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**REPORT REGARDING GRAVE RIGHTS VIOLATIONS
IMPLICATED IN FAMILY IMMIGRATION DETENTION
AT THE KARNES COUNTY DETENTION CENTER**

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Introduction

The Karnes County Residential Center (Karnes), located in Karnes City, Texas, is an immigration detention center, which currently holds 535 mothers and children, almost all of whom are asylum-seekers from Central American countries. Karnes is the newest of three immigration detention centers in the U.S. detaining women and their children—the other two are in Artesia, New Mexico, and Leesport, Pennsylvania. Both the Artesia and Karnes facilities opened during the summer of 2014. The government has plans to expand family detention further with the opening of a 2400-bed family detention center in Dilley, Texas in November 2014. These detention centers represent the first effort at widespread immigration detention of families since 2009 when the government shut down family detention at the problem-ridden T. Don Hutto Detention Center in Taylor, Texas.

The situation at the Karnes facility demonstrates that family detention is a colossal mistake, which implicates numerous human rights violations under international law and civil rights violations under domestic law. At Karnes, the government detains women and their children needlessly, even when they pose no danger or flight risk that cannot be addressed through measures such as release on bond. Families remain detained even after they pass an initial screening interview demonstrating that they have viable asylum claims. They can remain detained for months, pending their asylum proceedings in Immigration Court. Detention drastically reduces these families' ability to obtain and access counsel and effectively present their asylum claims.

In addition, the Karnes detention center is a secure facility from which detained women and their children cannot leave and which has many characteristics of criminal detention, such as regular body counts. Children as young as three months old are detained at Karnes. Yet, despite housing over 200 children, the facility is not licensed as a residential home for children. Facility staff is not trained in childcare or the special needs of asylum-seekers. Adequate mental and physical health services are not available.

International human rights bodies have already condemned the detention of asylum-seeking families in the United States.¹ Yet, despite growing documentation of abuses and harsh conditions, and despite international and domestic laws that forbid or limit the detention of

¹ See Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II.Doc.78/10, ¶ 368 (2010); Special Rapporteur on the Human Rights of Migrants, Mission to the United States of America, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) available at <http://www.refworld.org/docid/47d647462.html>.

asylum-seekers and children, the government obstinately insists on expanding family detention. This report describes the process by which women and children came to be detained at the Karnes facility, and some of the challenges they face with respect to detention and the ability to pursue their asylum cases. The report then summarizes the relevant international and domestic protections that relate to the detention of asylum-seekers and immigrant children at Karnes. Finally, this report sets forth the numerous ways in which family detention at Karnes violates international and domestic human rights and civil rights protections for the women and children held behind bars.

I. Women and Children in Family Detention

A. Detention at the Border in CBP Holding Facilities

Almost all of the women and children detained at Karnes were apprehended by Customs and Border Patrol (CBP) near the Texas/Mexico land border and placed into expedited removal proceedings before transfer to Karnes. Expedited removal is a “fast-track” deportation process established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).² Expedited removal may be imposed on an immigrant who is arrested near a U.S. border within fourteen days of entry.³ Immigration officers also may impose expedited removal on noncitizens upon their attempted entry to the United States at a “port of entry,” such as a bridge or airport, in two instances: (1) if the immigrant declares an intent to seek asylum; or (2) if the immigrant does not possess valid entry documents.⁴ The women and children detained at Karnes fall into the first category of expedited removal in almost all cases. Immigrants subject to expedited removal are detained mandatorily and without the right to seek review of their detention by an immigration judge, under Immigration and Nationality Act (INA) § 235, during the early stages of their proceedings.⁵

Initially, after being taken into CBP custody, women and children encountered along the border are taken to a CBP station or holding facility. They remain at that holding facility for several days, typically in degrading conditions. Immigrants, including children, have reported

² INA § 235(b)(1)(A); 8 U.S.C. § 1225(b)(1)(A).

³ INA § 235(b)(1)(A)(iii)(II); 8 U.S.C. § 1225(b)(1)(A)(iii)(II); In August 2004, the U.S. Department of Homeland Security announced in the Federal Register that expedited removal applies to inadmissible “aliens... who are present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.” See 69 FR 48877 (Aug. 2004).

⁴ 8 U.S.C. § 1225(b)(1)(A); 8 U.S.C. § 1182(a)(7); 8 U.S.C. § 1182(a)(6)(C); INA § 212(a)(6)(C); INA § 235(b)(1)(A); INA § 212(a)(7).

⁵ Immigrants may be eligible for release as a matter of discretion for a medical emergency or for reasons of law enforcement, but these circumstances are usually very limited. See 8 C.F.R. 1235.3(b)(2)(iii); 1235.3(b)(4)(ii).

being denied food and water in these holding facilities, sometimes for days on end.⁶ They complain that the facilities, which they dub “hieleras” or freezers, are extremely cold.⁷ CBP agents have also been accused of using excessive force, even resulting in the death of at least one immigrant who was hog-tied, tased and beaten to death.⁸ Immigrants have also told advocates that they were either discouraged from seeking asylum at the border, or not informed of their right to do so, and in some instances, they were coerced out of making asylum claims because of threatening comments by CBP officials.⁹ CBO officers take initial statements from the women and children during these first days in CBP custody,¹⁰ under coercive conditions, and these statements often plague asylum cases throughout the process, even after the asylum-seekers have left the CBP holding facilities.¹¹ After their initial detention with CBP, women and their children are sent into Immigration and Customs Enforcement (ICE) custody at one of the family detention centers,¹² such as the facility in Karnes City, Texas.¹³

B. Continued Detention At Karnes Under Expedited Removal

After transfer to Karnes, the family remains in expedited removal proceedings. This means that they will be deported summarily, without further review of any kind, and will remain

⁶ See Lutheran Immigration and Refugee Service, *LIRS Statement for Congressional Progressive Caucus Ad-Hoc Hearing “Kids First: Examining the Southern Border Humanitarian Crisis”* (Jun. 9, 2014), <http://lirs.org/press-inquiries/press-room/06292014statement/>.

⁷ Americans for Immigrant Justice has reported that these “hieleras” are kept so cold that immigrants’ lips chap and split, their fingers and toes turn blue, and they shake uncontrollably, see Americans for Immigrant Justice, *Border Patrol Continues to Abuse Immigrant Women* (May 23, 2013), <http://www.aijustice.org/news-release-border-patrol-continues-to-abuse-immigrant-women/>.

⁸ See Cristina Costantini, *Anastasio Hernandez Rojas Death: 16 Members of Congress Call for Justice*, HUFFINGTON POST, (May 10, 2012), http://www.huffingtonpost.com/2012/05/11/anastasio-hernandez-rojas_n_1507274.html.

⁹ See Human Rights First Report, *How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy* (June, 2014), <http://www.humanrightsfirst.org/sites/default/files/HRF-Asylum-on-the-Border-noApps.pdf>.

¹⁰ See e.g. CBP Record of Deportable/Inadmissible Alien, Attached Exhibit.

¹¹ Asylum applications are often scrutinized harshly by immigration officials (including judges) who view any denial of persecution made at any time or any inconsistency in an immigrant’s story as demonstrative of fraud or deception. If an asylum applicant fails to declare a fear of persecution on her initial apprehension by CBP, it makes it much more difficult for her to succeed on an asylum claim after leaving a CBP holding facility. Should she encounter threats or discouragement from CBP officials against making an asylum claim, or should fail to be advised about her right to an asylum claim, the potential damage to her application for asylum can be irreparable.

¹² The women and children are generally not returned immediately to their home countries from the border even if they have not yet been able to articulate a claim to asylum, mainly because travel arrangements cannot be made for their return to Central America from the border in a prompt manner.

¹³ Since the end of family detention at the T. Don Hutto Residential Center (a family immigration detention facility located in Taylor, TX) in 2009, which effectively terminated family immigration detention until the summer of 2014, ICE’s general practice was not to detain women and children together in family facilities under expedited removal processes. Rather, the general practice was to place families automatically into full-fledged removal proceedings and to release families on the expectation that they would appear for future removal proceedings dates. See US Moves to Stop Surge in Illegal Immigration, NEW YORK TIMES, (June 20, 2014), http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0.

detained until the moment of deportation, unless they are found to have a credible fear of persecution.

Women detained at Karnes who assert their intention to seek asylum are interviewed by an immigration official to determine whether they have a “credible fear” of persecution in their home country.¹⁴ If they pass the credible fear interview (CFI), they will avoid immediate deportation and be permitted to pursue an asylum claim in full-fledged (non-expedited) removal proceedings before an immigration judge. The family must continue to remain detained while the CFI determination is pending, which takes from several weeks to a month.¹⁵

At Karnes, immigration officials located at the Department of Homeland Security (DHS) Asylum Office in Houston conduct CFIs by telephone with the detained mothers, and only rarely do they conduct CFIs in person at Karnes.¹⁶ The government fails to provide CFIs to children at Karnes, even though many children have independent asylum claims as a result of threats and persecution in their home country, typically because of gang violence targeting children.

If an asylum officer concludes that a Karnes mother did not pass her CFI by demonstrating a credible fear of persecution, the asylum-seeking mother may obtain strictly limited review of the CFI determination before an immigration judge.¹⁷ If the asylum-seeker does not succeed in persuading the judge, then there is no further review. She will remain in expedited removal and will stay detained until she is deported to her home country, which usually happens in a matter of weeks.¹⁸ Families have already been deported from Karnes since it opened in August 2014.¹⁹

If an asylum-seeker “passes” her CFI, either with the asylum officer or on review by the immigration judge, then her asylum case passes to the immigration court for full proceedings and hearings on the asylum claim. At this point, the asylum-seeker is no longer subject to expedited removal, and is placed in removal proceedings before the immigration court under INA §240. However, getting to the immigration judge has proven problematic for some immigrants who have not been afforded an adequate opportunity to assert a fear of persecution. Many mothers at Karnes have failed their CFIs because they were not informed of the purpose or the format of the interview beforehand, they were unable to divulge details of their trauma so soon after arriving in

¹⁴ 8 U.S.C. § 1225(b)(1)(A)(i); INA § 235(b)(1)(A)(i).

¹⁵ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); INA § 235(b)(1)(B)(iii)(IV); 8 C.F.R. §§ 235.3(b)(4)(ii).

¹⁶ See Human Rights First Report, *US Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf> (describing problems with video proceedings in the asylum context, which affect the possibility of success on an asylum claim).

¹⁷ 8 U.S.C. § 1225(b)(1)(B)(iii); INA § 235(b)(1)(B)(iii)(III); 8 C.F.R. §1208.30(g)(2).

¹⁸ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); INA § 235(b)(1)(B)(iii)(IV).

¹⁹ Cindy Carcamo, *Nearly 300 women, children deported from immigration detention centers*, L.A. TIMES (Aug. 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-ff-new-mexico-immigration-deportation-20140821-story.html>.

the United States in the difficult context of detention with their children, and others were not allowed to elaborate upon their answers to particular questions.²⁰ Moreover, the DHS Asylum Office recently published a policy memorandum urging asylum officers to be stricter in making credible fear findings, which has led to lower grant rates.²¹

These practices limit the due process rights of asylum-seekers to an extent that is not acceptable under international human rights law. Further, the U.S. policy of placing women and children in expedited removal and detaining women and children asylum-seekers during the credible fear process does not comport with international human rights laws. As described below, very brief detention for purposes of an initial interview to establish identity and the contours of an asylum claim may be permissible in limited individualized circumstances.²² However, at Karnes, detention during the expedited removal process is categorical rather than individualized, exceeds the brief period that might be permissible, and fails to recognize the special situation of women and children asylum-seekers.

C. Detention After Passing CFI and During Removal Proceedings

If a woman detained at Karnes passes her CFI, she is referred to removal proceedings in immigration court, where she will pursue her asylum claim.²³ U.S. immigration law permits but does not mandate continued detention for asylum-seekers whose cases are being adjudicated in immigration court. When an asylum-seeker is referred to immigration court, ICE makes a written determination regarding her custody, either releasing her on her own recognizance, releasing her upon payment of a bond, or deciding on continued detention.²⁴

At Karnes, ICE has issued custody determinations continuing detention during removal proceedings for every single woman and child.²⁵ These determinations are not individualized; instead, ICE insists on a categorical basis that all of the women and children detained at Karnes must be detained on the grounds that they all pose a danger.²⁶ ICE asserts that releasing any one

²⁰ See LIRS, *supra* note 6, at 16; see also Human Rights First, *supra* note 9, at 4. A 2005 study of expedited removal conducted by the governmentally-appointed U.S. Commission on International Religious Freedom (USCIRF) found that immigration officers did not provide immigrants with required information about CFIs and the possibility of protection under U.S. law for those fearing persecution or torture in their home countries. Immigration officers were also found to have discouraged immigrants from seeking asylum claims. See USCIRF *Report on Asylum Seekers in Expedited Removal* (Feb. 8, 2005) <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>. Women and children detained at Karnes report similar problems, which have been exacerbated by their detention with their children.

²¹ USCIS's Updated Asylum Division Officer Training Course Lesson Plan, *Credible Fear of Persecution and Torture Determinations*, (Feb. 28, 2014), <http://www.aila.org/content/default.aspx?docid=48256>.

²² UNHCR-The UN Refugee Agency, *Detention Guidelines*, United Nations Refugee Agency Website, 21, Guideline 4.1.1, (2012), <http://www.unhcr.org/505b10ee9.html>.

²³ See Notice to Appear, Attached Exhibit.

²⁴ 8 C.F.R. 236.1(c)(8).

²⁵ See e.g. Notice of Custody Determination, Attached Exhibit .

²⁶ See Declaration of Philip T. Miller and Declaration of Traci A. Lembke, Attached Exhibit.

of these asylum-seeking families on bond would encourage mass illegal migration, despite evidence indicating that the women and children have arrived because they have legitimate refugee protections needs and further indicating that detention policy has little impact on the decisions that Central American women and children make when fleeing their home countries.²⁷ ICE decisions to detain based on categorical assumptions of danger fail to take individual facts for each asylum-seeker into account in establishing whether detention is necessary based on flight risk or danger to public safety (the two main permissible justifications for detention without the possibility for release on bond or other alternatives to detention). This categorical policy eschews the obligation to engage in individualized determinations regarding the need for detention of asylum-seekers, in contravention of international human rights law.²⁸

Furthermore, ICE's insistence on continuing detention explicitly invokes the need to use detention as a means of deterrence of future illegal migration. International human rights law specifically prohibits "detention policies aimed at deterrence," because they are "not based on an individual assessment as to the necessity to detain."²⁹

Detention of families at Karnes, who pose no flight risk or danger, also violates due process protections under international human rights law. Detention makes it harder to access counsel, gather evidence and prepare testimony. As a result of being detained, the women and children at Karnes thus have a more difficult time presenting and winning their asylum claims.³⁰

An asylum seeker at Karnes who seeks review of ICE's decision to continue detaining her may ask for a redetermination of ICE's custody decision before an immigration judge.³¹ In a

²⁷ See Declaration of Jonathan Hiskey and Declaration of Nestor Rodriguez, Attached Exhibits; see also Elizabeth Kennedy, AMERICAN IMMIGRATION COUNCIL, *No Childhood Here: Why Central American Children are Fleeing Their Homes* (Jul. 1, 2014), <http://www.immigrationpolicy.org/perspectives/no-childhood-here-why-central-american-children-are-fleeing-their-homes>.

²⁸ UNHCR *Detention Guidelines*, Guideline 4 ("As a fundamental right, decisions to detain are to be based on a detailed and individualized assessment of the necessity to detain in line with a legitimate purpose."); Inter-Am. Comm. Hum. Rts., Report on Immigration in the United States: Detention and Due Process, ¶ 104 (2010) available at <https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf> ("generalized use of detention in the case of asylum-seekers does not comport with the right to personal liberty"); U.N. Hum. Rts. Comm., *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) available at <http://www.refworld.org/docid/3ae6b71a0.html> (interpreting the International Covenant on Civil and Political Rights, ratified by the United States, to establish that detention of asylum seekers must be necessary "in all the circumstances of the case" and the grounds for detention must be "particular to . . . individuals").

²⁹ UNHCR *Detention Guidelines*, Introduction.

³⁰ See The Honorable Robert A. Katzmann, Bench, Bar and Immigrant Representation, 15 *Legislation and Public Policy* 585, 593 (2012) (reporting comprehensive study results which show detention to be one of the two most important variables determining success in Immigration Court, with representation being the other variable).

³¹ 8 CFR 1236.1(d); *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005) (confirming that an asylum seeker may request release on bond with the immigration court after passing her CFI). Not all persons initially subjected to expedited removal are eligible to petition an immigration judge for release, even if they have passed a CFI. Individuals considered "arriving aliens" (meaning those who were apprehended before achieving entry to the US, such as in an airport or at a land border bridge) are not eligible to go before a judge for redetermination of custody at all. ICE may

custody redetermination proceeding before the immigration judge, the asylum seeker must establish that she does not pose a danger or flight risk. The judge may then order her released on personal recognizance³² or on payment of a bond, the amount of which must be at least \$1,500.³³ If the immigration judge does not grant release on recognizance or bond or if the asylum seeker disagrees with the bond amount set, the asylum seeker may appeal to the Board of Immigration Appeals; conversely, the government can appeal the immigration judge's decision.³⁴

The redetermination hearings before the immigration court on custody status are not automatic, as required by international human rights law,³⁵ and so often are not requested or are not effective without representation. In addition, until the custody hearing before the immigration judge, the families must remain detained. Thus the need to seek a hearing before the immigration judge in order to obtain review of ICE's categorical decisions inherently makes the family's detention lengthier than it would be if ICE made individual decisions in the first instance.

At Karnes, some women who have been fortunate enough to obtain pro bono or private counsel have sought redetermination of custody before immigration judges in San Antonio, Texas. In those cases, ICE has opposed release, including on reasonable bond, before the immigration judge. As a result, bond hearings have drastically changed. Previously, they were very brief proceedings requiring only basic evidence and argument on the issues of flight risk or danger to the community. Now, ICE attorneys arguing these bond cases are submitting lengthy evidentiary packets insisting that women must remain detained on "deterrence of mass illegal migration" grounds and that bond should be denied. ICE attorneys are also cross-examining the asylum-seekers on information they provided in their CFIs in a fishing expedition to find evidence of flight risk or some other justification for ongoing detention. This practice has lengthened bond hearings significantly and has made the role of legal counsel more important, even though the families do not receive government-funded counsel in the U.S. system.

In support of its arguments that immigration judges should order continued detention of women and children at Karnes, ICE has sought to justify its policy of detention as deterrence by invoking the decision in *Matter of D-J-*. In that case, the U.S. Attorney General held that national

release such persons on "parole" in its discretion, but this decision is not reviewable by an immigration judge. 8 U.S.C. 1182(d)(5)(A); 8 CFR 1003.19(h). The women and children at Karnes do not fall into this category.

³² Some judges do not believe that they have the authority to release on personal recognizance, and so their inquiry does not consider the necessity of detention but only the bond amount to be assigned, if any. See EOIR, The Immigration Judge Benchbook, Bond Guide, available at:

<http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm>.

³³ 8 U.S.C. § 1226(a); INA § 236(a). Moreover, the immigrant must prove that she is not a threat to persons, property, or national security, and must ensure that she will appear at all future immigration proceedings in order to be released on bond. *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006) (citing *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999)).

³⁴ 8 C.F.R. §§ 1003.19(f); 8 C.F.R. §§ 1003.19(i)(1).

³⁵ See Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II.Doc.78/10, ¶ 368 (2010), 27-28.

security interests, specifically related to preventing future mass illegal migration, constituted a valid justification for categorically denying release on bond to certain asylum seekers. The policy applied in *Matter of D-J-* is in stark contrast with domestic and international law, requiring individualized determinations of the need to detain based on flight risk or danger to the community. As explained above, international law specifically prohibits use of detention as a deterrent. In addition, as further described below, the UN Refugee Agency (UNHCR) guidelines on detention recognize national security as a legitimate government purpose for holding an asylum-seeker in detention, but only where an individual has presented an actual risk to national security, which has not occurred in the Karnes context.³⁶

For the families in detention at Karnes, immigration judges have been ordering release on bond despite ICE's attempts to keep them detained. However, since the amount of the bond an immigration judge can set is discretionary (though it may not be less than \$1,500), judges in the same court have been wildly inconsistent in the amounts of the bonds they set for immigrants in similar circumstances and with similar asylum claims.³⁷ These results put in doubt the likelihood that immigration judges are properly evaluating the permissible considerations of flight risk or danger in making custody decisions. In some cases, bonds are set so high that families are simply unable to pay and remain detained throughout their proceedings.

There also remains another possibility that a family will not be released even after bond is set. ICE can reserve the right to appeal the immigration judge's decision, and within 24 hours may invoke a unilateral "automatic stay" power.³⁸ Once invoked, ICE's stay power means that the asylum seeker must remain detained while ICE appeals the immigration judge's decision to grant release on bond; these appeals may take months to resolve. As a practical matter, ICE's automatic stay power means that detained immigrants with asylum claims may end up remaining detained throughout the duration of their asylum cases in immigration court—despite the independent review of an immigration judge determining that such immigrants should be released on bond. This possibility effectively renders null the independent review of an immigration judge, and vests unreviewable authority in ICE to determine the length of detention of an asylum-seeker. As such, ICE's automatic stay power directly conflicts with international standards that require independent review of detention decisions based on objective criteria. Thus far, ICE has reserved the right to appeal immigration judges' decisions to grant bonds to Karnes detainees, but has not invoked the automatic stay power. Yet, the threat remains that ICE could deploy this tool at any point.

³⁶ UNHCR *Detention Guidelines*, Guideline 4.1.3.

³⁷ In the San Antonio Immigration Court, one judge has been generally setting \$5,000 bonds for women detained at Karnes, while another has generally been setting \$20,000 - \$25,000 bonds.

³⁸ Pursuant to 8 C.F.R. 1003.19(i)(2), ICE may halt release on bond during its appeal of the immigration judge decision where ICE originally declined to set bond, or where ICE set a bond of \$10,000 or more. Because ICE has denied bond in all Karnes cases, this rule may be invoked in any case where the immigration court orders release.

D. Lack of Access to Counsel and Legal Information

Access to counsel for the families detained at Karnes is of utmost importance yet is severely lacking. The American Bar Association has found that “[a]ccess to legal services is critical to a fair and efficient immigration removal and detention system. Authorities should facilitate access to legal and consular services, legal materials and information, correspondence, and legal orientation presentations.”³⁹ Without access to counsel and information about legal rights and processes, basic procedural protections required under international law are nonexistent or ineffective.

The families at Karnes have not had adequate information regarding the asylum process or their rights. When the facility was initially opened for families, no “Know Your Rights” presentations were given to the newly arrived mothers and children to inform them about the asylum process or the right to request bond from an immigration judge. Because of this, it is likely that many women underwent CFI’s without understanding why they were being questioned or that the interview was a pathway to either deportation or obtaining asylum. Some were likely deported as a result.

While non-profit service providers have now begun to provide legal presentations, the numbers of detainees are so great that it is difficult for these service providers to conduct “intakes” or “consultations” for immigration purposes to determine what immigration remedies exist for the more than 500 women and children. This shortcoming falls especially hard on children detained at Karnes, who are automatically assumed to be beneficiaries of their mothers’ asylum claims even if they might have their own claims.

Women and children detained at Karnes have an even more difficult time obtaining ongoing legal representation in their individual cases. Unlike criminal proceedings in the United States, asylum seekers do not have a right to publicly-funded appointed counsel in their removal proceedings. Instead, immigrants in removal proceedings have a “right to counsel” in that they may obtain representation by a private immigration attorney or by a pro bono immigration attorney if they can do so in time.⁴⁰ If not, an immigrant in removal proceedings is forced to represent himself, without the aid of counsel, having no background in the complex realm of U.S. immigration law.

The women must rely on non-profit legal services providers and volunteers to offer representation, except in the unusual case where the family can afford to pay a private attorney.

³⁹ American Bar Association, *Civil Immigration Detention Standards* at 4 (2012), <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf>.

⁴⁰ Immigrants have a right to counsel so long as it is provided at “no expense to the government.” 8 U.S.C. § 1362 (1996); *See also* 8 U.S.C. § 1229a(b)(4)(A) (2006).

Yet, the location of Karnes provides a barrier to women obtaining counsel, as it is located in a rural area far removed from pro bono immigration attorneys. The nearest large metropolitan cities with such attorneys are San Antonio, located more than an hour away from the facility, and Austin, located about two hours away from the facility. This makes it difficult not just to get a pro bono attorney, but also for attorneys to access their clients as they have to commute a considerable distance to interview the detainees in person. The facility's remote location also violates the ABA civil immigration detention standards, which state that a detention center should be near "[a]dequate non-profit, pro bono, or low-cost legal services."⁴¹

Additionally, even where a family obtains counsel, immigration officials do not always inform attorneys of important dates relevant to their cases (like the date of a woman's CFI). Furthermore, difficulties with women making outgoing phone calls from Karnes have made it hard for women to alert their attorneys of these dates. The result is that attorneys are not always able to adequately prepare a client's case before the deadline, and sometimes are unaware that an important step in the case has transpired until after the fact.

In general, the ability to seek representation and to effectively work with an attorney once represented has been greatly hindered by the difficulties in phone access. It is not possible for an attorney to call a client at Karnes and speak to her directly. Rather, the detainee must call out to the attorney. However, women detained at Karnes are only allowed to place outgoing phone calls if they have enough money in their commissary account to buy a phone card from Karnes—no outside phone cards are allowed. The only free phone calls permitted are to pro bono immigration attorneys and organizations, but women have repeatedly reported having a difficult time getting through on this free phone system.

Additionally, attorneys and other legal staff have reported encountering accessibility problems at Karnes. Staff at the facility imposes strict access rules on legal representatives other than attorneys (such as paralegals and even law student attorneys), requiring them to fax a sheet of intended clients 24 hours before the visit with an estimated time of arrival for the next day. If the representative arrives more than 30 minutes after her stated time of arrival, she is denied access to her clients. This poses a particularly difficulty for representatives commuting from long distances who might encounter travel or traffic delays. In addition, all non-attorney representatives and support staff, such as interpreters, must receive security clearance before being allowed admittance to Karnes. Attorneys have also reported waiting for long stretches of time after arriving at the Karnes facility before being allowed to speak with clients, sometimes even up to two hours. Some attorneys have been informed that they may only see a limited number of clients in a particular day, requiring additional travel on another day. These are all typical prison policies that should not apply to civil detention, where access to outside visitors, especially legal visitors, should be freely given.

⁴¹ ABA Civil Immigration Detention Standards at 11.

E. Conditions of Detention Not Civil

Immigration detention that is punitive in nature violates both domestic and international law. U.S. immigration officials have no authority to detain immigrants for purposes other than prevention, and outside a criminal process, punitive detention violates due process.⁴² Guiding principles for civil immigration detention have been addressed in a 2012 report published by the American Bar Association, which states that: “Residents should not be held in jails or jail-like settings...Civil detention facilities might be closely analogized to ‘secure’ nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities.”⁴³ The UNHCR guidelines on detention specifically state that: “Detention of asylum-seekers for immigration –related reasons should not be punitive in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided.”⁴⁴ Yet despite both domestic and international law on the issue, Karnes is largely punitive in the nature of its structure and conditions of detention.

Though Karnes is designated as “residential facility,” its so-called “residents” are locked in, and attorneys and visitors are locked out unless they follow very specific rules to gain entry. As a secure facility, there is no right to come and go for the women and children detained there. Karnes also looks like a correctional facility. The interior walls are painted cinderblock, and both interior and exterior doors are heavy, loud when slammed closed, and are most of the time left locked until a button is pushed and access through them is granted by Karnes staff. The facility is owned by a private prison corporation, GEO Group, whose website touts the corporation as being “the world’s leading provider of correctional, detention, and community reentry services.”⁴⁵

The staff is male-dominated and is not trained in proper interactions and care of women, children and asylum seekers. Only very limited mental health and medical services are available. Children must be placed in “daycare” at Karnes while their mothers attend court hearings, yet the care providers do not appear to have any training in working with children.

Guards give disciplinary write-ups to women and children alike, and multiple women have reported that children are written up for doing “children things,” like running or laughing loudly or playing too much. In addition, guards sometimes threaten separating a mother and her child if the child is sanctioned for “bad” behavior.

Women and children at Karnes are also required to participate in several daily body counts. During these times, all residents are required to remain in their designated indoor

⁴² *Zadvydas v. Davis*, 533 U.S. 678, 694-95 (2001); *Wong Wing v. United States*, 163 U.S.228, 241 (1896).

⁴³ ABA Civil Immigration Detention Standards at 4.

⁴⁴ UNHCR *Detention Guidelines*, Guideline 8.

⁴⁵ GEO, Welcome to the GEO Group, available at: <http://www.geogroup.com/>.

locations. If children cannot remain still during this time, they may be written up for a disciplinary infraction.

Children are also not allowed to bring toys into their rooms. Reportedly, infants and toddlers may not be placed on the ground to engage in developmentally-appropriate activities such as crawling.

II. International Human Rights Law Protects Asylum-Seekers from Arbitrary Detention

A. The Right to be Free from Arbitrary Detention and the Rights of Asylum Seekers

International human rights law protects all people from state-imposed arbitrary detention.⁴⁶ Thus, for example, the International Covenant on Civil and Political Rights (ICCPR)—which the United States has ratified—establishes that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”⁴⁷ The right to be free from arbitrary detention means that detention must be based on grounds and procedures set forth in law, and it must be proportional—used only to the extent needed to meet an important governmental purpose, and ending when the need for it ends.⁴⁸ Detention may not be discriminatory, based on race, gender, religion, or national origin.⁴⁹ Treatment of detainees must be humane, with access to medical evaluation and treatment.⁵⁰

The Inter-American Commission on Human Rights (IACHR) has specifically indicated, including in the immigration context, “that pre-trial detention is an exceptional measure.”⁵¹ The IACHR has thus insisted that alternatives to detention should always be considered.⁵²

International human rights law further obligates states to respect the right of all people to seek and enjoy asylum.⁵³ Anyone who is applying for refugee status holds the status of asylum

⁴⁶ American Declaration of the Rights and Duties of Man art. 25, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949); Universal Declaration of Human Rights, Article 9 GA res. 217A (III), UN Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, Article 9(1) GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

⁴⁷ International Covenant on Civil and Political Rights. *See also* American Declaration of the rights and Duties of Man, at art. 1.

⁴⁸ UNHCR-The UN Refugee Agency, *Detention Guidelines*, United Nations Refugee Agency Website, 21, Guideline 4.2, (2012), <http://www.unhcr.org/505b10ee9.html>. *See also*, the International Covenant on Civil and Political Rights, at art. 26.

⁴⁹ UNHCR, *Detention Guidelines*, Guideline 5.

⁵⁰ UNHCR, *Detention Guidelines*, Guideline 4.1.2.

⁵¹ *See* Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II.Doc.78/10, ¶ 368 (2010).

⁵² IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 15.

⁵³ American Declaration of the Rights and Duties of Man, at art. 27. *See generally* Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) (establishing international recognition of the

seeker for this purpose.⁵⁴ Among the rights that refugees, and asylum seekers, enjoy are the right to non-refoulement,⁵⁵ the right to freedom of movement,⁵⁶ the right to liberty and security of person,⁵⁷ and the right to family life.⁵⁸

With respect to the use of detention on asylum-seekers, the United Nations High Commission on Refugees (UNHCR)—the human rights body charged with leading and coordinating international action to protect refugees—has developed Detention Guidelines which are considered authoritative.⁵⁹ The IACHR regularly references standards by the United Nations when establishing human rights norms.⁶⁰

The UNHCR Guidelines confirm a strong presumption against detention of asylum seekers.⁶¹ Since detention deprives asylum seekers of fundamental liberty for asserting their right to seek protection and causes “well-known negative and at times serious physical and psychological consequences,”⁶² international human rights law imposes stringent restrictions on the detention of asylum-seekers.⁶³

right to seek asylum); UNHCR, *Detention Guidelines* (describing UNHCR standards designed to respect the right to asylum); Convention on Territorial Asylum, Mar. 28, 1954, OEA/Ser.X/1 (providing provisions for handling asylum to balance the interest of asylum seekers with the interest of the state); African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, 8 I.L.M. 1288 (entered into force June 20, 1974) (indicating that a right to seek asylum should be respected by member states of the African union); African Charter on Human and Peoples’ rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (stating that nations should recognize the right to seek asylum); OAS, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (recognizing rights of refugees among members of the Organization of American States); Nuala Mole & Catherine Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe Publishing, (2010), <http://www.refworld.org/pdfid/4ee9b0972.pdf> (indicating that European Union has recognized the right of asylum seekers).

⁵⁴ UNHCR, *Detention Guidelines*, Introduction at 10.

⁵⁵ Convention relating to the Status of Refugees, art 33(1), opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

⁵⁶ American Convention on Human Rights, at art. 22.

⁵⁷ International Covenant on Civil and Political Rights, at art. 9(1).

⁵⁸ See, e.g., American Convention on Human Rights, at art. 5 (recognizing the importance of a family).

⁵⁹ UNHCR, *Detention Guidelines*, Introduction at 8.

⁶⁰ See IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 13(citing to the United Nations when defining human rights norms and practices while investigating U.S. immigration detention).

⁶¹ UNHCR, *Detention Guidelines*, Guideline 2; See also *Id.*(indicating that the IACHR discourages detention); Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 Fordham Int’l L.J. 243, 269-70 (stating the United Nations has voiced a strong presumption against detention).

⁶² Briefing notes, *UNHCR releases new guidelines on detention of asylum-seekers*, United Nations Refugee Agency Website (September 21, 2012), <http://www.unhcr.org/505c461f9.html>. See also Katy Robjant, Rita Hassan & Cornelius Katona, *Mental health implications of detaining asylum seekers: systematic review*, BRITISH JOURNAL OF PSYCHIATRY, (2009) (discussing the mental health implications of detaining asylum seekers)

⁶³ UNHCR, *Detention Guidelines*, Introduction at 6.

Under the UNHCR standards, detention of asylum-seekers should be used only as a last resort or “exceptional measure,” and must be based on previously existing law.⁶⁴ Even then, the government must first consider alternatives to detention, such as release or release on bond.⁶⁵ The IACHR has found that similar limitations apply to the detention of asylum seekers and other migrants.⁶⁶

The UNHCR standards further require that detention must be justified by a legitimate purpose and be proportional to that purpose.⁶⁷ To determine if detention is proportional and reasonable, the UNHCR weighs its purpose against the asylum-seeker’s right to personal liberty, which must be given great weight.⁶⁸ The only legitimate purposes that may justify detention are – public order, public health, or national security.⁶⁹ With respect to public order, which is the most commonly invoked reason for immigration detention in the United States, the UNHCR has stated that detention is only justified when “1. the asylum-seeker is likely to abscond or refuse to cooperate; 2. detention is associated with accelerated procedures in narrow circumstances; 3. brief detention is necessary to carry out initial identity and security checks; or 4. an initial brief period of detention is necessary to allow for a ‘preliminary interview’ on the asylum claim.”⁷⁰ Even in those cases, there must always be an individualized determination that detention is needed in a particular case. National security grounds also must be narrowly interpreted and detention for national security reasons must be “necessary” and “proportionate to the threat.”⁷¹ Finally, detention may not be discriminatory, based for example on gender or a particular national origin.⁷²

In addition, detaining asylum-seekers in the name of deterrence is unlawful under human rights standards because it would violate the requirement that detention must be individualized—necessary, proportional, and reasonable “in all the circumstances” of the individual case.⁷³ This goes hand-in-hand with the principle, reiterated by UNHCR, that detention of asylum seekers should not be punitive.⁷⁴ Since asylum seekers are exercising their rights under international law to seek asylum, they may not be punished for doing so.

⁶⁴ UNHCR, *Detention Guidelines*, Guideline 4.1; see generally International Covenant on Civil and Political Rights (recognizing a right to be free from arbitrary detention).

⁶⁵ IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 12; UNHCR, *Detention Guidelines*, Guideline 4.3.

⁶⁶ IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 15.

⁶⁷ UNHCR, *Detention Guidelines*, Guideline 4.2.

⁶⁸ UNHCR, *Detention Guidelines*, Guideline 4.

⁶⁹ UNHCR, *Detention Guidelines*, Guideline 4.1.

⁷⁰ UNHCR, *Detention Guidelines*, Guideline 4.

⁷¹ UNHCR, *Detention Guidelines*, Guideline 4.1.3.

⁷² UNHCR, *Detention Guidelines*, Guideline 5.

⁷³ UNHCR, *Detention Guidelines*, Introduction at 7.

⁷⁴ UNHCR, *Detention Guidelines*, introduction at 7; IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 22.

In addition, when the extraordinary measure of detention is employed, international law imposes limits. Indefinite detention is arbitrary, and maximum limits on detention should be established.⁷⁵ Decisions to detain or to extend detention must be subject to procedural safeguards such as notice of their rights, right to counsel and regular review of detention.⁷⁶

The conditions of detention must be humane and dignified, for example with detainees provided adequate food, medical care, exercise, and regular contact with family.⁷⁷ The conditions of detention must reflect its civil nature, and criminal-type detention is not appropriate.⁷⁸ The special circumstances and needs of particular asylum-seekers, including those who have been traumatized or tortured, must be taken into account.⁷⁹ Detention facilities must also provide for the particular needs of children and women.⁸⁰

B. Protections for Children

Drawing upon international human rights instruments protecting children, such as the United Nations Convention on Rights of the Child, the UNHCR Guidelines make clear that “detention of children [should] be used only as a measure of last resort and for the shortest appropriate period of time.”⁸¹ The IACHR has also enshrined similar principles in several decisions.⁸²

If detention is utilized, the facility must act in the child’s best interests and accommodate a child’s “fundamental right to life, survival, and development.”⁸³ The facility must follow an “ethic of care” that respects the child’s rights to freedom of expression, to be in a family unit, and to be free from discrimination.⁸⁴ Children have a right to an education and a right to play with other children of their age.⁸⁵ The UNHCR standards recognize the “well-documented deleterious effects of detention on children’s well-being, including on children’s physical and mental development.”⁸⁶

⁷⁵ IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 15. See also American Declaration the Rights and Duties of Man, art. 1; International Covenant on Civil and Political Rights, at art. 9.

⁷⁶ IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 27-28.

⁷⁷ UNHCR, *Detention Guidelines*, Guideline 8.

⁷⁸ UNHCR, *Detention Guidelines*, Guideline 8.

⁷⁹ UNHCR, *Detention Guidelines*, Guideline 9.

⁸⁰ UNHCR, *Detention Guidelines*, Guideline 9.2-.3.

⁸¹ UNHCR, *Detention Guidelines*, Guideline 9.2.

⁸² See Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child 435* (Koinlijke Brill NV, Leiden, The Netherlands., 2008) (citing: Inter-American Commission on Human Rights, Report No. 39/02, Decision on Admissibility, Petition 12.328, *Adolescents in the Custody of the FEBEM, Brazil*, 9 October, 2002; Inter-American Commission on Human Rights, Report No. 41/99, Merits, Case 11.491 *Minors in Detention, Honduras*, 10 March 1999.)

⁸³ UNHCR, *Detention Guideline*, guideline 9.2.

⁸⁴ UNHCR, *Detention Guideline*, guideline 9.2.

⁸⁵ UNHCR, *Detention Guideline*, guideline 9.2.

⁸⁶ UNHCR, *Detention Guideline*, guideline 9.2.

Children should also be afforded all the same procedural rights as other detainees.⁸⁷ Efforts should be made to aid the child in the legal process of asylum by prioritizing the child’s claim. Also, an independent guardian and legal adviser should be appointed to aid the child navigate the complex legal webs the child must go through.⁸⁸

The IACHR has reached similar conclusions—namely, that families and pregnant women seeking asylum should not be detained, and if they are, the conditions must not be like prison; that facilities holding children should have less restrictive conditions than adult detention centers; and that “detention of children should be for the shortest appropriate period of time.”⁸⁹

C. Protections for Women

The UNHCR Guidelines also afford additional protections to women asylum-seekers in detention. Detention facilities should care for the women’s gender specific needs, and the use of female guards should be encouraged.⁹⁰ Abused women should be given special counseling and attention.⁹¹ Women who report sexual abuse should be given appropriate medical care, counseling, and legal aid.⁹² Pregnant or nursing women should not be detained.⁹³

III. Domestic Law Protections Relating to Immigration Detention

International law requires that detention be consistent with pre-existing domestic law. In the case of Karnes, family detention violates basic precepts of domestic law that parallel the protections in international law.

Both the United States Constitution and domestic federal law impose certain restrictions on immigration detention, although these restrictions are not always respected in practice, including at the Karnes facility. Immigration detention is distinct from criminal detention within the United States. It is civil detention, because it pertains to non-citizens who have entered or have remained in the country unlawfully, which is a civil infraction under immigration law. Detention is related to immigration proceedings, to ensure appearance for proceedings or deportation, rather than to any criminal penalty imposed after a conviction.

The United States Supreme Court has held that detained non-citizens, including asylum-seekers, are entitled to certain substantive and procedural rights under the Due Process Clause of

⁸⁷ UNHCR, *Detention Guideline*, Guideline 9.2.

⁸⁸ UNHCR, *Detention Guideline*, Guideline 9.2.

⁸⁹ IACHR, *Report on Immigration in the United States: Detention and Due Process*, at 18.

⁹⁰ UNHCR, *Detention Guideline*, Guideline 9.3.

⁹¹ UNHCR, *Detention Guideline*, Guideline 9.3.

⁹² UNHCR, *Detention Guideline*, Guideline 9.3.

⁹³ UNHCR, *Detention Guideline*, Guideline 9.3.

the United States Constitution. The Due Process Clause states, in relevant part, that no state shall “deprive any person of life, liberty, or property, without due process of law.”⁹⁴

Many Constitutional due process rights for detained immigrants mirror international human rights standards. First, detention of non-citizens cannot be arbitrary. Detention must be based on a legitimate governmental purpose, and the detention of a particular individual must have a reasonable relation to that purpose.⁹⁵ Typically, in the immigration detention context, the Supreme Court has noted that prevention of flight risk and danger to the community are legitimate governmental purposes. To the extent that the government has determined that flight risk or danger justifies the need for detention, that justification must be individualized.⁹⁶

Second, detention of non-citizens may not be indefinite or unduly prolonged.⁹⁷ Unduly prolonged detention results when the reason justifying detention no longer applies. At that point, the Due Process Clause prohibits further detention.⁹⁸ Third, civil immigration detention, including detention of asylum-seekers, cannot be punitive. Since immigration detention is regulatory and not based on violations of criminal law, it cannot be for the purpose of punishment.⁹⁹

Fourth, the initial decision to detain, as well as subsequent decisions to extend detention, must be accompanied by procedural safeguards to ensure that the detention rests on a legitimate governmental purpose and that the detention bears a reasonable relation to that purpose.¹⁰⁰ When the individual is no longer a risk for the reason she was detained, then review of detention should be available so that release can be secured.

IV. Domestic Law Establishes Special Protections for Children, including Those in Detention

A. Due Process for Children in State Custody

The U.S. Supreme Court has held that the United States Constitution affords children the same basic rights and guarantees that it provides adults.¹⁰¹ Non-citizens in this country, regardless of their status, are also guaranteed fundamental due process protections under the

⁹⁴ USCS Const. Amend. 14, USCS Const. Amend. 14, § 1.

⁹⁵ *Zadvydas*, 533 U.S. at 699 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 85(1992)); *Addington v. Texas*, 441 U.S. 418, 425(1979); *Kansas v. Hendricks*, 521 U.S. 346, 363(1997); *Demore v. Kim*, 538 U.S. 510, 527 (2003).

⁹⁶ *See Kim*, 538 U.S. at 515 (2003).

⁹⁷ *Zadvydas*, 533 U.S. at 689 (2001).

⁹⁸ *Zadvydas*, 533 U.S. at 691–692 (2001).

⁹⁹ *Zadvydas*, 533 U.S. at 690(2001).

¹⁰⁰ *See Kim*, 538 U.S. at 527 (2003).

¹⁰¹ *See Breed v. Jones*, 421 U.S. 529, 541 (1975) (stating juveniles are protected by the double jeopardy clause of the Fifth Amendment); *In re Winship*, 397 U.S. 358, 368 (1970) (requiring proof beyond a reasonable doubt in juvenile proceedings); *In re Gault*, 387 U.S. 1, 13 (1967) (Holding that the protections derived from the Fourth Amendment and Bill of Rights do not apply solely to adults and thus are extended to children).

Constitution's Due Process Clause.¹⁰² Therefore, non-citizen children detained and placed in removal proceedings benefit from the Constitution's fundamental due process guarantees.

Further affirming the strict limits on detention applicable to all children, the U.S. Supreme Court has held that pre-trial detention is restricted in the juvenile delinquency context. The state must have a compelling interest, detention must be necessary to prevent pre-trial crime by the child, the detention must not be punitive and must have short, strict time limits, and conditions of confinement must not be unduly severe.¹⁰³ Even then, the decision to detain must be individualized, and the state must provide procedural safeguards, such as notice of charges, assistance of counsel, and an adversarial hearing on the record.¹⁰⁴

Likewise, with respect to medical confinement of children, the Supreme Court has held that when parents or guardians voluntarily commit their children to psychiatric institutions, procedural due process protections apply.¹⁰⁵ Like adults, children have a substantial liberty interest in not being confined unnecessarily for medical treatment.¹⁰⁶ To protect that interest and prevent erroneous confinement, the Court requires procedural due process protections such as a full factual inquiry made by a neutral fact-finder.¹⁰⁷

Regardless of the purpose for the confinement, the detention of a child triggers the Due Process Clause.¹⁰⁸ Only a very important government interest particularized to the child, can justify deprivations of physical liberty, and strong procedural safeguards must exist to reduce the risk of error in decisions to detain.¹⁰⁹

B. Children Are Uniquely Vulnerable

Children have different needs and capacities than adults and care must be given to ensure those needs are met.¹¹⁰ Childhood is a particularly vulnerable time of life, and children erroneously institutionalized may bear scars for the rest of their lives.¹¹¹ For these reasons, the Supreme Court has pointed out that children may require more legal protection than adults and

¹⁰² See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (holding that "even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments").

¹⁰³ *Schall v. Martin*, 467 U.S. 253, 269–70 (1984).

¹⁰⁴ *Id.* at 275–77.

¹⁰⁵ *Parham v. JR*, 442 U.S. 584, 600 (1979).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 606.

¹⁰⁸ See *In re Winship*, 397 U.S. at 367 (holding that regardless of the purpose of the incarceration, that fact remains that the children are incarcerated and thus a deprivation of a child's liberty occurs.).

¹⁰⁹ *Martin*, 467 U.S. at 288 (Marshall, J., Dissenting).

¹¹⁰ *McKeiver v Pennsylvania*, 403 U.S. 528, 550 (1971).

¹¹¹ *Parham*, 442 U.S. at 628 (1979). (Brennan, J., Dissenting) (citing B. Flint, *The Child and the Institution 14-15* (1966); H. Leland & D. Smith, *Mental Retardation: Present and Future Perspectives* 86 (1974); N. Hobbs, *The Futures of Children 142-143* (1975)).

that Constitutional principles must be applied with sensitivity and flexibility to the special needs of children.¹¹² The Court has also recognized three reasons why courts must be sensitive and flexible in determining the constitutional rights of children, rather than automatically equating them with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.¹¹³ Care must be taken when making the decision to detain a child as the consequences of erroneous commitment decisions may be more severe where children are involved.¹¹⁴

Particular care should also be given when detention affects family relationships. The Supreme Court has recognized the unique role in our society of family, the institution by which “we inculcate and pass down many of our most cherished values, moral and cultural.”¹¹⁵ When state action impairs family unity and family decision-making, the state’s interests must be important, and state action cannot be arbitrary.¹¹⁶

C. The State’s Duty to Protect Children and *Parens Patriae*

The State has both the power and the responsibility to protect the interests of children within its jurisdiction under the legal concept *Parens Patriae*.¹¹⁷ Where the custody of the parent or legal guardian fails, the government must exercise custody or appoint someone else to do so.¹¹⁸ However, the state must respect the parents’ primary right and duty to care for their children, and courts must assume – in the absence of evidence of abuse or neglect – that parents act in the best interests of their children.¹¹⁹ Without evidence of abuse or neglect, the state should not negate parental decision-making to exert control over the child.

When a state acts to take custody of a child, the Constitution imposes upon the State affirmative duties of care and protection for the child.¹²⁰ The duty to protect arises from the limitation that is imposed on the child’s freedom to act on one’s own behalf.¹²¹ Federal statutes also elaborate on the governmental duty to protect the rights of children in the government’s care or custody.¹²²

¹¹² *Bellotti v. Baird*, 443 U.S. 622, 634-35 (1979) (stating that children generally are protected by the same guarantees against government deprivation as are adults and the State is entitled to adjust its legal system to account for the vulnerability of children).

¹¹³ *Bellotti*, 443 U.S. at 634-35.

¹¹⁴ *Reno v. Flores*, 507 U.S. 292 at 318 (O’Connor, J., Concurring).

¹¹⁵ *Moore v. City of East Cleveland*, 431 U. S. 494, 503-504 (1977).

¹¹⁶ *Moore*, 431 U.S. at 537-38.

¹¹⁷ *Santosky v Kramer*, 455 U.S. 745, 766 (1982).

¹¹⁸ *Flores*, 507 U.S. at 302.

¹¹⁹ *Parham*, 442 U.S. at 602.

¹²⁰ *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

¹²¹ *Id.*

¹²² *See e.g.*, 42 U.S.C. § 5101–07 (2014) (The Child Abuse and Protection Act provides that the government is allowed to step in for the mistreatment of children due to *parens patriae*, a legal term meaning that the government has a role in protecting the interests of children); 125 Stat. 369 (2011) (listing the requirements for states receiving

D. State of Texas Protections for Children in State Custody

In Texas, where the Karnes Detention Center is located, the Texas Family Code provides for the protection of children from abuse and neglect. The Code defines abuse as causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning.¹²³ The Code defines neglect as placing a child in a situation a reasonable person would realize requires judgment beyond the child's maturity, physical condition, or mental abilities, as well as failing to seek, obtain, or follow through with medical care resulting in a substantial risk of death, disfigurement, or bodily injury or observable and material impairment to the growth, development, or functioning of the child. The Code applies to persons responsible for a child's care, custody, or welfare.¹²⁴ This includes personnel at a public or private child-care facility that provides services for the child or at a residential institution or facility where the child resides.¹²⁵

E. The *Flores* Settlement Agreement Relating to Detained Children and Immigration Regulations on Detained Children

All children in DHS custody are entitled to certain procedural protections guaranteed to them by virtue of a federal court settlement agreement in a case entitled *Flores v. Reno*.¹²⁶ *Flores* involved a challenge on behalf of unaccompanied undocumented children to the Immigration and Naturalization Service's ("INS") policies governing children's release, and the conditions of confinement of children who were not released. In 1997, the government entered into a settlement agreement in the case, which requires the government to: (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the "least restrictive" setting appropriate to the age and special needs of minors; and (3) implement standards relating to improved care and treatment of children in U.S. immigration detention.

The Flores settlement requires facilities where the children are detained to be "licensed" by the state as a residential facility for children, which the Karnes facility is not. The settlement also requires facilities housing children to provide education, counseling, and other services.

welfare including that each State must plan for health care services and monitor and treat emotional trauma associated with a child's maltreatment and removal from home and requiring each State to address the developmental needs of such children who receive benefits or services.) Childrensrights.org, <http://www.childrensrights.org/issues-resources/know-your-rights/> (last visited Sep. 9, 2014).

¹²³Tex. Fam. Code § 261.001 (2013).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The *Flores v. Reno* settlement agreement is available at <http://immigrantchildren.org/Information/Flores%20Case.html>.

Finally, an immigration regulation regarding minors in DHS custody requires DHS to consider whether to release a detained child along with a detained parent, on a case-by-case basis.¹²⁷

CONCLUSION

The government's detention of women and children at the Karnes detention center violates international human rights standards, as well as parallel domestic law protections, in numerous ways:

1. The government's categorical determinations to continue detention of women and children at Karnes lack any individualized basis and therefore violate the human rights norm prohibiting arbitrary detention. ICE's decision to keep families in detention even if they pose no individual danger or flight risk, based on purported deterrence of "mass illegal migration" is not a legitimate basis for family detention. Moreover, there is no relation at all between the detention of families at Karnes and mass illegal migration patterns.
2. The government's decision to impose categorical family detention on asylum-seekers violates the international norms that detention of asylum-seekers and of children should be an exceptional measure, a last resort, and one that is imposed after consideration of alternatives. Here, the government uses family detention as a first resort, without consideration of non-detention alternatives such as community-based supervision and payment of bond.
3. The conditions at the Karnes detention center, as described herein, are punitive, disproportionate to the purpose, and are not the least restrictive, and therefore violate international norms. From inadequate food and medical services to harsh restrictions on children's movement to threats and discipline, the detention conditions resemble prisons far too closely.

Under these circumstances, family detention at Karnes violates the rights of the detained mothers and children, and the practice of family detention should end. Family detention is an excessive and disproportionate response to a purported influx of children crossing the border.

Finally, the harms to children from detention in a secure facility are significant. Children need, among other things, abundant food, education appropriate to their age, ability, and language skills, unrestricted play, flexible schedules, and activities supervised by their parents. At Karnes, children lack each of these important necessities, and their parents lose virtually all control over their care and upbringing.

¹²⁷ 8 CFR 236.3(b)(2).

Given the virtually nonexistent security benefits from detaining children and their mothers, and the serious harms resulting from such detention, the government should end the practice of family detention at Karnes, and desist from building more family detention centers.