Request No. MC-578-25

IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
ORGANIZATION OF AMERICAN STATES

AMICUS BRIEF BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS JOINTLY WITH MR. FELIPE GONZÁLEZ MORALES AND MR. FRANÇOIS CRÉPEAU

IN SUPPORT OF INDIVIDUALS TRANSFERRED BY THE UNITED STATES TO INCOMMUNICADO DETENTION IN EL SALVADOR

A. INTRODUCTION

1. This Amicus Brief is submitted by the UN Special Rapporteur on the human rights of migrants, Mr. Gehad Madi (herein after the Special Rapporteur).[1]

2. The mandate of the Special Rapporteur is to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing their disproportionate impact on migrants in situations of vulnerability.[2] The Proposed Beneficiaries are all migrants, many of whom had pending or approved applications for asylum or other humanitarian protection in the United States and their Petition illuminates the series of obstacles existing to the full and effective protection of their human rights. The Special Rapporteur further has a mandate to recommend

[1] The Special Rapporteur is part of "[t]he system of Special Procedures" that "is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social."[1] As a mandate-holder, the Special Rapporteur is independent human rights expert selected for her "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity."[1] The Special Rapporteur "undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith" and "do not receive financial remuneration."
In the performance of his mandate, Special Rapporteur on the human rights of migrants is accorded certain privileges and immunities as an expert on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946.
This submission is submitted voluntarily without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. In full accordance with the independence afforded to his mandate, the Special Rapporteur has not sought authorization for this submission by the United Nations, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, or any of the officials associated with those bodies.

[2] A/HRC/RES/52/20, Resolution adopted by the Human Rights Council on 3 April 2023, §1(a).

actions and measures applicable at a regional level to eliminate violations of the human rights of migrants.[3]

3. The Special Rapporteur files this Amicus Brief jointly with Messrs Felipe González Morales[4] and François Crépeau[5]. The Special Rapporteur and Messrs González and Morales are hereinafter jointly referred to as "the Interveners".

4. This Amicus Brief is submitted within proceedings related to the Request for Precautionary Measures **MC-578-25** on Behalf of Individuals Transferred by the United States to Incommunicado Detention in El Salvador (the "**Proposed Beneficiaries**") (the "**Request**"), before the Inter-American Commission on Human Rights (the "**IACHR**").

5. The Interveners are experts on the human rights of migrants.[6] The Interveners are uniquely well-placed to assist the Commission in the determination of the Petitioner's requests.

6. The Request contains an explanation of the rights of the Proposed Beneficiaries that have been violated not only in El Salvador but also in the United States and the serious and irreparable harms faced by the Proposed Beneficiaries. The system of arbitrary detention and deportation currently in operation presents a regional, Inter-American, challenge. The Interveners are well-positioned to assist the Commission in addressing this regional issue.

7. In light of their expertise, the Interveners seek to assist the Commission on two legal issues arising under international human rights law: (a) the ongoing human rights breaches committed by El Salvador as they particularly relate to the Proposed Beneficiaries' status as migrants (which give rise to the serious and irreparable harms

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3 A/HRC/RES/52/20, Resolution adopted by the Human Rights Council on 3 April 2023, §1(e).

4 Mr. González Morales was UN Special Rapporteur on the human rights of migrants from 2017 to 2023. He was also the Rapporteur on Migrants at the Inter-American Commission from 2008-2015 and President of the Commission from 2010-2011. He files this Amicus in his personal capacity.

5 Mr. François Crépeau was UN Special Rapporteur on the human rights of migrants from 2011 to 2017. He files this Amicus in his personal capacity.

6 This Amicus Brief adopts the definition of 'migrants' in the Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking: "*Any person who is outside the social, affective, or political territory to which they belong. For the purposes of these Inter-American Principles, a migrant is specifically considered to be someone who is outside of a territory of which they are a citizen or national, regardless of migratory status, intent and temporality. It also encompasses stateless persons and victims of human trafficking as defined by national legislations and by the pertinent international conventions*."

faced by the Proposed Beneficiaries, which are before the Commission in the pending request); and (b) the issues of potential secondary State responsibility arising from the arbitrary deportation and detention of migrants, which provide important context for the allegations before the Commission.

8. The Interveners have been assisted in preparing this brief by Counsel, members of the English Bar, with expertise in international law and human rights: Jessie Ingle and Sophie Bird of Brick Court Chambers, London.

9. In brief, the Interveners consider that:

9.1 El Salvador's actions constitute violations of fundamental Inter-American and international human rights, including the **right to life**, the **right to humane treatment**, the **prohibition on torture**, the **right to liberty**, the **right to a fair trial**, and the **prohibition of non-refoulement**.

9.2 The Proposed Beneficiaries have been subject to **enforced disappearance**, which constitutes a breach of multiple human rights in the Inter-American system.

9.3 The is no basis on which El Salvador can justify derogation of the rights in question.

9.4 As migrants, the Proposed Beneficiaries are particularly vulnerable to violations of human rights. In this context, El Salvador has **discriminated** against the Proposed Beneficiaries **on the basis of their migratory status** and there is an imminent risk of breaching the **prohibition of non-refoulement**.

9.5 The ongoing breaches of the Proposed Beneficiaries' rights expose them to serious and irreparable harm.

9.6 In view of the regional and cross-border nature of these violations, and the position El Salvador has taken in asserting that the United States bears exclusive international responsibility for any alleged rights violations, the Commission ought to be cognisant of the potential ancillary responsibility of El Salvador for the violations of human rights of the U.S., which serve to heighten the serious nature of the situation faced by the Proposed Beneficiaries.

10. It is respectfully submitted that in accordance with the Commission's established practice, the Commission should consider the submissions set out in this brief.

B. FACTUAL BACKGROUND

11. This section provides an overview of the facts background relevant to the issues considered in this Amicus Brief. The broader factual background is set out in more detail in the Request, which the Interveners have reviewed.

12. On February 4, 2025, President Bukele announced on X that El Salvador was offering the United States of America "*the opportunity to outsource part of its prison system*" and take "*criminals*" into their "*mega-prison*" ("**CECOT**") in exchange for a fee.[7] The specific terms of the agreement (the "**Bilateral Agreement**") are not known, but it has been reported that an arrangement was entered into on or around March 14, 2025, whereby El Salvador was to receive up to 300 members of the Tren de Aragua gang (or at least those the U.S. government alleged to belong to Tren de Aragua) in exchange for financial support.[8]

13. On March 15, 2025, three flights carried more than 260 people from the U.S. to El Salvador.[9] Since the Bilateral Agreement was made, according to public reporting, at least 288 people have been deported to CECOT.[10] Public reporting has confirmed that this group included both Venezuelan and Salvadoran nationals. At least 137 Venezuelan nationals were deported under the Alien Enemies Act 1798,[11] which was purportedly invoked by the U.S. administration on March 15, 2025, alleging that "*thousands of members*" of Tren de Aragua had "*unlawfully infiltrated*" and were "*conducting*

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7 Nayib Bukele (@nayibbukele), We have offered the United States of America the opportunity to outsource part of its prison system., X (Feb. 3, 2025), https://x.com/nayibbukele/status/1886606794614587573.

8 'Behind Trump's Deal to Deport Venezuelans to El Salvador's Most Feared Prison', *New York Times* (April 30, 2025) https://www.nytimes.com/2025/04/30/us/politics/trump-deportations-venezuela-el-salvador.html.

9 Ibid.

10 'El Salvador Put Trump Deportees Behind Bar. Now Their Families Are Suing' *New York Times* (May 9, 2025) https://www.nytimes.com/2025/05/09/world/americas/el-salvador-trump-deportees-lawsuit.html.

11 'Trump invokes 1798 Alien Enemies Act, orders deportation of suspected Venezuelan gang members', *CBS News* (March 16, 2025) https://www.cbsnews.com/news/trump-invokes-1798-alien-enemies-act/.

irregular warfare".[12] Another 101 Venezuelans were deported under regular immigration law and 21 Salvadorans accused of membership of MS-13.[13]

14. The U.S. government claims that the migrants are member of Tren de Arangua or MS-13.[14] However, it has been reported that such designations are based on spurious criteria, such as the presence of tattoos, and that the majority of migrants have no criminal records.[15] The Proposed Beneficiaries claim that they were given no opportunity to respond to accusations made against them or to contest their removal to El Salvador and imprisonment in CECOT.[16]

15. Since detention in CECOT, the Salvadoran authorities have not provided official confirmation of the Proposed Beneficiaries' location, condition or legal status.[17] National and international organizations have reported systemic mistreatment and violence to detainees in CECOT, including inhumane conditions, lack of adequate access to counsel, healthcare and food.[18]

16. On April 20, 2025, President Bukele proposed returning 252 Venezuelans to Venezuela in exchange for political prisoners.[19]

17. On or about June 6, 2025, El Salvador and the United States facilitated the return to the United States of Kilmar Armando Abrego Garcia, who was among the group of migrants initially taken to CECOT. Mr. Abrego Garcia had previously been determined by the United States government to be a refugee and granted a form of relief called "*withholding of removal*."[20]

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12 Donald J. Trump, Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua, White House (Mar. 15, 2025), https://www.whitehouse.gov/presidential-actions/2025/03/invocation-ofthe-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/.

13 *CBS News*, supra n [9].

14 Press Release, U.S. Department of State, More Foreign Gang Terrorists Deported Out of America (Mar. 31, 2025), https://www.state.gov/more-foreign-gang-terrorists-deported-out-of-america/.

15 Cecilia Vega, U.S. sent 238 migrants to Salvadoran mega-prison; documents indicate most have no apparent criminal records, CBS News (Apr. 6, 2025), https://www.cbsnews.com/news/what-records-show-about-migrantssent-to-salvadoran-prison-60-minutes-transcript/.

16 Request, p.[11].

17 Request, p.[13].

18 See, e.g. Human Rights Watch, 'Human Rights Watch declaration on prison conditions in El Salvador for the J.G.G. v. Trump case' (March 20, 2025) https://www.hrw.org/news/2025/03/20/human-rights-watch-declaration-prison-conditions-el-salvador-jgg-v-trump-case.

19 Nayib Bukele (@nayibbukele), *Señor @NicolasMaduro, usted ha dicho en numerosas ocasiones que quiere a losvenezolanos de regreso,* X (Apr. 20, 2025), https://x.com/nayibbukele/status/1914070199659098258.

20 See *Noem v Abrego Garcia* 604 U.S.__ (2025).

18. On July 2, 2025, litigation documents filed in the United States revealed that Mr. Abrego Garcia had apparently been subjected to severe mistreatment while in CECOT.[21]

19. On July 7, 2025, litigation documents filed in the United States revealed that El Salvador has disclaimed – in an April submission to the United Nations Working Group on Enforced and Involuntary Disappearances – any international responsibility for any acts or omissions taken in respect of individual transferred by the United States to and detained in El Salvador:

> "*The actions of the State of El Salvador have been limited to the implementation of a bilateral cooperation mechanism with another State, through which it has facilitated the use of the Salvadoran prison infrastructure for the custody of persons detained within the scope of the justice system and law enforcement of that other State. In this context, the jurisdiction and legal responsibility for these persons lie exclusively with the competent foreign authorities, by virtue of international agreements signed and in accordance with the principles of sovereignty and international cooperation in criminal matters.*
>
> *In this regard, the actions attributable to the Salvadoran State are limited to its sovereignty and territorial jurisdiction, and therefore it cannot be held responsible for the failure to observe the principle of non-refoulement with respect to the persons mentioned*."[22]

18. On July 18, 2025, El Salvador, the United States and Venezuela participated in what they termed a "prisoner exchange," resulting in the release of Venezuelan nationals via a United States aircraft from CECOT to Venezuela. This was announced by Salvadoran President Nayib Bukele.[23]

19. On July 31, 2025, the requestors filed a supplement to their pending request for precautionary measures on behalf of all migrants expelled from the United States and held at CECOT, a redacted advanced draft version of which Intervenors have reviewed, to include additional named proposed beneficiaries of Salvadoran nationality and also detail allegations of torture in sworn declarations by Venezuelan proposed beneficiaries who have been released.

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21 *Abrego Garcia v Noem*, Civil Action No.8:25-cv-00951, First Amended and Supplemental Complaint for Injunctive Relief and Declarator Judgment (D.Md, 2025)

22 *Sanchez v Trump*, Case No: 1:25-cv-00766-JEB, Notice of United Nations Document (D.D.C. 2025)

23 Nayib Bukele (@nayibbukele), *Today, we have handed over…* (July 18, 2025) https://x.com/nayibbukele/status/1946296384035918284

20. At the date of this Amicus Brief, with the exception of Mr. Abrego Garcia and an estimated 252 Venezuelan nationals, 36 of the Proposed Beneficiaries remain in incommunicado detention.

C. THE POSITION UNDER INTERNATIONAL LAW

21. The Interveners consider that El Salvador's actions constitute serious violations of the Proposed Beneficiaries' rights under international law, including under key international treaties which have been ratified by El Salvador. These include the American Convention on Human Rights (the **"ACHR"**), ratified by El Salvador on 23 June 1978; the International Covenant on Civil and Political Rights, ratified by El Salvador on 30 November 1979; the Convention Against Torture (the **"UN CAT"**), ratified by El Salvador on 17 June 1996; and the Inter-American Convention to Prevent and Punish Torture (the **"The Inter-American Convention Against Torture"**), ratified by El Salvador on 17 October 1994; the 1951 Refugee Convention and its 1967 Protocol, ratified by El Salvador on 22 February 1983 and the Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking (the **"IACHR Principles on the Human Rights of Migrants"**), which are principles developed by the IACHR to guide member states in their obligations to respect, protect, promote and guarantee the human rights of all persons irrespective of nationality or migration status.

22. In particular, El Salvador's actions constitute a violation of the following fundamental rights:

    22.1 A possible violation of the Proposed Beneficiaries' **rights to life** under Art 4 of the ACHR, Art 6 of the ICCPR and Principle 1 of the IACHR Principles on the Human Rights of Migrants.

    22.2 A violation of the Proposed Beneficiaries' **right to personal integrity, human dignity, humane treatment and the prohibition on torture** under Art 5 of the ACHR, Arts 7 and 10 of the ICCPR, the Inter-American Convention Against Torture, the UN CAT and Principle 2 of the IACHR Principles on the Human Rights of Migrants. El Salvador's actions may also constitute a **violation of the**

right to personal integrity of the family members of the Proposed Beneficiaries.

22.3 A violation of Proposed Beneficiaries' **right to personal liberty** under Art 7 of the ACHR and Art 9 of the ICCPR.

22.4 A violation of the Proposed Beneficiaries' **rights to a fair trial, access to courts / judicial protection and equal treatment under the law** under Art 8 (right to a fair trial), Art 24 (right to equal protection) and Art 25 (right to judicial protection) of the ACHR, Art 16 of the Refugee Convention and Principles 7, 40 and 50 of the IACHR Principles on the Human Rights of Migrants.

22.5 El Salvador's actions also constitute a violation of the prohibition against enforced disappearance enshrined in the 1994 Inter-American Convention on Forced Disappearance of Persons, the Declaration on the Protection of All Persons from Enforced Disappearance and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[24]

23. Further, the Proposed Beneficiaries were migrants to the United States, with several of the Proposed Beneficiaries actively seeking asylum in the United States as refugees at the time of their deportation to El Salvador. Of significant concern to the Interveners is the fact that the actions of the United States and El Salvador constitute a breach of fundamental principles relating to the rights of migrants and refugees, in particular:

23.1 The prohibition on discrimination based on migration status; and

23.2 The **principle of *non-refoulement*** enshrined in Art 33(1) of the 1951 Refugee Convention (and the 1967 Protocol), Art 3 of the CAT, Art 22(8) of the ACHR, Art 13 of the Inter-American Convention Against Torture and Principle 6 of the

[24] Although El Salvador has not signed or ratified the Inter-American Convention on Forced Disappearance of Persons or the International Convention for the Protection of All Persons from Enforced Disappearance, such a prohibition is a rule of customary international law: see for example the United Nationals Human Rights Council Report of the Working Group on Enforced or Involuntary Disappearances, dated 31 August 2022, which reviewed the State practice and *opinio juris* in relation to forced disappearance and stated at 72 that *"The Working Group affirmed that the Declaration reflects, codifies and consolidates the customary international law that is legally binding on all States. As outlined, State practice and opinio juris converge to show that various provisions of the Declaration, such as those enshrining the definition of enforced disappearance and the continuing nature of the offence – today are part of customary international law."*

IACHR Principles on the Human Rights of Migrants; and the right to seek and enjoy asylum.

24. In the following section, the Interveners:

24.1 Summarise the key principles relating to each of the above rights;

24.2 Discuss those principles and the violation of the Proposed Beneficiaries' rights in the specific context of enforced disappearances;

24.3 Summarise the limits on El Salvador's ability to derogate from its obligations under the ACHR; and

24.4 Highlight the specific considerations which apply to this case in view of Proposed Beneficiaries' status in the US as migrants and in some cases refugees.

Relevant rights protected under the ACHR (and other international treaties and documents)

25. The rights outlined below are fundamental human rights which are widely enshrined in international human rights law across multiple international treaties and documents. In order to most effectively assist the Commission, the Interveners focus their submissions on the interpretation of each of these rights under the ACHR, which El Salvador has ratified and which the Commission has the jurisdiction to interpret and apply. This section outlines the legal principles relevant to the Proposed Beneficiaries' human rights. The Interveners then summarise in Section D how the ongoing breaches of the rights set out below give rise to the serious and irreparable harms faced by the Proposed Beneficiaries.

Right to life

26. Art 4 of the ACHR (in similar terms to Art 6 of the ICCPR) guarantee the right to life, which is a non-derogable norm.

Right to personal integrity, human dignity, humane treatment and the prohibition on torture

27. Art 5(1) ACHR guarantees the right to physical, moral and mental integrity and Art 5(2) prohibits torture and cruel, inhuman or degrading punishment or treatment

(bringing together Articles 7 and 10 of the ICCPR). Art 5 in its entirety is a non-derogable right under the ACHR and the IACtHR has ruled that both the prohibition of torture and the prohibition of inhuman and degrading treatment are *jus cogens* norms.[25]

28. The rights protected under Art 5 extend to all persons, including those deprived of their liberty – the State has an obligation to *"safeguard the health and well-being of those deprived of liberty, and to ensure that the manner and method of deprivation of liberty does not exceed the inevitable suffering inherent in detention."*[26] In the context of detention, violations of Art 5(2) may occur if conditions of detention fail to meet international standards such as if there is severe prison overcrowding,[27] and improper access to drinking water, food or medical attention.[28]

29. The right to integrity under Art 5 also applies to family members and relatives of direct victims of certain human rights violations. Relevantly, the family members (direct ascendants, descendants and spouses) of direct victims of enforced disappearances are presumed to suffer and, as a result, have their rights to integrity violated.[29] Further, the anguish and suffering imposed on the close relatives of the victims of serious human rights violations can also constitute a violation of those relatives' rights to humane treatment.[30]

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25 *Case of the Gomez Paquiyauri Brothers v Peru.* Merits, Reparations, and Costs. Judgment of July 8, 2004. Series C No. 110, §112. The prohibition against treatment contrary to the dignity and integrity of a person is also reaffirmed in the Inter-American Convention Against Torture and the prohibition on torture is found also in the UN CAT. Principle 2 of the IACHR Principles on the Human Rights of Migrants further affirms that "every migrant has the right to human dignity, including physical, sexual and mental and moral integrity, regardless of their migration status or place of origin."

26 IACtHR Advisory Opinion OC-29/22 of May 30, 2022 on Differentiated Approaches with Respect to Certain Groups of Persons Deprived of Liberty, §291.

27 *Tibi v Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004.

28 *Case of Lopez Alvarez v Honduras.* Merits, Reparations and Costs. Judgment of February 1 2006. The IACHR has also reiterated that the State's obligation to respect the physical integrity of persons held in custody, of not using cruel and inhuman treatment and of respecting inherent human dignity also includes assuring them access to appropriate medical attention: IACHR, Report No. 67/11 Case 11.157 *Gladys Carol Espinoza Gonzales*, Admissibility and Merits, 31 March 2011, §177.

29 The IACtHR explained in *Case of Blake v Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, §114 that *"the Court considers that a violation of the right to mental and moral integrity of the direct next of kin victims of certain human rights violations can be declared, applying a presumption iuris tantum with regard to mothers and fathers, daughters and sons, husbands and wives, permanent companions (hereinafter 'direct next of kin'), provided this responds to the specific circumstances of the case, as has happened, for example, in the case of… forced disappearance of persons…"*

30 IACHR, Report No. 67/11 Case 11.157 *Gladys Carol Espinoza Gonzales*, Admissibility and Merits, 31 March 2011, §231.

30. None of these rights turn on the nationality of the expelled migrants and protect Venezuelan, Salvadoran and any other migrants who were transferred from the United States.

Right to liberty and prohibition on the arbitrary deprivation of liberty

31. Art 7(3) ACHR prohibits arbitrary arrest or imprisonment, with Art 7(4) guaranteeing that anyone who is detained shall be informed of the reasons for their detention and promptly notified of the charge(s) against them (which includes the right to establish contact with another person such as next of kin or an attorney), Art 7(5) guaranteeing that any person detained shall be entitled to a trial within a reasonable time and Art 7(6) guaranteeing that anyone deprived of liberty may have recourse to a court to decide on the lawfulness of the arrest or detention.

32. Of particular relevance to this case is the clear view of the Inter-American organs that preventive detention – if not lawful, necessary and proportionate - may be in violation of the Art 7(3) prohibition on arbitrary detention. As the IACtHR has explained, preventive detention is the most severe measure that may be applied to a person accused of a crime such that its application must be exceptional and limited by the principles of lawfulness, the presumption of innocence, necessity and proportionality.[31]

33. None of these rights turn on the nationality of the expelled migrants and protect Venezuelan, Salvadoran and any other migrants who were transferred from the United States.

Right to a fair trial, equal treatment under the law and judicial protection

34. Art 8 ACHR guarantees each person the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, in relation to any criminal charge brought against him or for the determination of his civil, fiscal, labor or any other rights and obligations. Art 8 also provides for various guarantees in a trial, including *inter alia* the presumption of innocence, notification of charges, the provision of adequate time to prepare a defence, and the right to be assisted by legal counsel.

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[31] *Case of Romero Feris v Argentina*. Judgment of October 15 2019. Merits, Reparations and Costs. §§91-92.

35. Art 25 ACHR protects an individual right to an effective remedy for fundamental rights violations and obliges the State to organize such remedies. It constitutes a basic expression of the rule of law: as the IACtHR has found, the guarantee *"of an effective remedy constitutes a basic pillar, not only of the American Convention, but of the Rule of Law in a democratic society under the terms of the Convention."*[32] The IACtHR has found that access to justice is a *jus cogens* norm,[33] and has commented on multiple occasions and including in relation to enforced disappearances that the State has an obligation to investigate, prosecute and punish those who have commissioned grave violations of human rights; and that the victims' relatives and society have a right to truth.[34]

36. The remedy under Art 25 must be simple, prompt and effective.[35] While a separate right from Art 8, these requirements are interpreted in light of the requirements of a fair trial and due process as defined in Art 8.

37. None of these rights turn on the nationality of the expelled migrants and protect Venezuelan, Salvadoran and any other migrants who were transferred from the United States.

Enforced disappearances as breaches of multiple human rights

38. The IACHR and IACtHR consider that an enforced disappearance in violation of human rights is made up of three cumulative elements: (i) a deprivation of liberty; (ii) the direct intervention or acquiescence of State agents; and (iii) the refusal to acknowledge or failure to provide information and to reveal the fate or whereabouts of the person concerned.[36] There is no doubt that the Proposed Beneficiaries in this case are the

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32 *Case of Blake v Guatemala*. Reparations and Costs. Judgment of January 22, 1999. Series C No. §48, §63.

33 *Case of Goiburu et al v Paraguay.* Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, §131.

34 In the case of *Herzog et al v Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 15 March 2018. Series C No. 353, 208, the IACtHR summarised its jurisprudence on Art 25 in the context of enforced disappearance.

35 *Case of Acevedo Buendia et al v Peru.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2009. Series C No. 198, §77.

36 This reflects the definition of forced disappearance under Art II of the 1994 Inter-American Convention on Forced Disappearance of Persons. Although El Salvador has not ratified that Convention, the IACtHR nonetheless applies that definition in its jurisprudence. See for example *Case of Terrones Silva et al. v Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2018. Series C No. 360, §135 and See *Case of Rodriguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 14, 2014. Series C No. 287, §226. The definition also echoes the definition of the Working Group on Forced and

victims of enforced disappearance by El Salvador: they have been deprived of their liberty under direct order of the Salvadoran State, and the Salvadoran State has to date refused to inform their legal representatives or family as to their whereabouts.

39. The IACtHR has consistently emphasised that enforced disappearances are a flagrant violation of numerous rights protected by the ACHR. Indeed, the prohibition of enforced disappearances is recognised by the IACthR as a peremptory norm of international law.[37] It has described the practice of disappearances as constituting *"a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the Inter-American system and the Convention"* and has observed that such practices disclose the *"disregard of the duty to organize the State in such a manner as to guarantee the rights recognised in the Convention."*[38]

40. Enforced disappearances are therefore analysed in the Inter-American legal system as a breach of multiple human rights, with the IACHR and IACtHR considering that enforced disappearances may constitute violations of Articles 3, 4, 5, 7, 8 and 25.[39] Arbitrary detention in a case of forced disappearance is also a continuing violation, with the IACtHR having explained that *"when examining an alleged forced disappearance, it should be taken into account that the deprivation of liberty of the individual must be understood merely as the beginning of the constitution of a complex violation that is*

Involuntary Disappearances of Persons of the United Nations and the 1992 UN Declaration on the Protection of Persons against Forced Disappearances, which have also been referred to by the IACtHR. While these texts are not binding, they are used by the IACtHR as a relevant corpus juris to determine the precise meaning of the phenomenon of enforced disappearance.

37 *Case of Tenorio Roca et al. v Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2016. Series C No. 314, §140.

38 *Case of Velasquez Rodriguez v Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4, §158. See also *Case of Godinez Cruz v Honduras.* Merits. Judgment of January 20, 1989. Series C No. 5, §166.

39 See, for an example of the IACtHR examining the violation of multiple rights under the ACHR in a case of enforced disappearance, *Case of Vereda La Esperanza v Columbia.* Preliminary Objectives, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, which related to the alleged forced disappearances of 14 persons, the alleged extrajudicial execution of another person, and for the arbitrary and illegal deprivation of liberty of a child occurring in Colombia in 1997. See also *Case of Tenorio Roca et al v Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 22 June 2016. Series C No. 314, §158. In *Heliodoro Portugal v Panama.* Preliminary Objections, Merits, Reparations and Costs, Judgment of August 12, 2008, the IACtHR noted *"it is therefore necessary to consider the offense of forced disappearance in toto, as an autonomous offense of a continuing or permanent nature with its multiple elements intricately interrelated."* For a summary of these principles by the IACHR, see §§111-116 of IACHR Report No. 22/17, Case 11.587, Merits Report, *Cesar Gustavo Garzon Guzman*, 18 March 2017.

prolonged over time until the fate and whereabouts of the alleged victim are established".[40]

41. In cases of enforced disappearance, where direct evidence gathering is difficult by virtue of the nature of the offence, the IACtHR has deduced violations of Articles 3, 4, 5 and 7 by presumption. It has presumed that incommunicado detention and solitary confinement are necessarily accompanied by ill-treatment and has found that by their very nature, enforced disappearances involve an arbitrary denial of liberty. For example, in *Velasquez Rodriguez v Honduras*[41], the Court found that enforced disappearances involved a series of multiple and continuing violations of several rights protected by the ACHR. In particular, the Court found a violation of Art 7 given that the *"kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest."*; the right to physical integrity of Art 5, based on the *"prolonged isolation and deprivation of communication"* considered *per se* as *"cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being"* and the right to life protected under Art 4, given that *"the practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible"* and based on *"the lack of knowledge seven years later about [the individual's] fate"* that created *"a reasonable presumption that he was killed"*.

42. In the Rapporteur's submission, the enforced disappearance of over 200 Venezuelan and Salvadoran nationals arbitrarily deported to CECOT is, following the jurisprudence of the IACtHR, a clear violation of multiple fundamental rights including at least the rights to personal integrity and humane treatment under Art 5 ACHR, the right to liberty under Art 7 ACHR, and the right to a fair trial under Art 8 ACHR and judicial protection under Art 25 ACHR.

43. As the IACHR itself has noted in its report on the State of Emergency and Human Rights in El Salvador dated 28 June 2024, there have also been numerous allegations

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40 *Heliodoro Portugal v Panama,* §112.

41 *Case of Velasquez Rodriguez v Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4.

of deaths and torture of individuals while in the custody of the Salvadoran State. It is, sadly, likely that at least some of the Proposed Beneficiaries may also have suffered violations of the prohibition on torture under Art 5 ACHR and their right to life under Art 4 ACHR.

44. None of these rights turn on the nationality of the expelled migrants and protect Venezuelan, Salvadoran and any other migrants who were transferred from the United States.

Derogation and limits on derogation

45. Some of the rights guaranteed in the ACHR are derogable under Art 27 ACHR in circumstances of *"war, public danger or other emergency that threatens the independence or security of a State".* The Interveners note that El Salvador has justified its "Emergency Regime" and the numerous derogations from the rights protected under the ACHR on the basis that it is necessary to combat the rampant criminality and gang violence in the State. However, there are limits to the ability to suspend such rights:

45.1 The IACHR and IACtHR have emphasised repeatedly that the suspension of rights under the ACHR can only be legitimately adopted when the conditions, general principles, and limits on the circumstances, procedure and specific measures affecting the suspended rights or freedoms under Art 27 ACHR are respected. For instance, while Art 7 is not a non-derogable right (save for the protection of habeas corpus under Art 7(6)), any suspension of constitutional liberties may not exceed what is strictly necessary.[42]

45.2 Art 27(2) ACHR provides that certain rights cannot be suspended under any circumstances, including Art 3 (right to recognition of juridical personality); Art 4 (right to life); and Art 5 (right to personal integrity). The IACtHR has determined that the judicial procedures that are necessary to guarantee the full exercise of those rights and freedoms – including the legal procedures enshrined in Arts 25(1) and 7(6) of the ACHR - should be considered as indispensable judicial guarantees, and that such judicial guarantees must be exercised within the framework and according to the principles of due process of the law under

[42] *Case of the Gomez Paquiyauri Brothers v Peru.* Merits, Reparations, and Costs. Judgment of July 8, 2004. Series C No. 110, §85.

Art 8 ACHR.[43] Accordingly, while Art 8 is not included as a non-derogable right under Art 27(2), reading Art 8 together with Articles 7(6), 25 and 27(2) leads to the conclusion that Art 8 is a non-derogable norm insofar as it applies to the remedies provided for in Articles 7(6) and 25.

46. As the IACHR itself has found, El Salvador has experienced a great improvement in citizen security *"which would demonstrate that there is no emergency situation that justifies maintaining in force the suspension of rights and guarantees in accordance with the requirements of the American Convention".*[44] In light of those findings, the IACHR has recommended that the Salvadoran State reestablish the suspended rights and adopt measures for the prevention of criminality from a perspective that respects and guarantees human rights.

47. In light of that finding, the Interveners submit that there is no basis on which the Salvadoran State can justify the derogations from each of the guarantees provided by the ACHR. The detention of the Proposed Beneficiaries is, therefore, in clear violation of each of the rights outlined above, both where those rights are derogable under Art 27(2) ACHR and where the rights are absolute.

48. In addition, regardless of the question of derogation, the Interveners submit that there is no justification under international law principles for El Salvador to disclaim international responsibility for acts or omissions violating the rights of individuals in their territorial jurisdiction and subject to their custody and control in a state prison facility. While a further discussion of the principles of state responsibility is below (and to be determined at the merits stage of proceedings), regardless of whether individuals *also* remain subject to the jurisdiction of the United States pursuant to the Bilateral Agreement, El Salvador must also ensure the protection of applicable rights to all of the Proposed Beneficiaries.

Specific considerations in relation to the rights of migrants and refugees

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43 IACtHR Advisory Opinion OC-8/87 on Habeas Corpus in Emergency Situations (Articles 27.2, 25.1 and 7.6 of the American Convention on Human Rights), January 30, 1987, §29, §44; IACtHR Advisory Opinion OC-9/87 on Judicial Guarantees in States of Emergency (Articles 27.2, 25 and 8 of the American Convention on Human Rights), October 6, 1987, §41.

44 State of Emergency and Human Rights in El Salvador dated 28 June 2024, §3.

49. International bodies, including the IACtHR and IACHR, have identified that migrants and refugees are populations that are particularly vulnerable to violations of human rights and the international community has therefore recognised the need to adopt special measures to ensure the human rights of migrants.[45] It is therefore essential that States are especially cognisant of their obligations towards migrants and refugees.

50. The Interveners understand from the Request that many of the Proposed Beneficiaries had pending asylum claims or were seeking and / or had been granted other forms of humanitarian protection in the United States at the time of their deportation to El Salvador. Both the United States and El Salvador therefore have the obligation to protect the rights of these individuals specifically afforded to them due to their status as refugees or protection claimants.[46] In addition, while all of the 288 proposed beneficiaries, whether Salvadoran or Venezuelan or any other nationality, were migrants when they were transferred from the United States, not all of them remained migrants in El Salvador. Therefore, these rights apply only to those, such as the Venezuelan nationals, who remained migrants once in CECOT.

51. Three specific obligations vis-à-vis migrants and refugees are summarised below: (i) the obligation not to discriminate on the basis of legal status; (ii) the principle of non-refoulement; and (iii) the right to seek and be granted asylum.

Obligation not to discriminate on the basis of legal or migratory status

52. The rights which are set out above apply equally to all individuals regardless of their legal or migratory status and States must fully protect the universally recognised human rights of migrants without any discrimination owing to their legal status. While this does not mean that States cannot take any action against migrants who do not comply

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45 Inter-American Court of Human Rights Advisory Opinion OC-18/03 on the Juridical Condition and Rights of Undocumented Migrants, September 17, 2003 (the **"Advisory Opinion on the Rights of Migrants"**), §112, §117. This observation is echoed in the General Assembly's resolution on "Protection of Migrants", which notes *"the situation of vulnerability in which migrants frequently find themselves owing, inter alia, to their absence from their State of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their States of origin as migrants…"*: United Nations General Assembly, Resolution A/RES/54/166 on "Protection of migrants" of 24 February 2000.

46 As identified in the Request, El Salvador has adopted the broader definition of a refugee from the Cartagena Declaration into domestic law, with Article 4 on the Determination of Refugee Status stating that for the purposes of that law, a refugee is considered to be "*anyone who has fled their country of origin because their life, safety, or freedom has been threatened by widespread violence, foreign aggression, internal conflicts, massive human rights violations, or other circumstances that have seriously disrupted public order."*

with national laws, or that States cannot treat migrants differently from nationals, any differential treatment based on migration status must be reasonable, objective, proportionate and in compliance with the State's human rights obligations.[47]

53. Of particular relevance to the present circumstances is the fact that the right to due process must be ensured to all persons, and that States must ensure that all individuals have access without restrictions to simple and effective recourse that protects them in determining their rights, irrespective of their migratory status.[48] Further, the IACtHR has clearly stated that migrants who are targeted by an expulsion decision should have access to effective remedies to challenge such a decision.[49]

54. The Interveners note with concern that, in violation of these rights, the Proposed Beneficiaries (all of whom were migrants to the United States and some of whom were, or may be, refugees) were not able to effectively challenge their expulsion from the US or their detention in El Salvador.

Prohibition on refoulement

55. The principle of non-refoulement prohibits States from expelling or returning individuals to countries where there are substantial grounds for believing the individual would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations. It is a touchstone of international refugee law and is an absolute prohibition without any exceptions. It is enshrined in Article 33 of the Refugee Convention and 1967 Protocol, and additionally in the Inter-American Convention on the Prevention of Torture (Art 13), the UN CAT (Art 3) and the International Convention for the Protection of All Persons from Enforced Disappearance (Art 16).

56. The Interveners are concerned about breaches of the prohibition on refoulement in two respects: (i) they consider that the United States has acted in breach of the principle of non-refoulement; (ii) they consider that the Proposed Beneficiaries face a continued risk of refoulement. As to each of those concerns:

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47 Advisory Opinion on the Rights of Migrants, §§118-119.

48 IACtHR Advisory Opinion OC-18/03 on the Juridical Condition and Rights of Undocumented Migrants, September 17, 2003, §107, §§121-122.

49 *Case of expelled Dominicans and Haitians v Dominican Republic.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 292, para 355.

56.1 The Interveners consider that the United States has acted in breach of its obligations under international and domestic US law (the 1980 Refugee Act) by expelling the Proposed Beneficiaries with pending asylum claims without processing those claims or otherwise determining whether those individuals were at risk of irreparable harm should they be expelled to a third country (in this case El Salvador). As outlined in the Request, there could have been little doubt about the treatment such individuals would be faced with in light of the various reports about the State of Emergency and the treatment of those detained in El Salvador, including the report of the IACHR itself. Accordingly, had an assessment of risk been undertaken in the United States, the Interveners submit it is likely that the United States would have found that the Proposed Beneficiaries faced a clear risk of ill treatment and serious human rights violations (namely, in the forms outlined in this brief above). Indeed, in the case of at least one individual, the United States had determined that the non-refoulement principle prevented their removal to El Salvador.

56.2 The Interveners note with great concern the statements made by President Bukele about proposal to return the 252 Venezuelan transferees to Venezuela made on 20 April 2025.[50] Any transfer by El Salvador of the Proposed Beneficiaries to other third countries without establishing whether they would be at risk of irreparable harm would be a breach of the principle of non-refoulement. The Interveners therefore emphasise the importance of the IACHR granting all of the proposed measures sought by the Proposed Beneficiaries, including in this context request (7) - that El Salvador refrain from deporting or forcibly returning the Proposed Beneficiaries to any other country where there are substantial grounds for believing they would be subjected to irreparable harm.

The right to seek and receive asylum

57. The right to seek and receive asylum is a fundamental right and inherent to the system for the protection of refugees. The IACtHR has explained that although the Refugee

[50] Nayib Bukele (@nayibbukele*), Señor @NicolasMaduro, usted ha dicho en numerosas ocasiones que quiere a los venezolanos de regreso*, X (Apr. 20, 2025), https://x.com/nayibbukele/status/1914070199659098258.

Convention does not explicitly establish the right of asylum, this is incorporated implicitly. In its Advisory Opinion on the Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System at §95, quoting the United Nations High Commissioner for Refugees, the IACtHR noted that *"the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights… is among the most basic mechanisms for the international protection of refugees."* The Court has further established that the Article 22(7) of the American Convention and Article XXVII of the American Declaration of the Rights and Duties of Man provide for the right of all persons to seek and receive asylum, that the ability to seek asylum goes beyond a "mere state prerogative",[51] and that a State's obligations under the right to seek and receive asylum are operative with respect to all persons who fall under the expanded definition of "refugee" under the Cartagena Declaration.[52]

58. The IACtHR has found that the right to seek and receive asylum under refugee status imposes on States the following specific duties: (i) the obligation of non-refoulement and its extraterritorial application; (ii) the obligation to allow the asylum application and not to reject it at the border; (iii) the obligation not to penalize or punish irregular entry or presence and not to arrest; (iv) the obligation to provide effective access to a fair and efficient procedure for determining refugee status; (v) the obligation to ensure the minimum guarantees of due process in fair and efficient procedures to determine refugee status or condition; (vi) the obligation to adapt procedures to the specific needs of children and adolescents; (vii) the obligation to grant international protection if the refugee definition is met and ensure the maintenance and continuity of refugee status; (viii) the obligation to restrictively interpret exclusion clauses and (ix) the obligation to provide access to rights with equal conditions under refugee status.[53]

Breaches of the prohibition on refoulement and the right to seek and receive asylum

59. The Interveners are concerned about breaches of the prohibition on refoulement and the right to seek and receive asylum in two respects: (i) they consider that the United States

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51 IACtHR Advisory Opinion OC-25/18 on "The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System", §132.

52 IACtHR Advisory Opinion OC-21/14 on the "Rights and Guarantees of Children in the Context of Migration and / or in Need of International Protection", §79.

53 IACtHR Advisory Opinion OC-25/18 on "The Institution of Asylum and its Recognition as a Human Right in the Inter-American Protection System", §90, §122.

has acted in breach of the principle of non-refoulement and the right to seek and receive asylum; (ii) they consider that the Proposed Beneficiaries face a continued risk of refoulement. As to each of those concerns:

59.1 The Interveners consider that the United States has acted in breach of its obligations under international and domestic US law (the 1980 Refugee Act and its implementing regulation) by expelling the Proposed Beneficiaries with pending asylum claims without processing those claims or otherwise determining whether those individuals were at risk of irreparable harm should they be expelled to a third country (in this case El Salvador). As outlined in the petition, there could have been little doubt about the treatment such individuals would be faced with in light of the various reports about the State of Emergency and the treatment of those detained in El Salvador, including the report of the IACHR itself. Accordingly, had an assessment of risk been undertaken in the United States, the Interveners submit it is likely that the United States would have found that the Proposed Beneficiaries faced a clear risk of ill treatment and serious human rights violations (namely, in the forms outlined in this brief above). Further, in at least one well-publicised case, the US expelled an individual who had already been granted international protection – in direct violation of its obligation to ensure the maintenance and continuity of refugee status which is part of the right to seek and receive asylum.

59.2 The Interveners note with great concern the statements made by President Bukele about proposal to return the 252 Venezuelan transferees to Venezuela made on 20 April 2025 as well as the ultimate transfer from El Salvador to Venezuela of as many as 252 of the 288 proposed beneficiaries.[54] Any further transfer by El Salvador of any of the Proposed Beneficiaries to other third countries without establishing whether they would be at risk of irreparable harm would be a breach of the principle of non-refoulement. The Interveners therefore emphasise the importance of the IACHR granting all of the proposed measures sought by the Proposed Beneficiaries, including in this context request (7) - that El Salvador refrain from deporting or forcibly returning the Proposed

[54] Nayib Bukele (@nayibbukele*), Señor @NicolasMaduro, usted ha dicho en numerosas ocasiones que quiere a los venezolanos de regreso*, X (Apr. 20, 2025), https://x.com/nayibbukele/status/1914070199659098258.

Beneficiaries to any other country where there are substantial grounds for believing they would be subjected to irreparable harm.

D. THE PROPOSED BENEFICIARIES FACE IRREPERABLE HARM

60. The Interveners consider that the ongoing breaches of the Proposed Beneficiaries' rights set out above have not only already caused serious harm to the Proposed Beneficiaries but continue to expose the Proposed Beneficiaries to irreparable harm – and ongoing urgent risk of such harm. While not all of the Proposed Beneficiaries remain detained in CECOT, at least 36 of them do and remain at such risk. The proposed measures in the Request are therefore necessary to prevent such harm. In particular:

60.1 The rights of the Proposed Beneficiaries, and in particular the at least 36 individuals who remain in CECOT, to life, dignity, humane treatment and the prohibition on torture are at risk of irreparable harm due to the conditions of detention in CECOT;

60.2 The rights of the Proposed Beneficiaries, and in particular the at least 36 individuals who remain in CECOT, are at risk of irreparable harm due to the ongoing situation of forced disappearance;

60.3 The protection against non-refoulement is at risk of irreparable harm due to the deportation of certain Proposed Beneficiaries to Venezuela and the potential for other "prisoner swaps" in relation to those 36 individuals who remain in CECOT.

Framework for Precautionary Measures

61. The IACHR is empowered to grant precautionary measures under its oversight functions in Article 41(b) of the Convention and in accordance with Article 25 of its Rules of Procedure ("**RoP**").[55] The IACHR may grant precautionary measures where there is:

[55] Also in accordance with Article XIII of the Inter-American Convention on Forced Disappearance of Persons.

61.1 A "serious situation": i.e., grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system (Article 25(2)(a) RoP);

61.2 an "urgent situation": i.e., a risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action (Article 25(2)(b) RoP);

61.3 a risk of "irreparable harm": i.e., injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation (Article 25(2)(c).

62. As set out below, the Interveners consider that each of these criteria are met in the present case.

63. The purpose of precautionary measures is twofold: they are (i) precautionary in the sense that, if/once a petition has been filed, they preserve rights at risk until the dispute is settled so as to guarantee the integrity and effectiveness of a decision on the merits; and (ii) protective in the sense that they are a true judicial guarantee of a preventative nature – in seeking to avoid irreparable damage, they protect human rights.[56]

64. In its 2018 Resolution on Precautionary Measures, the Commission committed to guaranteeing an analysis of the situation submitted and to take into account differentiated approaches to applicants belonging to groups in vulnerable situations.[57] The Commission further recognised that migrants are people in a vulnerable situation who may benefit from precautionary measures.[58]

65. The Interveners urge the Commission to take into account the vulnerable situation faced by the Proposed Beneficiaries as migrants and consider that the Proposed Beneficiaries are in precisely the urgent and serious situation for which they need precautionary measures to be imposed to both preserve and protect their rights.

Risk of irreparable harm to right to life, dignity, humane treatment and the prohibition on torture

56 Case of Carpio Nicolle et al. v. Guatemala, Provisional Measures, Order of July 6, 2009, considerandum 16; IACHR, Annual Report 2024, at §676.

57 IACHR Resolution 3/2018, 'Strengthening of the processing of requests for precautionary measures' (May 10, 2018).

58 Ibid.

66. The Interveners consider that due to the conditions of imprisonment reported at CECOT there is an irreparable risk to the right to life, dignity and human treatment of the Applicants, and to the prohibition against torture.

67. The Commission has previously recognised that extreme imprisonment conditions are serious and urgent situations giving rise to a risk of irreparable harm such that precautionary measures are warranted. The IACHR has granted precautionary measures on this basis to inmates at Urso Branco Prison (Brazil)[59] and the Provisional Prison of Mendoza (Argentina),[60] and it has applied to the IACtHR for provisional measures on the same bases in respect of Yare I and Yare II Capital Region Penitentiary Centre (Venezuela), Uribana Prison (Venezuela),[61] the Evaristo de Moraes Penitentiary (Brazil),[62] and Placido de Sa Carvalho Penal Institute (Brazil) (among several other cases).[63] The Commission and the Court recognised that inmates in these respective cases were in a situation of grave danger and vulnerability[64] and noted the following alleged facts giving rise to a serious and urgent situation of irreparable harm:[65]

67.1 Deaths in prison;

67.2 Violence against inmates;

67.3 Overcrowding and inhumane conditions; and

67.4 Physical punishment and mistreatment by guards.

68. Each of these facts has been set out in the Request in respect of the treatment of the Applicants in CECOT.[66] Further, the Commission itself has obtained reports of each of

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59 IACHR, Inmates in the Urso Branco Prison, Precautionary Measures regarding Venezuela, Order of March 14, 2002.

60 IACHR, MC 923-04, Inmates in the Provisional Prison of Mendoza, Precautionary Measures regarding Argentina, Order of November 22, 2004.

61 I/A Court H.R., Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison) Provisional Measures regarding Venezuela, Order of February 13, 2013.

62 I/A Court H.R., Evaristo de Moraes Penitentiary, Provisional Measures regarding Brazil, Order of March 21, 2023.

63 I/A Court H.R., Matter of Placido de Sa Carvalho Penal Institute Provisional Measures regarding Brazil, Order of February 13, 2017.

64 I/A Court H.R., Matter of the Yare I and Yare II Capital Region Penitentiary Center, Provisional Measures regarding the Bolivarian Republic of Venezuela, Order of March 30, 2006, considerandum 3(g).

65 See, e.g. I/A Court H.R., Matter of the Yare I and Yare II Capital Region Penitentiary Center, Provisional Measures regarding the Bolivarian Republic of Venezuela, Order of March 30, 2006.

66 See Request, [pp.15-16].

the above facts in relation to the State of Emergency in El Salvador,[67] and the existence of these conditions has been widely reported.[68]

69. The Commission has an established practice of issuing precautionary measures of a collective nature under Article 25(3) Rules of Procedure where, although the beneficiaries cannot all be named, they are determinable through their geographic location. The precautionary measures in relation to extreme imprisonment conditions set out above at §66 were granted collectively to inmates at each particular prison. There is no difficulty in identifying the Proposed Beneficiaries as being those people deported from the U.S. and imprisoned in CECOT. The additional testimony recently submitted to the Commission regarding the ill-treatment of proposed beneficiaries at CECOT only underscores the urgency of this request.

Risk of irreparable harm to the right against forced disappearance

70. The Interveners consider that there is a risk of irreparable harm the right of the Applicants against forced disappearance. As set out above at §42, the Interveners consider that there is no doubt that the beneficiaries are the victims of forced disappearance by El Salvador: they have been deprived of their liberty under direct order of the Salvadoran State, and the Salvadoran State has to date refused to inform their legal representatives or family as to their whereabouts.

71. Article XIII of the Inter-American Convention on Forced Disappearance of Persons specifically supports the use of precautionary measures in the context of forced disappearance. The Commission has recently granted precautionary measures in circumstances where a person was deported from the U.S. to El Salvador and then his whereabouts became unknown, and requested that El Salvador investigate the fate of the beneficiary and adopt measures to protect his life and personal integrity.[69] The Commission has also recently recognised the particular urgency and risk of irreparable

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67 IACHR, State of Emergency and Human Rights in El Salvador, Doc.97/24 (June 28, 2024), pp.211-225.

68 See Leire Ventas, 'Coming face to face with inmates in El Salvador's mega-jail, BBC News (February 15, 2024) https://www.bbc.co.uk/news/world-latin-america-68244963; Bernd Debusmann Jr, 'Kilmar Ábrego García alleges torture and abuse in El Salvador prison', BBC News (July 3, 2025) < https://www.bbc.co.uk/news/articles/cgq7nxkpkp4o>; 'Juanita Goebertus, 'Human Rights Watch declaration on prison conditions in El Salvador for the J.G.G. v. Trump case' (March 20, 2025) < https://www.hrw.org/news/2025/03/20/human-rights-watch-declaration-prison-conditions-el-salvador-jgg-v-trump-case>.

69 IACHR, PM 170-18, Óscar Álvarez Rubio, Precautionary Measures regarding El Salvador, Order of May 3, 2018.

harm that may arise from forced disappearance; in August 2024 it processed, evaluated, deliberated and notified the Respondent State of recommended precautionary measures in less than 48 hours of receiving the application.[70] The IACHR further recognised in 2024 that persons deprived of their liberty and missing persons were at particular risk and in need of protection via precautionary measures.[71]

72. There is an urgent risk that the Applicants have been and will continue to be subject to forced disappearance. It is established in Inter-American case-law that forced disappearance continues for as long as the person concerned is unaccounted for.[72] Since their transfer to CECOT, Salvadoran authorities have not provided any official confirmation regarding the Applicants' location, condition or legal status.[73] The Applicants who remain at CECOT continue to be subject to forced disappearance and are entitled to benefit from the protection of precautionary measures to address the ongoing risk of irreparable harm.

Risk of irreparable harm to the right against non-refoulement

73. The Interveners consider that there is a risk of irreparable harm the right of the Applicants against non-refoulement given the return of 252 Venezuelan deportees to Venezuela.[74] The Request sets out that several of the Venezuelan Applicants had been approved for refugee resettlement in the U.S. before deportation, while others held other humanitarian protection or were actively pursuing the right to asylum.[75] There is no evidence that El Salvador conducted any protection screening before collaborating with the United States and effectuating such returns.

74. The IACHR has granted precautionary measures to protect persons from being deported from the Dominican Republic to Haiti in recognition that preventing removal from the territory of the Respondent State is both precautionary and protective.[76] The IACHR

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70 IACHR, PM 862-24 María Andreina Oropeza Camacho, Precautionary measures regarding Venezuela, Order of August 10, 2024; IACHR, Annual Report 2024, §685.

71 IACHR, Annual Report 2024, at §679.

72 I/A Court HR, *Blake*, Series C, No.36, para 67 (1998).

73 Request, III.A.4. This is subject to the exception of Kilmar Abrego Garcia, who was returned to the U.S. in June 2025 (but faces a serious risk of deportation again).

74 Nayib Bukele (@nayibbukele), Señor @NicolasMaduro, usted ha dicho en numerosas ocasiones que quiere a losvenezolanos de regreso, X (Apr. 20, 2025), https://x.com/nayibbukele/status/1914070199659098258.

75 Request, III.A.3.

76 IACHR, PM 279/12, In the case of Luisa Fransua and others, Precautionary Measures regarding the Dominican Republic, Order of June 10, 2013.

has also crafted precautionary measures to require the release of detainees in a manner which complies with the obligation of non-refoulement.[77]

75. The Interveners recommend that the IACHR (a) grant the requested precautionary measure [(7)] in respect of non-refoulement; and (b) ensure that other precautionary measures are drafted such that any release of any remaining detained Applicant from CECOT will not put them at risk of refoulement.

Conclusion on Precautionary Measures

76. For the reasons set out above, the Interveners consider that the Proposed Beneficiaries face a serious and urgent situation and are at risk irreparable harm, particularly to their right to life, dignity and humane treatment and to their protection against torture, forced disappearance and refoulement. Granting the requested precautionary measures would be consistent with the Commission's previous practice and jurisprudence and would fulfil the Commission's function to promote respect for and defense of human rights.

77. The IACHR's power to order precautionary measures is in principle broader than the power of the IACtHR to order provisional measures, which may only be granted in cases of "extreme gravity and urgency".[78] In any event, the Interveners consider that these criteria are also met and that the Proposed Beneficiaries' case is one of "extreme gravity and urgency" and additionally support a referral to the IACtHR.

E. POTENTIAL SECONDARY STATE RESPONSIBILITY

78. The Interveners consider that, in addition to the violations enumerated in Section C above, the secondary responsibility of El Salvador for aiding and assisting human rights violations of the United States is potentially engaged under the international legal framework of State responsibility. The Interveners note that the granting of precautionary measures does not constitute a prejudgment of the violation of any right and acknowledge that the precautionary measures stage of proceedings is not the forum in which to debate issues of responsibility. However, the Interveners consider it important to raise the issue of potential secondary responsibility for aiding and assisting

[77] IACHR, PM 259/02, Detainees in the US Military Base in Guantanamo, Extension of Precautionary Measures regarding the U.S., Order of July 23, 2013.

[78] ACHR, Article 63(2).

alleged human rights violations of the U.S. given the regional aspect of the violations alleged in the Request and also given El Salvador's position in other fora that it is not responsible for any acts or omissions in relation to those forcibly disappeared from the United States and detained at CECOT.

79. The Interveners have a mandate while in office to recommend actions and measures applicable at a regional level to eliminate violations of the human rights of migrants and are thus cognisant of the risks to human rights that arise in the specific context of cross-border collaboration between States in the removal, transfer and detention of migrants.[79] The Interveners respectfully submit the Commission should have regard to the continuing arrangement of arbitrary detention and deportation existing at the regional level between the United States and El Salvador and the consequent potential responsibility of El Salvador for aiding and assisting breaches of rights (as set out below) by the United States.

80. The Interveners consider that the situation of the Proposed Beneficiaries has sufficient seriousness, urgency and risk of irreparable harm solely arising from the potential primary responsibility of El Salvador for direct violations to enable precautionary measures to be granted under Article 25 of the Commission's Rules of Procedure. However, the Interveners note that the Request contains a detailed description (evidenced by external sources) of the arbitrary detention and deportation undertaken by U.S. authorities. The Interveners consider that the seriousness of the situation of the Proposed Beneficiaries is enhanced by the additional layer of potential responsibility on the part of El Salvador for aiding and assisting violations of another State.

81. Due to the cross-border nature of the alleged violations, neither State appears to be accepting responsibility for the Proposed Beneficiaries. As noted, the Salvadoran government has recently told the United Nations that the United States, not El Salvador, is responsible for the people deported from the U.S. and detained in CECOT, stating that the "*jurisdiction and legal responsibility for these people lie exclusively with the competent foreign authorities*".[80] In these circumstances, the Interveners respectfully

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79 A/HRC/RES/52/20, Resolution adopted by the Human Rights Council on 3 April 2023, §1(e).

80 Alex Woodward, 'El Salvador officials say deported migrants in notorious jail are Trump S problem, not theirs', *The Independent*, July 8, 2025, <https://www.independent.co.uk/news/world/americas/us-politics/el-salvador-alien-enemies-trump-cecot-b2784991.html>, accessed 9 July 2025.

submit that the Commission ought to be cognisant of the potential secondary liability of El Salvador for assisting the U.S., in addition to the direct liability set out at Section C above.

82. In this context, this section sets out the framework of the international law of State Responsibility and, in particular, the basis upon which a State may be responsible for aiding and assisting human rights violations of another State.

83. Under Article 16 of the International Law Commission's Articles on State Responsibility,[81] a State (A) may be independently liable for an international wrong where it "*aids or assists*" another State (B) in the commission of an internationally wrongful act by State B in circumstances where (i) State A assists with knowledge of the circumstances of the internationally wrongful act of State B; and (ii) the act of State B would be internationally wrongful if committed by State A. The responsibility of State A is separate and distinct from the liability of State B. The responsibility of State A is that of secondary, ancillary responsibility arising from the fact that State A facilitated the wrongful act of State B, rather than primary responsibility for the direct violation committed State B.[82]

84. The ILC Commentary specifically envisages that a State may incur responsibility under Article 16 if it provides material aid to State that uses the aid to commit human rights violations.[83] Article 16 of the ILC Articles has been invoked in the European context support of human rights claims based on primary rules (e.g. the former Yugoslav Republic of Macedonia was held responsible for the deprivation of the right to liberty

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81 Commended by several UN General Assembly Resolutions including, recently, UNGA Resolution No 71/133 on the Responsibility of States for internationally wrongful acts, 19 December 2016, UN Doc A/RES/71/133.

82 See International Law Commission, 'Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001-II(2)] Yearbook of the International Law Commission ("**ILC Commentary**") p.66 [1]; Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016, Chatham House Research Paper), para 15. https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf.

83 ILC Commentary, p.67 [9]. See also Crawford et al, *The Law of International Responsibility* (2010:OUP), Pt III, ch 20.

through facilitating the extraordinary rendition of a person by the U.S.)[84] though not, as yet, plainly in the Inter-American context.[85]

85. The international rules for aiding and assisting are clear and Article 16 has been affirmed as reflecting customary international law by the International Court of Justice in the *Bosnia Genocide* decision.[86] Article 16 contains three requirements to establish responsibility for aiding and assisting:

85.1 The act committed by the recipient State must also be wrongful if committed by the assisting State.

85.2 The assisting State must provide aid or assistance, which, as a matter of fact, contributes to the commission of the unlawful act to the requisite degree; and

85.3 The assisting State must possess the requisite mental element.[87]

Condition 1: the internationally wrongful act

86. Responsibility will only be engaged where the act carried out by the recipient State would also be unlawful for the assisting State. The Interveners consider that the actions

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84 *El-Masri v The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment 13 December 2012, paras 97, 239; see also *Husayn (Abu Zubaydah) v Poland*, Application No.7511/13, Judgment, 24July 2014, para.201; *Big Brother Watch and others v the United Kingdom*, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13September 2018, para.420; *Nasr et Ghali v Italy*, Application 44883/09, Judgment, 23February 2016, para.185.

85 While the general international rules of State responsibility for aiding and assisting are clear, there is a lack of clarity as to how these rules apply in the Inter-American system (see, e.g. Rivier, 'Responsibility for Violations of Human Rights Obligations: Inter-American Mechanisms' in Crawford, supra n [47], at p.722). While Inter-American case-law has relied explicitly on the general international law of State responsibility (see, e.g. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001, Series C No. 73., Concurring Opinion of Judge Cançado Trindade, p.14), the Inter-American Court has also commented that the obligations set forth in Article 1 and 2 of the Convention are "*ultimately the basis for the establishment of international responsibility…for abridgements to the Convention…[which] constitutes lex specialis regarding State responsibility*" (*Case of the "Mapiripán Massacre" v Colombia*, Judgment of September 15, 2005 (Merits, Reparations and Costs) Series C-134, para 107). Further, the references to the general international law of responsibility are primarily in relation to the attribution of conduct of private actors to the State. There would be a benefit of specific clarity of the application of the principles of State responsibility in the Inter-American system to the context of cross-border collaboration on deportation so as to ensure more consistent compliance in the region.

86 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment of 26 February 2007, ICJ Rep 2007, para 419.

87 See Moynihan, para 18; ILC Commentary, p.66.

of the U.S. as detailed in the Request are (at the very least) relevant to the following Inter-American rights, breach of which would be internationally wrongful:[88]

86.1 The right to liberty, on the basis of arbitrary detention in the U.S. and deportation (American Declaration of the Rights and Duties of Man (the "Declaration"), Article I; Principles 72-73, Principles on Migrants);

86.2 The right to due process and protection from arbitrary arrest, on the basis of unsubstantiated allegations of criminality (Declaration, Articles XXV, XXVI; principle 50, Principles on Migrants);

86.3 The right to equal treatment before the law, on the basis of detention and deportation due to race (Declaration, Article II; Principle 12, Principles on Migrants); and

86.4 The right to seek and enjoy asylum (Article 22(7) of the American Convention and Article XXVII of the American Declaration of the Rights and Duties of Man).

87. While the U.S. has not ratified the Convention and so its responsibility would only be engaged by reference to the American Declaration, El Salvador is a party to the Convention and may additionally be in breach of Articles 7 (right to liberty), 8 (right to a fair trial), 22 (freedom of movement and residence) and 24 (right to equal protection) of the Convention if it had committed the above conduct of the U.S.

Condition 2: the assistance

88. The assistance must have contributed significantly to the wrongful act, though it need not be essential for the performance of the wrongful act.[89] There is some debate as to whether the later reference in the ILC Commentary that the assistance "*may have contributed only to a minor degree*" lowers the threshold of the nexus between the

[88] While it is generally not admissible in judicial proceedings to decide on the international responsibility of a State if to do so a court would have to rule, as a prerequisite, on the lawfulness of the conduct of another State (i.e. the *Monetary Gold* principle: *Monetary Gold Removed from Rome in 1943*, Judgment, I.C.J. Reports 1954, p. 19, at p. 32), these admissibility concerns do not arise in respect of the way the Request is presented to the Commission and the principle "*does not vitiate the purpose of article 16…[or] questions of responsibility as such*": ILC Commentary, p.67 [11].

[89] ILC Commentary, p.66 [5].

assistance and the international wrong, however, it is generally accepted that the requirement is one of 'significant contribution'.[90]

89. In any event, that the Interveners consider that the assistance of El Salvador is one of significant contribution. The assistance of El Salvador was a necessary condition to the arbitrary deportation of all of the Proposed Beneficiaries. Further, the arbitrary arrest, detention and unequal treatment of the majority of the Proposed Beneficiaries occurred after and for the purpose of fulfilling the Bilateral Agreement. The assistance provided by El Salvador in offering to "*outsource part of its prison system*" (above at para 12) on February 3 2025, only two weeks after the current U.S. Administration took office, was an apparent catalyst for the U.S. programme of arbitrary arrest and detention of migrants.

Condition 3: the "mental" element

90. Article 16 requires that the assisting State have "*knowledge of the circumstances of the internationally wrongful act*". The "mental" element of ancillary liability is the most debated in international law, however, the Interveners nevertheless consider that it is likely satisfied in the present circumstances.

91. The State must have knowledge of the underlying circumstances of the act but also its wrongfulness. In the *Bosnian Genocide* case, the ICJ held that Serbia did not know that genocide was being committed by the Bosnian Serb army, because Serbia did not know of the specific intent of that army (genocide being a crime of specific intent).[91]

92. As to the degree of knowledge of the circumstances of wrongfulness, while actual knowledge will obviously satisfy the mental element, there is strong support that wilful blindness would suffice. If a State makes a deliberate effort to avoid knowledge of illegality or has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye.[92] This reflects the reality of international relations where States are not privy to the detailed future plans of another State, particularly where such plans involve the commission of an international wrong.

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90 See Moynihan, paras 22-27.
91 *Bosnian Genocide*, para 421.
92 See Moynihan, para 50; Miles Jackson, *State Complicity in International Law* (OUP, 2015) pp.160-162.

93. While the text of Article 16 does not include any requirement of 'intent', the ILC Commentary states that the assistance must be given "*with a view to facilitating the commission of that [wrongful] act, and must actually do so*".[93] However, because there is no specific requirement of intent additional to knowledge set out in Article 16, the better view is that the assisting State need not actually 'desire' that the international wrong take place; if assistance is given with 'near certain' knowledge of illegality where, as a matter of general principle, States are supposed to intend the foreseeable consequences of their acts, then the requisite 'intent' under the ILC Commentary can be imputed on the basis of the State's knowledge.[94]

94. President Bukele's initial offer to the U.S. was to accept "convicted criminals" (see above at para 12). It has been reported that President Bukele sought assurances from the U.S. that those people it detained were members of Tren de Aragua.[95] However, in response to an article from the New York Post reporting that a U.S. federal judge issued an order temporarily blocking the U.S. from invoking the Alien Enemies Act "*to swiftly deport alleged Venezuelan gang members without a hearing*",[96] President Bukele posted on X "Oopsie…Too late".[97] The Interveners consider that it is likely that El Salvador possessed, if not actual knowledge, then at least wilful blindness to the wrongfulness of the arbitrary arrests and deportations of the Proposed Beneficiaries by the U.S. The subsequent repatriation of Venezuelan nationals by the United States in exchange for Venezuela's release of U.S. nationals only emphasizes this knowledge and cooperation.

Conclusion on State Responsibility

95. The Interveners respectfully submit that the Commission ought to have regard to the potential secondary responsibility of El Salvador for the breaches of Inter-American rights conducted by the U.S. While the Request is not presented on the basis of El

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93 ILC Commentary, p.66 [5].

94 See Moynihan, para 74, Crawford, 408.

95 'Behind Trump's Deal to Deport Venezuelans to El Salvador's Most Feared Prison', *New York Times* (April 30, 2025) https://www.nytimes.com/2025/04/30/us/politics/trump-deportations-venezuela-el-salvador.html.

96 New York Post, 'Fed judge orders deportation flights carrying alleged Venezuelan gangbangers to return to US, blocks Trump from invoking Alien Enemies Act; (March 15, 2025) https://nypost.com/2025/03/15/us-news/fed-judge-orders-deportation-flights-carrying-alleged-venezuelan-gangbangers-to-return-to-us-after-trump-invokes-alien-enemies-act/.

97 Nayib Bukele (@nayibbukele), *Oopsie…Too late,* X (Mar. 16, 2025), https://x.com/nayibbukele/status/1901238762614517965?lang=en.

Salvador's ancillary responsibility, it contains claims of detailed and widely reported breaches of human rights by the U.S. in furtherance of the Bilateral Agreement between the U.S. and El Salvador under which vulnerable migrants were arbitrarily detained, deported and imprisoned in inhumane conditions. In view of the regional and cross-border nature of these violations, the Interveners consider that the ancillary responsibility of El Salvador is relevant to the seriousness of the situation warranting precautionary measures.

96. Such submission is without prejudice to the potential international responsibility of the U.S. for the direct violations of Inter-American and international human rights. Article 19 of the ILC Articles provide that liability under Article 16 of the assisting State does not prejudice responsibility of the receiving State. By the same token, El Salvador's potential responsibility for the international wrongs enumerated at Section C above is without prejudice to the potential secondary responsibility of the U.S. for such wrongs. In deporting the Proposed Beneficiaries to CECOT under the Bilateral Agreement, the U.S. similarly engages international responsibility under Article 16 of the ILC Articles, for aiding and assisting breaches of human rights by El Salvador.]

F. CONCLUSION AND RECOMMENDATIONS

97. In light of the above concerns, the Interveners consider that the actions of El Salvador constitute violations of fundamental Inter-American and international rights of the Proposed Beneficiaries who, as migrants, are particularly vulnerable to violations of human rights. Those violations have subjected, and continue to expose the Proposed Beneficiaries, to serious and irreparable harm.

98. The Interveners respectfully invite the Commission to adopt the precautionary measures sought by the Proposed Beneficiaries and to make recommendations to El Salvador under Article 41(b) of the Convention to cease accepting deportations of migrants under the Bilateral Agreement.

31 July 2025

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