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January 5, 2019

Dr. Paulo Abrão  
Executive Secretary  
Inter-American Commission on Human Rights  
1889 F Street, NW  
Washington, DC 20006

**RE: Request for Thematic Hearing During 175<sup>h</sup> Period of Sessions of the Inter-American Commission on Human Rights Addressing Persistent Violations of International Law Resulting from the Implementation of the Migrant Protection Protocols (known as “Remain in Mexico”) (United States and Mexico)**

Dear Executive Secretary Abrão:

In accordance with Article 64 of the Rules of Procedure for the Inter-American Commission on Human Rights (the “Commission”), the University of Texas School of Law Immigration Clinic and the University of Pennsylvania School of Law Transnational Legal Clinic respectfully submit this request for a thematic hearing during the upcoming 175<sup>th</sup> Period of Sessions of the Commission from March 1-10, 2020. This hearing will address the implementation of the “Remain in Mexico” program (formally called Migrant Protection Protocols (“MPP”). MPP has denied many migrants the right to seek asylum, has directly endangered asylum seekers in prejudice of their right to life and physical integrity, and has violated the right to family life through targeting of children and families and ongoing family separations.

This hearing is being requested after a year of rapid expansion of the MPP program, including through returns of asylum seekers from the United States to notoriously dangerous areas of Mexico, such as Nuevo Laredo, Tamaulipas, while they await their hearings in U.S. Immigration Courts. The request specifically coincides with yet another expansion of the program, this time to the Nogales, Arizona border area. The program now places more than 55,000 asylum seekers at

immediate risk and continues to expand in ways that violate the fundamental human rights of asylum seekers.

The U.S. is carrying out this program with the full cooperation and complicity of the government of Mexico, which has failed to take the necessary steps to protect those asylum seekers trapped in danger in Mexico where they are actively targeted for kidnapping, extortion, sexual and other forms of violence. The Mexican government has further acted to interfere with asylum seekers right to seek asylum by transporting asylum seekers in MPP away from cities along the northern border to the places further south, without providing transportation that will permit the asylum seekers' participation in their ultimate immigration proceedings in the United States.

In light of the ongoing and escalating humanitarian crisis caused by MPP – one which this Commission has noted with grave concern<sup>1</sup> – we urge the Commission to recommit its attention to this matter through the granting of a hearing at its 175<sup>th</sup> Period of Sessions to be held in Washington, D.C. This hearing will provide important follow up to the Commission's consideration of MPP, family separations and other troubling developments impeding access to asylum at the U.S./Mexico border, during its visit to the U.S./Mexico border in August 2019 and upon other occasions.<sup>2</sup> The timeliness and urgency of this hearing request cannot be overstated.

## I. BACKGROUND

On December 20, 2018, former U.S. Secretary of the Department of Homeland Security Kristjen M. Nielsen announced the issuance of the Migrant Protection Protocols.<sup>3</sup> Under the MPP program, individuals who arrive in or enter the United States from Mexico to seek asylum may be sent back to Mexico for the duration of their U.S. immigration proceedings.<sup>4</sup> MPP applies principally to asylum seekers from Spanish-speaking countries.<sup>5</sup> By former Secretary Nielsen's own admission, the MPP program is “an unprecedented action” in the United States.<sup>6</sup>

The MPP program is part of an effort by the United States to deter and block asylum seekers, and its implementation is one more step towards the destruction of the asylum system in the United States. On January 24, 2019, the Department of Homeland Security (“DHS”) issued a press release emphasizing its goal of deterring migration, including the presentation of asylum claims: “The MPP will . . . discourage individuals from attempting illegal entry and making false

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<sup>1</sup> IACHR, *Press Release: IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America* (July 23, 2019),

[https://www.oas.org/en/iachr/media\\_center/PReleases/2019/180.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/180.asp)

<sup>2</sup> *See id.*; IACHR, *Press Release: IACHR Conducted Visit to the United States' Southern Border* (Sept. 16, 2019),

[https://www.oas.org/en/iachr/media\\_center/PReleases/2019/228.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/228.asp); IACHR, *Press Release: IACHR Grants*

*Precautionary Measure to Protect Separated Migrant Children in the United States* (Aug. 20, 2018),

[https://www.oas.org/en/iachr/media\\_center/PReleases/2018/186.asp](https://www.oas.org/en/iachr/media_center/PReleases/2018/186.asp).

<sup>3</sup> U.S. Dep't of Homeland Sec., *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [hereinafter *Nielsen Announcement*].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Dep't of Homeland Sec., *Migrant Protection Protocols*, (Jan. 24, 2019),

<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [hereinafter *Migrant Protection Protocols*].

claims to stay in the U.S.”<sup>7</sup> The unfounded presumption of “false claims” is paired with the implementation of a program that denies the right to have those claims adjudicated, making clear that the MPP program is intended to defeat access to asylum.

Implementing and expanding MPP required the U.S. government to seek the support of the Mexican government, since MPP involves sending asylum seekers to Mexico to await their U.S. asylum proceedings. During the summer of 2019, the U.S. threatened harsh tariffs to be imposed on Mexican goods unless the Mexican government cooperated with the U.S. government to implement draconian immigration measures.<sup>8</sup> The U.S. government only backed off the plan to impose tariffs against Mexico after the Mexican government agreed to expand the MPP program.<sup>9</sup> The United States thus used an economic and political threat to bilateral relations to coerce Mexico to join the U.S. in implementing MPP. In doing so, the United States took no precautions to ensure that Mexico would respect the human rights of those asylum seekers that the United States sent back to Mexico through the program. The United States has made clear that it has insisted that Mexico cooperate broadly with MPP, stating that “MPP is a core component of U.S. foreign relations and bilateral cooperation.”<sup>10</sup>

The Mexican government has accepted returns from the United States to Mexico of individuals placed in the MPP program but has not provided these asylum seekers with protection from violence.<sup>11</sup> Nor has the Mexican government ensured that asylum seekers’ basic needs, such as food and shelter, are met while they await lengthy proceedings with multiple hearings in the United States.<sup>12</sup> The Mexican government also does not provide stable and clear immigration status to asylum seekers returned through MPP so that they have great difficulty working and may even face detention and deportation by Mexican authorities.<sup>13</sup>

The United States initially rolled out the MPP program in San Diego, California, in January 2019 with hearings in Immigration Court for these cases beginning in March 2019.<sup>14</sup> This was followed by implementation in El Paso and Calexico in March 2019.<sup>15</sup> U.S. authorities then expanded the program to Laredo and Brownsville in July of 2019 with initial hearings taking place

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<sup>7</sup> *Migrant Protection Protocols*, *supra*.

<sup>8</sup> *Statement from the President Regarding Emergency Measures to Address the Border Crisis* (May 30, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/>.

<sup>9</sup> Donald Trump (@realDonaldTrump) TWITTER (Jun 7, 2019, 5:31PM), <https://twitter.com/realDonaldTrump/status/1137155056044826626>.

<sup>10</sup> *Assessment of the Migrant Protection Protocols* (Oct. 28, 2019), [https://www.dhs.gov/sites/default/files/publications/assessment\\_of\\_the\\_migrant\\_protection\\_protocols\\_mpp.pdf](https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf).

<sup>11</sup> Letter from the Washington Office on Latin America and More than 160 Organizations to Mexican Officials (Nov. 19, 2019), <https://www.wola.org/wp-content/uploads/2019/11/11.19.19-MPP-Letter-Eng-to-GOM.pdf>

<sup>12</sup> *Id.*; Human Rights First, *Orders from Above: Massive Human Rights Abuses under Trump Administration Return to Mexico Policy* (Oct. 2019), <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>

<sup>13</sup> Refugees International, *Remain in Mexico Policy is Undermining Asylum and Endangering Asylum Seekers* (Aug. 28, 2019), <https://www.refugeesinternational.org/reports/2019/8/28/remain-in-mexico-policy-is-undermining-asylum-and-endangering-asylum-seekers>.

<sup>14</sup> See Human Rights First, *Delivered To Danger: Illegal Remain In Mexico Policy Imperils Asylum Seekers’ Lives And Denies Due Process* 21 (Aug. 2019), <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>

<sup>15</sup> *Id.* at 22.

in south Texas in September 2019.<sup>16</sup> On October 28, 2019, DHS expanded MPP to individuals apprehended at or near Eagle Pass, Texas who will be required to attend hearings at the Laredo port of entry.<sup>17</sup> In late November 2019, DHS expanded MPP to Tucson, Arizona, where asylum seekers presenting on the Arizona border are transported to El Paso, Texas, sent across the border to Ciudad Juárez, and told to appear for their asylum hearings in El Paso, Texas.<sup>18</sup> The new year brought a renewed commitment to the expansion of MPP, with the inclusion of individuals apprehended at or near the Nogales, Arizona port of entry who will attend hearings in El Paso, Texas.<sup>19</sup>

MPP has been targeted at families. As of October 3, 2019, about one-third of the migrants in the MPP program were children under the age of eighteen. Of those children, 4,300 of them were under the age of five and 481 had not even turned one-year-old yet.<sup>20</sup>

MPP operates alongside other U.S. practices and policies, such as “metering” and the “third-country rule”, to block migrants from seeking asylum at the U.S. southern border. Metering blocks people from seeking asylum at a port of entry at a U.S.-Mexico border crossing by requiring asylum seekers to add their names to a waitlist and wait outside the United States, often for weeks or months, before they even are processed at the border and enter the asylum process.<sup>21</sup> The “third-country rule” adds an asylum bar for those who enter or attempt to enter the U.S. across the southern border and who did not apply for asylum in Mexico or another third country through which they traveled.<sup>22</sup> This policy is paired with mechanisms to return asylum seekers to “alternative countries” to undergo asylum processing there rather than in the United States, via bilateral agreements between the United States and Guatemala, El Salvador, and Honduras.<sup>23</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> U.S. Dep’t of Homeland Sec., *DHS Expands MPP Operations to Eagle Pass*, (Oct. 28, 2019), <https://www.dhs.gov/news/2019/10/28/dhs-expands-MPP-operations-eagle-pass>.

<sup>18</sup> The Washington Post *Trump administration’s ‘Remain in Mexico’ program to shuttle migrants from Tucson to El Paso* (Nov. 22, 2019), [https://www.washingtonpost.com/immigration/remain-in-mexico-to-shuttle-migrants-from-tucson-to-el-paso/2019/11/22/2f56a484-0cb3-11ea-8397-a955cd542d00\\_story.html](https://www.washingtonpost.com/immigration/remain-in-mexico-to-shuttle-migrants-from-tucson-to-el-paso/2019/11/22/2f56a484-0cb3-11ea-8397-a955cd542d00_story.html).

<sup>19</sup> U.S. Dep’t of Homeland Sec., *DHS Begins MPP Returns at Nogales Port of Entry in Arizona*, (Jan. 2, 2020), <https://www.dhs.gov/news/2020/01/02/dhs-begins-mpp-returns-nogales-port-entry-arizona>.

<sup>20</sup> Reuters, U.S., *Migrant Policy Sends Thousands of Children, including Babies, Back to Mexico* (Oct. 11, 2019), <https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-babies-and-toddlers-back-to-mexico-idUSKBN1WQ1H1> (analyzing Immigration Court data).

<sup>21</sup> Strauss Center for International Security and Law, *Metering Update* (Nov. 2019) <https://www.strausscenter.org/campi-content/campi-reports-working-papers.html>; U.S. Dep’t of Homeland Sec. Office of Inspector General, *Special Review- Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sep. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf#page=8> (describing metering as a waiting system utilized by CBP). Some asylum seekers face a wait period in Mexico because of the metering policy and then also are processed through MPP and are returned to Mexico to wait for additional months for their hearings.

<sup>22</sup> 8 C.F.R. § 1208.13 (2019).

<sup>23</sup> Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 223, 64095 (Nov. 19, 2019).

## II. THE IMPLEMENTATION OF MPP OPERATES IN CLEAR VIOLATION OF U.S. AND MEXICO OBLIGATIONS UNDER THE AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN, THE AMERICAN CONVENTION ON HUMAN RIGHTS, AND CORE PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW

Through its implementation of MPP, the United States directly endangers the physical safety of asylum seekers along the U.S./Mexico border and threatens their right of asylum to a degree that creates additional imminent risk of irreparable harm. At its core, the MPP program involves violations of the right to life and physical integrity recognized in Article I and the right to asylum recognized in Article XXVII of the American Declaration of the Rights and Duties of Man. By knowingly returning asylum seekers to dangerous Mexican border cities, where their basic safety is at risk, and by denying the right to obtain or even seek asylum, the United States puts asylum seekers directly in harm's way. Asylum seekers in MPP experience kidnappings, assaults, death threats and forced return to persecution in their home countries as a result of MPP.

In causing these overarching harms through implementation of MPP, the United States has taken a number of specific actions and has developed procedural and substantive barriers to asylum that involve more concrete violations of the rights to asylum and physical integrity as well as additional human rights violations. Specifically, the United States has inflicted harm and created a great imminent risk of harm through the following violations, analyzed further below: the right to life, liberty and personal security (Am. Decl. Art. I), the right to seek asylum (Am.Decl. Art. XXVII), the right to a fair trial (Am.Decl. Art. XVIII), the right to due process (Am.Decl. Art. XXVI), the right to recognition of juridical personality and civil rights (Am.Decl. Art. XVII), the right to equality before the law (Am.Decl. Art. II), the right to preservation of health and wellbeing (Am. Decl. Art. XI), the right to protection of the family (Am.Decl. Art. VI), the right to protection for mothers and children (Am.Decl. Art. VII), and the right to education (Am.Decl. Art. XII).

For its part, because of its complicity in operating the MPP program, Mexico is also responsible for violations of the right to seek asylum (Am.Conv., Art. 22(7)) and the right to life and physical integrity (Am.Conv., Arts. 4, 5) and thus has acted in violation of its obligations under the American Convention on Human Rights. Mexico's actions and omissions also implicate violations of additional individual rights protected under the American Convention on Human Rights, including the rights of the family (Am.Conv., Art. 17), the right to juridical personality (Am.Conv., Art. 3) and the right to equal protection (Am.Conv., Arts. 1, 24).

The United States and Mexico have also each violated their obligation of *non-refoulement*, or not returning a refugee to a territory where their life or freedom would be threatened on account of his or her "race, religion, nationality, membership of a particular social group or political opinion." The implementation of MPP thus runs afoul of the 1951 Convention Relating to the Status of Refugees and Article 7 of the International Covenant on Civil and Political Rights.<sup>24</sup>

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<sup>24</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, at Article 33(1); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999; *see also* UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (explaining how ICCPR Article 7 has come to mean that states have an obligation not to send refugees to places where they would likely suffer torture).

## A. DELIVERING ASYLUM SEEKERS INTO DANGER IN MEXICO: MPP THREATENS THE RIGHTS OF PERSONAL SECURITY AND HEALTH AND WELL-BEING

MPP effectively denies asylum seekers the right to life and safety by returning them to Mexico where they are at great physical risk. Under Article I of the American Declaration, “[e]very human being has the right to life, liberty and the security of his person.” Articles 4 and 5 of the American Convention similarly provide for the right to life and physical integrity. Furthermore, as a *jus cogens* norm codified in various international treaties<sup>25</sup> and previously recognized by the Commission, a state is prohibited from returning individuals to a territory where the individual is at risk of persecution or torture.

Asylum seekers subjected to MPP are delivered directly into border towns in Mexico with high rates of violence where their status as asylum seekers further increases risk of danger.<sup>26</sup> One study found that between 21-24% of migrants in MPP have reported receiving threats of violence while in Mexico, and of those, over 50% reported that the threats turned into actual violence, including beatings, robbery, and extortion.<sup>27</sup> As of December 23, 2019, there were at least 660 documented reports of rape, kidnapping, torture, and other violent attacks against asylum seekers returned to Mexico under MPP.<sup>28</sup>

The Department of Homeland Security claimed in announcing MPP that the program would “decrease...the ability of smugglers and traffickers to prey on vulnerable populations, and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protection they need.”<sup>29</sup> However, MPP has actually increased cartels’ ability to prey on and profit from asylum seekers, since the United States deposits asylum seekers in border cities in Mexico and into the hands of the cartels that extort and exploit them.

The United States purports that the danger faced by asylum seekers returned to Mexico is mitigated by the use of interviews, labeled *non-refoulement* interviews,<sup>30</sup> which are available to those in MPP who express a fear of returning to Mexico. However, these interviews have been ineffective at ensuring that those in danger in Mexico will be allowed to enter the United States

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<sup>25</sup> See, e.g., the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

<sup>26</sup> See Human Rights First, *Human Rights Fiasco: The Trump Administration’s Dangerous Asylum Returns Continue* (Dec. 2019) (detailing the life-threatening dangers confronted by asylum seekers in MPP), <https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf>; see also U.S. Immigration Policy Center, UC San Diego, *Seeking Asylum: Part 2* (Oct. 29, 2019) (9 out of 10 interviewees expressed a fear of return to Mexico, and 1 out of 4 study respondents had been threatened with physical violence) [hereinafter UCSD Study], <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

<sup>27</sup> UCSD Study, *supra*.

<sup>28</sup> Human Rights First, Online Database, <https://deliveredtodanger.org/> (online database of attacks on asylum seekers under MPP, coordinated by Human Rights First, in partnership with Refugees International, Instituto para las Mujeres en Migración, the Women’s Refugee Commission, Washington Office on Latin America, the Latin American Working Group, the American Immigration Lawyers Association and Physicians for Human Rights).

<sup>29</sup> *Migrant Protection Protocols*, *supra*.

<sup>30</sup> These interviews purportedly assess danger in Mexico for asylum seekers in MPP in U.S. proceedings; they do not assess danger upon return to home country, even though return to Mexico may indirectly lead to a return to the home country, as described below.

for the remainder of their asylum proceedings. These interviews are not guaranteed; the asylum seeker often must know to express, unprompted, a fear of returning to Mexico during the hearing. The interviews are often perfunctory proceedings generally conducted by telephone without the presence of an attorney even where the asylum seekers has secured representation. Asylum seekers also must meet a very high standard to receive a favorable decision in the interview.<sup>31</sup> They must show that it is more likely than not that they will be persecuted on account of a protected ground in Mexico or face torture at the hands of a Mexican government official. And the interviews rarely result in favorable determinations. Only 13% of asylum seekers who express fear of returning to Mexico have been allowed into the United States for the remainder of their asylum proceedings.<sup>32</sup>

#### B. RETURN TO THE COUNTRY OF PERSECUTION: MPP THREATENS THE RIGHT OF NON-REFOULEMENT

Asylum seekers in MPP are forced to decide between two risks, the danger in Mexican border cities and the danger they fled in their home countries. Some decide to abandon their efforts to seek asylum in the United States and return to danger in their home countries rather than face ongoing harm in Mexico. As a result, the U.S. is failing to meet its obligation of *non-refoulement* by forcibly returning asylum seekers to Mexico in conditions where the likelihood of indirect return to the persecution they fled is high and may be intended.

Mexico, through its cooperation in MPP, is complicit in this violation and in some instances is itself acting in direct violation of the principle of *non-refoulement*. There are reported cases of Mexican authorities engaging in actions that actively coerce or force asylum seekers to return to southern Mexico and then on to their home countries. Reports include stories of Mexican authorities urging asylum seekers in MPP, particularly those returned to Nuevo Laredo, to board buses that take them to far southern Mexico.<sup>33</sup> Asylum seekers returned to Mexico through MPP find themselves in dangerous, unfamiliar towns, with uncertain futures, no legal status, no family networks and no authorization to work. Fearing for their safety and their children's safety, some have made the "choice" to take these buses rather than remaining homeless in dangerous circumstances in cities such as Nuevo Laredo. Once in southern Mexico, without any status or any transportation, many resort to returning to their home countries despite dangers awaiting them there.<sup>34</sup>

In other instances, Mexican authorities may formally detain and deport individuals in MPP. There is no functioning process that grants asylum seekers in MPP clear legal status under Mexican law. When asylum seekers in MPP are returned by the United States to Mexico, Mexican authorities issue them a paper document known as a Multiple Migration Form.<sup>35</sup> The

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<sup>31</sup> DHS, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), available at [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf)

<sup>32</sup> See *Assessment of the Migrant Protection Protocols*, *supra*.

<sup>33</sup> [https://www.latimes.com/world-nation/story/2019-08-03/stymied-by-u-s-asylum-policies-many-migrants-on-the-border-are-headed-home?\\_amp=true](https://www.latimes.com/world-nation/story/2019-08-03/stymied-by-u-s-asylum-policies-many-migrants-on-the-border-are-headed-home?_amp=true)

<sup>34</sup> *Assessment of the Migrant Protection Protocols*, *supra* (highlighting voluntary returns and abandonment of claims as a positive development and describing actions of Mexican authorities and the International Organization for Migration furthering this purpose).

<sup>35</sup> See Sample Forms (on file with the authors).

form usually indicates that the asylum seeker is allowed to remain in Mexico up until the next hearing in Immigration Court. The form is not an identification card or other permanent document showing status. In some cases, a box is marked on the form providing “humanitarian status” to asylum seekers in Mexico. In these cases, the form could serve as a basis to obtain work authorization and identification, although asylum seekers rarely receive information about the process for doing so. In many other cases, the form does not indicate a grant of humanitarian status or any other status. Because many asylum seekers returned to Mexico through MPP have no status at all in Mexico, Mexican authorities may detain and deport these individuals to their home countries just as they would any other individual present on Mexican territory without status. Asylum seekers are particularly at risk of such forced returns if they are transported to southern Mexico by Mexican authorities rather than being permitted to remain in the U.S./Mexico border area where authorities are aware of the functioning of the MPP program.

### C. FUNDAMENTALLY FLAWED ASYLUM PROCEEDINGS: MPP THREATENS ASYLUM AND DUE PROCESS

MPP has: 1) created significant geographic, temporal, and procedural barriers that make it difficult and sometimes impossible for asylum seekers to appear in court; 2) imposed substantial barriers to asylum seekers’ ability to secure legal representation; 3) used inadequate “court” facilities to prevent meaningful participation in asylum proceedings; and 4) failed to provide asylum seekers in the MPP program with adequate translation, undermining the ability of asylum seekers to understand and participate in their own proceedings. These impediments to participation in asylum proceedings violate Article XXVII of the American Declaration and Article 22(7) of the American Convention guaranteeing the right to seek asylum, as well as Articles XVIII and XXVI of the American Declaration and Articles 8 and 25 of the American Convention guaranteeing all persons access to a fair trial and due process of law.

The cumulative impact of the various procedural barriers to presenting an asylum claim in MPP is a complete denial of due process. The final impact of these due process violations is that it is nearly impossible for asylum seekers in MPP to secure protection in the form of asylum or other related forms of relief, since they do not have a fair and full opportunity to present their claims. As a result, the multiple barriers to the asylum process also violate the right to obtain asylum, putting them at great risk of return to danger and persecution in their home countries.

#### 1. Physical Exclusion From Immigration Court Hearings

In order to pursue their asylum claims, individuals in MPP must arrive on time to multiple Immigration Court hearings in the United States, despite being forced to live in Mexico in between hearings, and must attempt to present an asylum claim at these hearings. Asylum seekers in MPP face extreme difficulty and danger in attending their U.S. Immigration Court hearings.

Asylum seekers who do not appear for hearings receive *in absentia* deportation orders (even though they are not in the United States to be deported). These orders mean that their cases have ended without a chance to seek asylum and carry harsh negative impacts on the possibility to seek immigrant or non-immigrant status in the future. *In absentia* removal rates in MPP are

high. Data shows that as of September 2019, at least 29,987 people in MPP were still waiting for their first hearing, and 6,799 people out of the 17,326 who had already had their first hearings had received an *in absentia* decision, which means that nearly 40% of people were ordered removed simply because they were not able to re-cross the border and attend court.<sup>36</sup>

There are several serious barriers to appearing for hearings. First, the prevalence of kidnapping that asylum seekers experience makes it impossible to attend hearings in some cases. In some instances, asylum seekers have missed their hearings because they were kidnapped at the time of their hearings.<sup>37</sup>

In addition, U.S. and Mexican government officials are themselves acting directly to thwart asylum seekers from appearing for their Immigration Court hearings by relocating asylum seekers subjected to MPP to locations far from the northern Mexico border. Mexican authorities bus asylum seekers in MPP as far south as Chiapas.<sup>38</sup> These relocations create an insurmountable barrier for many asylum seekers who must return to a designated port of entry to be processed into the United States for their hearings. No transportation is provided back to the northern Mexican border. Furthermore, Mexican authorities may subject asylum seekers in MPP to detention and deportation, particularly if they are found in southern Mexico without Mexican immigration paperwork. It goes without saying that individuals detained or deported by Mexican authorities cannot attend their hearings in the United States.

Finally, the high rate of missed hearings is due in part to lack of adequate notice. The Notices to Appear issued to those subjected to MPP are deficient. These forms, in the MPP context, are frequently addressed to placeholder addresses that have no relationship to the migrants<sup>39</sup> or sometimes merely to “Facebook.”<sup>40</sup> They reveal the extent to which the authorities fail to take basic steps to ensure that they can communicate with asylum seekers in Mexico regarding changes in hearing dates or other case developments.

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<sup>36</sup> *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGRATION (Sep. 2019), <https://www.trac.syr.edu/phptools/immigration/mpp/> (follow these steps: check “Measure” as “Current Status”; check “Graph Time Scale” as “by Month and Year”; select “Hearing Location” on leftmost dropdown menu; select “Hearing Attendance” on center dropdown menu; check “Outcome” on rightmost dropdown menu) (last visited Nov. 15, 2019).

<sup>37</sup> See Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process* 16 (2019), <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>.

<sup>38</sup> L.A. Times, *Mexico Sends Asylum Seekers South - With no Easy Way to Return for U.S. Court Dates* (Oct. 15, 2019), <https://www.latimes.com/world-nation/story/2019-10-15/buses-to-nowhere-mexico-transport-migrants-with-u-s-court-dates-to-its-far-south>

<sup>39</sup> *Women’s Refugee Commission, Chaos, Confusion and Danger: The Remain in Mexico Program in El Paso* (April 2019), <https://www.womensrefugeecommission.org/images/zdocs/ElPaso-Report.pdf>.

<sup>40</sup> BuzzFeed News, *Border Patrol Agents are Writing “Facebook” as a Street Address for Asylum-Seekers Forced to Wait in Mexico* (Sept. 27, 2019), <https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico>.

## 2. Denial of Access to Counsel

Few migrants in MPP are able to access representation by an attorney for their U.S. immigration proceedings.<sup>41</sup> Approximately 98% of the 47,313 asylum seekers in the program were unrepresented as of September 2019.<sup>42</sup>

The lack of counsel has a significant impact on immigrants' ability to receive a fair hearing and secure protection. In general, Immigration Court data show that non-detained immigrants with representation are nearly five times more likely than their unrepresented counterparts to obtain immigration relief, such as asylum.<sup>43</sup> Given other barriers to presentation of an asylum claim for individuals in MPP, access to counsel is likely to have an even greater impact.

Immigration judges provide asylum seekers in MPP with a list of pro bono attorneys and organizations to call to seek representation when they appear for their first hearing in immigration court; however, almost none of the organizations on that list are accepting MPP clients. Most U.S. attorneys are unwilling to represent individuals in the MPP program, because it would involve potentially dangerous travel to Mexico to meet with clients. At a minimum, visiting Mexico to work with MPP clients is time-consuming and expensive for attorneys, making it prohibitive for most to handle MPP cases. Most attorneys are located away from the border and so would need to travel to the border and then also cross the international border, requiring interactions and approval from Mexican and United States immigration officials.

Proper preparation for an asylum claim requires hours of client interviews, and any court proceeding can be subject to unpredictable time crunches. When asylum seekers are enrolled in MPP, the potential for attorney/client meetings is extremely limited. Representation through the use of technology (e.g. Skype and WhatsApp) does not solve the problem. It is very difficult to gain the trust of traumatized asylum seekers over such technology and develop the level of detail needed to present an asylum claim. Full and effective representation is not possible, and many attorneys simply will not handle MPP cases in these circumstances.

The Commission has previously recognized the centrality of legal representation to fundamental rights within the immigration context,<sup>44</sup> and its importance to preserving the right to a fair trial, the right to due process of law, and the right to receive asylum.<sup>45</sup> The Commission has also recognized that international standards may require governments to “ensure that lawyers and legal services are available to all persons subject to the State’s jurisdiction”<sup>46</sup> In providing

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<sup>41</sup> In the United States, non-citizens in immigration proceedings do not have a right to government-appointed counsel, though they do have the “privilege” to be represented if they secure their own counsel. 8 U.S.C. § 1362.

<sup>42</sup> *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGRATION (Sep. 2019), <https://trac.syr.edu/phptools/immigration/mpp/> (follow these steps: check “Measure” as “Current Status”; check “Graph Time Scale” as “by Month and Year”; select “Hearing Location” on leftmost dropdown menu; select “Represented” on center dropdown menu; check “Represented” on rightmost dropdown menu) (last visited Nov. 3, 2019).

<sup>43</sup> See <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

<sup>44</sup> IACHR, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II., doc. 78, rev. 10 (Dec. 30, 2019), <https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf>.

<sup>45</sup> *Id.* at 21-22.

<sup>46</sup> IACHR, Access to Justice for Women Victims of Violence in the Americas, 20 Jan 2007, OAS/Ser.L/V/II., Doc. 68, ¶54, <http://www.cidh.org/women/Access07/chap1.htm>.

recommendations to the United States with regard to the treatment of migrant families and children, the Commission has urged the United States to ensure access to legal representation, explaining that “[a]ccess to legal counsel . . . ensures adequate attention to the protection needs of persons, ensuring access to mechanisms of international protection.”<sup>47</sup> Yet, MPP effectively denies asylum seekers meaningful access to legal representation.

### 3. Video “Court” Facilities and Other Impediments to a Fair Hearing

The “court” facilities and procedures used for MPP – particularly in Texas – preclude any meaningful participation of asylum seekers in the proceedings. In Laredo and Brownsville, for example, asylum seekers appear via video before the court in San Antonio and Harlingen Immigration Courts respectively, from temporary facilities located within the ports of entry in Laredo and Brownsville. In El Paso, asylum seekers in MPP are bussed to the pre-existing El Paso Immigration Court for non-detained individuals, where many have hearings via video with judges in Dallas or elsewhere in Texas.

#### a. Restrictions on Access to the Immigration Courts and Lack of Court Involvement in the Proceedings

Access to the Brownsville and Laredo facilities is tightly restricted. The facilities are not open to the public. Only attorneys who have a pre-existing agreement to represent a client called to appear before the court on that particular day may enter. This lack of transparency prevents accountability for the manner in which the facilities are run and asylum hearings are conducted.

In addition, the Laredo and Brownsville facilities are not really courts at all. In the facilities themselves, there are no Immigration Court personnel available. The Department of Homeland Security attorneys, the immigration judges, and even the interpreters, are all in San Antonio or Harlingen. The government employees located at the facility are responsible only for immigration enforcement. In effect, the facility is a temporary detention center, run by immigration enforcement officers, to which asylum seekers must present themselves in order to access court proceedings conducted by video.

Unlike in Brownsville and Laredo, asylum seekers in MPP in El Paso more typically appear before the Immigration Court in person. However, while immigration hearings should be open to the public,<sup>48</sup> observation of MPP dockets is often forbidden on the purported grounds that there is not enough room in the court. Even attorneys representing individuals in MPP are not permitted to sit in on other hearings on the docket on a day when they are appearing. Instead, they must wait downstairs in the lobby of the building where the Immigration Court sits. This preventable barrier to observation of MPP’s adjudication puts asylum seekers at risk by blocking transparency and accountability.

Furthermore, when the U.S. initially implemented MPP in El Paso, trained volunteers could assist asylum seekers in reviewing paperwork and filing applications and could even

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<sup>47</sup> IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, OEA/Ser.L/V/II155, doc. 16 (July 24, 2015), <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

<sup>48</sup> 8 C.F.R. 1003.27

address the court briefly regarding the status of a particular case. In July of 2019, however, the Immigration Court in El Paso stopped this practice specifically for those in MPP. Asylum seekers in MPP now must sit for hours in the El Paso court waiting for their hearings without the benefit of any meaningful legal orientation or opportunity to speak with prospective counsel even during the time that they are within the United States for the day.

b. Video Hearings from “Court” Facilities in Laredo and Brownsville

The proceedings also lack basic safeguards that permit asylum seekers to interact effectively with the court, particularly given the emphasis on video hearings. At the facilities in Laredo and Brownsville, asylum seekers take turns at a small table in the front of the room with two chairs that face a giant television screen with video showing the immigration judge and interpreter in San Antonio. The microphone rests on the table, so sound is easily accidentally muffled. The video cuts out approximately once every forty minutes, and all communication between the facility in Laredo and the court in San Antonio is lost at such moments. While asylum seekers in El Paso appear in the court rooms used for non-detained immigration dockets, they are still often conducted by video-conference with judges located remotely, with similar difficulties.

The use of video to conduct the hearings deprives asylum seekers of any real opportunity to present their claims for protection to the court. Communicating a traumatic personal experience via video between a facility and a distant court is near impossible. The video appearance is distancing and dehumanizing; the asylum seeker cannot even look the judge in the eyes nor can he or she approach the bench. As a result, the use of video makes it much more likely that an asylum claim will be denied. Routine technical failings exacerbate inherent difficulties with using video technology as a replacement to in-person court hearings.

4. Language Barriers to Participation in Hearings

Asylum seekers in MPP also face obstacles to their meaningful participation in the hearings that will determine their fate as a result of interpretation problems. The Immigration Courts provide interpreters. However, the interpretation provided by the Immigration Courts is selective and non-simultaneous. Throughout the hearing, the attorney for DHS and the judge engage in discussions that go completely uninterpreted. These exchanges are often of a substantive nature.

The problems with interpretation are amplified if Spanish is not the asylum seeker’s best language. The availability and quality of interpreters for indigenous languages is limited.

D. FAMILY SEPARATION PERPETUATED: MPP VIOLATES THE RIGHT TO PROTECTION OF THE FAMILY AND THE RIGHT TO PROTECTION FOR CHILDREN

The entire MPP program is targeted largely at families with children. It thus operates in direct violation of obligations under Articles VI and VII of the American Declaration and Articles 17 and 19 of the American Convention, guaranteeing the right to protection of the family and the rights of children.

MPP also perpetuates ongoing family separations, which violate these same provisions. Family separations under MPP follow on a prior U.S. policy of active and intentional removal of children from their parents at the U.S. southern border. In 2018, the United States began using a “Zero Tolerance” criminalization of irregular border crossings to separate migrating parents from their children who had arrived at the border with them. This tactic was a calculated attempt to deter people from seeking asylum in the United States. The honorable members of this Commission issued Precautionary Measures against the United States due to the family separations caused by the “Zero Tolerance” policy. Specifically, this honorable Commission found that the rights to family, life, personal integrity, and identity were at risk.<sup>49</sup>

The zero-tolerance policy formally ended on June 20, 2018.<sup>50</sup> However, the United States has used MPP to continue separating children from their parents, even after a U.S. federal court and the U.S. President formally ended family separation. In multiple cases, children arrived at the U.S.-Mexico border with a parent but have been separated, rendered unaccompanied by DHS officials, and transferred to unaccompanied minor facilities across the United States, while their parents were subjected to MPP.<sup>51</sup> In one reported case, a woman went into labor shortly after arriving in the United States and was placed into MPP by U.S. CBP officials, while her child – a U.S. citizen – was in the Neonatal Intensive Care Unit. Officials told the mother that her baby would be placed into the U.S. foster care system. It is nearly impossible to secure reunification of parents and children when the location of family members is unknown due to the precarity of life in northern Mexican border towns where violence is ubiquitous.<sup>52</sup>

MPP also creates significant difficulties in maintaining family unity even for those families that are not directly separated by the United States through MPP. Family members who do not belong to the same nuclear family unit (eg aunts or cousins) are often separated with some family members placed in MPP and others sent into detention in the United States to await their proceedings. In addition, threatening family separation is a technique used to control the actions of asylum seekers, both in the United States and in Mexico. For example, on November 1, 2019, the Mexican child welfare agency threatened to separate families in an attempt to force them out

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<sup>49</sup> IACHR, Resolution 64/28 (Aug. 16, 20180, <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf>)

<sup>50</sup> The White House, Executive Orders: *Affording Congress an Opportunity to Address Family Separation* (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>

<sup>51</sup> See Letter from Women’s Refugee Comm’n to Cameron Quinn, Office of Civil Rights & Civil Liberties, and Joseph Cuffari, Inspector Gen., Dep’t of Homeland Sec. (Aug. 16, 2019), <https://www.womenrefugeecommission.org/images/zdocs/Separation-of-families-via-the---Migrant-Protection-Protocols---WRC-complaint-to-DHS.pdf>.

<sup>52</sup> See Human Rights Watch, *US: Family Separation Harming Children, Families* (July 11, 2019), <https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families>.

of a tent encampment at Matamoros. The authorities used the possibility of separation to pressure families into a shelter in a dangerous part of Matamoros where kidnappings and violence are common and where it is more difficult to access the port of entry where asylum seekers must present for their asylum hearings.<sup>53</sup>

Yet other families are confronting the “choice” of whether to send their children on their own across the border where they believe they will be safer and perhaps reunified with other family, knowing that unaccompanied minors are not subject to MPP.<sup>54</sup> The result is in an increase in unaccompanied minors crossing the border, meaning *de facto* family separation.

### III. CONCLUSION

For the foregoing reasons, we urge the Commission to grant this request for a thematic hearing and to:

Call upon the United States to:

1. Officially announce an end to the MPP program and cease the placement of any asylum-seekers in MPP going forward.
  - a. When an asylum seeker presents at a U.S. port of entry or arrives in the U.S., that asylum-seeker must be allowed to stay in the U.S. for the duration of that person’s asylum proceedings and must be given adequate resources and support during that person’s stay in the U.S., including access to due process of the law and the protection of family integrity.
  - b. The U.S. must eliminate the use of the temporary tent facilities designed and constructed specifically for the MPP program and must not repurpose these tent facilities for use with any other immigration-related program.
2. Accept those previously placed in MPP back into the U.S., upon presentation at any port of entry, to pursue their asylum claims within U.S. borders, notwithstanding any prior deportation orders or other impediments.
3. Work with officials in Mexico and non-governmental organizations to reunify family members who have been separated as a result of MPP.

Call upon the State of Mexico to:

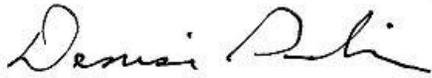
1. Cease its cooperation with MPP and deny entry to asylum seekers sent by the United States into Mexico through the MPP program.
2. Ensure that those already placed into MPP are provided safe return to the United States to pursue their claims from within the United States.
3. Cooperate with the United States and non-governmental organizations to facilitate reunification of family members who have been separated as a result of MPP.

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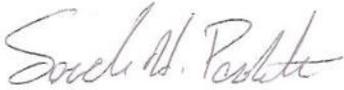
<sup>53</sup> Texas Public Radio, *New Migrant Shelter in Mexico Comes With Threat of Family Separation* (Nov. 1, 2019), <https://www.tpr.org/post/new-migrant-shelter-mexico-comes-threats-family-separation>.

<sup>54</sup> Los Angeles Times, *The New Family Separation: Migrant Parents Stranded on Border Send Kids Across Alone* (Nov. 27, 2019), <https://www.latimes.com/world-nation/story/2019-11-27/the-new-family-separation-migrant-parents-stranded-on-border-send-kids-across-alone>.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Gilman". The signature is fluid and cursive, with the first name "Denise" written in a larger, more prominent script than the last name "Gilman".

Denise Gilman  
Co-Director, Immigration Clinic  
University of Texas School of Law

A handwritten signature in black ink, appearing to read "Sarah H. Paoletti". The signature is fluid and cursive, with the first name "Sarah" written in a larger, more prominent script than the last name "Paoletti".

Sarah H. Paoletti  
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