscript{22} Both institutions can hear complaints concerning violations of human rights recognized in the OAS Charter or any other Inter-American convention.\textsuperscript{23} Both can also issue protective measures or injunctions if a person is at risk of imminent danger or irreparable harm.\textsuperscript{24}

Although the Commission and the Court often work together, they have different roles within the system. The Commission is in charge of monitoring human rights conditions in all OAS member states, and it also serves as an advisory body of the OAS on human rights issues.\textsuperscript{25} The Court is the judicial entity and its mandate is more limited, as it only decides on contentious cases involving countries that have accepted its jurisdiction.\textsuperscript{26} Although both the Commission and the Court analyze cases or questions from the perspective of the American Convention and other Inter-American instruments, they complement their analyses and interpretations through the use of other international sources like international treaties or International Courts decisions.\textsuperscript{27}

The United States, Mexico, and Guatemala are part of the OAS.\textsuperscript{28} Therefore, they are bound by the decisions of the Inter-American Commission. However, unlike the majority of Latin American countries, the United States has not recognized the authority of the Inter-American Court of Human Rights and it has not ratified the Convention on the Rights of the Child, nor the Inter-American Convention on the International Return of Children.\textsuperscript{29} The United States, however, is a party to the American Declaration and the Charter of the OAS, which contains similar obligations to those in the American Convention on Human Rights.\textsuperscript{30} Not being a party to certain international treaties doesn’t signify that a country has no other international obligations related to the protection, promotion, and respect of children’s rights. As a matter of international law, all states are required to comply with their international obligations in good faith.\textsuperscript{31} Thus, if another source of obligations exists, like is the case, the states have the duty to comply with them.

The United States, Mexico, and Guatemala are bound by the OAS Charter, which effectively codifies the Inter-American Commission’s function of investigating human rights violations in countries not bound by the American Convention on Human Rights.\textsuperscript{32} By signing this document, member states assume a commitment to fulfill in good faith the obligations derived from other international law sources and the Charter itself.\textsuperscript{33} Additionally, the United States was


\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Organization of American States [OAS], Charter of the Organization of American States art. 3(a) (Feb. 27, 1967) [hereinafter "Charter of the Organization of American States"].


\textsuperscript{30} Multilateral Treaties, supra note 8.

\textsuperscript{31} 1155 U.N.T.S. 18232, art. 26.


\textsuperscript{33} Charter of the Organization of the American States, supra note 27, at art. 3(b), (c).
one of the countries that adopted the American Declaration of the Rights and Duties of Man, which recognizes certain judicial guarantees and rights, such as due process.\textsuperscript{34} Using these guarantees and rights as a basis, the Commission evaluates whether a violation has occurred.

\section*{A. Due Process in the Inter-American Human Rights System}

Due process is recognized in Article 8 of the American Convention on Human Rights and Article XXVI of the American Declaration of the Rights and Duties of Man.\textsuperscript{35} The Court has explained and interpreted what due process means.\textsuperscript{36} Specifically, it has indicated that Article 8 delineates a series of requisites that should be observed in judicial proceedings in order to achieve proper judicial guarantees.\textsuperscript{37} Due process is therefore the set of conditions needed to fulfill and secure an adequate defense for those whose rights and obligations are under judicial scrutiny. Due process serves to protect, secure, or enforce the exercise of a right.\textsuperscript{38}

Although due process is generally understood to be applicable in judicial proceedings, its application is not limited to those instances. Its objective is to provide individuals with enough resources and tools to defend themselves adequately from any government act that could affect their rights.\textsuperscript{39} Thus, due process is applicable to proceedings before any public office, whether that proceeding is administrative, legislative, or judicial.\textsuperscript{40}

The guarantees in the American Convention can be identified as independent rights that together form a due process guarantee. Among these are the right to be heard within a reasonable time by a competent, independent, and impartial judge or tribunal.\textsuperscript{41} Many of these guarantees are elements established in Article 8.\textsuperscript{42} One of the central tenets of these due process guarantees is the right to a defense.

The right to a defense is regulated specifically in Article 8.2(c) of the American Convention.\textsuperscript{43} According to the Inter-American Court of Human Rights, a person should be able to exercise his or her right to a defense from the moment that he or she is charged with an illicit act to the moment the process ends.\textsuperscript{44} One of the elements of the right to a defense is the right to counsel.\textsuperscript{45}

The right to counsel is affirmed in Article 8.2(d) and (e) and states that the accused has

\textsuperscript{34} Organization of the American States (OAS), American Declaration of the Rights and Duties of Man, art. XXVI, II and XII (May 1948) [hereinafter “Declaration of the Rights and Duties of Man”], available at https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

\textsuperscript{35} American Convention on Human Rights, supra note 9, at art. 8.


\textsuperscript{37} Id.


\textsuperscript{39} CUADERNILLO DE JURISPRUDENCIA, supra note 36, at 4.

\textsuperscript{40} Id.

\textsuperscript{41} American Convention on Human Rights, supra note 9, at art. 8.

\textsuperscript{42} Id.

\textsuperscript{43} Id. at art. 8.2(c).

\textsuperscript{44} Id. at 164.

\textsuperscript{45} American Convention on Human Rights, supra note 9, at art. 8.2(d)-(e).
the right to a personal defense or one assisted by the attorney of their choice.46 However, if a person is not assisted by counsel for economic reasons, then the government has the obligation to provide a lawyer free of charge.47 Otherwise, a respondent’s right to a legal defense would be moot as they would be affected by economic discrimination. In fact, lacking a legal defense could be considered an exception to the exhaustion of domestic remedies when petitioning for a case within the Inter-American System.48

The right to government-appointed counsel within the American Convention on Human Rights’ framework is only required in criminal proceedings, and only when necessary to guarantee due process.49 Nonetheless, the Court has established as a principle that any detainee should be provided with counsel when required to serve justice.50 Thus, the ensuing question is, would it serve justice to provide counsel to unaccompanied children in removal proceedings?

II. THE IMPORTANCE OF HAVING LEGAL ASSISTANCE IN REMOVAL PROCEEDINGS

A. What are removal proceedings?

Removal proceedings, deportations, or expulsions of aliens are normally administrative proceedings where the objective is to decide whether an individual is admissible according to domestic laws.51 In asylum law, these proceedings are guided by international law—specifically, the 1951 Convention Relating to the Status of Refugees (the “Refugee Convention”).52

Article 33 in the Refugee Convention contains the “non-refoulement” principle.53 This principle states that no state party to the convention “shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”54 However, it is important to recognize that there is no obligation to admit overseas refugees. In fact, the Refugee Convention and its 1967 Protocol allow the exclusion of certain categories of people from a country’s protection.55 However, all asylum seekers are presumed to be refugees until proven otherwise.56 Therefore, any exclusion findings should be made after an asylum claim is rejected.57

To determine whether a claim should or should not be rejected, due process must be

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46 Id.
47 American Convention on Human Rights, supra note 9, at art. 8.2(d)-(e).
48 CUADERNILLO DE JURISPRUDENCIA, supra note 36, at 169; American Convention on Human Rights, supra note 9, at art. 2, 46.1.
49 American Convention on Human Rights, supra note 9, at art. 8.2.
53 Id.
56 Expulsion of aliens in international human rights law, supra note 54.
57 Id.
established. For example, in the United States, when an individual arrives at a border seeking asylum, they are usually detained and placed in removal proceedings. Although every country has its own procedures, the level of due process offered should be standardized. When it comes to determining the rights of a person, countries must ensure that the process contains all the elements of a fair hearing, including the presence of counsel as necessary. This is especially relevant when it comes to unaccompanied immigrant children.

**B. Due Process Rights of Children in Removal Proceedings**

The International Organization for Migrants ("IOM") has defined children to be "all persons under eighteen years of age." Children migrate for different reasons that often overlap. These may include family reunification; escaping poverty; or escaping violence, abuse, and persecution, among others. When leaving their homes, many of these unaccompanied immigrant children lack the economic resources to pay for legal assistance. Moreover, seeking counsel while in detention is close to impossible for many UACs. This is especially true for those held in detention centers far away from major cities where many nonprofit organizations are located. Children are especially vulnerable due to two factors: age and immigration status. Children traveling alone without an adult to protect them face additional vulnerabilities in their health, physical, psycho-social, and material, among others. These vulnerabilities demand specific protections from the government of the country where these children are in transit.

In 2013, over 25,300 asylum petitions from unaccompanied or separated children were submitted in seventy-seven countries around the world. Separated children are those who are apart from either their parents or their legal or customary guardians but not from other relatives. On the other hand, unaccompanied children are those who are outside their country of origin and are separated from both parents, or who are not under the care of an adult who can traditionally be considered their guardian under the law or practiced custom. Although the focus here is on unaccompanied children, it is important to distinguish between UACs and separated children.

In 2014, the United States faced a humanitarian crisis due to the drastic increase of Central

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58 See Aliens and Nationality, 8 C.F.R. § 235.3(b)(4) (2017).

59 CUADERNILLO DE JURISPRUDENCIA, supra note 36, at 17.


61 Id.


64 Id.

65 Expulsion of aliens in international human rights law, supra note 54, at 7.


67 Id.

68 Id. at ¶ 34.

69 Id. at ¶ 49(c).

70 Id. at ¶ 49(b).
American migrants, many of whom were children.\textsuperscript{71} By 2016, the situation had not improved.\textsuperscript{72} In 2015, the number of children migrating to the United States was 35,000 and, in the first ten months of 2016, the number had reached about 31,000.\textsuperscript{73} In the United States, migrant children have reported physical and psychological abuse while under the supervision of the Customs and Border Protection (\textquote{CBP}) agency.\textsuperscript{74} This demonstrates how vulnerable children are when defending themselves against any government without the benefit of legal assistance.

C. The Child\textquotesingle s Best Interest Regarding Repatriation

The proceedings to handle migrant children vary between Guatemala, Mexico, and the United States. In Mexico and Guatemala, as aforementioned, the proceedings are mainly administrative. These proceedings are based on principles of international law that account for the child\textquotesingle s best interest when reaching a decision and protecting his or her rights.\textsuperscript{75} These principles are found in the UN Convention on the Rights of the Child (UNCRC).\textsuperscript{76} Mexico and Guatemala are two of the countries that are parties to that agreement.\textsuperscript{77} The principle of the child\textquotesingle s best interest guides governmental acts to treat children with special protection by considering all the factors that best suit their welfare.\textsuperscript{78} This principle is closely related to the obligation to be heard the child on all aspects of immigration and asylum proceedings and the right to participate in matters that concern them.\textsuperscript{79} Mexico and Guatemala have elaborated a binational protocol for repatriation.\textsuperscript{80} Under this protocol, the two countries have developed procedures for how to respond to


\textsuperscript{72} Id.


\textsuperscript{76} United Nations, Convention on the Rights of the Child, 20 November 1989, art. 3.


\textsuperscript{78} Article 12 of the Convention on the Rights of the Child establishes the child\textquotesingle s right to express his or her views freely in \textquote{all matters affecting the child,\textquoteright\ }those views being given due weight, taking into account his or her age and degree of maturity. See also Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, UN Doc. CRC/C/12/20, July 2009.

\textsuperscript{79} Expulsion of aliens in international human rights law, supra note 54.

unaccompanied children and how the two countries will cooperate in repatriating them, if needed.

In Mexico, once a migrant child is identified by any authority besides the National Migration Institute, that authority has the responsibility to notify the Institute.81 After the notification, the Institute steps in to take care of the child.82 The first step is to provide medical assistance if needed.83 Once the child is stabilized, he or she is taken to the nearest migratory station where the child is informed about his or her rights and is interviewed by an immigration officer.84 If the child petitions for asylum, the case is referred to the Mexican Commission for Helping Refugees.85 Once the case is filed, this commission reviews the child’s case in order to make a decision regarding the petition.86 If the child is found to be ineligible for asylum, the child is returned to his or her last country of habitual residence.87 The commission respects the right of all petitioners to have an attorney but it does not provide one.88 Guatemala has a similar process to remove unaccompanied alien children from its territory. Once a UAC is identified, he or she is placed under the state’s protection in temporary foster care.89 While in foster care, the child receives primary medical care and is interviewed.90 If it is necessary to provide the child with further protection, he or she is kept in foster care and a judge assesses the situation.91 Throughout the process, the Guatemalan Attorney General’s Office (Procuraduría General de la Nación) is in charge of the child’s well-being.92 When the child has been victim of a crime, then the child will be represented by an attorney appointed by the government through the Attorney General’s office.93 However, if no risk to the child’s repatriation is detected, the child is sent back to his or her home country without a hearing.94

The proceedings for unaccompanied children in the United States are initially administrative but can develop into judicial proceedings. A UAC in the United States is defined as a child who “a) has no lawful immigration status in the United States; b) has not attained eighteen years of age; and c) with respect to whom – (i) there is no parent or legal guardian in the United States or (ii) no parent or guardian in the United States is available to provide care and take physical custody.”95

When a UAC is detained, the U.S. Department of Homeland Security (DHS), through the

81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 PROYECTO DE PROTOCOLO BINACIONAL, supra note 80.
87 Id.
90 Id. at 86.
91 Id. at 87.
93 Id.
94 CONSEJO NACIONAL DE ATENCIÓN AL MIGRANTE DE GUATEMALA, supra note 89, at 89.
CBP, must provide a screening within forty-eight hours. This screening is used to determine whether the child has been a victim of human trafficking or is at risk of becoming one upon return to his or her home country. This screening is also used to establish whether the child has a credible fear of past or future persecution in his or her country of origin. Lastly, this interview is used to ascertain whether the child can make an independent decision on whether to withdraw their application for admission to the United States.

For children who are citizens or nationals of a contiguous country who do not “pass” this first hearing, the immigration officer may allow the child to withdraw the application for admission and to return voluntarily to his or her home country. If the child does not withdraw the application, the officer finds that the child may be a victim of human trafficking, the child has expressed a credible fear of persecution upon return to their home country, or the child is not a citizen or national from any contiguous countries, then the child will be transferred to the Department of Health and Human Services (HHS) within seventy-two hours while an immigration hearing is scheduled.

Once the child is transferred, the child is temporarily placed under the care of the Office of Refugee Resettlement (“ORR”). However, DHS can initiate removal proceedings against the child at any time. In any of these proceedings, counsel is not mandatorily provided to children. The removal proceedings to be applied are those established in the Immigration and Nationality Act (“INA”) § 240; they are not expedited removal proceedings. According to the INA, HHS must ensure that all UACs in removal proceedings have counsel “to the greatest extent practicable and consistent with § 292 of the Immigration and Nationality Act,” meaning that a provided attorney “shall be at no cost to the government.”

D. The Child’s Best Interest Regarding Access to Counsel/Justice

Although certain initiatives exist in the United States to provide free counsel to UACs, there is no legal obligation to do so. Therefore, providing counsel to children remains a discretionary act. For example, in 2014, the Obama administration launched its “Justice AmeriCorps” program, which provided grants to approximately one hundred lawyers and paralegals to furnish legal services to UACs in removal proceedings. Additionally, NGOs like

97 TVPRA 2008 § 235(a)(4).
100 TVPRA 2008 § 235(a)(2)(B).
101 TVPRA 2008 § 235(b)(3).
102 LEGOMSKY & RODRIGUEZ, supra note 55, at 1160.
103 Id.
104 Id.
105 Id.
109 LEGOMSKY & RODRIGUEZ, supra note 55, at 1158.
110 Id.
Kids in Need of Defense, the University of Chicago’s Young Center for Immigrant Children’s Rights, and the National Immigrants Justice Center have tasked themselves with representing children in removal proceedings at little or no cost. However, although these pro bono efforts are significant, they do not meet the increasing need for counsel. When children are found at the United States border, they are detained and taken to centers. United States courts are encouraged to take into account the special characteristics that are specific to child respondents, such as their mental capacity and competency. However, under the law, children must face the same proceedings as adults. In the standard procedure, every asylum seeker must first “pass” a credible fear interview. In the United States, if the child is found not to have a credible fear, he or she has a right to judicial review. In general, detention increases the disadvantages that a migrant faces when in removal proceedings. Not having an attorney increases the likelihood that the government office in charge of such proceedings will weigh evidence against the asylum seeker.

Mexico and Guatemala also interview children but, if the child is found not to have a credible fear of persecution, he or she is sent back to the country of origin without subsequent judicial review. These children are deported despite the existence of other remedies they could exhaust if they knew how, or if they had counsel to defend their rights. Being unable to exercise an effective remedy due to the absence of counsel can be considered an exception to a country’s obligation within the Inter-American Human Rights System. The system itself requires parties to exhaust remedies before taking a decision that could adversely affect the child. Deporting children due to the absence of a legal defense is an abject rejection of a country’s duties within this system.

111 Id.
112 Id.
117 LEGOMSKY & RODRIGUEZ, supra note 55, at 1061.
118 According to the American Immigration Council “Some individuals face traumatic repercussions from their time in detention or journeying to the United States and may never know that a deadline exists. Even those who are aware of the deadline encounter systemic barriers, such as lengthy backlogs, that can make it impossible to file their application in a timely manner. In many cases, missing the one-year deadline is the sole reason the government denies an asylum application.” American Immigration Council, Asylum in the United States, (May 14, 2018) https://www.americanimmigrationcouncil.org/research/asylum-united-states.
119 UNICEF, supra note 73.
120 PROYECTO DE PROTOCOLO BINACIONAL, supra note 80, at 35.
121 In Mexico, the remedy is “el recurso de revisión” [review remedy]. See Reglamento de la Ley Sobre Refugiados y Protección Complementaria [Regulations of the Law on Refugees and Complementary Protections] art. 45, Diario Oficial de la Federación [DOF] 21-02-2012, últimas reformas DOF 21-02-2012 (Mex.) (2012); In Guatemala, the remedy is “el recurso de revocatoria” [the revocation remedy], see Reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala [Regulations for the Protection and Determination of the Refugee Statute within the Guatemalan Territory], Acuerdo Gubernativo No. 383-2001 (Sept. 14, 2001).
122 American Convention on Human Rights, supra note 9, at art. 46.1(a).
123 Id. at art. 2.
Unaccompanied children who have an attorney are more likely to win their cases than those who do not. In 2006, only fifty-six percent of unaccompanied children facing removal proceedings in the United States were assisted by counsel. Lack of legal counsel representing them makes the case unlikely to be successful even if the child has a bona fide claim of fear of persecution. Having representation increases the number of a child’s court appearances and their likelihood of success in their case. At the same time, an attorney proves to be an essential tool since finding success in their claims could prevent children from being returned to the dangerous circumstances that they are fleeing.

III. THE RIGHT TO GOVERNMENT-APPOINTED COUNSEL FOR UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS FROM THE INTER-AMERICAN HUMAN RIGHTS PERSPECTIVE

Member countries of the Inter-American system of human rights have recognized through the American Convention and the American Declaration the right to due process, equality, and special protections for children. Each one of these concepts has been developed to encompass a series of rights, especially for children, according to conditions and vulnerability. The right to legal assistance for unaccompanied children in the Inter-American system of human rights is a product of the progressiveness principle. This principle is incorporated in Article 26 of the American Convention, as well as the Preamble of the American Declaration on the Rights and Duties of Man. The progressiveness principle recognizes the evolving nature of human rights, and how the conceptualization of these rights is meant to be expanded, not limited.

OAS member countries have the obligation not only to guarantee due process to all persons within their borders, but also to go beyond these guarantees and adopt all the necessary measures and mechanisms needed to protect the rights of children. These measures and mechanisms vary from country to country; however, the means of protecting children should depend upon the following considerations: the condition of children as minors; their mental development; their level of education; and other personal situations that may affect their understanding of the process. The member states should also guarantee access to justice in conditions of equality by providing effective due process and observing the best interest of the

124 Arulanantham, supra note 108.
126 AM. BAR ASS’N, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS CONTINUE TO PRESENT A CRITICAL NEED FOR LEGAL REPRESENTATION 1 (2016), available at https://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.authcheckdam.pdf [hereinafter A HUMANITARIAN CALL TO ACTION].
127 Id. at 1.
128 Id. at 7-8.
129 American Convention on Human Rights, supra note 9, at art. 8, 19, 24; Organization of the American States (OAS), American Declaration of the Rights and Duties of Man, Art. XXVI, II and XII (May 1948).
130 American Convention on Human Rights, supra note 9, at art. 26; American Declaration of the Rights and Duties of Man, supra note 129, at Preamble.
131 Liliana Galdamez Zelada, La Progresividad en la Jurisprudencia de la Corte Interamericana de Derechos Humanos [The Progressiveness in Jurisprudence in the Inter-American Court of Human Rights], 1 REV. DE DERECHO UNIV. CAT. DEL NORTE 139, 139 (2008).
132 Advisory Opinion OC-21/14, supra note 66, at ¶ 160.
133 Id. at ¶ 164.
child.\textsuperscript{134}

The best interest of the child principle has its roots in human dignity and the particular characteristics of children.\textsuperscript{135} This principle encompasses the special protections that states must implement to protect the rights of children. These protections need to be provided by considering the child’s vulnerability, immaturity, and inexperience.\textsuperscript{136} The best interest of the child is the guiding principle and, thus, it must be integrated into any decision or proceeding affecting the child by taking special measures and accounting for personal characteristics.\textsuperscript{137}

In that sense, facing a hearing without counsel may result in a general practice that does not consider children’s special circumstances. The practice of not providing counsel to children equates children’s understanding with that of an adult. This practice does not acknowledge the special characteristics that each child has. The right to legal assistance should be considered a special measure for migrant children that will make the procedures affecting their rights fairer and more effective.\textsuperscript{138}

\section*{A. The Right to Counsel for Member States That Have Recognized the Jurisdiction of the Inter-American Court of Human Rights}

The Inter-American Court of Human Rights has published opinions and decisions pertaining to the obligation of its member states to provide counsel for migrant children facing judicial or administrative procedures.\textsuperscript{139} The Court has stated that “the circumstances of a particular proceeding, its meaning, character, and context in a particular legal system are factors that support the determination if legal representation is necessary or not to the due process.”\textsuperscript{140} Additionally, the Court has indicated that states have an obligation to guarantee that every child facing an immigration proceeding has court appointed legal counsel without charge.\textsuperscript{141}

Access to counsel is especially relevant for unaccompanied children seeking asylum. In order to achieve a fair process, children need to have access to a government-appointed counsel due to their special circumstances. These circumstances are: being a child; being an immigrant in a foreign land without adult protection; and potentially being a victim of persecution. A fair process is one where children can defend their rights effectively, so as to avoid being returned to a place where their well-being is at risk.

OAS member states are supposed to have several obligations and duties to adopt mechanisms to protect migrant children. Some of these mechanisms are found in the American Convention on Human Rights, Articles 19, 22.7, and 22.8; the American Declaration of Human Rights, Articles VII and XXVII; the Convention on the Rights of the Child, Article 22; and the Refugee Convention and its Protocol.\textsuperscript{142} Mexico and Guatemala are parties to these treaties, and

\begin{footnotesize}
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\item \textsuperscript{134} Id. at ¶ 165.
\item \textsuperscript{135} Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A), No. 17, at ¶ 56.
\item \textsuperscript{136} Id. at ¶ 60.
\item \textsuperscript{137} Id. at ¶¶ 57-58; 60.
\item \textsuperscript{138} Advisory Opinion OC-21/14, supra note 66, at ¶ 203.
\item \textsuperscript{139} See, e.g., Advisory Opinion OC-21/14, supra note 66; see also, e.g., Advisory Opinion OC-17/02.
\item \textsuperscript{140} American Convention on Human Rights, supra note 9, at art. 2. For exceptions to the exhaustion of domestic remedies rule, see art. 46.
\item \textsuperscript{141} Advisory Opinion OC-21/14, supra note 66, at ¶ 204.
\item \textsuperscript{142} American Convention on Human Rights, supra note 9, at art. 19, 22.7, 22.8; Organization of the American States (OAS), American Declaration of the Rights and Duties of Man, Art. VII, & XXVII; United Nations, Convention on
\end{enumerate}
\end{footnotesize}
they have an obligation to comply with the dispositions found within.\(^{143}\) In light of the American Convention on Human Rights, the country signatories are obligated to respect the rights of children per Article 1; in addition, they are obligated to adopt domestic measures to guarantee effective legal assistance for children.\(^{144}\)

### B. The Right to Counsel in the United States

The process in the United States is different because the country is not a party to the American Convention or the Convention on the Rights of the Child, and it has not recognized the Inter-American Court’s jurisdiction.\(^{145}\) However, there are still obligations the United States has committed to fulfill, such as those articulated in the American Declaration, and there are other mechanisms available to compel the United States to be accountable for any human rights violations.

United States domestic law has not recognized a right to an appointed lawyer in immigration proceedings. 8 USC 1362 states that,

> in any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.\(^{146}\)

Additionally, the courts have refused to recognize a constitutional right to a government-appointed counsel in immigration cases. For example, in \textit{Aguilera-Enriquez v. INS},\(^{147}\) the appellate court held that “the test for due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness—the touchstone of due process.’”\(^{148}\) In the opinion, the court held that having counsel would not change the administrative outcome, so “fundamental fairness” was not affected.\(^{149}\)

Fundamental fairness is definitively affected when unaccompanied children face removal
proceedings without counsel. Yet, after years of difficult litigation, the American Civil Liberties Union ("ACLU") is still fighting for a constitutional right to appointed counsel in immigration courts for children, which has been unsuccessful many times by now.\footnote{Arulanantham, supra note 108 (stating that the court had no jurisdiction to decide).} For example, in\textit{C.J.L.G. v. Sessions}, a 2018 case heard in the U.S. Court of Appeals for the Ninth Circuit, the court characterized government-appointed counsel as a "privilege," and not a constitutional right.\footnote{C.J.L.G. v. Sessions, 880 F.3d 1122, 1133 (9th Cir. 2018) (holding that an unaccompanied minor seeking asylum had no right to a government-appointed lawyer in removal proceedings), rehearing ex parte granted, 904 F.3d 642 (9th Cir. 2018).}

At an international level, the United States is obligated to apply special measures and mechanisms to protect the rights of children. According to U.S. law, international treaties are not automatically self-executing; they need domestic laws created by Congress to execute them.\footnote{Medellin v. Texas, 552 U.S. 491, 498-99 (2008).} From the Inter-American perspective, the United States has assumed duties to respect due process rights and to provide special protections to children.\footnote{Declaration of the Rights and Duties of Man, supra note 34, at art. XII, VII.} Any action not in line with these commitments can be evaluated by the Inter-American Commission, which can offer recommendations or promote settlements when a petition is filed against a member state.\footnote{Organization of American States (OAS), General Assembly Res. 447, art. 19 (Oct. 1979).} In the past, the Commission has encouraged the United States to appoint counsel for migrant children.\footnote{INTER-AM. COMM’N H. R., supra note 4, at 19.}

While the U.S. federal government has created some programs to provide counsel to unaccompanied children, these programs are discretionary and may disappear at any moment.\footnote{As a matter of example, the Office of Refugee Resettlement provides funding to legal service providers in order to secure a lawyer for unaccompanied migrant children. See A HUMANITARIAN CALL TO ACTION, supra note 126, at 5.}

\textbf{CONCLUSION}

To conclude, the Inter-American System has established the right to legal assistance in removal proceedings for children, which means a government-appointed attorney for unaccompanied minors. This right is an important element of due process and acts as a counterweight to a heavy and well-structured governmental apparatus aimed against a minor who needs special considerations. These special considerations are meant to take into account the best interests of children, who may need technical and specialized advice when facing the national government. If enforced, the right to legal assistance not only provides a fair process, but it could also prevent more harm from occurring to at-risk-children by thwarting their return to a possible situation of persecution and danger.

Mexico and Guatemala are examples of countries that are signatories of the American Convention and have recognized the Inter-American Court’s jurisdiction. They are thereby obligated to provide counsel to unaccompanied children in removal proceedings. On the other hand, although the United States is not a signatory of the American Convention, and it has not recognized the Court’s jurisdiction, it has obligations stemming from the American Declaration. Mexico, Guatemala, and the United States have international duties within the Inter-American human rights system that must be performed in order to guarantee the best interests of children.