

Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection



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CHAPTER 1
INTRODUCTION

INTRODUCTION AND METHODOLOGY

A. *Introduction and Situation of Forced Migration in the Americas*

1. In recent years, the Inter-American Commission on Human Rights (IACHR, or the Commission) has been observing with growing concern the progressive and sometimes abrupt increase in the number of persons in the context of human mobility with special protection needs, such as asylum seekers, refugees, and stateless persons, who are often displaced by a variety of factors, such as persecution, generalized violence, internal conflicts, or massive violation of human rights in many countries of the Americas¹. There are currently unprecedented levels of forced migration worldwide, which is proportionally reflected in the increasing numbers of pending applications for all forms of international protection in the Americas and, as noted by the United Nations High Commissioner for Refugees (UNHCR), with the risk of collapse of national asylum systems.

2. In this context, the IACHR has established that the right of asylum and the prohibition of refoulement necessarily presuppose the existence of a process with a procedural framework that offers the minimum guarantees necessary to allow for the individualized, serious, and timely study of each asylum application. As noted in its Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking (hereinafter, “Inter-American Principles”), States should ensure due process in all proceedings leading to a restriction or recognition of rights, such as procedures for determining refugee or stateless person status or other international protection needs. The process should be geared towards identifying the international protection needs of individuals and recognizing refugee status where appropriate.² Such procedures are fundamental since they involve an assessment and decision on the possible risk of adversely affecting the most basic rights, such as the rights to life, humane treatment, and

¹ The IACHR has developed in successive documents the definitions of key concepts for the protection of people in situations of human mobility, such as in its report *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Trafficking in Persons and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, and in its Resolution 04/19, *Inter-American Principles on the human rights of all migrants, refugees, stateless persons, and victims of human trafficking*,

² IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OAS/Ser.L/V/II.106, February 28, 2000, par. 62.

personal liberty,³ their aim being to ensure effective implementation of the right of asylum and non-refoulement.

3. According to the UNHCR⁴, by the end of 2019 there were more than 79 million forcibly displaced persons in need of protection worldwide, the highest number recorded since World War II. Of that number, 26 million refugees in the world and 701,600 refugees and in a situation considered by UNHCR as similar to that of refugees in the Americas. According to UNHCR, the Americas became the largest recipient of asylum claims worldwide in 2019.
4. Among the main challenges in the Americas today are the situations that are generating forced displacement in Venezuela, Nicaragua, the Northern Triangle of Central America, and Mexico. According to data published by UNHCR in its Global Trends Report on forced displacement, the region presents a growth curve for new asylum applications. Between 2016 and 2019, nationals from Central America and Venezuela submitted 1.6 million asylum applications across the continent. This number would be 727.26% higher than the total number of requests registered between 2010 and 2015, about 220,000. Likewise, the report highlights that, in 2019 alone, almost a million asylum applications were registered, considering in particular the 5 main host countries, the United States of America, Peru, Costa Rica, Mexico, Canada and Brazil. The Americas became the largest recipient of asylum claims worldwide in 2019.⁵
5. The severe humanitarian crisis in Venezuela has displaced an alarmingly high number of people in recent years. Estimated at more than 5,093,987 as of April 2020, they were forced to move to other countries in search of international protection. In that period, more than 2 million Venezuelans have been taken in by the six main host countries alone: Colombia (799,373), Peru (628,976), Chile (472,827), Argentina (192,460), Brazil (123,507), and Ecuador (107,052)⁶.
6. Alongside these crises, the Commission also notes the intense movement of people forced to leave Nicaragua because of political violence and persecution, stemming from State repression of the protests that intensified from April 2018. Since the crisis began, 328 people have been killed and approximately 700 people have reportedly been arrested and prosecuted⁷. As of the end of 2019, according to information from civil society organizations compiled by the Special Monitoring Mechanism for Nicaragua (MESENI), around 130 people

³ IACHR, Report on Merits No. 136/1, Case 12.474, *Pacheco Tineo Family* – Bolivia, October 31, 2011, par. 136. In this sense, see also, I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 25, 2013, Series C. No. 272, par. 157.

⁴ UNHCR, *Global Trends - Forced Displacement in 2019*, Jun 2020, pp. 19 and 39.

⁵ UNHCR, *Global Trends - Forced Displacement in 2019*, Jun 2020, p. 39.

⁶ UNHCR, *Response for Venezuelans*, Data from December 5, 2019.

⁷ CIDH, *Migración Forzada de Personas Nicaragüenses a Costa Rica*, set 2019, p. 11.

continued to be deprived of their liberty over acts related to the protests. One year after the start of the crisis, the IACHR noted that more than 70,000 Nicaraguans had been forced to displace, 55,000 of them to Costa Rica.⁸

7. The IACHR also observes and tracks through its monitoring mechanisms the situation of forced displacement due to natural disasters in countries such as Haiti. Likewise, the IACHR has been monitoring the serious situation of structural racial discrimination against Haitian and Dominican migrants, persons of Haitian descent, or those perceived as such in the Dominican Republic. That situation was aggravated by Constitutional Court judgement TC/0168/13 of September 23, 2013, which redefined—with retroactive effects—the criteria for acquiring citizenship by application of the principle of *jus soli*, by giving a new interpretation to the concept of foreign nationals in transit, equating this concept with that of a foreign national in an irregular migratory situation. As a result, that ruling ordered the administrative transfer of the birth certificates of people born in the Dominican Republic as children of "foreigners in transit" from 1929-2007, to the birth registration book for foreigners, arbitrarily depriving of their nationality a significant number of people.⁹
8. The response of States in addressing the complex situations of displacement of persons in the region must be guided by the highest norms and standards in the area of human rights and international refugee law. Furthermore, such practices and procedures can also be improved through the continuous sharing of best practices in the region in relation to the right to seek and receive asylum, complementary protection, and statelessness. In this way, the Commission aims to contribute to the progressive development of standards and public policies based on a comprehensive approach to human rights through this practical compilation of guarantees for the proper conduct of such procedures, and in accordance with inter-American standards.
9. In that regard, the Commission starts from a basic definition of due process and its applicability to procedures related to migrants and, more particularly, to persons in need of special protection. The Commission recalls that the Inter-American Court of Human Rights (Inter-American Court or Court) has indicated that the right to a fair trial, enshrined in Article 8 of the American Convention, refers to the set of requirements that must be met in procedural instances, so that a person may defend himself adequately in the face of any kind of act of the State, adopted by any public authority, whether administrative, legislative, or judicial, that affect their rights.¹⁰ As a result, the minimum guarantees of due process of law apply in the determination of rights and obligations of a "civil, labor, fiscal or any other nature" and "due process of

⁸ IACHR, [Forced Migration of Nicaraguans to Costa Rica](#), September 2019, p. 11.

⁹ IACHR, [Situation of Human Rights in the Dominican Republic](#), OEA/Ser.L/V/II. Doc. 45/15, December 31, 2015, par. 3.

¹⁰ I/A Court H.R., [Constitutional Court Case v. Peru, Merits, Reparations and Costs](#), Judgment of January 31, 2001. Series C. No. 71, par. 69, and [Case of Chocrón Chocrón v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs](#), Judgment of July 1, 2011. Series C. No. 227, par. 130.

law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive administrative, or of a judicial nature,"¹¹ including procedures for identifying international protection needs and recognizing refugee status.

B. Importance of Procedures for Persons Subject to International Protection

10. International human rights law and international refugee law have recognized that there are individuals who require international protection so that they can be ensured equal access to and enjoyment of their human rights. It is considered that persons subject to international protection include refugees, stateless persons, and beneficiaries of complementary protection. This section examines the connection between procedures for the determination of international protection needs and guarantees of due process and non-discrimination in the light of international human rights law and international refugee law.

1. Recognition of Refugee Status

11. The 1951 Convention and its 1967 Protocol consider a person to be a refugee from the moment he meets the elements set out in the definition, i.e. (i) they are outside their country of nationality; (ii) they have a well-founded fear of persecution; (iii) for reasons of race, religion, nationality, membership of a particular social group, or political opinion; and (iv) and owing to such fears they are unable or unwilling to avail themselves of the protection of their country, or are stateless and, being outside the country of their former habitual residence as a result of such events, are unable or, owing to such fears, unwilling to return to it. A person can meet the elements of the definition of refugee regardless of whether or not he or she is formally recognized by a State.
12. The Inter-American Court has interpreted the right to seek and receive asylum in Article 22(7) of the American Convention on Human Rights, in conjunction with its Articles 1(1) and 2, as requiring States to adopt legislative or other measures to ensure the right to seek and receive asylum in accordance with the Convention itself and other relevant treaties. The Inter-American Court has established that States that have not yet adopted domestic laws in that regard should take the necessary measures to regulate adequately and in accordance

¹¹ I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 25, 2013, Series C. No. 272, par. 151.

with treaty-based parameters the procedure and other aspects necessary to give useful effect to the right to seek and receive asylum.¹²

13. In that sense, a person's refugee status derives from the circumstances that they faced in their country and not from the determination made by States. The administrative or judicial decision recognizing a person's refugee status and concluding the respective determination procedure is not constitutive but declaratory in nature. Therefore, the person does not acquire refugee status by virtue of the act of recognition.¹³ Accordingly, refugee status determination procedures are intended to assess whether a person seeking international protection meets the definition of a refugee in accordance with international, regional, and national standards.
14. In that regard, the Inter-American Court reaffirmed in its analysis of the case of *Pacheco Tineo v. Bolivia* that “[r]ecognition of [a person’s] refugee status does not therefore make him a refugee, but declares him to be one,” and that it is, therefore, incumbent on States to “guarantee a duty of special care in the verification of this status and in the measures that it may adopt,”¹⁴ through appropriate procedures and in accordance with due process.
15. Procedures for recognition of refugee status are essential since they aim to protect and ensure access to fundamental rights in the effective implementation of the right to asylum. The Commission notes that effective enjoyment of the rights and benefits derived from refugee status depends on the recognition by other States of the status of a person or group of persons in assessing whether the situation of a person or group of persons meets the definition of refugee.¹⁵
16. Article III of the 1967 Protocol relating to the Status of Refugees requires States Parties to communicate to the Secretary-General of the United Nations the laws and regulations that they adopt to ensure the application of the Protocol. Also, at its 1977 session, the Executive Committee of UNHCR expressed the hope that all States Parties to the Convention and the Protocol would be able to establish

¹² I/A Ct.H.R., Advisory Opinion OC-25/18, *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 141.

¹³ Cf. I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations, and Costs*, Judgment of November 25, 2013, Series C. No. 272, par. 145, citing United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Reissued, Geneva, December 2011. HCR/1P/4/ENG/REV.3., para. 28; and I/A Court H.R., *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 210. See also Directive 200/95/EU of the European Parliament and of the Council, 13 December 2011, Whereas para. 21.

¹⁴ I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparations, and Costs*, Judgment of November 25, 2013, Series C. No. 272, paras. 145 and 150.

¹⁵ IACHR, Report on Merits No. 136/1, Case 12.474, *Pacheco Tineo Family – Bolivia*, October 31, 2011, par. 136. In this sense, see also, I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 25, 2013, Series C. No. 272, par. 157.

specific procedures for the determination of refugee status, and that they would involve the UNHCR in such procedures, which the Commission notes is the case in the vast majority of systems for the recognition of refugee status in the region. The Committee also recommended very general basic procedural requirements so that they could be adopted by most States.¹⁶

17. At the regional level in the Americas, the 2014 Brazil Declaration and Plan of Action enshrine the importance of establishing refugee status determination procedures that are "fair and efficient."¹⁷
18. The IACHR has determined that "the specific terms of [the 1951 Convention and its 1967 Protocol] are complemented and in certain respects amplified by a range of international human rights instruments, as well as certain provisions of international humanitarian law. Pursuant to this network of protections, States are obliged to refrain from taking measures contrary to the principle of asylum, such as returning or expelling asylum seekers or refugees contrary to international human rights, humanitarian and refugee law."¹⁸
19. The Inter-American Commission has established that the right of asylum and the prohibition of *refoulement* necessarily presuppose the existence of a process with a procedural framework that offers the minimum guarantees necessary to allow for the individualized and serious study of each asylum application. In addition, the process should be geared towards identifying the international protection needs of individuals and recognizing refugee status where appropriate.¹⁹
20. The IACHR also established that procedures must have sufficient flexibility to be able to take into account the reality of persons who are victims of persecution; for example, the extreme disadvantage they are at when it comes to producing evidence or, very often, the complexity of trying to explain clearly the treatment to which they have been subjected due to the serious physiological and psychological harm sustained. One example of such measures that States should take is the need to extend the time allowed for the submission of evidence until the time when decisions on their status are taken, so that legitimate refugees can be identified and their right to *non-refoulement* guaranteed.²⁰

¹⁶ EXCOM, Conclusion No. 8 (XXVIII) (1977), No. 30 (XXXIV) (1983)

¹⁷ Brazil Declaration, "[A Framework for Regional Cooperation and Solidarity to Strengthen International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean](#)," December 3, 2014.

¹⁸ IACHR, [Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System](#), OAS/Ser.L/V/II.106, February 28, 2000, par. 26.

¹⁹ IACHR, [Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System](#), OAS/Ser.L/V/II.106, February 28, 2000, par. 62.

²⁰ IACHR, [Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System](#), OAS/Ser.L/V/II.106, February 28, 2000, par. 72.

21. Furthermore, the IACHR has consistently held that, given the seriousness of the possible consequences of exclusion or denial of refugee status, any determination of refugee status must be made through impartial and adequate procedures, in accordance with due process. The IACHR has reiterated that such procedural requirements are present even in cases where the persons are included in one of the causes for exclusion, such as the fact that they may be considered a "danger to the security of the country."²¹
22. The IACHR has recognized that the rights often at stake in the right to seek asylum are primarily the rights to liberty, humane treatment, and life. In that sense, the procedure must be adequate to enforce those rights by providing mechanisms that establish whether a person meets the risk standard and by establishing a specific protection²² response.
23. The Commission considers that such a diversity of procedures represents a challenge for the development of standards and for monitoring the consequences that adjustments in procedures or subtle changes in the regulatory, legal or institutional bases in national protection systems may have on the effective conditions of access to procedures and the rights inherent in the recognition and granting of such protection mechanisms. The Commission, therefore, focuses its analysis on the impacts generated on concrete social situations and verifiable empirical realities and, in turn, focuses its observations and recommendations on its evaluation of the concrete impact of public policies and their development on the lives of people as subjects of rights. Thus, it considers that a right is a right only as long as it is susceptible to being enforced and tools and mechanisms are available to facilitate meeting this requirement.²³
24. In that regard, the Commission notes that international human rights treaties and various pronouncements by regional and international bodies, such as the Executive Committee of UNHCR, provide minimum norms and standards that should exist in procedures for the recognition of refugee status.
25. In that regard, the IACHR notes that the absence of specific standards and procedural guarantees expressed in international treaties relating to the recognition of refugee status presents a challenge. In response, the inter-American system has analyzed the application of the right to seek and receive asylum in conjunction with other rights such as the right to a fair trial (Article 8 of the American Convention) and judicial protection (Article 25 of the American Convention).

²¹ IACHR, [Report on Terrorism and Human Rights](#), OAS/Ser.L/V/II.116, October 22, 2002, par. 391.

²² IACHR, [Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System](#), OEA/SER/.L/V/II.106, February 28, 2000, par. 104.

²³ IACHR, [Public Policies with a Human Rights Approach](#), OAS/Ser.L/V/II. Doc. 191, September 15, 2018, par. 64.

2. Importance of Establishing Procedures for the Determination of Statelessness

26. The Commission notes that the role of inter-American standards in designing procedures for the recognition and protection of stateless persons is unique and has special significance. Those standards were included in the Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalisation,²⁴ a key guidance document for the development and design of fair and efficient procedures for determining statelessness. While the historical development of international protection for refugees through successive treaties, protocols, and State practice produced a legal corpus that detailed many procedural steps and specificities and, therefore, accompanied the development of complementary protection, statelessness has a peculiarity. States have broad discretion in designing and implementing procedures for determining statelessness, while the conventions relating to the issue of statelessness do not establish a procedure, as such, for its determination, and, additionally, its recent internalization in many States in the region impacted the development of other institutional sources. For this reason, the Commission considered it essential to include a specific effort aimed at deepening the standards concerning statelessness in this report, in a specific chapter. Currently only eight States in the region have procedures for determining statelessness.
27. The UNHCR has stated that, since some stateless persons may also be refugees, States may consider combining statelessness and refugee determination in the same procedure.²⁵

C. Objectives and Scope of the Report

28. Despite the accepted importance of the above-mentioned procedures, there is no formal frame of reference, as such, established in international or regional treaties, the understanding being that States may establish the flows they consider most appropriate for the international protection of refugees and stateless persons. As a result, there is a great disparity in the way in which States in the region have developed the processes to recognize international protection, although the Commission has identified mechanisms for strengthening State capacities in the area of recognition of refugee status and for the implementation of the other protection mechanisms addressed in this report. One example is the coordinated initiative between the UNHCR and States in the region for the development of quality asylum systems through the

²⁴ UNHCR, [Draft Articles on the Protection of Stateless Persons and the Facilities for their Naturalisation](#), February 2017.

²⁵ UNHCR, [Statelessness determination procedures. Identifying and protecting stateless persons](#), p. 5.

so-called Quality Assurance Initiative (QAI) within the framework of the Brazil Action Plan.²⁶

29. The Commission also recognizes that refugee recognition processes pose a number of challenges in terms of analysis of the credibility, reliability, relevance, and study of documentary and testimonial evidence. In that context, international refugee law converges with international human rights law by establishing minimum norms and standards that should exist and guide national systems for the recognition of refugee status.
30. Considering all the above, this report seeks to compile the highest norms and standards of human rights and international refugee law, as well as the best practices of States in the region in relation to the right to seek and receive asylum, complementary protection, and statelessness. It also contains a practical compilation of the standards that should be guaranteed in order for such flows to take place in an appropriate manner, ensuring and realizing the right of any person to obtain international protection where necessary.

D. Structure and Methodology

31. This report compiles jurisprudence and standards produced by the inter-American human rights system, as well as other legal sources of international human rights, international refugee law and humanitarian law relevant to the protection of refugees, stateless persons, asylum seekers, and other persons claiming protection. In carrying out this analysis, the Commission also collected comments from civil society, academics, authorities, and experts in the field, and made use of the information received through its regular mechanisms for monitoring human rights in the region, such as observation visits.
32. To that end, on September 6, 2017, the IACHR held an ex officio hearing on the *Legal and Judicial Process for the Recognition of Refugees, Stateless Persons, and Beneficiaries of Complementary Protection in the Americas*.²⁷ In addition, the IACHR prepared a questionnaire that was disseminated in July 2018; it received responses from the States of Argentina, Brazil, Colombia, El Salvador, Panama, Paraguay, and Uruguay. The IACHR also received information from various civil society organizations in Argentina, Brazil, Venezuela, Ecuador, Panama, Colombia, Mexico, and Peru, as well as from the Human Rights Commission of Mexico City and the Human Rights Ombudsperson of Guatemala.

²⁶ UNHCR, *Brazil Plan of Action. Thematic Consultations for the Elaboration of a Triennial Progress Report. Programs on Quality of Asylum and Eradication of Statelessness*, November 2, 2019.

²⁷ IACHR, *Proceso legal y judicial para el reconocimiento de refugiados, apátridas y beneficiarios de protección complementaria en América* (EX OFFICIO), September 6, 2017.

33. Through that questionnaire, the IACHR received information from civil society organizations and states on the main obstacles—whether legislative, administrative, or institutional, or in terms of organizational cultures and cultural barriers—faced by persons in need of international protection. The report seeks to help overcome these obstacles through the adoption of inter-American human rights standards in this area.
34. In addition, on March 21, 2018, the Commission held a consultation of experts in Washington, DC, with the aim of ensuring that the content of the report would reflect all the most advanced standards and norms in this field. Those who participated in the consultation approach the issues addressed in this report from different spheres, such as academia, litigation, and direct care for individuals. They focused their observations on identifying emerging protection issues to guarantee due process in the context of mixed mass migratory movements in the region.
35. In that regard, drawing on different legal sources of international law, in this report the Commission analyzes findings, norms, and existing standards in the present report. To this end, it welcomes the jurisprudential, normative and institutional development that accompanies the application of general human rights norms, their interpretation and concrete implementation in particular contexts for the recognition of refugee status, statelessness and complementary protection, thereby generating knowledge of the subject and promoting the development of new standards. This is in line with the provisions of Article 29 of the American Convention on Human Rights, especially paragraphs b and d thereof; with the aim of making the application of other international agreements and conventions compatible with the Convention; and with the inter-American *corpus juris*.
36. In its structure, the report includes this introduction on the importance of the topic and the situation in the region in Chapter 1. Thereafter, in the following order, it sets out the normative basis for implementation of the main systems of recognition of protection statuses in the Americas in Chapter 2 and systematically discusses the application of the principles that contribute to due process in procedures for the protection of refugees, stateless persons, and complementary protection in Chapter 3; Chapters 4 and 5 develop the main inter-American standards for the strengthening of guarantees derived from due process of law. Lastly, the report systematizes its main conclusions and recommendations in Chapter 6.

CHAPTER 2
GENERAL NORMATIVE
FRAMEWORK

GENERAL NORMATIVE FRAMEWORK

A. Normative Framework and Background to the Report

37. International human rights law and international refugee law recognize that refugees, stateless persons, and beneficiaries of complementary protection require international protection to ensure equal access to, and enjoyment of, their human rights.

1. The Right of Asylum as a Human Right

American Declaration of the Rights and Duties of Man (1948)

38. The right to asylum was formalized under modern international human rights law in 1948 by the American Declaration of the Rights and Duties of Man, the first instrument to recognize that everyone has the right to seek and receive asylum in foreign territory. Article XXVII of the Declaration states that every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the conditions established in the laws of each country and with international agreements.

Universal Declaration of Human Rights (1948)

39. At the international level, the Universal Declaration of Human Rights establishes, at Article 14, the right of asylum from persecution,²⁸ including the right to seek and to enjoy it in other countries; it also provides that this right may not be invoked in the case of prosecutions genuinely arising from ordinary crimes or from acts contrary to the purposes and principles of the United Nations.

²⁸ The recognition of the right to seek and receive asylum in the American Declaration had a fundamental impact on the recognition of this right that same year in the Universal Declaration of Human Rights, where the impetus and influence of the Latin American States were decisive in the recognition of the right of asylum in article 14 of the Universal Declaration of Human Rights of 1948.

The Convention relating to the Status of Refugees (1951) and its Protocol (1967)

40. These instruments are part of international refugee law. The 1951 Convention was adopted in response to the refugee situation resulting from the Second World War and entered into force on April 22, 1954.
41. The 1951 Convention articulates the classic definition at its Article 1, providing that a refugee is any person who owing to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is outside the country of their nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country. The 1951 Convention provides that any person who, not having a nationality and being outside the country of their former habitual residence as a result of events connected with such well-founded fear, are unable or, owing to such fear, are unwilling to return to it, shall also be considered refugees.
42. The 1951 Convention contained a temporal and a geographic restriction that the person had to be outside the country of their nationality as a result of events occurring before 1 January 1951. However, the 1967 Protocol extended the applicability of the 1951 Convention by removing those restrictions and clarifying that the Protocol applies without any geographical limitation²⁹ by expressly deleting the expressions "as a result of events occurring before 1 January 1951", such as "... as a result of such events", in Article 1, section A, paragraph 2, of the Convention, also in accordance with item 3 of the same Article, without any geographical limitation.
43. Although the 1951 Convention, considered the cornerstone of International Refugee Law, does not explicitly establish asylum as a right, it is considered to be implicitly incorporated into its text, which establishes the definition of refugee, the protection against non-refoulement, and the list of rights it encompasses. In addition, Article 33 of the convention prohibits expulsion and return (*refoulement*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.
44. The 1951 Convention also lists the basic rights that must be recognized to refugees, including specific guarantees for the protection of their human rights and guarantees of access to economic, social, cultural and environmental rights without discrimination.³⁰

²⁹ Cf. IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106 Doc.40 rev., February 28, 2000, par. 22.

³⁰ Exemption from exceptional measures (Article 8); Personal status (Article 12), in reference rights previously acquired by a refugee and dependent on personal status, especially rights attaching to

Cartagena Declaration on Refugees (1984)

45. The Cartagena Declaration was adopted by the “Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems,” held in Cartagena, Colombia, from November 19 to 22, 1984. Latin American government representatives and jurists discussed the challenges facing the region in terms of international protection for people fleeing Central America.³¹
46. The Cartagena Declaration recommended, in its third conclusion, that States should broaden the definition of refugees to include persons fleeing generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Specifically, the Cartagena Declaration on Refugees states:
3. [Reiterates] that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.³²
47. Additionally, the Cartagena Declaration insists on the recognition and need for protection of the rights of refugees, highlighting the importance of respect for

marriage; most favorable treatment possible as regards acquisition of movable and immovable property (Article 13); Artistic rights and industrial property (Article 14); Right of association (Article 15); Access to courts (Article 16); Access to the job market, including through wage-earning employment (Article 17) and the possibility of self-employment (Article 18); Access to liberal professions (Article 19); Rationing system with the same treatment as nationals (Article 20); Right to housing (Article 21); Public education (Article 22); Public relief (Article 23); Access and rights to work and social security (Article 24); Administrative assistance (Article 25); Freedom of movement (Article 26); Identity papers (Article 27); Travel documents (Article 28); Transfer of assets (Article 30); No penalties on account of illegal entry (Article 31); Prohibition of expulsion or return (“refoulement”) (Article 33); Naturalization (Article 34).

³¹ 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, December 31, 2015, par. 102.

³² Cartagena Declaration on Refugees. Adopted by the “Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems,” held in Cartagena, Colombia, from 19 to 22 November 1984, Conclusion 3.

non-refoulement, economic, social and cultural rights, family reunification, and the voluntary nature of repatriation.³³

48. In this regard, the Inter-American Court considers that the broadening of the definition of refugee is not only a response to the dynamics of forced displacement that gave rise to it, but also satisfies the protection challenges arising from other patterns of displacement that are occurring today.³⁴
49. It should be noted that the 1951 Convention has 19 States Signatories and 145 States Parties. The Convention has also been ratified by 31 OAS member states.³⁵ In addition, the domestic law of 15 States in the region³⁶ includes the broadened definition of refugee recommended by the Cartagena Declaration on Refugees.

2. Complementary Protection

International standards on non-refoulement

50. In its report on Human Mobility,³⁷ the IACHR analyzes complementary protection, i.e. that which refers to legal mechanisms designed to protect persons who do not meet the requirements established to be granted refugee status. In this sense, the protection measures make it possible to regularize the status of persons whose return would be contrary to general obligations of non-refoulement. Such non-refoulement obligations are found in various legal instruments. Thus, the concept of complementary protection gives rise to a broad expression of the content and scope of the right to non-refoulement, through which States ensure the rights of persons who seek some form of international protection but do not qualify as refugees or for another migratory status, but cannot be returned.³⁸

³³ IACHR, Observations of the IACHR, Request for an Advisory Opinion presented by the State of Ecuador: The institution of asylum in its different forms and the legality of its recognition as a human right of every individual in accordance with the principle of equality and non-discrimination, par. 13.

³⁴ I/A Ct.HR., Advisory Opinion OC-21/14, par. 76; I/A Ct.HR, Advisory Opinion OC-25/18, par. 96.

³⁵ Antigua and Barbuda, Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Uruguay.

³⁶ Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

³⁷ 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, OAS/Ser.L/V/II. Doc. 46/15, December 31, 2015, par. 133.

³⁸ IACHR, Forced Migration of Nicaraguans to Costa Rica, OAS/Ser.L/V/II. Doc. 150, September 8, 2019, par. 211.

51. Article 22(8) of the American Convention on Human Rights provides: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”³⁹
52. In addition, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on December 10, 1984, expressly prohibits States from expelling, returning (*refoulement*) or extraditing a person to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture. Also, according to the Convention, the competent authorities shall take into account any objective conditions or risks of human rights violations, including, where applicable, the existence of consistent patterns of “gross, flagrant or mass violations of human rights.”⁴⁰
53. Similarly, Article 13 of the Inter-American Convention to Prevent and Punish Torture, adopted in 1985 and ratified by 18 OAS member states,⁴¹ provides that extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.
54. In this report, the Commission examines in depth the repercussions of *non-refoulement* as a principle, guarantee, and objective of due process in the international protection procedures addressed, taking into account the findings and progress presented in that regard in the Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking (2019).⁴² The extension of that principle, as the report later shows, varies according to the applicable context, transferring the general principle—which is based on humanitarian law and human rights, as well as having emerged from the practice of States—to other situations, such as non-refoulement of persons to States where there are situations of internal or international conflict.
55. The Commission understands that there are a variety of protection responses. During the period of preparation of this report, the Inter-American Commission conducted a working visit to Costa Rica from October 14 to 18, 2018. Its aim was to monitor the situation of Nicaraguan asylum seekers and

³⁹ [American Convention on Human Rights](#), 1969.

⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

⁴¹ As of June 14, 2020: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Suriname, Uruguay and Venezuela.

⁴² IACHR, [Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking](#), San Salvador, December 7, 2019

persons in need of international protection, analyze its findings, and make recommendations that included the national asylum system and policies on the subject. In the context of the forced displacement of Nicaraguans to Costa Rica, the IACHR published its report *Forced Migration of Nicaraguans to Costa Rica* in which it recommended the recognition of refugee status for persons whose objective personal circumstances so required,⁴³ with respect for due process, as well as the implementation of complementary protection formulas where appropriate, considering the need for the asylum systems to act from a comprehensive perspective of mutual complementarity.

56. In that regard, the Commission interpreted the applicability of the right of non-refoulement, understanding that there are persons who do not meet the definition of a refugee, but seek international protection outside their territories and countries after fleeing conditions where their lives and well-being are at risk. In such circumstances, the Commission indicates in its Inter-American Principles that States should not in any way return, surrender, or reject a person so that they are indirectly returned to a country, whether or not it is their country of nationality, where their life or freedom might be in danger or where they might be subjected to torture, cruel, inhuman, or degrading treatment or punishment, either due to obligations under other international treaties or by application of international customary law.⁴⁴

3. International Human Rights Law and Due Process in International Protection

57. Different sources of international human rights law provide elements for the progressive development of due process guarantees in international protection. In relation to that analysis, the IACHR notes the output of human rights bodies such as the Human Rights Committee, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and other entities that have directly interpreted human rights norms in procedures for recognition of refugee status, complementary protection, and statelessness, in keeping with what the inter-American human rights system understands in terms of their application and connection with regional norms, taking as a guide the provisions of Article 29(b) and 29(c) of the American Convention on Human Rights (1969), according to which the application of conventions and

⁴³ IACHR, *Forced Migration of Nicaraguans to Costa Rica*, OAS/Ser.L/V/II. Doc. 150, September 8, 2019.

⁴⁴ Article 33 of the Refugee Convention, Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the International Covenant on Civil and Political Rights, Articles 5 and 22(8) of the American Convention on Human Rights, Article 13 of the Inter-American Convention to Prevent and Punish Torture, and Article 3 of the European Convention on Human Rights; IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019.

other acts must be compatible with the protection established by the Convention.

58. With respect to due process, the inter-American human rights system has recognized that the right to seek and receive asylum must be interpreted in conjunction with the rights to a fair trial and judicial protection established in Articles XXVI and XXVIII of the American Declaration of the Rights and Duties of Man and Articles 8 and 25 of the American Convention on Human Rights.

American Declaration of the Rights and Duties of Man

Right to due process of law

Article XXVI. Every accused person is presumed innocent, until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Right to a fair trial.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

American Convention on Human Rights

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Article 25. Judicial protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

59. In the case of *Andrea Mortlock v. United States*, the IACHR determined that the scope of protection of the right to due process encompassed other types of processes, aside from criminal ones, and, therefore, to deny an alleged victim the protection afforded by Article XXVI simply by virtue of the nature of immigration proceedings would contradict the very object of that provision.⁴⁵ In the case of *Pacheco Tineo v. Bolivia*, the Inter-American Court recognized that the determination of refugee status implies a decision on the potential risk to enjoyment or the impairment of the most basic rights of applicants, such as the rights to life, humane treatment, and personal liberty. Therefore, due process guarantees must be fully observed in any procedure relating to the determination of refugee status, even if it is of an administrative nature.⁴⁶
60. With regard to other human rights instruments, it is important to note that the International Covenant on Civil and Political Rights does not contain the right to asylum. There is debate as to whether the guarantees set out in Article 14(1) of the Covenant are applicable to procedures for the recognition of refugee status. In that regard, the IACHR notes that the Human Rights Committee has been reluctant to use the guarantees established in that provision. The Committee has studied such cases because of their proximity to the expulsion procedures and their possible arbitrariness, as well as the risk of harm, as set out in Articles 6 and 7, read in conjunction with Article 2(3).
61. Similarly, the European Court of Human Rights has interpreted the recognition of refugee status from the perspective of expulsions but, unlike the United Nations Human Rights Committee, has opted for the theme of "*serious harm*" rather than more general arbitrary expulsion. The European Court has also ruled on the right to an effective remedy set out in Article 13 of the European Convention, stating that a procedure must include the following elements: access to a competent national authority; independent and rigorous scrutiny; a rapid response; and automatic suspension of expulsion.
62. In addition, the IACHR also notes that, although the jurisprudence of the European Court seems to suggest that recognition of refugee status does not require the protections of Article 6(1), the standards it has developed through Articles 13 and 3 of the European Convention do not represent lower standards of protection:

[I]t does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be

⁴⁵ IACHR, Report on Admissibility and Merits No. 63/08, Case 12.534, *Andrea Mortlock (United States)*, July 26, 2008, paras. 91-94.

⁴⁶ I/A Ct.HR., Case of the *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 25, 2013, par. 157.

it direct or indirect, to the country from which he or she has fled.⁴⁷

63. The Commission notes that the application of procedural guarantees in the structure and workings of mechanisms for recognition of asylum and statelessness and the granting of complementary protection are essential to the implementation of the right to asylum and the right to *non-refoulement*. In addition, they require objective institutional and regulatory conditions for verification.

4. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking (Resolution 04/2019 adopted by the IACHR on December 7, 2019)

64. In its recent efforts to develop and deepen guidelines to steer the strengthening of measures for the protection of persons on the move and in situations of displacement, the Commission adopted Resolution 04/2019, “Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking” (Inter-American Principles), in December 2019. The Inter-American Principles and this report have a close, interdependent, and complementary relationship, which is explored further in Chapter 3.
65. With regard to the above, the Commission stresses the importance that standards of protection should be in dialogue with the need for an interpretation that, by integrating universal and regional norms and treaties, advances the scope of the rights and guarantees of groups in need of protection, such as refugees and stateless persons.

B. Mandate of the UNHCR for the Recognition of Refugee Status

66. With regard to the specific determination of refugee status, the UNHCR Statute establishes the competence to provide international protection to persons who meet the definition of refugees set out in that document.⁴⁸ According to the Statute:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the

⁴⁷ EctHR, *MSS v. Belgium and Greece*, para. 286.

⁴⁸ UNHCR, *Statute of the UNHCR, adopted by General Assembly resolution 428 (V)*, 14 December 1950.

function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.⁴⁹

67. The definition of a refugee contained in the Statute differs from that of the 1951 Convention in that the former does not contain the criterion of a well-founded fear of persecution on account of "membership of a particular social group."⁵⁰ Despite that, it has been established that all those who meet the eligibility criteria under the 1951 Convention are also refugees within the competence of UNHCR.⁵¹
68. The Statute of UNHCR also provides that the High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council,⁵² thus, UNHCR is also competent to recognize persons as refugees because they belong to a certain social group:

In legal terms, the High Commissioner and his Office form a multilateral, intergovernmental institution, established by the GA as its subsidiary organ through resolution 319 A (IV) of 3 December 1949, and provided with its Statute in resolution 428 (V) of 14 December 1950 (Annex). The Statute stipulates that the High Commissioner "acting under the authority of the General Assembly, shall assume the function of providing international protection ... and of seeking permanent solutions for the problem of refugees." The Statute is, however, not the only source of law of the mandate of the High Commissioner and his Office. Paragraph 9 of the Statute provides for the further evolution of his functions and activities. Since 1950, the GA and, to some extent, the Economic and Social Council [ECOSOC], have developed the mandate further. From time to time, the mandate of the High Commissioner and his Office has also been extended via "good offices" arrangements [...]. Other activities may include action and participation "at the invitation of the Secretary-General, in those humanitarian endeavours of the United

⁴⁹ UNHCR, Statute of the UNHCR, adopted by General Assembly resolution 428 (V) of 14 December 1950.

⁵⁰ The definition of a refugee in the Statute does not include membership of a particular social group as a ground for recognition as a refugee.

⁵¹ UNHCR, Refugee Status Determination: Identifying who is a refugee, Self-study module 2, p. 8.

⁵² UNHCR, Statute of the UNHCR, adopted by General Assembly resolution 428 (V) of 14 December 1950.

Nations for which the Office has particular expertise and experience.”⁵³

69. The UNHCR uses for its determination the Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, published in 2003 and under constant review to keep it updated.⁵⁴ In addition, the UNHCR has a refugee status determination deployment scheme and roster, which provides expert support to refugee status determination operations or to build and strengthen government capacity in refugee status determination procedures.⁵⁵
70. An intervention by UNHCR to ensure urgent protection may be based on prima facie elements such as valid reasons for fleeing the country of origin and the needs of the group in question. When assistance is expressly requested by a host country, such an invitation is sufficient to justify the involvement of the UNHCR.
71. Action on recognition of refugee status in individual cases is also necessary, especially, but not limited to, States where no procedures have been established to respond to asylum requests. In such cases, the action of the UNHCR becomes necessary to protect and ensure the rights and guarantees concerning international protection of persons in need of it. The Commission notes that States should assume primary responsibility for refugee status recognition processes, as an extension of their obligation to protect all persons under their jurisdiction, without discrimination as to nationality. That consideration should not, however, be used to impose barriers to requests for assistance to the Office of the High Commissioner for Refugees that may be necessary, at the discretion of national refugee authorities.
72. The Commission considers that an intervention to ensure urgent protection may be based on prima facie elements such as valid reasons for fleeing the country of origin and the needs of the group in question. When assistance is expressly requested by a State, such an invitation justifies the involvement of UNHCR in all phases of the refugee recognition process, as well as other relevant forms of international protection.

C. The UNHCR's Mandate in relation to Statelessness

73. A stateless person is someone who is not considered a national by any State under the operation of its law. A person is stateless from the moment he or she meets the conditions of this definition. This definition is part of customary international law. The 1954 Convention relating to the Status of Stateless Persons gave rise to the obligation for States to identify stateless persons in

⁵³ UNHCR, [Note on the mandate of the High Commissioner for Refugees and his office](#).

⁵⁴ UNHCR, [Procedural Standards for Refugee Status Determination under UNHCR’s Mandate](#).

⁵⁵ UNHCR, [Refugee status determination](#).

order to provide them with appropriate treatment. To that end, the establishment of a statelessness determination procedure is a crucial guarantee mechanism.⁵⁶

74. The lack of a nationality produces profound effects on the most basic capacities for human beings to develop their social life and access rights. In this way, procedures for identifying and protecting stateless persons are directly connected to reducing this phenomenon. Through such mechanisms, States can establish a legal framework and guidelines identifying persons in need of protection, thus enabling them to document and regulate their stay in host countries. This also allows, especially in the case of stateless persons, to give them basic rights to participate and contribute to the society in which they live, as well as to develop their own livelihood and social autonomy. Finally, their determination as stateless persons is necessary for them to acquire a nationality by facilitating naturalization. In addition, such procedures help to assess the extent of the situation of persons in need of international protection in countries of destination, as well as the specific type of protection they require and trends and causes of such situations.⁵⁷
75. In the case of statelessness, the UNHCR's mandate had been consolidated over the decades. The mandate of UNHCR was initially limited to stateless refugees, as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. Subsequently, in 1974, the UNHCR's mandate was extended to carry out the functions provided for in Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness and it was by United Nations General Assembly Resolution 3274 (XXIX) that its mandate was extended to include persons falling under the terms of that Convention.⁵⁸ On that occasion, the UNHCR was asked to assume that mandate on a temporary basis, which became permanent in 1976.⁵⁹
76. That role would only be consolidated in 1995, on the recommendation of the UNHCR Executive Committee and subsequently incorporated in a General Assembly resolution n. 31/36-1976.⁶⁰ Subsequently, in resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106, which sets out four broad areas of responsibility for the UNHCR: identification, prevention and reduction of statelessness, and protection of stateless people.

⁵⁶ UNHCR, [Statelessness determination procedures. Identifying and protecting stateless persons](#), p. 1.

⁵⁷ UNHCR, [Statelessness determination procedures. Identifying and protecting stateless persons](#), p. 3.

⁵⁸ United Nations General Assembly (UNGA) [res. 3274 \(XXIX\)](#), 10 Dec 1974, para. 1.

⁵⁹ Through [UNGA res. 31/36, 30 November 1976, para 4.](#)

⁶⁰ UN General Assembly (UNGA) [res. 50/152, 21, December 1995.](#)

D. States and Recognition of Refugee Status and Statelessness

1. Regarding Refugee Status

77. According to the 1951 Convention⁶¹ and its 1967 Protocol,⁶² the determination of refugee status is primarily a matter for states parties. However, neither of those instruments provides for a detailed procedure to be followed for determining refugee status.
78. States have the primary responsibility for establishing procedures for the recognition of refugees. However, where the State has been unable or lacks sufficient capacities, especially during periods of crisis and in contexts of a large increase in the number of requests for asylum, the United Nations High Commissioner for Refugees (UNHCR) has played an active role in making such recognitions.⁶³
79. The Commission considers that the incorporation of explicit legal mechanisms on the right to asylum and international protection of displaced persons is a necessary step towards ensuring fundamental rights and responding to the protection needs of this population. However, it also notes that the existence of clear legal mandates on such protection is not sufficient to corroborate effective levels of protection.
80. In the region, of the 35 OAS member states, 16 expressly recognize the right of asylum in their constitutional texts: Bolivia, Brazil, Costa Rica, Cuba, Dominican Republic, Ecuador, Colombia, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Paraguay, Peru, and Venezuela. Of those, only Haiti and Cuba do not have additional domestic laws on asylum. Another group of States, apart from having no express mention of it in their constitutions, also have no infra-constitutional domestic laws on the right to seek and receive asylum: Antigua and Barbuda, Bahamas, Barbados, Dominica, Grenada, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Among the countries that regulate asylum with their domestic law and do differentiate between asylum and political asylum: Brazil, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, the Dominican Republic and Venezuela.⁶⁴
81. The Commission also notes the significance of the cycle of declarations and action plans developed on the basis of the 1984 Cartagena Declaration, which

⁶¹ Article 3 provides that the Contracting States shall apply the provisions of the Convention to refugees.

⁶² Article 1 of the 1967 Protocol.

⁶³ UNHCR, *Refugee status determination*.

⁶⁴ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 124-127

proposes the so-called broadened definition of refugee status. That definition was partially or fully adopted by 15 States in the region: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.⁶⁵

82. In the region, the predominant model is one of refugee status recognition systems operated by administrative agencies, such as national commissions or committees for refugees, with relative autonomy of decision-making in terms of structuring rules of procedure, regulatory norms, and other procedural mechanisms. In some cases, such as the systems in place in the United States or Canada, the agencies responsible, while continuing to be characterized as administrative bureaucracies, take the form of individual judges or decision-makers.
83. From the above, it is clear that not all countries in the region are equipped with a procedure for recognition of refugee status, nor is there uniformity in the standards that States follow in implementing such procedures. This situation is all the more worrying given the low level of institutionalization of the procedures and guarantees afforded for the protection of stateless persons.

2. Regarding Statelessness

84. With regard to statelessness recognition procedures, the protection mechanism is less widely disseminated, as well as being a more recent occurrence. Only eight countries offer such protection in the region: Mexico, Brazil, Costa Rica, Ecuador, Argentina, Paraguay, Uruguay and Panama (starting in 2012).
85. With regard to recognition of statelessness and attendant protection, the Commission notes that its historical evolution was based on the gradual construction of international standards closely related to the development of refugee protection, following the incorporation of the issue of statelessness into the 1951 Convention relating to the Status of Refugees, which deals with stateless refugees. In 1954, with the emergence of the Convention relating to the Status of Stateless Persons and, in 1961, the Convention on the Reduction of Statelessness, a system of protection, guarantees, and rights in relation to stateless persons was established, as were generic guidelines for prevention and reduction of factors that cause the phenomenon. Considering that such a phenomenon is characterized by the corroboration of the absence of a legal link with any State, that is, the verification that, under the definition of the 1954 Convention, a person "is not considered as a national by any State under the operation of its law," there are specific challenges for the implementation of

⁶⁵ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 122.

procedural guarantees in the field of recognition and protection of stateless persons that warrant special consideration.

86. In conclusion, the considerations in this chapter match the structure of the following chapters, dealing initially with a framework of general principles that undergird the construction and strengthening of protection systems (Chapter 3), the development of general considerations on systems for recognition of refugee status and complementary protection (Chapter 4), and protection from statelessness (Chapter 5).

CHAPTER 3

CORE PRINCIPLES IN
CONNECTION WITH DUE
PROCESS FOR THE RECOGNITION
OF REFUGEES, STATELESS
PERSONS AND PERSONS IN NEED
OF PROTECTION

CORE PRINCIPLES IN CONNECTION WITH DUE PROCESS FOR THE RECOGNITION OF REFUGEES, STATELESS PERSONS AND PERSONS IN NEED OF PROTECTION

A. Linkages between Principles and Constitution of the Concept of Due Process of Law in this Report

1. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking and Due Process

87. The Inter-American Commission on Human Rights recognizes the interdependent and interlocking nature of rights and principles expressed through different sources of international human rights law, international humanitarian law, and the more specific branches of the *corpus juris* that enshrine the mechanisms for protection of refugees, stateless persons, asylum seekers, and other persons in need of special protection. In its recent work, the IACHR has identified a set of broader guidelines that can serve the States of the region in protecting the human rights of all persons on the move and in situations of displacement.
88. It was with that motivation that the IACHR adopted the Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking (or Inter-American Principles) by Resolution 04/2019 on December 7, 2019. The Principles systematize the Commission's interpretation and provide a set of guidelines to support State action, civil society action, and dialogue with international agencies, especially in relation to progressive development and implementation of the standards of the inter-American human rights system.
89. The Inter-American Principles share this report's programmatic and methodological orientation, based on the identification of norms and standards, good practices observed in countries of the region and other regional contexts, as well as current regulatory and institutional challenges. In substantive terms, the IACHR considers the Inter-American Principles to be an

essential part of the sources and references set forth in this report, as can be seen throughout its chapters.

90. This chapter aims briefly to present an interrelated core of principles that interdependently linked to each other, expressing the normative content for due process standards, which is further elaborated in Chapters 4 and 5.

2. Key Concepts in the Inter-American Principles

91. Through Resolution 04/19, the Commission provides States, rights defenders, and civil society with a consolidated manual on guidelines, concepts and standards for protection. In this document, it systematizes definitions, such as **complementary protection**, which is the protection to be provided to a person or persons not qualifying for refugee or asylum status to prevent their return to the territory of another country in which their life would be in danger or there are reasons to believe that they would be in danger of being subjected to torture or other cruel, inhuman, and degrading treatment or punishment.
92. The concept of **international protection**⁶⁶ distinguishes from complementary protection, which is that which is offered by a State or an international organization to a person because their human rights are threatened or violated in their country of nationality or habitual residence, and in which they could not obtain due protection because they are not accessible, available and/or effective. International protection includes: (a) the protection received by asylum seekers and refugees based on international conventions or internal laws; (b) the protection received by asylum seekers and refugees based on the expanded definition of the Cartagena Declaration; (c) the protection received by any person of foreign nationality based on international human rights obligations and, in particular, the principle of non-refoulement and the so-called complementary protection or other forms of humanitarian protection, and (d) the protection received by stateless persons in accordance with international instruments on the subject.
93. International protection also covers, in the case of refugees and asylum seekers, all actions aimed at ensuring equal access and enjoyment of the rights of women, men, boys and girls benefited. Such protection includes interventions by States or international organizations in the interest of asylum seekers and refugees to ensure that their rights, security and well-being are guaranteed according to international standards, such as: guaranteeing respect for the principle of non-refoulement, access to physical security, and access to fair procedures for determining refugee status, to standards of human treatment, and the implementation of durable solutions.

⁶⁶ IACHR, Resolution 04/19, [Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking](#), San Salvador, December 7, 2019, p. 3.

B. Principle of Non-Discrimination and Equal Protection

94. Migrants and persons under international protection often face multiple forms of discrimination, not only because of xenophobia and racism, but also for reasons of age⁶⁷ or gender.⁶⁸ This has been recognized, at the international level, by different human rights protection bodies. In analyzing the vulnerable situation of migrants, the Inter-American Court noted that

Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.⁶⁹

95. It is notable in this regard that one of the objectives in formulating the Declaration was to assure as fundamental the “equal protection of the law to nationals and aliens alike in respect to the rights set forth in the Declaration.”⁷⁰ In its conceptual development, the Commission developed the principle of non-discrimination in the context of human mobility in detail in the Inter-American Principles, linking it to the duty to offer protection mechanisms on equal terms.
96. In accordance with the Principle of Equal Protection, all persons, including migrants, are equal before the law and are entitled to equal protection of the law without discrimination of any kind or on any ground, including status as a migrant. It also considers that the prohibition of discrimination is closely linked to ensuring that migrants enjoy equal and effective protection against discrimination on any grounds.⁷¹

⁶⁷ Committee on the Rights of the Child, General Comment No. 6, *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 17 May to 3 June 2005.

⁶⁸ Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 26 on women migrant workers*, CEDAW/C/2009/WP.1/R, 5 December 2008.

⁶⁹ I/A Court H. R., *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, par. 112.

⁷⁰ IACHR, Report on Admissibility and Merits No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al. (The Mariel Cubans)* (United States). April 4, 2001, par. 179.

⁷¹ Among such grounds for discrimination, the Inter-American Principles list, for example, race, color, sex, language, religion or conviction, political or other opinion, national or social origin, economic status, birth, property, marital status, sexual orientation, gender identity or expression, ethnic group, disability, nationality or statelessness, migration or residence status, age, reasons for crossing international borders or the circumstances of travel or any situation in which they are found by the

97. The conceptual construction developed by the IACHR in the Principles with respect to equality and non-discrimination is based on four elements: (1) to guarantee equal access to rights; (2) to prevent forms of differential treatment that result in violations of the rights of migrants or their fundamental liberties; (3) to highlight the need for a parameter for actions or procedures that result in differential treatment, and to objectively monitor their application; and (4) to prevent and punish any discriminatory actions and resulting violence.
98. With regard to the application of the Convention, when referring to the general obligation to respect and ensure the rights recognized in its text, the Inter-American Court has established that it is of an *erga omnes* nature,⁷² and that States are not allowed to establish any cause for discrimination in respecting and ensuring the rights recognized in the Convention for persons under their jurisdiction. In the words of the Court, “the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person’s migratory status in a State.”⁷³
99. The Inter-American Court considers that right to equal protection of the law and non-discrimination belongs to the domain of *jus cogens*, as a peremptory norm of international law. In that regard, no discrimination is permitted on the basis of gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status.⁷⁴
100. Migrants and persons under international protection, along with the nationals of a State, are entitled to have their human rights respected and guaranteed and to have States establish mechanisms for their protection. The only limitations envisaged are the right to enter, move about in, and reside in a country, which is restricted to those persons who are lawfully authorized to do so,⁷⁵ and certain political rights that are reserved exclusively for citizens.⁷⁶ However, those exceptions aside, the right of access to justice and due process must be ensured, as must the principles of *non-refoulement*, non-discrimination, the best interests of the child or adolescent, and family unity.
101. Thus, with these sole limitations, migrants and persons subject to international protection are entitled to have their rights recognized in the American

authorities, [or] any other factor. See IACHR, Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 12.

⁷² I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, par. 109.

⁷³ I/A Court H.R., *Case of the Yean and Bosico Children v. Dominican Republic*, Judgment of September 8, 2005. Series C. No. 130, par. 155.

⁷⁴ I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, par. 101.

⁷⁵ American Convention on Human Rights, Article 22(1).

⁷⁶ American Convention on Human Rights, Article 23(1).

Convention respected and guaranteed on an equal footing with all others, and only with the aforementioned limitations.

102. The right to equal protection and non-discrimination also affects procedures and guarantees of due process and judicial protection. In that regard, the Commission notes their interdependence and complementarity, recognizing that the existence of situations of discrimination against or negative differentiation of the rights of migrants, asymmetrical conditions of access to justice, the possibility or relative impossibility of mounting defense arguments in administrative or judicial processes, requires States to take positive steps to allow people to avail themselves of legal services under genuinely equal conditions.

C. Pro Persona Principle

103. The pro persona principle is a hermeneutic rule provided for in article 29 of the CADH, whereby when two or more provisions are applicable to a particular case or situation, States are obligated to use the most favorable provision to protect the rights of all migrants, regardless of their migration status. Likewise, where there are two or more interpretations of a provision, States are obligated to use the one most favorable to the person and offer them the broadest possible protection. In addition, States should apply the most favorable interpretation to guarantee human rights, and the most restrictive interpretation to impose limits on those rights.⁷⁷
104. The pro persona principle has been understood by the organs of the inter-American human rights system as the rule of interpretation that requires a broad interpretation of human rights and a restrictive interpretation of their limitations.⁷⁸ The pro persona principle is constituted through two manifestations: the preference of norms and the preference of interpretation, seeking always to favor the person with the broadest possible protection.⁷⁹
105. In its Advisory Opinion OC-25/18, “The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection,” the Inter-American Court reiterated that in interpreting a treaty provision, the application of the rule that gives the greatest protection to the rights of the

⁷⁷ IACHR, Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 3.

⁷⁸ I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, November 13, 1985, Separate Opinion of Judge Rodolfo E. Piza Escalante, par. 12.

⁷⁹ Brito Melgarejo, Rodrigo, *El principio pro persona y la protección de los derechos humanos: alcances e implicaciones*, *Revista de la Facultad de Derecho de México*, Tomo LXV, núm. 264, July-December 2015, p. 272.

individual should be privileged. This principle also implies rights should be interpreted in a broad manner in favor of the individual.⁸⁰

106. The Inter-American Court has established that a narrow interpretation may involve limiting the scope of rules that are contrary to the objectives and purposes envisaged in international treaties. Thus, in *Boyce et al. v. Barbados* the Court held that the provisions on the death penalty must be interpreted in view of the pro persona principle, that is to say, they should be interpreted as imposing restrictions designed to delimit strictly the application and scope of the death penalty, in order to reduce its application to bring about its gradual disappearance.”⁸¹
107. The Commission recognizes the importance of the pro persona principle as a key hermeneutic, not only for the most favorable interpretation of normative provisions applicable to migrants, refugees, asylum seekers, stateless persons or persons in need of protection, but also as an interpretative element of the actual circumstances and difficulties of access to rights. This should be directly reflected in the conditions for interpretation of facts, in proportionate and reasonable distribution of burden of proof in refugee status recognition procedures, and, in line with the recommendations of the Inter-American Court in refugee status recognition procedures, in the obligation to interpret the exclusion clauses restrictively.⁸²

D. The Principle of Due Process and its Guarantees

1. Scope of the Principle and Essential Elements in Processes Linked to Human Mobility

108. The right to *non-refoulement* has a broad meaning in the inter-American human rights system (IAHRS), as a consequence of the complementarity that governs that system, so that international human rights law in its regional dimension is “in dialogue” with international refugee law, as well as with the UN global human rights system.
109. The Inter-American Principles comprehensively address the applicability of processing conditions for persons on the move and in situations of displacement, affirming right to due process before the courts, tribunals, and all other organs and authorities administering justice in any legal process

⁸⁰ I/A Court H.R., Advisory Opinion OC-25/18, *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 149.

⁸¹ I/A Court HR, Case *Boyce et al. V. Barbados*, Sentence of November 20, 2007, Preliminary Objection, Merits, Reparations and Costs.

⁸² I/A Court H.R., [Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection](#), May 30, 2018, par. 99.

conducive to the restriction of rights, as well as before those persons and authorities specifically charged with determining their migration status.⁸³ The Commission recognizes that these guarantees represent levels of protection and access to rights and procedures necessary for all migrants and should be guaranteed in particular for refugees, asylum seekers, stateless persons and others in need of complementary protection.

110. The IACHR inscribed, in the Inter-American Principles, the temporality and timeliness of procedures as constituent elements of due process, "so as not to unduly prolong the suffering caused by remembering events that happened and to promote appropriate handling of the risk of re-traumatization as a result of those proceedings."⁸⁴ Such concerns have an even greater impact on the dynamics of protecting persons in the context of human mobility, such as refugees and stateless persons.
111. Migration proceedings, as well as procedures leading to the restriction or recognition of rights, must be fully mindful of due process guarantees. The IACHR warns of the strong impact that migration procedures can have on conditions of enjoyment of rights, as well as procedures leading to the loss of nationality, or procedures leading to decisions such as the recognition of the refugee status, statelessness, or any other protection mechanism. From its eminently protective position on fundamental rights, the Commission considers that such procedures must meet certain minimum guarantees, as part of their mindfulness of the principle of due process of law.

Minimum guarantees in the principle of due process (IACHR Res. 04/19)

- a. Migration control functions performed by authorities that are clearly identified by law to perform such duties, including those with the authority to request and review documentation;
- b. **Information on their legal status, the legal process and their rights;**
- c. Handling of legal proceedings and appeals by a competent, independent, and impartial authority;
- d. **Protection of personal information** and observance of the principle of **confidentiality;**
- e. **Prior and detailed notification** about the proceeding in which they are a party, its implications and possibilities of appeal in a **language and form they understand;**
- f. The right to appear promptly before a judge or other officer authorized by law to exercise judicial powers, and to trial within a reasonable period of time; to

⁸³ IACHR, Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 50.

⁸⁴ IACHR, Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 50.

analyze the **legality of detention, or be released from detention** without prejudice to the continuation of legal proceedings;

g. **Cost-free assistance of a translator or interpreter** (including in any proceeding regarding their status as a migrant);

h. **Legal assistance and representation by a qualified legal representative** of the migrants' choice (including in any proceeding regarding their status as a migrant), and cost-free when migrants cannot afford private representation;

i. **Hearing or personal interview without delay**, within a reasonable time and with the means needed to prepare a defense, and to **meet in a free and private manner with one's lawyers**;

j. **Notification** of the decision taken in the proceedings;

k. Delivery of written notification of a **duly substantiated and reasoned decision**;

l. The right to appeal the decision, within a **reasonable time and with suspensive effect**;

m. Notification of the right to receive consular assistance and to have effective access to it, **when the migrant so requests** in order to notify the consular authorities of their country of origin;

n. **For asylum-seekers and refugees, as well as stateless persons and those seeking recognition of statelessness, the right to contact a UNHCR representative**;

o. Exemption from disproportionate penalties on account of entry, presence or migration status, or on account of any other migration-related offense; and

p. A trauma-sensitive approach, where applicable, to implementation of these guarantees.

112. The Commission notes that, in view of the specific regulations and protection of refugee and stateless populations, the standards of legal guarantees may be higher, taking into account the particular situation of their displacement and the risks in the event of their return. In line with the Inter-American Court, the Commission notes, in short, that any act or omission of the State organs during an administrative, punitive or jurisdictional proceeding, must respect due process of law.⁸⁵

113. In the same vein, in General Comment No. 15 (1988), the Human Rights Committee stated that the rights set forth in the International Covenant on Civil and Political Rights apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness,⁸⁶ while the Committee on Economic, Social and Cultural Rights established in its General Comment no. 20 (2009) that the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and

⁸⁵ I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 25, 2013, Series C. No. 272, par. 130.

⁸⁶ Human Rights Committee, CCPR General Comment No. 15: *The Position of Aliens Under the Covenant*, Twenty-seventh session, 11 April 1986, para. 1.

documentation.⁸⁷ For its part, the Executive Committee of UNHCR (ExComm) established in its Conclusion No. 82 (1992) on safeguarding asylum that there is an obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.⁸⁸

2. Due Process and Children

114. As will be seen in the following chapters, protection relating to the status of refugees, stateless persons or persons under complementary protection often overlaps with the special situation experienced by displaced children and adolescents. In that regard, the Commission recalls the position of the Inter-American Court that the right to seek and receive asylum in connection with refugee status recognized in Articles 22(7) of the American Convention and XXVII of the American Declaration, under its systematic interpretation with other provisions of the Convention and in light of special treaties, imposes specific duties on the State, including the obligation to adapt procedures to the specific needs of children and adolescents.⁸⁹
115. In keeping with that interpretation, the IACHR, through its Resolution 04/2019 adopting the Inter-American Principles, details special conditions for the guarantees of due legal process involving children and adolescents to be met. The core element of such processes is the determination of the best interests of the child, in addition to the general guarantees set out above, taken in conjunction with the specific guarantees of proceedings to determine refugee status, statelessness, or complementary protection, as appropriate. These are guarantees inherent to the concept of due process in situations involving children and adolescents, such as (i) access to the territory, regardless of the documentation they have or lack; (ii) the obligation to appoint a guardian from the first moment of the proceedings; (iii) to be fully informed throughout the entire procedure, together with their guardian and legal adviser; (iv) the right to be heard; (v) priority handling of applications and procedures; (v) access to contact with their families and not to be separated from them; and (vi) that the best interests be assessed evaluated before any decision that affects their life is made.

⁸⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, para. 30.

⁸⁸ UNHCR Executive Committee, No. 82 (XLVIII), *Conclusion on Safeguarding Asylum*, 1997, 48th Session, para. (d)(vi). Available at <http://www.acnur.org/fileadmin/scripts/doc.php?file=fileadmin/Documentos/BDL/2002/0593>.

⁸⁹ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 99.

3. Due Process and Judicial Protection in the Context of Human Mobility

116. The Commission also considers the profound interdependence between the principles of due process of law and judicial protection, since the right of access to justice for the protection of all rights and to integral reparation of harm done should be granted free of charge, without discriminatory barriers, and on an equal basis with nationals of the State concerned; it also considers that this includes the right to due process and judicial guarantees.⁹⁰ The Commission, bearing in mind the connection between the guarantees of due process and access to justice, observed, in the Inter-American Principles, that States should guarantee the real possibility of access to justice and effective protection, in an effective, impartial and expeditious manner, subject to the principles of immediacy, celerity and due diligence.⁹¹
117. In that sense, the Inter-American Court has established that the minimum guarantees of due legal process apply when determining rights and obligations of a civil, labor, fiscal or any other nature.⁹² Likewise, the Court considered: “[T]he right to due process of law should be recognized within the framework of the minimum guarantees that should be provided to all migrants, irrespective of their migratory status. The broad scope of the preservation of due process applies not only *ratione materiae* but also *ratione personae*, without any discrimination.”⁹³
118. Likewise, the Court has considered that a person’s right to judicial protection and judicial guarantees is violated by the risk that they run in administrative or judicial proceedings of being deported or deprived of their liberty and by being denied the services of a public defender free of charge, which prevents them from asserting the rights under determination, and that the State must guarantee that access to justice is genuine and not merely formal.⁹⁴
119. In the same vein, the Commission established that States should address violations of the rights of migrants, refugees, stateless persons and those in need of complementary protection, as well as seeking their restoration when

⁹⁰ IACHR, Resolution O4/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 40.

⁹¹ IACHR, Resolution O4/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 40.

⁹² I/A Court H.R., Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, September 17, 2003, par. 124.

⁹³ I/A Court H.R., Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, September 17, 2003, par. 122.

⁹⁴ I/A Court H.R., Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, September 17, 2003, par. 126.

they have been violated, and their enforcement when their exercise encounters unjustified obstacles.⁹⁵

E. The Interrelationship between Due Process and Non-Return (Non-Refoulement)

120. ***Non-refoulement***, a key concept that represents the full effectiveness of protection mechanisms, is considered a customary rule of international law⁹⁶ that has also been recognized as *jus cogens* (peremptory law)⁹⁷ in relation to torture and cruel, inhuman or degrading treatment or punishment. In that sense, considering the absolute prohibition of all forms of torture, whether physical or psychological, it has been concluded that "threats and the real danger of a person being subjected to serious physical injuries produces, in certain circumstances, such a degree of moral anguish that it can be considered 'psychological torture.'"⁹⁸ Thus, the obligation of *non-refoulement* is binding on all States, regardless of whether they are parties to the international treaties that recognize it⁹⁹, taking into consideration the circumstances expressly provided for Article 33 (2) of the Convention Relating to the Status of Refugees of 1951, which must be given restrictive interpretation and in accordance with the principle of proportionality¹⁰⁰.
121. The IACHR, therefore, regards the principle of *non-refoulement* as the cornerstone of international protection for refugees, asylum seekers, and persons in need of international protection, since it prevents the expulsion or return of such persons to the borders of territories where their life or freedom is in danger.¹⁰¹

⁹⁵ IACHR, Resolution 04/19, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XII, Principle 40.

⁹⁶ Paragraph 4 of the Declaration of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees indicates: "Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."

⁹⁷ I/A Court H.R., [Advisory Opinion OC-25/18, the institution of asylum, and its recognition as a human right under the Inter-American System of Protection](#), May 30th 2018, par. 181. IACHR, [Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System](#), OEA/Ser.L/V/II.106, February 28, 2000, par. 154.

⁹⁸ I/A Court H.R., [Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection](#), August 19, 2014, par. 224.

⁹⁹ IACHR, [Report on Terrorism and Human Rights](#). OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr. (2002), par. 394.

¹⁰⁰ IACHR, Resolution 04/19, [Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking](#), San Salvador, December 7, 2019, Section I, Principle 6x.

¹⁰¹ Non-refoulement has also been characterized by the Executive Committee of the United Nations High Commissioner for Refugees as a "cardinal principle" of refugee protection that "encourages States to

122. Although the American Declaration does not contain a specific provision on non-refoulement, the Commission has concluded that other human rights prohibit refoulement or expulsion where that might lead to a violation of those rights. In Case 10.675 (*Haitian Interdiction – Haitian Boat People*), the Commission concluded that the United States had violated the principle of non-refoulement, having based its argument on the second part of Article XXVII (Right of asylum) of the American Declaration (“... in accordance with ... international agreements”),¹⁰² which refers, in this case, to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, which, in turn, enshrines non-refoulement. In addition, the Commission notes that *non-refoulement* reflects a progressive development, based on the American Convention on Human Rights, the Convention relating to the Status of Refugees, the Inter-American Convention to Prevent and Punish Torture, and the United Nations Convention against Torture.
123. Taking into account regional developments in the protection of displaced persons in the Americas, the Commission included in its Resolution 04/2019 on Inter-American Principles a summary of the concept of *non-refoulement*, which will be further developed in Chapters 4 and 5, following the close connection with the issues of due process in refugee, asylum, statelessness procedures and the definition of complementary protection measures.

Principle 6. Non-refoulement

No migrant shall be expelled or returned in any matter to another State where there are substantial grounds for believing that the migrant’s life might be threatened or that the migrant would be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Asylum seekers or persons already recognized as refugees enjoy a special protection against the return, which derives from the obligations of international refugee law. The exceptions to the principle of *non-refoulement*, in accordance with international refugee law 1951, are only applicable in the circumstances expressly provided for Article 33 (2) of the Convention Relating to the Status of Refugees of 1951, must be given restrictive interpretation and in a of accordance with the principle of proportionality. Return is prohibited without exception when there are substantive reasons to believe that the person would be at risk of torture, or other irreparable damage in the place to which she or he would be transferred or returned.

intensify their efforts to protect the rights of refugees.” See Conclusions Adopted by the Executive Committee on International Protection of Refugees, 1991 (42nd Session of the Executive Committee) No. 65 (XVLL), General conclusions, para. c.

¹⁰² IACHR, *Human Mobility : 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*, OAS/Ser. L/V/II. doc. 46/15, December 31, 2015, par. 440.

States should respect the principle of non-refoulement, including the prohibition of refusal at the border and indirect return, with respect to any person seeking asylum or other form of international protection.¹⁰³

124. At the heart of the definition of the principle of *non-refoulement* is the idea of the preservation of life and freedom, as well as certain aspects of the most basic physical and moral integrity, included in the formula where "where this person's life or freedom might be endangered or where this person would risk be subjected to torture or cruel, inhuman or degrading treatment or punishment." The protective content of this principle is referred to in specific treaties, as well as relying on the interpretative efforts of national justice systems and international human rights systems.
125. The IACHR emphasized in its *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking* that *non-refoulement* applies both when the person has already entered the territory and extraterritorially:

The States shall enforce the right of non-refoulement of any person in all places where they exercise jurisdiction, even within their own territory. The term "territory" includes the land area and territorial waters of a State, as well as its *de jure* border entry points, including transit zones or "international" zones at airports. The responsibility of a State to protect people against *refoulement* occurs irrespective of whether the person has entered the country lawfully or and has passed through immigration controls.¹⁰⁴

126. The Commission also notes the theoretical development of the concept that has been implemented since the mid-1980s, based on an interpretative advance in the field of international human rights law, in particular through the practice of regional human rights protection bodies,¹⁰⁵ which has pushed the threshold of the right of *non-refoulement* by applying it not only to refugees, but to any person in a situation similar to that of refugees. That includes those who are "at risk of torture or inhuman or degrading treatment or punishment, and-at least where the risk is clear and extreme-applies also where there is a threat to: life; freedom from slavery; liberty and security of person; protection against

¹⁰³ IACHR, Resolution 04/19, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Principle 6.

¹⁰⁴ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section I, Principle 6.

¹⁰⁵ For its part, the European Court of Human Rights, in the case of *Soering v. The United Kingdom* established that under Article 3 [Prohibition of Torture] there is an absolute prohibition on the *refoulement* of a person to a State where there is a real risk that he or she may suffer such treatment.

ex post facto criminality; privacy and family life; or freedom of thought, conscience, or religion.¹⁰⁶

127. On this subject, the Inter-American Court has established that, given the declaratory nature of refugee status determination, the protection afforded by non-refoulement applies to all refugees, regardless of whether they have been recognized as such by the authorities, which implies that it is also guaranteed to persons seeking asylum.¹⁰⁷
128. In this regard, the Inter-American Court has established that a flagrant violation of the basic guarantees of due process in cases of administrative proceedings related to migratory status, in expulsion or deportation proceedings, and in proceedings to determine refugee status, may result in the violation of the principle of *non-refoulement*.¹⁰⁸
129. In fact, by way of comparison, and in line with the European Court of Human Rights (ECtHR), the right to non-refoulement can be violated by flagrant violations of the rights to due process. The degree of such violations may differ, but the jurisprudence of that court has found that threshold has been reached in cases that have included:¹⁰⁹
- conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge;
 - a trial which is summary in nature and conducted with a total disregard for the rights of the defence;
 - detention without any access to an independent and impartial tribunal to have the legality the detention reviewed
 - deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country; and
 - the admission of evidence obtained under torture to incriminate a person.¹¹⁰
130. In this regard, the principle of non-refoulement can be invoked by any person seeking international protection, over whom the State in question is exercising authority or who is under its control,¹¹¹ regardless of whether she or he is on

¹⁰⁶ HATHAWAY, James C., "Leveraging Asylum," in *Texas International Law Journal*, Vol. 45, 2010, p. 503.

¹⁰⁷ I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 25, 2013, Series C. No. 272, pars. 145, 147, and 153.

¹⁰⁸ I/A Ct.HR, Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 230.

¹⁰⁹ ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, 17 January 2012, § 259.

¹¹⁰ ECtHR, *Case of Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, 17 January 2012, § 267.

¹¹¹ IACHR, Report on Inadmissibility No. 38/99, *Victor Saldaño v. Argentina*, March 11, 1999, pars. 17 and 19.

the land, rivers, or sea or in the air space of the State.¹¹² According to the Inter-American Court, “this provision includes acts performed by immigration and border authorities, as well as acts performed by diplomatic officials.¹¹³

131. In the same sense, the Inter-American Court has already interpreted that Article 22(8) of the Convention does not establish any geographical limitations, which makes the general criterion of jurisdiction appropriate, i.e. it has a broad scope of application. Therefore, the scope of protection against *refoulement* is not limited to the person being in the territory of the State, but also obliges States extraterritorially, provided that the authorities exercise their authority or effective control over such persons, as may be the case in legations, which by their very nature are in the territory of another State with its consent.¹¹⁴
132. The principle of *non-refoulement* also includes the prohibition of indirect *refoulement*. In that connection, the IACHR has determined that “ ‘chain’ (or indirect) *refoulement* is considered to be the transfer of persons to a country or territory from which they can be returned to a country where their life, liberty or personal integrity are in danger,”¹¹⁵ which means that States also have an obligation, not to hand over a person in need of international protection where there is a possibility that he may risk persecution, or to a State from which he may be returned to the country where such a risk exists.¹¹⁶
133. Another important aspect of *non-refoulement* is that not only does it require that the person not be returned, but imposes positive obligations on States. In that sense, the Inter-American Court emphasized that the principle of non-refoulement also requires State action, including individualized risk assessment in the case of *refoulement*, based on an interview with the person and a prior or preliminary assessment in order to determine if there are sufficient grounds to believe that there is a risk of irreparable harm to his or her rights.¹¹⁷

¹¹² I/A Court H.R., *Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, August 19, 2014, par. 219.

¹¹³ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 192.

¹¹⁴ I/A Court H.R., *Advisory Opinion OC-25/18, The institution of asylum and its recognition as a human right in the Inter-American Protection System*, May 30, 2018, par. 188.

¹¹⁵ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section I, Principle 6.

¹¹⁶ I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 25, 2013, Series C. No. 272, par. 153, citing *United Nations High Commissioner for Refugees. Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, par. 4.3.4.

¹¹⁷ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, pars. 194 to 199. Likewise, *Advisory Opinion OC-21/14*, supra, par. 235 and 236; *Case of Wong Ho Wing v. Peru*, par. 128 and 129; *Case of the Pacheco Tineo Family v. Bolivia*, supra, par. 136.

134. This signifies that the basic guarantees of due process must be respected as part of the opportunity given to the individual to explain the reasons why he should not be returned and, if that risk is verified, the person should not be returned to the country where the danger exists.¹¹⁸ In addition, the State must take appropriate protection measures in favor of persons subject to such risks.
135. The inter-American system has interpreted the prohibition of *refoulement* in cases where a person's health is at issue as being related to the rights to life and humane treatment. In that regard, the IACHR decided in the case of *Andrea Mortlock v. The United States* that the protection against cruel, infamous or unusual punishment contained in Article XXVI of the American Declaration was being violated since, if she were returned to Jamaica, she would not be treated for HIV, a disease that was terminal and incurable. Specifically, the IACHR established that in such cases:
- the applicable standard will consist of whether the deportation will create extraordinary hardship to the deportee and her family and may well amount to a death sentence given two principal considerations: (1) the availability of medical care in the receiving country and (2) the availability of social services and support, in particular the presence of close relatives.¹¹⁹
136. For its part, the Inter-American Court has indicated that the expulsion or return of a person could be considered a violation of the right to *non-refoulement* in cases where it would result in harm or a serious deterioration to the person's health or possibly even their death. To determine the above, the status of the health or the type of ailment that the person suffers would have to be taken into account, as would the health care available in the country of origin and its physical and financial accessibility, among other aspects.¹²⁰
137. Similarly, in *Precautionary Measure No. 490-18*, the IACHR analyzed the shortage of and difficulties of access to medicines in Venezuela and granted a precautionary measure for a person who was at risk of deportation to that country, where her rights to life, humane treatment, and health would be at risk due to an alleged lack of access to adequate medical treatment, particularly with respect to HIV. The IACHR determined that Panama had not assessed the risk to her health and the possibilities for continuing her medical treatment.¹²¹
138. Accordingly, the IACHR requested that Panama "adopt the necessary measures to ensure the right to life, personal integrity and health of M.B.B.P; in particular, to refrain from deporting or expelling the beneficiary to Venezuela, as long as domestic authorities have not been able to properly assess, in keeping with

¹¹⁸ I/A Court H.R., *Case of Wong Ho Wing v. Peru*, par. 129.

¹¹⁹ IACHR, Report No. 63/08, *Andrea Mortlock vs. United States*, July 25, 2008, par. 91.

¹²⁰ I/A Ct.HR, Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 229.

¹²¹ IACHR, *Precautionary Measure No. 490-19, M.B.B.P. regarding Panama*, October 15, 2018.

applicable international standards, the alleged risk she faces as to her health situation.”¹²²

139. The Commission also adopted *Resolution 2/18* in which it specified that the principle of non-refoulement should be respected in the case of Venezuelan nationals, "whether through deportation proceedings, expulsion, or any other action of the authorities, of Venezuelans who would be in danger of persecution or other serious violations of human rights—including serious risk to their health or life due to medical conditions—in accordance with the right to non-refoulement established in Article 22.8 of the American Convention on Human Rights, Article 13 of the Inter-American Convention to Prevent and Punish Torture.”¹²³
140. Finally, it should be noted that non-refoulement is "a guarantee of various non-derogable human rights.”¹²⁴ In that sense, the principle of non-refoulement is not an exclusive component of international refugee protection,¹²⁵ but serves to protect other universal human rights (such as life, well-being, liberty, and others); therefore, refoulement or expulsion is also prohibited where that could lead to the violation of such rights.
141. It is in efforts to protect human rights—particularly economic, social, cultural, and environmental rights—from new risk factors and threats of harm that the need to expand protection mechanisms through implementation of the principle of non-refoulement most commonly arises.
142. In that regard, the United Nations Human Rights Committee decided on a communication submitted by a Kiribati citizen, alleging that New Zealand had violated his right to life by denying him asylum, despite his testimony that climate change had made Kiribati uninhabitable. The allegation was that New Zealand had violated the right to life under the International Covenant on Social and Political Rights, on the grounds that climate change-induced sea level rise in Kiribati would have created a shortage of living space, resulting in violent land disputes and environmental degradation, salinization of freshwater sources. Despite that refusal, the Committee noted that since "the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.”¹²⁶

¹²² IACHR, [Resolution 2/18 Forced Migration of Venezuelan Persons](#), March 2, 2018.

¹²³ IACHR, [Resolution 2/18 Forced Migration of Venezuelan Persons](#), March 2, 2018.

¹²⁴ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 180.

¹²⁵ I/A Court H.R., *Advisory Opinion OC-25/18, supra*, par. 180.

¹²⁶ UNHCR, [Views adopted by the Committee under article 5 \(4\) of the Optional Protocol, concerning communication No. 2728/2016](#), 7 January 2020, para. 9.11.

F. Principle of Respect for Family Unity

Principle 33: Protection of family unity and reunification

Family unity and family reunification shall be paramount considerations in any decision about migration status, valuing the best interest of children and adolescents, and their right to non-deprivation of liberty. States shall not use family separation to coerce parents into forgoing their right to seek protection or migration status in another country.

Any child who lacks a valid nationality shall have the right to return to the State of origin of either parent and to remain indefinitely with one or both parents regardless of the child's or adolescent's citizenship, when it does not contravene his best interests.

In determining the custody of children of migrants, the migration status of either parent shall not be a reason to terminate custody, parental rights, or visitation rights. Likewise, to determine the custody of children and adolescents whose parents die, the existence of close relatives will be taken into account, even if they are outside the country.

In light of the right to family unity and the best interests of the child, States should prevent the forced emigration of children and adolescents who are nationals as a result of the deportations of migrant parents or family members, according priority to family unity.¹²⁷

143. The right to family unity is also established in Article 17 of the American Convention on Human Rights and Article VI of the American Declaration of the Rights and Duties of Man, which establish the concept that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, which must ensure the right to establish a family and to receive protection therefor.
144. The inter-American human rights system has recognized that the family is a fundamental component of society and that the separation of children and adolescents from their family unit can only take place when there is objective justification based on the best interests of the child, and must be for a limited time. In the case of *Wayne Smith, Hugo Armendariz, et al. v. United States*, the IACHR established that having family ties does not establish an immutable right to remain in a country. However, the rights to family unity and to the best

¹²⁷ IACHR, Resolution O4/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XII, Principle 38.

interests of the child in any proceedings that may involve family separation should be weighed against each other.¹²⁸

145. In its advisory opinion on migrant children, the Inter-American Court established the child's right to the protection of the family and, in particular, to enjoy family life preserving family unity insofar as possible, should always be given prevalence, except in those cases in which the separation of the child from one or both parents would be necessary owing to the best interest of the child.¹²⁹
146. Likewise, the Court has established that any administrative or judicial organ that must decide on family separation owing to expulsion based on the migratory status of one or both parents must, when weighing all the factors, consider the particular circumstances of the specific case, and guarantee an individual decision.¹³⁰ In the same vein, the Committees on the Rights of the Child and on Migrant Workers and their Families established that "the rupture of the family unit by the expulsion of one or both parents based on a breach of immigration laws related to entry or stay is disproportionate, as the sacrifice inherent in the restriction of family life and the impact on the life and development of the child is not outweighed by the advantages obtained by forcing the parent to leave the territory because of an immigration-related offence."¹³¹
147. Both the Inter-American Court of Human Rights¹³² and the United Nations Committees on the Rights of the Child and on Migrant Workers and their Families¹³³ have expressed their views on the importance of facilitating regular and non-discriminatory migration channels, as well as making it easier for families to regularize their migratory status or to obtain residency permits based on grounds such as family unity, labor relations, social integration, and

¹²⁸ IACHR, Report No. 81/10, Case 12.562, Wayne Smith, Hugo Armendariz, et al. v. United States, July 12, 2010, par. 58.

¹²⁹ I/A Ct.HR., Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 275.

¹³⁰ I/A Ct.HR., Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 282.

¹³¹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, para. 29.

¹³² I/A Ct.HR., Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 277.

¹³³ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, para. 31.

others. Specifically, the Committees recommended facilitating the regularization of migrants in an irregular situation who reside with their children, in particular when they were born in the territory or have lived in the country of destination for a long period of time, or when the return to the country of origin of the parent would be against the best interests of the child.¹³⁴

148. In line with those guidelines, the Commission has repeatedly established in its Inter-American Principles the protection of the family unit and the duty of States to invest efforts in the family reunification of persons separated in contexts of displacement and to avoid measures that result in the forced separation of family members. In this regard, it considered the need to preserve family unity as a constituent element of the principle that safeguards access to asylum procedures and territory (Principle 56), throughout any migration procedure (Principle 61), linked to the principle of non-detention of migrants (Principle 68), and as part of the guarantees in repatriation, return, and expulsion procedures (Principle 73).¹³⁵
149. On the subject of removal from the territory, the Committees on the Rights of the Child and on the Protection of the Rights of All Migrant Workers and Members of Their Families point out that where the expulsion of parents is based on criminal offences, their children's rights, including the right to have their best interests be a primary consideration and their right to be heard and have their views taken seriously, should be ensured, also taking into account the principle of proportionality and other human rights principles and standards, stressing a guiding principle in the granting and implementation of complementary protection measures.¹³⁶
150. Likewise, on the effects of immigration detention on family unity, the Inter-American Court determined:

States may not resort to the deprivation of liberty of children as a precautionary measure to protect the objectives of immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain

¹³⁴ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, para. 29.

¹³⁵ IACHR, Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019.

¹³⁶ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, para. 29.

in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority.”¹³⁷

In this way, the Court places the protection of children and the best interests of children above other concerns of the immigration administration, and it must be understood that the search for less harmful alternatives to deprivation of liberty must be prioritized in the interests of maintaining family unity.

G. Mainstreaming Gender and Differentiated Approaches

151. As stated in the Inter-American Principles, the Commission considers it essential that laws and policies related to the phenomena of human mobility, including the treatment accorded in the context of procedures for recognition of international protection status—including refugee status, asylee status, and statelessness—and all forms of complementary protection, should incorporate a gender perspective. Such a perspective must consider the specific risks, as well as the differentiated impacts faced by women, men, children and adolescents of both sexes, and LGBTI persons in the context of human mobility. This aspect needs further elaboration by addressing the topic of intersectionality.
152. In its thematic report on *Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean*, the IACHR observes the incidence of factors of violence and discrimination faced by women migrants throughout the migration process, at destination, in transit, and at origin. Also, the intersection of the mobility situation with different conditions, such as gender, race, ethnicity, social class, and age, place migrant women and girls at risk for situations that may represent abuse and exploitation.¹³⁸ Furthermore, asylum and protection systems that lack such a perspective can create additional obstacles to women's and girls' access to protection procedures and systems, including asylum, statelessness and complementary protection systems, as well as generate factors of revictimization and affect their rights.
153. In the broader context of protection mechanisms, the Commission recognizes that the extension of other considerations to the definition of life as a legal good

¹³⁷ I/A Ct.HR., Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 283(6).

¹³⁸ IACHR, *Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean*, OAS/Ser.L/V/II. Doc. 233, November 14, 2019, paras. 191, 268; and Annex, par. 36.

to be preserved must challenge conceptions of interrelated principles such as those of family unity, non-refoulement, non-discrimination, and due process. In the following chapters, it will focus on the consolidation of protection mechanisms for refugees, stateless persons, and persons in need of complementary protection in the light of due process of law.

CHAPTER 4

PROCEDURAL GUARANTEES
AND DUE PROCESS IN
PROCEDURES FOR THE
RECOGNITION OF REFUGEES,
STATELESS PERSONS AND
PERSONS IN NEED OF
COMPLEMENTARY
PROTECTION

PROCEDURAL GUARANTEES AND DUE PROCESS IN PROCEDURES FOR THE RECOGNITION OF REFUGEES, STATELESS PERSONS AND PERSONS IN NEED OF COMPLEMENTARY PROTECTION

A. Introduction

154. In the current context of human mobility in the Americas a growing number of factors of forced displacement compromise and affect the rights of more than 6 million people, who are forced to move in search of protection in other countries, due to various crises in the region. Mass movements of people put strong pressure on national protection systems, which, as the Commission has observed in the course of its monitoring activities, are often forced to implement changes in their routines and protocols.
155. By systematizing standards and recommendations developed by the inter-American and universal human rights systems, this chapter aims to establish a guide with the structural references for the implementation of national systems of recognition and protection and as a framework for defenders of the rights of this population. Those components are presented in the light of relevant findings that the Commission has made through its monitoring activities in this area.

B. Access to Territory

156. States have an obligation to allow entry to their territory in order to allow access to procedures for assessing international protection needs. In that sense, the Inter-American Court of Human Rights has established that third States may not take action to prevent persons in need of international protection from seeking protection in other territories nor may they hide behind legal fictions to do so in order not to give access to the corresponding protection procedures.¹³⁹

¹³⁹ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 122.

157. In line with the jurisprudence of the Inter-American Court and the progressive development of human rights, the Commission established in Resolution 04/19, "*Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*," that persons with possible international protection needs may not be rejected at the border or points of entry into the territory, including airports, without adequate analysis of their protection requests. The Commission also stressed that access to a territory should not be subject to the presentation of identity or travel documents in the case of asylum seekers or refugees.¹⁴⁰
158. In referring to the scope of the right to seek and receive asylum in the *Haitian Interdiction* case, the Commission determined that the fact that the United States authorities intercepted Haitian refugees and summarily repatriated them to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as "refugees" contravened the right to seek and receive asylum in Article XXVII of the Declaration, since such actions prevented the victims from even having the opportunity to exercise that right.¹⁴¹
159. In that case, the IACHR understood as a standard that the right to seek asylum implies that third states not prevent persons seeking international protection from reaching other places where they can apply. In that regard, the Commission found a violation of the right to seek and receive asylum, establishing that:
- [T]he Commission finds that the United States breached Article XXVII of the American Declaration when it summarily interdicted, and repatriated Jeanette Gedeon, Dukens Luma, Fito Jean, and unnamed Haitians to Haiti, and prevented them from exercising their right to seek and receive asylum in foreign territory as provided by the American Declaration.¹⁴²
160. In the same vein, the Inter-American Court has stated that "the practice of intercepting asylum-seekers in international waters in order not to allow their requests to be assessed in potential host States 'is contrary to the principle of non-refoulement, as it does not allow for the assessment of individual risk factors.' The same applies to the outsourcing of borders and to migration control carried out outside the territory."¹⁴³

¹⁴⁰ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIII, Principle 56.

¹⁴¹ IACHR, *Report on Merits No. 51/96, Case 10.675, Haitian Interdiction*, March 13, 1997, par. 163.

¹⁴² IACHR, *Report on Merits No. 51/96, Case 10.675, Haitian Interdiction*, March 13, 1997, par. 163.

¹⁴³ I/A Court H.R., *Advisory Opinion OC-25/18, The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection*, May 30, 2018, par. 122; *Advisory Opinion OC-*

161. The IACHR and the Court have established that States have the authority to establish their immigration policies, including mechanisms to control the entry into and departure from their territory of persons who are not their nationals, provided that these policies are compatible with the norms for the protection of human rights established in the American Convention.
162. The Commission has also considered that it is a violation of the right to asylum that applications for asylum are not processed immediately and for asylum seekers to be asked to return temporarily to their countries. In this regard, in the *case of John Doe et al. v. Canada*, the Commission held:
- The State's failure to permit the John Does to remain in Canada until processing could be completed, to gain assurances from U.S. officials that they would permit the John Does to return for their scheduled appointments, or to ensure that the John Does could seek asylum in the United States before directing them back had the effect of violating the John Does' right to seek asylum, as protected by Article XXVII of the American Declaration.¹⁴⁴
163. In that regard, in order to provide effective access to territory, thus allowing persons in need of international protection to apply for it, it is essential that the following standards be ensured: *non-refoulement at the border*; *prohibition of collective expulsions*; and *non-punishment for irregular entry and non-detention of migrants*. Such standards should be understood in connection with the provisions discussed in Chapter 3, especially in the sense of strengthening the standards on non-refoulement through a framework of procedural safeguards.
164. During its working visit to the southern border of the United States in August 2019, the Commission was able to observe *in loco* the challenges implementing adequate mechanisms to provide effective access to the right to seek and receive asylum and the development of such mechanisms with the guarantees of due process. During this visit, the Commission systematized a set of findings and their causes, with emphasis on the existence of physical barriers to access to the territory established under *Migrant Protection Protocol* policy in force during the period under review, which are linked to the possible violations of rights and guarantees within the framework of due process.¹⁴⁵
165. Below are the standards related to the effective implementation of due process in the framework of the procedures for recognizing refugees, stateless persons and those with complementary protection needs.

21/14, citing IACHR, Report on Merits No. 51/96, Case 10.675 – *Haitian Interdiction (United States)*, March 13, 1997, paras. 156, 157, and 163.

¹⁴⁴ IACHR, Case 12.586, *John Doe et al. v. Canada*, July 21, 2011, par. 97.

¹⁴⁵ IACHR, Press release 228/19, [IACHR conducted visit to the United States' southern border](#), September 16, 2019.

1. No Rejection at Borders

166. Inherently related to non-refoulement is the right of non-refoulement at a border, to the extent that it also represents a guarantee for the enjoyment of other rights, such as the right to seek and receive asylum.
167. In this regard, the Inter-American Commission has held that the prohibition on refoulement necessarily requires that such any person recognized or seeking recognition as a refugee cannot be rejected at the border or expelled without an adequate, individualized examination of their claim.¹⁴⁶ Consolidating its interpretation in that regard, in Principle 56 of the Inter-American Principles the Commission established: “Persons with possible international protection needs may not be rejected at the border or points of entry into the territory, including airports, without adequate analysis of their protection requests, especially in the case of unaccompanied children and adolescents, and explicit consideration must also be given to the principles of family unity and the best interests of the child or adolescent.”¹⁴⁷
168. For its part, the Inter-American Court has established that persons who are either on the border or have crossed it must be admitted officially into the territory of the country, because, otherwise, this right would become illusory and without content.”¹⁴⁸ In addition, in the case of the *Pacheco Tineo Family*, the Inter-American Court established as a guarantee that those seeking asylum are entitled to a proper assessment by the national authorities of their requests and of the risk that they may suffer in case of return to the country of origin.¹⁴⁹
169. The Commission notes that the existence of any practice of holding persons who wish to apply for asylum at the border for the sole purpose of imposing admissibility phases on them in asylum procedures is in itself an obstacle to due process. In the case of the foregoing, authorities must provide prompt access to forms, formalities and knowledge of and access to the rights, duties and freedoms inherent in the status of an asylum seeker, which should include information and access to legal representation and to translators and interpreters.
170. For its part, UNHCR has already specified that an accelerated procedure would not necessarily violate due process guarantees, but that it must at least have the due guarantees that exist in other types of procedures of the same

¹⁴⁶ IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OAS/Ser.L/V/II.106 of February 28, 2000, par. 25.

¹⁴⁷ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIII, Principle 56.

¹⁴⁸ I/A Ct.HR., *Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, August 19, 2014, par. 210.

¹⁴⁹ I/A Court H.R., *Case of the Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 25, 2013, Series C. No. 272, par. 122.

nature.¹⁵⁰ An accelerated process cannot be a justification for denying basic rights and guarantees of due process in asylum procedures, such as the right to information, access to free legal representation, translator and interpreter, and the possibility to appeal a negative decision with suspensive effect.

171. It is therefore extremely important, for the effectiveness of the right to seek and receive asylum, that border migration authorities not refuse claims without adequately examining situations that may give rise to international protection needs, which therefore requires authorities to be properly trained in human rights and international refugee law and to have appropriate skills for conducting interviews and identifying possible international protection and special protection needs.¹⁵¹

2. Prohibition of Collective Expulsions and Obligation to Make a Reasonable and Objective Case-by-Case Analysis

172. The Inter-American Commission has defined collective expulsions as any measure of expulsion of a foreign person that is not based on individual cases but on group considerations, even if the group in question is not large. It also emphasized that collective expulsions violate not only the right to residence and freedom of movement, but may also place at risk many other rights, including the rights to life, security, liberty, as well as the principle of non-refoulement and the right to seek and receive asylum, since they involve the expulsion of persons without an individualized study of their migration status, regardless of whether they are suffering persecution or a threat to any of their rights.¹⁵²
173. The prohibition against collective expulsions is established in the American Convention on Human Rights (Article 22.9), as well as in other international human rights instruments, such as the Universal Declaration of Human Rights (Articles 9, 13.1 and 13.2), the International Covenant on Civil and Political Rights (Articles 12 and 13), and International Covenant on the Elimination of All Forms of Racial Discrimination (Article 5), among others.
174. The Commission considers that collective expulsions or deportations are manifestly contrary to international law. In this regard, as established in the *Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons, and Victims of Trafficking*, “[t]he absence of a reasonable and objective examination of each person’s individual case means that collective expulsion or deportation is inherently arbitrary and must be prohibited. Therefore, each case of expulsion or deportation must be ordered through an individual

¹⁵⁰ UNHCR, *Asylum Processes (Fair and efficient asylum procedures)*, 31 May 2001, para. 22.

¹⁵¹ UNHCR, *Asylum processes (Fair and efficient asylum procedures)*, 31 May 2001, para. 23.

¹⁵² IACHR, *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, OAS/Ser.L/V/II.155, Doc. 16, July 24, 2015, paras. 102 and 103.

decision, with particular consideration given to any international protection needs.”¹⁵³

175. For its part, the Inter-American Court "considers that the ‘collective’ nature of an expulsion involves a decision that does not make an objective analysis of the individual circumstances of each alien and, consequently, incurs in arbitrariness.¹⁵⁴" In order to comply with the prohibition of collective expulsions, the Court has held that proceedings that may result in the expulsion or deportation of an alien must be individual in order to assess the personal circumstances of each person, and this requires, at least, the identification of the person and the clarification of the particular circumstances of his migratory status.¹⁵⁵
176. In addition, the Commission understands that the prohibition of collective expulsions applies to any measure that has the effect of preventing migrants from reaching the borders of States or of pushing them towards another State, such as interdiction measures, even those carried out extraterritorially, to prevent people from arriving at its borders.¹⁵⁶

3. No Penalty for Irregular Entry

177. Article 31 of the Convention relating to the Status of Refugees prohibits States parties to "impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."
178. According to UNHCR's interpretation, the prohibition on penalties for irregular entry applies in general and not just to criminal sanctions. In that sense, the broad meaning of the term "penalty" must be taken into account and, therefore, it must be concluded that Art. 31.1 denies governments the right to subject refugees to any detriment for reasons of their unauthorized entry or presence in the asylum country. The term '*penalties*' is not defined in Article 31, but it

¹⁵³ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XVI, Principle 72.

¹⁵⁴ I/A Court H.R., *Case of Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations and Costs, Judgment of October 24, 2012, par. 171.

¹⁵⁵ I/A Court H.R., *Case of Expelled Dominican and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 28, 2014, par. 381.

¹⁵⁶ IACHR, *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, OAS/Ser.L/V/II.155, Doc. 16, July 24, 2015, par. 105.

could include prosecution, fine, imprisonment, and other restrictions on freedom of movement.”¹⁵⁷

179. In turn, the IACHR has established that the fact that a migrant is in an irregular situation in a State does not harm any fundamental legal good that needs protection through the punitive power of the State and, therefore, that migrants, including persons seeking international protection, must be free from penalties on account of entry, presence or migration status, or on account of any other offense which can only be committed by migrants. Therefore, punishment of irregular entry, presence, stay or status is disproportionate under criminal law.¹⁵⁸
180. In that regard, the entry into or stay in the territory of a State by a person in need of international protection should not result in any kind of punishment for such persons, especially since this type of entry is often the only way they can afford to make their claim for asylum or complementary protection possible.¹⁵⁹ Otherwise, such criminalization would eventually undermine and void the right to seek and receive international protection.

4. No Immigration Detention

181. The IACHR has held that the detention of asylum seekers and refugees for migration-related reasons is not justified under international law and that, in addition to constituting a penalty within terms of Article 31 of the Convention relating to the Status of Refugees, it can also amount to collective punishment in violation of international human rights law.¹⁶⁰ In addition, the Commission has recognized that detention may constitute an obstacle to the exercise of the right to seek and receive asylum. The Commission, therefore, reaffirms that irregular entry into a country does not constitute an offense, which is why there is no automatic detention of persons seeking asylum, whereas States have an obligation to use alternative measures to detention for the duration of the procedure.¹⁶¹

¹⁵⁷ UNHCR, UNHCR Submissions to the Inter-American Court of Human Rights in the framework of the request for an Advisory Opinion on the scope and purpose of the right to asylum, 30 April 2017, Annex A, para. 2.

¹⁵⁸ IACHR, Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, San Salvador, December 7, 2019, Section XV, Principle 67.

¹⁵⁹ The IACHR has expressed such a view in Resolution 2/18 on forced migration of Venezuelan persons (adopted in Bogotá, Colombia, in the framework of its 167th session on March 2, 2018).

¹⁶⁰ IACHR, Observations of the IACHR on the request for an advisory opinion presented by the State of Ecuador The institution of asylum in its different forms and the legality of its recognition as a human right of every individual in accordance with the principle of equality and non-discrimination, May 4, 2017, par. 49.

¹⁶¹ IACHR, Observations of the IACHR on the request for an advisory opinion presented by the State of Ecuador The institution of asylum in its different forms and the legality of its recognition as a human

182. In this sense, according to the IACHR, detention of asylum seekers is a measure that runs counter to the spirit of protection in accordance with international law, which should guide the actions of States with respect to these persons. More granularly, the Commission established that:

measures aimed at the automatic detention of asylum seekers are therefore impermissible under international refugee protections. They may also be considered arbitrary and, depending upon the characteristics of persons affected by any such restrictions, potentially discriminatory under international human rights law.¹⁶²

183. In addition, the Commission notes that the detention of asylum-seekers may interfere with their right of access to justice. According to information provided by civil society organizations, on many occasions people who must remain in detention withdraw their cases and opt for voluntary repatriation, even when this situation puts their lives at risk. Organizations also mentioned a lack of mechanisms for the correct identification of persons in need of international protection in detention. In this regard, the Special Rapporteur on torture has pointed out that often people in detention do not have the minimum guarantees of due process, such as a translator or interpreter and legal representation, which often leaves them in a limbo where their migration status is concerned.¹⁶³

184. In this respect, the Commission was able to analyze the conditions of access of asylum seekers through its monitoring mechanisms, repeatedly indicating the need for the presence of interpreters throughout all procedures involving the applicants. During its working visit to the southern border of the United States, the IACHR noted that a lack of translators and interpreters was a weakness in terms of legal assistance that directly undermined the guarantees of due process.¹⁶⁴

185. For its part, the UNHCR has held that the detention of asylum seekers and refugees as a punitive measure or a disciplinary sanction is not permitted.¹⁶⁵ In that regard, based on the prohibition of penalization for irregular entry or stay contained in Article 31 of the Convention relating to the Status of Refugees,

right of every individual in accordance with the principle of equality and non-discrimination, May 4, 2017, par. 49.

¹⁶² 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, December 31, 2015, par. 433.

¹⁶³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, para. 21.

¹⁶⁴ IACHR, Press release 228/19, IACHR conducted visit to the United States' southern border, September 16, 2019.

¹⁶⁵ UNHCR, UNHCR Submissions to the Inter-American Court of Human Rights in the framework of the request for an Advisory Opinion on the scope and purpose of the right to asylum, 30 April 2017, Annex A, para. 3.

taken together with the right to freedom of movement established in Article 26 of that Convention, the UNHCR has recognized in its Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers that many asylum seekers have suffered traumatic experiences, a situation that must be taken into account when deciding whether to impose restrictions on their freedom.¹⁶⁶ Thus, liberty must be the default situation for asylum seekers¹⁶⁷ and detention must be authorized in accordance with national law and may only be used when it is determined that it is necessary, reasonable, and proportionate to a legitimate aim.¹⁶⁸

186. In addition to the above, the Inter-American Court has already stated that the deprivation of liberty of children will never be in their best interests. In light of the above, States may not resort to the deprivation of liberty of children—whether they are with their parents or unaccompanied or separated from their parents—as a precautionary measure to protect the objectives of immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority.¹⁶⁹
187. Likewise, the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have consistently stated that "children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice."¹⁷⁰
188. The Committees have also emphasized the harm and repercussions that immigration detention can have on minors' physical and mental health and on their development, even when they are detained for a short period of time or

¹⁶⁶ UNHCR, Detention Guidelines: Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 2012.

¹⁶⁷ UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012; IACHR, Observations of the IACHR on the request for an advisory opinion presented by the State of Ecuador, The institution of asylum in its different forms and the legality of its recognition as a human right of every individual in accordance with the principle of equality and non-discrimination, May 4, 2017, par. 44.

¹⁶⁸ UNHCR, Detention Guidelines: Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 2012, p. 16-20.

¹⁶⁹ I/A Ct.HR., Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, August 19, 2014, par. 283(6).

¹⁷⁰ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, para. 5.

with their families.¹⁷¹ Additionally, the Special Rapporteur against torture and other cruel, inhuman or degrading treatment or punishment has established that "the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children."¹⁷²

189. In this sense, the IACHR, in addition to pointing out that immigration detention should be a measure of last resort and that all alternatives to detention should be explored, recommends that persons in need of international protection, in situations of vulnerability, pregnant women, nursing mothers, and victims of human trafficking should not be detained.¹⁷³ The Commission also notes the need for States to prohibit the immigration detention of children both by law and in practice and stresses that, since deprivation of liberty will never be in their best interests, the prohibition should be extended to their parents, relatives, principal carer, or legal guardian accompanying them.¹⁷⁴
190. In addition, the IACHR has recommended that persons in vulnerable situations, such as refugees, victims of human trafficking, victims of crime, children and adolescents, survivors of torture and trauma, pregnant women, nursing mothers, older persons, persons with disabilities, or those with physical or mental health needs should not be placed under detention for migratory reasons.¹⁷⁵ According to the Special Rapporteur on Torture, depending on the circumstances, the threshold for torture or cruel treatment can be reached very quickly, if not immediately, for migrants in situations of increased vulnerability, such as children, women, older people, persons with disabilities, medical conditions, or torture trauma, and LGBTI persons.¹⁷⁶

¹⁷¹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, para. 9.

¹⁷² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 March 2015, A/HRC/28/68, para. 80.

¹⁷³ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XV, Principle 69.

¹⁷⁴ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Trafficking*, San Salvador, December 7, 2019, Section XV, Principle 71.

¹⁷⁵ IACHR, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, OAS/Ser.L/V/II Doc.48/13, December 30, 2013, par. 577.5.

¹⁷⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, para. 28.

C. Rights and Procedural Guarantees in Connection with the Recognition of Protection Status

191. In accordance with international norms, the right to seek and be granted asylum upheld in Article 22.7 of the American Convention on Human Rights requires the pursuit of nondiscriminatory and fair procedures to ensure the effective application of protection instruments. The Inter-American Court and the IACHR have pointed to the close connection with Articles 8 and 25 of the American Convention and have established that adequate conditions for protecting this population derive from procedural guarantees.
192. In order for States to be able to guarantee appropriate protection for persons needing international protection, such persons have to be identified. That identification consists of the so-called "recognition of refugee status or of statelessness," or, where applicable, "the concession or granting of supplementary protection," for which no specific procedure is envisaged in the international conventions regulating this matter. Consequently, it is up to each State to determine said status, based on its own criteria and having regard to the specific features of its administrative and constitutional structures.
193. At the same time, it is true that minimal parameters must be followed in such procedures, above all in light of international human rights law, the case law derived from it, and the guidelines and recommendations of the Office of the United Nations High Commissioner for Refugees (UNHCR).
194. The Executive Committee of the UNHCR points to "the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection."¹⁷⁷
195. For its part, the Inter-American Commission has established that there needs to be a procedure within a well-defined procedural framework which offers the necessary minimum guarantees for individual and appropriate analysis of each request for international protection.¹⁷⁸
196. For its part, the Inter-American Court concluded that the right to seek and to receive asylum established in Article 22(7) of the American Convention must be read in conjunction with Articles 8 and 25 of that instrument, thereby ensuring that the person applying for refugee status must be heard by the State

¹⁷⁷ Executive Committee of the Office of the United Nations High Commissioner for Refugees. General Conclusion on International Protection No. 71 (XLIV) - 1993, para.1

¹⁷⁸ IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, February 28, 2000.

to which he applies, with due guarantees and in the corresponding proceeding.¹⁷⁹

197. Accordingly, the Inter-American Court has established that asylum seekers must have access to proceedings to determine this status that permit a proper examination of their request in keeping with the guarantees contained in the American Convention and in other applicable international instruments, which entail the following obligations for the States:¹⁸⁰

a) They must guarantee the applicant the necessary facilities, including the services of a competent interpreter, as well as, if appropriate, access to legal assistance and representation in order to submit their request to the authorities. Thus, the applicant must receive the necessary guidance concerning the procedure to be followed, in words and in a way that he can understand and, if appropriate, he should be given the opportunity to contact a UNHCR representative;

b) The request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority, and requires a personal interview;

c) The decisions adopted by the competent organs must be duly and expressly founded;

d) In order to protect the rights of applicants who may be in danger, all stages of the asylum procedure must respect the protection of the applicant's personal information and the application, and the principle of confidentiality;

e) If the applicant is denied refugee status, he or she should be provided with information on how to file an appeal under the prevailing system and granted a reasonable period for this, so that the decision adopted can be formally adopted, and

f) The appeal for review must have suspensive effects and must allow the applicant to remain in the country until the competent authority has adopted the required decision, and even while the decision is being appealed, unless it can be shown that the request is manifestly unfounded.

198. Likewise, the "Brasilia Regulations Regarding Access to Justice for Vulnerable People" constitute an important parameter to be followed in connection with such procedures. The document expressly includes refugees among those in vulnerable circumstances and acknowledges that they must be afforded special

¹⁷⁹ I/A Court H.R. *Case of the Pacheco Tineo Family v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272, par. 154.

¹⁸⁰ I/A Court H.R., *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, par. 159.

protection. That being so, mention can be made of the need to comply with the following rights and guarantees:

- a) Quality and specialized technical legal assistance free of charge;
- b) Right to an interpreter when the foreigner does not know the official language or languages;
- c) The need for simple and easily understandable procedural mechanisms;
- d) Expeditious processing; and
- e) Specialization, awareness-raising and proper training of the authorities involved in these processes/procedures.¹⁸¹

199. In the same vein, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* recommends a series of rights and guarantees, including provisions that cut across all protection mechanisms, such as:¹⁸²

- (i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority;
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed;
- (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance;
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned; Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;

¹⁸¹ Ibero-American Judicial Summit *Brasilia Regulations Regarding Access to Justice for Vulnerable People*, Brasilia, March, 2008, Chapter 1, Section 2, 6.13.

¹⁸² UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, reissued, 2019, para. 192.

(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status;

(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system, in order for the decision taken to be officially reconsidered;

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive; He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.

Brazil Declaration and Plan of Action and the Quality Asylum Programme

The 2014 Brazil Declaration and Plan of Action (“A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean”) drawn up to mark the thirtieth anniversary of the Cartagena Declaration on Refugees of 1984 (“*Cartagena +30*”) also established parameters for procedures in connection with the “Quality Asylum” program, including, notably, the goal of consolidating national refugee status determination systems, particularly to guarantee:¹⁸³

- i. Effective access to refugee status determination procedures, especially at borders, airports and ports, that respect due legal process and regional and international standards;
- ii. Respect for the principle of non-refoulement and the right to legal representation, if possible through mechanisms that are free of cost, with qualified interpreters or translators;
- iii. The principle of confidentiality for the applicants and their asylum claim and the applicants’ right to be heard through a pre-established and objective procedure including an assessment of the risk to their most fundamental rights, and the possibility of contacting UNHCR;
- iv. The asylum-seekers’ right to receive a decision on their case in writing, which duly founded and reasoned, within a reasonable, set timeframe, applying the principles of good faith and benefit of the doubt.

¹⁸³ [Brazil Declaration and Plan of Action \(“A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean”\)](#), Brasilia, 3 December 2014, Chapter Two, p. 10.

200. Accordingly, based on systematic interpretation of documents and of international case law, it is possible to conclude that States have an obligation to respect and realize applicants' individual rights, such as the right to appropriate information and guidance, the right to a cost-free translator or interpreter, the right to cost-free legal aid, and the right to contact a UNHCR representative; as well as the procedural guarantees inherent in due legal process in connection with the various procedures, such as: the existence of an impartial and qualified authority for processing applications and taking a decision, the conducting of individualized and personal interviews, observance of confidentiality, the possibility of using all lawful and legally allowed means of proof and receiving the benefit of the doubt, being told the reasons and grounds for decisions, proper notification of the interested party, the possibility of recourse to a suitable and effective remedy, and completion of the process within a reasonable period of time.

1. The Individual Rights of Applicants

a) Right to Appropriate Information and Guidance

201. The first people whom persons needing international protection usually come into contact with are State border control personnel. For that reason, it is essential that those officials have clear instructions regarding how they should proceed in accordance with international instruments. Above all, that includes identifying people potentially in need of protection, observing the principle of non-refoulement, applying an intersectional lens, non-rejection at borders, simplifying red tape in pertinent cases, and affording sufficient information and appropriate guidance regarding the procedures available for applying for international protection in accordance with domestic law. In this regard, the IACHR underscores the importance of border control personnel being trained to handle distinctions between migration procedures and international protection applications, such as refugee status, complementary protection, and statelessness.

202. All of which needs to be in simple language that end-users can grasp. To that end, it is to be recommended that all official information on procedures be user-friendly and that the authorities responsible for initial contact are duly identified as such. The above also applies to the authorities responsible for initial contact with persons needing international protection, who are usually found in border areas. In addition, as a consequence of the right to information and appropriate guidance, States have the obligation to take measures to guarantee access to information effectively, considering the situation of people with disabilities, including language adaptation measures, Visual, auditory relay and signaling information at all stages of their processes.

203. As established by the IACHR in its Resolution 04/19, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of*

Human Trafficking, "States shall ensure that the situation of each individual is determined and that migrants who are at particular risk and who may or are likely to present international protection needs, [...], or are unaccompanied children or children separated from their families] are [promptly] identified and referred to the proper authorities or protection procedures. Authorities shall also ensure effective and immediate access to information for example in migratory detention centers and points of entry into the territory, including airports, in the language of the person, on the existence the right to asylum and the procedure for seeking international protection, including refugee status."¹⁸⁴

204. For its part, the Brazil Declaration and Plan of Action (*Cartagena +30*) in connection with the "Borders of Solidarity and Safety" Programme to be jointly implemented by States, UNHCR, other international organizations, and civil society actors, proposes, inter alia, the following actions:¹⁸⁵

i) Provide continued training for State officials working in border areas on the rights of persons, the profiles of asylum-seekers and refugees in situations of vulnerability and on the measures adopted by the State in the implementation of the "Borders of Solidarity and Safety" programme.

ii) Carry out broad information and dissemination campaigns, both at border posts and in areas along migratory routes, on the risks and dangers to which people are exposed when travelling as part of mixed migratory movements and on the protection mechanisms that exist in each country.

iii) Improve basic care and assistance infrastructure for asylum-seekers and refugees, as well as access to social and community services.

205. For its part, the right to information needs to be respected by state authorities throughout the process for determining refugee or stateless person status and for the granting of complementary protection, so as to enable applicants to be informed as to timeframes, procedures, decisions, and their possible impacts, as well about appeal possibilities and remedies.

¹⁸⁴ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIV, Principle 57.

¹⁸⁵ *Brazil Declaration and Plan of Action ("A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean")*, Brasilia, 3 December 2014, Chapter Two, p. 11.

b) Right to a Translator and/or Interpreter, Free of Charge

206. Article 8.2 of the American Convention on Human Rights establishes the right of the accused to be assisted without charge by a translator or interpreter if he does not understand or does not speak the language of the tribunal or court: a guarantee that has been extended to administrative and other proceedings. This right is particularly important for people who do not speak the language in which their proceedings are being conducted, which is the case for a large majority of applicants for international protection. Translation or interpretation enable an immigrant to understand the proceedings he is involved in and all the procedural rights he is entitled to,¹⁸⁶ as well as to communicate effectively with the authorities.
207. Thus, the right to a translator or interpreter recognizes and corrects one element of the real disadvantages experienced by migrants brought before the bar. This facility, along with others, such as cost-free legal representation, enables people to fully assert other rights that the law recognizes for everyone, such as genuine access to justice and the benefit of due process of law on an equal footing, including the necessary adaptations so that the procedures are fully accessible, considering disability situations.¹⁸⁷
208. This right likewise includes the State's obligation to ensure that there are translators or interpreters available free of charge for persons pertaining to other, non-predominant cultures and ethnicities. In the *Case of Tiu Tojín v. Guatemala*, the Inter-American Court pronounced on the need to offer such persons interpreters or other effective means to ensure that they understand and are understood, given their right of access to justice without discrimination.¹⁸⁸ Similarly, the IACHR found that the right to due process was violated in the case of the population of Miskito origin when testimony statements were taken from them in criminal proceedings without the assistance of interpreters, even though the majority only mastered their own native language.¹⁸⁹
209. Along those same lines, the Human Rights Committee had already noted the obligation of States to ensure that persons seeking international protection

¹⁸⁶ IACHR *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families.*, par. 99.C.;

¹⁸⁷ I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, par. 119.

¹⁸⁸ I/A Court H.R. *Case of Tiu Tojín v. Guatemala*. (Merits, Reparation, and Costs. Judgment of November 26, 2008, par. 100;

¹⁸⁹ IACHR. *Special Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, par. 17 (d)

could avail themselves of the services of an interpreter from the start of the proceedings.¹⁹⁰

210. The right to a translator or interpreter is also recognized in the European and African human rights systems. The European Court of Human Rights (ECHR) has recognized the right of people to be given information in a language that enables them to understand the reasons for their detention, the proceedings, and the guarantees they can be set in motion. For its part, the African Commission on Human and Peoples' Rights explicitly recognizes entitlement to the cost-free assistance of an interpreter and specifies the scope of that right: in criminal proceedings, establishing that it applies to all stages of the proceedings, including pre-trial proceedings; in written or oral proceedings where it is needed to understand the proceedings; that the interpretation or translation suffice to allow the person to understand the proceedings and the judicial authorities to understand the testimony of the accused or of witnesses for the defense.¹⁹¹
211. Regarding the entitlement to a translator or interpreter in cases involving children and adolescents, the Inter-American Court underscored that:

To be able to guarantee the right to be heard, States should ensure that every child may be assisted by a translator or interpreter if she or he does not understand or does not speak the language of the decision-maker. In this regard, the assistance of a translator or interpreter shall be considered a basic and essential procedural guarantee in order to comply with the child's right to be heard and to ensure that its best interest constitutes a paramount consideration. Otherwise, the child's effective participation in the proceedings becomes illusory.¹⁹²

212. Along the same lines, the Committees on the Rights of the Child and on Migrant Workers and Members of Their Families have emphasized that children and adolescents should be provided with a translator in order that they may express themselves fully in their native language and/or receive support from someone familiar with the child's ethnic, religious and cultural background. They add that those professionals should be trained in the specific needs of children in the context of international migration, including gender, cultural, religious and other intersecting aspects.¹⁹³

¹⁹⁰ United Nations, Human Rights Committee, Concluding observations on the second periodic report of Malta, 21 November 2014, para. 17.

¹⁹¹ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, 1. Right to adequate time and facilities for the preparation of a defence, 7.1

¹⁹² I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 124.

¹⁹³ Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the

213. Persons working as translators or interpreters perform a paramount function in safeguarding due process and access to justice of persons entitled to international protection. For that reason, it is highly useful to draw up guides regarding their role and to provide appropriate training that includes sensitivity and confidentiality issues. In particular, it is crucial to ensure that the translation is accurate and manages to convey the message intended precisely, clearly and reliably from one language to another. For that it is important that the interpreter not give advice or express his or her opinions, and that there be no conflicts of interest,¹⁹⁴ with care being taken to disclose any factors that might impair his or her impartiality, such as personal acquaintance with an applicant or the receipt of threats or offers of bribes.¹⁹⁵ Due account must also be taken of the need to have women interpreters, especially in cases involving sexual or gender-based violence.¹⁹⁶
214. In keeping with the UNHCR rules, the IACHR points to the need to ensure that interpreters are properly trained and have appropriate linguistic and communication skills and to seek to use only certified interpreters, including mastery of sign language. Impartiality and confidentiality need to be maintained by interpreters throughout proceedings and procedures must be available for commenting on or complaining about their services.¹⁹⁷

c) Right to Free Legal Aid

215. Applicants for international protection are also entitled to cost-free legal assistance, in both administrative and judicial proceedings.
216. The Inter-American Court pronounced on this matters in the *Case of Vélez Loor v. Panamá*, in which it considered that in administrative or judicial proceedings where decisions are taken concerning deportation, expulsion or deprivation of freedom, the provision of free public legal aid is necessary¹⁹⁸ In such cases, the Inter-American Court has recognized that free legal aid is imperative to ensure that justice is done. The Court has stressed that cases involving a foreigner who may not know the country's legal system require the State to take into account

general principles regarding the human rights of children in the context of international migration, 16 November 2017, para. 36.

¹⁹⁴ Maahanmuuttovirasto, Finnish Immigration Service, Interpretation in the asylum process – Guide for interpreters, 2010, p. 9.

¹⁹⁵ ACNUR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 220.

¹⁹⁶ UNHCR, Inter-Parliamentary Union, *Refugee Protection: A Guide to International Refugee Law*, 2001, p. 59.

¹⁹⁷ ACNUR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 220.

¹⁹⁸ I/A Court H.R., *Case of Vélez Loor v. Panamá*, November 23, 2010, par. 146.

the particular characteristics of the person's situation so that he or she has effective access to justice on equal terms.¹⁹⁹

217. In the same vein, the UN Special Rapporteur on the Human Rights of Migrants has stated that in order to truly operationalize the right to due process, migrants enjoy a right to technical legal assistance, which should be provided by the State free of charge for those who cannot afford it.²⁰⁰ The United Nations Committee against Torture also recommended in its Concluding observations on the seventh periodic report of Mexico that the country "provide quality legal aid services to migrants and asylum seekers."²⁰¹
218. Thus, according to the Brasilia Regulations Regarding Access to Justice for Vulnerable People, the relevance of technical legal advice for the effectiveness of the rights of vulnerable people is confirmed. Thus, according to the Regulations, the right to legal assistance and public defense include legal consultation regarding any issue that may affect the legitimate rights or interests of the vulnerable person, even if a trial has not been initiated.²⁰² Moreover, that assistance must be free, high-quality, and specialized. To that end, the Regulations stress the importance of broadening and strengthening Public Defense Offices and legal assistance mechanisms, such as legal consultancy with the participation of universities and bar associations.
219. Following UNHCR guidelines, the IACHR recognizes that, in order to act properly as a legal representative, an individual must have the necessary training and/or experience to perform this role. As a general rule, representatives need to have the following skills:²⁰³
- i. a working understanding of international refugee law;
 - ii. a working understanding of UNHCR procedures;
 - iii. experience in assisting refugee status claimants;
 - iv. a thorough understanding of the Applicant's claim; and
 - v. be bound by a code of ethics or professional responsibility.

¹⁹⁹ Ibid., par. 132.

²⁰⁰ Special Rapporteur on the Human Rights of Migrants, Felipe González, The Human Rights of Migrants, 26 July 2018, para. 10.

²⁰¹ United Nations, Committee against Torture, Concluding observations on the seventh periodic report of Mexico, 13 May 2019.

²⁰² Ibero-American Judicial Summit Brasilia Regulations Regarding Access to Justice for Vulnerable People, Brasilia, March, 2008, Chapter 2, Section 2, paras. 28-31 (and 29).

²⁰³ UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, Legal Representation in UNHCR RSD Procedures (Unit 2.7), 2.7.3 (a), p. 3.

220. Furthermore, anyone assigned to provide legal assistance must:²⁰⁴

- i) possess a valid license or professional legal accreditation as a lawyer, solicitor, attorney, barrister, counselor-at-law or equivalent professional designation; or
- ii. be a member of an established and reputable organization providing free or low-cost legal representation to asylum-seekers and refugees with which UNHCR has a partnership arrangement; or
- iii. have already been authorized by UNHCR to act as legal representative in mandate RSD procedures.

221. Therefore, considering that decisions to grant or deny international protection have repercussions with respect to guarantees for applicants' other human rights and could jeopardize their life, liberty, or personal integrity, as well impair their access to economic, social, and cultural rights,, the Commission deems that free legal assistance is a key right for ensuring due process for applicants for international protection, especially in view of those candidates' special vulnerability.

d) Right to Contact a UNHCR Representative

222. Recognizing the international protection mandate of the Office of the United Nations High Commissioner for Refugees, the IACHR notes that contact with a UNHCR representative enables applicants for international protection to receive help or guidance from the international agency vested with specific competence and a mandate in this field and which, often enough, is the only agency people needing protection can turn to that inspires trust and offers applicants a secure environment.

223. Accordingly, the Commission stresses that States should offer and broaden such contact, thereby enabling UNHCR and/or the agencies working with it to offer their services and help those in need of them

224. It is worth noting that in some countries, UNHCR acts as the agency in charge of processing and deciding on international protection applications, so that, in such countries, too, contact with a representative will serve to provide access to proceedings.

²⁰⁴ UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, Legal Representation in UNHCR RSD Procedures (Unit 2.7), 2.7.3 (a), p. 3.

2. Minimum Procedural Guarantees (or Due Guarantees)

a) Impartial Authorities Trained to Identify International Protection Needs

225. In most countries in the region, the procedures for determining entitlement to refugee, statelessness or complementary protection status are handled by administrative authorities. There are a few exceptions to this rule, such as Costa Rica, where there is a second instance Tribunal specializing in asylum, in addition to the United States and Canada, which also have authorities specializing in the subject.
226. Decisions on international protection matters cannot be delegated to non-specialized police or administrative officials. The Inter-American Court of Human Rights has also stated that if international protection proceedings are conducted by judges or courts, these must evidently comply with the essentials of impartiality and independence. If, on the other hand, administrative officials take this type of decision, they must respond before the law, their superiors and, if appropriate, the control mechanisms, for the legality of their decisions.²⁰⁵ Accordingly, the process of appointing and assigning an adjudicator and the status of the office within the administrative structure of the state must guarantee impartiality and protection against any possible pressure or influence, and they must act strictly in accordance with the law.²⁰⁶
227. In addition, in proceedings involving children, States should guarantee that those who intervene in them are appropriately qualified, so that they can identify the special needs for protection of the child, in keeping with her or his best interest.²⁰⁷
228. Apart from impartiality it is vital that there should be clearly designated and identified authorities who receive, register, and process asylum claims and who have been given clear instructions on their duties and obligations.²⁰⁸ The official authority in charge of determining entitlement to refugee, statelessness, or complementary protection status must have clear and precise information regarding the procedures involved, as well as be trained in the

²⁰⁵ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 120.

²⁰⁶ 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, December 31, 2015, par. 313; IACHR *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families*, par. 99.

²⁰⁷ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 121.

²⁰⁸ UNHCR, Inter-Parliamentary Union, *Refugee Protection: A Guide to International Refugee Law*, 2001, p. 57.

highest human rights norms and standards. He or she must also have sufficient sensitivity to deal with victims of trauma.

229. Accordingly, it is deemed important to establish a technical, specialized, independent, and autonomous authority, run by its own set of officials selected in accordance with technical competence criteria and based on their having received specific training in refugee and human rights law and their lack of ties to governments, so as to preclude political interference.

b) Personal Interviews and the Right to Be Heard

230. A personal interview must be conducted with a qualified official competent to make an individual, objective and impartial decision. The asylum-seeker must be able to present a detailed description and provide proof of the circumstances of the case, as well as establish the relevant facts.
231. Due to the impossibility for many international protection seekers of presenting evidence, a personal interview is of the utmost importance for assessing the credibility of an asylum-seeker's statements.²⁰⁹ In the Case of John Doe et al. v. Canada, the Commission held that the right to seek asylum requires that **a person be heard to see if he or she is at risk of persecution** and that it is precisely the act of hearing the person that implements the most fundamental element of the right to seek asylum.²¹⁰
232. In this regard, it is very important for interviewers to take the vulnerability of a person's situation into account, from an intersectional perspective, especially any pre-existing traumas, and that they give due consideration to possible cultural, ethnic, religious, and linguistic differences and other differentiating factors.
233. UNHCR observes that refugee status must normally be determined on an individual basis. At the same time, that status may be determined on a collective or "group determination" basis if: i) entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees; ii) the need to provide assistance is extremely urgent; iii) it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the

²⁰⁹ UNHCR, Inter-Parliamentary Union, Refugee Protection: A Guide to International Refugee Law, 2001, p. 59.

²¹⁰ IACHR, Case 12.586, John Doe et al. v. Canada, July 21, 2011, par. 92. [<https://www.refworld.org/cases,IACHR,502b61572.html>]

group; and iv) when each member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.²¹¹

234. The beginning of the interview should be devoted to creating an environment of trust and respect, so that the applicant feels comfortable enough to tell his/her story as coherently and completely as possible. It is important that the interviewer, translator and/or interpreter give a presentation and an explanation of the confidentiality of the information and of the importance of the act for the outcome of the procedure. The next step should be devoted to listening to the applicant's story. Then, the interview should proceed to the asking of open questions designed to clarify contradictory aspects or matters that were not understood in the applicant's story.²¹²
235. When the application involves several family members without an individual application form for each member, individual interviews should be conducted with each family member. If, for any reason, that is not possible or not recommended, it is up to the interviewer to evaluate the possibility of conducting a short interview with each family member in order to assess the existence of possible special protection needs.²¹³
236. During the interview the applicant may also present other kind of information, such as documents and witnesses. Likewise, the applicant should be notified of that possibility when filing his or her application, so that there is sufficient time and the opportunity to produce them during the personal interview.²¹⁴
237. Except in cases when a person prevented by special circumstances or a child or adolescent resists, the interview may not be omitted.²¹⁵ In expedited proceedings, the time taken may be reduced but an interview must take place. Including in manifestly unfounded cases, the analysis may not be based solely on documents.²¹⁶
238. At the end, all the content of the interview must be recorded in writing and faithfully reflect the words and expressions used by the applicant throughout his or her account.²¹⁷

²¹¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, reissued, 2019, Geneva, p. 204

²¹² UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 4.8- 4.10.

²¹³ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 4-15.

²¹⁴ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 4-12, 13

²¹⁵ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 4.24

²¹⁶ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 4.22

²¹⁷ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, p. 4.14

c) Confidentiality and the Protection of Personal Data and Information

239. Confidentiality constitutes the guarantee for trust and for the security of the procedure. Thus, in addition to all the steps taken to safeguard it, applicants must be duly notified of the existence of this guarantee. At the same time, it should be pointed out that confidentiality is a guarantee vis-a-vis third parties and does not apply to the interested party, who shall retain his right to access the records, given that this is a right to internal disclosure of the proceeding.
240. Information provided by asylum-seekers must only be used to determine eligibility for refugee status.²¹⁸ Accordingly, no information should be shared with the authorities of the applicant's country of origin, nor should such information be released to any third party without the express consent of the individual concerned²¹⁹
241. Regarding this principle, the Inter-American Court has determined that in order to protect the rights of applicants who may be in danger, all stages of the asylum procedure must respect the protection of the applicant's personal information and the application, and the principle of confidentiality.²²⁰
242. On this matter, it is important to emphasize that the right to consular protection²²¹ does not apply to asylum-seekers and refugees, given the detrimental consequences it might have for the safety of the person and the principle of confidentiality.

d) Possibility of Using All Lawful and Legally Allowed Means of Proof and Receiving the Benefit of the Doubt in the Assessment of the Facts and Circumstances Surrounding Applications

243. It is possible to highlight two stages in the assessment of applications for international protection: i) the first concerns the establishment of factual circumstances which may constitute evidence that supports the application; and ii) the second refers to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions for recognizing refugee status or for granting other

²¹⁸ UNHCR, *Refugee Status Determination, Identifying who is a refugee Self-study module No. 2*, p. 157.

²¹⁹ UNHCR, *Refugee Status Determination, Identifying who is a refugee Self-study module No. 2*, p. 157.

²²⁰ I/A Court of H.R., Advisory Opinion OC-21/14: *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, August 19, 2014, par. 254.

²²¹ It refers to the set of mechanisms expressed in the Vienna Convention on Consular Relations that nationals can access, subject to measures that involve the deprivation of their freedom to notify and receive assistance by the consular offices of their nationality States, see: IACHR, *Human Mobility, Inter-American Standards*, 2016, para. 329.

forms of international protection are met.²²² This section specifically addresses stage 1.

244. Given the nature of the cases involving applications for international protection, the issue of evidence needs to be analyzed from a particular angle. Regarding means of proof, the Commission considers that all lawful and legally allowed means of proof should be accepted, (including statements, documents, and other elements presented by the applicant) that support and/or demonstrate the facts substantiating the application and are relevant for recognition of the need for international protection.
245. Accordingly, the IACHR, pursuant to the parameters of the European Asylum Support Office (EASO), considers that evidence may include anything that asserts, confirms, supports or bears on relevant facts. Evidence may be verbal or documentary, including written, graphic, digital and visual materials. It may also encompass exhibits such as physical objects and bodily scarring, as well as audio and visual recordings.²²³ The following Table shows a non-exhaustive list of types of evidence:

Oral	<ul style="list-style-type: none"> – statements of applicant – statements of family members – statements of witnesses – statements of experts 	
Documents	<ul style="list-style-type: none"> – identity card/passport – birth certificate – medical reports – forensic reports – legal reports – court decisions or judgments – witness reports – reports on country of origin 	<ul style="list-style-type: none"> – reports on age assessment – reports on language assessment – printed emails – letters – travel documents – arrest warrants – (official) police reports – media reports
Visual	<ul style="list-style-type: none"> – social media – photographs – videos – drawings 	
Audio	<ul style="list-style-type: none"> – audio recordings 	
Exhibits	<ul style="list-style-type: none"> – physical objects 	

²²² European Asylum Support Office (EASO), *Evidence and credibility assessment in the context of the Common European Asylum System*, 2018, p.. 43 (p.41)

²²³ European Asylum Support Office (EASO), *Evidence and credibility assessment in the context of the Common European Asylum System*, 2018, p.. 52 (49)

	<ul style="list-style-type: none"> – fingerprints – body scarring
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Source: European Asylum Support Office (EASO), Evidence and credibility assessment in the context of the Common European Asylum System, 2018.

246. On the other hand, it is necessary to bear in mind that In most cases persons fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents, making it very difficult for them to provide evidence for all the statements they make in their personal interviews. Likewise, in connection with the rights and guarantees cited in inter-American norms and standards regarding human mobility, refuge, asylum, statelessness, and international protection, the Commission refers to the table contained in the previous paragraph, containing a list of possible types of evidence for reinforcing the accounts given by applicants for asylum or any other kind of protection. In that regard, it considers that it should not be a requirement that documents such as passports or others be current; rather consideration needs to be given to all the fact that applicants can cite throughout the proceedings. The point is that the principal purpose of the procedure is not to identify refugees with total certainty, but rather to establish the probability that they are refugees which means granting the benefit of the doubt more than relying on proof.
247. Consequently, in line with the UNHCR Guidelines, the IACHR considers that the examiner in the case must ascertain and evaluate all the relevant facts in light of the means at his disposal to check the credibility and veracity of statements and, where applicable, produce the necessary evidence in support of the application.²²⁴ In other words, in cases in which an applicant may not be able or lacks the wherewithal to prove all the facts supporting his or her application, it may be for the examiner to use all the means at his or her disposal to produce the necessary evidence in support of the application, whereby the principle of confidentiality must remain paramount given the need to avoid exposing applicants to the risk that persecutors hear of their location or their protection status.
248. In this regard, in the case of MM., the Court of Justice of the European Union (CJEU) stressed that "A Member State may also be better placed than an applicant to gain access to certain types of documents."²²⁵ In the same vein, the European Court of Human Rights (ECHR) stated that "it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings".²²⁶

²²⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019, para. 196.

²²⁵ CJEU, MM, op.cit, footnote 82, para. 66 Regarding the obligation imposed on courts under domestic law to gather evidence *proprio motu*, see Section 3.1.2.1.

²²⁶ ECHR, *JK and Others v Sweden*, op.cit, footnote 20, para. 96.

249. Likewise, in the most complicated cases when statements are not susceptible of proof and it is impossible to elicit reliable information from the country of origin, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt²²⁷.
250. On this, UNHCR has asserted that "it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt."²²⁸ The UNHCR deems that "The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself."²²⁹
251. However, it must be pointed out that the benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts in the analyses on the countries of origin and in information garnered by the examiner.²³⁰
252. Benefit of the doubt was also incorporated into the Brazil Plan of Action, which established the need to consolidate national refugee status determination systems, in order to guarantee certain rights, including the asylum-seekers' right "to receive a decision on their case in writing, duly founded and reasoned, within a reasonable, set timeframe, applying the principles of good faith and benefit of the doubt."²³¹
253. In short, based on UNHCR's *Handbook and Guidelines on Procedures*, the following points may be singled out regarding the rights of applicants and examiners in the process of ascertaining and evaluating the evidence:²³²

a) applicant should:

- (i) Tell the truth and assist the examiner to the full in establishing the facts of his case.

²²⁷ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019, para. 196

²²⁸ UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, para. 203.

²²⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019, para. 197.

²³⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019, para. 204.

²³¹ Brazil Declaration "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014, Chapter Two, f) iv.

²³² UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2019, para. 205.

(ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.

(iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts.

He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

b) The examiner should:

(i) Ensure that the applicant presents his case as fully as possible and with all available evidence.

(ii) Assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case.

(iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.

254. Regarding the assessment of facts and circumstances in the examination of applications, the IACHR considers, in line with some of the principles used in the Common European Asylum System,²³³ that the following tenets should be used in all procedures at administrative level, including accelerated and border procedures, and in the hearing of appeals or actions by courts and tribunals: i) Individual assessment of the application; ii) Objective and impartial assessment; iii) Rigorous and careful scrutiny of facts, circumstances, cultural and religious particularities, or special protection needs; iv) No general requirement that applicant's statements be supported by documentary or other evidence; v) Pertinent granting of the benefit of the doubt; vi) Free, substantiated conviction of the examiner in the case.

e) Reasoned and Substantiated Decision

255. Regarding due substantiation, the Inter-American Court has stated that it is "the reasoned justification that permits a conclusion to be made."²³⁴ The Court

²³³ European Asylum Support Office (EASO), *Evidence and credibility assessment in the context of the Common European Asylum System*, 2018, pp. 61-62.

²³⁴ I/A Court H.R. Case of López Mendoza v. Venezuela. Merits, Reparation, and Costs Judgment of September 1, 2011, Series C No. 233, par. 141; I/A Court H.R. Case of Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, par. 208; and

has also explored in depth what a decision must contain in order to be considered well-grounded:

The obligation to provide cause in the rulings is a guarantee associated with the proper administration of justice, which protects the right of citizens to be tried for the reasons that the law provides and lends credibility to legal decisions within the framework of a democratic society.²³⁵ Therefore, decisions adopted by domestic bodies that could affect human rights should be properly grounded, otherwise they would be arbitrary decisions.²³⁶ In that sense, the justification for a ruling and certain administrative decisions should disclose the facts, reasons and standards on which the authority for the decision was based, in order to rule out any suggestion of arbitrariness.²³⁷ Moreover, it must also show that it has duly taken into account the arguments of the parties and that the evidence has been analyzed. Therefore, the duty to provide cause is one of the "due guarantees" included in Article 8(1) to safeguard the right to a fair trial.²³⁸

256. The Inter-American Court has also pronounced on the need for the decision to be duly and expressly substantiated, in order to enable an applicant to defend himself or herself, and to appeal. Accordingly, the Inter-American Court concluded that "the decision on the request taken by the competent authority as to whether the applicant is granted refugee status based on the factual and legal determinations must expressly include the reasons for the decision, in

I/A Court H.R., Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, par. 118

²³⁵ I/A Court H.R. Case of López Mendoza v. Venezuela. Merits, Reparation, and Costs Judgment of September 1, 2011, Series C No. 233, par. 141. Citing. Cf. I/A Court H.R. Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, par. 77. The European Court of Human Rights found as much in the Case of Suominen v. Finland, where the European Court held that: "according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based." Cf. ECHR, Suominen v Finland. Case No. 37801/97, July 1, 2003, para. 34.

²³⁶ I/A Court H.R. Case of López Mendoza v. Venezuela. Merits, Reparation, and Costs Judgment of September 1, 2011, Series C No. 233, par. 141. Citing I/A Court H.R., Case of Yatama v. Nicaragua. Judgment of June 23, 2005. Series C No. 127, paras. 152 and 153. Likewise, the European Court has held that judges should state the reasons on which their decisions are based with sufficient clarity. Cf. European Court of Human Rights, Hadjianastassiou v. Greece. Judgment of December 16, 1992, Series C No. 252, par. 23.

²³⁷ I/A Court H.R. Case of López Mendoza v. Venezuela. Merits, Reparation, and Costs Judgment of September 1, 2011. Series C No. 233, par. 141. Citing. I/A Court H.R. Case of Claude-Reyes et al. v. Chile, Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, par. 122

²³⁸ I/A Court H.R. Case of López Mendoza v. Venezuela. Merits, Reparation, and Costs Judgment of September 1, 2011. Series C No. 233, par. 141

order to enable the applicant to exercise his right of appeal,"²³⁹ which, in turn, constitutes another essential procedural guarantee.

257. Along those lines, the Commission holds that, in connection with procedures for assessing international protection needs, for a decision to be properly founded and substantiated, it must:

i) expressly state the reasons justifying a conclusion reached;

ii) expressly state the facts, reasons, and norms on which the authority based its decision;

iii) demonstrate that the arguments of the parties were duly taken into account; and

iv) that all evidence was analyzed, especially the personal interview and objective information of the country of origin of the applicants.²⁴⁰

258. In addition, in the case of children and adolescent in the context of international mobility, the decision must explain in detail the way in which the opinions expressed by the child were taken into account and also the way in which her or his best interest was assessed.²⁴¹

f) Notification of the Interested Person

259. Notification accompanied by the resolution containing the final decision is basic because it enables people to enjoy their right to international protection, or else to access court oversight of the administrative act in the event of a negative ruling, or access to a superior authority in the case of a decision taken by a judicial authority.

260. Accordingly, the Inter-American Court has established that the lack of notification constitutes, per se, a violation of Article 8 of the Convention, because it places the victim in a situation of legal uncertainty and makes the exercise of the right to appeal a judgment impracticable.²⁴²

²³⁹ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 257

²⁴⁰ UNHCR, Inter-Parliamentary Union, Refugee Protection: A Guide to International Refugee Law, 2001, p. 59.

²⁴¹ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 139

²⁴² I/A Court H.R. Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010. Series C No. 218, par. 180

g) Right to a Suitable and Effective Remedy

261. The Inter-American Court has reaffirmed the right of everyone to appeal all final decisions of an administrative or judicial nature adopted in immigration proceedings, especially those that order expulsion or deportation from a country or that deny permission to enter or remain in the country.²⁴³
262. In addition, the Inter-American Court has specified that, if the decision was adopted by the administrative authority, the review by a judge or panel of judges is a basic requirement to ensure adequate control and examination of administrative decisions that affect fundamental rights.²⁴⁴
263. In order to ensure that the right to file an appeal is effective, the judicial remedy by which a migratory decision is contested must have suspensive effect, so that the person is not returned to his or her country of origin or to another State before a final and firm ruling is made by the final instance for resolving on the case.²⁴⁵ Suspension is fundamental to protect the rights of migrants, because, otherwise, once deportation has taken place, the migrants' lack of economic resources or legal assistance are insurmountable obstacles against their access to justice.²⁴⁶
264. Likewise, the Inter-American Court has stressed that "if the applicant is not granted refugee status, she or he should be provided information on how to appeal the decision and given a reasonable time for this, so that the decision adopted is formally reconsidered."²⁴⁷
265. The right to appeal must be respected for anyone, including persons accused of committing crimes. In addition, the right to appeal with suspensive effect also applies to the expedited proceedings usually applied at borders and at sea. Here, the Commission reiterates that summary procedures to intercept and return migrants and asylum-seekers on the high sea, or, in general where the authorities of another State exercise jurisdiction, contravene the right of those persons to have access to courts in order to defend their rights, because

²⁴³ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 140

²⁴⁴ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 141

²⁴⁵ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 142

²⁴⁶ 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, December 31, 2015, par. 323

²⁴⁷ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 258

carrying out these kinds of operations deprives migrants and asylum-seekers of a chance to claim and defend their rights before a court of law²⁴⁸.

266. The IACHR likewise reaffirms that the right to access to justice and effective remedy should not be subject to the presentation of identity documents that are difficult or impossible to obtain for the migrant population,²⁴⁹ which is particularly relevant in the case of persons needing international protection who in many cases lack said documents.
267. Accordingly, the Commission recommends that the right to a suitable and effective remedy in the event of a negative decision meet the following parameters: i) the possibility of a judicial review of the administrative decision; ii) suspensive effect until a final, last instance resolution; iii) that applicants be given sufficient information regarding how to appeal; iv) reasonable time allowed to file the appeal; v) free legal aid; vi) that the right also apply to expedited proceedings; vii) no insistence on identity documents that are difficult or impossible to obtain.
268. In the specific case of children and adolescents, the Court has specified that the review body must permit, among other matters, ascertaining whether the decision gave due weight to the principle of the best interest of the child.²⁵⁰

h) Reasonable Duration of the Process

269. Application of the principle that proceedings should be conducted within a reasonable time as a procedural guarantee in connection with the procedures for determining international protection needs stems from a context in which most States' legal texts do not contemplate time limits for analyzing and concluding such procedures, so that, in practice, processing is slow, in some cases lasting years, which prolongs the suffering of those involved and their uncertainty regarding their legal status in the country.
270. The Inter-American Court has pointed out that Article 8.1 of the American Convention also refers to "a reasonable time." According to the Court, in defining it, one may invoke the points raised by the European Court of Human Rights in various decisions in which this concept was analyzed. According to existing jurisprudence in the inter-American system, it is necessary to take into account three elements in order to determine the reasonableness of the time in which the proceedings are held: (a) the complexity of the case; (b) the

²⁴⁸ I/A Court H.R. Case of Vélez Looor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010, Series C No. 218, par. 126

²⁴⁹ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIV, Principle 40.

²⁵⁰ I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 141

procedural activity of the party concerned, and (c) the conduct of the judicial authorities.²⁵¹

271. It is also the view of the Court that in certain cases a prolonged delay in itself can constitute a violation of judicial guarantees. In those situations, the State must provide, according to the above criteria, an explanation and proof as to why it has needed more time than would reasonably be required to issue a final judgment in a particular case.²⁵²
272. The Inter-American Court has also pointed out that the "reasonable time" referred to in Article 8.1 of the Convention should be construed to refer to the whole duration of the proceedings through to final judgment.²⁵³
273. The Inter-American Court has established, moreover, that "[I]n the analysis of reasonableness [of time] the adverse effect of the duration of the proceedings on the judicial situation of the person involved in it must be taken into account; bearing in mind, among other elements the matter in dispute. If the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible."²⁵⁴
274. Accordingly, in its Principle 50 on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, the IACHR has established that "States should adopt all measures that may serve to avoid unnecessary delays in administrative and judicial proceedings, so as not to unduly prolong the suffering caused by remembering events that happened and to promote appropriate handling of the risk of re-traumatization as a result of those proceedings."²⁵⁵
275. The whole store of jurisprudence accumulated by the inter-American human rights system regarding a reasonable time for proceedings is especially relevant for the proceedings for granting international protection, since it directly affects the effective enjoyment of other rights and the determination of people's legal status, so that unwarranted and excessive delay is tantamount to a denial of the right to receive international protection. Therefore, the Commission understands why the requirement that proceedings be completed within a reasonable amount of time is applied to the procedures for

²⁵¹ I/A Court H.R. *Genie-Lacayo Case v. Nicaragua*. Merits, Reparations and Costs. Judgment of January 29, 1997. Series C No. 30, par. 77

²⁵² I/A Court H.R. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* Merits, Reparations and Costs. Judgment of June 21, 2002. Series C No. 94, par. 145

²⁵³ I/A Court H.R. *Case of Vásquez Durand et al. v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 15, 2017. Series C No. 332, par. 159

²⁵⁴ I/A Court H.R. *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, par. 155

²⁵⁵ IACHR, *Resolution O4/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIV, Principle 50.

determining international protection needs and that State practices involving unwarranted and excessive procrastination of final decisions on applications submitted constitute a violation of Article 8.1 of the American Convention.

276. At the same time, regarding the time allowed for filing international protection applications, the IACHR recommends, pursuant to UNHCR guidelines, that requests be lodged at the earliest opportunity, but bearing in mind that there are many reasons why an asylum-seeker may have difficulty in lodging a timely request, ranging from psychological issues, such as trauma, to practical issues, such as ignorance of his or her rights, the inability to access legal assistance, and so on.²⁵⁶ Accordingly, along the same lines as the UNHCR recommendations, the IACHR is of the view that deadlines for filing the application must not be too rigid to a point at which they entail loss of the right to request asylum or other forms of international protection.

D. Access to Economic, Social, and Cultural Rights (ESCR) during Proceedings

277. In order to guarantee economic, social, and cultural rights during the processing of procedures, it is essential to consider so-called "firewalls," which establish a strict and real separation between immigration enforcement and public services, meaning that immigration authorities cannot have access to information regarding the migration status of visitors to public services, and that the institutions responsible for providing such services are not required to investigate or share information on the migration status of their users."²⁵⁷
278. This guarantee is fundamental for ensuring that people have real, and not just formal, access to rights on an equal footing and with no discrimination. Regarding firewalls, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has established the need for States to adopt them in order to protect workers. Likewise, in the case of children and adolescents, it has been pointed out that "States parties should implement a 'firewall' and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as protection, remedy, civil registration and access to services."²⁵⁸
279. Likewise, the institutions responsible for providing such services may not require regular migration status or that refugee status already be granted as a condition for providing those services to people who request them. It is

²⁵⁶ UNHCR, Inter-Parliamentary Union, [Refugee Protection: A Guide to International Refugee Law](#), 2001, p. 58.

²⁵⁷ Special Rapporteur on the Human Rights of Migrants, Felipe González, [The Human Rights of Migrants](#), 26 July 2018, para. 33

²⁵⁸ Special Rapporteur on the Human Rights of Migrants, Felipe González, [The Human Rights of Migrants](#), 26 July 2018, para. 35

important to point out that access to ESCR should not be conditioned upon administrative status or level of protection (regular migrant, person recognized as a refugee, or other status). The mere fact of "being a person" must suffice to ensure effective enjoyment of ESCR. Accordingly, any applicant for international protection must have access to health care, education, housing, security, and other rights, on an equal footing with nationals.

280. To that end, the first step is to provide personal identity documents to persons with protection needs, so as to preclude discrimination against applicants. Here, in line with the recommendations of the Executive Committee of UNHCR, the Commission is of the view that asylum applicants be provided with identity documents to ensure that they are protected against refoulement or expulsion, and that persons who are "in large-scale influx situations" and are recognized prima facie have access to that document. In this regard the Commission points out, in line with the Executive Committee of UNHCR, that Article 27 of the 1951 United Nations Refugee Convention requires Contracting States to issue identity papers to any refugee in their territory who does not have a valid travel document.²⁵⁹
281. Persons seeking international protection had a right to be issued a document certifying their regular status, protecting them against refoulement or expulsion, enabling them to identify themselves, and more easily access other rights. That document may be a temporary residence permit and should eventually lead to permanent residence or else citizenship.²⁶⁰
282. The Commission observes that the above is especially important given that the Convention Relating to the Status of Refugees does not establish the type of residence to be granted to a person recognized as a refugee. However, Article 34 establishes that the Contracting States shall facilitate the assimilation and naturalization of refugees. The Convention establishes that "[T]hey shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."
283. On this, the Commission reinforces the position held by UNHCR that acquisition of the nationality of the State of asylum allows refugees to fully exercise their right to protection both within and outside the country and is therefore a critical factor in the integration process for refugees.²⁶¹

²⁵⁹ Executive Committee, Identity Documents for Refugees, No. 35 (XXXV), 18 October 1984.

²⁶⁰ UNHCR, Local integration.

²⁶¹ UNHCR has addressed in depth measures to facilitate the naturalization of refugees, including: i) a reasonable period of residency, not exceeding five years, to be eligible for naturalization; ii) information and assistances with obtaining permanent residence and naturalization; iii) greater flexibility in requirements for naturalization, taking into account matters that refugees cannot prove or obtain, such as official documents from their country of origin, proof of financial self-sufficiency, or language skills. In addition, naturalization should be facilitated for children and adolescents recognized as refugees and their close relatives, in order to safeguard the right to family unity. UNHCR, UNHCR Submissions to the

284. In its resolution 04/19 on Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, the Commission points in Section IX (Adequate standard of living), to the need to guarantee certain rights, access to which must be provided to all migrants, refugees, asylum-seekers, and others needing international protection. Such protection encompasses access to the whole pool of economic, social, cultural, and environmental rights, such as the right to health (Principle 35), work (Principle 36), education (Principle 37), housing (Principle 38), and culture (Principle 39).²⁶²
285. The enjoyment of these rights is what enables persons in need of international protection to achieve local integration (considered to be a lasting solution), which will only be effective if access to rights occurs on an equal footing with others and nondiscrimination vis-a-vis nationals. The Commission underscores that access to ESCR should be facilitated from the moment of application and throughout the processing period, thereby preventing people from falling through the cracks and ultimately being exploited. Accordingly, and given their particular vulnerability, any solution in favor of persons needing protection requires that effective steps be taken to guarantee their access to ESCR.
286. In this regard, in a recommendation it made to the State of Costa Rica, the IACHR called for an easing of conditions for access to asylum-seekers' right to work, given the influx of applications from Nicaraguans forced to leave their country by the state repression recorded from April 18, 2018. The Costa Rican authorities provided them with a provisional document certifying that they are applicants for refugee status, which does not immediately authorize their access to work. Following recommendations made by the IACHR during its working visit in November 2018, the Costa Rican authorities shortened the period required for granting work permits to asylum-seekers.²⁶³

Inter-American Court of Human Rights in the framework of the request for an Advisory Opinion on the scope and purpose of the right to asylum, 30 April 2017, Annex A, para. 24

²⁶² IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIV, Principle 40.

²⁶³ IACHR, *The forced migration of Nicaraguans to Costa Rica*, September 2019, p. 89

CHAPTER 5

SPECIFIC PROCEDURAL
GUARANTEES REGARDING
DETERMINATION OF THE
PROTECTION STATUS OF
STATELESS PERSONS

SPECIFIC PROCEDURAL GUARANTEES REGARDING DETERMINATION OF THE PROTECTION STATUS OF STATELESS PERSONS

A. Introduction

287. Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines the term "stateless person" to mean a person who is not considered as a national by any State under the operation of its law. Based on the identification of persons needing international protection, in this case because they are not protected by any country as they are not considered *as* a national *by any State*, the need arises to address this issue by establishing procedures to determine statelessness.
288. There are an estimated 3.9 million people in the world known to be stateless, one third of whom are children.²⁶⁴ However, bearing in mind the difficulties States face with identifying and registering all cases, as well as a possible "transmission" of statelessness from one generation to another, the exact number by which they are multiplied each year is unknown. In the Americas, the handing down of Judgment No. 168/13 of the Constitutional Court of the Dominican Republic was the subject of close scrutiny by the Inter-American Commission, which included the installation of a Working Group on Implementation of Human Rights Policies in the Dominican Republic, whose final report was published in the IACHR 2019 Annual Report.²⁶⁵
289. Statelessness determination procedures are especially important when it comes to stateless persons in a migratory context. However, they may not be appropriate for persons who remain in their "own country" (their country of birth), who are referred to as *in situ* populations,²⁶⁶ given their long-established ties to these countries. One example are people of Haitian descent born in the Dominican Republic, a case that has been and is still being addressed as a priority issue by the inter-American human rights system.²⁶⁷

²⁶⁴ UN News [Article 6: The right to be recognized as a person before the law](#), 15 November 2018. See also: UNHCR, [Statelessness Around the World](#).

²⁶⁵ IACHR2019 Annual Report of the IACHR, p. 793.

²⁶⁶ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva, 2014, para . 58

²⁶⁷ In particular, in the "Girls Yean and Bosico v. Dominican Republic" case resolved on September 8, 2005, the I/A Court of H.R. established in the 8th operative paragraph that: "The State should adopt within its domestic law ...administrative and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth. This procedure should be simple, accessible

290. Stateless persons need to be recognized as such, which entails granting special protection so that they can access and exercise their human rights. Those persons who have no nationality and consequently lack an identity and travel document have difficulty accessing health care, education, and social services.²⁶⁸ At the same time, the exercise of their civil and political rights is likewise impaired. They cannot circulate freely and, in particular, run the risk of being deprived of their liberty for lack of identity and travel documents. Statelessness determination procedures are therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention.²⁶⁹ Any detention is arbitrary, inter alia, when it is not subject to periodic and judicial review; not proportionate; when it is used instead of opting for other available and less harmful measures;²⁷⁰ and, above all, when it involves the detention of persons because they are stateless, which is always arbitrary per se.²⁷¹
291. In that context, States need to adopt measures conducive to identifying stateless persons, recognizing them, and, consequently, granting the special protection they need. In addition, it is also necessary to adopt measures to prevent statelessness. On this, the Court pointed out that:

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective.²⁷²

and reasonable since, to the contrary, applicants could remain stateless. Also, an effective remedy should exist for cases in which the request is rejected..."

²⁶⁸ In December, 2013, the IACHR paid an on-site visit to the Dominican Republic, during which 3,342 people came before the Commission to file complaints. In that connection, the IACHR was told of a variety of obstacles that the children of migrants in irregular status face to exercising their fundamental human rights. In one of those testimonies garnered by the IACHR, a woman referring to her child born in the Dominican Republic summarized the suffering involved in the following statement: "I have a three-year-old daughter, who has not been able to go to school as I have not been able to declare her, she cannot have health insurance, because she has not been declared and I have no official I.D. (*cédula*)."

²⁶⁹ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 115

²⁷⁰ Regarding arbitrary detentions in a context of the use of pre-trial detention, one source to consult is the IACHR report entitled [Report on the use of pretrial detention in the Americas](#) (2013). Many of its considerations and standards turn out to be applicable to any kind of arbitrary detention, especially considering that (arbitrary) detention of persons because of their statelessness is akin in practice to pretrial detention: not to detention imposed by virtue of a conviction, because statelessness is not a crime; very much to the contrary, it is a human rights violation.

²⁷¹ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 112

²⁷² I/A Court H.R., *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 130, par. 142

B. Nationality and Statelessness

1. Right to Nationality

292. Nationality is a fundamental human right and one that is non-derogable,²⁷³ which means that it may not be suspended in time of war, public danger, or other emergency that threatens the independence or security of a State Party, in accordance with Article 27(2) of the American Convention.²⁷⁴ The Court understands that nationality is a juridical expression of a social fact that connects an individual to a State.²⁷⁵
293. Without prejudice to nationality being determined according to the domestic laws of each State, because States do have the power to determine who their nationals are, that power must be exercised in accordance with relevant provisions of international law.²⁷⁶ This means that said State power is limited by their obligation to provide each individual with the equal and effective protection of the law without discrimination.²⁷⁷
294. The right to nationality is recognized in a number of both regional and universal human rights instruments. They include, in particular, Articles XIX of the American Declaration on the Rights and Duties of Man,²⁷⁸ 20 of the American Convention on

²⁷³ I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 130, par. 136

²⁷⁴ IACHR, *Human Mobility, Inter-American Standards*, 2016. par. 467

²⁷⁵ I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 130, par. 136

²⁷⁶ This principle has been upheld by the IACHR since the beginning of the 1980s. In particular, in connection with the advisory opinion regarding the proposal to amend the Political Constitution of Costa Rica, the Court stated that: "Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction." (I/A Court of H.R. Advisory Opinion OOC-4/84, Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, January 19, 1984, paras. 32-34).

²⁷⁷ IACHR, *Human Mobility, Inter-American Standards*, 2016. par. 473

It is worth underscoring that this principle has been upheld by the IACHR since the beginning of the 1980s. [TR: REPETITION?] In particular, in connection with the advisory opinion regarding the proposal to amend the Political Constitution of Costa Rica, the Court stated that: "Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction." (I/A Court of H.R. Advisory Opinion OOC-4/84, Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, January 19, 1984, paras. 32-34).

²⁷⁸ Article XIX. Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Human Rights,²⁷⁹ 15 of the Universal Declaration of Human Rights²⁸⁰; as well as Articles 7²⁸¹ and 8.1²⁸² of the United Nations Convention on the Rights of the Child (CRC), which guarantee the rights of children to acquire a nationality immediately after their birth²⁸³ and to keep their identity, respectively; and Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁸⁴ which recognizes the right of women not be discriminated against in the exercise of their rights to acquire, change, or keep their nationality. and with regard to the nationality of their children.²⁸⁵

295. In particular, the American Convention includes two aspects of the right to nationality: the right to a nationality from the perspective of endowing the individual with the basic legal protection for a series of relationships by establishing his connection to a specific State, and the protection of the individual against the arbitrary deprivation of his nationality because this would deprive him of all his political rights and of those civil rights that are based on a person's nationality.²⁸⁶ Hence the importance of nationality is that it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for access to and the exercise of specific rights derived from the individual's status as a national of a State.²⁸⁷

²⁷⁹ Article 20. Right to Nationality 1 Every person has the right to a nationality. 2 Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3 No one shall be arbitrarily deprived of his nationality or of the right to change it.

²⁸⁰ Article 15. 1 Every person has the right to a nationality. 2 No one shall be arbitrarily deprived of his nationality or of the right to change it.

²⁸¹ Article 7. 1 The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2 States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

²⁸² Article 8. 1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

²⁸³ It should also be mentioned that Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) also guarantees the right of every child to acquire a nationality.

²⁸⁴ Article 9. 1 States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2 States Parties shall grant women equal rights with men with respect to the nationality of their children.

²⁸⁵ The impossibility for women of transmitting their nationality to their children on the same footing as men is still a major challenge to be overcome. It worries the IACHR that there are still laws in the region containing this discrimination, in force in The Bahamas and Barbados.

²⁸⁶ I/A Court H.R., *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary objections, merits, reparations and costs, August 28, 2014, Series C No. 282, par. 254

²⁸⁷ I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 130, par. 137

2. Right of Children to Acquire a Nationality at Birth

296. At the same time, given that most stateless persons in the world have not had any nationality since birth,²⁸⁸ it is worth pondering for a moment the right of the child to acquire nationality at birth. The Convention on the Rights of the Child guarantees the rights of children to be registered immediately after their birth and to acquire a nationality.²⁸⁹ That means that they must acquire a nationality at birth or as soon as possible thereafter.²⁹⁰ At the same time, the CRC imposes on States the obligation to ensure the enforcement of those rights, especially when, otherwise, those children would be stateless.²⁹¹ Thus, as UNHCR maintains, the obligations imposed on States by the Convention on the Rights of the Child are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through parentage or residence.²⁹²
297. In addition, Article 1 of the 1961 Convention on the Reduction of Statelessness establishes as a general principle that a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. It adds that nationality shall be granted at birth, by operation of law, or upon an application being lodged with the appropriate authority. In the case of Contracting States that opt to grant nationality upon application, UNHCR has recommended that they accept such applications from children as soon as possible after their birth and during childhood.²⁹³ The 1961 Convention further provides that if the Contracting State establishes a period for lodging the application, it must begin no later than at the age of eighteen years and ending no earlier than at the age of twenty-one years²⁹⁴.
298. In the region, Article 20(2) of the American Convention expressly recognizes the right of children to acquire the nationality of the State in whose territory they were born if they do not have the right to any other nationality, that is to say, if they would

²⁸⁸ Among the reasons why most stateless persons are stateless from birth, the UNHCR has highlighted the following: 1. Their parents were stateless; They were born in a country with a nationality law that does not confer its nationality on children even if this means that they would be left stateless; 3. When they are born abroad and their parents have a nationality but cannot confer it under the law of their State of nationality; and 4. when they have been abandoned or separated from their family and their nationality cannot be ascertained (UNHCR Global 2014-24 Action Plan to End Statelessness, 2014, p. 10).

²⁸⁹ Article 7 of the Convention on the Rights of the Child

²⁹⁰ UNHCR, GUIDELINES ON STATELESSNESS NO. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness. GENERAL DISTRIBUTION HCR/GS/12/04, 21 December 2012, para. 11

²⁹¹ Article 7 of the Convention on the Rights of the Child

²⁹² UNHCR, GUIDELINES ON STATELESSNESS NO. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness. GENERAL DISTRIBUTION HCR/GS/12/04, 21 December 2012, para. 11

²⁹³ UNHCR, GUIDELINES ON STATELESSNESS NO. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness. GENERAL DISTRIBUTION HCR/GS/12/04, 21 December 2012, para. 38.

²⁹⁴ Article 1 (2). (a) of the Convention on the Reduction of Statelessness.

otherwise be stateless²⁹⁵. It is worth stressing here that the inter-American standard posits a higher level of protection, since it establishes that automatic acquisition of nationality at birth in the event of a child not having acquired another nationality at birth and not being entitled to another. It is important to highlight two situations of child refugees born in the receiving countries. First, if the nationality of the parents can be acquired solely via registration or other procedure that requires that they be in contact with their country of origin or nationality, that may not be possible given the nature of their refugee status, which prevents refugee parents from contacting the consular authorities of the country of which they are nationals.²⁹⁶ In such circumstances in which the son or daughter of a refugee would remain stateless, the safeguard contained in Article 20.2 of the American Convention should be applied. In the second case, the situation is different, as it has to do with nationality systems in which the children of refugees automatically acquire their parents' nationality at birth. In cases in which the child of a refugee is unable to confirm his or her parents' nationality and does not acquire the nationality of the receiving country where he or she was born either, States are encouraged to offer the possibility of acquiring the nationality of the State of birth in the manner provided for in Article 1(1) of the 1961 Convention.²⁹⁷

3. Ways of Acquiring and Losing Nationality

299. The Commission observes that there are both automatic and non-automatic mechanisms through which nationality may be acquired or lost. Automatic modes or mechanisms are those where a change in nationality status takes place by operation of law as soon as criteria set forth by law are met, such as birth on a territory or birth to nationals of a State.²⁹⁸
300. By contrast, in non-automatic modes an act of the individual or a State authority is required before the change in nationality status takes place.²⁹⁹ A non-automatic mode occurs, for example, when a person acquires the nationality of a State that is not the State where he or she was born by exercising a right of option, such as that of his or her parents in the case of States that apply the principle of *jus sanguinis*.

²⁹⁵ Likewise, tArticle 6(4) of the African Charter on the Rights and Welfare of the Child states that: "States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws."

²⁹⁶ United Nations High Commissioner for Refugees (UNHCR), *Guidelines on international protection: No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04. Para. 27.

²⁹⁷ United Nations High Commissioner for Refugees (UNHCR), *Guidelines on international protection: No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04. Paris 28.

²⁹⁸ UNHCR, *Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons*, Geneva. 2014, para . 26.

²⁹⁹ UNHCR, *Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons*, Geneva. 2014, para . 26

301. It is worth pointing out that in non-automatic mechanisms consular authorities play a prominent and indispensable role in preventing statelessness. Usually States require children born to their nationals overseas to register with a consulate as a prerequisite for acquiring the nationality of the parents.³⁰⁰ If an individual is refused such registration or is prevented from applying for it, he or she is not considered as a national³⁰¹ and if the country of birth does not grant him or her its nationality by virtue of the *jus soli* principle, that individual could end up being stateless.
302. Likewise, a person may become stateless through the loss of his or her -- only -- nationality; which may also occur in an automatic or non-automatic mode.³⁰² A person may automatically become stateless due to the loss of his or her nationality, in the sense of a withdrawal of nationality by operation of law (*ex lege*) *as a result of a change in status. married status, for example, the termination of marriage, legitimation, recognition or adoption*, in the terms used in Article 5 of the Convention on the Reduction of Statelessness.
303. Non-automatically, a person may become stateless by renouncing his or her -- only -- nationality, or by being deprived of it when the State authorities initiate the withdrawal of nationality procedure. According to Article 7(1) of the 1961 Convention, if the legislation of a Contracting State provides for renunciation of nationality, said renunciation shall only be effective if the interested party has or acquires another nationality. The above is without prejudice to the fact that the use of deprivation of nationality procedures may be queried as violating the human right to a nationality. Said procedure must be conducted in accordance with due process and its proportionality needs to be analyzed, especially when that practice renders a person stateless. Under Article 8 (2) of the Convention on the Reduction of Statelessness, Contracting States may deprive a person of his or her nationality, even when that renders a person stateless:
- a) In cases in which in it is permissible to prescribe the loss of a person's nationality: a situation that arises when a naturalized person resides abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned and fails to declare to the appropriate authority his or her intention to retain his or her nationality³⁰³; and in the case of a national of a Contracting State, born outside its territory, when that State makes the retention of its nationality after the expiry of one year from his or her attaining his/her majority conditional upon residence at that

³⁰⁰ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 39.

³⁰¹ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 39

³⁰² UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 26.

³⁰³ Pursuant to Article 7 (4) of the Convention on the Reduction of Statelessness.

time in the territory of the State or registration with the appropriate authority.³⁰⁴ OR,

b) where the nationality has been obtained by misrepresentation or fraud.

304. Finally, Article 8 (3) of the Convention on the Reduction of Statelessness establishes that a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

(i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or

(ii) has conducted himself in a manner seriously prejudicial to the vital of the State;

(b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

4. Statelessness

305. Statelessness, as previously elaborated in this report, is understood as a lack of nationality, and defined in Article 1 of the 1954 Convention relating to the Status of Stateless Persons as referring to a person *who is not considered as a national by any State under the operation of its law*, is declared by national protection systems. This means that an individual is a stateless person from the moment that the conditions of this definition are met. Thus, any finding by a State or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature.³⁰⁵ This definition forms part of customary international law.

306. In this regard, the domestic provisions of States with respect to nationality are a determining factor since they shape, for the better or worse, the way people can live their lives as well as their ability to fully access, exercise, and enjoy their human rights. Thus they can leave children stateless if they are born in a country which does not grant nationality on the basis of birth in the territory, or if their parents are stateless, or if their parents possess a nationality but neither can confer it upon their

³⁰⁴ Pursuant to Article 7 (5) of the Convention on the Reduction of Statelessness.

³⁰⁵ UNHCR, Handbook on the Protection of Stateless Persons. Geneva, 2014. Para. 16.

children.³⁰⁶ This last case may occur when the nationality of the parents cannot be transferred to their children because the country of their nationality does not recognize the *jus sanguinis* principle. This situation may also arise in countries with nationality laws determining uneven ability of women to confer nationality on their children, thereby preventing mothers from conferring nationality on their children on an equal footing with fathers, as is the case in The Bahamas and Barbados.³⁰⁷

307. Another instance when a child may be rendered stateless is when domestic regulations in States preclude in an arbitrary and discriminatory manner the acquisition of nationality based on application of the *jus soli* principle in the case of children of persons with irregular migratory status. The Inter-American Court has referred to this situation in a case brought against the Dominican Republic in which it maintained that:³⁰⁸

- a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
- b) the migratory status of a person is not transmitted to the children, and
- c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.³⁰⁹

308. Consequently, in order to prevent cases of statelessness, which impair people's enjoyment of their human rights by placing them in a condition of extreme vulnerability, the Commission reminds States of their obligation not to adopt laws, practices or policies concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons.³¹⁰

³⁰⁶ UNHCR, GUIDELINES ON STATELESSNESS NO. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness. GENERAL DISTRIBUTION HCR/GS/12/04, 21 December 2012, para. 18.

³⁰⁷ UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness, p. 6 See also: IACHR, Human Mobility, Inter-American Standards, 2016. par. 57

³⁰⁸ I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 140, par. 156

³⁰⁹ The position taken by the I/A Court of H.R. is in line with Article 1 of the Convention on the Reduction of Statelessness, which establishes that: " A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless."

³¹⁰ Along the same lines, see: I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 140, par. 142

C. Procedures for Determining Statelessness

1. Establishment of Procedures for Recognition of Stateless Person Status

309. Although the 1954 Convention relating to the Status of Stateless Persons does not specifically regulate how statelessness determination procedures are to be conducted, nor where they are located within each State's national administrative structures, according to UNHCR, it is preferable that those procedures be centralized. Centralized procedures are those conducted by a central public authority exclusively charged with determining statelessness status.³¹¹ Centralized procedures are preferable as they are more likely to develop the necessary expertise among the officials undertaking status determination,³¹² which leads --or should lead - to greater effectiveness in the procedures, not just thanks to the professionalization of public officials, but also to application of the same evaluation criteria, thereby ensuring uniformity in the decisions taken.
310. Consequently, the Commission urges States to adopt centralized procedures for determining statelessness status conducted by a centralized body specializing in such determination and responsible for deciding on all applications submitted. If the applicant can acquire a nationality, determination of stateless person status shall be the last instance. With the applicant's consent, the competent determination body shall refer the application to the corresponding administrative or consular authorities.
311. At the same time, location of the central determination body within the administrative structure of the State will depend on estimates of the size and profile of the stateless population in the country. Thus, in the case of countries in which, for instance, most of the stateless population is made up of persons born in that territory, possibly because the State in question does not apply the *jus soli* principle, it may be best for public registrar bodies to be in charge of statelessness determination with a view to resolving their situation by automatically restoring their nationality. In countries that do apply the *jus soli* principle, on the other hand, and are countries of destination for persons seeking international protection, the bodies responsible for determining refugee status may be best suited to also determine statelessness status.
312. In addition, all procedures for determining stateless status must be accessible, simple, and fast; be formally regulated by law; and governed by minimum judicial guarantees. The procedure needs to be geographically accessible, in order to enable all persons lacking a nationality to file their application regardless of where they live

³¹¹ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 11

³¹² UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 11

in the country. Thus, according to UNHCR, the guarantee of accessibility could be facilitated by, for instance, allowing written applications to be filed with local offices for subsequent referral to the central determination body which can coordinate and steer a proper examination of the facts, as well as conduct a personal interview with the applicant.³¹³ In addition, the procedure needs to be accessible in the sense of not imposing requirements impossible to meet for most cases of persons lacking a nationality, such as demanding, for example, lawful entry into the country as a prerequisite for filing a statelessness application. In the same vein, as UNHCR has maintained, that requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully.³¹⁴

313. The procedure also needs to be simple and hassle-free, that is to say, easy-to-understand for all those needing this type of protection, also considering the situation of people with disabilities. It also needs to be expeditious, meaning that it is completed within a reasonable period of time. That last requirement means that the statelessness determination procedure must allow reasonable time to gather evidence, but not be so protracted as to prolong the applicant's vulnerability. Thus, the Commission recommends that States have pre-established time limits within which determination authorities are to make a decision on a statelessness application. On this, according to UNHCR, it is undesirable for a first instance decision to be issued more than six months from the submission of an application; nevertheless, it understands that in exceptional circumstances it may be appropriate to allow the proceedings to last up to 12 months to provide time for inquiries regarding the individual's nationality status to be pursued with the State concerned.³¹⁵
314. At the same time, statelessness determination procedures, like any administrative process that may affect a person's right to nationality, should be formalized in law³¹⁶ and governed by at least the due process guarantees recognized in Article 8 of the American Convention.³¹⁷ That means that, with respect to this procedure, anyone applying for statelessness status has a right to:
- To be heard, with due guarantees and within a reasonable period of time, by an independent and impartial competent authority;

³¹³ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 11

³¹⁴ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 17

³¹⁵ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 23

³¹⁶ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 71

³¹⁷ IACHR, Human Mobility, Inter-American Standards, 2016. par. 477

- To cost-free translation or interpretation assistance if he or she does not understand or speak the language of the competent authority, at every stage of the proceedings;³¹⁸
- To have access to legal counsel, with the ability to choose a lawyer she or she trusts, or to free legal assistance offered to applicants without financial means; AND
- To appeal against a negative first instance decision by a competent authority denying him or her the status of a stateless person before an equally competent, independent, and impartial higher authority; and to be given adequate time and means needed to prepare the appeal. In this regard, for this right to be exercised, States should ensure that there is an effective remedy available where a decision on nationality is found to be unlawful or arbitrary.³¹⁹

315. Furthermore, the organs of the inter-American human rights system have each recognized that the guarantees of due process of law are applicable in the administrative sphere. In particular, the Commission has established the obligation for states to have clear rules governing the behavior of their agents in order to avoid inappropriate levels of discretionality in the administrative sphere that might encourage arbitrary or discriminatory practices.³²⁰

316. As mentioned previously, pursuant to the case law of the inter-American human rights system on the scope of people's right to due process upheld in Article 8 of the American Convention, that right to due process is not restricted to just penal matters, but also extends to domains of a "civil, labor, fiscal, or any other nature."³²¹ This, it is recognized that it is important for the conduct of the administration to be regulated and that it may not invoke public order to reduce discretionally the guarantees of its subjects.³²² In this regard, the Court has held that:

[t]he right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons.³²³

³¹⁸ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 71

³¹⁹ IACHR, Human Mobility, Inter-American Standards, 2016. par. 480

³²⁰ IACHR, Human Mobility, Inter-American Standards, 2016. par. 478

³²¹ I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*, Merits, reparations and costs, Judgment of February 2, 2001, Series C No. 72, par. 125.

³²² I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*, Merits, reparations and costs, Judgment of February 02, 2001, Series C No. 72, par. 126.

³²³ I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*, Merits, reparations and costs, Judgment of February 02, 2001, Series C No. 72, par. 127

317. Likewise, the inter-American system has identified additional minimum standards of legal due process to be observed in any procedure that may impact the right to nationality. These are, above all:³²⁴

- 1) prior notice of the proceeding, especially loss of nationality proceedings;
- 2) the right to a hearing for a determination of the rights at stake³²⁵;
- 3) the right to mount a defense and to have a reasonable time to prepare arguments, formally present them, and submit the corresponding evidence;
- 4) the right to a written record of the proceedings and decisions in the process;
- 5) the proceedings, and notification of decisions, should be conducted within a reasonable time;
- 6) the right to a reasoned decision;
- 7) right to effective judicial review of administrative decisions; and
- 8) right to disclosure of the actions of the administration.

318. In addition to the above, UNHCR has encouraged State to include the following guarantees:³²⁶

- The right of any interested party to information on eligibility criteria, the determination procedure and the rights associated with recognition of statelessness;
- The right to have access to legal counseling.
- The right of applicants to an interview with a decision-making official;
- Guaranteed access to UNHCR;
- Access to the right to appeal;
- That States refrain from expelling applicants from their territory while the outcome of the determination process is still pending.³²⁷

319. In light of the above, the Commission urges States to adopt and establish statelessness determination procedures that are accessible, simple, and expeditious; that are formally regulated by law; and that are governed by the

³²⁴ IACHR, Human Mobility, Inter-American Standards, 2016. par. 479

³²⁵ Thus, in reference to proceedings in which the right to nationality is at stake, the Court has stated: "...although Article 8(1) of the Convention alludes to the right of every person to a hearing by a "competent tribunal" for the "determination of his rights", this article is also applicable in situations in which a public rather than a judicial authority issues resolutions that affect the determination of such rights." (I/A Court H.R., *Ivcher Bronstein Case v. Panama*, Reparations and costs, Judgment of February 6, 2001, Series C No. 74, par. 105).

³²⁶ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 19

³²⁷ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para . 72

minimum judicial guarantees of due process embodied in Article 8 of the American Convention.

2. Stateless Children

320. In cases involving stateless children, particularly since they are doubly vulnerable because of their age and because they lack nationality, in statelessness determination procedures the same rules apply as for asylum procedures. In particular, this applies with regard to the adoption of special protection measures, treatment and assistance provided by specialized personnel at every stage of the process -- including the moment when the application is submitted --, the priority accorded to the processing of their applications, the cost-free assignment of legal representatives, the heavier burden of proof of the State, and absolute respect for their rights to be heard and to have their best interests taken as a primary consideration in each decision taken that might affect them.
321. As in every procedure involving them, children have a right to participate in the procedure for determining the status of statelessness through full exercise of their right to express their views freely, to be heard, and to have their views given due weight in accordance with their age and maturity, as established in Article 12 of the Convention on the Rights of the Child (CRC).³²⁸ Accordingly, the Committee on the Rights of the Child has interpreted that this right can be seen from two perspectives: as a right of all children and as an obligation on the States Parties to the CRC to guarantee the conditions needed for its full enjoyment and exercise.³²⁹ Thus, the Committee interprets that for children to be listened to, the proceedings must be voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.³³⁰
322. In addition, throughout the process and through to its completion, the best interests of the child must be a primary consideration, as per Article 3 of the CRC.³³¹ The

³²⁸ Article 12. 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

³²⁹ See: Committee on the Rights of the Child, General Comment No. 12: 12, The right of the child to be heard, CRC/C/GC/12, 20 July 2009.

³³⁰ See: Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, CRC/C/GC/12, 20 July 2009.

³³¹ Article 3. 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration..

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

mentioned Committee on the Rights of the Child has also analyzed the scope of this principle and has interpreted it from three points of view: as a right to have the best interest of the child taken as a primary consideration and that it be taken into account when weighing different interests for taking a decision; as a principle, which means that when a provision allows for more than one interpretation, heed must be paid to the one that best satisfies that best interest; and a procedural norm, which implies that whenever a decision has to be taken involving one or more children, consideration must be given to the repercussions that decision will have on their lives.³³²

323. The Committee has also analyzed the obligations that derive from this principle, including, notably, the following: 1- to guarantee that the best interests principle is applied in all measures adopted by public institutions; and 2- to ensure that explicit mention be made in the decision that the best interests of the child were assessed and were a primary consideration.³³³ Finally, the Committee has established that those responsible for taking decisions that may affect children must assess and determine their best interests in each concrete case; giving due weight to their views; taking their identity into consideration; according priority to preserving the family unit; analyzing their needs for care and protection; and giving due consideration to what is best regarding their rights to health and education.³³⁴
324. Consequently, the Commission recommends that States establish statelessness determination procedures that grant special treatment to stateless children; that take their extreme vulnerability into account; that respect the rights of children, especially their right to be heard and to have their best interests taken as a primary consideration when it comes to taking a statelessness determination decision and its protection.

3. Main Similarities to and Differences from Asylum Procedure

325. Interrelationships between statelessness and asylum procedures Firstly, both statuses grant international protection to persons whose human rights are threatened or impaired in their country of nationality or habitual residence, in which it proved impossible to obtain due protection because it was not accessible, available, and/or effective. In the case of stateless persons, there is no State to protect them because none recognizes them as a national. Asylum, in contrast, protects those who, being outside their country of nationality, cannot or are

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

³³² See: Committee on the Rights of the Child, General Comment No. 14: On the right of the child to have his or her best interests taken as a primary consideration CRC/C/GC/14, 29 May 2013.

³³³ See: Committee on the Rights of the Child, General Comment No. 14: On the right of the child to have his or her best interests taken as a primary consideration CRC/C/GC/14, 29 May 2013.

³³⁴ Committee on the Rights of the Child, General Comment No. 14: On the right of the child to have his or her best interests taken as a primary consideration CRC/C/GC/14, 29 May 2013.

unwilling to avail themselves of that country's protection,^{335[061]} or who, in the regional context, have fled from their countries.^{336[061]}

326. Second, another major similarity with asylum procedure has to do with the principal effect of recognizing a person as stateless or as a refugee. Recognition of both statuses grants persons recognized as such access to their fundamental rights as well as the right to reside lawfully in the territory of the State in which they were recognized until, in the case of stateless persons, they acquire a nationality, and, in the case of refugees, until the circumstances in connection with which they have been recognized as a refugee have ceased to exist, pursuant to Article 1. C. of the 1951 Convention.³³⁷ The residence permit, moreover, must allow them to access, enjoy, and exercise their fundamental human rights in the State in question, without being discriminated against because they lack a nationality or for being refugees.
327. Third, in the statelessness determination procedure, as in asylum procedure, there are regulations governing the so-called "exclusion clauses," which, if applicable, preclude a person from availing himself or herself of international statelessness protection.³³⁸
328. As for the differences between the two procedures, one has to do with the factors required for protection to be granted. Whereas, in order for a person to be recognized as stateless, only lack of nationality is required, recognition as a refugee requires, as noted earlier, two principal elements: one relating to the reasons prompting the applicant to leave the country and the second relating to the fact of being outside his or her country of origin. Thus, the grounds for leaving the country should not apply for recognition of statelessness status. Nevertheless, although the

³³⁵ Article 1. A. 2) of the Convention relating to the Status of Refugees of 1951.

³³⁶ Third Conclusion of the 1984 Cartagena Declaration on Refugees.

³³⁷ Article 1. Definition of the term "refugee." (...) C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

³³⁸ On exclusion clauses in the statelessness determination procedure, see paragraphs 341-348.

“being outside the country of nationality” factor is proper to asylum, the fact is that stateless persons may be either outside their country of birth or within their “own country” under Article 12 (4)³³⁹ of the International Covenant on Civil and Political Rights³⁴⁰.

329. In addition, the purposes of the two procedures differ. The ultimate purpose of the refugee status determination procedure is to arrive at a lasting solution for refugees, whereby the three possible solutions are: i) local integration in the host community; ii) voluntary repatriation; and iii) resettlement in a third country. The purpose of the statelessness determination procedure, on the other hand, is to grant protection to stateless persons, including the right to reside lawfully in the territory in which they were recognized and subsequently to facilitate their naturalization. In addition to that, any statelessness procedure that abides by international human rights law should subsequently facilitate the naturalization of stateless persons and grant them a nationality within a reasonable period of time: an objective that does not necessarily have to apply in an asylum procedure, unless the best option for the refugee is to integrate with the local community.
330. Finally, another pertinent different between the two procedures has to do with the protection granted in each case. Thus, the Convention relating to the Status of Refugees grants greater rights and more protection than the 1954 Convention. In particular, the non-refoulement ban is only guaranteed for asylum-seekers and refugees, pursuant to Article 33 of the 1951 Convention; it is not upheld in the Convention Relating to the Status of Stateless Persons. Nevertheless, despite this omission, it is to be pointed out that the non-refoulement principle is part of customary international law, which generates the obligation for the States not to return a stateless person to their country or countries of previous habitual residence, as well as to any other place where their life or liberty is in danger or where they would be subjected to torture, cruel, inhuman or degrading treatment or punishment. The 1954 Convention likewise does not prohibit penalties for

³³⁹ Article 12. 4 No one shall be arbitrarily deprived of the right to enter his own country.

On this, in its [General Comment No.27: *Freedom of Movement \(Article 12\)*](#) of 2 November 1999, the Human Rights Committee stated in paragraph 20 that the wording of article 12, paragraph 4, does not distinguish between nationals and aliens (“no one”). *Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”. The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.* Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

³⁴⁰ On the situation of stateless persons inside their country of birth, see paragraphs 347-350.

unlawful entry, whereas that prohibition does apply to asylum-seekers and refugees under Article 31 of the Convention relating to the Status of Refugees.

4. Interrelationships between Statelessness and Asylum Procedures

331. Under certain circumstances, stateless persons may also be refugees by virtue of their being in one of the situations regulated in the 1951 Convention. This situation may trigger a "conflict" with respect to the applications for those statuses, their processing, and how they are resolved. Thus, if a person considers that his or her situation fits both statuses, the Commission recommends that he or she receive counseling regarding the submission of two distinct applications. Furthermore, the IACHR recommends that the respective competent authorities process both applications with a view to either both statuses being recognized in the corresponding resolutions, or one of them, depending on the case.
332. At the same time, the Commission observes that it is important for both authorities to coordinate with one another with a view to preventing one procedure from adversely affecting the other, or jeopardizing the integrity of the applicant. In asylum procedures, States are obliged to abide by the confidentiality principle, because if the State in question were to be notified that one of its nationals is fleeing the country, it could severely endanger that person's personal integrity, or, where applicable, that of any family members who stayed in his or her country of origin. Thus, if the decision-making officials are required to consult with the foreign authorities to ascertain the nationality status of the applicant, thereby placing confidentiality at risk, according to UNHCR, the refugee status determination needs to go ahead and consideration of the statelessness application should be suspended.³⁴¹ If, on the other hand, it is not necessary to contact the authorities in the country of origin to determine statelessness, it is possible for both procedures to proceed parallel to one another.³⁴² Accordingly, the IACHR urges States to extend and abide by the confidentiality principle in statelessness determination procedures as well, in those case in which one and the same applicant may meet the requirements for both statuses.
333. In addition to the above, according to UNHCR, regardless of whether both procedures -- statelessness and refugee or, where applicable some form of complementary protection procedure -- are being processed separately or are combined, under certain circumstances, an applicant should be able to reactivate a statelessness application that has been suspended, for instance if:³⁴³

³⁴¹ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 26.

³⁴² UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 27.

³⁴³ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 30.

- the asylum application is denied;
 - refugee status is recognized, but subsequently expires;
 - refugee status is canceled; or
 - additional evidence arises that the person is stateless.
334. Finally, in the event that a person is recognized as having both statuses, that shall be upheld by the 1951 Convention, which established stateless refugee status. In addition to the above, and bearing in mind the differences between the protection afforded in each case, the Commission observes that, based on the pro persona principle, greater respect for those persons' rights is shown if they are covered by the Convention Relating to the Status of Refugees. As noted, this instrument grants greater rights than the 1954 Convention and consequently affords more protection, especially with respect to non-refoulement and the prohibition of penalties for unlawful entry.

D. Application for Recognition of Stateless Person Status

1. Persons Applying for Recognition of Stateless Person Status

335. The term applicant for statelessness status refers to a person who requests recognition of said status and whose application is pending final resolution in the host country. Final resolution means a decision that cannot be challenged given that all domestic remedies have been exhausted or because the times allowed for challenging it have lapsed.

2. The Application

336. In order to ensure correct registration of the procedure and transparency, it is recommended that applications be submitted in writing, with States providing assistance with this if necessary, especially in respect of translation and interpretation.³⁴⁴
337. If a family is involved, it is the right of every member of a family to make an independent application³⁴⁵ in order to ensure that his or her particular circumstances are taken into consideration. Likewise, even with joint applications,

³⁴⁴ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 71.

³⁴⁵ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 71.

the competent authority must separately analyze whether exclusion clauses apply in respect of each individual.

3. Child Applicants

338. If the stateless persons are children, the Commission considers that the mother, father, or legal representative should be allowed to submit the application; or, in their absence, that it may be submitted by the person taking care of children separated from their families or of unaccompanied children. The IACHR further recommends that States avoid judicial proceedings in the case of applications by separated or unaccompanied children so as to avoid subjecting them to more complex processes. Consequently, the Commission urges States to process statelessness applications by children separated [from their families] or unaccompanied children using administrative procedures, provided that they have free legal aid and are accompanied, including prior to submission of the application.

4. Principal Obligations of the State relating to the Application

339. With respect to an application for recognition of statelessness status, the Commission finds that host States have two main obligations relating to the submission of the application and the rights derived therefrom. First, to comply with minimum procedural guarantees, States are obliged to afford applicants access to legal aid, according them the right to choose a lawyer they trust or, in the absence of such a person or if the applicants lack the financial resources to pay for the services, State are obliged to provide free assistance at all stages of the procedure, that is to say, from application to adoption of a final resolution.
340. At the same time, the principal right derived from submission of a statelessness application is the applicants' right to temporary residence, which allows them to remain lawfully in the territory of the host country and to have access to their fundamental human rights. Accordingly, the Commission urges host countries to grant a temporary residence permit to those applying for the status of stateless person that can be renewed until a final decision is taken in the procedure. That permit must enable applicants to exercise their human rights without any form of discrimination based on their lacking a nationality; in particular, to move freely within the territory of the country; not to be detained arbitrarily; and to be protected against expulsion.

5. Exclusion Clauses

341. At the same time, it is worth stressing that, as in the refugee status determination procedure, exclusion clauses also apply in the determination of statelessness. Article 1(2) of the 1954 Convention relating to the Status of Stateless Persons establishes

its exclusion clauses, the wording of which is identical to those contained in Article 1, D, E and F of the Convention relating to the Status of Refugees. Thus, exclusion clauses may be divided into two groups, based on the cause giving rise to exclusion from protection: whether it is because the applicant is already receiving special protection, or due to acts or crimes in respect of which there are substantiated ground for considering that the applicant committed them.

342. Within the first group of exclusions, the 1954 Convention does not apply to persons who:

- are at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees for as long as they receive said protection or assistance³⁴⁶; and
- or to persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.³⁴⁷

343. For its part, the second group of exclusions from application of the 1954 Convention refers to persons with respect to whom there are serious reasons for considering that:

- They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments referring to such crimes³⁴⁸;
- have committed a serious non-political crime outside the country of their residence prior to their admission to that country³⁴⁹; and
- have been guilty of acts contrary to the purposes and principles of the United Nations³⁵⁰.

344. Consequently, this means that persons to who the exclusion clauses apply are not entitled to the special protection of the Convention relating to the Status of Stateless Persons even though *prima facie* they comply with the requirements for being considered stateless persons (*a person who is not considered as a national by any State*, as Article 1 (1) of the 1954 Convention puts it).

³⁴⁶ Article 1.2.i) of the Convention relating to the Status of Refugees of 1954.

³⁴⁷ Article 1.2.ii) of the Convention relating to the Status of Refugees of 1954.

³⁴⁸ Article 1. 2. iii) of the Convention relating to the Status of Refugees of 1954.

³⁴⁹ Article 1. 2. iii) (b) of the Convention relating to the Status of Refugees of 1954.

³⁵⁰ Article 1. 2. iii) (c) of the Convention relating to the Status of Refugees of 1954.

6. Individual and Collective Determination

345. Statelessness determination procedures should normally be individualized, as such procedures allow for the exploration of each applicant's personal circumstances.³⁵¹ However, as UNHCR has maintained, it is possible to grant stateless person status to individuals within a group on a prima facie basis, where there is readily apparent, objective information about the lack of nationality of members of a group.³⁵²
346. Therefore, in this latter case, an individual's eligibility would be based on analysis of whether he or she is a member of the previously identified group and on individual consideration of whether his or her situation is encompassed by any of the exclusion clauses.

7. Situation of Stateless Persons inside Their Country of Birth

347. Persons lacking nationality are often found within their country of birth, that is to say, in their "own country", in the words of Article 12 (4)³⁵³ of the International Covenant on Civil and Political Rights.³⁵⁴ Accordingly, according to UNHCR, recourse to a statelessness determination procedure will not generally be appropriate in the last case mentioned. There, restoration or automatic conferral of nationality would apply, as the case may be.³⁵⁵
348. However, here we come up against the fact that many States are discriminatory in their domestic provisions on conferring nationality, for instance when they prohibit children born to unlawful immigrants from acquiring the nationality of their country

³⁵¹ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 55.

³⁵² UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 56.

³⁵³ Article 12...4 No one shall be arbitrarily deprived of the right to enter his own country.

³⁵⁴ On this, in its [General Comment No.27: Freedom of Movement \(Article 1212\)](#) of 2 November 1999, the Human Rights Committee stated in paragraph 20 that the wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). *Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.* Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

³⁵⁵ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 165

of birth. That circumstance, combined with failure to adopt measures that could prevent statelessness, may induce persons who have no other way of asserting and exercising their rights to resort to seeking protection via the statelessness determination procedure.

349. The inter-American human rights system, especially the Inter-American Court, tried to resolve this situation in a case brought against the Dominican Republic by ordering the State to:

...adopt within its domestic law ... legislative, administrative and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth. This procedure should be simple, accessible and reasonable since, otherwise, applicants could remain stateless.³⁵⁶

350. Therefore, the Commission reminds States of their obligation to confer nationality on children and, in general, any person who would otherwise be stateless; and to refrain from impeding access to procedures for determining statelessness status by persons forced to resort to them.

E. Examination of the Application and Assessment of the Applicant's Nationality Situation

1. Evaluation of the Application

351. As with asylum applications, requests for statelessness status must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority³⁵⁷ specializing in statelessness.
352. However, unlike what happens in asylum procedures which only evaluate circumstances and facts, statelessness procedures require analysis of nationality and other relevant laws of the States concerned and evaluation of the application of those laws in practice, including the extent to which they require the engagement of different branches, as judicial and government officials, in nationality procedures.³⁵⁸ Thus, it is worth pointing out that an analysis must be made of the laws of the countries with which the applicant has any close ties, for example, his or her place of birth, places where the applicant has lived --especially those in which applicant

³⁵⁶ I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Serie C No. 130, operative paragraph 8.

³⁵⁷ IACHR, *Human Mobility, Inter-American Standards*, 2016. para. 432

³⁵⁸ UNHCR, *Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons*, Geneva. 2014, paras. 83 and 85.

stayed for a long period of time - as well as, inter alia, the place of residence and/or nationality of the applicant's parents, spouse, or children.

353. When determining an applicant's eligibility, the competent authorities must evaluate nationality.³⁵⁹ An individual's nationality is to be assessed as at the time of determination of eligibility, that is to say, if resolution of a nationality procedure is still pending, the person concerned is still stateless. On the contrary, if the person is still awaiting resolution of a procedure for loss, renunciation, or deprivation of nationality, that individual is still considered a national. Thus, in order to obtain clarification of nationality status, officials may consult the consulate of the State in question located in the country of the procedure, or, if there is no such consulate, the one that is competent. This is one of those cases in which consular authorities are identified as competent authorities for determining a person's nationality, and they play an important part in the statelessness procedure, especially when they respond.³⁶⁰

2. Evidence Assessment

354. The statelessness procedure also requires a personal interview conducted by an official of the competent authority responsible for taking decisions on the statelessness status of the applicant.³⁶¹ The personal interview is a right to which all applicants are entitled, that enables them to describe their personal circumstances and that arises from their duty to cooperate with the procedure. In connection with that interview, applicants have a right to assistance, where needed, with translation or interpretation, as well as all the necessary measures to guarantee the accessibility of all the procedural stages to people with disabilities.³⁶²
355. The interview not only affords applicants an opportunity to tell their story and explain their situation, which is especially important when evidence is lacking; it is also an important opportunity for the decision-maker to explore any questions regarding the evidence presented.³⁶³
356. Likewise, in addition to the applicant's testimony during the interview or provided in writing in the application, in the statelessness determination procedure there are also other kinds of evidence that are assessed by the competent authority with a

³⁵⁹ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 50.

³⁶⁰ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 40.

³⁶¹ There is a UNHCR publication that addresses interviewing techniques in connection with asylum procedures that are also applicable to procedures for determining statelessness status. ACNUR, [Metodología y Técnicas para Entrevistar a Solicitantes de la Condición de Refugiado, Módulo de Capacitación](#), 1995. [English: Interviewing Applicants for Refugee Status (RLD 4) 1995]

³⁶² UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 71.

³⁶³ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 100.

view to ascertaining whether the applicant lacks a nationality, the applicability of the exclusion clauses, and other matters relating to determination of statelessness status. This evidence may be submitted both by the applicant and the authority responsible for determination, particularly since the shared burden of proof principle applies, so that both parties must cooperate in eliciting the evidence and establishing the facts.

357. Examples of evidence include: identity documents (e.g. birth certificate, national identity card, voter registration document); travel documents (including expired ones); documents regarding applications to acquire nationality; certificate of naturalization; certificate of renunciation of nationality; marriage certificate; military service record/discharge certificate; school certificates; medical certificates/records; identity and travel documents of parents, spouse and children; immigration documents (such as residence permits); other documents pertaining to countries of residence (for example, property deeds, tenancy agreements); and records of sworn oral testimony of neighbors and community members; and so on.³⁶⁴
358. Given the difficulties of proving statelessness, UNHCR has recommended that States adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a “reasonable degree” that an individual is not considered as a national by any State under the operation of its law³⁶⁵ In addition, the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts..³⁶⁶

F. Finalization of the Procedure for Recognizing Stateless Person Status: Reaching a Decision

1. Recognition of Stateless person Status

359. Once the nationality situation of the applicant has been evaluated on the basis of the definition given in Article 1(1) of the 1954 Convention; his or her situation has been analyzed in light of the exclusion clauses; and the evidence has been weighed, within a reasonable period, the competent authority must decide, in a written and substantiated resolution, whether or not it recognizes stateless person status. If the decision is positive, the recognition by a State of stateless person status entails that it grant the stateless person the rights to reside in its territory, move around freely

³⁶⁴ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 32.

³⁶⁵ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 39

³⁶⁶ UNHCR, Handbook on the Protection of Stateless Persons. Geneva, 2014. Para. 89.

within it, leave and re-enter it based on the issuance of a travel document, and to exercise his or her human rights without discrimination based on lack of nationality.

360. Given that recognition of statelessness does not involve acquisition of a nationality, when States recognize a person's statelessness status, they must also grant that person a residence permit that enables him or her, once legal requirements have been met, to become naturalized and acquire the nationality within a reasonable period of time; as well as grant that person protection against expulsion.³⁶⁷ Accordingly, UNHCR has recommended that said residence permit be valid for at least two years and that it be renewable thereby offering the possibility of facilitating naturalization pursuant to Article 32 of the 1954 Convention.³⁶⁸
361. Nevertheless, the residence permit may be canceled if the stateless person subsequently acquires the nationality of another State, following analysis of proportionality considerations in relation to acquired rights and taking into consideration the degree to which the individual has established a family life in the host State³⁶⁹; all that, with a view to avoiding the possibility of a family separation.
362. Consequently, the Commission urges States to grant stateless persons recognized as such a permanent residence permit that allows them to remain in the territory of the country provided that they keep their statelessness status. In addition, the IACHR urges States to maintain the residence permit even after the stateless person acquires a different nationality, in order to protect the family unit.

2. Rights Acquired by Virtue of Recognition of Stateless Person Status

363. Anyone recognized as a stateless person must be allowed to exercise his or her human rights without discrimination based on the lack of nationality. The fundamental principle of the Convention relating to the Status of Stateless Persons is that "no stateless person shall be treated less favorably than any alien in general."³⁷⁰ Furthermore, given that the Convention recognizes that stateless

³⁶⁷ Along the same lines, see: UNHCR. Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, 2014, p. 5: "...the Convention requests that the Contracting States as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

³⁶⁸ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 148.

Article 32 of the Convention relating to the Status of Stateless Persons provides: The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

³⁶⁹ UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 149.

³⁷⁰ UNHCR. Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, 2014, p. 4.

persons are more vulnerable than other aliens, in broad terms it establishes that a series of special measures for their protection, such as the right to administrative assistance (Article 25) and the right to identity papers and travel documents (Articles 27 and 28), and it exempts them from reciprocity requirements (Article 7).³⁷¹

364. However, the 1954 Convention only equates the treatment of stateless persons with that of nationals in respect of the right to religious freedom (Article 4) and to primary education. In contrast, as regards the exercise of some rights such as the right of association, the right to work, and the right to housing, the 1954 Convention provides that stateless persons must enjoy, at a minimum, the same treatment as other non-nationals,³⁷² and applies the formula "treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances."³⁷³
365. Nevertheless, bearing in mind the current context of international human rights law, the Commission considers that the international protection and treatment accorded a person recognized as stateless must go beyond his or her assimilation to an "alien," particularly because this latter term is very broad and ambiguous and could lead, erroneously, to the assimilation of a stateless person with someone temporarily visiting the country as a tourist.
366. That said, the IACHR maintains that a recognition of statelessness that respects human rights and in line with its purpose of granting international protection to persons who, because they lack a nationality, are in an extremely vulnerable situation must entail the possibility that those stateless persons can fully access and enjoy their human rights on an equal footing with a national; in other words they must be accorded the same treatment as nationals.
367. In particular, the Commission urges States to guarantee for stateless persons recognized as such, at a minimum, the following rights:³⁷⁴
- **Juridical status:** recognition of statelessness status, access to courts, property rights (intellectual, industrial, movable and immovable), and right of association.

³⁷¹ UNHCR. Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, 2014, p. 4.

³⁷² 1954 Convention relating to the Status of Stateless Persons, Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR).

In addition, it grants stateless persons the same treatment as nations with regard to public relief and assistance (Article 23), the delivery of documents or certifications (Article 25), labor legislation and social security (Article 24), fiscal charges (Article 29), and rationing (Article 20).

³⁷³ See: Article 13 (movable and immovable property), Article 18 (self-employment), Article 19 (liberal professions), Article 21 (housing), and Article 22 (public education).

³⁷⁴ Note that some of the rights categories were derived from the Convention relating to the Status of Stateless Persons, but in this documents they are applied differently. See: UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, para. 129.

- **Economic and social rights**

- The right to access work with the possibility of obtaining formal employment, which includes wage-earning employment (*trabajo en relación de dependencia*) and practice of the liberal professions to the extent that compliance with the requirements proper to each profession is guaranteed.
- The right to education (public, wherever it is available and always on a non-discriminatory basis);
- The right to health: including access to health services in all their dimensions and at every level, particularly sexual and reproductive health care services;
- Access to social assistance and any public welfare services;
- The right to social security benefits;
- The right to housing.

- **Rights to freedom of movement and residence:** right to be granted a residence permit, the right to move freely within the territory of the country, the right to be issued with identity papers and travel documents, the right to freely leave and enter the territory, protection against expulsion, and the right to the option of becoming naturalized and acquiring a nationality within a reasonable period of time.

- **Family unity:**³⁷⁵ the right of all stateless persons to be reunited with their family. As in asylum procedure, this right applies to reuniting a stateless person with his underage children or children who are dependent upon him or her, as well as with his or her spouse or person with whom he or she has a relationship having legal effects equivalent to marriage. In practice, other family members may also be included who are responsible for the stateless person, such as the father or mother if they are older adults and are part of the same household.³⁷⁶

368. However, whereas application of the family reunification principle in an asylum procedure context leads to a person's refugee status being extended to his or her family members, in the statelessness procedure it does not entail extending statelessness status to family members -- who may have a nationality -- but rather granting residence rights to dependents of a stateless person on the same terms as

³⁷⁵ The right to family unity and the principle of family reunification are rooted in the human right to a family and to its protection that are enshrined in the principal, regional and international, human rights instruments. Particularly noteworthy are the following:

- Article VI of the American Declaration on the Rights and Duties of Man establishes that: "Every person has the right to establish a family, the basic element of society, and to receive protection therefor."
- For its part, Article 17(1) of the American Declaration on Human Rights provides that: The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."
- Finally, Article 16(3) of the Universal Declaration of Human Rights reads as follows: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

³⁷⁶ This extension of what constitutes the family group is accepted by UNHCR in asylum procedures. See: UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 1992, para. 185; and it turns out to apply in a statelessness context as well.

those granted to the stateless person, in order to facilitate their meeting in the territory.³⁷⁷

369. At the same time, it is worth underscoring that this right becomes especially important in the case of stateless children, or when the stateless person has children under the age of 18. Based on an analysis of Articles (9 (1)³⁷⁸ and 10³⁷⁹ of the CRC, the Commission deems that in connection with a statelessness procedure involving children - be it directly, if they are stateless, or indirectly, when their mother or father are stateless - the right to family unity may be interpreted as the right of the children and of their parents to both leave or enter any country -- in both cases including their own country -- in order to reunite with their family and maintain family ties. In addition, the IACHR is of the understanding that, in the case of stateless children, the right to family reunification may also be applied to their siblings and grandparents, particularly in the case of very young children.

3. Identity Papers and Travel Documents

370. As pointed out previously, by virtue of the recognition of statelessness status, States should furnish all stateless persons recognized as such with an identity paper and a travel document. The issuance of such documents is justified by the obstacles that stateless persons encounter for obtaining them, a situation that exposes them to a number of risks associated with not being able to lawfully leave and enter through a country's border and that, in more extreme cases, may lead to arbitrary and prolonged detention.
371. The Convention relating to the Status of Stateless Persons calls on State to issue identity papers to any stateless person in their territory and do not possess a valid travel document.³⁸⁰ As regards the travel document, Article 28 of the 1954

³⁷⁷ Along those same lines, see: UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva. 2014, note 97 to para. 151.

³⁷⁸ Article 9. 1 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

³⁷⁹ Article 10. 1 In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2 A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention

³⁸⁰ Article 27 of the Convention relating to the Status of Stateless Persons.

Convention also states that the Contracting States shall issue to *stateless persons lawfully staying* in their territory travel documents, and may issue such a travel document to any other stateless person, giving sympathetic consideration to those who are unable to obtain a travel document from the country of their lawful residence.

372. Here, it is worth noting that the travel document in no way affects the nationality status of the stateless person; it is issued solely with a view to providing the holder with a travel document which shows his or her identity and *can serve in lieu of a national passport*, under the terms of the 1954 Convention.³⁸¹ Its purpose is to allow stateless persons to exercise their rights to leave the territory, enter other countries, and return to the previous one -- within the time allotted -- without encountering any obstacles.
373. To ensure that States comply with this duty, which is considered a basic legal benefit for stateless persons,³⁸² the Convention relating to the Status of Stateless Persons includes a model travel document and makes recommendations as to both format³⁸³ and content. In particular, the model recommends that the travel document contain expiration, renewal, or extension dates; the full name of the holder of the document; in the event that the document is issued for a child, the full name of the person accompanying the child; the time during which the holder of the document is authorized to return to the country, preferably not less than three months; date and place of birth; place of residence; personal data of the spouse; a physical description of the person; data on the children accompanying the holder; indication of the countries for which it is valid; photograph and fingerprint of the holder; and signature and stamp of the issuing authority.
374. In light of the above, the Commission urges States to issue identity papers and travel documents to the stateless persons recognized as such in their territories as soon as possible after their recognition. The IACHR further recommends that, in complying with that duty, States adopt a model compatible with the indications contained in the 1954 Convention relating to the Status of Stateless Persons.

³⁸¹ Point one of the recommended travel document model expressly states: "This document is issued solely with a view to providing the holder with a travel document which can serve in lieu of a national passport. It is without prejudice to and in no way affects the holder's nationality.

³⁸² UNHCR. Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, 2014, p. 4.

³⁸³ As for format, the model document text provides that: It is recommended that the document be in booklet form (approximately 15 x 10 centimetres), that it be so printed that any erasure or alteration by chemical or other means can be readily detected, and that the words "Convention of 28 September 1954" be printed in continuous repetition on each page, in the language of the issuing country." It is also recommended that the document be in at least two languages, one of them being English or French.

At the same time, as of April 1, 2010, according to International Civil Aviation Organization (ICAO) rules, all travel documents issued by States, including travel documents for stateless persons, must be machine-readable. See: ICAO-UNHCR [Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons](#). October 2013.

4. Possibility of Acquiring Nationality within a Reasonable Period of Time

375. The only circumstance than can put an end to the international protection granted to a stateless person is acquisition of a nationality. Accordingly, the Commission reiterates the importance of ensuring that the residence permit granted to stateless persons allows them to proceed to their naturalization and the acquisition of nationality within a reasonable period of time.³⁸⁴
376. The Commission acknowledges that States have the power to regulate by law the terms under which a person lawfully residing in their territory may become naturalized, as this is a function proper to them. All the same, the IACHR recommends that they grant facilities for the prompt naturalization of stateless persons. In particular, the Commission urges States not to demand evidence that such persons cannot reasonably be expected to obtain; to shorten the residence times required to apply for their naturalization compared to the times normally required, so as to enable stateless persons to put an end to their statelessness status as soon as possible and thereby gain access to a country's protection.
377. The Commission further considers that those facilities should include priority processing of the procedure for the naturalization of stateless persons and their acquisition of a nationality; exemption from language skills and knowledge testing; and a reduction of processing costs or even cost-free processing.³⁸⁵

5. Decision to Deny an Application for Recognition and Protection Due to Stateless Person Status

378. As in cases involving the conferral or loss of nationality, the IACHR recognizes that States have the power to decide on recognition of stateless person status. Nevertheless, the Commission also values the gradual development of international norms regarding a number of protection mechanisms and commends the States that are working on procedures and methods for granting such protection, as a means of guaranteeing non-discriminatory access applying the highest inter-American human rights standards.
379. Thus, the Commission observes that, pursuant to those standards, statelessness recognition procedures need to focus on investigating the fact that the applicant has no nationality or on verifying one or other of the objective exclusion clauses. It likewise notes that there may be cases in which the investigation into the absence

³⁸⁴ See in this regard the references to reasonable period of time guarantees in paragraphs 341-344.

³⁸⁵ One example of that, welcomed by the Commission is Argentina's General Law on Recognition and Protection of Stateless Person, Law No. 27.512, Article 25 of which establishes cost-free processing of naturalization, of statelessness determination procedures, and migration procedures.

Along similar lines, Article 32 of the 1954 Convention regulated the duty of the Contracting States to facilitate the naturalization of stateless persons, by expediting processing and reducing costs as much as possible.

of nationality may prove inconclusive, for instance when the competent authorities find no definitive evidence to show that said person is not recognized as a national by any State, or when they find that the applicant may be entitled to acquire or reacquire the nationality of a different State and should apply for that instead of requesting statelessness status.³⁸⁶ In these cases, the IACHR recommends that states favor the benefit of doubt to the applicant.

380. Finally, in case of a denial by the competent authorities of an application for recognition of statelessness, the resolution in question should be handed down within a reasonable period of time, substantiate the reasons for the decision, and allow for an appeal.

6. Appeal or Challenge Remedy

381. Any applicant for statelessness status is entitled to challenge a decision by a competent authority denying the status requested before an equally competent, independent, and impartial higher authority. That right is embodied in Article 8 of the American Convention. In addition, that right encompasses the right to be given the time and means needed to prepare an appeal.
382. Therefore, the Commission urges States to explicitly include in their domestic regulations a legal, effective, and suitable appeal option for challenging a decision denying statelessness status and that includes the possibility of the decision being overturned and nationality conferred when that decision is found to have been unlawful or arbitrary.³⁸⁷ In addition, the appeal remedy must allow for complete revision of the negative ruling, that is to say, in respect of both the facts and assessment of the evidence, as well as the law applied. According to UNHCR, States may in addition permit a further judicial review, which addresses questions of law only, and may be limited by the procedural rules of the judicial system concerned³⁸⁸.
383. At the same time, in order for applicants to be able to exercise their right to appeal decisions, the IACHR considers that legislation should in addition provide for deadlines for submitting an appeal that are sufficiently generous to enable the appellant to prepare his or her defense, but not excessive, as the idea is also to avoid

³⁸⁶ UNHCR has acknowledged the possibility of cases in which protection is available in another State, under just two scenarios:

- when a stateless person: is able to acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or
- when a stateless person enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible.

See: UNHCR, Handbook on the Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons, Geneva, 2014, paras. 153-157.

³⁸⁷ IACHR, Human Mobility, Inter-American Standards, 2016. para. 480.

³⁸⁸ UNHCR, GUIDELINES ON STATELESSNESS NO. 2: Procedures for determining whether a person is stateless. GENERAL DISTRIBUTION, HCR/GS/12/02, 5 April 2012, para. 25.

procedures being dragged on for too long due to appeals. Time limits also need to be set for resolutions by the competent body.

384. In addition to the above, the IACHR recommends that States clearly establish in their domestic legislation which body is competent to decide the appeal. That body needs to be independent and higher than the authority that took the first instance decision, as well as trained and competent in statelessness matters.
385. The Commission further reiterates the obligation of States to provide legal aid to applicants who file an appeal. That service must be provided cost-free to persons lacking the financial resources to pay for it.
386. Finally, in order to avoid impairing applicants' right to temporary residence, the Commission urges States to give suspensive effects to the appeal for review to allow the applicant to remain in the country while the decision on the appeal is still pending, unless it can be shown that the request is manifestly unfounded.³⁸⁹

³⁸⁹ IACHR, Human Mobility, Inter-American Standards, 2016. para. 432.

CHAPTER 6

**CONCLUSIONS AND
RECOMMENDATIONS**

CONCLUSIONS AND RECOMMENDATIONS

387. In this report, the Commission has conducted an extensive survey, commenting on the norms, procedures, standards, and other key factors for constituting and strengthening systems for recognizing refugee protection, asylum, and statelessness status, as well as other mechanisms offered by States to provide supplementary protection to persons in need of it. Based on its diagnostic assessment regarding the lack of an agreed-upon procedural basis for addressing the principal aspects of the various types of protection status recognition, the Commission acknowledges the challenges involved in proposing standards that enable protection statuses to be applied in practice in the very different institutional contexts found in the region.
388. That being so, the present report is built around recognition of minimum standards for verifying adequate due process safeguards in the different kinds of protection status recognition procedures. The content of this report has also been coordinated with the recently published Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, approved by the IACHR in Resolution 04/2019, with a view to expanding the repertoire of best institutional practices available to States for strengthening and rating existing procedures, as well as devising innovations in processes that respond to new contexts of human mobility.
389. The Commission observes that one of the main challenges in the region with regard to procedures for recognizing protection statuses has to do with the concrete conditions in which applicants can gain access to legal defense, aid, and representation mechanisms that are especially necessary in order to file administrative or judicial appeals when their applications are denied. A second frequent issue that States need to address is the placing of obstacles to the exercise of rights of defense, such as the detention of migrants and the outsourcing abroad of procedures with the express or tacit consent of third countries in which asylum-seekers or applicants for complementary protections are held while their cases are being analyzed.
390. Third, the Commission underscores the need to effectively guarantee access to economic, social, and cultural rights, particularly in order to ensure that applicants for protection have access to the labor market, health care, welfare services, and education. The Commission views such conditions as essential for making sure that applicants' rights are not further impaired while they wait for their applications to be processed.
391. In recent years, the Commission has also been able to monitor the intensification of so-called mixed migratory movements and the increase in

new applications for asylum and the quest for protection in response to new forms of forced displacement. Such displacements pose huge challenges for transit and final destination States, such as the overburdening of national protection systems, and they require new institutional cooperation and response systems. In this regard, the Commission stresses that such responses need to be shaped by such values as solidarity, willing acceptance, and shared responsibility, while respecting asymmetrical differences between countries, with a focus on protecting the lives and human rights of displaced persons. Finally, the Commission recognizes that responses to the new movements have to be structured in a manner consistent with protection of due process guarantees and non-discrimination.

392. At the same time, the IACHR also acknowledges the progress made in recent years with respect to protection, such as the adoption of statelessness conventions by a number of countries in the Americas, and new regulations or domestic legislation incorporating and providing an institutional basis for protection commitments relating to statelessness. The Commission is also mindful of the Brazil Plan of Action, established in connection with the 2014 Declaration of Brazil, on the protection of refugees and stateless persons in the region, which proposes a commitment to eradicate statelessness in the Americas by 2024.
393. Regarding protection for stateless persons, the Commission hopes that the compilation of protection standards and the proposals to enhance them will help bolster institutional and regulatory changes conducive to concrete and immediate results for persons still suffering the effects of arbitrary deprivation of nationality. In a context in which mechanisms to protect stateless persons are still only weakly embodied in institutions, the Commission is systematizing a set of standards geared to strengthening national system and enhancing States' technical capacities.
394. The IACHR reiterates its commitment to cooperate with the States in the region in the quest for solutions and to develop more robust recognition and protection systems for refugees, stateless persons, and those in need of complementary protection. In that spirit, and based on its consideration in this report, the IACHR formulates the following recommendations to OAS member states, with a view to protecting and safeguarding the rights of that group of persons. In light of the above and by virtue of Article 41.b of the American Convention on Human Rights, the Commission hereby makes the following recommendations to the member states of the Organization of American States.
395. In respect of guarantees relating to procedures for recognizing stateless person and refugee status, and for granting complementary protection, States should:
 1. Effectively guarantee access to territories and protection procedures, including access to social and economic rights from the moment an application is submitted, especially the right to work and the right to education;

2. Constantly review their procedures, regulations, and practices, seeking to ensure comprehensive protection of the procedural guarantees for non-discriminatory and fair procedures and committing also to continue gradually developing inter-American human rights standards in this field;
3. Recognize that the practice of detention for strictly migration-related reasons impairs, among other values, the possibility of fully guaranteeing due process, particularly in procedures for recognizing and granting protection status, so that such practices must be rethought;
4. Establish and maintain protection status determination procedures that grant special treatment to stateless children; that take their extreme vulnerability into account; that respect the rights of children, especially their right to be heard and to have their best interests taken as a primary consideration when it comes to taking decision, in line with international norms and inter-American standards, within the framework of internal laws and public policies;
5. In line with international rules and regulations and inter-American standards, within the framework of domestic laws and public policies, incorporate and constantly update specific provisions on the protection of refugee and asylum rights, complementary protection, and the recognition and protection of stateless persons;
6. Adopt measures for adapting existing structures and institutions, endowing them with the capacities needed to process and make appropriate decisions, mindful of due process, regarding the mass influx of asylum-seekers, refugees, and applicants for other forms of humanitarian protection in connection with the current mixed migratory movements in the region;
7. Intensify the sharing of information, best practices, and experiences in the region, guided by the principles of solidarity and cooperation, and a despite to reinforce human rights standards in welcoming, recognizing, and assimilating refugees, stateless persons, and those needing other forms of protection;
8. Mainstream the gender perspective based on an intersectional approach in policies and at all stages in procedures and processes, taking into account the variety of contexts and situations in which recognition and protection procedures might exacerbate the vulnerabilities to which applicants may be exposed;
9. Adapt their protection systems in order to recognize and process new forced displacement factors and new hypotheses that lend a new dimension to the non-refoulement principle, such as generalized

violence and severe impairments of economic, social, cultural, and environmental rights in the wake of pandemics and other emergencies.

396. Specifically as regards the treatment of statelessness, States should:

10. Sign and ratify international instruments specifically addressing the protection of stateless persons and reduction of the factors giving rise to statelessness, such as the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness;
11. Adopt centralized procedures for determining statelessness status conducted by a centralized body specializing in such determination and responsible for deciding on all applications submitted ,through a trained technical body;
12. Establish and maintain statelessness status determination procedures that are accessible, simple, and expeditious; formally regulated by law, and governed by minimum judicial due process guarantees;
13. Incorporate mechanisms to facilitate rapid granting of naturalization, in appropriate cases, that consider the possibility of exempting applicants from requirements that they cannot reasonably be expected to meet, waive language skills and knowledge tests, and reduce processing costs or even make processing cost-free.

APPENDIX TO THE THEMATIC REPORT

QUICK GUIDE TO DUE PROCESS STANDARDS, NORMS AND PRINCIPLES IN PROCEDURES TO DETERMINE REFUGEE STATUS AND STATELESS PERSON STATUS, AND FOR GRANTING COMPLEMENTARY PROTECTION

Methodological note

In this appendix, the IACHR includes the standards of the Inter-American Human Rights System that work as guidelines for OAS member states on how to comply with various obligations related to the comprehensive protection of the human rights of all persons in context of human mobility, such as migrants, refugees, stateless persons, asylum seekers, and those seeking complementary protection, and with different protection needs. Inter-American Standards also function as an important resource and instrument for the advocacy, defense and monitoring work of civil society organizations, international agencies, and the academic sector, as well as for the protection of human rights through their application by both international and national bodies. In this way, standards also provide guidelines on the design, implementation, monitoring, evaluation, and adjustment of public policies on this matter.

For the purposes of this report, the Commission considers that the standards of the Inter-American Human Rights System can be found in decisions on the merits, thematic and country reports, and other rulings of the IACHR; also including the sentences and resolutions of the Inter-American Court. In addition, the standards encompass the provisions contained in the framework of protection instruments of the Inter-American System, such as the American Declaration and the American Convention, as well as other international treaties on asylum and statelessness, that have allowed an understanding of the content to the ACHR.

PART I: Due process in procedures to determine refugee status and stateless person status, and for granting complementary protection

Access to territory

- I. States should allow entry into their territory in order to provide access to procedures for assessing international protection needs.
- II. States should not prevent persons seeking international protection from going to other places where they may apply for it. The practice of intercepting asylum-seekers in international waters contravenes the principle of non-refoulement.
- III. States have the power to establish migration policies that are compatible with the human rights protection standards established in the American Convention.
- IV. States should process applications for protection as quickly as possible in order to avoid unduly delaying those procedures or forcing applicants to return to their countries of origin or moving to a third country.

Right of non-refoulement

- I. No person shall be expelled, returned, extradited, informally transferred to or, in any form delivered or placed at the borders of a country, regardless of this be his or her country of nationality, where this person's life or freedom might be endangered or where this person would risk be subjected to torture or cruel, inhuman or degrading treatment or punishment³⁹⁰.
- II. States should abide by the principle of non-refoulement, including the ban on rejecting applicants at the border and indirect refoulement, with regard to anyone seeking asylum or another form of international protection. In its implementation, consideration shall be given to the circumstances expressly provided for Article 33 (2) of the Convention Relating to the Status of Refugees of 1951, which must be given restrictive interpretation and in accordance with the principle of proportionality³⁹¹.
- III. States should bear in mind that, there are no exceptions allowed to non-refoulement under Article 22.8 of the American Convention, or in the case law of the Inter-American Court³⁹², regardless of whether or not they are parties to international treaties recognizing that principle.³⁹³
- IV. States should not return, expel, or in any other manner place a person in need of international protection in a territory or place from which he or she might be returned to the country in which his or her life, safety, or freedom are at risk (indirect refoulement).
- V. States should apply the non-refoulement principle to all refugees and persons seeking international protection.³⁹⁴ In this regard, observance of the principle of non-refoulement may be demanded by any person seeking international protection over whom the State is exercising authority or any person who is effectively under its control,³⁹⁵ thereby imposing an extraterritorial obligation on States.
- VI. States should conduct an individualized assessment of the risk involved in refoulement, based on an interview with the person concerned and a prior or preliminary assessment to determine whether there are sufficient

³⁹⁰ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section I, Principle 6.

³⁹¹ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section I, Principle 6x`.

³⁹² I/A Court H.R. *Case of the Pacheco Tineo Family v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272.

³⁹³ Along the same lines, see: IACHR, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002), par. 394.

³⁹⁴ Along the same lines, see: I/A Court H.R. *Case of the Pacheco Tineo Family v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272, paras. 145, 147, and 153.

³⁹⁵ See: IACHR, Admissibility Report N° 38/99, *Víctor Saldaño v. Argentina*), March 11, 1999, paras. 17 and 19.

grounds to believe that there is a risk of irreparable impairment of his or her rights.³⁹⁶

- VII. States should pay particular heed to the principle of non-refoulement in cases in which, if a person is returned, his or her health might be affected or deteriorate to a point that might lead to her or his death. Likewise that principle also serves to protect other human rights (to life, integrity, liberty, and others), so that refoulement or expulsion are also prohibited when such an act might lead to violation of those rights.

No rejection at borders

- I. States may not reject persons with possible international protection needs at the border or points of entry into the territory, including airports, without adequate analysis of their application, especially in the case of unaccompanied children and adolescents, and explicit consideration must also be given to the principles of family unity and the best interests of the child or adolescent.³⁹⁷
- II. States should guarantee that the competent authorities have an opportunity to adequately assess international protection needs. The identification of persons needing international protection and the use of referral mechanisms requires that authorities be properly trained in human rights and international refugee law and that they be well versed in appropriate interviewing techniques and the identification of possible protection needs.

Prohibition of collective expulsion

- I. States should avoid collective expulsion or deportation, which are manifestly contrary to international law. Accordingly, States should furnish the conditions for a reasonable and objective examination of each person's individual case before proceeding to a collective expulsion or deportation, otherwise it will be deemed inherently arbitrary. Each case of expulsion or deportation must be ordered through an individual decision, with particular consideration given to any international protection needs.³⁹⁸
- II. States should apply the prohibition on collective expulsions to any measure which has the effect of preventing migrants from reaching the borders of States or of pushing them to another State. This would include

³⁹⁶ Along the same lines, see: I/A Court of H.R., Advisory Opinion OC-25/18: The institution of asylum, and its recognition as a human right under the Inter-American System of Protection, May 30, 2018, paras. 194 to 199. In the same vein, Advisory Opinion OC-21/14, *supra*, paras. 235 and 236; *Case of Wong Ho Wing v. Peru*, paras. 128 and 129; *Case of the Pacheco Tineo Family v. Bolivia*, *supra*, par. 136.

³⁹⁷ Along the same lines, see: IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XIII, Principle 56.

³⁹⁸ See: IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XVI, Principle 72.

interdiction measures taken by a State, even those carried out extraterritorially, to prevent persons from arriving at its borders.³⁹⁹

No penalty for irregular entry and no detention for migration-related reasons

- I. States should refrain from criminalizing the irregular entry or stay in the territory by a person in need of international protection when that act made it possible for him or her to seek asylum, complementary protection, or the determination of statelessness.⁴⁰⁰
- II. Therefore, it is not permissible to automatically detain asylum-seekers and States are obliged to use alternatives to detention.
- III. States should view detention of a migrant as a measure of last resort and use it only after exploring all alternatives to detention, especially with regard to persons with international protection needs.
- IV. States should seek to avoid detaining child migrants, both in law and in practice, bearing in mind that depriving children of their liberty will never be in their best interest. The ban on detention must extend also to children's parents, family members, principal caregiver or legal guardian accompanying them.⁴⁰¹

Children and adolescents

- I. States should establish procedures for determining refugee status, eligibility for complementary protection, and protection for stateless persons that accord specialized treatment of children, taking their best interests into account.
- II. States should give special consideration to the children's extreme vulnerability and respect their rights, especially their right to be heard and to have their best interests taken as a primary consideration when it comes to taking a decision.
- III. States should guarantee that, in procedures involving children and adolescents, those who intervene in them are appropriately qualified, so that they can identify the special needs for protection of the child or adolescent, in keeping with her or his best interest.⁴⁰²
- IV. Resolutions determining international protection needs must take into account the opinions expressed by the child and explicitly show how her or his best interest was assessed.

³⁹⁹ Along the same lines, see: IACHR. Report on the Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America. OEA/Ser.L/V/II. 155, Doc. 16. July 24, 2015, par. 105.

⁴⁰⁰ The IACHR stated as much in Resolution 2/18 on the Forced Migration of Venezuelans (adopted in Bogotá, Colombia, in connection with the 167th period of sessions, on March 2, 2018).

⁴⁰¹ See: IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XV, Principle 71.

⁴⁰² I/A Court H.R. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, par. 121.

- V. States should guarantee straightforward access to procedures and guarantee that child protection-seekers can be accompanied by their legal representatives.
- VI. States should ensure that a guardian is assigned to children and adolescents who are unaccompanied or separated from their families and guarantee them cost-free legal aid in procedures to determine international protection needs (refugee or stateless person status or complementary protection). That support must be provided as soon as it is ascertained that a child is unaccompanied or separated from his or her family.
- VII. States should, as a matter of priority, ensure that specialized procedures involving children and adolescents are carried out and, above all, located in offices that are not shared with security or police installations and services.

Rights and procedural guarantees in connection with the procedures

Right to appropriate information and guidance

- I. States should guarantee prompt identification and referral of persons needing any kind of international protection to the competent asylum authorities or pertinent protection procedures, including in cases involving children who are unaccompanied or separated from their families. The competent authorities must provide information (for instance, in migratory detention centers and points of entry into the territory, including airports), in the language of the person, on the existence the right to asylum and the procedure for seeking international protection.⁴⁰³
- II. States should provide continuous training to its border officials on the rights of persons with international protection needs.
- III. States should carry out broad information and dissemination campaigns, both at border posts and in areas along migratory routes, on the risks and dangers to which people are exposed and on the protection mechanisms that exist in each country.
- IV. States should guarantee that sufficient and appropriate information is available to applicants for international protection regarding deadlines, procedures, decisions, and their possible effects, as well as about the possibility and ways of appealing, for each type of procedure.

Right to a translator or interpreter, free of charge, and accessibility

- I. States should ensure that persons seeking international protection can avail themselves, from the start of the procedure, of the services of qualified interpreters with the required training and the right language and communication skills.
- II. States should safeguard impartiality and confidentiality in the work done by interpreters throughout the procedure and provide channels for commenting on or complaining about their services.

⁴⁰³ IACHR, *Resolution 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking*, San Salvador, December 7, 2019, Section XII, Principle 57.

- III. The States must guarantee the appropriate and accessible conditions in all stages of the processes that involve people with disabilities.

Right to free legal aid

- I. States should guarantee the right to legal assistance and public defense, including legal consultation regarding any issue that may affect the legitimate rights or interests of the vulnerable person, even if a trial has not been initiated.⁴⁰⁴ In the case of persons in need of international protection, that assistance must be free of charge, of a high quality, and specialized, for which the assistant or legal representative needs to have had training or experience in international refugee law, a working knowledge of the procedure, and bound by a code of ethics or professional responsibility.
- II. States should promote the expansion and strengthening of Public Defender (or Ombudsperson) Offices, as well as legal aid mechanisms, through all available means such as legal advice offices in cooperation with universities and bar associations, to lend legal assistance to persons needing international protection.

Impartial authorities trained to identify international protection needs

- I. States should ensure that international protection decisions are processed and taken by competent, trained, and impartial authorities, free from coercion, and acting independently.⁴⁰⁵
- II. States should seek to achieve the highest possible level of technical and institutional specialization, establishing a technical, specialized, independent, and autonomous authority, run by its own set of officials selected in accordance with technical competence criteria and based on their having received specific training in refugee, stateless person and human rights law, so as to preclude political interference.

Collective or "group" determination

- I. Refugee status should normally be determined in each individual case.
- II. That status may be determined on a collective or "group determination" basis if: i) entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees; ii) the need to provide assistance is extremely urgent; iii) it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group; and iv) when each member of

⁴⁰⁴ Along the same lines, see: Ibero-American Judicial Summit *Brasilia Regulations Regarding Access to Justice for Vulnerable People*, Brasilia, March, 2008, Chapter 2, Section 2, paras. 28-31.

⁴⁰⁵ Along the same lines, see: 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, December 31, 2015, par. 313; IACHR Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families., par. 99.

the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.⁴⁰⁶

Interviews

- I. Interviews must be individual and conducted by qualified personnel.
- II. In all cases, including those that are manifestly unfounded, States should refrain from decisions denying an application merely on the basis of documentary analysis.⁴⁰⁷
- III. States should keep records of the content of interviews for as long as is needed to ensure use of it throughout the procedure and keep an exact written record of words and expressions used by an applicant throughout his or her account.⁴⁰⁸
- IV. States should provide adequate means to receive and process complaints related to crimes and infringements of rights suffered by applicants throughout their migratory itinerary, such as trafficking, extortion, and sexual violence, that come to their attention during the asylum procedures or any process related to the granting of complementary protection / statelessness.

Confidentiality

- I. States should ensure that all personal information to which they have access throughout procedures is kept confidential.
- II. States must not share information with the authorities of the applicant's country of origin.
- III. States should use the information provided by persons solely for the purpose of determining their international protection needs.

Assessment of evidence and application of the benefit of the doubt.

- I. States should accept all relevant evidence (including statements, documents, and other materials submitted by the applicant) to demonstrate the facts supporting the request for international protection. In cases in which the person cannot, or does not have the resources needed to, prove all the substantive facts in his or her application, the competent authorities shall help to obtain the evidence in question. In other words, the burden of proof shall be shared by the applicant and the State.
- II. At the same time, when it is not possible to corroborate the statements or elicit reliable information regarding the country of origin, States should apply the benefit of the doubt principle **[TR. Spanish words missing?]** and the reasonable nature of assertions criterion to establish whether the applicant's account is credibly and plausible, after giving it the benefit of the doubt.

⁴⁰⁶ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, reissued, 2019, Geneva, p. 204

⁴⁰⁷ *Idem.* p.4.22

⁴⁰⁸ *Idem* 4.14

- III. Ascertaining refugee or stateless person status shall be justified when it is demonstrated to a "reasonable degree." The following criteria shall apply to all administrative and judicial procedures for assessing international protection needs:
- a) well-reasoned assessment of the application;
 - b) objective and impartial assessment;
 - c) rigorous and careful scrutiny of facts, circumstances, cultural and religious particularities, or special protection needs;
 - d) no general requirement that applicant's statements be supported by documentary or other evidence;
 - e) pertinent granting of the benefit of the doubt; and
 - f) free, substantiated conviction of the examiner in the case.

Reasoned decision

- I. Decisions regarding applications for protection must be taken by a competent authority, in writing, b duly and expressly substantiated, and contain all that is needed to allow exercise of the right to review, via an appeal or suit.
- II. For a decision to be duly founded and substantiated, it is necessary:
 - a. that it expressly state the reasons justifying a conclusion reached;
 - b. that it expressly state the facts, reasons, and norms on which the authority based its decision;
 - c. that it demonstrate that the arguments of the parties were duly taken into account; and
 - d. that all evidence was analyzed, especially the personal interview and objective information of the country of origin of the applicants.
- III. The administrative proceeding recognizing refugee or stateless person status shall have declaratory effect and be of a humanitarian, apolitical nature.

Notification of the interested party

- I. The competent authorities must notify all those directly affected in each procedure, or their representatives, of the final decision. Such notification is fundamental, particularly because it places the victim in a situation of legal uncertainty and renders the exercise of the right to appeal the decision impracticable.⁴⁰⁹

Right to a suitable and effective remedy

- I. The right to an appropriate and effective remedy against denial of recognition of refugee or stateless person status or of other forms of protection must meet the following parameters:
 - a) the possibility of a judicial review of the administrative decision;
 - b) suspensive effects pending a final last instance resolution;

⁴⁰⁹ See: I/A Court H.R. Case of Vélez Looz v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010. Series C No. 218, par. 180.

- c) sufficient information provided to applicants as to how they can appeal;
- d) reasonable time allowed for an appeal;
- e) cost-free legal aid;
- f) application to all procedural guarantees also to any modality of expedited procedures as well;
- g) no requirement to produce identity papers that are difficult or impossible to obtain.

Reasonable duration of the process

- I. The duration of procedures for assessing international protection needs must be reasonable, with no unwarranted delays in issuing the final resolution on applications submitted.
- II. States should bear in mind the principle of reasonableness in setting times allowed and procedural requirements, so as not to unduly curtail the right to asylum, or other forms of international protection.

Access to economic, social, and cultural rights during the procedures for recognizing refugee or stateless person status and eligibility for complementary protection.

- I. States should guarantee access for all persons with protection needs, access to services, policies and programs regardless of their immigration status and documentary verification capacity.
- II. States should issue all applicants a document certifying their lawful presence in the country, protecting them against refoulement or expulsion, enabling them to identify themselves, and more easily access other rights. Access to fundamental rights and services must be guaranteed unconditionally, based solely on the rights inherent to being a [person].
- III. States should guarantee for all applicants for international protection access to health care, education, housing, security, and other rights, on a nondiscriminatory basis

Access to justice, representation, and defense

- I. States should guarantee the actual possibility of accessing justice and effective protection, in a manner that is effective, impartial, and expeditious, based on the principles of immediacy, speed, and due diligence, through the mechanisms contemplated under domestic law for all inhabitants.
- II. States should strive to institutionalize legal representation and cost-free sponsorship or legal aid at every stage of the procedures for recognizing refugee or stateless person status or eligibility for complementary protection.

PART II Standards and recommendations specifically for statelessness determination procedures

Preventing statelessness

- I. States have the obligation not to adopt laws, practices or polices concerning the conferral or acquisition of nationality, the application of which fosters an increase in the number of stateless persons.⁴¹⁰
- II. States should automatically grant their nationality to any child born in their territory who would otherwise be stateless. For that, statelessness determination is vital for applying the safeguard embodied in Article 20.2 of the American Convention.

Establishment of procedures for determining stateless person status

- I. States should adopt centralized procedures for determining statelessness status conducted by a centralized body specializing in such determination and responsible for deciding on all applications submitted.
- II. States should have pre-established time limits under domestic law for statelessness determination procedures and within which determination authorities are to make a decision on a statelessness application.
- III. In addition, States should adopt and establish statelessness determination procedures that are accessible, simple, and expeditious; that are formally regulated by law; and that are governed by the minimum judicial guarantees of due process embodied in Article 8 of the American Convention.
- IV. Determination of stateless person status shall be a final instance resolution. In the event that the applicant is able to acquire a nationality, that option shall be accorded priority. With the applicant's consent, the competent determination body shall refer the application to the corresponding administrative or consular authorities.

Interrelationships between statelessness and asylum procedures

- I. If a person considers that his or her situation fits both statuses, States should provide counseling and appropriate information regarding the legal options available and ways to submit both applications.
- II. If possible, the respective competent authorities must process both applications with a view to both statuses being recognized in the corresponding resolutions, or one of them, depending on the case. If both statuses are recognized, stateless refugees will find themselves covered by the 1951 Convention.
- III. States should guarantee that the authorities and services involved in the protection mechanisms and actions (of refuge, complementary protection or statelessness) be able to coordinate with one another with a view to preventing one procedure from adversely affecting the other, or jeopardizing the integrity of the applicant.

⁴¹⁰ Along the same lines, see: I/A Court H.R., *Girls Yeans and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs. September 8, 2005. Series C No. 140, par. 142.

- IV. States should extend the confidentiality principle to statelessness determination procedures as well and abide by it, in those case in which one and the same applicant may meet the requirements for both statuses.

Principal obligations of the State relating to the application

- I. Host States should grant the permit and authorizations needed for statelessness status applicants to reside lawfully in the territory and to have nondiscriminatory access to welfare and health care services, as well as access to work. That residence permit needs to be renewable until such time as a final decision is reached in the procedure. That permit must enable applicants to exercise their human rights without any form of discrimination based on their lacking a nationality; in particular, to move freely within the territory of the country; not to be detained arbitrarily; and to be protected against expulsion.
- II. States shall preserve the family unity of applicants for stateless person status. Member of the family group who are nationals of another country shall be granted temporary residence permits pending resolution of the application.

Situation of stateless persons inside their country of birth

- I. States should work preventively to reduce statelessness, above all by facilitating access to nationality for children and, in general, for anyone who would otherwise be stateless.
- II. States should restore, or, where applicable, automatically grant nationality to persons who are stateless in their own country.

Recognition of stateless person status

- I. States should grant stateless persons recognized as such a permanent residence permit that allows them to remain in the territory of the country provided that they keep their statelessness status.
- II. States shall preserve the family unity of persons recognized as stateless. Members of the family group who are nationals of another country shall be granted a residence permit.

Rights acquired by virtue of recognition of stateless person status

- I. Given the special vulnerability of stateless persons, States should proactively promote their social inclusion and grant them legal treatment and protection of the very highest standard, if expedited naturalization is either not possible or desirable.
- II. States should strive to grant stateless persons the most favorable treatment possible and under no circumstances treatment that is less favorable than that granted to aliens in general. States are urged to guarantee human rights on an equal footing with nationals; in other word, stateless persons should receive the same treatment as nationals.
- III. States should guarantee for stateless persons recognized as such, at a minimum, the following rights: In respect of juridical status (recognition of

statelessness, access to courts, property rights (intellectual, industrial, movable and immovable), and right of association; gainful employment, In respect of welfare (access to public education, health care services, including sexual and reproductive health care services, and to social and public welfare services; the right to social security benefits; and the right to housing). In respect of administrative measures, family unity.

- IV. Within this framework, States should issue identity papers and travel documents to the stateless persons recognized as such in their territories as soon as possible after their recognition. To that end, States should strive to adopt as a benchmark the parameters and standards contemplated in the 1954 Convention relating to the Status of Stateless Persons.

Possibility of acquiring nationality within a reasonable period of time

- I. States should consider legislative options and public policies to facilitate prompt naturalization of stateless persons.
- II. When immediate naturalization is not possible, States should consider refraining from imposing requirements that cannot reasonably be met and shortening the residence times required for requesting naturalization in the case of stateless persons, compared to the normally established times. The idea here is to enable stateless persons to put an end to their statelessness as soon as possible and thereby enjoy the protection that a country provides for its nationals. Those facilities should include priority processing of the procedure for the naturalization of stateless persons and their acquisition of a nationality; exemption from language skills and knowledge testing; and a reduction of processing costs or even cost-free processing.

Appeal or challenge remedy

- I. States should explicitly include in their domestic regulations a legal, effective, and suitable appeal option for challenging a decision denying statelessness status and that includes the possibility of the decision being overturned and nationality conferred when that decision is found to have been unlawful or arbitrary.⁴¹¹
- II. Appeals and other remedies must allow for complete revision of the negative ruling, that is to say, in respect of both the facts and assessment of the evidence, as well as the law applied.
- III. The guarantee to legal, effective and adequate appeals and remedies include the establishment of clearly determined and reasonable time to be filled.
- IV. States should clearly establish in their domestic legislation which body is competent to decide the appeal. That body needs to be independent and higher than the authority that took the first instance decision, as well as trained and competent in statelessness matters.
- V. States have an obligation to provide legal aid to applicants who file an appeal. That service must be provided cost-free to persons lacking the financial resources to pay for it.

⁴¹¹ IACHR, Human Mobility, Inter-American Standards, 2016. par. 480.

- VI. The appeals for review available must be accorded suspensive effects to allow the applicant to remain in the country while the decision on the appeal is still pending, unless it can be shown that the request is manifestly unfounded.⁴¹²

⁴¹² IACHR, Human Mobility, Inter-American Standards, 2016. par. 432.