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Statement of the American Immigration Lawyers Association

**Submitted to the Committee on the Judiciary of the U.S. House of Representatives
Hearing on “An Administration Made Disaster:
The South Texas Border Surge of Unaccompanied Alien Minors”**

June 25, 2014

The American Immigration Lawyers Association (AILA) submits this statement to the Subcommittee on Immigration and Border Security. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 13,000 attorney and law professor members.

Current humanitarian crisis

Contrary to the title assigned to this hearing, the escalation in the movement of unaccompanied alien children (UACs) is a regional humanitarian crisis born from the rapid growth in crime, violence and poverty that has affected Mexico and several Central American countries for many years. In October 2011, the United States experienced a dramatic rise in UACs, particularly from the countries of El Salvador, Guatemala and Honduras. The number of unaccompanied children apprehended by U.S. Customs and Border Protection (CBP) jumped from 17,775 in FY2011 to 41,890 in FY2013.¹ For the fiscal year 2014, beginning October 1, 2013 up through May 31, 2014, CBP has already apprehended 47,017 unaccompanied children just in the Southwest Border sectors alone.² The children making the difficult and treacherous migration journey are now younger than in years past (many under 13), and a higher percentage are girls.³

This humanitarian crisis affects not only the United States but the entire Central American region as well. The United States is the largest country in the region, with the most developed asylum and humanitarian protection regime. Hence, the greatest number of displaced individuals continues to seek asylum in the United States. Yet other countries in the region, in particular, Belize, Nicaragua, Panama, Mexico, and Costa Rica, have seen a striking 435 percent increase in asylum applications from El Salvadorans, Hondurans, and Guatemalans; an even more dramatic increase considering the small size of these nations.⁴

Drawing upon interviews with 404 children aged 12 to 17 who had left their home countries, the U.N. High Commissioner for Refugees (UNHCR) concluded that the “the children’s responses to

¹ UNHCR Report, “Children on the run: Unaccompanied children leaving Central America and Mexico and the need for international protection.” May 2014.

http://www.unhcrwashington.org/sites/default/files/UAC_Children%20on%20the%20Run_Full%20Report_May2014.pdf

² CBP Border Patrol Statistics. <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>

³ “Obama creates group to help border crossing kids” June 2, 2014

<http://www.usatoday.com/story/news/nation/2014/06/02/obama-immigration-group-undocumented-children-border/9876003/>

⁴ UNHCR, Children on the Run

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the questions of why they left . . . were as complex as the children themselves.” The reasons most frequently cited by children – even by those who had a parent or family member with whom they wished to reunite – were domestic abuse within the home, gang and cartel violence, deprivation of basic survival necessities, and labor and sex trafficking.⁵ Violence and destabilization in these countries has grown in recent years due to the strength of transnational criminal actors (including gangs).⁶ In many cases, state actors are unwilling or unable to stem the violence.

UNHCR found that the majority of the children made statements indicating that they may well be in need of international protection. Children who migrate without an accompanying parent or guardian face a harrowing journey, during which they are often targeted for theft, sexual abuse, and abduction.⁷ Some may be lured by false promises from smugglers or local media touting U.S. policies that do not exist or that cannot benefit them. But the root causes that make these children desperate to leave their home countries and seek a safe haven are indisputable. Given the severity of conditions in Mexico and these Central American nations, it would not be accurate to attribute the surge in child migration to any specific circumstances in the United States or actions taken by the U.S. government.

The dramatic increase in the influx of UACs on the Southwest border has raised speculation as to its cause, including accusations that DHS’s Deferred Action for Childhood Arrivals (DACA) initiative or perceived weaknesses in the enforcement system have drawn more children to our borders. However, no one arriving in the United States after June 15, 2007 would even qualify for the DACA initiative, and it is well known that human smugglers and traffickers spread rumors about non-existent immigration benefits, new laws and opportunities to encourage people to make the journey to the United States. Such misinformation should be counteracted with better public information campaigns by the government and credible non-governmental organizations. .

Claims that the President’s enforcement policies are insufficiently robust ignore the overwhelming evidence that immigration enforcement has reached unprecedented levels under this Administration. By early 2014, DHS will have removed 2 million people during the course of the Obama administration, at a time when net migration to the U.S. from Mexico is at or near zero and border crossings are at a 40-year low. Immigration detention rates continue to rise and now total about 430,000 individuals each year, at a cost of \$2 billion annually to American taxpayers. Federal criminal prosecutions of immigration-related offenses are at the highest point in history—up 468 percent from FY2003. The border is more secure than ever. Increased

⁵ UNHCR, *Children on the Run*

⁶ International Centre for the Human Rights of Migrants (CIDEHUM), *Forced Displacement and Protection Needs produced by new forms of Violence and Criminality in Central America*

⁷ “Children traveling solo across U.S. border face dangerous trip.” June 4, 2014.

<http://www.npr.org/2014/06/04/318733312/children-traveling-solo-across-u-s-border-face-dangerous-trip>



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manpower, infrastructure, and technology on the border have resulted in heightened enforcement with record numbers. As a result, removals are happening more quickly than ever, often at the expense of due process. In 75 percent of all removals, DHS relied on summary procedures that allow enforcement agents to bypass the immigration court system.

Even more severe detention and deportation practices are not likely to change the desperate behavior of those fleeing from the violence, instability, and poor conditions in the sending countries. The current humanitarian crisis will only be solved when those factors are lessened, when gang violence is not an overriding fear, and when abuse and trafficking are not ever-present. Therefore, while the Administration has taken important steps to provide necessary international assistance, its announced “surge” in resources to expand its capacity to detain families – including women and young children – is an inappropriate response. The announcement is particularly troubling given the recent history of family detention. In 2009, the Administration ended the detention of immigrant families at the T. Don Hutto detention facility due to inhumane conditions and abuses. Revisiting this failed experiment would be a step backward. For families that cannot be released, alternatives to detention are extremely effective, far more humane and cost-effective than institutional detention, and would preserve America’s core commitment to the protection of families. Moreover, a harsher system would undermine or even violate long-standing U.S. obligations to protect children and other vulnerable individuals and would greatly diminish America’s status as a humanitarian leader.

U.S. principles on protection

Welcoming and protecting the vulnerable and those fleeing persecution is a deeply rooted American value that has defined our country since its founding and is firmly established in our laws. In 1968, the U.S. acceded to the 1967 U.N. Protocol Relating to the Status of Refugees, which extends the obligation of *non-refoulement*, or the duty not to return a refugee to a country where there is a risk that his or her life or freedom would be threatened on the basis of certain grounds – an obligation that was first enshrined in the 1951 Convention Relating to the Status of Refugees. Additionally, the U.S. is bound under the U.N. Convention Against Torture not to return an individual to a country where the person would likely face torture. In 1980, the U.S. enacted the Refugee Act to bring its laws into compliance with international law and has continued to be a leader in the area of asylum and refugee protections internationally.

The United States also has specific protocols for the treatment and protection of children that are guided both by U.S. immigration law and child welfare principles. Unaccompanied immigrant children are a highly vulnerable population given their age, lack of English language skills, and the severe trauma many experienced before or after arriving in the United States. Significant numbers of these children may have been trafficked or are at risk of being trafficked. They commonly exhibit a combination of physical, emotional, and other trauma symptoms and urgently need intensive case management services, such as counseling, medical care, and access to legal services while in custody.

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Since the 1990s, the United States has followed guidelines that were established following the 1993 Supreme Court case, *Reno v. Flores*, 507 U.S. 292 (1993). These protocols govern the detention, release and repatriation of UACs and require that there be adequate food, drinking water, and bathroom facilities as well as proper medical care for those in custody. Importantly, children are required to be separated from unrelated adults when held in custody and should be transferred to facilities more appropriate for juveniles, such as foster care homes, within 3 to 5 days.

In recognition of the vulnerability of child migrants, Congress passed several laws intended to protect UACs in government custody: In 1990, Congress amended the Immigration and Nationality Act and created a special form of protection called “Special Immigrant Juvenile” status for abused, neglected, or abandoned children who are in the custody and care of a state or agency and who cannot be reunified with their parents.

The Homeland Security Act of 2002 (HSA) tasked the Department of Homeland Security (DHS) with the apprehension, transfer, and repatriation of UACs and the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) with their long-term custody, care, and placement. Upon apprehension, UACs from countries other than Mexico are placed into removal proceedings. While these proceedings are pending, they remain in ORR custody until a parent, legal guardian, or other suitable custodian can be found. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) requires that CBP transfer custody of UACs from countries other than Mexico or Canada to ORR within 72 hours, barring exceptional circumstances. For children from Mexico or Canada, the TVPRA requires that they be screened to determine whether they have a fear of persecution or have been trafficked. If they have not, and are determined to have made an independent decision to return, children from Mexico or Canada are returned across the border and are not taken into ORR custody.

For the past two decades, the existing system has managed an influx of between 5,000 to 20,000 UACs each year with numbers steadily rising since 2011. In response to the more dramatic increase in 2014, this spring the Administration initiated a coordinated and comprehensive response to the crisis. First, the Secretary of Homeland Security declared a Level IV condition of readiness -- the highest level of contingency planning within DHS, through which DHS personnel can be reassigned to assist in the emergency. The President then directed an interagency Unified Coordination Group to address the situation. Federal Emergency Management Agency (FEMA) Administrator Craig Fugate was appointed as the Federal Coordinating Official.

On May 30, the President’s Office of Management and Budget (OMB) sent a letter to the leaders of both the Senate and House Appropriations Committees showing that the projected costs of caring for and resettling child migrants from Central America could reach \$2.28 billion next year

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— well over double what the administration asked for in its FY2015 budget.⁸ On June 10, the Senate Appropriations subcommittee on Labor, Health and Human Services and Education indicated that it would increase funding for the UAC program by \$1.03 billion in FY2015, bringing the total funding proposal to \$1.94 billion.

Recommendations

While the United States has made great strides in the last 20 years, the protection regime is still inadequate to meet the needs of those it is designed to safeguard. More must be done to ensure that the most vulnerable are protected. The United States can strengthen its overall protection regime, not only for UACs but for everyone who comes to our country seeking protection.

- **Ensure that children and other vulnerable populations are not exploited or abused in custody.** While DHS has taken steps to shorten the length of time children spend in detention and improve the care and treatment of children, reports of abuse at the hands of agents and officers persist. On June 11, 2014, a group of civil, immigrant, and human rights organizations filed an administrative complaint on behalf of 116 children who had reported abuse and mistreatment while in CBP custody.⁹ The complaint includes reports that children were shackled, subjected to inhumane detention conditions, had inadequate access to medical care, and were verbally, sexually, and physically abused.

This complaint follows a long history of reported abuse and highlights an urgent need to address the detention of children and other vulnerable populations. A report by the American Immigration Council shows over 800 complaints received by CBP from 2009-2012, including reports of inhumane detention, physical, verbal, and sexual abuse, including some by minors.¹⁰ AILA recognizes that most officers and agents perform their jobs professionally and do not engage in abuses. However, the Administration should take these complaints seriously to ensure that the culture at CBP does not accept abuse. Abuse at the hands of immigration officers and agents compounds the trauma and abuse that many of these children have already suffered. Greater oversight and accountability is needed for CBP as it encounters and interacts with children, many of whom have fled violence and persecution in their home countries and are in the aftermath of a dangerous journey here. Short-term detention facilities must also be regulated and improved as they are the first stop for the children in the process.

⁸ “OMB: Child migrants to cost U.S. \$2.3 billion” May 31, 2014. <http://www.politico.com/story/2014/05/omb-child-migrants-107284.html#ixzz34XLyaHHV>

⁹ Complaint to DHS OCRCL and OIG by National Immigrant Justice Center, Esperanza Immigrant Rights Project, Americans for Immigrant Justice, Florence Immigrant and Refugee Rights Project and the ACLU Border Litigation Project. <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs%202014%2006%2011.pdf>

¹⁰ American Immigration Council. “No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse” May 2014. <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>



- **Ensure adequate access to legal orientation programs and counsel.** Children who are in detention should be given information about their rights, the U.S. immigration system, opportunities for relief, and the compliant process. Such orientation should be provided in a language and manner that is meaningful and age-appropriate to the child, and can be understood. Adequate funding and training should be in place so that each child is screened for vulnerabilities such as risk for trafficking as mandated.

Unaccompanied alien children, like other indigent persons appearing in removal proceedings, have no right to legal counsel paid for by government. This compounds their vulnerability as they move through our nation's complicated removal system. For asylum seekers, the lack of legal counsel contributes to the immigration court backlog, and to the prolonged state of uncertainty for many seeking protection in the U.S. Six out of ten individuals, including asylum seekers, children, and mentally-ill respondents, appear before immigration courts without legal counsel. Children, even those who survived trauma or persecution or live in fear of return, are left to navigate our laws and to present their claims without any legal assistance when representation by an attorney is the "single most important factor" affecting the result in an asylum case.¹¹ Adequate consideration and resources should be given to facilitate the representation of asylum-seekers in immigration court.

AILA welcomes the announcement this month by the Department of Justice and the Corporation for National and Community Service of a new AmeriCorps partnership that will create 100 positions for AmeriCorps members to provide legal services and paralegal services to UACs in immigration courts starting next year. Planning for this program preceded the current crisis and will not likely be up and running until next year. For that reason it is unlikely to help resolve the immediate humanitarian crisis of migrant children.

Strengthen the U.S. protection regime. Core to America's leadership on the world stage is the strength and generosity of our humanitarian protections. Nonetheless, in many ways, our protections do not go far enough. Screening for trafficking, fear of persecution, and other vulnerabilities needs to be improved including through improvements in training, oversight, and redress procedures, particularly of CBP officers and agents who play the critical role as the first contact for individuals coming to U.S. borders.

In response to the current crisis, some are calling for more rapid procedures to deport those who come. Any changes that further curtail due process would be a mistake as they are likely to jeopardize meaningful access to asylum and other humanitarian relief for children and families. Already DHS has dramatically increased the use of expedited removal and other summary removal procedures for those apprehended in the wide swath of land considered the border

¹¹ Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340-41 (2007).



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region. These procedures hinder meaningful access to present claims and to seek eligible relief. The United States cannot compromise humanitarian principles and must ensure that children and families who come are given an opportunity to present their case before an asylum officer or an immigration judge. AILA submitted recommendations on the current asylum system in the form of written testimony for the hearings this committee conducted on December 12, 2013 and February 11, 2014.

The solution to this humanitarian crisis will require a comprehensive and coordinated effort by the U.S. government, foreign governments, and international and domestic non-governmental organizations. These steps will take time to develop and implement. In the meantime the United States cannot compromise its long-standing commitment to humanitarian principles including the protection of refugees and child welfare in the hope of finding a quick solution to a complex problem. In the past decade, other nations with fewer resources, such as Turkey, Lebanon, and Jordan have responded to huge migrations of people fleeing war or violence. The United States has called upon these and other nations to respect and honor their obligations to protect those who are vulnerable. Now is not the time for the United States to back away from its own principles.

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