
Before the
Supreme Court of Justice of the Nation

—◆—
Amparo Directo en Revisión 943/2023
—◆—

Brief of *Amicus Curiae*

Álvaro Botero Navarro

Member and Vice-Chair of the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (2018-2021)

François Crépeau

United Nations Special Rapporteur on the Human Rights of Migrants (2011-2017)

Felipe González Morales

United Nations Special Rapporteur on the Human Rights of Migrants (2017-2023)
Comisionado y Relator sobre los derechos de las personas migrantes
de la Comisión Interamericana de Derechos Humanos (2008-2015)

—◆—
HELEN KERWIN
STAFF ATTORNEY, HUMAN RIGHTS CLINIC
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
353 Law Building
Berkeley, CA 94720
+1 (510) 643-8781
hkerwin@law.berkeley.edu

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

INTEREST OF AMICI..... 8

SUMMARY OF ARGUMENT 9

I. INTERNATIONAL TREATIES RATIFIED BY MEXICO REQUIRE THE DOMESTIC INCORPORATION OF INTERNATIONAL PROTECTIONS 10

 A. International treaty obligations and customary law require Mexico to uphold the rights of migrants, including the right to seek and receive asylum..... 11

 B. Mexico must respect the procedural and substantive rights of refugees from the moment they meet the elements of the definition 14

 C. Mexico must guarantee the rights of migrants in international transit zones at airports .. 16

II. INTERNATIONAL TREATY OBLIGATIONS AND CUSTOMARY LAW REQUIRE MEXICO TO AFFORD ASYLUM-SEEKERS AT AIRPORTS AND IN DETENTION SUBSTANTIVE AND PROCEDURAL RIGHTS 20

 A. Mexico must assess international protection needs and ensure the principle of *non-refoulement* of all individuals arriving at airports..... 20

 1. The principle of *non-refoulement* prohibits the deportation of migrants to territories where their lives or integrity would be at risk 21

 2. Mexico must adequately screen migrants for international protection needs..... 22

 B. Mexico must guarantee due process for asylum seekers arriving at airports..... 24

 1. Mexico must fulfill its positive obligations to ensure due process and access to justice for migrants, who are in a situation of vulnerability..... 24

 2. Mexico has due process obligations in any proceeding that might lead to expulsion or deportation 25

 C. Mexico must enforce protections, including judicial review and the prohibition of incommunicado detention, to prevent arbitrary detention of migrants at airports..... 27

 1. Mexico must ensure access to legal remedies and prevent incommunicado detention 28

 2. Mexico must respect the obligation of humane treatment of persons deprived of liberty 30

 D. Extended or indefinite detention of migrants in airport international zones may amount to arbitrary detention and violate the prohibition against inhumane treatment 31

 E. Mexico must ensure that migration detention is used only as a measure of last resort 35

 1. Migration detention is generally discouraged and should only occur after authorities have conducted individualized assessments, ensuring the necessity, proportionality, and legitimate purpose of detention..... 35

 2. Mexico is obligated to consider measures alternative to detention before resorting to detention..... 37

III. CONCLUSION..... 38

TABLE OF AUTHORITIES

Treaties & Conventions

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123	passim
American Declaration on the Rights and Duties of Man Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, May 2, 1948.....	10, 23
Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, Colombia, Nov. 19–22, 1984, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf	11, 19
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.....	8, 10, 19
Convention on the Protection of all Migrant Workers and their Families, Dec. 18, 1990, 2220 U.N.T.S. 3	8, 10
Inter-American Convention to Prevent and Sanction Torture, Dec. 9, 1985, O.A.S.T.S. No. 67	8, 10, 19
International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3	10
International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171... 8, 10, 25	
Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267	8, 10
United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137	8, 10, 11, 19
Vienna Convention on the Law of Treaties, <i>entered into force</i> Jan. 27, 1980, 1155 U.N.T.S. 331.....	8, 20

Constitutional Provisions

Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación, May 2, 1917, últimas reformas DOF October 2, 2014.....	9
--	---

Codes & Regulations

Ley Aduanera, Diario Oficial de la Federación (Dec. 11, 2021), https://www.diputados.gob.mx/LeyesBiblio/pdf/LAdua.pdf	16
Ley de Migración, Diario Oficial de la Federación (May 27, 2014), https://www.diputados.gob.mx/LeyesBiblio/pdf/LMigra.pdf	16
Ley sobre Refugiados, Protección Complementaria y Asilo Político art. 13(I), Diario Oficial de la Federación (May 27, 2024), https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf	11, 13, 14

Cases

Inter-American Court of Human Rights

Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).....	9
Baena-Ricardo v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72 (Feb. 2, 2001).....	18
Bulacio v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003).....	28
Caesar v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005).....	28
Castillo Petruzzi et al. v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52 (May 30, 1999).....	10
Galindo Cárdenas et al. v. Peru, Preliminary Exceptions, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 301 (Oct. 2, 2015).....	25
García Rodríguez et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 482 (Jan. 25, 2023).....	10
Juvenile Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).....	28
Mendoza et al. v. Argentina, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260 (May 14, 2013).....	28
Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251 (Oct. 24, 2012).....	11, 18
Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272 (Nov. 25, 2023).....	passim
Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009).....	8
Ruano Torres et al. v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 303 (Oct. 5, 2015).....	26
Vélez Loor v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218 (Sept. 26, 2006).....	passim

Inter-American Commission on Human Rights

Andrea Mortlock v. United States, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/08,OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2009).....	20
Cuban and Haitian Nationals detained at and deported from the Carmichael Road Detention Center v. Bahamas, Case 12.071, Inter-Am. Comm’n H.R., Report No. 459/21, OEA/Ser.L/V/II, doc. 473 (2021).....	21
Djamel Ameziane v. United States, Case 12.865, Inter-Am. Comm’n H.R., Report No. 29/20,OEA/Ser.L/V/II, doc. 39 (2020).....	20, 21

Haitian Centre for Hum. Rts. et al. v. United States, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1997).....	14, 17
John Doe et al. v. Canada, Case 12.586, Inter-Am. Comm’n H.R., Report No. 78/11, OEA/Ser.IV/II.141, doc. 29 (2011).....	10, 19, 20, 21
European Court of Human Rights	
Amuur v. France, App. No. 19776/92, Eur. Ct. H.R. (June 25, 1996).....	15, 16, 29, 30
Hirsi Jamaa et al. v. Italy, App. No. 27765/09, Eur. Ct. H.R. (Feb. 23, 2012).....	17, 19, 21
M.S.S. v. Belgium and Greece, App. No. 30696/09, Eur. Ct. H.R. (Jan. 21, 2011)	24
Nolan and K. v. Russia, App. 2512/04, Eur. Ct. H.R. (Feb. 12, 2009)	16
Paposhvili v. Belgium, App. No. 41738/10, Eur. Ct. H.R. (Dec. 13, 2016)	20
Riad and Idiab v. Belgium, App. Nos. 29787/03 and 29810/03, Eur. Ct. H.R. (Jan. 24, 2008).....	15, 30, 31
Z.A. et al. v. Russia, Apps. 61411/15, 61420/15, 61427/15, and 3028/16, Eur. Ct. H.R. (Nov. 21, 2019)	16
International Court of Justice	
Factory at Chorzów (Germ. v Pol.), Jurisdiction, Judgment P.C.I.J. Ser. A No. 9, 1927 ICGJ 247 (July 26, 1927).....	18
U.N. Human Rights Committee	
U.N. Human Rights Committee, <i>A.B. and family v. Poland</i> , U.N. Doc. CCPR/C/135/D/3017/2017 (Feb. 3, 2023).....	24
U.N. Human Rights Committee, <i>C. v. Australia</i> , U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002)	20
U.N. Human Rights Committee, <i>F.J. et al. v. Australia</i> , U.N. Doc. CCPR/C/116/D/2233/2013 (May 2, 2016).....	28
National Courts	
Mexico	
Amparo en Revisión 353/19 (MP José Fernando Franco González Salas), Segunda Sala de la SCJN, Oct. 16, 2019	9
Amparo en Revisión 665/2019 (MP Alfredo Gutiérrez Ortiz Mena), Primera Sala de la SCJN, 2021	9
Contradicción de criterios, Pleno de la Suprema Corte de Justicia, Sept. 3, 2013, Tesis 293/11, https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=129659....	9
Other Countries	
Judgment SU-543/23, Corte Constitucional de Colombia (Dec. 5, 2023) (Colom.).....	13
Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004, [2006] HCA 53 (Nov. 15, 2006) (Austl.).....	13
Nemeth v. Canada, [2010] 3 S.C.R. 281 (Can.).....	13

R (Hoxha) v. Special Adjudicator, [2005] UKHL 19 (Mar. 10, 2005).....	13
Sentencia No. 1214-18-EP/22, Pleno de la Corte Constitucional de Ecuador (Jan. 27, 2022) (Ecuador).....	15, 21
Sentencia No. 159-11-JK, Corte Constitucional del Ecuador (Nov. 26, 2019) (Ecuador)	32
Sentencia No. 335-13-JP/20, Pleno de la Corte Constitucional de Ecuador (Aug. 12, 2020) (Ecuador).....	29, 31, 32
Sentencia No. 2496-21-EP/23, Corte Constitucional del Ecuador (July 12, 2023) (Ecuador).....	13
Sentencia No. 897-11-JP/20, Corte Constitucional del Ecuador (Aug. 12, 2020) (Ecuador).....	13

Resolutions & Advisory Opinions

Inter-American Court of Human Rights

Advisory Opinion 14/94: The Obligations in Matters of Human Rights of a State that Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States, Inter-Am. Ct. H.R. (ser. A) No. 14 (Dec. 9, 1994)	8
Advisory Opinion 18/03: Juridical Condition and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 169 (Sept. 17, 2003).....	passim
Advisory Opinion 21/14: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Inter-Am. Ct. H.R. (ser. A) No. 21 (Aug. 19, 2014)	passim
Advisory Opinion 23/17: The Environment and Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017)	14
Advisory Opinion 25/18: The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System, Inter-Am. Ct. H.R. (ser. A) No. 25 (May 30, 2018).....	12, 15, 16, 17

Inter-American Commission on Human Rights

Inter-American Commission on Human Rights & Organization of American States, <i>Res. 04/19: Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Trafficking in Persons</i> (Dec. 7, 2019), https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf	passim
---	--------

International Court of Justice

International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (July 9, 2004).....	14
--	----

U.N. High Commissioner for Refugees

U.N. High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007)	12, 17, 19
---	------------

U.N. Documents

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, <i>General comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary</i>	
---	--

<i>detention and their connection with other human rights</i> , U.N. Doc. CMW/C/GC/5 (July 21, 2022)	passim
Felipe González Morales (Special Rapporteur on the human rights of migrants), <i>Report on means to address the human rights impact of pushbacks of migrants on land and at sea</i> , U.N. Doc. A/HRC/47/30 (May 12, 2021).....	17
G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948).....	10
Nils Melzer (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), <i>Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment</i> , U.N. Doc. A/HRC/37/50 (Nov. 23, 2018).....	28
Office of the High Commissioner for Human Rights, <i>Technical note: The principle of non-refoulement under international human rights law</i> (July 5, 2018), https://www.ohchr.org/en/documents/tools-and-resources/technical-note-principle-non-refoulement-under-international-human	20
Recommended Principles and Guidelines on Human Rights at International Borders, U.N. GAOR, 69th Sess., conference room paper, U.N. Doc. A/69/CRP. 1 (July 23, 2014).....	15
U.N. Committee Against Torture, <i>General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22</i> , U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018).....	12, 24, 30
U.N. Committee on the Rights of the Child, <i>General Observation No. 6: Treatment of unaccompanied and separated minors outside their country of origin</i> , U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).....	15
U.N. HIGH COMMISSIONER FOR REFUGEES, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION (2012), https://www.unhcr.org/us/media/unhcr-detention-guidelines	passim
U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019), https://www.unhcr.org/us/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967	12, 13, 14
U.N. High Commissioner for Refugees, <i>Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response</i> (Mar. 16, 2020)	17
U.N. High Commissioner for Refugees, <i>Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports</i> (Jan. 17, 2019).....	10, 15, 17, 20

U.N. High Commissioner for Refugees, <i>Note on the Mandate of the High Commissioner for Refugees and his Office</i> (Oct. 2013), https://www.unhcr.org/pk/wp-content/uploads/sites/103/2018/05/UNHCR-mandate.pdf	12
U.N. Human Rights Committee, <i>Concluding observations on Belgium</i> , U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004)	15
U.N. Human Rights Committee, <i>General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant</i> , U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004).....	14
U.N. Human Rights Committee, <i>General Comment No. 35 on Article 9, Liberty and security of person</i> , U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014)	25, 27
U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AT INTERNATIONAL BORDERS (2014), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf	15, 21
U.N. Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <i>General comment No. 1 (2024) on article 4 of the Optional Protocol (places of deprivation of liberty)</i> , U.N. Doc. CAT/OP/GC/1 (July 4, 2024).....	26

Other Authorities

Álvaro Botero & Jens Vedsted-Hansen, <i>Asylum Procedure</i> , in THE OXFORD HANDBOOK ON INTERNATIONAL REFUGEE LAW (Cathryn Costello, Michelle Foster & Jane McAdam eds.) (2021).....	20, 24, 25
European Parliamentary Research. Service, <i>Legal fiction of non-entry in EU asylum policy Implications of the new Screening Regulation</i> (2024).....	15
HUMAN RIGHTS WATCH, THE USE OF INCOMMUNICADO DETENTION (2005), https://www.hrw.org/reports/2005/spain0105/6.htm#	27
Inter-American Commission on Human Rights, <i>Observations of the IACHR on the Request for Advisory Opinion presented by the State of Ecuador</i> (May 4, 2017), https://www.corteidh.or.cr/sitios/observaciones/oc25/7_cidh.pdf	16
JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2d ed. 2021) ..	12, 15
JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007).....	19
JOANNE VAN SELM, ACCESS TO PROCEDURES ‘SAFE THIRD COUNTRIES’, ‘SAFE COUNTRIES OF ORIGIN’, AND ‘TIME LIMITS’, UNHCR (2001).....	19
Marcela Nochebuena, <i>Negativas para que extranjeros ingresen al país desde aeropuertos se multiplicaron en cinco años</i> , ANIMAL POLÍTICO (Jan. 10, 2023), https://animalpolitico.com/sociedad/negativas-ingreso-extranejeros-aeropuertos-migracion...	7
PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS (PICUM), IMMIGRATION DETENTION AND DE FACTO DETENTION: WHAT DOES THE LAW SAY? (2022),	

https://picum.org/wp-content/uploads/2022/09/Immigration-detention-and-de-facto-detention.pdf	16
Secretaria de Gobernacion, Unidad de Politica Migratoria, <i>Eventos de Rechazo 2023: Según continente y país de nacionalidad</i> , https://portales.segob.gob.mx/es/PoliticaMigratoria/evento_de_rechazos_aereos (last visited Aug. 27, 2024)	7
Shana Tabak, <i>Refugee Detention As Constructive Refoulement</i> , 48 YALE J. INT’L L. 289 (2023).....	30

INTEREST OF AMICI

Amici are internationally recognized experts on the human rights of people in human mobility, including refugees and asylum seekers. They have served on multiple international bodies, including the Inter-American Commission on Human Rights, the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the United Nations Special Rapporteur on the Human Rights of Migrants, where they have promoted the progressive development of international human rights law and have monitored and analyzed State practices that violate the rights of asylum seekers, including limitations on access to territory and due process and the systematic use of immigration detention.

Álvaro Botero Navarro is an adjunct professor at American University Washington College of Law, a senior research associate at the Refugee Law Initiative (RLI) at the University of London, and a non-resident senior research fellow at the Inter-American Dialogue. He was a member and vice-chair of the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) (2018-2021). Previously, he led the work on migrants, refugees and forced displacement of the Secretariat for Access to Rights of the Organization of American States (OAS) and worked as monitoring coordinator and Senior Specialist of the Rapporteurship on the Rights of Migrants at the Inter-American Commission on Human Rights (IACHR). He is a Colombian lawyer with a law degree from the Universidad del Norte (Colombia) and holds a Master's degree in Advanced Studies in Human Rights from the Universidad Carlos III (Spain).

François Crépeau is a professor of public international law at the Faculty of Law of McGill University, Canada. He was United Nations Special Rapporteur on the human rights of migrants (2011-2017). As Special Rapporteur, he undertook official visits to more than ten countries and produced thematic reports on detention of migrants, protection of their rights at the external borders of the European Union, climate change and migration, global governance of migration and labor rights. He was a member of the Scientific Committee of the *European Union Agency for Fundamental Rights* (France, Vienna, Austria) (2018-2023), Chair of the Thematic Working Group: Migrants' Rights and Integrations in Host Communities of *KNOMAD - Global Knowledge Partnership on Migration and Development*, *World Bank Group* (Washington, DC), member of the Advisory Committee of the International Migration Initiative of the *Open Society Foundations* (NY) (2017-2021), and member of the Board of Directors of the *International Bureau for Children's Rights* (Montreal) (2018-2021). He is the author of *Droit d'asile: De l'hospitalité aux contrôles migratoires* (Brussels: Bruylant, 1995) and has published widely on asylum and migration, the management of the European Union's external borders, and the criminalization of migration.

Felipe González Morales is Professor of International Law at Diego Portales University, in Santiago, Chile, where he also directs the Master's program in International Human Rights Law. He was United Nations Special Rapporteur on the human rights of migrants (2017-2023). He was Commissioner and Rapporteur on the rights of migrants at the Inter-American Commission on Human Rights (2008-2015), of which he was also President between 2010-2011. He is founder

and was the first Director of the Human Rights Center of Diego Portales University. He holds a PhD and a Master's degree in Advanced Human Rights from Universidad Carlos III and an LL.M. in International Legal Studies from American University.

SUMMARY OF ARGUMENT

This *amicus brief* addresses the governing international standards regarding the rights of asylum seekers arriving at airports. The case before this Supreme Court concerns Misael Bastidas Contasti, a Venezuelan asylum-seeker who was subjected to detention and attempted deportation by Mexican authorities at Mexico City International Airport in 2018. Despite his clear expression of fear of persecution in Venezuela, he was denied access to asylum proceedings, detained for three days at the airport and, following the grant of a writ of *amparo* presented by his attorneys, held for an additional three weeks at the “Las Agujas” Immigration Center. Mr. Bastidas was awarded asylum in Mexico in 2020. His experience is illustrative of the denial of rights to asylum seekers at Mexico’s airports. In 2023 alone, more than 83,000 travelers were refused entry at Mexican airports;¹ many of these may have been asylum seekers denied their right to request asylum.²

The case pending before this court concerns Mr. Bastidas’ right to reparation for these acts under the Ley de Responsabilidad Patrimonial del Estado. To resolve this issue, it is relevant for the Court to establish that Mr. Bastidas in fact suffered violations of his rights. The standards that *amici* present in this brief will support the Court in determining the actual occurrence of human rights violations in the case under governing international law, and Mr. Bastidas’ corresponding right to comprehensive reparation.

In accordance with the Constitution and this Court’s jurisprudence, Mexico has international treaty obligations and is bound by customary norms that should inform this Court’s decision in this case. *Amici*, internationally recognized experts in human mobility, submit this brief to provide a comprehensive analysis of international human rights and refugee law on access to asylum, detention, and humane treatment.

First, *amici* argue that asylum-seekers arriving at airports come within the jurisdiction of the Mexican State, which must respect and guarantee their rights. Under international law, Mexico is obligated to guarantee the rights of asylum-seekers from the moment they meet the refugee definition, irrespective of formal recognition of that status by any State. *Amici* identify the specific international obligations Mexico disregards by denying asylum-seekers at airports access to due

¹ See Secretaría de Gobernación [SEGOB], Unidad de Política Migratoria, *Eventos de Rechazo 2023: Según continente y país de nacionalidad*, https://portales.segob.gob.mx/es/PoliticaMigratoria/evento_de_rechazos_aereos (last visited Aug. 27, 2024).

² See, e.g., Marcela Nochebuena, *Negativas para que extranjeros ingresen al país desde aeropuertos se multiplicaron en cinco años*, ANIMAL POLÍTICO (Jan. 10, 2023), <https://animalpolitico.com/sociedad/negativas-ingreso-extranejeros-aeropuertos-migracion>.

process and subjecting them to detention, including the obligation to screen arriving migrants³ for protection needs; to inform them of their rights; and to ensure access to due process and international protection. *Amici* further argue that Mexico must ensure that asylum seekers who arrive at airports have access to its territory; refrain from penalizing irregular entry (including the imposition of detention as punishment); respect the obligation of *non-refoulement*; prohibit arbitrary detention; and ensure humane treatment of those in detention.

I. INTERNATIONAL TREATIES RATIFIED BY MEXICO REQUIRE THE DOMESTIC INCORPORATION OF INTERNATIONAL PROTECTIONS

The United Mexican States (hereinafter “Mexico” or “the Mexican State”) has signed and ratified several international treaties that enshrine protections for asylum seekers and persons in human mobility, including the 1951 Convention Relating to the Status of Refugees (1951 Convention) and its 1967 Protocol,⁴ the International Covenant on Civil and Political Rights (ICCPR),⁵ the Convention against Torture,⁶ the Convention on the Protection of all Migrant Workers and their Families,⁷ the American Convention on Human Rights (“American Convention”),⁸ and the Inter-American Convention to Prevent and Sanction Torture (CIPST).⁹ In accordance with international and domestic law, Mexico is required to uphold the rights established by these treaties and incorporate those obligations into its domestic legal framework.¹⁰

Following the constitutional reform of 2011, the Supreme Court of Justice of the Nation (SCJN) has repeatedly affirmed that under Article 1 of the Mexican Constitution (“Mexican

³ *Amici* use the term “migrant” to refer to migrants, asylum-seekers, refugees, stateless persons, victims of human trafficking, and other persons with international protection needs. See generally Inter-Am. Comm’n on H.R. & Organization of American States [OAS], *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Trafficking in Persons*, General Provision (Dec. 7, 2019) [hereinafter Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*], <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>. Additionally, “migrant” is used interchangeably with “persons in human mobility.”

⁴ U.N. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 150 (ratified by Mexico in 2000); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (ratified by Mexico in 2000).

⁵ International Covenant on Civil and Political Rights [ICCPR], Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by Mexico in 1981).

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Convention against Torture], Dec. 10, 1984, 1465 U.N.T.S. 85 (ratified by Mexico in 1986).

⁷ Convention on the Protection of all Migrant Workers and their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (ratified by Mexico in 1999).

⁸ American Convention on Human Rights [American Convention] art. 1, Nov. 22, 1969, 1144 U.N.T.S. 123 (ratified by Mexico in 1981).

⁹ Inter-American Convention to Prevent and Sanction Torture, Dec. 9, 1985, O.A.S.T.S. No. 67 (ratified by Mexico in 1987).

¹⁰ Vienna Convention on the Law of Treaties, arts. 26, 27, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331; American Convention arts. 1, 2; Advisory Opinion 14/94: The Obligations in Matters of Human Rights of a State that Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 35 (Dec. 9, 1994); *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 338–39 (Nov. 23, 2009).

Constitution”), Mexico’s international treaty obligations carry equal weight to its constitutional obligations.¹¹ Moreover, this Court held that Mexico is bound by international treaty law to which it is party and Inter-American Court of Human Rights (“IA Court” or “Inter-American Court”) precedent.¹² Mexico must rigorously enforce conventionality control to ensure compliance with these obligations.¹³

Likewise, article 11 of the Mexican Constitution establishes the right to seek and receive asylum and mandates that “the recognition of refugee status and granting of political asylum will be done in accordance with international treaties.”¹⁴ This Court has similarly interpreted article 11 in light of Mexico’s treaty obligations and Inter-American jurisprudence.¹⁵

This brief addresses international legal obligations arising from international treaties, jurisprudence, and customary law that are binding on Mexico to elucidate the State’s obligations with respect to the rights of migrants who arrive at Mexico’s airports, as well as persuasive authority that further reinforces the nature of these obligations and demonstrates the appropriate application of the relevant international standards to the context of airports. In this section, *amici* discuss sources of the binding obligation to guarantee the right to seek and receive asylum, and the territorial scope of application of the obligation, which includes airports.

A. International treaty obligations and customary law require Mexico to uphold the rights of migrants, including the right to seek and receive asylum

While international law affirms the right of States to regulate migration as an aspect of both sovereignty and national security, States must ensure respect for human rights when enforcing their migration laws and policies.¹⁶ Mexico has signed and ratified international treaties that enshrine the right to seek and receive asylum, including the 1951 Convention on the Status of Refugees, its

¹¹ Contradicción de criterios, Pleno de la Suprema Corte de Justicia [SCJN], Sept. 3, 2013, at 36, Tesis 293/11, <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=129659>; Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

¹² Contradicción de criterios, Tesis 293/11, SCJN, at 64–66.

¹³ The Inter-American Court on Human Rights (“Inter-American Court”) has directed national judiciaries to “exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights . . . [by] tak[ing] into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.” *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006).

¹⁴ CPEUM art. 11 (*amici*’s translation).

¹⁵ *Amparo en Revisión 353/19* (MP José Fernando Franco González Salas), Segunda Sala de la SCJN, Oct. 16, 2019 (interpreting CPEUM art. 11); *Amparo en Revisión 665/2019* (MP Alfredo Gutiérrez Ortiz Mena), Primera Sala de la SCJN, 2021, ¶ 48 and ss. (recognizing constitutional protection of the right to seek and receive asylum).

¹⁶ *Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 97 (Sept. 26, 2006).

1967 Protocol, and the American Convention,¹⁷ and that uphold the rights of migrants to due process, judicial protection, an effective remedy,¹⁸ the right to humane treatment¹⁹ and to life,²⁰ the prohibition against arbitrary detention,²¹ the principle of *non-refoulement*,²² and related rights.

With respect to the human rights of migrants, the Inter-American Court has held that:

In exercising their power to set migration policies, States may establish mechanisms to control entry to and departure from their territory of persons who are not their nationals, provided that such policies are compatible with the standards for the protection of human rights established in the American Convention. Indeed, although States retain a degree of discretion in determining their migration policies, the objectives pursued by such policies must respect the human rights of migrants.²³

Indeed, the Inter-American Court has repeatedly affirmed the State obligation to enact domestic legislation or policies that uphold the rights and freedoms protected by the American Convention.²⁴ In accordance with Inter-American jurisprudence, domestic procedures and policies related to the expulsion or deportation of foreigners must “strict[ly] adhere[] to the guarantees of

¹⁷ United Nations Convention relating to the Status of Refugees; Protocol Relating to the Status of Refugees; American Convention, art. 22.7 (establishing that “[e]very person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions . . .”). *See also* American Declaration on the Rights and Duties of Man Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, May 2, 1948, art. XXVII (adopted by the Members of the Organization of American States on May 2, 1948); G.A. Res. 217 (III) A, Universal Declaration of Human Rights [UDHR] (Dec. 10, 1948), U.N. Doc. A/810, at 71.

¹⁸ American Convention arts. 8, 25; ICCPR arts. 2, 14; Convention on the Protection of all Migrant Workers and their Families art. 18.

¹⁹ American Convention art. 5; ICCPR arts. 7, 10; Convention against Torture art. 2; Inter-American Convention to Prevent and Punish Torture art. 1; Convention on the Protection of all Migrant Workers and their Families art. 10.

²⁰ American Convention art. 4; ICCPR art. 6.

²¹ American Convention art. 7; ICCPR arts. 9, 14; Convention on the Protection of all Migrant Workers and their Families art. 16.

²² American Convention art. 22.9; ICCPR arts. 6, 7; Convention against Torture art. 3; Protocol Relating to the Status of Refugees art. 33; Inter-American Convention to Prevent and Punish Torture art. 13; International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 3; UDHR art. 13.

²³ Vélez Lóor, Inter-Am. Ct. H.R., ¶ 97. *See also* Advisory Opinion 18/03: Juridical Condition and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (ser. A) No. 18, (Sept. 17, 2003).

²⁴ *See* García Rodríguez et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 482, ¶ 176 (Jan. 25, 2023) (recalling that Article 2 of the American Convention obliges State Parties to adopt necessary measures to uphold the rights and freedoms protected by the Convention); *Id.* at 177 (holding that States have a positive obligation to adopt legislative measures ensuring the exercise of rights and to refrain from enacting laws that obstruct their free exercise, while simultaneously preserving protective legislation); *See also* Castillo Petruzzi et al. v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 207 (May 30, 1999) (holding that Article 2 of the Convention mandates the “elimination of any norms and practices that in any way violate the guarantees provided under the Convention”). *See also* John Doe et al. v. Canada, Case 12.586, Inter-Am. Comm’n H.R., Report No. 78/11, OEA/Ser.IV/II.141, doc. 29, ¶ 92 (2011); U.N. High Commissioner for Refugees [UNHCR], Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports, ¶ 3 (Jan. 17, 2019).

due process, judicial protection and respect for human dignity, regardless of the legal status or migratory status of the migrant . . .”²⁵

Mexican domestic law establishes broad substantive guarantees against *refoulement* to any country or territory where an individual’s life, integrity, liberty, or other fundamental rights would be at risk.²⁶ The 2011 Law on Refugees, Complementary Protection, and Political Asylum (“2011 Law on Refugees”) grants international protection in Mexico to individuals:

1. who have a “well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion” (the 1951 Convention definition of refugee),²⁷ with the addition of “gender” as a category protected from persecution;²⁸
2. who have fled “generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances that have gravely affected public order” (the definition established in the 1984 Cartagena Declaration on Refugees);²⁹
3. who receive diplomatic asylum;³⁰ and
4. who are not recognized as refugees but require protection from *refoulement* “to the territory of another country where their life would be in danger or where there are substantial grounds for believing that they would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment,” known as complementary protection.³¹

²⁵ Vélez Lóor, Inter-Am. Ct. H.R., ¶ 100; *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 154 (Oct. 24, 2012). *See also* Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶¶ 118, 119.

²⁶ *Cfr.* *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 157 (Nov. 25, 2023) (“Thus, any proceeding relating to the determination of the refugee status of a person entails an assessment and decision on the possible risk of affecting his most basic rights, such as life, and personal integrity and liberty.”). *See also infra* section V.A.

²⁷ United Nations Convention relating to the Status of Refugees art. 1(A)(2).

²⁸ *Ley sobre Refugiados, Protección Complementaria y Asilo Político* art. 13(I), *Diario Oficial de la Federación* (May 27, 2024) [hereinafter *Ley sobre Refugiados*], <https://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP.pdf> (recognizing as a refugee a foreigner present on State territory who, “debido a fundados temores de ser perseguido por motivos de raza, religión, nacionalidad, género, pertenencia a determinado grupo social u opiniones políticas, se encuentre fuera del país de su nacionalidad y no pueda o, a causa de dichos temores, no quiera acogerse a la protección de tal país . . .”).

²⁹ *Ley sobre Refugiados* art. 13(II) (recognizing as a refugee a foreigner present on State territory who, “ha huido de su país de origen, porque su vida, seguridad o libertad han sido amenazadas por violencia generalizada, agresión extranjera, conflictos internos, violación masiva de los derechos humanos u otras circunstancias que hayan perturbado gravemente el orden público”); *see also* Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, Colombia, Nov. 19–22, 1984, at § III.3, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

³⁰ *Ley sobre Refugiados*, art. 61.

³¹ *Ley sobre Refugiados*, art. 28.

To access these asylum protections, international bodies have underscored that individuals seeking international protection must have effective access to procedural and substantive guarantees that ensure the right, from the moment of arrival to Mexican territory.³² The Inter-American Court has found that for the right to seek asylum to be effective, “host States are required to allow persons to apply for asylum or refugee status, which is why such persons cannot be rejected at the border or returned without an adequate and individualised analysis of their claims with due guarantees.”³³

International law further establishes binding standards for Mexico's treatment of persons with possible international protection needs at international borders, in particular in airports and “international transit zones,” as will be addressed in the following sections.

B. Mexico must respect the procedural and substantive rights of refugees from the moment they meet the elements of the definition

Under international law, a person becomes a refugee at the moment they meet the definition of the term, independent of formal recognition by a State.³⁴ The United Nations High Commissioner for Refugees (UNHCR)—the UN body mandated by the General Assembly to protect refugees, asylum-seekers, and other persons of concern³⁵—has affirmed:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.³⁶

³² Pacheco Tineo, Inter-Am. Ct. H.R., ¶ 153; *see also, e.g.*, U.N. Committee Against Torture [UNCAT], *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, ¶¶ 10, 13, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018); 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*, ¶¶ 9, 20 (Jan. 26, 2007).

³³ *Advisory Opinion 25/18: The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System*, Inter-Am. Ct. H.R. (ser. A) No. 25, ¶ 122 (May 30, 2018); Inter-Am. Comm’n. on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 56.

³⁴ JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 173, 180 (2d ed. 2021).

³⁵ “Persons of concern” is a term of art that describes persons subject to UNHCR’s mandate, including refugees, asylum-seekers, returnees, stateless persons, and internally displaced persons under some circumstances. UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office* (Oct. 2013), <https://www.unhcr.org/pk/wp-content/uploads/sites/103/2018/05/UNHCR-mandate.pdf>.

³⁶ UNHCR, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES*, ¶ 28, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) [hereinafter UNHCR, *REFUGEE STATUS HANDBOOK*], <https://www.unhcr.org/us/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>.

In *Pacheco Tineo v. Bolivia*, the Inter-American Court relied on the UNHCR standard in recognizing the declaratory, rather than constitutive, nature of the refugee status determination process.³⁷ According to the Court, recognition of refugee status is not a transformative process; it does not *make* an individual a refugee but rather *declares* an already-existing status.³⁸

Mexican law recognizes the declaratory, rather than constitutive, nature of refugee status determination. The 2011 Law on Refugees and Asylum establishes: “The Secretariat shall recognize the status of refugee, *by means of a declaratory act*, to non-citizens who are in any of the cases set forth in Article 13 of this Law, and who shall therefore be subject to the rights and obligations contained therein” (emphasis added).³⁹ The declaratory nature of refugee status determination has also been widely upheld by many foreign courts, including in the United Kingdom, Canada, Ecuador, Colombia, and Australia.⁴⁰ This widespread recognition demonstrates international acceptance of this principle.

International law affords asylum seekers rights from the moment they meet the refugee definition,⁴¹ which in most cases will occur prior to their arrival on the territory of the State where they request asylum. Many asylum-seekers will meet the definition at the moment they leave the

³⁷ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 145 (“According to the 1951 Convention, a person is a refugee as soon as he meets the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee, but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”) (citing UNHCR, REFUGEE STATUS HANDBOOK, *supra* note 36, at ¶ 28).

³⁸ *Id.*

³⁹ Ley sobre Refugiados art. 12. *See also id.* at art. 47 (“Cuando un extranjero reconocido como refugiado en un tercer país, se interne en contravención a las disposiciones de ingreso al territorio nacional, la Secretaría, *teniendo en cuenta el carácter declarativo del reconocimiento de la condición de refugiado*, analizará los motivos de dicha internación y las razones por las cuales salió del país donde fue reconocido como refugiado con el objeto de determinar si gozaba o no de protección efectiva” (emphasis added)).

⁴⁰ Sentencia No. 2496-21-EP/23, Corte Constitucional del Ecuador, ¶ 56 (July 12, 2023) (Ecuador) (“Dado el carácter declarativo y no constitutivo de la determinación de la condición de refugiado, la protección brindada por el principio y derecho de no devolución aplica a las personas solicitantes de refugio”). *See also* Sentencia No. 897-11-JP/20, Corte Constitucional del Ecuador, ¶ 77 (Aug. 12, 2020) (Ecuador), Judgment SU-543/23, Corte Constitucional de Colombia, ¶ 91 (Dec. 5, 2023) (Colom.) (“los Estados tienen la obligación internacional de adoptar procesos ‘justos y eficientes’ para determinar la condición de refugiado . . . puesto que, a pesar de que la condición de refugiada de una persona se deriva de las circunstancias que enfrentó en su país y *no de la determinación que hacen los Estados receptores*, el pleno y efectivo goce de los derechos y beneficios que derivan de la condición de persona refugiada depende, en la práctica, del reconocimiento formal” (emphasis added)); Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53, ¶ 96 (Nov. 15, 2006) (Austl.) (Kirby, J. dissenting) (“The Refugee Convention ‘establishes a process by which a person becomes ‘recognized’ as a refugee. In using the language of ‘recognition,’ rather than ‘rendering,’ ‘becoming,’ or ‘constituting,’ the [Convention] connotes a process whereby a person, who already is a refugee, gains ‘formal recognition’ as such within the country of refuge. Recognition does not render a person a ‘refugee.’ It simply recognizes the status as one that preceded the recognition. That is why the process is commonly described as merely ‘declaratory.’”); R (Hoxha) v. Special Adjudicator [2005] UKHL 19, at 60 (Mar. 10, 2005) (“True it is . . . as para. 28 of the Handbook neatly points out, that someone recognised to be a refugee must by definition have been one before his refugee status has been determined.”); Nemeth v. Canada, [2010] 3 S.C.R. 281, ¶ 50 (Can.) (“Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings.”).

⁴¹ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 145.

territory of their country of origin.⁴² Accordingly, *amici* will discuss international State obligations to ensure procedural and substantive rights to asylum-seekers upon arrival to the State territory.⁴³ States must guarantee the rights of asylum-seekers from the moment they arrive in the territory of the receiving State and until the asylum-seeker completes the refugee status determination process. By ensuring effective access to domestic protections, international bodies have recognized that States can prevent further rights violations, including *refoulement*⁴⁴ and arbitrary detention.⁴⁵

C. Mexico must guarantee the rights of migrants in international transit zones at airports

Under international law, States have obligations to “all persons who may be within their territory and to all persons subject to their jurisdiction.”⁴⁶ International human rights law generally defines jurisdiction as arising with respect to individuals present on a State’s territory or with respect to individuals who are subject to the State’s “effective control.”⁴⁷ With regard to migrants, the Inter-American Court has established that international protections “can be invoked by any [non-citizen] over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State.”⁴⁸ The Inter-American Commission on Human Rights (“Inter-American Commission”) has similarly underscored the State responsibility to protect migrants within State territory from *refoulement*, “including [those in] transit zones or ‘international’ zones at airports.”⁴⁹ Likewise, UNHCR has

⁴² Given that an essential element of the refugee definition is that the person is outside of their country of origin. An exceptional case would be the situation of refugees *sur place*, who become refugees while outside of their countries due to their own changed circumstances (an example would be conversion to a religion persecuted in their home country) or changed circumstances in the country of origin (examples might include a changed government or outbreak of war). This possibility is also recognized in Mexican Law. *See Ley sobre Refugiados art. 13(III)*. *See also* UNHCR, REFUGEE STATUS HANDBOOK, *supra* note 36, at ¶¶ 94–96.

⁴³ *See infra* section IV.

⁴⁴ *See infra* section.V.A.

⁴⁵ *See infra* section VII.

⁴⁶ U.N. Hum. Rts. Comm., *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004).

⁴⁷ *Id.*; International Court of Justice [ICJ], *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 9, 2004, ¶ 109–11 (“The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory . . . In conclusion, the Court considers that the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”); *Advisory Opinion 23/17: The Environment and Human Rights*, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 81 (Nov. 15, 2017) (“The Inter-American Court finds that a person is subject to the ‘jurisdiction’ of a State in relation to an act committed outside the territory of that State (extraterritorial action) or with effects beyond this territory, when the said State is exercising authority over that person or when that person is under its effective control, either within or outside its territory.”); *Haitian Centre for Hum. Rts. et al. v. United States*, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156–57 (1997).

⁴⁸ *Advisory Opinion 21/14: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 219 (Aug. 19, 2014).

⁴⁹ Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 6. *See also id.* at Principles 56, 57.

stated that “[t]he term ‘territory’ includes a state’s land territory and territorial waters as well as its de jure border entry points, including transit areas or ‘international’ zones at airports.”⁵⁰

Airports are unquestionably within the physical borders and the territorial jurisdiction of the State. In response to State efforts to define international transit zones of airports as rights-restricted zones of exception,⁵¹ international bodies and foreign courts have repeatedly upheld the rights of individuals, including asylum seekers, inside airports.⁵² The Inter-American Court has likewise ruled that States cannot “hide behind legal fictions so as not to give access to” asylum proceedings, referring specifically to attempts to define parts of State territory, including international zones of airports, as outside of State jurisdiction.⁵³ Similarly, the UN Office of the High Commissioner for Human Rights (OHCHR) has affirmed that “international borders are not zones of exclusion or exception for human rights obligations [and] the human rights of all persons at international borders must be respected”⁵⁴

From the moment a migrant disembarks from an international flight and enters the airport, they come under the direct control and authority of State officials. In Mexico, all individuals inside the “immigration review filter” in airport transit zones experience restriction of rights while in these spaces. Mexican authorities may inspect identity documents, question, detain, deport (in the case of non-citizens), surveil, search individuals and their belongings, conduct customs revision, and carry out other actions affecting individual rights that constitute a clear exercise of control and

⁵⁰ UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports*, *supra* note 24, at ¶ 5. *See also* Recommended Principles and Guidelines on Human Rights at International Borders, U.N. GAOR, 69th Sess., conference room paper, ¶ 1, U.N. Doc. A/69/CRP. 1 (July 23, 2014) (stating “international borders are not zones of exclusion or exception for human rights obligations.”). The term ‘international borders’ includes land checkpoints, ports, airports, immigration and transit zones, the high seas, ‘no-man’s land’ between border posts, and embassies/consulates. *Id.* at ¶ 10(b).

⁵¹ Eur. Parliamentary Rsch. Serv., *Legal fiction of non-entry in EU asylum policy Implications of the new Screening Regulation 1* (2024) (stating that European Union States have used the “non-entry” legal fiction of international transit zones “to inhibit asylum-seekers’ entry to their territory and thereby avoid the obligation under international law to provide asylum-seekers with certain protection and aid”). *See also* HATHAWAY, *supra* note 34, at 298 (discussing, among others, Australia’s attempt to “excise” more than 3,500 of its islands from being considered national territory for immigration purposes).

⁵² *Amuur v. France*, App. No. 19776/92, Eur. Ct. H.R. (June 25, 1996); *Riad and Idiab v. Belgium*, App. Nos. 29787/03 and 29810/03, Eur. Ct. H.R. (Jan. 24, 2008); *Sentencia No. 1214-18-EP/22*, Pleno de la Corte Constitucional de Ecuador, ¶ 130–33 (Jan. 27, 2022) (Ecuador); *Sentencia No. 335-13-JP/20*, Pleno de la Corte Constitucional de Ecuador, ¶ 113. *See also* U.N. Hum. Rts. Comm., *Concluding observations on Belgium*, ¶ 17, U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004).

⁵³ Advisory Opinion 25/18, Inter-Am. Ct. H.R., ¶ 122 (citing Advisory Opinion 21/14, Inter-Am. Ct. H.R., ¶ 220; U.N. Comm. on the Rts. of the Child, *General Observation No. 6: Treatment of unaccompanied and separated minors outside their country of origin*, ¶ 12, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) (noting “State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State”). *See also* *Amuur*, Eur. Ct. H.R., ¶ 52.

⁵⁴ U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS [OHCHR], RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AT INTERNATIONAL BORDERS ¶ 1 (2014), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

jurisdiction.⁵⁵ Mexican immigration officials are further obligated under domestic law to ensure the security and physical integrity of individuals, as well as minimum adequate conditions, inside the “immigration review filter.”⁵⁶

International courts and bodies have directly addressed the rights of asylum seekers in airports. In the case of *Amuur v. France*, the European Court of Human Rights (“European Court”) found that airport international zones “do[] not have extritorial status”⁵⁷ and asylum-seekers present in these zones were subject to domestic law.⁵⁸ The Inter-American Court has adopted this finding,⁵⁹ and the Inter-American Commission has similarly argued that “it is clear that States exercise jurisdiction when individuals enter their territory [and] that migrants are within the jurisdiction of a State when they are within an ‘international zone’ or in waiting areas in airports (*zone d’attente*).”⁶⁰

Moreover, the concept of “effective control” extends beyond State borders. Both the Inter-American and European human rights courts have found that States exercise jurisdiction over

⁵⁵ See, e.g., Ley de Migración art. 37, Diario Oficial de la Federación (May 27, 2014) [hereinafter Ley de Migración], <https://www.diputados.gob.mx/LeyesBiblio/pdf/LMigra.pdf> (inspection of identity documents); Ley de Migración art. 43 (questioning); Ley de Migración arts. 81, 82 (general authority to conduct immigration control); Ley de Migración arts. 86, 88 (refusal of entry); Ley de Migración art. 87 (secondary inspection); Ley Aduanera, arts. 4.II, 50, Diario Oficial de la Federación (Dec. 11, 2021) [hereinafter Ley Aduanera], <https://www.diputados.gob.mx/LeyesBiblio/pdf/LAdua.pdf> (customs authority to search, surveil, and inspect passengers and goods).

⁵⁶ Ley de Migración art. 36, ¶ 5 (“Durante el tiempo que perduren los procedimientos de revisión, el Instituto está obligado a preservar la seguridad e integridad física de los solicitantes, mismos que pueden permanecer en las instalaciones del Instituto.”); Ley de Migración art. 89 (“Los lugares destinados al tránsito internacional de personas por tierra, mar y aire deberán contar con espacios adecuados para la estancia temporal de éstas en tanto se autoriza su ingreso, o bien, se resuelve el rechazo a que hubiere lugar, conforme a las disposiciones jurídicas aplicables.”).

⁵⁷ *Amuur*, Eur. Ct. H.R., ¶ 52. See, in this regard, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families [CMW], *General comment No. 5 (2021) on migrants’ rights to liberty and freedom from arbitrary detention and their connection with other human rights*, ¶ 26, U.N. Doc. CMW/C/GC/5 (July 21, 2022) [hereinafter CMW, *General comment No. 5*] (“With regard to the right to liberty, the responsibility of States parties encompasses not only human rights violations against migrants in places of detention under their jurisdiction and within their territory, but extends to places of detention outside their territory, if the State has effective de jure or de facto control over that territory.”).

⁵⁸ *Amuur*, Eur. Ct. H.R., ¶ 52; *Nolan and K. v. Russia*, App. 2512/04, Eur. Ct. H.R., ¶¶ 94–96 (Feb. 12, 2009) (applicant denied entry to Russia at Moscow Airport and held overnight in the “transit hall” was on State territory, under State’s effective control, and suffered a deprivation of liberty); *Z.A. et al. v. Russia*, Apps. 61411/15, 61420/15, 61427/15, and 3028/16, Eur. Ct. H.R., ¶ 154 (Nov. 21, 2019) (observing that asylum-seekers denied entry to Russia at Moscow Airport and held in the “transit hall” were not free to leave Russia at any time and were arbitrarily detained and concluding that “[t]he practical and real possibility for the applicants to leave the airport transit zone and do so without a direct threat for their life or health, as known by or brought to the attention of the authorities at the relevant time, must be convincingly shown to exist”). For additional cases decided by the European Court of Human Rights, see also PLATFORM FOR INT’L COOP. ON UNDOCUMENTED MIGRANTS (PICUM), IMMIGRATION DETENTION AND DE FACTO DETENTION: WHAT DOES THE LAW SAY? 6–7 (2022), <https://picum.org/wp-content/uploads/2022/09/Immigration-detention-and-de-facto-detention.pdf>.

⁵⁹ Advisory Opinion 25/18, Inter-Am. Ct. H.R., ¶ 122 (citing *Amuur v. France*, Eur. Ct. H.R.).

⁶⁰ Inter-Am. Comm’n on H.R., *Observations of the IACHR on the Request for Advisory Opinion presented by the State of Ecuador*, ¶ 51 (May 4, 2017), https://www.corteidh.or.cr/sitios/observaciones/oc25/7_cidh.pdf.

asylum-seekers when conducting interdictions or “pushbacks” on the high seas.⁶¹ In *Haitian Centre for Human Rights vs. United States*, the Inter-American Commission found the U.S. responsible for Coast Guard interdiction and return of boats of Haitian asylum-seekers on the high seas back to Haiti, because the refugees came under the “effective control” of the State.⁶² Likewise, in *Hirsi Jamaa et al. v. Italy*, the European Court found that Italy violated the prohibition of *non-refoulement* by returning boats of asylum-seekers intercepted on the high seas to Libya.⁶³ The European Court established that the State had unequivocally exercised jurisdiction over the applicants, as “in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.”⁶⁴

This principle makes clear that States must guarantee the right to seek and receive asylum wherever the State exercises jurisdiction over asylum-seekers.⁶⁵ Asylum-seekers in international transit zones of airports are, at all times, under State jurisdiction because they are physically located in the territory and also under “continuous and exclusive *de jure* and *de facto* control”⁶⁶ of State authorities, who regulate their access to rights, movement, and stay on the territory.⁶⁷

In order to ensure respect and guarantee of arriving asylum-seekers’ rights, UNHCR has clarified that States have a duty in airport “international” zones “to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of refoulement.”⁶⁸

⁶¹ Advisory Opinion 25/18, Inter-Am. Ct. H.R., ¶ 122. “Pushbacks” have been broadly defined as measures resulting in groups of refugees being intercepted and returned during their journeys “without an individual assessment of their human rights protection needs.” Felipe González Morales (Special Rapporteur on the human rights of migrants), *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, ¶ 34, U.N. Doc. A/HRC/47/30 (May 12, 2021).

⁶² *Haitian Centre for Human Rights*, Inter-Am. Comm’n H.R., ¶¶ 156–57. The IACHR has found that Article 33 of the 1951 Convention (establishing the right to *non-refoulement*) has “no geographical limitations.” *Id.* 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, *supra* note 32, at ¶ 9 (stating that the State obligation to protect individuals against refoulement to unsafe territories “is not subject to territorial restrictions,” rather, “it applies wherever the State in question exercises jurisdiction”); see also UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports*, *supra* note 24, at ¶ 5 n.12 (stating that State duties apply extraterritorially).

⁶³ *Hirsi Jamaa et al. v. Italy*, App. No. 27765/09, Eur. Ct. H.R., ¶ 181 (Feb. 23, 2012) (finding that asylum-seekers were induced to board the Italian ship by false promises from Italian authorities that they would be transported to Italy, and that they clearly expressed that they did not wish to return to Libya and would face harm if returned).

⁶⁴ *Id.* at ¶ 81.

⁶⁵ UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports*, *supra* note 24, at ¶ 5.

⁶⁶ *Hirsi Jamaa*, Eur. Ct. H.R., ¶ 81.

⁶⁷ See UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports*, *supra* note 24, at ¶ 5 (“A state’s responsibility to protect persons from refoulement is regardless of whether the person has entered the country in a legal sense . . . or is located in the transit areas or ‘international’ zone of an airport.”).

⁶⁸ *Id.* at ¶ 6.

Individualized proceedings are particularly important “when states know, or could reasonably be expected to know, the risks which arise when persons are returned.”⁶⁹

II. INTERNATIONAL TREATY OBLIGATIONS AND CUSTOMARY LAW REQUIRE MEXICO TO AFFORD ASYLUM-SEEKERS AT AIRPORTS AND IN DETENTION SUBSTANTIVE AND PROCEDURAL RIGHTS

Asylum seekers arriving at Mexican airports are subject to the State’s jurisdiction, and therefore Mexico is obligated to guarantee their right to seek and receive asylum and related rights. In the following sections, *amici* will discuss the obligations to screen arriving travelers for protection needs and ensure the principle of *non-refoulement*, guarantee due process to asylum seekers, respect the prohibition of arbitrary detention, and ensure humane treatment of individuals deprived of liberty. A failure by Mexico to respect and guarantee any of these rights to arriving asylum seekers in airports constitutes a violation of the State’s human rights obligations and creates a corresponding obligation of reparation.⁷⁰

A. Mexico must assess international protection needs and ensure the principle of *non-refoulement* of all individuals arriving at airports

Mexico is responsible for respecting and protecting the human rights of all persons, “regardless of their migration status.”⁷¹ Chief among these obligations is ensuring *non-refoulement* and avoiding the criminalization of migration. To fulfill these obligations, the State must ensure adequate screening of migrants for international protection needs and other vulnerabilities. The IA Court has identified migrants, particularly those in irregular migration status, “as a group in a vulnerable situation, as they are the most exposed to potential or actual violations of their rights and suffer, in consequence of this situation, a high level of lack of protection of their rights.”⁷² This has led the international community to recognize “the need to adopt special measures to ensure the protection of the human rights of migrants.”⁷³

⁶⁹ *Id.*

⁷⁰ *Factory at Chorzów (Germ. v Pol.)*, Jurisdiction, Judgment, P.C.I.J. Ser. A No. 9, 1927 ICGJ 247 (July 26, 1927) (holding that “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”). *See also* *Baena-Ricardo v. Panama*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 201 (Feb. 2, 2001) (observing that the Inter-American Court on Human Rights “has reiterated in its constant jurisprudence as a principle of international law that any violation of an international obligation that has caused damage carries with it the obligation to repair it adequately”).

⁷¹ Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶ 109.

⁷² *Pacheco Tineo Family*, Inter-Am. Ct. H.R., ¶ 128 (citing *Vélez Lloor*, Inter-Am. Ct. H.R., ¶ 98; *Nadege Dorzema*, Inter-Am. Ct. H.R., ¶ 152). *See also* Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶ 114.

⁷³ Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶ 117. *See also id.* at ¶ 104.

1. The principle of *non-refoulement* prohibits the deportation of migrants to territories where their lives or integrity would be at risk

The Inter-American Court has held that the principle of *non-refoulement* is a “cornerstone” of international refugee protection and a non-derogable customary norm of international law.⁷⁴ *Non-refoulement* requires States not to effect the return of a person, by any means, direct or indirect,⁷⁵ to a country or territory where his or her life or integrity would be in danger. This prohibition of return encompasses international protection through refugee status (as defined in the 1951 Convention and the Cartagena Declaration),⁷⁶ protection against torture⁷⁷ and complementary protection.⁷⁸ International precedents indicate that *any* serious danger to life,

⁷⁴ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 151 (“The prohibition of refoulement constitutes the cornerstone of the international protection of refugees or asylees and of those requesting asylum. This principle is also a customary norm of international law, and is enhanced in the inter-American system by the recognition of the right to seek and to receive asylum.”). *See also* Djamel Ameziane v. United States, Case 12.865, Inter-Am. Comm’n H.R., Report No. 29/20, OEA/Ser.L/V/II, doc. 39, ¶¶ 256–58 (2020); 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*, *supra* note 32, at ¶¶ 5–6; Cartagena Declaration on Refugees § III.5 (reiterating “the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.”).

⁷⁵ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 153; Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 6. *See also* John Doe, Inter-Am. Comm’n H.R., ¶¶ 103, 107, 112; Hirsi Jamaa, Eur. Ct. H.R., ¶ 157; JOANNE VAN SELM, ACCESS TO PROCEDURES ‘SAFE THIRD COUNTRIES’, ‘SAFE COUNTRIES OF ORIGIN’, AND ‘TIME LIMITS’, UNHCR (2001). The Inter-American Commission has noted that States are obligated “not only to prevent the removal of a refugee directly to a country of persecution but also indirectly through a third country.” John Doe, Inter-Am. Comm’n H.R., ¶ 103. States must ensure that the individual will be able to seek asylum, whether in the destination State or in a third country, by individually evaluating “the risk of persecution in that third country and . . . the risk that the refugee claimant could be refouled to the original country of persecution.” *Id.* at ¶¶ 94, 107.

⁷⁶ United Nations Convention relating to the Status of Refugees art. 33; Cartagena Declaration on Refugees § III.5.

⁷⁷ Convention against Torture art. 3.1; Inter-American Convention to Prevent and Punish Torture art. 13.

⁷⁸ *See generally* JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007).

integrity, and security⁷⁹ must be assessed through a legal procedure that includes guarantees of *non-refoulement*.⁸⁰

Mexican domestic law guarantees *non-refoulement* protection.⁸¹ Its treaty obligations and customary international law require the State to respect these protections for all individuals, including those arriving at airports.

2. Mexico must adequately screen migrants for international protection needs

To implement the principle of *non-refoulement* effectively, Mexico must establish procedural safeguards that ensure the identification of persons with international protection needs and provide access to legal procedures to assess their claims with due process.⁸² (*Amici* will examine due process obligations *infra* section VI.) The Inter-American Court has noted that “the establishment of procedures for the identification of protection needs is a positive obligation of States and failure to institute them would constitute a lack of due diligence.”⁸³ This obligation of screening and access to due process may not be circumvented by domestic legislation or bilateral agreement. In this respect, it is a fundamental principle of international law that a State “may not invoke its legislation as a basis or justification for failure to perform its international legal obligations,”⁸⁴ nor, as Inter-American, European, and universal system bodies have found, may it

⁷⁹ Advisory Opinion 21/14, Inter-Am. Ct. H.R., ¶ 229; *Andrea Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Rep. No. 63/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ¶ 94 (2009). In the European system, see *Paposhvili v. Belgium*, App. No. 41738/10, Eur. Ct. H.R., ¶ 183 (Dec. 13, 2016). In the universal system, see UNHRC, *C. v. Australia*, ¶ 8.5, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002).

The Office of the High Commissioner for Human Rights (OHCHR) has summarized international precedents from regional courts and universal system bodies regarding the rights and factual situations that may engage State *non-refoulement* obligations: “The prohibition of *refoulement* has been interpreted . . . to apply to a range of serious human rights violations, including torture, and other cruel, inhuman or degrading treatment, flagrant denial of the right to a fair trial, risks of violations to the rights to life, integrity and/or freedom of the person, serious forms of sexual and gender-based violence, death penalty or death row, female genital mutilation, or prolonged solitary confinement, among others. Some courts and some international human rights mechanisms have further interpreted severe violations of economic, social and cultural rights to fall within the scope of the prohibition of non-refoulement because they would represent a severe violation of the right to life or freedom from torture . . . For example, degrading living conditions, lack of medical treatment, or mental illness have been found to prevent return of persons.” OHCHR, *Technical note: The principle of non-refoulement under international human rights law* (July 5, 2018), <https://www.ohchr.org/en/documents/tools-and-resources/technical-note-principle-non-refoulement-under-international-human> (citing sources in footnotes).

⁸⁰ *Pacheco Tineo Family*, Inter-Am. Ct. H.R., ¶ 133; *John Doe*, Inter-Am. Comm’n H.R., ¶ 94; *Djamel Ameziane*, Inter-Am. Comm’n H.R., ¶¶ 263–66 (finding that failure to assess a Guantanamo detainee’s *non-refoulement* claim in the framework of *habeas corpus* litigation violated the obligation of *non-refoulement*). See also Inter-Am. Comm’n H.R., *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 6.

⁸¹ See *supra* notes 27–31 and accompanying text.

⁸² See generally Álvaro Botero & Jens Vedsted-Hansen, *Asylum Procedure*, in THE OXFORD HANDBOOK ON INTERNATIONAL REFUGEE LAW 590, 597–606 (Cathryn Costello, Michelle Foster & Jane McAdam eds.) (2021) (analyzing the evolution of standards in the universal and regional human rights systems through interpretation and application of the rights to an effective remedy, due process, fair trial, and judicial protection to the asylum context).

⁸³ Advisory Opinion 21/14, Inter-Am. Ct. H.R., ¶ 82.

⁸⁴ Vienna Convention on the Law of Treaties, art. 27; UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports*, *supra* note 24, at ¶ 5.

evade these obligations through bilateral agreements with other countries that do not permit a duly founded, individual decision of a protection claim.⁸⁵

The Inter-American System and OHCHR have identified best practices to facilitate screening and detection of persons with international protection needs that may promote State compliance with these obligations. The Inter-American Commission has found that “[m]igration control functions [must be] performed by authorities that are clearly identified by law to perform such duties, including those with the authority to request and review documentation.”⁸⁶ OHCHR has called on States to consider “[a]ssessing and amending [international protection] screening and referral processes”⁸⁷ to ensure that interviews at borders are conducted professionally and with respect for human dignity.⁸⁸ The OHCHR Principles likewise recommend “[e]stablishing or strengthening national referral mechanisms and communication channels between relevant State authorities, national human rights institutions, international and civil society organizations . . .”⁸⁹ and recommend that States ensure that “entry system regulations provide the opportunity for asylum seekers to access information on the right to claim asylum and to access fair and efficient asylum procedures.”⁹⁰

Other high courts in the Americas have recognized the State obligation to affirmatively identify protection needs at borders. For example, the Constitutional Court of Ecuador has held that airport officials failed to ensure access to the asylum proceeding and affirmatively screen individuals for international protection needs in violation of constitutional and internationally protected rights.⁹¹ In reaching this conclusion, the Court underscored Ecuador’s responsibility to protect individuals in “international” zones of airports against *refoulement*.⁹²

The opinion specified that “a person who is located in a transit or international zone of an airport . . . may manifest at any moment their intention to present an asylum claim.”⁹³ For this purpose, “it is not relevant whether the person does so at the moment of interview by migration

⁸⁵ CMW, *General comment No. 5*, *supra* note 57, at ¶ 28 (“if States reach agreements to transfer asylum-seekers for the processing of their cases, they should take into account when signing such agreements that States cannot dismiss their obligations under international human rights law, international refugee law and international criminal law”); John Doe, Inter-Am. Comm’n H.R., ¶ 94; *Cuban and Haitian Nationals detained at and deported from the Carmichael Road Detention Center v. Bahamas*, Case 12.071, Inter-Am. Comm’n H.R., Report No. 459/21, OEA/Ser.L/V/II, doc. 473, ¶ 82 (2021) (observing that bilateral return agreements that circumvent access to asylum between Bahamas, Cuba, and Haiti are impermissible); *Hirsi Jamaa*, Eur. Ct. H.R., ¶ 129 (finding that a State “cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements”).

⁸⁶ Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 50.

⁸⁷ OHCHR, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AT INTERNATIONAL BORDERS, *supra* note 54, at Principle 6.1.

⁸⁸ *Id.* at Principle 6.9. *See also id.* at Principles 6.10–17.

⁸⁹ *Id.* at Principle 7.1.

⁹⁰ *Id.* at Principle 7.5.

⁹¹ Sentencia No. 1214-18-EP/22, Pleno de la Corte Constitucional de Ecuador, ¶ 130–33 (Jan. 27, 2022) (Ecuador).

⁹² *Id.* at ¶ 130 (amici’s translation).

⁹³ *Id.* at ¶ 131 (amici’s translation).

officials . . . or whether they have already been denied entry and the airline is coordinating their transfer.”⁹⁴ Moreover, the Court observed:

there is no single formula or correct way as to how one might manifest the desire or intention to request international protection. To this must be added the fear or anxiety that migrants face when they are detained at airports. Thus, in order to guarantee the right to seek and enjoy asylum and the right and principle of non-refoulement, *migration agents or officials have the obligation* with respect to persons who are detained in the transit or “international” zone of an airport, *to conduct independent inquiries regarding their need for international protection and ensure that they are not at risk of refoulement, as well as to provide relevant information in a language they understand about the possibility of submitting a formal asylum application* to the competent authority⁹⁵ (emphasis added).

Like Mexico’s legal system, the Ecuadorian Constitution recognizes international treaties as having the same normative value as constitutional protections. In this case, Ecuador’s Constitutional Court interprets the constitutional prohibition against refoulement in light of Inter-American jurisprudence and UNHCR guidelines. This Court should similarly consider Mexico’s treaty obligations and authoritative interpretations in determining whether airport authorities violated the petitioner’s rights.

B. Mexico must guarantee due process for asylum seekers arriving at airports

1. Mexico must fulfill its positive obligations to ensure due process and access to justice for migrants, who are in a situation of vulnerability

The Inter-American Court has held that in order to ensure respect for *non-refoulement* and access to asylum, States must guarantee due process to migrants such that they can “defend their rights adequately vis-à-vis any act of the State, adopted by any public authority, whether administrative, legislative or judicial.”⁹⁶

In the IA Court’s jurisprudence, due process is “closely related to the notion of justice,”⁹⁷ which requires actual, “not merely formal,” access to the judicial system and fair trial guarantees.⁹⁸ Mexico’s obligation to guarantee the right to due process under the American Convention encompasses “the right to a hearing, with due guarantees and within a reasonable time, by a

⁹⁴ *Id.* (amici’s translation).

⁹⁵ *Id.* at ¶ 133 (amici’s translation).

⁹⁶ Advisory Opinion 21/14, Inter-Am. Ct. H.R., ¶ 109.

⁹⁷ *Id.*

⁹⁸ *See id.*

competent, independent, and impartial tribunal.”⁹⁹ These guarantees are not limited to proceedings in a courtroom or before a judge, but have been applied by the IA Court to migration proceedings and “extend to the decisions of administrative organs that have competence to determine the rights of the individual or when they exercise functions of a jurisdictional nature, as occurs in some countries in relation to immigration proceedings.”¹⁰⁰

The Inter-American Court has found that migrants, and particularly those with irregular migration status, are in a situation of vulnerability,

in an individual condition of absence or difference of power with respect to non-migrants (nationals or residents). This condition of vulnerability has an ideological dimension and occurs in a historical context that is different for each State, and is maintained by *de jure* (inequalities between nationals and foreigners in laws) and *de facto* (structural inequalities) situations.¹⁰¹

Mexico must take into account this situation of vulnerability and “adopt special measures” to ensure access to justice for persons in human mobility.¹⁰² The IA Court has found that all persons in human mobility have the right to access justice, “regardless of their immigration status.” Thus, Mexico must guarantee that they “have the possibility of asserting their rights and defending their interests in an effective manner and under conditions of procedural equality with other parties.”¹⁰³

2. Mexico has due process obligations in any proceeding that might lead to expulsion or deportation

The Inter-American Court has indicated that in cases that may lead to expulsion or deportation, as an exercise of the punitive power of the State, procedural guarantees should be

⁹⁹ American Convention art. 8(1); *see also* American Declaration art. XXVI (“Every accused person is presumed to be 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.”).

¹⁰⁰ Advisory Opinion 21/14, Inter-Am. Ct. H.R., ¶ 111.

¹⁰¹ Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶ 112.

¹⁰² *Id.* at ¶ 117.

¹⁰³ Vélez Lóor, Inter-Am. Ct. H.R., ¶ 143; Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶¶ 122, 124. The Inter-American Commission has articulated that: “Every migrant has the right to access to justice for the protection of all their rights, and to integral reparation of harm done, free of charge and on an equal basis with nationals of the State, including the right to due process and judicial guarantees. States shall 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, through the mechanisms that the national legislation provides for all inhabitants, so that just resolution of a dispute is reached, with care taken to ensure that no migrant is left without appropriate and effective legal representation. Guarantees shall be established to facilitate the recognition of rights, their requirement when they have been disregarded, their reestablishment when they have been violated, and their implementation when their exercise encounters unjustified obstacles.” Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 40.

“substantially the same” as those contained in article 8(2) of the American Convention.¹⁰⁴ The Human Rights Committee,¹⁰⁵ Committee Against Torture,¹⁰⁶ and European Court of Human Rights¹⁰⁷ have all similarly affirmed the State obligation to provide due process and an effective remedy to asylum-seekers in proceedings that may lead to deportation or return, demonstrating widespread international acceptance of this principle.

Of these universal and regional international bodies, the Inter-American Court has most extensively developed the content and scope of application of due process guarantees to the migration context in its jurisprudence.¹⁰⁸ In *Pacheco Tineo v. Bolivia*, the Inter-American Court established that in any “proceeding that may lead to the expulsion or deportation of [a non-citizen],”¹⁰⁹ the individual has the right:

- i) To be informed, expressly and formally, of the charges against him, if applicable, and the reasons for the expulsion or deportation. This notification must include information on his rights, such as:
 - a. The possibility of presenting the reasons why he should not be deported and defending himself from any charges against him;
 - b. The possibility of requesting and receiving legal assistance, even by free public services if applicable and, if necessary, translation and interpretation, as well as consular assistance, when required
- ii) In the case of an unfavorable decision, he must have the right to submit the case to review before the competent authority, and to appear or to be represented before the competent authorities for this purpose, and
- iii) The eventual deportation may only be carried out following a reasoned decision in keeping with the law, which has been duly notified.¹¹⁰

¹⁰⁴ Advisory Opinion 21/14, Inter-Am. Ct. H.R., ¶ 112.

¹⁰⁵ U.N. Hum. Rts. Comm., *A.B. and family v. Poland*, ¶ 9.4–9.7, U.N. Doc. CCPR/C/135/D/3017/2017 (Feb. 3, 2023) (affirming the applicability of rights of equality before the law, due process, fair trial, and access to an effective remedy enshrined in arts. 2(3), 7, 13, and 14 to the situation of asylum-seekers rejected at a State border without process).

¹⁰⁶ UNCAT, *General comment No. 4, supra* note 32, at ¶ 13 (“Each case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal.”).

¹⁰⁷ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H.R. ¶ 293 (Jan. 21, 2011) (“[T]he effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response; it also requires that the person concerned should have access to a remedy with automatic suspensive effect.”) (internal citations omitted).

¹⁰⁸ Botero & Vedsted-Hansen, *supra* note 82, at 590, 597–98.

¹⁰⁹ *Pacheco Tineo Family*, Inter-Am. Ct. H.R., ¶ 133.

¹¹⁰ *Id.* See also Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants, supra* note 3, at Principle 50.

The Inter-American Commission has further held that expulsion or deportation proceedings “must respect, protect, and fulfill migrants’ rights to due process. As long as the appeal remains pending, the suspension of the decision to expel or deport must be guaranteed.”¹¹¹ These obligations apply in the context of any return from an airport of an asylum seeker, considering the quasi-punitive nature of deportation or expulsion and the corresponding importance that asylum seekers be afforded due process to avoid *refoulement*.

Likewise, the Inter-American Court has detailed a series of minimum guarantees that States must ensure in the context of asylum proceedings.¹¹²

C. Mexico must enforce protections, including judicial review and the prohibition of incommunicado detention, to prevent arbitrary detention of migrants at airports

Liberty is a fundamental right broadly protected in human rights law, which inherently disfavors detention.¹¹³ The American Convention establishes that “[e]very person has the right to personal liberty and security” and “[n]o one shall be subject to arbitrary arrest or detention.”¹¹⁴ For its part, the Committee on Migrant Workers (CMW), the specialized body tasked with interpreting the corresponding Convention to which Mexico is Party, has found that the prohibition on arbitrary detention is a *jus cogens* norm.¹¹⁵

Inter-American and universal system sources concur that “transit” zones of airports may be places of detention. The Inter-American Court has held that what defines deprivation of liberty, regardless of the name given to a measure at the domestic level, “is the fact that the person . . . cannot or is unable to leave or abandon at will the place or establishment where she or he has been placed.”¹¹⁶ The Human Rights Committee has specified that deprivation of liberty “involves more severe restriction of motion within a narrower space than mere interference with liberty of movement,” and includes “confinement to a restricted area of an airport.”¹¹⁷ The CMW

¹¹¹ Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 73.

¹¹² Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 159. *See also generally* Botero & Vedsted-Hansen, *supra* note 82, at 588–606.

¹¹³ ICCPR art. 9(1); Vélez Loo, Inter-Am. Ct. H.R., ¶ 166 (stating that any limitation to the right to liberty “must be exceptional”).

¹¹⁴ American Convention art. 7(1), (3).

¹¹⁵ CMW, *General comment No. 5*, *supra* note 57, at ¶ 16.

¹¹⁶ Galindo Cárdenas et al. v. Peru, Preliminary Exceptions, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 301 (Oct. 2, 2015) (citing Advisory Opinion OC-21/14: Rights and Guarantees of Girls and Boys in the Context of Migration and/or International Protection, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 145 (Aug. 19, 2014) and Inter-Am. Comm’n H.R. & OAS, *Resolution 1/08: Principles and Good Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra* note 3).

¹¹⁷ U.N. Hum. Rts. Comm., *General Comment No. 35 on Article 9, Liberty and security of person*, ¶ 5, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014). *See also* CMW, *General comment No. 5*, *supra* note 57, at ¶ 13 (“Irrespective of how that measure is defined in the national policy, law or practice, or the reasons giving rise to it, if the measure results in a deprivation of liberty in which migrants or members of their families are unable to leave the place of detention at will, the Committee understands the measure to be a form of detention . . .”). The Subcommittee for the Prevention

has concurred that “immigration detention includes the detention of migrants in . . . any other enclosed spaces, such as international or transit areas at air, land and maritime ports.”¹¹⁸

1. Mexico must ensure access to judicial remedies and prevent incommunicado detention

The American Convention establishes that effective access to judicial remedies —“the guarantee that any person deprived of liberty may appeal the legality of his detention before a competent judge or court”¹¹⁹— is a fundamental safeguard against arbitrary detention. The IA Court has held that these guarantees “must not only exist formally in law but must be effective, that is, . . . must fulfill the objective of obtaining without delay a decision on the legality of the arrest or detention.”¹²⁰ In accordance with Inter-American precedent, these safeguards apply in the context of detentions at airports and are binding on Mexico in this context.

The Inter-American Court has indicated that States must abide by “the principles of judicial control and procedural immediacy,”¹²¹ and take detainees promptly and “in person before the competent authority, who should hear the detained person personally . . . to decide whether to release him or continue the deprivation of liberty.”¹²² In the case of detention ordered by an administrative authority, “review by a judge or court is a fundamental requirement to guarantee adequate control and scrutiny of the administrative acts which affect fundamental rights.”¹²³ On the question of immediacy, UNHCR has considered that review by a court should be automatic and take place in the first 24 to 48 hours after detention of an asylum seeker.¹²⁴ After an initial review decision, further automatic reviews should happen periodically.¹²⁵

As discussed *supra* section II.B.2, the Inter-American Court has held that an effective judicial remedy to challenge migration detention requires notification of the proceedings against the individual, the provision of legal aid, information about the individual’s rights, and the

of Torture (SPT) has likewise adopted a comprehensive approach to defining places of deprivation of liberty that encompasses airport transit zones. *See* U.N. Subcomm. on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *General comment No. 1 (2024) on article 4 of the Optional Protocol (places of deprivation of liberty)*, ¶¶ 8, 14, 21, U.N. Doc. CAT/OP/GC/1 (July 4, 2024).

¹¹⁸ CMW, *General comment No. 5, supra* note 57, at ¶ 14.

¹¹⁹ *Ruano Torres et al. v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 303, ¶ 140 (Oct. 5, 2015); American Convention art. 7(6); Vélez Lóor, Inter-Am. Ct. H.R., ¶ 126. *See also* CMW, *General comment No. 5, supra* note 57, at ¶ 16 (stating that “[a]ny use of detention in the context of migration must therefore be . . . subject to . . . judicial review”).

¹²⁰ *Ruano Torres*, Inter-Am. Ct. H.R., ¶ 140.

¹²¹ Vélez Lóor, Inter-Am. Ct. H.R., ¶ 107. *See also* American Convention art. 7(5).

¹²² Vélez Lóor, Inter-Am. Ct. H.R., ¶ 109.

¹²³ *Id.* at ¶ 126.

¹²⁴ UNHCR, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION ¶ 47(iii) (2012), <https://www.unhcr.org/us/media/unhcr-detention-guidelines>.

¹²⁵ *Id.* at ¶ 47(iv). CMW, *General comment No. 5, supra* note 57, at ¶ 16 (observing that “[a]ny use of detention in the context of migration must therefore be . . . subject to periodic re-evaluation”).

opportunity to appear before a judicial authority.¹²⁶ These protections have been similarly upheld by the Human Rights Committee¹²⁷ and the CMW.¹²⁸

The Human Rights Committee, interpreting the right to liberty under the ICCPR, has emphasized that States must ensure that individuals are not held *incommunicado*, but have access to the outside world, including access to legal assistance, consular assistance, and communication with family.¹²⁹ The Inter-American Court has similarly emphasized “the importance of legal aid in cases . . . involving a foreigner who may not know the country’s legal system and who is in a particularly vulnerable situation by being deprived of liberty.”¹³⁰ Inter-American and universal interpretations concur that access to legal aid, like other remedies, must not only exist as a possibility but be effective, taking into account asylum-seekers’ particular vulnerability.¹³¹

In this regard, UNHCR’s Detention Guidelines, which compile good practices derived from its operations across the globe and restate binding law, stresses that detention should not deprive asylum seekers of the right to seek asylum.¹³² The Guidelines emphasize that asylum seekers must be able “to contact and be contacted by UNHCR, and ideally other national bodies or agencies, such as ombudsman offices, human rights commissions, or NGOs.”¹³³ In the context of airport detentions, which are characterized by a lack of access to information and frequently by *incommunicado* detention, *amici* consider that access to legal aid may be particularly important to guarantee the rights of asylum seekers, including access to territory.

¹²⁶ Cf. Vélez Loo, Inter-Am. Ct. H.R., ¶ 120.

¹²⁷ U.N. Hum. Rts. Comm., *General Comment No. 35*, *supra* note 117, at ¶ 46 (observing that detainees should be informed of the reasons for their detention and of their right to review of their detention in a language they understand); CMW, *General comment No. 5*, *supra* note 57, at ¶ 59 (noting that the “right to information is essential for the exercise of other rights, such as access to justice”).

¹²⁸ CMW, *General comment No. 5*, *supra* note 57, at ¶ 68 (pointing out that the right to information includes the right to be notified of the decision in immigration proceedings and the right to a well-founded and reasoned decision).

¹²⁹ U.N. Hum. Rts. Comm., *General Comment No. 35*, *supra* note 117, at ¶ 46; *see also* HUM. RTS. WATCH, THE USE OF INCOMMUNICADO DETENTION (2005), <https://www.hrw.org/reports/2005/spain0105/6.htm#> (explaining that incommunicado detention “is generally understood as a situation of detention in which an individual is denied access to family members, an attorney, or an independent physician”).

¹³⁰ Vélez Loo, Inter-Am. Ct. H.R., ¶ 132.

¹³¹ *See id.* ¶¶ 107, 139. *Accord.* CMW, *General comment No. 5*, *supra* note 57, at ¶ 66 (observing that migrants and their family members have the right to legal representation, which should be free for those who cannot afford it); UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 47(ii). UNHCR also indicates, in line with basic tenets of procedural fairness, that this right should include the protection of confidentiality and the attorney’s private access to the client. UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 47(ii).

¹³² UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 11.

¹³³ *Id.* at ¶ 47(ii).

2. Mexico must respect the obligation of humane treatment of persons deprived of liberty

The Inter-American Court has established clear standards on detention that are binding on Mexico as a Party to the American Convention. The Court has repeatedly held that States assume a special position as guarantor of the rights of persons deprived of their liberty,¹³⁴ because it

produces a special relationship and interaction of subjection between the person deprived of liberty and the State, characterized by the particular intensity with which the State can regulate their rights and obligations and by the circumstances of confinement, in which the prisoner is prevented from satisfying on their own a series of basic needs that are essential for the development of a dignified life.¹³⁵

For this reason, “[t]he way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee’s vulnerability.”¹³⁶ All persons deprived of liberty “have the right to live in detention conditions compatible with their personal dignity . . . Lack of compliance may constitute a violation of the absolute prohibition against torture and cruel, inhumane, or degrading punishment or treatment.”¹³⁷ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has emphasized that these obligations are heightened in the context of arbitrary detention, as “experience shows that any form of arbitrary detention exposes migrants to increased risks of torture and ill-treatment.”¹³⁸

The Human Rights Committee “has repeatedly considered that the combination of the arbitrary character of detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to detainees and the difficult conditions of detention cumulatively inflict serious psychological harm” upon detained persons and violate the prohibition on inhumane treatment.¹³⁹ Indeed, the Special Rapporteur on torture has found that “[d]etention

¹³⁴ See, e.g., Vélez Lóor, Inter-Am. Ct. H.R., ¶ 198.

¹³⁵ *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 152 (Sept. 2, 2004); *Mendoza et al. v. Argentina*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 188 (May 14, 2013). See also *Caesar v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 97 (Mar. 11, 2005); *Fermin Ramírez v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 126, ¶ 118 (June 20, 2005).

¹³⁶ *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 126 (Sept. 18, 2003).

¹³⁷ Vélez Lóor, Inter-Am. Ct. H.R., ¶ 198.

¹³⁸ Nils Melzer (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 25, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018).

¹³⁹ *Id.* at ¶ 26 (citing U.N. Hum. Rts. Comm., *F.J. et al. v. Australia*, ¶ 10.6, U.N. Doc. CCPR/C/116/D/2233/2013 (May 2, 2016)).

based solely on migration status, as such, can even amount to torture.”¹⁴⁰ He highlighted that the intentional imposition or perpetuation of detention “for such purposes as deterring, intimidating or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum . . . agreeing to voluntary repatriation, . . . or for reasons based on discrimination of any kind” would contribute to a finding of torture.¹⁴¹ The CMW has reaffirmed and adopted this finding in its General Comment 5,¹⁴² indicating increasing international acceptance of this standard.

D. Extended or indefinite detention of migrants in airport international zones may amount to arbitrary detention and violate the prohibition against inhumane treatment

Detention of persons in human mobility in airport “international zones” constitutes a restriction of their personal liberty, as they are not free to leave before clearing immigration and customs.¹⁴³ In this regard, extended or indefinite detention in airports is likely to violate the prohibition on arbitrary detention, particularly where individuals’ rights to independent review of detention and ability to communicate with legal support, consular authorities (when desired), and loved ones are not effectively guaranteed. Such circumstances of detention moreover create serious risks of violations of the right to personal integrity through subjection to inhumane and degrading detention conditions and violations of the principle of *non-refoulement* and due process.

At least two courts—the European Court of Human Rights and the Constitutional Court of Ecuador—have found extended detention in airports to constitute arbitrary detention, inhumane treatment, and found related violations of *non-refoulement* in concrete cases. The Constitutional Court of Ecuador has additionally ruled that no person may be detained in a transit zone for more than 24 hours, and that while in the transit zone the State must ensure a series of basic rights and guarantees to persons in human mobility.¹⁴⁴

These cases provide persuasive examples of how courts have interpreted and applied international human rights obligations in cases of airport detentions. *Amici* consider that these courts correctly applied international standards related to access to asylum, due process, effective remedies, arbitrary detention, and humane treatment in these cases.

In the case of *Amuur v. France*,¹⁴⁵ regarding four Somali asylum-seekers detained at Paris Orly airport, the European Court found that the State’s holding of the applicants in the international zone of the airport constituted a deprivation of liberty.¹⁴⁶ The Court rejected the State’s argument

¹⁴⁰ *Id.* at ¶ 28.

¹⁴¹ *Id.*

¹⁴² CMW, *General comment No. 5*, *supra* note 57, at ¶ 21.

¹⁴³ *See supra* sections IV, VII.

¹⁴⁴ Sentencia No. 335-13-JP/20, Pleno de la Corte Constitucional de Ecuador (Aug. 12, 2020) (Ecuador).

¹⁴⁵ Also discussed *supra* note 57 and accompanying text.

¹⁴⁶ *Amuur*, Eur. Ct. H.R., ¶ 44. In this case, the applicants were held “in the airport’s transit zone (and its extension, the floor of the Hôtel Arcade adapted for the purpose” for approximately three weeks. *Id.*

that the situation did not amount to detention because the refugees were “free to leave” by accepting a deportation flight, finding that it was not clear that they had access to safety in the transit country from which their flight had originated.¹⁴⁷ The Court’s ruling highlights that deporting or obligating asylum-seekers to accept deportation through intolerable detention conditions is likely to violate the principle of *non-refoulement* and may constitute chain *refoulement*.¹⁴⁸ Moreover, the Court concluded that the detention was arbitrary because there was no basis in ordinary law for their detention in the international zone, nor did they have access to any judicial proceeding to review the legality, conditions, or duration of their detention.¹⁴⁹

Likewise, in the case of *Riad and Idiab v. Belgium*, the European Court found the prolonged detention of two asylum seekers in an airport “international zone” to be a “*de facto* deprivation of liberty”¹⁵⁰ and

consider[ed] that the fact of ‘detaining’ a person in that zone for an indefinite and unforeseeable period without that detention being based on a specific legal provision or a valid decision of a court and with limited possibilities of judicial review on account of the difficulties of contact enabling practical legal assistance, is in itself contrary to the principle of legal certainty, which is . . . one of the fundamental elements of a State governed by the rule of law.¹⁵¹

Moreover, the Court found that the conditions to which Riad and Idiab were subjected violated the prohibition on inhumane and degrading treatment. In the transit zone, the two Palestinian men suffered “physical and psychological ill-treatment,” including no legal and social assistance, no food or drink, no toilets, no place to sleep, “nowhere to wash other than the public conveniences in the airport, no change of clothes, no toiletries and nowhere to enjoy a private life,”

¹⁴⁷ *Id.* at ¶¶ 43–49. On the facts of the case, the European Court found that “[s]ending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by [the 1951 Refugee Convention].” *Id.* at ¶ 48.

¹⁴⁸ *Cfr.* Shana Tabak, *Refugee Detention As Constructive Refoulement*, 48 *YALE J. INT’L L.* 289 (2023) (arguing that “[c]onstructive refoulement arises when a state orchestrates material conditions so intolerable for an asylum-seeker that she has no choice but to return to the country from which she fled”). *See also* UNCAT, *General Comment No. 4*, *supra* note 32, at ¶ 14 (“States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers, which would compel persons in need of protection under article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment there.”).

¹⁴⁹ *Amuur*, Eur. Ct. H.R., ¶ 53.

¹⁵⁰ *Riad and Idiab*, Eur. Ct. H.R., ¶ 68. In this case, the two men were seeking asylum and had previously been held in immigration detention inside the country. They were subsequently transferred back to an airport international zone in an attempt to deport them. *Id.*

¹⁵¹ *Id.* at ¶ 78.

no access to communication or any means of contacting the outside world.¹⁵² The physical conditions in the transit zone “were used in order to bring psychological pressure to bear . . . with the aim of encouraging them to leave.”¹⁵³ The Court “consider[ed] it unacceptable that anyone might be detained in conditions in which there is a complete failure to take care of his or her essential needs,”¹⁵⁴ and denounced “the feelings of arbitrariness, inferiority and anguish” and “humiliation occasioned by the obligation to live in a public place without any support”¹⁵⁵ that these conditions of detention caused.

Similarly, in the case of a Cuban man who was detained for three days in the Guayaquil airport, the Constitutional Court of Ecuador ruled that his detention at the airport constituted an arbitrary deprivation of liberty that violated his right to personal integrity.¹⁵⁶ In the airport, the petitioner was held *incommunicado*, slept on benches, was unable to bathe, and ate only chocolates that he had packed in his luggage as a gift.¹⁵⁷ No judicial order justified his detention, nor was he promptly presented before a judge to rule on the legality of his detention.¹⁵⁸

The Constitutional Court of Ecuador found expressly that the prohibition on detention except by court order applies in airport “international” zones.¹⁵⁹ Moreover, the Court ruled that airport detention must in no circumstances become “extended or indefinite . . . and without any procedural guarantees,” for which reason it established a limit on detention of 24 hours, after which the individual should be granted entry to the country¹⁶⁰ with, if appropriate, adequate measures to ensure periodic presentation before immigration authorities until the person’s migration status is resolved.¹⁶¹

The Constitutional Court of Ecuador further established minimum guarantees to ensure dignified treatment of migrants while in airport transit zones, affirming their right to:

- a) Not be held *incommunicado* in detention cells or other spaces;
- b) Be informed of the reasons that their entry to national territory is being limited;
- c) Access an interpreter or translator if requested;
- d) Request international protection, with the corresponding guarantees;

¹⁵² *Id.* at ¶ 88.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at ¶ 106.

¹⁵⁵ *Id.* at ¶ 108.

¹⁵⁶ The facts of the case indicate that petitioner naturalized as Ecuadorean in 2009; he renounced his Cuban citizenship in order to naturalize. However, authorities later determined that the naturalization documents he presented had been falsified and revoked his Ecuadorean nationality without notifying him in the proceedings. While boarding a plane in 2011 to visit a sick family member in Cuba, Ecuadorean authorities confiscated his Ecuadorean passport and national ID card. He was refused entry at the airport in Cuba as he had renounced his Cuban citizenship, and returned by plane to Guayaquil, where he was detained. Petitioner was unable to regularize his status in Ecuador and today resides in the United States. Sentencia No. 335-13-JP/20, Pleno de la Corte Constitucional de Ecuador, ¶¶ 16–32, 37, 117.

¹⁵⁷ *Id.* at ¶¶ 115–17.

¹⁵⁸ *Id.* at ¶ 105.

¹⁵⁹ *Id.* at ¶ 103.

¹⁶⁰ *Id.* at ¶ 110.

¹⁶¹ Sentencia No. 335-13-JP/20, Pleno de la Corte Constitucional de Ecuador, ¶ 112.

- e) Communicate with their consulate and access consular assistance;
- f) Have legal assistance of their choosing or receive legal aid from the Public Defender and Ombudsman’s offices, which should be immediately notified by immigration agents when a traveler is not admitted;
- g) Activate the legal mechanisms they consider necessary and adequate in light of the limitation of their right to migrate.¹⁶²

In finding that the detention in the airport constituted an arbitrary and illegal deprivation of liberty, the Court held that “regardless of the name given to migratory detention and the type of physical space the migrant is held in, any measure that limits his ambulatory liberty constitutes detention and as such, requires respect for minimum guarantees.”¹⁶³ Thus, detention in “transit or ‘international’ zones of airports, is also a form of migratory detention, as they are under the custody and control of State agents, in this case immigration officers, and their freedom of movement is substantially limited.”¹⁶⁴ The Court held that “States cannot attempt to avoid their national and international [human rights and international protection] obligations through dispositions of national migration law that exclude parts of their territory . . . in these transit or ‘international’ airport zones,” and recalled that this finding also engages the obligation of non-discrimination.¹⁶⁵

Moreover, the Constitutional Court found that “the generalized use of migratory detention, as well as summary deportations, are forms of criminalization of migration, as they reinforce the stereotype of the migrant as criminal and impose disproportionate sanctions based on the person’s condition, and not their conduct.”¹⁶⁶ It likewise found that the detention of the petitioner violated the right to migrate, which is established in article 40 of Ecuador’s Constitution,¹⁶⁷ and which “implies respect for people’s right to move and the guarantee that such movement takes place in dignified conditions, both at the place of origin, transit, destination and return.”¹⁶⁸

Amici encourage this court to follow binding international precedent outlined in this brief that indicates that airport “international” or “transit” zones are not “zones of exception” to human rights obligations, but rather places where migrants’ human rights must be particularly and assiduously protected and ensured by authorities. Asylum seekers may be particularly vulnerable to arbitrary detention, inhumane treatment, and violations of their rights to due process, access to asylum, and *non-refoulement* in airport contexts, highlighting the importance of judicial control and access to effective legal remedies. Violations of these rights by State authorities during airport detentions create a corresponding obligation of reparation.

¹⁶² *Id.* at ¶ 113 (amici’s translation).

¹⁶³ *Id.* at ¶ 97 (amici’s translation).

¹⁶⁴ *Id.* at ¶ 98 (amici’s translation).

¹⁶⁵ *Id.* at ¶ 99 (amici’s translation).

¹⁶⁶ Sentencia No. 335-13-JP/20, Pleno de la Corte Constitucional de Ecuador, ¶ 107 (amici’s translation).

¹⁶⁷ *Id.* at ¶¶ 118–27 (amici’s translation).

¹⁶⁸ Sentencia No. 159-11-JK, Corte Constitucional del Ecuador, ¶ 108 (Nov. 26, 2019) (Ecuador).

E. Mexico must ensure that migration detention is used only as a measure of last resort

Finally, when individuals lacking regular migration status are admitted into a State territory from airports or other border zones, States must ensure that any subsequent decision to subject them to migration detention is not arbitrary, nor based solely on the individual's irregular migration status.¹⁶⁹ Binding international law requires that any decision to remit a migrant to a detention center must be made pursuant to an individualized decision that respects the principles of necessity, proportionality, and legitimate purpose, considering the availability of alternatives to detention.¹⁷⁰

The CMW has considered that detention of migrants should be used only as a last resort.¹⁷¹ In the case of migrants “who are in vulnerable situations, States’ duty of due diligence to effectively protect is greater than in other cases; they should, in particular, take reasonable measures to prevent the deprivation of liberty of those persons. States should avoid detaining migrants who have specific needs . . . including . . . refugees, asylum-seekers and stateless persons.”¹⁷² To avoid arbitrary detention, Mexico is obligated to ensure that decisions to detain migrants in migration detention centers comply with the criteria discussed below.

1. Migration detention is generally discouraged and should only occur after authorities have conducted individualized assessments, ensuring the necessity, proportionality, and legitimate purpose of detention

The Inter-American Court prohibits the automatic detention of asylum-seekers, holding that

immigration policies based on the obligatory detention of irregular migrants, without the competent authorities verifying in each specific case, by an individualized evaluation, the possibility of using less restrictive measures that may be effective to achieve these purposes, will be arbitrary.¹⁷³

Arbitrary detention may be one of the “legal and practical obstacles that make effective access to justice illusory” for migrants.¹⁷⁴ The CMW has likewise indicated that “[t]here should

¹⁶⁹ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 131. CMW, *General comment No. 5*, *supra* note 57, at ¶ 17 (observing that “[a]ny compulsory, automatic, systematic or widespread detention of migrant workers and members of their families is arbitrary”); UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 20.

¹⁷⁰ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 131. CMW, *General comment No. 5*, *supra* note 57, at ¶ 17

¹⁷¹ CMW, *General comment No. 5*, *supra* note 57, at ¶ 17.

¹⁷² *Id.* at ¶ 45.

¹⁷³ Pacheco Tineo Family, Inter-Am. Ct. H.R., ¶ 131. CMW, *General comment No. 5*, *supra* note 57, at ¶ 17; UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 20.

¹⁷⁴ Vélez Lóor, Inter-Am. Ct. H.R., ¶ 98; *see also* Advisory Opinion 18/03, Inter-Am. Ct. H.R., ¶ 126 (observing that “the State must guarantee that access to justice is genuine and not merely formal” to migrants); CMW, *General*

always be a presumption in law against detention and therefore in favour of freedom,” and detention must be only “an exceptional measure of last resort.”¹⁷⁵ Mexico is obligated to avoid automatic and therefore arbitrary detention by ensuring that detention is evaluated on a case-by-case basis.

Inter-American Court jurisprudence indicates that any decision to detain must be made through an individualized, reasoned decision that considers the individual circumstances of each asylum seeker.¹⁷⁶ To ensure that the measure is not arbitrary, the detention must serve a legitimate purpose,¹⁷⁷ be necessary,¹⁷⁸ and be strictly proportionate.¹⁷⁹

Inter-American jurisprudence and the Committee on Migrant Workers prohibit the imposition of migration detention as a punitive measure, as this is not a legitimate purpose.¹⁸⁰ In the case of *Vélez Loor v. Panama*, the IA Court noted that both criminal and administrative sanctions represent an exercise of the State’s punitive power, which is only permissible in a democratic society when necessary to “protect fundamental legal rights from serious attacks that

comment No. 5, supra note 57, at ¶ 1 (expressing that the Committee is “deeply concerned about the trend towards the criminalization of migration” as reflected in the “increasingly frequent use of detention of migrants across several regions of the world”).

¹⁷⁵ CMW, *General comment No. 5, supra* note 57, at ¶ 17 (noting that “[d]eprivation of liberty in the immigration context therefore should be an exceptional measure of last resort”); see UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 2.14.

¹⁷⁶ *Vélez Loor*, Inter-Am. Ct. H.R., ¶ 112; CMW, *General comment No. 5, supra* note 57, at ¶ 17 (observing that “[t]he relevant authorities must carry out a context-specific and individualized assessment of the situation, in which relevant factors must be considered on a case-by-case basis, not on the basis of a mandatory rule for a broad category”); UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 20.

¹⁷⁷ *Vélez Loor*, Inter-Am. Ct. H.R., ¶ 169; CMW, *General comment No. 5, supra* note 57, at ¶¶ 20–21.

¹⁷⁸ Detention must be “absolutely indispensable for achieving the intended purpose” and authorities must ensure “that no other measure less onerous exists...to achieve the intended purpose.” *Vélez Loor*, Inter-Am. Ct. H.R., ¶ 166. Detention may only be found necessary “to protect fundamental legal rights from serious attacks that may impair or endanger them;” detention for other reasons would constitute an “abusive exercise of the punitive power of the State.” *Id.* at ¶ 170.

¹⁷⁹ The proportionality requirement involves balancing the individual’s interest in liberty with the public interest in limiting such liberty, including consideration of “the potential effects of detention on the physical and mental health of the migrant.” CMW, *General comment No. 5, supra* note 57, at ¶ 25. As such, “the sacrifice inherent in the restriction of the right to liberty” cannot be “exaggerated or unreasonable compared to the advantages obtained from this restriction.” *Vélez Loor*, Inter-Am. Ct. H.R., ¶ 166.

¹⁸⁰ *Vélez Loor*, Inter-Am. Ct. H.R., ¶ 169; CMW, *General comment No. 5, supra* note 57, at ¶ 36. (“Criminalizing irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular migration and leads to unnecessary detention.”) The CMW has emphasized that “immigration detention disproportionately affects poor migrants and people of colour, who at the same time have the greatest difficulties in mounting their legal defence or obtaining legal assistance in immigration, asylum and international protection procedures.” *Id.* at ¶ 5. Likewise, the 1951 Convention on the Status of Refugees prohibits States from imposing penalties on refugees on the basis of irregular entry. Convention relating to the Status of Refugees, art. 31(1) (“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees . . .”).

may impair or endanger them.”¹⁸¹ The principle of non-criminalization of migration requires State authorities to respect migrants’ human rights without discrimination.¹⁸²

By implication, any custodial measure aimed solely at punishing migrants for their irregular status will be arbitrary.¹⁸³ The Committee on Migrant Workers has emphasized that “immigration detention can be justified only if there is a risk that the migrant will evade immigration proceedings or to guarantee the implementation of a deportation order.”¹⁸⁴ These legitimate purposes for using migration detention “must be substantiated by proven facts and be based on an individualized assessment.”¹⁸⁵

From the requirements of necessity, proportionality, and legitimate purpose follows the requirement that any detention must occur “only for the shortest period of time.”¹⁸⁶ Likewise, it follows that, “[d]etention should never be excessive or indefinite during the course of immigration proceedings, because it would then become arbitrary.”¹⁸⁷

2. Mexico is obligated to consider measures alternative to detention before resorting to detention

Satisfying the requirements of strict necessity and proportionality requires Mexico to consider alternative measures to detention in order to avoid arbitrary detention.¹⁸⁸ The Inter-American Court requires that States assess the feasibility of detention alternatives “in each particular case and by means of an individualized evaluation,” and affirmatively requires States to devise measures alternative to detention to accomplish the same goals.¹⁸⁹ The CMW has defined alternatives to detention as “all community-based care measures or non-custodial accommodation

¹⁸¹ Vélez Loor, Inter-Am. Ct. H.R., ¶ 170. *See also* Inter-Am. Comm’n on H.R. & OAS, *Res. 04/19: Inter-American Principles on the Human Rights of All Migrants*, *supra* note 3, at Principle 67. (“[A] migrant [] in an irregular situation in a State does not harm any fundamental legal good that needs protection through the punitive power of the State. States shall not impose penalties on persons in need of international protection, on account of their illegal entry or presence,” migrants must be “free from penalties” on account of irregular entry or stay, and “punishment of irregular entry, presence, stay or status is disproportionate under criminal law.”).

¹⁸² Vélez Loor, Inter-Am. Ct. H.R., ¶ 100. (The non-criminalization principle “does not mean that no legal action may be taken against migrants who do not comply with national law, but that when adopting the corresponding measures, States must respect migrants’ human rights and guarantee their exercise and enjoyment to all people under their jurisdiction, without discrimination based on regular or irregular status, nationality, race, gender, or any other basis.”).

¹⁸³ *See* Vélez Loor, Inter-Am. Ct. H.R., ¶¶ 167, 169.

¹⁸⁴ CMW, *General comment No. 5*, *supra* note 57, at ¶ 20.

¹⁸⁵ *Id.*

¹⁸⁶ Vélez Loor, Inter-Am. Ct. H.R., ¶ 171. *See also* CMW, *General comment No. 5*, *supra* note 57, at ¶ 51 (“detention should be permitted only for the shortest possible period of time”).

¹⁸⁷ CMW, *General comment No. 5*, *supra* note 57, at ¶ 51. *See also* UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 44.

¹⁸⁸ UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶¶ 18, 34, 35, 40. *See also* CMW, *General comment No. 5*, *supra* note 57, at ¶ 46 (observing that “States have an obligation to review and implement all available alternative measures before resorting to detention, in accordance with the principles of necessity and proportionality”).

¹⁸⁹ Vélez Loor, Inter-Am. Ct. H.R., ¶ 171.

solutions – in law, policy or practice – that are less restrictive than detention.”¹⁹⁰ In devising alternatives, UNHCR has stated that States ought to be guided by the principle of “minimum intervention.”¹⁹¹ The CMW emphasizes that, where States implement alternatives to detention, they must guarantee the rights to “[l]egal assistance, psychosocial support and the protection of the rights to education, housing and health care for migrant workers and members of their families.”¹⁹²

The requirement to consider alternatives to detention is thus a necessary element of the individualized evaluation of the necessity, proportionality, and legitimate purpose of detention. In order to comply with its obligations under Inter-American jurisprudence, further supported by universal system interpretations and UNHCR guidelines, Mexico must carry out this evaluation on a case-by-case basis. Any restriction of liberty not based on a justification that allows an evaluation of whether it complies with these conditions will be arbitrary, and thus, a violation of international law and the right to personal liberty under the American Convention.¹⁹³

III. CONCLUSION

International human rights law obligates Mexico to respect and guarantee the rights of individuals arriving on its territory, including at “international” zones of airports. Key among these guarantees, informed by the standards of the Inter-American Court and the universal human rights system, are the obligation of *non-refoulement*, non-penalization of irregular entry, due process, access to judicial guarantees, the prohibition of arbitrary detention, and the right to humane treatment. Because an individual becomes a refugee at the moment at which they meet the elements of the refugee definition, Mexico must treat asylum-seekers as such regardless of whether they have yet formally presented an asylum claim. Individuals with possible international protection needs must be referred to asylum proceedings if they affirmatively state their desire or intention to seek asylum at any point while under the Mexico’s effective control; and Mexican authorities are obligated to make affirmative inquiries as to individuals’ possible international protection needs.

Despite the terminology “transit” or “international” zone, “international” zones of airports do not have extraterritorial status. Under international human rights law, these zones of airports are plainly within State territory and within States’ effective control, such that Mexico’s human

¹⁹⁰ CMW, *General comment No. 5*, *supra* note 57, at ¶ 47. The Committee additionally observes that such alternatives “must respect the right to personal freedom and therefore not create onerous restrictions or conditions, but rather generate other legitimate mechanisms and measures that are in line with human rights standards.” *Id.* In this regard, it found that alternatives mirroring those in the criminal system, such as bail and home-based detention, are inappropriate in the migration context. *Id.* at ¶ 48. Instead, it “recommends that States emphasize community-based non-custodial measures that include case management and other forms of support, are adapted to the specific needs and vulnerabilities of each person or family and allow people to live freely within communities.” *Id.* at ¶ 50.

¹⁹¹ UNHCR, DETENTION GUIDELINES, *supra* note 124, at ¶ 39. *See also supra* note 171 and accompanying text.

¹⁹² CMW, *General comment No. 5*, *supra* note 57, at ¶ 50.

¹⁹³ Vélez Loo, Inter-Am. Ct. H.R., ¶ 161.

rights obligations toward migrants and asylum seekers are applicable. In addition to properly identifying individuals with international protection needs and ensuring effective access to asylum proceedings, Mexico must also ensure that detention inside “international” zones—from which individuals are not, as a rule, free to leave—does not become arbitrary, and that humane treatment obligations are respected. In order to do so, it must respect due process protections, including access to counsel; ensure that individuals are not held *incommunicado*; and ensure access to judicial review. Furthermore, given that “international” zones generally do not have infrastructure to support human habitation (including food, potable water, beds, bathrooms, showers, and basic privacy, among others), periods of detention longer than a few hours will steadily increase the risk of arbitrary detention and subjection to inhuman and degrading detention conditions.

Finally, immigration detention is disfavored and should only be used as a last resort. Refugees and asylum-seekers, who are in a particularly vulnerable situation, generally should not be detained. Mexico must ensure due process and access to judicial remedies in all immigration and asylum proceedings. *Amici* encourage this court to apply the international human rights standards discussed in this brief as it considers the commission of human rights violations in Mr. Bastidas Contasti’s case and corresponding right to reparation.