

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RESOLUTION 41/2020**

Precautionary measure No. 265-20

Northwest Detention Center regarding the United States of America
July 27, 2020

I. INTRODUCTION

1. On April 2, 2020, the Inter-American Commission on Human Rights (“Inter-American Commission,” “Commission,” or “IACHR”) received a request for precautionary measures filed by Ms. Alejandra Gonza, from “Global Rights Advocacy,” Mr. Thomas Antkowiak, from the International Human Rights Clinic of the Seattle University School of Law, and Ms. Maru Mora Villalpando, from “La Resistencia,” urging the IACHR to request the United States of America (the “United States” or “the State”) to safeguard the rights to life, personal integrity and health of all the migrants being held at the Northwest Detention Center (“NWDC”), Washington. According to the applicants, the potential beneficiaries face a serious and imminent risk of irreparable harm given the possibility of them being exposed to the COVID-19 virus and the lack of appropriate measures to address the situation while being deprived of liberty.

2. On April 30 and June 23, 2020 the Commission requested information from both parties, pursuant to Article 25.5 of its Rules of Procedure. The applicants replied on May 6 and June 27, 2020. The State submitted a report on June 5.

3. Having analyzed the submissions of fact and law, the Commission considers that the information shows, *prima facie*, that the rights to life, personal integrity and health of the migrants being detained at the NWDC face a serious and urgent situation of irreparable harm. Consequently, it is hereby requested that the United States: a) adopt the measures necessary to protect the rights to life, personal integrity and health of the migrants who are detained at the NWDC. In particular, by ensuring that they have a proper, speedy and accessible access to the appropriate remedies without unnecessary burdens, to assess the continuity of their detention in light of the threat caused by the COVID-19, especially those who are in a high risk category, as described in the Center for Diseases and Control Prevention (“CDC”) guidelines. In addition, the State is called upon doubling its efforts in identifying *ex officio* all those who might fall under discretionary release based on medical circumstances while preventing from placing any new such persons at the NWDC; b) adopt the measures necessary to ensure that the potential beneficiaries’ detention conditions comply with the applicable international standards, particularly with regards to the threat posed by the COVID-19. In this sense, the State must improve its capacity in effectively preventing the spread of the virus within the NWDC, such as by properly cleaning and disinfecting the facility, as well as providing sufficient sanitary material and guarantee that safety protocols are followed by every person at the facility, among other measures that might be necessary in the present circumstances. Following the above, and in order to ensure social distancing, the State is called upon adopting any measure deemed adequate, such as by sufficiently reducing the number of people being held at the NWDC, prioritizing those who face a greater risk given their personal conditions as indicated above, and allocating available space to adequately enforce social distancing, in light of the recommendations issued by the relevant authorities; and c) adopt the measures necessary to ensure that the detention conditions are generally compatible with the applicable international standards,

particularly concerning sanitation, and that access to medical treatment is guaranteed to the extent prescribed by the respective specialists or physicians.

II. SUMMARY OF FACTS AND LEGAL ARGUMENTS SUBMITTED

1. Information submitted by the applicants

4. The NWDC is a large immigrant detention center in Tacoma, Washington, opened in 2004 and currently operated by the GEO Group, a private corporation under contract with the U.S. Immigration and Customs Enforcement (“ICE”). According to the applicants, the center has a capacity of 1,575 beds and is the dedicated facility for adult immigrants apprehended in Alaska, Oregon, Idaho and Washington, although it also accepts transfers from other ICE locations.

5. Although applicants focused their allegations on the current risk posed by the COVID-19, they also denounced the detention conditions that already existed prior to March 2020. Based on more than 40 confidential interviews with inmates, the issues reported, among others, ranged from prolonged detention, improper nutrition, abusive commissary prices, lack of proper hygiene, abuse of solitary confinement, both administrative and medical, to the lack of adequate mental and medical care and the hurdles to seek accountability for these problems. Furthermore, detainees “had to go on hunger strikes several times to demand better conditions and seek the protection of their health and welfare.”¹ Given the above, the Mayor and City Council of Tacoma wrote a letter to the U.S. Congress, which references “breaches of health, safety, civil rights and human dignity in the detention center.” Meanwhile, the spokesperson for the Tacoma Police Department indicated that from October 2018 to October 2019, most of the approximately 300 calls to 911 from the facility concerned medical help. It was also said that the police responded to 25 assaults, including sexual assaults and several suicide attempts. Moreover, Governor Jay Inslee called for an immediate and independent investigation following the suspicious death of an asylum seeker at the end of 2018 and to inspect the health and safety conditions at NWDC. The Washington State Attorney General and detainees in a class action also sued GEO Group regarding labor conditions and the State Legislature even considered passing a law to shut it down by 2023, “due to safety, health and human rights concerns, after a nationwide campaign requested the abolishment of civil detention as the best solution.” In their last report, applicants stated that the detention conditions persist to date, but that it was extremely hard for the potential beneficiaries to litigate and bring this matter to the attention of a court given many material challenges, despite that concerning labor conditions.

6. Migrants interviewed in January 2020 all shared their concern regarding inadequate and unhygienic facilities and practices, such as a lice outbreak that lasted for two weeks, reports of rashes that appeared after using communally washed clothing, overall poor ventilation, persons finding screws, worms or mold in their meals, diabetic people not receiving an appropriate diet or the difficulty to properly address a chicken pox and mumps outbreak. In relation to the extent of medical attention, applicants included some accounts as an example, such as an alleged excessive reliance on over-the-counter medication as the only treatment for various conditions, generalized fear to speak up and demand a better care, inadequate follow-up, confusing advice regarding their conditions and contradictory diagnosis, even for serious matter such as a detainee that suffered a heart attack in January 2020 and was reportedly given aspirins and vitamins after being released from the hospital. In February 10, 2020 another interviewed claimed that despite suffering from chest pain, severe swelling

¹ The request contains transcripts from some potential beneficiaries.

and Hepatitis C, he believed that officials at the facility will not help him until he is “close to dying, when it will be too late.” Months later, he is apparently still waiting for a liver test and got his shoulder dislocated by guards when he was pulled from his cell. Following his release from hospital, he was allegedly prescribed acetaminophen, a dangerous medication for patients with liver conditions.

7. As for the situation with regards to the COVID-19, applicants reminded that the state of Washington registers (at the time of the filing of the request) the highest death toll in the country and that the NWDC, even when not operating at capacity, constitutes a source of risk given the fact that it offers little ventilation and common spaces are crowded, also stressing the requests for help from Governor Inslee to the federal government to alleviate the overwhelmed state infrastructure. Applicants furthermore indicated that about 75 people began an indefinite hunger strike on late March 2020, following news of other inmates already showing symptoms of COVID-19. One of them was reportedly transferred to a hospital and placed in intensive care. Meanwhile, some accounts state that more detainees have been isolated from the rest and that guards were cleaning their cells; in addition, applicants denounced that testing is very limited, that new arrivals are not properly screened or placed in quarantine and that deportations still continue despite the risk of spreading the virus.

8. Regarding the preventive measures in place, applicants claimed that some pods are already at full capacity (between 50 to 100 people), making social distancing impossible, that only guards are equipped with masks (at least at that time) and that some units do not have hand sanitizer, while dozens of detainees may share limited restrooms and showers, hand soaps and are still crowded in dining and living areas. By the beginning of May 2020, at least 647 hundred immigrants in ICE custody around the nation tested positive, which is more than 50% of the 1,346 people tested. Moreover, applicants informed that approximately only 10 people were released from NWDC by discretion of ICE, a process that has been described as “slow, confidential, without the participation of immigrant lawyers, and lacks any transparency, due process of fairness.” The Tacoma City Council, even requested from ICE Seattle, on April 24, 2020 to “immediately release those who do not pose a public safety risk.” As far as the judiciary is concerned, applicants explained that courts to date have not ordered a release of large numbers of immigrants from the center, the matters being rather assessed on a case-by-case approach, taking into account the high-risk categories established by the CDC. So far, courts are generally reluctant to grant temporary restraining orders (“TRO”) given the fact that, at that time, no official account of positive cases were registered in Tacoma. However, to the applicants’ knowledge, only one person was successful in getting a TRO.

9. In that regard, applicants attached a copy of said decision from the U.S. District Court for the Western District of Washington (“U.S. District Court”), granting a TRO to a petitioner of 66 years old with hypertension and recurrent respiratory infections. The court noted that ICE already acted to decrease the number of detainees held at its detention facilities and performed reviews to consider whether continued detention was appropriate when regarding specific individuals at risk. As a result, the NWDC is reportedly at less than half of its capacity; however, the population within individual housing units was still not appreciably reduced. The court further pointed out that although preventive measures were already in place, they were insufficient to prevent the introduction of the virus by asymptomatic individuals and that GEO is not required to notify ICE if any of its staff members have been tested or diagnosed with COVID-19. Moreover, according to the court,

Immigration detention facilities, in particular, are at a heightened risk as they house a great number of vulnerable detainees, have close living quarters, and have limited capacity for medical care [...]. Social distancing in detention facilities is often impossible as toilets, sinks, and showers are shared, food

preparation and service is communal, and detainees share common areas [...]. Further, staff rotate through the population on a shift basis, providing opportunities for transmission into the facility, especially by asymptomatic carriers. Indeed, “[t]he only way to control the virus [in these settings] is to use preventive strategies, including social distancing.” Accordingly, much focus has been placed on reducing detained populations, and public health experts have recommended that authorities release detained individuals who are at high risk of serious illness or death from COVID-19 [...].

Perhaps the biggest challenge to controlling the spread of COVID-19 is presented by the communal conditions in the [NWDC]. In almost all aspects, life among detainees is a shared experience that does not allow for social distancing [...]. There is no evidence that Respondents have added tables or otherwise made accommodations in response to COVID-19 that would allow detainees to adequately space themselves while eating [...]. While using recreation area, attending immigration court, or seeking medical care and medicine, detainees are again in close contact [...]. Even when detainees retire for the night, they are housed tightly with other detainees, often in bunkbeds [...]. Put simply, the undisputed evidence establishes that maintaining social distance at the [NWDC] is impossible [...]. Respondents present no evidence that professional cleaning occurs within the housing units. Indeed, GEO generally passes on the responsibility for maintaining the cleanliness of its facilities to detainees, and GEO does not always assure that adequate cleaning is performed [...].²

10. On June 3, 2020 the U.S. District Court issued an order, converting the above TRO into a preliminary injunction.³ According to the ruling,

Respondents have done nothing to alter the Court’s conclusion [in the TRO]. Respondents attempt to argue that Petitioner is not high-risk because he does not suffer from additional health risks. But, even if this argument was not belied by the record, Petitioner is over the age of 65 [...]. Likewise, Respondents have [...] failed to mitigate the risk of the coronavirus entering and spreading within the [NWDC]. As noted previously, the risk is heightened as Respondents now house a COVID-19 positive detainee at the [NWDC]. While Respondents may have acted to reduce populations within housing units and reduce cross-contact between housing units, social distancing remains impossible, 11 guards are not required to wear masks, and cleaning is inconsistent. Further, Petitioner presents additional expert testimony – consistent with the testimony of his earlier experts – indicating that ICE’s guidance for responding to the pandemic, as applied at the [NWDC], is insufficient to prevent the infiltration of the coronavirus.⁴

11. In their latest report, applicants indicated that, according to some numbers shared by ICE to the courts in early June 2020, the authorities are holding either 561, 564 or 570 at the NWDC, while gathering some details from testimonies concerning their allocation within certain units.⁵ They further claimed that although the center is operating at half its capacity,⁶ as of itself that does not cast away the existence of a situation of risk. Indeed, they indicated, for instance, that ICE and GEO employees are “constantly” coming in and out and moving around the center without wearing masks and that hygiene

² U.S. District Court for the Western District of Washington, *Rafael Pimentel-Estrada v. William P. Barr, et. al.*, Case NO. C20-495 RSM-BAT, order granting motion for temporary restraining order, April 28, 2020.

³ According to U.S. law, while a TRO has a limited short-term duration and is more expedite, it may be converted into a preliminary injunction to maintain the status quo until the court can adjudicate the claims on the merits: “The standard for issuing a TRO is the same as the standard for issuing a preliminary Injunction [...]. “The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.’” See above, at 22.

⁴ U.S. District Court for the Western District of Washington, *Rafael Pimentel-Estrada v. William P. Barr, et. al.*, CASE NO. C20-495 RSM-BAT, order converting temporary restraining order into preliminary injunction, June 3, 2020.

⁵ C2-21, F3-42, F1-32, C3-35, G1-12, G2-23, D3-5.

⁶ According to the applicants, “[t]he reduction is certainly not the result of a massive release of people at risk, after a case by case review, that the U.S. Government reports to the Commission. Current numbers respond to the border closure, the implementation of the remain in Mexico policies, the reduction of daily arrests, and a reckless deportation of people to other countries and detention centers in the nation.”

measures are still not sufficient to address the issue. Despite the above, the State did not disclose to the Commission the number of cases being revised at the NWDC, in addition to the fact that, according to the applicants, only 6 people were released under ICE's discretionary policy to decongest the population on humanitarian grounds. They even claimed that that revision is not carried out *ex officio*, but rather once potential beneficiaries with underlying medical conditions file a motion before ICE, which places a heavy burden on them given the paperwork needed and the lack of proper legal representation, especially when they need to sue ICE and litigate.

12. As an example, applicants shared the situation of a woman who was 65 years old, with a heart condition and several illnesses, whose TRO was denied. She was assisted by a pro-bono lawyer to file for parole or discretionary release and, despite submitting medical documentation and other pieces of evidence, her request was apparently denied without a clear motivation. She now uses a (broken) walker after having fallen and broken her knee, in need of surgery and living in fear of contracting COVID-19, to the extent that she avoids medical assistance to prevent being moved to another pod.

13. In relation to the preventive measures put in place by the authorities, applicants stressed some of the findings made by the court in the successful TRO, noting that ICE failed to release a significant number of people who did not have criminal convictions or charges against them. Applicants did refer to other 4 TRO that were denied with regards to individuals with underlying medical conditions, noting that those succeeding *Pimentel* did not dispute the persistence of the detention conditions, albeit clarifying that the denials were based on other considerations, such as the extent of the underlying medical conditions or the fact that, after more testing was carried out at NWDC, only 1 positive case was detected. Yet, applicants, referred to ICE's website, according to which, to date, there are 5 confirmed cases, with 2 of them currently under monitoring.⁷ They also questioned the fact that the testing was actually comprehensive, that being a main factor relied upon by the courts to deny said TRO, since dozens of potential beneficiaries refused to be tested out of fear or that guards were not tested as well, among other issues. In that regard, they added the fact that some TRO were not granted given the lack of confirmed cases at that time, or that there was only 1 confirmed.

14. Furthermore, applicants mentioned that potential beneficiaries were given a mask only on a weekly basis, despite them wearing out, and that ICE and GEO guards are not following safety protocols, such as moving around without masks even in locked down and quarantined pods (images were provided). As to the cleaning and disinfection, they reported that cells and bathrooms were not regularly cleaned, stressing that that task is being carried out by the potential beneficiaries themselves (without proper equipment or gear), who in turn refuse to do it for fear of contracting the virus. Guards do disinfect, but the chemicals they used allegedly cause eye and skin irritation, rashes, coughing and nose bleeding to some detainees.

15. Finally, applicants indicated that on June 18, 2020 a bill named Dismantle Mass Incarceration For Public Health Act of 2020⁸ was introduced in Congress and would include the release of immigrants in detention centers, which constitutes according to them "[...] one of the boldest efforts yet to tackle mass incarceration amid the pandemic [...]."

⁷ See: ICE Detainee Statistics at <https://www.ice.gov/coronavirus>

⁸ See: <https://www.congress.gov/bill/116th-congress/house-bill/7281?s=1&r=6>

2. Reply submitted by the State

16. The State initially replied by claiming that the U.S. District Court was seized with this same matter and concluded that petitioners failed to demonstrate the likelihood of irreparable harm in relation to the risks of their ongoing detention at NWDC during the COVID-19 pandemic. The State considers that the court's findings are relevant in the present case for the following reasons. First, it shows that potential beneficiaries are actively seeking judicial remedies in the United States "[...] which, if successful, could confer the benefits they ask the Commission to confer," thus claiming that the IACHR should not intervene in these circumstances. Second, it noted that the irreparable harm standard used by domestic courts parallels that set forth in Article 25 of the Rules of Procedure and hence the determination done by the U.S. independent judiciary "[...] should be granted deference where the Commission is being asked to apply the same test but reach the opposite conclusion."⁹ Third, the relevant authorities have already adopted the necessary measures to safeguard the potential beneficiaries' rights, as detailed above.

17. ICE is reportedly taking important steps in that direction and to detect and mitigate the spread of the virus, while regularly updating its protocols according to the CDC's guidance and referring staff and contractors to them. On April 10, 2020 it issued the Pandemic Response Requirements ("PRR"), which established mandatory requirements to be adopted by all the facilities, as well as best practices.¹⁰ According to the State, the PRR "[...] was developed in consultation with the CDC and sets forth expectations and assists ICE detention facility operators with sustaining detention operations, while mitigating risk to the safety and well-being of detainees, staff, contractors, visitors and stakeholders due to COVID-19."

18. To that end, ICE continues to evaluate the potential beneficiaries and makes custody determinations on a case-by-case basis, pursuant to the applicable legal standards, weighing both mitigating and aggravating factors, with due consideration of public health issues. More specifically, it explained that a higher risk for serious illness from COVID-19, based upon the CDC factors, is a relevant factor in determining whether a person may be released; however, that applies only to those who are subject to discretionary detention; indeed, the Immigration and Nationality Act precludes release of aliens placed in mandatory detention in some circumstances, even during a pandemic. As of April 25, 2020 ICE overall released more than 900 aliens, after considering their medical issues, immigration histories, criminal records, potential threat posed to the public, flight risk and national security concerns.

19. With regards to the detention conditions at NWDC, the State stressed that all facilities are bound by strict detention standards to ensure that detainees remain safe, secure and in a humane environment, thus allowing for consistency of operations, management expectations and accountability for compliance with CDC and medical requirements, together with a culture of professionalism. In the case of the NWDC, those standards are set forth in the ICE's Performance Based National Detention Standards 2011¹¹ and the service provider is required to obtain and maintain the American Correction Association accreditation, which provides for an independent review and determination of compliance with standards recognized by the courts and state and local governments. Moreover, the State noted that ICE's standards were developed in consultation with civil rights groups and incorporates many of the

⁹ The State attached to its report a copy of two decisions denying TRO, from March 19 and April 18, 2020.

¹⁰ See: <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>

¹¹ See: <https://www.ice.gov/detention-standards/2011>

recommendations made by the United Nations High Commission for Refugees, among other international organizations.

20. According to the State, ICE is committed to providing comprehensive medical care for everyone in its custody, which includes an initial health screening, 24/7 access to emergency care and treatment by specialists, when appropriate, even during the pandemic. In the event of a confirmed COVID-19 case with mild symptoms and no need for higher level of care, the detainee will be managed in a medical housing by on-site health care professionals. However, those that present a greater risk are transferred to a hospital with advanced coordination.

III. ANALYSIS OF THE ELEMENTS OF SERIOUSNESS, URGENCY AND IRREPARABLE HARM

21. The precautionary measures mechanism is part of the Commission's function of overseeing member states' compliance with the human rights obligations set forth in Article 106 of the Charter of the Organization of American States. These general oversight functions are set forth in Article 41(b) of the American Convention on Human Rights and in Article 18(b) of the IACHR Statute; the precautionary measures mechanism is described in Article 25 of the Commission's Rules of Procedure. According to that Article, the Commission issues precautionary measures in situations that are serious and urgent, and where such measures are necessary to prevent irreparable harm to persons.

22. The Inter-American Commission and the Inter-American Court of Human Rights (hereinafter the "Inter-American Court" or "I/A Court H.R.") have consistently held that precautionary and provisional measures have a dual nature: precautionary and protective. Regarding their protective nature, the measures seek to avoid irreparable harm and preserve the exercise of human rights. Regarding their precautionary nature, the measures have the purpose of preserving a legal situation being considered by the IACHR. Their precautionary nature aims at preserving those rights at risk until the petition in the Inter-American system is resolved. Its object and purpose are to ensure the integrity and effectiveness of the decision on the merits and thus avoid infringement of the rights at issue, a situation that may adversely affect the useful purpose (*effet utile*) of the final decision. In this regard, precautionary measures enable the State concerned to fulfill the final decision and, if necessary, to comply with the ordered reparations. As such, for the purposes of making a decision, and in accordance with Article 25(2) of its Rules of Procedure, the Commission considers that:

- a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;
- b. "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
- c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

23. In analyzing those requirements, the Commission reiterates that the facts supporting a request for precautionary measures need not be proven beyond doubt. Rather, the assessment of the information provided as to whether the requirements of seriousness and urgency are met must be determined under a *prima facie* standard of review.¹² Moreover, it is neither called upon to find any

¹² In that regard, for instance, in relation to the provisional measures, the Inter-American Court has considered that this standard requires a minimum of details and information that allow for the *prima facie* assessment of the situation of risk and urgency. I/A Court H.R., *Matter of the*

criminal or personal liability in the present matter nor to establish any international responsibility of the State. The above analysis thus exclusively refers to the existence of a situation of seriousness and urgency of irreparable harm, an examination that can be accomplished without addressing the merits of a potential petition or case.

24. In relation to the requirement of seriousness, the Commission notes that, notwithstanding the fact that the potential beneficiaries are placed in immigration detention and the existence of international standards in that regard (*vid. infra* para. 32), they are nevertheless still deprived of liberty.¹³ Hence, it is worth recalling that the State is in a special position of guarantor, inasmuch as the penitentiary authorities have full control and command over the persons who are subject to their custody.¹⁴ This is due to the relation and unique interaction of subordination between the person deprived of liberty and the State, characterized by the particular intensity with which the latter can regulate their rights and obligations. Indeed, the very circumstances of imprisonment prevent persons deprived of liberty from satisfying on their own a series of basic necessities that are essential for the development of a dignified life.¹⁵

25. Given the emergence of a pandemic caused by the spread of COVID-19, the Commission further issued Resolution 1/2020 “Pandemic and Human Rights in the Americas today,”¹⁶ where it specifically recommended a series of measures to be taken with regards to persons deprived of liberty. To the extent applicable to the present situation, attention may be drawn, *mutatis mutandis*, to the need of reducing the overall population in detention facilities, exploring alternatives to the deprivation of liberty while prioritizing those who present a greater risk given their personal conditions, and ensuring proper food, health, sanitation and medical care, among others.¹⁷ Moreover, when tackling serious situations that posed an imminent threat to persons deprived of liberty, as a result of their detention conditions, the Commission specifically requested States to reduce overcrowding, considering the closely related risks that were thereafter caused by it, including the spread of infectious diseases,¹⁸ although it must be stressed here that the NWDC certainly does not show a situation of overcrowding (*vid. supra* para. 11).

children and adolescents deprived of their liberty in the “Complexo do Tatuapé” of the Fundação CASA. Request for extension of precautionary measures. Provisional Measures regarding Brazil. Resolution of the Inter-American Court of Human Rights of July 4, 2006. Considerandum 23. Available at: http://www.corteidh.or.cr/docs/medidas/febem_se_03.pdf

¹³ The Commission has defined it as “[a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, Stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.” IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 46/15 31 December 2015, para 385. Available at: <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf>

¹⁴ I/A Court. *Caso Mendoza et al Vs. Argentina*. Preliminary objections, merits and reparations). Judgement from May 14, 2013. Series C No. 260, para. 188. Also see: IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, December 31, 2011, para. 49.

¹⁵ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, para. 49 y ss.

¹⁶ IACHR, *Pandemic and Human Rights in the Americas today*, Resolution 1/2020, April 10, 2020. Available at: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>

¹⁷ IACHR, *Pandemic and Human Rights in the Americas today*, para. 45-48.

¹⁸ See, for instance: IACHR, *Civil Penitentiary of Port-au-Prince regarding Haiti* (PM-125-17), Resolution 13/2017 from May 26. Available in Spanish at: <http://www.oas.org/es/cidh/decisiones/pdf/2017/13-17MC125-17-HA.pdf>; IACHR, *Police Coordination Center José Francisco Bermúdez regarding Venezuela* (PM-260-16), Resolution 26/2016 from April 26. Available in Spanish at: <http://www.oas.org/es/cidh/decisiones/pdf/2016/MC260-16-Es.pdf>

26. In the present matter, the Commission finds that the requirement of seriousness is met. To make this determination, the analysis first focuses on the amount of threat currently posed by the COVID-19 and whether the actions adopted by the relevant authorities are sufficient to mitigate the risk in question. To that end, as it has been pointed out by the applicants themselves in the request, the United Nations Special Rapporteur on Migrants, together with other Special Procedures, sent out an urgent appeal on April 27, 2020 with regards to the NWDC, requesting the State to release migrants “held for processing” from COVID-19 high-risk detention centers, explore alternative measures and guarantee access to health care, among others.¹⁹ The Commission understands that the above is relevant to the extent that it constitutes one of many indicia suggesting that the NWDC is indeed facing a serious situation of risk. Second, authorities both at the local and state level have already recognized the worrisome conditions in which the potential beneficiaries were being held since at least 2018, which even caused the legislature to consider a bill to have it shut down (*vid. supra* para. 5). Although the Commission assesses the fulfillment of the requirements set forth in Article 25 of the Rules of Procedure with autonomy, due consideration is given to the statements made by relevant authorities as yet another piece of indicia and, absent any information to the contrary – particularly, taking into account the fact that the State did not reply to the Commission’s last request for information, which also addressed that specific matter –, it deems that said conditions continue to exist to date. Another concerning information regards the fact that dozens of potential beneficiaries reportedly began an indefinite hunger strike, which in itself reflects the point at which the situation has evolved, particularly because of the State’s apparent unsatisfactory response to the handling of the COVID-19 in the facility.

27. In this regard, the Commission has indeed paid attention to the information contained in the different TRO, preliminary injunction and other orders issued by the U.S. District Court and its considerations (*vid. supra* para. 9 and 10), given the fact that it allowed to gain access to a close assessment of the situation at NWDC, among other documents or testimonies. In relation to this, it appears that despite ICE having implemented a number of measures to prevent the spread of COVID-19 and provide medical care, the potential beneficiaries still face an actual threat to their rights to life, personal integrity and health, since the actions taken in some instances were deemed to be insufficient, in the manner described by the court. It is also worth pointing out that the successful preliminary injunction has a limited scope in the sense that, according to the applicants, to date no judicial order to release large numbers of immigrants exists, having the detainees to allegedly request immediate protection on an individual basis, further noting that most of the TRO were actually denied.

28. The Commission salutes the recent introduction of a bill seeking to significantly diminish population in detention centers, which would include those for immigration purposes, noting that it is consistent with the recommendations stated in Resolution 1/2020 above quoted. In that regard, while clarifying that it is improper to analyze within the precautionary measures mechanism the compatibility of domestic immigration laws with international standards or otherwise dictate policy, the Commission deems useful to consider these aspects in order to determine the extent to which sufficient or adequate remedies exist so as to mitigate the situation of risk, in light of the requirement of seriousness. Similarly, in analyzing the potential beneficiaries’ detention conditions, it is important to take into account the many challenges currently and usually faced by them in trying to successfully litigate before domestic courts as well as those encountered by applicants in gathering and accessing all the necessary information.

¹⁹ United Nations, Office of the High Commissioner for Human Rights, “US: Migrants ‘held for processing’ should be released from COVID-19 high-risk detention centres.” Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25827&LangID=E>

29. The Commission does not possess any additional information concerning the measures U.S. courts adopted to address this situation but understands that the discretionary release procedure carried out by ICE presents a series of obstacles and that, according to the information provided by the applicants, the number of confirmed cases of COVID-19 did increase after the preliminary injunction was rendered on June 3, 2020 precisely on the grounds that the relevant authorities “[...] have done nothing to alter the Court’s conclusion [...]” and have “[...] failed to mitigate the risk of the coronavirus entering and spreading within the [NWDC].” (*vid. supra* para. 10). This is particularly important, given the fact that, according to the available information, prevention is the key measure when tackling the COVID-19. In other words, while the State indicated that those detainees with more severe symptoms are given the proper medical care, because of the nature of this disease that may indeed be mandated but not sufficient as of itself under the current applicable standard set forth in Article 25 of the Rules of Procedure. To the extent that subsequent medical treatment may address additional complications as depending on previous conditions, to fully and adequately mitigate the factor of risk in this situation, the Commission understands that for the present purposes stress must be put on proper prevention measures.

30. The Commission reminds that it is not here in a position of reviewing the factual determinations made by local courts or verifying the implementation of their orders and judgments. As indicated earlier, particular attention is paid to the information therein contained to the extent that it purportedly is a reliable piece of indicia for *prima facie* purposes, while recognizing that some outcomes or findings may be a result of the application of specific legal domestic standards. Here, the Commission understands that courts earlier found that there neither were no confirmed cases of COVID-19 nor sufficient conditions to support that the measures implemented by the relevant authorities were insufficient to safeguard the petitioners’ rights. Yet, acknowledging applicants’ allegations, it appears that not only additional positive cases were registered at NWDC but that the measures implemented to date are still insufficient for the current purposes. In addition, individual cases reported in this request (*vid. supra* para. 12) seem to show that potential beneficiaries may not necessarily receive all the appropriate medical care or consideration, especially in the context of this pandemic.

31. In relation to the above, the Commission considers that it is important to stress the subsidiary nature of the Inter-American System. In particular, it has stated that, in light of the principle of complementarity, international jurisdiction indeed “reinforces” or “complements” national jurisdictions, although without replacing them.²⁰ For a claim based on said principle to be successful, the actions adopted by the State must have been sufficient so as to find that the potential beneficiaries of a precautionary measure do not face a serious and urgent risk of irreparable harm anymore, due to its substantial reduction as a consequence of the local authorities’ intervention. Therefore, although the Commission understands that detainees held at the NWDC may have access to similar judicial recourse, at this very moment it is unclear whether all those who might be more vulnerable to the virus are adequately protected or that the State has sufficiently implemented preventive measures. Moreover, it is

²⁰ In that regard, the Preamble of the American Convention established that the human rights “justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.” The Inter-American Court had indicated, in regard to this principle and its application in provisional measures that it “is equally applicable in the adoption of provisional measures and its continuance, as, by being in the preamble of the American Convention, it shall guide the actions of the States when a situation of extreme seriousness, urgency and danger of irreparable damage is claimed for the persons who are the users of the Inter-American System of Protection of Human Rights. Therefore, it is not only in contentious cases, but also in the matter of the provisional measures mechanism, the system of protection established by the American Convention does not replace national jurisdictions, but it compliments them.” IHR Court. Case of the Rochela Massacre v. Colombia. Provisional Measures. Resolution of the Inter-American Court of Human Rights of February 16, 2017, para. 42.

worth pointing out that the same situation may continue to arise insofar new migrants continue to be detained at the NWDC in these conditions. It is also worth reminding that when granting precautionary measures with regards to the “Zero-Tolerance” Policy, the Commission heavily relied upon the application of the principle of complementarity, in the sense of analyzing whether the intervention of domestic federal courts was sufficient to properly mitigate the situation of risk in question.²¹

32. In relation to the scope and subject matter of the present resolution, the Commission stresses that, as it was already stated in the matter of *Rael Ferrer-Mazorra et al. v. United States*,²² the principle of exceptionality in immigration detention calls for the establishment of a presumption of liberty, rather than of detention,²³ the contrary being incompatible with the object and purpose of Articles I and XXV of the American Declaration of the Rights and Duties of Man (“American Declaration”).²⁴ Furthermore, in its Report on Immigration in the United States,²⁵ the Commission emphasized that detention “is only permissible when a case-specific evaluation concludes that the measure is essential in order to serve a legitimate interest of the States and to ensure that the subject reports for the proceeding to determine his or her immigration status and possible removal. The argument that the person in question poses a threat to public safety is only acceptable in exceptional circumstances in which there are certain indicia of the risk that the person represents.”²⁶

33. Notwithstanding the above, and acknowledging applicants’ specific requests,²⁷ the Commission also reminds that the precautionary measures mechanism may not prejudice on the merits of any potential petition or case, and that the granting of said measures is not justified in circumstances in which the right in question is not deemed to be irreparable. In this sense, although applicants argued that the detention of immigrants at the NWDC violates international standards, that determination is improper here, as well as requesting that all of them be immediately released, a decision more suited to be taken by the relevant domestic authorities, which cannot be substituted by the Commission. In addition, while recognizing the risk caused by the COVID-19 virus, the information currently available suggests that not all potential beneficiaries may face it to the same extent, meaning that the seriousness depends upon the likelihood of suffering a harm that is irreparable in nature. To the Commission’s knowledge, that class in question is to be determined by the relevant medical authorities and guidelines, particularly the CDC in the present matter, as it has already been adopted by national courts and other authorities. Notwithstanding the aforementioned, the Commission finds that the overall population at NWDC also face a situation of risk as a result of the detention conditions that already existed before the spread of the COVID-19 and allegedly continue to exist to date, as reasoned *supra*.

²¹ See: IACHR, *Migrant Children affected by the “Zero Tolerance” Policy regarding the United States of America* (MC-731-18), Resolution 64/2018 from August 16, para 19 and following. Available at: <http://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf>; also, IACHR, *Vilma Aracely López Juc de Coc and others regarding the United States of America* (MC-505-18), Resolution 63/2018 from August 16, para. 20 and following. Available at: <http://www.oas.org/en/iachr/decisions/pdf/2018/63-18MC505-18-US-en.pdf>

²² IACHR, Report on Admissibility and Merits No. 51/01, Case 9,903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001.

²³ IACHR, *Human Rights of Migrants...*, para. 391.

²⁴ IACHR, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States), para. 219.

²⁵ IACHR, *Report on Immigration in the United States: detention and due process*, OEA/Ser.L/V/II. Doc. 78/10, 30 December 2010. Original: English. Available at: <http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf>

²⁶ IACHR, *Report on Immigration in the United States: detention and due process*, para. 39

²⁷ “This warrant, at a minimum, the following urgent actions: a) the release of all immigrants at the NWDC, as soon as reasonably possible; b) the immediate release of those detained immigrants who are particularly vulnerable to COVID-19, because of their age or physical condition, and those experiencing an urgent medical problem; c) the halt of immigration detention and deportation during the health crisis, and the concession of humanitarian visas d) to allow family reunification; g) the provision of access to medical care for immigrants with COVID-19; and h) the investigation of ICE and GEO management of the COVID-19 pandemic at the NWDC.”

34. Therefore, the Commission holds that the available information *prima facie* shows that the potential beneficiaries face a serious and urgent risk of irreparable harm to their rights to life, personal integrity and health.

35. As it refers to the requirement of urgency, the Commission concludes that it is equally fulfilled, given the reasonable likelihood of the COVID-19 further spreading within the facility, according to the allegations and evidence submitted in the request, coupled with an apparent lack of sufficient and appropriate measures to effectively safeguard the potential beneficiaries' rights. In this sense, it must be stressed that persons belonging to more vulnerable categories face an even more imminent threat.

36. Regarding the requirement of irreparable harm, the Commission deems it met, to the extent that the possible violation of the right to life and personal integrity constitutes the maximum situation of irreparability.

IV. BENEFICIARIES

37. The Commission declares that the beneficiaries of this precautionary measure all those migrants who are detained at the NWDC, a sufficiently determinable class as per Article 25.3 of the Rules of Procedure.

V. DECISION

38. In light of the foregoing considerations, the IACHR considers that this matter meets *prima facie* the requirements of seriousness, urgency and irreparability set forth in Article 25 of its Rules of Procedure. Consequently, it is hereby requested that the United States:

- a) adopt the measures necessary to protect the rights to life, personal integrity and health of the migrants who are detained at the NWDC. In particular, by ensuring that they have a proper, speedy and accessible access to the appropriate remedies without unnecessary burdens, to assess the continuity of their detention in light of the threat caused by the COVID-19, especially those who are in a high risk category, as described in the CDC guidelines. In addition, the State is called upon doubling its efforts in identifying *ex officio* all those who might fall under discretionary release based on medical circumstances while preventing from placing any new such persons at the NWDC;
- b) adopt the measures necessary to ensure that the potential beneficiaries' detention conditions comply with the applicable international standards, particularly with regards to the threat posed by the COVID-19. In this sense, the State must improve its capacity in effectively preventing the spread of the virus within the NWDC, such as by properly cleaning and disinfecting the facility, as well as providing sufficient sanitary material and guarantee that safety protocols are followed by every person at the facility, among other measures that might be necessary in the present circumstances. Following the above, and in order to ensure social distancing, the State is called upon adopting any measure deemed adequate, such as by sufficiently reducing the number of people being held at the NWDC, prioritizing those who face a greater risk given their personal conditions as indicated above, and allocating available space to adequately enforce social distancing, in light of the recommendations issued by the relevant authorities; and

- c) adopt the measures necessary to ensure that the detention conditions are generally compatible with the applicable international standards, particularly concerning sanitation, and that access to medical treatment is guaranteed to the extent prescribed by the respective specialists or physicians.

39. The Commission highlights that, in conformity with Article 25(8) of its Rules of Procedure, the granting of precautionary measures and their adoption by the State do not constitute a prejudgment on the possible violation of rights safeguarded in the American Declaration and other applicable instruments.

40. The Commission instructs its Executive Secretariat to notify the present resolution to the United States and the applicants.

41. Approved on July 27, 2020 by: Joel Hernández García, President; Antonia Urrejola Noguera, First Vice-President; Flávia Piovesan, Second Vice-President; Esmeralda Arosemena de Troitiño; Stuardo Ralón and Julissa Mantilla, Commissioners.

Paulo Abrão
Executive Secretary