



# *“Because of the Color of My Skin and the Way I Speak Spanish”:*

The INM’s Detention and Deportation of  
Indigenous and Afro-Descendant Mexicans



**“Because of the Color of My Skin and the Way I Speak Spanish”: The INM’s Detention and Deportation of Indigenous and Afro-Descendant Mexicans**

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# “Because of the Color of My Skin and the Way I Speak Spanish”:<sup>1</sup> The INM’s Detention and Deportation of Indigenous and Afro-Descendant Mexicans

## I. INTRODUCTION

While traveling on a bus to visit family friends in Tapachula, Chiapas in 2009, Tobyanne Ledesma Rivera, then in her early twenties, was singled out by migration authorities.<sup>2</sup> The authorities boarded the bus but only asked two people, Ledesma Rivera and her mother, what they were doing there.<sup>3</sup> According to Ledesma-Rivera, she and her mother were the only two visibly Afro-descendant passengers on the bus.<sup>4</sup> In response, Ledesma Rivera and her mother explained their trip and each showed their voter identification cards,<sup>5</sup> thus indicating their Mexican nationality.<sup>6</sup> The migration authorities then demanded to see their passports; Ledesma Rivera responded that they had not brought their passports because they were traveling domestically in their own country.<sup>7</sup> The authorities proceeded to take Ledesma Rivera and her mother off the bus and then separate them for interrogation.<sup>8</sup>

To Ledesma Rivera, who has lighter skin than her mother, they asked who she was traveling with, whether they were voluntarily traveling together, and where they were going; to her mother, migration authorities asked what she was doing in Mexico, and how she possessed a voter credential.<sup>9</sup> After two hours of interrogation, Ledesma Rivera and her mother were released and, their bus having long since departed without them, walked back to the bus depot.<sup>10</sup>

This is not the first time that agents of the National Migration Institute (“INM” for its Spanish acronym) have, in the words of the National Commission for Human Rights (“CNDH” for its Spanish acronym), “decided to ignore that [a victim] was a Mexican citizen, and treated them as if they were a foreigner.”<sup>11</sup> Ledesma Rivera has since avoided the INM and its discriminatory practices by staying away from the south of Mexico.<sup>12</sup> Her mother, however, who immigrated to Mexico from Cuba in the 1960s, frequently encounters this type of questioning and assumptions throughout the country.<sup>13</sup> In administrative processes, for example, she is asked to produce evidence not usually required in order to prove her Mexican citizenship.<sup>14</sup> Ledesma Rivera, who now serves as the General Director of the Mechanism for

1. Interview by la Coalición Indígena de Migrantes de Chiapas [hereinafter CIMICH] with Jesús. Translated from the original Spanish: “. . . me empezaron a discriminar por el color de piel y por la forma que hablo el español.” The translations in this document are not official translations.

2. Telephone Interview with Tobyanne Ledesma Rivera (July 11, 2019) (on file with authors).

3. *Id.*

4. This report will use the term “Afro-descendant,” which was defined at the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Durban in 2001 as “a person of African origin who lives in the Americas and in the region of the African Diaspora as a result of slavery, who has been denied the exercise of their fundamental rights.” *The Situation of People of African Descent in the Americas*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., doc. 62, 19 (Dec. 5, 2011), [https://www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS\\_2011\\_ENG.pdf](https://www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS_2011_ENG.pdf). This report will also use the term “Afro-Mexican” which has been defined to include “persons of Mexican nationality who are descendants of African men and women who were separated from their communities of origin and forcefully brought to the American continent during the colonial period from the 16th to the 19th century, or those who migrated to what is now Mexico after the nation’s Independence” (author’s translation *Afrodascendencias en México Investigación e Incidencia*, A.C., *Decálogo para el reconocimiento de las poblaciones afro-mexicanas y sus derechos en la constitución política de la ciudad de México* 1 (2016), <http://www.migrantologos.mx/es/images/pdf/reconocimientoafrocdmxfl.pdf>).

5. Voter identification cards, issued by Mexico’s National Electoral Institute, are the most common form of personal identification for Mexicans in Mexico, similar to driver’s licenses in the United States. Because proof of Mexican nationality is required to obtain an “INE” (as the cards are known in their Spanish acronym), the card also demonstrates Mexican citizenship. See *Detalles de la solicitud para la Credencial para Votar, Instituto Nacional Electoral (INE)*, <https://www.ine.mx/credencial/credencial-proceso/> (last visited July 10, 2019).

6. Interview with Tobyanne Ledesma Rivera, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 68/2017 78 (Dec. 11, 2017) [hereinafter Recomendación No. 68/2017].

12. Interview with Tobyanne Ledesma Rivera, *supra* note 2.

13. *Id.*

14. *Id.*

Integral Protection of Defenders of Human Rights and Journalists of Mexico City, blames this racial profiling, in part, on the fact that many Mexicans believe that there are no black people in Mexico.<sup>15</sup>

Indigenous Mexicans experience similar racial profiling.<sup>16</sup> Mexican migration agents have explained that they can identify an undocumented migrant before even speaking with them: they recognize them, amongst other characteristics, “by their nervous behavior; by the color of their skin, by their dress, but above all by their odor.”<sup>17</sup> These discriminatory methods lead to the illegal detention, disappearance, and deportation of indigenous and Afro-descendant Mexican citizens who are misidentified as undocumented migrants by migration agents.

This report focuses on the illegal treatment of indigenous and Afro-descendant Mexican citizens by the INM and local and federal authorities that also participate. Mexico’s detention, disappearance, and deportation of Afro-Mexican and indigenous Mexican citizens violates Mexican and international law protecting fundamental human rights, including the right to nationality, the right to identity, the right to personal liberty, the right to freedom of movement, and the right not to be discriminated against.

First, this report describes various personal accounts by indigenous and Afro-Mexican victims of the INM’s discriminatory treatment. These narratives were collected through interviews conducted by the Institute for Women in Migration (“IMUMI” for its Spanish acronym) and the Chiapas Indigenous Migrant Coalition (“CIMICH” for its Spanish acronym), as well as from media publications and CNDH recommendations. Second, this report explains three institutional and cultural barriers to compliance with human rights law: the “mestizo myth” in Mexico and the invisibility of certain ethno-racial minorities, the INM’s internal and external pressures against human rights compliance, and articles of the Law of Migration that unconstitutionally permit racial profiling. Finally, this report examines the CNDH’s recommendations related to the detention and disappearance of indigenous Mexicans by agents who believed them to be immigrants, and the domestic, regional, and international law upon which the CNDH draws.

## II. THE INM’S DETENTION AND DEPORTATION OF AFRO-MEXICANS

Tanya Duarte, director of the Mexico Afrodescendancy Project, works to make Afro-Mexicans visible in the country.<sup>18</sup> She has experienced racial profiling by the INM on numerous occasions, beginning when she was twelve years old: while leaving for school, two men hit her and brought her in a private car to a detention facility.<sup>19</sup> Fortunately, neighbors notified her mother, who came to collect Duarte with money and photos to prove their relationship.<sup>20</sup> At age 16, authorities detained Duarte for two days; she was carrying only her student identification at the time.<sup>21</sup>

The next time authorities detained Duarte, they only kept her for a few hours because her friends—also Mexican but not Afro-descendants like Duarte—defended her.<sup>22</sup>

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15. *Id.*

16. Gabriela Díaz Prieto, *El Colegio de la Frontera Norte, Operativos móviles de revisión migratoria en las carreteras de México (2016)*, <http://unviajesinrastrros.imumi.org/wp/wp-content/uploads/2016/08/Operativos-de-revision-migratoria-en-carreteras.pdf>.

17. *Id.* at 4.

18. María Gabriela López Suárez, *Proyecto Afrodescendencia México, la existencia de la tercera raíz*, CIENCIA. MX., <http://www.cienciamx.com/index.php/ciencia/humanidades/24703-proyecto-afrodescendencia-mexico> (last visited July 25, 2019).

19. Telephone Interview with Tanya Duarte (July 18, 2019) (on file with authors).

20. *Id.* Duarte’s mother provided photo evidence of their relationship because of the difference in their skin color.

21. *Id.*

22. *Id.*

Duarte explains, “Since I was in my twenties, I’ve learned that I must have my birth certificate and passport and all identification possible. Now I show [migration authorities] everything. I have my Sam’s Club membership, my driver’s license, I have absolutely everything, even my CineMex membership.”<sup>23</sup> During such interactions, migration authorities often claim that her voter credential is fake and demand that she sing the Mexican National Anthem, which she refuses to do.<sup>24</sup> “Instead, I give them the recipes for mole, for Tlalpeño soup, and more recipes. It surprises them. Also, I give them cultural details about my country and especially my rights as a Mexican, so in the end they let me go.”<sup>25</sup> Having to carry all of her identification documents in case of stops and interrogations by migration authorities “is part of my daily life,” Duarte says.<sup>26</sup>

This is the reality that countless Afro-Mexicans face<sup>27</sup>. In one publicly-reported case, the INM detained Leonardo and José González Silverio for 15 days despite the brothers producing their voter ID cards—the INM planned to deport the brothers to the Dominican Republic, but their parents traveled to Tijuana to advocate for, and eventually secure, their release.<sup>28</sup> In another case, Crisógono Prudente Rodríguez, known as “Chogo El Bandeño,” an Afro-Mexican singer in Mexico City, was detained and required to sing the Mexican National Anthem three times and list the governors of five states before he was released.<sup>29</sup> Tour guide Oliverio Francés was detained while he was waiting for a tour group to arrive at the airport in Villahermosa—authorities held him for 24 hours because they believed him to be Honduran.<sup>30</sup> Lucía Domínguez was detained in Mexico City and deported to Cuba in less than 24 hours; Mexican authorities did not attempt to validate her identity with the Civil Registry of Oaxaca before deporting her.<sup>31</sup> The deportation of Afro-Mexicans to Haiti is so widespread that the Haitian media calls it a “systemic problem.”<sup>32</sup>

While certain locations (especially points of transit, such as airports and buses) see higher rates of INM abuse, within the Afro-Mexican population there does not seem to be a trait, occupation, gender, or other determining factor that increases the probability of INM discrimination. In addition, while the described cases captured the attention of the media and involved victims willing to share their experiences, most cases go unreported.<sup>33</sup> Duarte explains, “People are so afraid of being disappeared that they do not want to report it.”<sup>34</sup>

### III. THE INM’S DETENTION AND DEPORTATION OF INDIGENOUS MEXICANS

The INM also detains and deports indigenous Mexicans based on the racist misapprehension that they are undocumented Central Americans<sup>35</sup>. Experiences described in news articles, CNDH recommendations, and collected through a series

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. For information on racial dynamics in other Latin American countries, see Edward Telles, *Pigmentocracies: Ethnicity, Race, and Color in Latin America* (U. of N. Carolina Press 2014).

28. Témoris Grecko, *Afromexicanos: La discriminación visible*, EL PROCESO (Apr. 1, 2017), <https://www.proceso.com.mx/480201/afromexicanos-la-discriminacion-visible>.

29. Luis Carlos Rodríguez, *México deporta a “afrodescendientes” a Haití solo por su color de piel*, Hougansydney: Haiti News (Feb. 20, 2017), <https://mexiconuevaera.com/nacional/estados/2017/02/20/deporta-mexico-afrodescendientes-haito-solo-pos-su-color-de-piel>.

30. Grecko, *supra* note 28.

31. *Id.* The Mexican consulate in Cuba later assisted Domínguez in returning to Mexico due to media pressure.

32. *Id.* (citing *Black Mexicans deported from Mexico to Haiti for “looking like a Haitian”*, Hougansydney: Haiti News (April 11, 2016), <http://hougansydney.com/whats-happening-in-haiti/black-mexicans-deported-from-mexico-for-looking-like-a-haitian->).

33. *Id.* See, e.g., Nina Lakhani, *Mexico tortures migrants – and citizens – in effort to slow Central American surge*, *The Guardian* (Apr. 4, 2016), <https://www.theguardian.com/world/2016/apr/04/mexico-torture-migrants-citizens-central-america>; Red Migrante Sonora, *Y la impunidad continua. Segundo informe de la Red Migrante Sonora 32* (June 2017), <https://www.kinoborderinitiative.org/wp-content/uploads/2017/12/Informe-RMS.pdf>.

34. Interview with Tanya Duarte, *supra* note 19.

35. Díaz Prieto, *supra* note 16.

of interviews CIMICH conducted with indigenous Mexicans show patterns of abuse by migration agents<sup>36</sup>. Common threads in the narratives include nighttime migration checks of buses in transit, demands to produce documents proving nationality, and the particular vulnerability of indigenous Mexicans traveling between Mexican states for work.<sup>37</sup> Migration agents' focus on appearance and manner of speaking Spanish when making citizenship determinations was also a recurring theme.<sup>38</sup>

Unlike in the case of Afro-Mexicans, there seem to be demographic factors that heighten the likelihood of indigenous Mexicans becoming victims of racial profiling: many of the victims are young males (late teens and early twenties), hail from rural and disproportionately- impoverished indigenous communities,<sup>39</sup> do not speak fluent Spanish, and are harassed while in transit on economy buses in search of agricultural work.<sup>40</sup> For example, Jesús, a 21-year-old male from Yaxgemel (in the municipality of Chenalhó, Chiapas) whose first language is Tsotsil, was traveling by bus between San Cristóbal de Las Casas and Tuxtla Gutiérrez for construction work.<sup>41</sup> Migration agents stopped his bus, reviewed his papers, and said he was not Mexican and that his physical characteristics seemed very Central American.<sup>42</sup> The agents "discriminated against me because of the color of my skin and the way I speak Spanish," Jesús told his CIMICH interviewers.<sup>43</sup>

Domingo, a 22-year-old male from Nail Ch'en (in the municipality of San Juan Cancuc, Chiapas) whose first language is Tzeltal, traveled from Chiapas to Sonora in search of agricultural work.<sup>44</sup> He described increased and "harsher" migration checkpoints as the bus traveled further north, with indigenous Mexicans often taken off the bus and asked to produce a voter credential, Clave Única de Registro de Población ("CURP"), the Mexican equivalent of a social security number,<sup>45</sup> and birth certificate, among other documents.<sup>46</sup> As Domingo explained, "in the detentions, they always told us that we are Central American, Guatemalan and/or Honduran."<sup>47</sup> When officials took him and other indigenous Mexicans off buses to check documents, the officials would say it was because they "look[] like Central Americans," "hardly speak Spanish well," and their Spanish accent "seems like [that of] Central Americans."<sup>48</sup>

According to multiple accounts, migration agents try to determine nationality by using tactics such as forcing detainees to sing the Mexican National Anthem and answer questions about Mexico.<sup>49</sup> Chepe, an agricultural worker from the Mequeja community (in the municipality of Chilón, Chiapas), said that after providing his own identification to an INM

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36. See, e.g., Interviews by CIMICH, *supra* note 1.

37. *Id.*

38. *Id.*

39. *Más del 70% de los indígenas, en situación de pobreza: Coneval*, Aristegui Noticias (Aug. 9, 2018), <https://aristeginoticias.com/0908/mexico/mas-del-70-de-los-indigenas-en-situacion-de-pobreza-coneval/>.

40. Interview by CIMICH with Ana and Chepe (on file with authors).

41. Interview with Jesús, *supra* note 1.

42. *Id.*

43. *Id.*

44. Interview by CIMICH with Domingo (on file with authors).

45. Anna Joseph et al, Institute for Women in Migration, *Mexican Tarjetas de Visitante por Razones Humanitarias and Firm Resettlement: A Practice Advisory for Advocates* 9 (June 7, 2019), <http://imumi.org/attachments/2019/Mexican%20Tarjetas%20de%20Visitante%20por%20Razones%20Humanitarias%20and%20Firm%20Resettlement%20-%20A%20Practice%20Advisory%20for%20Advocates.pdf>. See also *Acuerdo para la adopción y uso por la Administración Pública Federal De la Clave Única de Registro de Población*, Diario Oficial de la Federación [DOF] 10-23-1996 (Mex.).

46. Interview with Domingo, *supra* note 44.

47. *Id.*

48. *Id.*

49. Interview with Chepe, *supra* note 40; interview by CIMICH with Álvaro (on file with authors).

agent and answering questions, he watched an INM agent ask the boy sitting next to him for identification.<sup>50</sup> The boy provided his voter credential, and the INM agent asked the boy why he had not renewed the credential since it was very worn and part of the edge was unstuck.<sup>51</sup> The agent “beg[an] to say that his [voter credential] is false, so the boy no longer knew what to say and they got him off the bus; they started to tell him that he is not Mexican, that he is Guatemalan<sup>52</sup>.” Chepe observed from the window that the boy “began to march as a soldier and to sing the national anthem” while the INM agents watched; meanwhile other boys who had been removed from the bus were showing their birth certificates.<sup>53</sup> After several minutes, the boys were freed and re-boarded the bus.<sup>54</sup>

Álvaro, a male from the Pechiquil community (in the municipality of Chenalhó, Chiapas), reported that upon being deported to Mexico from the United States, INM agents declared that, based on his physical characteristics and the way he speaks, he was not Mexican but Guatemalan.<sup>55</sup> The agents forced him call his family in Chiapas, sing the national anthem, and tell stories of Mexico to prove otherwise.<sup>56</sup> This questioning was carried out with violent physical force, Álvaro said, who also stated that the agents’ treatment was “inhumane<sup>57</sup>.” He added that the INM agents “don’t use any suitable mechanism to determine the nationality of detainees,” and that Mexicans are mistaken for Guatemalans and nationals of other Central American countries.<sup>58</sup> CIMICH reports that the INM has been violating human rights “constantly,” “due to the lack of or few complaints made by the victims, that is, detained and deported migrants<sup>59</sup>.” While human rights defenders report that the INM generally deports indigenous Mexicans to Guatemala or Honduras and Afro-Mexicans to Honduras, Haiti, or Cuba, the situation is not visible to the public and very few cases receive support from civil society organizations.<sup>60</sup> Due to that lack of attention, and the fact that the Mexican government does not publish statistics on the number of people who claim Mexican citizenship prior to deportation or the number of people its consulates help repatriate after wrongful deportation, there is no specific data on the detention and deportation of indigenous or Afro-descendant Mexicans.<sup>61</sup>

One case that did receive support from civil society was that of eighteen-year-old Maximiliano Gordillo Martínez. On May 7, 2016, Gordillo Martínez, a member of the Tzinil indigenous community, was traveling via bus from his home state of Chiapas to Quintana Roo in search of work when INM officials falsely identified him as an undocumented Guatemalan migrant.<sup>62</sup> He carried his birth certificate and his CURP, but officials dismissed those documents as fake.<sup>63</sup> INM agents took him into custody at the migration detention center in Chablé, Tabasco, but then denied having had any contact with Gordillo Martínez.<sup>64</sup>

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50. Interview with Chepe, *supra* note 40.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Interview with Álvaro, *supra* note 49.

56. *Id.*

57. *Id.*

58. *Id.*

59. Comments by CIMICH that accompanied the interviews (on file with authors).

60. *Id.* See also Interview with Tanya Duarte, *supra* note 19.

61. Comments by CIMICH, *supra* note 59; Interview with Tanya Duarte, *supra* note 19.

62. *Desaparición Forzada de Maximiliano Gordillo Martínez por agentes del INM*, CDH Fray Bartolomé De Las Casas: Acciones Urgentes (May 18, 2016), <https://frayba.org.mx/desaparicion-forzada-de-maximiliano-gordillo-martinez-por-agentes-del-inm/>.

63. *Id.*

64. *Id.*

Fifty-two days later, after a national and international campaign drew attention to Gordillo Martínez's disappearance, he re-appeared in Chiapas.<sup>65</sup> His family confirmed to reporters that during his detention by the INM he had suffered grave human rights violations.<sup>66</sup> Voces Mesoamericanas, a civil society organization, believes that Martínez's forced disappearance was the INM's attempt to cover up its violation of a recommendation issued by the CNDH five months earlier regarding the discriminatory detention of indigenous Mexicans.<sup>67</sup> That is, the INM misidentified Martínez as Central American, detained him in contravention of the CNDH decision, and then held him for months to conceal its error.

The CNDH, an independent constitutional organization charged with ensuring that "the Mexican state remedies human rights abuses and reforms the laws, policies, and practices that give rise to them," has issued multiple recommendations regarding the INM's racial profiling of indigenous Mexicans.<sup>68</sup> For example, a recommendation issued December 31, 2015 ("the 58/2015 recommendation") censures the illegal detention of thirteen Mexican citizens in the span of less than a year.<sup>69</sup> Some of the victims cannot read, write, or understand Spanish, and still others were unaccompanied minors at the time of their detention.<sup>70</sup>

In a recommendation issued in 2016 ("the 22/2016 recommendation"), the CNDH addresses human rights violations committed against a family of indigenous Mexicans.<sup>71</sup> On September 3, 2015, near the city of Querétaro, four family members from the Tzeltal indigenous community ("Victims 1, 2, 3 and 4")<sup>72</sup> had traveled on a bus towards Guaymas, Sonora where they intended to find jobs as agricultural day laborers.<sup>73</sup> Victim 3 was only seventeen years old.<sup>74</sup>

Victims 1 and 2 did not fluently speak or understand Spanish.<sup>75</sup> INM officials boarded the bus and conducted a migratory inspection, ultimately pulling ten passengers off of the bus for further inspection.<sup>76</sup> Among those ten were Victims 1, 2, and 3,<sup>77</sup> even though they each carried copies of their birth certificates issued by the Civil Registry of Chiapas and Victim 2 also carried a copy of her voter credential.<sup>78</sup> Despite the identification documents they carried, INM officials decided that the victims were undocumented Guatemalan migrants.<sup>79</sup> One day after Victims 1, 2 and

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65. Isáin Mandujano, *Tras 52 días de desaparecido, joven indígena aparece con vida en Chiapas*, Proceso (Sept. 3, 2016), <https://www.proceso.com.mx/453477/tras-52-dias-desaparecido-joven-indigena-aparece-vida-en-chiapas>.

66. *Id.* As of the writing of this report, no further information is known on Gordillo Martínez's experiences during or after his forced disappearance.

67. Gloria Leticia Díaz, *Acusan a agentes del INM por desaparición forzada de joven chiapaneco*, Proceso (Aug. 22, 2016), <https://www.proceso.com.mx/451882/acusan-a-agentes-del-inm-desaparicion-forzada-joven-chiapaneco>.

68. *Mexico's National Human Rights Commission: A Critical Assessment*, Human Rights Watch (Feb. 12, 2008), <https://www.hrw.org/report/2008/02/12/mexicos-national-human-rights-commission/critical-assessment>.

69. Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 58/2015 (Dec. 31, 2015) (Mex.) [hereinafter Recomendación No. 58/2015].

70. *Id.* 64.

71. Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No.22/2016 (May 22, 2016) [hereinafter Recomendación No. 22/2016]. See also el Presidente de la Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 29/2007 (Aug. 8, 2007) [hereinafter Recomendación No. 29/2007] (finding that the INM violated a Honduran mother's right to legality and legal certainty, and that the INM violated the mother's Mexican-born infant's rights to equality, identity, nationality, and legal personality); Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 36/2013 (Oct. 1, 2013) [hereinafter Recomendación No. 36/2013] (addressing the INM's violations of a Venezuelan mother's right to legal certainty and dignified treatment, and the violations of her Mexican minor daughter's right to Mexican nationality, including the rights to legality, equality, and education).

72. CNDH recommendations use "Victim No." in lieu of names to protect the victims' confidentiality.

73. Recomendación No. 22/2016, *supra* note 71, 2; Díaz Prieto, *supra* note 16, at 3-4.

74. Recomendación No. 22/2016, *supra* note 71, 17.3.4.

75. *Id.*

76. Díaz Prieto, *supra* note 16, at 3.

77. Díaz Prieto, 22/2016, *supra* note 71, 3.

78. *Id.* at 34.

79. Recomendación No. 22/2016, *supra* note 71, 3-9.

3 were detained in an migration detention center (“estación migratoria”),<sup>80</sup> the INM requested and received from the Guatemalan Embassy in Mexico special passes for the victims to enter Guatemala.<sup>81</sup> Only after the Guatemalan Embassy—having found no record of the victims in the national registry—canceled the passes previously issued did the INM reach out to the Civil Registry in Chiapas to corroborate the authenticity of the birth certificates provided by the victims, who were eventually released.<sup>82</sup>

The INM later provided numerous, inconsistent explanations for why the victims were detained: in an interview conducted by the CNDH four days after the event, an INM agent claimed that the victims had said they were Guatemalan;<sup>83</sup> Victims 2 and 3 said they had Guatemalan parents and Victim 1 said he was born in Guatemala,<sup>84</sup> and Victim 1 admitted his identification documents were purchased.<sup>85</sup> The victims dispute these claims; in addition, Victim 1 asserts that once taken into custody, he was tortured via a kick to the leg and electrical shocks to the hand because he refused to admit he was Guatemalan.<sup>86</sup> Victim 4, who disembarked the bus when he realized his family was not returning, says he was told by the agents that his family members’ documents were invalid because birth dates were inconsistently listed.<sup>87</sup> An official document by the INM written nearly a month after the incident, meanwhile, states that the victims were detained because copies of birth certificates are not enough to guarantee their authenticity.<sup>88</sup> Noting the similarities with the circumstances of the 58/2015 recommendation, the CNDH concludes in the 22/2016 recommendation that the INM detains individuals based not on objective determinations, but rather on subjective presumptions regarding an individual’s appearance.<sup>89</sup>

A 2017 recommendation (“the 31/2017 recommendation”) echoes this finding, holding that the victim, a seventeen-year-old Mexican woman who was pulled off of her bus in Chiapas at 2:30 in the morning on June 23, 2015 by INM agents who identified her as Guatemalan despite her proffered CURP, was also a victim of racial profiling.<sup>90</sup> She has been missing since that time.<sup>91</sup> According to INM agents, they decided to give the victim “the benefit of the doubt” and released her at 3:00 in the morning without confirming or denying her Mexican nationality.<sup>92</sup> Although the 31/2017 recommendation does not include the victim’s ethnicity, it indicates that she was in a similar situation to the victims of recommendations 58/2015 and 22/2016,<sup>93</sup> who were indigenous, and that she was detained because of her “foreign features,”<sup>94</sup> and was thus a victim of discrimination.<sup>95</sup> The CNDH attributes her forced disappearance to the INM’s actions.<sup>96</sup>

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<sup>80</sup> In Mexico, spaces where migrants are detained are called estaciones or estancias migratorias, and these are not legally considered “detention,” but “housing” (*alojamiento*). Arguing from the self-evident fact that migrants held in these places are deprived of liberty (i.e., not free to leave), advocates have been working for years to achieve recognition of the fact that Mexican migration detention is legally detention.

<sup>81</sup> Recomendación No. 22/2016, *supra* note 71, 4.

<sup>82</sup> *Id.* 5, 17.3.13.

<sup>83</sup> *Id.* 8.

<sup>84</sup> *Id.* 34.

<sup>85</sup> *Id.* 8.

<sup>86</sup> *Id.* 12.

<sup>87</sup> *Id.* 15.2.

<sup>88</sup> *Id.* 17.1.

<sup>89</sup> *Id.* 134.

<sup>90</sup> Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 31/2017 3-5, 42, 238, 243 (Aug. 21, 2017) [hereinafter Recomendación No.31/2017].

<sup>91</sup> *Id.* 87.

<sup>92</sup> *Id.* 43.

<sup>93</sup> *Id.* 238.

<sup>94</sup> *Id.* 73.

<sup>95</sup> *Id.* 228-244.

<sup>96</sup> *Id.* 146.

## IV. FACTORS THAT CONTRIBUTE TO THE DETENTION AND DEPORTATION OF INDIGENOUS AND AFRO-DESCENDANT MEXICANS

This section explores three factors contributing to the INM's continued non-compliance with domestic and international law and perpetuation of racialized human rights violations: the ideology of mestizaje, which creates disbelief that Afro-descendant and indigenous Mexicans “look Mexican”; the disproportionate presence of indigenous and Afro-Mexican communities in areas most highly policed by the INM; and the Law of Migration's discriminatory articles.

### A. The Mestizo Myth, Afro-Mexican Invisibility, and Anti-Indigenous Racism

Numerous studies show that Afro-Mexicans confront systemic discrimination: they are denied access to public health care, employment, housing, and schools (in which, when allowed to enroll, Afro-Mexicans are often bullied and discriminated against), all based on skin color.<sup>97</sup> This deeply-embedded racism traces back to the Spanish conquest in the sixteenth century: Mexico, then called “New Spain,” was a Spanish territory “comprised of Spanish colonizers, indigenous natives (who were often enslaved . . . ), African slaves, freed Blacks, and slaves from the Pacific Islands.”<sup>98</sup> The Crown used both African and indigenous slaves to achieve the Spanish goal of economic growth and territorial expansion in New Spain.<sup>99</sup>

Indigenous people and Afro-descendants served different roles, however. While the enslavement of indigenous people was initially endorsed by the Spanish Crown, exploitation, wars, and epidemics so devastated indigenous populations that, in 1542, indigenous slavery was abolished.<sup>100</sup> Instead, indigenous populations worked for low wages, were forced to pay tribute, and were evangelized and incorporated into the Catholic community, while increasing numbers of Africans were imported as slaves.<sup>101</sup> The Crown turned “indigenous people into quasi citizens – subject to Spanish rule but also entitled to certain protections, rights, and privileges . . . the most precious [of which] was undoubtedly freedom.”<sup>102</sup> Meanwhile, approximately 250,000 enslaved Africans were brought to Mexico during the period of the Viceroyalty, mostly between 1580 and 1650.<sup>103</sup>

Slavery of Africans and their descendants was rationalized as an economic necessity; for example, during the 1665-1700 reign of King Carlos II, a report by the Council of the Indies stated that the “fatal consequences of not having [blacks] are easily deduced, for . . . they are the ones who cultivate the haciendas, and there is no one else who could do it,

97. See, e.g., *Africa's Lost Tribe in Mexico*, *New African* (Jan. . 10, 2012), <https://newafricanmagazine.com/3308/2/>; *Reconocimiento de las poblaciones afroamericanas en la constitución de la Ciudad de México*, Afrodescendientes en México Investigación e Incidencia, A.C., <https://www.change.org/p/diputadas-y-diputados-de-la-asamblea-constituyente-de-la-ciudad-de-mexico-reconocimiento-de-las-poblaciones-afroamericanas-en-la-constitucion-de-la-ciudad-de-mexico> (last visited Jan. 9, 2020); Consejo para Prevenir y Eliminar la Discriminación de la Ciudad de México <https://www.copred.cdmx.gob.mx> (last visited Oct. 1, 2019); Encuesta sobre Discriminación en la Ciudad de México, Consejo para Prevenir y Eliminar la Discriminación de la Ciudad de México <http://data.copred.cdmx.gob.mx/programas-estudios-e-informes/encuesta-sobre-discriminacion-en-la-ciudad-de-mexico-2013/> (last visited Oct. 1, 2019); Consejo Nacional para Prevenir la Discriminación (CONAPRED), *Encuesta Nacional sobre Discriminación en México*, (Apr. 2011), [www.conapred.org.mx/userfiles/files/Enadis-2010-RG-Accss-002.pdf](http://www.conapred.org.mx/userfiles/files/Enadis-2010-RG-Accss-002.pdf); Consejo Nacional para Prevenir la Discriminación, *Documento informativo sobre discriminación racial en México* (Mar. 27, 2011), [www.conapred.org.mx/documentos\\_cedoc/Dossier%20DISC-RACIAL.pdf](http://www.conapred.org.mx/documentos_cedoc/Dossier%20DISC-RACIAL.pdf); *Denuncia CNDH el entorno de exclusión e indiferencia en que viven un millón 381 mil 853 afrodescendientes mexicanos, y llamó a reconocer, proteger y defender sus derechos*, Comisión Nacional de los Derechos Humanos (CNDH) (Oct. 18, 2016), [https://www.cndh.org.mx/sites/default/files/doc/Comunicados/2016/Com\\_2016\\_267.pdf](https://www.cndh.org.mx/sites/default/files/doc/Comunicados/2016/Com_2016_267.pdf); Andrés Villarreal, *Stratification by Skin Color in Contemporary Mexico*, 75.5 AM. SOC. ASS'N 652, 658-659, 665-666 (2010); Eucenia Iturriaca Acevedo, *Las élites de la ciudad blanca: racismo, prácticas y discriminación étnica en Mérida, Yucatán 3* (Universidad Autónoma de Yucatán 2011), <http://132.248.9.195/ptb2011/abril/0668094/Index.html>.

98. See, e.g., Noah M. Wright, *The Historical Trauma: the impact of colonial racism on contemporary relations between African Americans and Mexican Immigrants*, *Colorado State University* 61 n.68 (Spring 2011), ProQuest Dissertations Publishing (database updated 2011).

99. *Id.* at 61 (internal citation omitted).

100. María Elena Martínez, *The Black Blood of New Spain: Limpieza de Sangre, Racial Violence, and Gendered Power in Early Colonial Mexico*, 61 *The William and Mary Q.* 479, 486-487 (2004).

101. *Id.* at 487; Wright, *supra* note 98, at 62 n.70.

102. Martínez, *supra* note 100, at 487.

103. María Elisa Velázquez, UNESCO: The Slave Route Project, *Africans and Afro-descendants in Mexico and Central America: overview and challenges of studies of their past and present 4*, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Maria\\_Elisa\\_Velazquez\\_Eng\\_01.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Maria_Elisa_Velazquez_Eng_01.pdf) (last visited Oct. 1, 2019).

because of the lack of Indians”: Spanish America would therefore face “absolute ruin.”<sup>104</sup> Christian discourses were also used to rationalize slavery: at the time, Spaniards “were regularly deploying the myth of the Curse of Ham against dark-skinned Africans, thereby linking them to a stained biblical genealogy that was condemned to perpetual servitude.”<sup>105</sup> Indigenous peoples, meanwhile, were descendants from “the Gentiles who had not mixed with ‘contaminated’ or ‘condemned’ sects.”<sup>106</sup> Unlike descendants of Africans, who were seen as less-than-human, descendants of indigenous people were seen as meriting some rights given their relatively “untainted” background.<sup>107</sup>

The Spanish also consolidated their rule through *mestizaje* (“miscegenation”): conquerors and early colonists forged unions “formal and otherwise” with indigenous women.<sup>108</sup> Plantation owners raped the indigenous women they employed in what was referred to in 20th century official documents and oral testimony from Chiapas as the “civilizing act of miscegenation” (“la acción civilizadora mediante el mestizaje”).<sup>109</sup>

*Mestizaje* also allowed the Spanish Crown to maintain control by separating the races and pitting them against one another. A caste system was established to “solidif[y] Spanish superiority and protect them from a unified rebellion” by emphasizing the differences between indigenous people and African people and their descendants.<sup>110</sup> The caste system named and reified dozens of racial classifications, which varied by region and time period.<sup>111</sup> For example, according to this system, the child of a Spanish man and indigenous woman was a “mestizo”; the child of a Spanish man and mestiza woman was a “castizo”; and the child of a Spanish man and castiza woman was a “tornaespañol.”<sup>112</sup> This caste system, though traditionally associated with Spanish rule,<sup>113</sup> created a cultural legacy such that Afro-descendants and indigenous peoples are still considered racially inferior by many Mexicans.<sup>114</sup>

The Mexican Inquisition, at the end of the sixteenth century, went so far as to issue certificates of *limpieza* (cleanliness) to those who had no more than one fourth indigenous ancestry.<sup>115</sup> Racist blood purity theories continued throughout the centuries; for example, in his early seventeenth century work, Friar Gregorio García argued that when mixing Spanish with indigenous blood, the indigenous “part loses whatever negative association it had, and gains much from the one now that accompanies it.”<sup>116</sup>

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104. Phil Russell, *The History of Mexico: from pre conquest to present* (Routledge 2010).

105. Martínez, *supra* note 100, at 485.

106. *Id.* at 484 (internal citation omitted).

107. *Id.* at 491.

108. *Id.* at 493.

109. Olivia Gall, *Identidad, exclusión y racismo: reflexiones teóricas y sobre México* [*Identity, Exclusion and Racism: Theoretical Reflections and Reflections about Mexico*], 66 *Revista Mexicana de Sociología* [RMS] 221, 248-49 (2004), JSTOR.

110. Wright, *supra* note 98, at 62 (internal citation omitted).

111. For more information on the various terms that were used to identify people with specific ethnic or racial heritages, see *Las Castas – Spanish Racial Classifications, Native Heritage Project* (June 15, 2013), <https://nativeheritageproject.com/2013/06/15/las-castas-spanish-racial-classifications/>.

112. UNAM Global, *México, un país que ejerce el racismo y cree que no es racista, Excélsior* (Oct. 22, 2018), <https://www.excelsior.com.mx/nacional/mexico-un-pais-que-ejerce-el-racismo-y-cree-que-no-es-racista/1273271>. The word *tornaespañol* is a conjunction of the Spanish verb *tornar* (to turn into or to return) and the word for Spanish, implying a route for indigenous people to gradually “clean” their blood.

113. Wright *supra* note 98, at 67.

114. Natividad Gutierrez, *What Indians Say about Mestizos: A Critical View of a Cultural Archetype of Mexican Nationalism*, 17.3 *Bulletin of Latin American Research* 285, 298 (1998), JSTOR; Iturriaga Acevedo, *supra* note 97, at 53.

115. *Id.* at 485.

116. *Id.*

While Spaniards viewed “both indigenous and African ancestries as impure and generally saw mixture with either group in negative terms, it was black blood that was more frequently and systemically construed as a stain on lineage.”<sup>117</sup> The mixture of African with Spanish blood conferred no such upward mobility, nor any figurative whitening. Moreover, in colonial political narratives, miscegenation between Spaniards and African slaves, producing so called “mulattos,” was considered “a threat to unity or coherence, a contaminant, a stain, a temptation, or a force beyond the control of vested powers.”<sup>118</sup> This created a “legacy of the mulatto as a metaphor for corruption or fracture . . . common to social and literary discourse throughout Latin America.”<sup>119</sup> Mexican independence was quickly followed by the abolition of slavery.<sup>120</sup> The emphasis on racial assimilation, however, was renewed following the Mexican Revolution of the early twentieth century, during which the government promoted “the mestizo” as the official protagonist of Mexican history.<sup>121</sup> The Revolution thus created a national ideology that identified the Mexican as a mix of two ethnicities: indigenous and Spanish.<sup>122</sup> This post-independence ideology was meant to promote a sense of Mexican exceptionalism by portraying a racially- unprejudiced Mexico, unlike New Spain with its racial caste system and the rest of the world with its racism and segregation.<sup>123</sup>

In 1925, Mexican philosopher and former Secretary of Education José Vasconcelos published an essay called the Cosmic Race, in which he argued that through “constructive miscegenation . . . the ‘Negro race’ would vanish from the Mexican social body.”<sup>124</sup> He indicated that, at the time of his writing, the Afro-Mexican population was small and increasingly mulatto, and that therefore it would be relatively easy for them to fully integrate into the “cosmic race” and, consequently, disappear.<sup>125</sup> Continuing through the twentieth century, Mexico’s ruling elite sought to whiten the Mexican population by encouraging European immigration and prohibiting that of Asians and Afro-descendants.<sup>126</sup> The narrative of the mestizaje gradually expanded from a mix of indigenous and Spanish to include Afro-Mexicans. In an early showing of this definitional expansion, a 1982 textbook called *Historia y Civismo* (History and Civics) claimed that “all the indigenous groups living in the country have mingled with Spaniards and Black slaves; this is why, nearly all the Mexican people are mestizo.”<sup>127</sup>

Scholars argue that for both indigenous and Afro-Mexican communities, their inclusion in the imagined Mexican mestizaje resulted in a national racial policy that silenced “their specific problems, demands and presence,” and “provided a way to forge ideas of equality while maintaining an economy based on dramatic inequality.”<sup>128</sup> Many autonomous indigenous communities—either defined by linguistics or geography—were eroded; indigenous and Afro- Mexican heritage and

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117. Martínez, *supra* note 100, at 484 (internal citation omitted).

118. Marilyn Grace Miller, *The Rise and Fall of the Cosmic Race: The Cult of Mestizaje in Latin America* 45 (U. of Tex. Press 2004).

119. *Id.*

120. Gonzalo Aguirre Beltrán, *The Slave Trade in Mexico*, 24.3 *The Hispanic American Historical Rev.* 412, 430-31 (1944).

121. Iturriaga Acevedo, *supra* note 97, at 63.

122. *Id.* at 4.

123. Kimberly Medina, *Afro-Mexicans and the Struggle for Recognition*, U. of S. Car. Scholar Commons Senior Theses, May. 2017., at. 25, [https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1188&context=senior\\_theses](https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1188&context=senior_theses).

124. See Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, So There Is No Blackness*, 15 *S. Cal. Interdisc. Law J.* 199, 219 (2006).

125. Medina, *supra* note 123, at 26.

126. Lovell Banks, *supra* note 124, at 218.

127. Gutierrez, *supra* note 114, at 286 (internal citation omitted). Notably, the Mexican mestizo identity did not include other minorities that had migrated to Mexico, such as Lebanese, Chinese, and Jewish individuals. Mónica G. Moreno Figueroa & Emiko Saldívar Tanaka, *Creolizing Europe* 175, 188 (Encarnación Gutiérrez Rodríguez et. al. eds., 2015).

128. Moreno Figueroa & Saldívar Tanaka, *supra* note 127, at 175, 188. Scholars also believe the mestizo myth “undermine[d] the formation of black and indigenous identities that are needed to sustain effective social movements for combating persistent social and cultural exclusion.” Edward Telles & Dénia García, *Mestizaje and Public Opinion in Latin America*, 48 *Latin Am. Research Rev.*, 130, 132 (2013).

culture was romanticized; and the active engagement of indigenous and Afro-Mexican populations with contemporary politics was dismissed.<sup>129</sup> As such, the national myth of mestizaje created the appearance of including indigenous people and Afro-Mexicans in Mexican society while in reality excluding them.<sup>130</sup>

Due to this national ideology of mestizaje, often referred to by scholars as the “mestizo myth,” many Mexican individuals claim that there is no racism in Mexico; they assert that because they are mestizo—that is, of mixed descent from both Spaniards and indigenous people—they cannot be racist. As Anthropology scholar Eugenia Iturriaga Acevedo explains, the argument goes: how could one be racist if one is two races?<sup>131</sup> Many Mexicans do not know that majority Afro- descendant communities still exist in Mexico, believing rather that Afro-descendants only exist in Mexicans’ ancestry. Many of the interactions between Afro-Mexicans and INM officials demonstrate the lack of education about the existence of Afro-Mexicans.<sup>132</sup> According to Clemente Jesús López, former director of the government office for Afro-Mexicans in Oaxaca, Afro- Mexicans are deported to Honduras and Haiti because of officials’ insistence that there are no people of African descent in Mexico.<sup>133</sup> For example, authorities detained a group of Afro- Mexicans from Mata Clara, Veracruz and only released them after the municipal president of Cuitlahuac, Veracruz convinced the officers “that there were indeed black people in this territory.”<sup>134</sup>

Legal and statistical invisibility compounds the social exclusion of indigenous and Afrodescendant Mexicans.<sup>135</sup> Censuses constitute important mechanisms by which states divide resources, configure political representation, and “define racial boundaries.”<sup>136</sup> Before the 2000 Census, the government identified indigenous people based exclusively on whether or not they spoke an indigenous language.<sup>137</sup> Indigenous peoples’ organizations successfully pressured the government to include a question based on self-identification as indigenous, which has been included in every Census since 2000.<sup>138</sup> The difference between those two classification methods was evident in the most recent survey results: when asked whether they consider themselves indigenous in regards to their culture, history and traditions, 21.5% of the population said yes, 1.6% of the population said yes in part, and 74.7% said no.<sup>139</sup> When asked whether they speak an indigenous language, only 6% of the population said yes.<sup>140</sup>

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129. Grace Miller, *supra* note 118, at 4; see also Miriam Jimenez Roman, What is a Mexican? Smithsonian Institution: Migrations in History (last. visited. Oct. 8, 2019), <http://www.smithsonianeducation.org/migrations/legacy/almx.html>.

130. *Id.*

131. Iturriaga Acevedo, *supra* note 97, at 53 (stating in the original Spanish: “¿cómo se podría ser racista si se provenía de dos sangres?”). Accord Eugenia Iturriaga Acevedo, *Las élites de la ciudad blanca. Discursos racistas sobre la otredad* (1st ed., 2016).

132. See, e.g., Interview with Tobyanne Ledesma Rivera, *supra* note 2; Interview with Tanya Duarte, *supra* note 19.

133. Arlene Gregorius, *The black people ‘erased from history,’* BBC News, Mexico (Apr. 10, 2016), <https://www.bbc.com/news/magazine-35981727>. Clemente Jesús López recalls two separate cases involving women: “One was deported to Honduras and the other to Haiti because the police insisted that in Mexico there are no black people,” Lopez said. “Despite having Mexican ID, they were deported.” The women returned with the help of the Mexican consulates, but they did not receive an apology or compensation.

134. Wright, *supra* note 98, at 68.

135. For more information on Mexican censuses and statistical invisibility of indigenous and Afro-descendant Mexicans, see Moreno Figueroa & Tanaka, *supra* note 127; *Mexico: Indigenous People, Minority Rights Group International* <https://minorityrights.org/minorities/indigenous-peoples-4/> (last visited July 9, 2019); *Infografía Población Indígena* | Consejo Nacional de Población [https://www.gob.mx/cms/uploads/attachment/file/121653/Infografia\\_INDI\\_FINAL\\_08082016.pdf](https://www.gob.mx/cms/uploads/attachment/file/121653/Infografia_INDI_FINAL_08082016.pdf) (last viewed July 9, 2019); Villarreal, *supra* note 97, at 652, 655; Instituto Nacional de las Mujeres, Gobierno de la República, *Datos de la Población Afrodescendiente en México*, [https://www.gob.mx/cms/uploads/attachment/file/199489/Datos\\_INEGI\\_poblacion\\_afromexicana.pdf](https://www.gob.mx/cms/uploads/attachment/file/199489/Datos_INEGI_poblacion_afromexicana.pdf) (last visited Jan. 9, 2020); *Encuesta Intercensal 2015: Cuestionario para viviendas particulares habitadas. . y población*. 5., Instituto Nacional de Estadística y Geografía. (INEGI), [http://en.www.inegi.org.mx/contenidos/programas/intercensal/2015/doc/eic2015\\_cuestionario.pdf](http://en.www.inegi.org.mx/contenidos/programas/intercensal/2015/doc/eic2015_cuestionario.pdf) (last visited July 10, 2019); *Encuesta Intercensal 2015: Resultados definitivos de la encuesta intercensal 2015* at 1, Instituto Nacional de Estadística y Geografía (INEGI) (Dec. 8, 2015), [http://en.www.inegi.org.mx/contenidos/programas/intercensal/2015/doc/especiales2015\\_12\\_3.pdf](http://en.www.inegi.org.mx/contenidos/programas/intercensal/2015/doc/especiales2015_12_3.pdf).

136. Villarreal, *supra* note 97, at 652, 655. See generally Kif Augustine-Adams, *Making Mexico: Legal Nationality, Chinese Race, and the 1930 Population Census*, 27(1) *Law and History Rev.* 113, 113 (2009).

137. *Mexico: Indigenous People*, *supra* note 135.

138. *Id.*

139. *Infografía Población Indígena*, *supra* note 135, at 1.

140. *Id.*

The Political Constitution of the United Mexican States (“the Mexican Constitution”) recognizes indigenous Mexicans but not Afro-Mexicans.<sup>141</sup> While included in some federal legislation and regulatory programs, only three Mexican states (Guerrero, Oaxaca, and Coahuila) include Afro-Mexicans in their constitutions, legislation, or regulations.<sup>142</sup> The National Institute of Statistics and Geography only included Afro-Mexican heritage as a racial category in the most recent (2015) Intercensal Survey.<sup>143</sup>

After asking, “in accordance with your culture, history and traditions, do you consider yourself black, which is to say Afro-Mexican or Afro-descendant?” the 2015 Intercensal Survey found that 1,381,853 Mexicans, or 1.2% of the population, said yes; and 497,975 persons, or 0.5% of the population, said they are part Afro-descendant.<sup>144</sup> Of those respondents, 64.9% also consider themselves to be indigenous.<sup>145</sup> An additional 1.4% of the population said they do not know whether or not they are Afro-descendant.<sup>146</sup> The National Council for the Prevention of Discrimination (“CONAPRED” for its Spanish acronym) previously estimated the Afro- descendant population to be around 450,000 persons, which is approximately one third of the number produced by the 2015 Intercensal Survey.<sup>147</sup>

Scholars and advocates believe there are many more Afro-Mexicans than what the 2015 Intercensal Survey captured; they also critique the Survey’s non-use of colloquial terms for afro- descendants and the government’s failure to preempt the Survey with an educational campaign regarding the terms that would be used, their meanings, and black and Afro-descendant identity.<sup>148</sup> Advocates have worked to include the Afro-Mexican population more comprehensively in the 2020 Population and Housing Census, which has been postponed due to Covid-19.<sup>149</sup>

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141. The Mexican Constitution defines indigenous Mexicans as “descendants of those inhabiting the country before colonization and that preserve their own social, economic, cultural and political institutions, or some of them.” Constitución Política de los Estados Unidos Mexicanos [CPEUM], tít. 1, cap. I, art. 2, párr. 2, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-01-2016 (Mex.) [hereinafter CPEUM], translated in Political Constitution of the United Mexican States [PCUMS] title 1, chap. I, art. 2, Universidad Nacional Autónoma de México (UNAM): Instituto de Investigaciones Jurídicas (Oct. 2015), <https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente>; but see *Consulta libre, previa e informada para la reforma constitucional y legal sobre derechos de los pueblos indígenas y afroamericano*, Secretaría de Gobernación, Instituto Nacional de los Pueblos Indígenas, <http://www.inpi.gob.mx/gobmx-2019/INPI-principios-y-criterios-para-la-reforma-constitucional.pdf> (demonstrating the existence of a movement to include Afro-Mexicans in the Constitution) (last visited July 15, 2019).

142. Medina, *supra* note 123, at 18; Comisión Nacional de los Derechos Humanos, *Estudio Especial de la CNDH sobre la situación de la población afrodescendiente de México a través de la encuesta intercensal 2015*. 10-12. (Oct., 2016), [https://www.cndh.org.mx/sites/default/files/doc/Informes/Especiales/Estudio\\_2016\\_001.pdf](https://www.cndh.org.mx/sites/default/files/doc/Informes/Especiales/Estudio_2016_001.pdf).

143. Instituto Nacional de las Mujeres, *supra* note 135; *Encuesta Intercensal 2015: Cuestionario para viviendas particulares habitadas y población*, *supra* note 135, at 5.

144. *Encuesta Intercensal 2015: Cuestionario para viviendas particulares habitadas y población*, *supra* note 135, at 5; *Encuesta Intercensal 2015: Resultados definitivos de la encuesta intercensal 2015*, *supra* note 135, at 1.

145. *Encuesta Intercensal 2015: Resultados definitivos de la encuesta intercensal 2015*, *supra* note 135, at 1.

146. *Id.*; *Infografía Población Afro Descendiente*, Consejo Nacional de Población (CONAPO), [https://www.gob.mx/cms/uploads/attachment/file/122501/Infografia\\_poblacion\\_afrodescendiente\\_CONAPO.pdf?fbclid=IwAR0MSqugdY4M\\_nSRYSZShDskK4TaEIs0-iWMTIeaYhrGU9gJO6OJAUXG19Q](https://www.gob.mx/cms/uploads/attachment/file/122501/Infografia_poblacion_afrodescendiente_CONAPO.pdf?fbclid=IwAR0MSqugdY4M_nSRYSZShDskK4TaEIs0-iWMTIeaYhrGU9gJO6OJAUXG19Q) (last visited Oct. 8, 2019).

147. Medina, *supra* note 123, at 8.

148. See, e.g., Interview with Tobyanne Ledesma Rivera, *supra* note 2; Interview with Tanya Duarte, *supra* note 19; Randal C. Archibold, *Negro? Prieto? Moreno? A Question of Identity for Black Mexicans*, *The New York Times* (Oct. 25, 2014), <https://www.nytimes.com/2014/10/26/world/americas/negro-prieto-moreno-a-question-of-identity-for-black-mexicans.html?auth=login-email&login=email>.

149. Elías Camhaji, *México pregunta por primera vez sobre la población negra y afrodescendiente*, *El País* (March 2, 2020), <https://elpais.com/sociedad/2020-03-02/mexico-pregunta-por-primera-vez-sobre-la-poblacion-negra-y-afrodescendiente.html>; Nadia Sanders, *Los afroamericanos, invisibilizados por 200 años, demandan ser tomados en cuenta*, *The Washington Post* (March 25, 2020), <https://www.washingtonpost.com/es/post-opinion/2020/03/25/los-afroamericanos-invisibilizados-por-200-aos-demandan-ser-tomados-en-cuenta/>; *Suspenden los censos en México por Covid-19*, *Contra Réplica* (March 31, 2020), <https://www.contrareplica.mx/nota-Suspenden-los-censos-en-Mexico-por-Covid-19202031358>.

## B. Forced Displacement and Internal Migration in Mexico

Roughly 37.6% of Mexico's 3,290,310 internal migrants identify as indigenous.<sup>150</sup> Internal migration has long been "an important element—sometimes even a rite of passage—for many Mexican indigenous communities."<sup>151</sup> These emigrations can be temporary, cyclical, or permanent, and many are due to economic opportunities made available by other populations' migration;<sup>152</sup> for example, when residents of the State of Mexico or Morelos migrate to the United States, residents of Guerrero and Oaxaca migrate to take agricultural jobs left vacant in the relatively wealthy states.<sup>153</sup> In turn, migrants from Central America migrate to Guerrero and Oaxaca.<sup>154</sup>

Forced displacement increasingly contributes, resulting from development projects, criminal organizations, and/or militarization of territories.<sup>155</sup> Those dangers, compounded by anti-indigenous racism, expose indigenous women in particular to greater threats of violence, sexual abuse, exploitation, and trafficking, driving an increasing number of indigenous women to leave their communities and migrate to urban centers.<sup>156</sup>

Given the increased internal migration, and as stated by both the 58/2015 and the 22/2016 CNDH recommendations, it is highly likely that migratory authorities conducting inspections within the country will encounter indigenous Mexicans.<sup>157</sup> In addition, some of the states with the greatest indigenous populations also host routes commonly used by Central American migrants, and therefore garner more attention from migration authorities. The states with the greatest number of indigenous language speakers are Oaxaca (in which 32.8% of the population speaks an indigenous language), Yucatán (in which 28.9% of the population speaks an indigenous language), and Chiapas (in which 28% of the population speaks an indigenous language).<sup>158</sup> As migratory routes used by many Central Americans run through Chiapas and Oaxaca,<sup>159</sup> these states see some of the highest numbers of detentions by the INM. In 2018, Chiapas had the greatest number of detentions of any state with 63,109 detentions, while Oaxaca had the fourth greatest number of detentions with 7,488 detentions.<sup>160</sup>

150. *Derechos humanos de los migrantes y otras personas en el contexto de la movilidad humana en México* 35, Comisión Interamericana de Derechos Humanos. (Dec. 30, 2013), <http://www.oas.org/es/cidh/migrantes/docs/pdf/Informe-Migrantes-Mexico-2013.pdf> (note that the National Institute for Statistics and Geography last published statistics on internal migration in 2010); Marcela Valdivia Correa & Landy Sánchez Peña, *Protección laboral para los jornaleros agrícolas en México*, *El Colegio de México. Seminario sobre trabajo y desigualdades* 1, 3 (2017). The number of internal migrants is likely much higher now, due to forced displacement. See Alex Papadovasilakis, *La crisis, ignorada, del desplazamiento forzado en México*, *Insight Crime* (July 25, 2019), <https://es.insightcrime.org/noticias/noticias-del-dia/la-crisis-ignorada-del-desplazamiento-forzado-en-mexico/>; *Las mujeres indígenas y sus derechos humanos en las Américas* 71-72, Comisión Interamericana de Derechos Humanos (April 17, 2017), <http://www.oas.org/es/cidh/informes/pdfs/MujeresIndigenas.pdf>.

151. Gabriela León-Pérez, *Internal migration and the health of Indigenous Mexicans: A longitudinal study 2*, Elsevier LTD. (May 7, 2019), <https://reader.elsevier.com/reader/sd/pii/S2352827319300321?token=828F7A3A723375DB0147331081642DD3EBFF59A964AEBDE14C325D79A26632E0C3EB6AE8900616D8FE8B816F48FC57ED>.

152. Federico Navarrete Linares, *Los pueblos indígenas de México*, Comisión Nacional para el Desarrollo de los Pueblos Indígenas 14 (2008), [http://www.cdi.gob.mx/dmdocuments/monografia\\_nacional\\_pueblos\\_indigenas\\_mexico.pdf](http://www.cdi.gob.mx/dmdocuments/monografia_nacional_pueblos_indigenas_mexico.pdf).

153. *Id.*

154. *Id.*

155. Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), Informe de la Relatora Especial sobre los derechos de los pueblos indígenas sobre su visita a México 60, U.N. Doc. A/HRC/39/17/Add.2 (June 28, 2018).

156. *Las mujeres indígenas y sus derechos humanos en las Américas* 71-72, Comisión Interamericana de Derechos Humanos (April 17, 2017), <http://www.oas.org/es/cidh/informes/pdfs/MujeresIndigenas.pdf>; Tauli-Corpuz, *supra* note 155, 60.

157. Recomendación No. 58/2015, *supra* note 68, 209; Recomendación No. 22/2016, *supra* note 71, 133.

158. *Infografía Población Indígena*, *supra* note 135.

159. Rodrigo Domínguez Villegas, *Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses*, Migratory Policy Institute (MPI). (Sept. 10, 2014), <https://www.migrationpolicy.org/article/central-american-migrants-and-la-bestia-route-dangers-and-government-responses> (discussing the routes of the train commonly used by Central American migrants through Chiapas and Oaxaca).

160. Unidad de Política Migratoria, Secretaría de Gobernación, *Boletín mensual de estadísticas migratorias*. 2018. at. 129. (Jan. 2018), [http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines\\_Estadisticos/2018/Boletin\\_2018.pdf](http://www.politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2018/Boletin_2018.pdf); *Detenciones de personas migrantes por entidad federativa 2001–mayo 2015*, Instituto para las Mujeres en la Migración, AC (IMUMI), [http://imumi.org/Mapa\\_IMUMI/index.html](http://imumi.org/Mapa_IMUMI/index.html) (last visited July 10, 2019).

Likewise, two of the three states with the greatest Afro-Mexican population—Oaxaca (with 4.9% of the population self-identifying as Afro-descendant or Afro-Mexican) and Veracruz (with 3.3% of the population self-identifying as Afro-descendant or Afro-Mexican)—also contain important routes for Central Americans traveling to the United States, and therefore have a large INM presence.<sup>161</sup> In 2018, Veracruz reported the second highest number of detentions by the INM with 13,701 total detainees.<sup>162</sup> Oaxaca reported the fourth highest number of detentions by the INM with 7,488 total detentions.<sup>163</sup>

The problem is compounded by the fact that it is not unusual for indigenous and Afro- descendant Mexicans to lack documentation. Birth certificates must be issued by civil registry offices, which many of regions with the highest concentrations of those groups lack; obtaining certificates becomes costly after the child's first year of life; it is extremely difficult to issue a birth certificate if the child's parents and grandparents lack documentation; and many people still use midwives.<sup>164</sup> Due to economic, geographical, and linguistic barriers, obtaining any form of identification can become unmanageable.

### C. Laws that Sanction Human Rights Violations

Many of the aforementioned human rights violations are rooted in the Mexican Law of Migration, the constitutionality of which the Mexican Supreme Court of Justice of the Nation ("Supreme Court," "the Court," or "SCJN") is in the process of analyzing. The Supreme Court is considering an amparo, or constitutional claim,<sup>165</sup> by the victims in the CNDH 22/2016 recommendation: four indigenous Mexican family members, three of whom were detained by the INM for "appearing Guatemalan," one of whom was tortured in INM custody.<sup>166</sup>

All draft Supreme Court decisions regarding the constitutionality of laws are published before the Court ministers (judges) meet to discuss and vote on a case;<sup>167</sup> thus, there are at least two draft decisions for the above-mentioned case that are public, though the Supreme Court has not yet adopted its decision in this case.<sup>168</sup> A majority of Supreme Court ministers hearing the case must still vote in favor of one of these proposed drafts, or another version yet to be developed.<sup>169</sup>

<sup>161</sup> Instituto Nacional de las Mujeres, *supra* note 135. According to government statistics, Guerrero has the greatest number of people who self-identify as Afro-descendant or Afro-Mexican (with 7%). Tanya Duarte, president of Afrodescendencia México, disputes the adequacy of the government's methodology and the accuracy of the resulting numbers. While exact numbers of Afro-Mexicans are unknown, Duarte concurs that the states with the largest populations are Guerrero, Veracruz, Oaxaca, Chiapas, the Yucatan Peninsula, Tabasco, Mexico City, and Michoacan. Interview with Tanya Duarte, *supra* note 19.

<sup>162</sup> Unidad de Política Migratoria, Secretaría de Gobernación, *supra* note 160, at 129. Note: while the statistics provided are labeled "[e]vents of foreigners presented before migratory authorities," the information actually refers to migrants who "entered" INM migration detention centers with unaccredited migratory situations. These statistics thus likely include detained and deported Afro-Mexicans.

<sup>163</sup> *Id.*

<sup>164</sup> See Anita Gupta, *Hazme Visible: Indigenous Children's Rights in Chiapas*, 5.2 Depaul J. for SOC. SCI. 379, 379-391. (2012), [https://via.library.depaul.edu/sj/vol5/iss2/6/?utm\\_source=via.library.depaul.edu%2Fjsj%2Fvol5%2Fiss2%2F6&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://via.library.depaul.edu/sj/vol5/iss2/6/?utm_source=via.library.depaul.edu%2Fjsj%2Fvol5%2Fiss2%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages).

<sup>165</sup> For more information on amparos in Mexico, see Olga María del Carmen Sánchez Cordero Dávila, *Interés legítimo en la nueva ley de amparo*, Instituto de Investigaciones Jurídicas UNAM (2017), <https://archivos.juridicas.unam.mx/www/bjv/libros/9/4317/17.pdf>; Ley de amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF] 04-02-2013, últimas reformas DOF 06-15-2018 [hereinafter Reglamentaria de ley de amparo].

<sup>166</sup> Amparo en revisión 275/2019 Quejosos (y recurrentes), Suprema Corte de Justicia de la Nación (SCJN), 14 de mayo de 2019, (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2019-07/A.R.-275-2019-190814.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2019-07/A.R.-275-2019-190814.pdf) [hereinafter August draft of the Amparo].

<sup>167</sup> Reglamentaria de ley de amparo, *supra* note 165, at tít. 1, cap. X, art. 73, 2-3. See also Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11.2 Am. U. Int'l L. Rev. 295, 321 (1996) ("Once the evidence hearing is concluded, pursuant to the Organic Act of the Federal Judicial Power, the designated Justice submits the pertinent draft resolution (*Proyecto de resolución*) to the full Court (*Tribunal Pleno*).").

<sup>168</sup> Interview with Dr. Ricardo García de la Rosa, Law Professor at the Instituto Tecnológico Autónomo de México, Law Clerk to SCJN Minister Norma Lucía Piña Hernández (Dec. 2, 2019).

<sup>169</sup> Reglamentaria de ley de amparo, *supra* note 165, at tít. 1, cap. II, § 3, art. 185, 186(1). It is important to note the limited precedential impact that the Supreme Court's eventual decision in *Amparo en revisión 275/2019* will have: "Unlike in the [Supreme Court of the] United States, Mexican case law does not have precedential value. Instead, there is 'jurisprudencia' [jurisprudence], which is only established when the Supreme Court and the federal collegiate courts issue consecutive and consistent decisions on a point of law." *General Structure*

As of the publication of this report, the Supreme Court has not decided its ruling on the case of the four indigenous Mexicans who were detained near Querétaro (“Case 275/2019” or “the Querétaro case”);<sup>170</sup> on four separate occasions, the Court has deferred its vote.<sup>171</sup>

Published in August of 2019, the first draft judgment (“August draft judgment” or “August draft”) divides the relevant Law of Migration articles into three categories: those that 1) facilitate the identification of people as migrants or permit their stigmatization as foreigners, 2) facilitate the temporary deprivation of migrants’ liberty, and 3) relate to administrative migration procedures.<sup>172</sup> Discussing the laws in the first category, the August draft judgment states that “the legislature empowered the authorities to perform a series of acts consisting of the detection and identification of any person they consider as a foreigner to prove their legal status in the Mexican territory;” acts including stopping and detaining people who do not present identification when it is requested or whose identification is unsatisfactory.<sup>173</sup> Furthermore, the August draft states that the obligation “of any person to prove their nationality and legal status in the country is imposed; that is, any person must carry identification documents to prove their Mexican nationality, or their legal status in the country.”<sup>174</sup>

Yet regarding articles 16, section II,<sup>175</sup> 17,<sup>176</sup> 20, section VII,<sup>177</sup> 97, paragraph I,<sup>178</sup> 98,<sup>179</sup> and 99 of the Law of Migration,<sup>180</sup> which allow for INM officials to ask for identification from migrants traveling within Mexico and detain those who do not satisfactorily comply, the August draft judgment continues: “when granting powers and imposing obligations, start from the assumption that in their application people will be identified by a certain phenotype that makes the authorities

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of the Mexican Legal System, James E. Rogers, College of Law, University of Arizona. (last visited Nov. 10, 2019), <https://libguides.library.arizona.edu/law-library/mexicanlaw/legalsystem>; Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31.1 U. Miami Inter-Am. L. Rev. 23, 26 (2000). Thus, the Supreme Court’s sentence on the *Amparo en revisión* 275/2019 would be influential but not binding precedent. Four additional, consistent decisions must be rendered by the Supreme Court before the holding in *Amparo en revisión* 275/2019 would become binding.

170. During the Court session on November 21st, 2019, the *Amparo en revisión* 275/2019 was deferred at the request of the minister who put forth the draft judgment. *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el jueves 21 de noviembre de 2019* 12, SCJN (Nov. 21., 2019), [https://www.scjn.gob.mx/sites/default/files/actas-sesiones-publicas/documento/2019-11-27/acta%20de%20sesion%20publica%20EXTRAORDINARIA%2021%20de%20noviembre%20de%202019%2043%20INTERNET\\_0.pdf](https://www.scjn.gob.mx/sites/default/files/actas-sesiones-publicas/documento/2019-11-27/acta%20de%20sesion%20publica%20EXTRAORDINARIA%2021%20de%20noviembre%20de%202019%2043%20INTERNET_0.pdf). Then on November 27, 2019, the ministers voted but failed to reach the requisite votes for the draft sentence. The case was passed to a different minister to prepare a draft sentence, and eventually will be re-listed for a court session and vote. *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el jueves 27 de noviembre de 2019* at 19-20, SCJN (Nov. 27, 2019), <https://www.scjn.gob.mx/sites/default/files/actas-sesiones-publicas/documento/2019-12-04/acta%20de%20sesion%20publica%2027%20de%20noviembre%20de%202019%2044%20INTERNET.pdf>.

171. Interview with Dr. Ricardo García de la Rosa, *supra* note 168; *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el miércoles 14 de agosto de 2019* at 9, Suprema Corte de Justicia de la Nación: Primera Sala-Versiones Taquigráficas (Aug. 14, 2019), <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2019-08-15/14082019%20PS.pdf>; *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el miércoles 4 de septiembre de 2019* at 21, Suprema Corte de Justicia de la Nación: Primera Sala-Versiones Taquigráficas. (Sept. 4., 2019), <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2019-09-05/04092019%20PS.pdf>; *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el miércoles 2 de octubre de 2019* at 29, Suprema Corte de Justicia de la Nación: Primera Sala-Versiones Taquigráficas. (Oct. 2., 2019), [https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2019-10-03/02102019%20PS\\_0.pdf](https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2019-10-03/02102019%20PS_0.pdf); *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el jueves 27 de noviembre de 2019*, *supra* note 170, at 19-20.

172. August draft of the *Amparo*, *supra* note 166, 36.

173. *Id.* 112.

174. *Id.* 112-113.

175. Ley de Migración [LM] *tít. 2, cap. I, art. 16*, Diario Oficial de la Federación [DOF] 05-25-2011, últimas reformas 04-21-2016 DOF (Mex.) [hereinafter LM] (“Migrants must comply with the following obligations: (...) II. Show documentation that proves their identity or regular migratory status, when they are required by migratory authorities.”).

176. *Id.* at *tít. 2, cap. I, art. 17* (“Only the migration authorities may retain documentation proving the identity or migration status of migrants when elements to presume that they are apocryphal exist, in which case they must immediately make it known to the competent authorities so that they resolve what is relevant.”).

177. *Id.* at *tít. 3, cap. I, art. 20* (“The Institute shall have the following powers in migration matters: (...) VII. Present at the migration detention centers or in the places authorized for this purpose, foreigners who merit it in accordance with the provisions of this Law, respecting at all times their human rights; (...)).

178. *Id.* at *tít. 6, cap. IV, art. 97* (“In addition to the places destined for international transit, the Institute may carry out migration checkpoints within the national territory in order to verify the migration status of foreigners. The order by which the migration checkpoints is arranged must be well founded and motivated; be issued by the Institute and specify the person responsible for the diligence and the personnel assigned to carry it out; the duration of the review and the geographical area or the place where it will take place.”).

179. *Id.* at *tít. 6, cap. IV, art. 98* (“If, on the occasion of the migration checkpoint, it is detected that a foreigner does not have documents proving your regular immigration status in the country, will proceed in the terms of article 100 of this Law.”).

180. *Id.* at *tít. 6, cap. V, art. 99* (“The presentation of foreigners in migration detention centers or in places authorized for this purpose, while their migratory situation is being determined, is public order. Detention of foreigners is the measure dictated by the Institute by means of which the temporary accommodation of a foreigner who does not accredit his immigration status for the purpose of regularization of his stay or assisted return.”).

suppose the people are foreigners . . . <sup>181</sup> The articles, the August draft concludes, therefore cause an unreasonable, unfair, and unjustifiable difference in treatment, “since their application is based on the stigmatization of people . . . using as a basis the qualification of a physical trait or feature,”<sup>182</sup> which is prohibited by article I of the Constitution and article I of the American Convention on Human Rights (“the Convention” or “ACHR”), to which Mexico is a party.<sup>183</sup> The August draft reiterates that discrimination may occur through seemingly-neutral rules when they result in a “disproportionate impact on persons or groups at a historical disadvantage just because of that disadvantage, without there being an objective and reasonable justification.”<sup>184</sup>

Noting that the Law of Migration includes no parameters for distinguishing who is a foreigner and who is not,<sup>185</sup> the August draft judgment states that the aforementioned articles discriminate indirectly because their application requires officials to make evaluations based on suspect categories.<sup>186</sup> “[I]n the absence of rational parameters, every individual who, in the judgement of the authority, does not meet that which [the authority] considers as a ‘Mexican phenotype’, will be considered a migrant and must prove their legal status in the country.”<sup>187</sup>

The August draft judgment determines that the relevant articles of the law, therefore, when applied, “discriminate irrationally and unjustifiably.”<sup>188</sup> The articles permit the stigmatization of people as foreigners or migrants based on skin color, language, accent, expressions, way of speaking, clothing and race, which constitutes discrimination; similarly, to catalogue any person as a part of a historically-vulnerable group in Mexico—such as that of migrants—also constitutes discrimination “that contravenes the human right to equality.”<sup>189</sup> Finding that the INM violated the rights of the four indigenous Mexican family members, the August draft states, “from the reading of the records, it is inevitable to conclude that the migration authorities relied on [the family members’] personal appearance” when deciding to detain them at a federal INM migration detention center in Querétaro.<sup>190</sup>

Regarding the second category of Law of Migration articles assessed by the Supreme Court—articles that facilitate the temporary deprivation of migrants’ liberty—the August draft judgment states that the challenged articles are in accordance with the Mexican Constitution and the ACHR. The draft specifies, however, that the detention of migrants should be 1) necessary, proportionate, and for legitimate purposes (i.e. should not be arbitrary), and 2) for the shortest possible time.<sup>191</sup> The draft finds:

Consequently, any detention of migrants must contain the grounds that accredit and motivate their need, always taking into account the facts and the particular circumstances of the persons in particular, so that the detention of migrants in an irregular situation does not proceed automatically, that is, without taking into account their individualized circumstances . . . detention or imprisonment for reasons or through methods that – while

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<sup>181</sup>. August draft of the Amparo, *supra* note 166, 114.

<sup>182</sup>. *Id.* 115.

<sup>183</sup>. CPEUM, *supra* note 141, at tit. I, cap. I, art. 1; *American Convention on Human Rights Signatories and Ratifications*. No. 17, Organization of American States, <https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm> (last visited July 12, 2019).

<sup>184</sup>. August draft of the Amparo, *supra* note 166, 117.

<sup>185</sup>. *Id.* 116.

<sup>186</sup>. *Id.* 123.

<sup>187</sup>. *Id.* 124.

<sup>188</sup>. *Id.* 126.

<sup>189</sup>. *Id.* 133.

<sup>190</sup>. *Id.* 176.

<sup>191</sup>. *Id.* 140.

classified as legal – can be considered incompatible with respect for the fundamental rights of the individual for being, among other things, unreasonable, unpredictable or lacking in proportionality.<sup>192</sup>

Arbitrariness, therefore, should be interpreted “broadly to include elements of impropriety, injustice and unpredictability.”<sup>193</sup>

The August draft judgment also gives guidance regarding the second requirement for detention: it must be for the shortest time possible. To assess the reasonableness of a migration detention’s duration, which must always be within the limits established by law (fifteen days, or sixty under exceptional circumstances), the August draft requires:

[T]he following factors be taken into account: (1) the probability that the person is an immigrant with an irregular stay in the country; and (2) the complexity in the investigation process of the authority in order to know their immigration status, as well as to define their stay in national territory or their return to the country of origin; for which all those factual elements that allow presuming the delay – or promptness – of the authority to obtain the necessary information to make that decision must be taken into account; such as channels or channels of communication, international treaties on the exchange of information concluded between the Mexican State and other States, as well as all those economic, cultural conditions – or of any other category – that allow to justify the period in which the person remains within the migration detention center to obtain the information.<sup>194</sup>

Thus, these factors should be evaluated on an individual basis to determine whether the length of a detention is reasonable and for the shortest time possible.<sup>195</sup>

Regarding the third category of challenged laws, articles related to migration administrative procedures, the August draft judgment states that the articles are constitutional if they are applied to include the “fundamental right” of the “presumption of innocence,” which “must be applied in all the procedures from which the result may derive some penalty or sanction as a product of the State’s punitive power.”<sup>196</sup> Therefore, in accordance with the right to due process, the burden of proof regarding a person’s immigration status must shift to the authority, which, after inquiry, “must determine whether to 1) bring that person to a detention center—for the shortest possible time, until their irregular situation is defined (reasonable time period)—, or (2) ensure that the person continues their transit within the national territory.”<sup>197</sup> This determination, the August draft adds, is to “prevent a Mexican from being deprived of their freedom in any of the migration detention centers,” and “must be carried out free of any stereotype or stigma (about race, physical features, clothing, appearance, etcetera).”<sup>198</sup>

The ministers of the Court charged with analyzing the August draft judgement did not approve it, and so a second draft judgement was published in September of 2019. That second public draft judgment (“September draft” or “September draft judgement”)<sup>199</sup> finds that the same articles are unconstitutional as in the August draft, but that articles

<sup>192</sup> *Id.* 142.

<sup>193</sup> *Id.* 143.

<sup>194</sup> *Id.* 152.

<sup>195</sup> *Id.* 153.

<sup>196</sup> *Id.* 159.

<sup>197</sup> *Id.* 162.

<sup>198</sup> *Id.*

<sup>199</sup> *Sesión pública ordinaria de la Primera Sala de la Suprema Corte de Justicia de la Nación, celebrada el miércoles 4 de septiembre de 2019, supra note 171, at 21.*

97, 98, and 99 are unconstitutional because they violate the right to personal liberty rather than of the right to non-discrimination.<sup>200</sup> The September draft includes an additional category of Law of Migration articles: those that attack the right to personal liberty within the Mexican territory.<sup>201</sup>

In the section on articles protecting personal liberty, the September draft judgment discusses: (1) the doctrine of personal liberty and its restrictions; (2) comparative doctrine of personal liberty; (3) the doctrine of personal liberty in the Universal Human Rights System; (4) the doctrine of personal liberty in the Inter-American Human Rights System; (5) the constitutional personal liberty doctrine of the Supreme Court; and (6) a study of the constitutionality of articles 97, 98, and 99 of the Law of Migration in light of the previous considerations.<sup>202</sup>

The September draft judgment holds that articles 97, 98, and 99 unconstitutionally violate personal liberty because, among other reasons, their use constitutes a coercive interference.<sup>203</sup> The Supreme Court had held that the temporary restriction of the exercise of the right to personal liberty, such as migration checkpoints, must be exceptional in order to be constitutional: “that is, that it is only admissible when it is not possible to obtain a migratory authority written order or court order to perform the act of nuisance.”<sup>204</sup> Yet, the September draft judgment states:

[F]ar from complying with the parameter of being an extraordinary measure, the ordinary legislator allowed and empowered the National Migration Institute to carry out this . . . level of contact, affecting the personal freedom of people who are transiting through a particular point, without further requirements to specify the person responsible for the diligence and the personnel assigned to carry it out, its duration and the geographical area or place where it will be carried out.<sup>205</sup>

After finding that the articles violate the right to personal liberty, the September draft judgment analyzes whether that deprivation is proportional,<sup>206</sup> a question it divided into four parts: whether A) the purpose of the measure is constitutionally valid; B) the measure is appropriate;<sup>207</sup> C) the measure is necessary;<sup>208</sup> and D) the measure is strictly proportional.<sup>209</sup> The September draft judgment holds that the migration checkpoints provided for in articles 97, 98, and 99 provide serve a constitutionally-valid purpose and are appropriate.<sup>210</sup> As to the necessity of the migration checkpoint procedures for which articles 97, 98, and 99 provide, the September draft holds that two less-intrusive means of achieving the law’s purpose exist (the review of documents of those entering or leaving the country at places of international transit, and verification visits, consisting of INM personnel searching a foreign person’s home with an

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<sup>200</sup>. Amparo en revisión 275/2019 Quejosos (y recurrentes) 284, Suprema Corte de Justicia de la Nación (SCJN), 4. de septiembre. de. 2019, [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2019-09/AR-275-2019-190924.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2019-09/AR-275-2019-190924.pdf) [hereinafter September draft of the Amparo].

<sup>201</sup>. See, e.g., *Id.* 61.

<sup>202</sup>. *Id.* 74.

<sup>203</sup>. *Id.* 194.

<sup>204</sup>. *Id.* 208.

<sup>205</sup>. *Id.* 208, 210

<sup>206</sup>. *Id.* 223-224.

<sup>207</sup>. *Id.* 131

<sup>208</sup>. *Id.* 132

<sup>209</sup>. *Id.* 224.

<sup>210</sup>. As to their purpose, the draft judgment states that “the aims sought [by the articles] are not only legitimate, but conventionally desirable” as “[s]tates may establish mechanisms to control entry and exit from their territory with respect to persons who are not their nationals.” *Id.* 233 (citing *Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, 97 (Nov. 23, 2010)). Regarding their appropriateness, the draft judgment continued that migration checkpoints may be appropriate to achieving the constitutionally-valid purpose, as “the entry, exit and circulation in the territory must be regulated in a general, abstract and impersonal manner, which can only be obtained when it is in law.” September draft of the Amparo, *supra* note 200, 241.

INM order, which must indicate the person sought, where they will be sought, and what the visit will be about),<sup>211</sup> and “are sufficient to fulfill the constitutionally-desired purpose, without it being necessary for the [migration checkpoints] to subsist.”<sup>212</sup>

Since the September draft judgment finds migration checkpoints to be unnecessary, it did not reach the question of whether the interest in the checkpoints outweighed their infringement on personal liberty.<sup>213</sup> The September draft judgment also holds that the articles violate the American Convention on Human Rights, which requires that all persons detained be brought before a judge or other functionary authorized to exercise judicial functions without delay,<sup>214</sup> since “it is the same migratory agents that validate the truth of the documents as well as the migratory status as well as the time of their detention.”<sup>215</sup>

Like the August draft judgment, the September draft judgment concludes that articles 16, section II, 17 and 20, section VII permit unconstitutional discrimination. Conversely, it holds articles that “empower the temporary deprivation of the freedom of migrants,” namely articles 20, part VII, 99, 100, and the first paragraph of 121, constitutional as long as detentions are carried out in accordance with national and international law.<sup>216</sup>

The Mexican judicial system allows for parties to meet privately with Supreme Court ministers to try to persuade them of the merits of a position.<sup>217</sup> These informal meetings permit the litigants to present supplemental evidence to the formal written claims made at the constitutional hearing; commonly, claimants will use the opportunity to introduce the victims, and both sides will try describe potential political and economic impacts of an adverse decision (this practice is known as hearsay allegations (“alegatos de oídas”).

For the Querétaro case, representatives of the victims met with Supreme Court ministers and explained that the INM abuses described in the case are ubiquitous, such that the INM has discriminated against countless other victims based on appearance; in addition, advocates argued, all Mexicans are negatively impacted when forced to carry identification while traveling within their own country.<sup>218</sup> On the government side, Mexico’s Secretary of the Interior directly lobbied the Supreme Court ministers, arguing that internal checkpoints are necessary.<sup>219</sup> The Secretary argued that if the Court rules in favor of the victims, the identification of human traffickers in transit would become more difficult,<sup>220</sup> as

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<sup>211</sup> *Id.* 247-250, 263.

<sup>212</sup> *Id.* 269.

<sup>213</sup> *Id.* 279.

<sup>214</sup> American Convention on Human Rights art. 7(5), Nov. 22, 1969, Organization of American States (OAS), O.A.S.T.S. No. 3, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

<sup>215</sup> September draft of the Amparo, *supra* note 200, 282.

<sup>216</sup> See *Id.* 154. See also LM, *supra* note 175, at tít. 6, cap. IV, art. 100 (“When a foreigner is put in front of the Institute for verification or migration checkpoints proceedings the corresponding presentation will be issued within 24 hours afterwards.”), cap. VIII, art. 121 (“The foreigner who is subject to an administrative migratory procedure of assisted return or deportation, will remain presented at the migration detention center, observing the provisions of article 111 of this Law.”). Both draft judgments include a discussion of the importance of adherence to the 15-day limit for migratory detention, except in exceptional circumstances, and that authorities should endeavor to detain people for the shortest possible duration. August draft of the Amparo, *supra* note 166, 153; September draft of the Amparo, *supra* note 200, 378.

<sup>217</sup> See *Erradicar “alegatos de oídas”, plantea iniciativa de Monreal, Talla Política* (Sept. 22, 2019), <https://www.tallapolitica.com.mx/erradicar-alegatos-de-oidas-plantea-iniciativa-de-monreal/>. See also Carlos Elizondo Mayer-Serra and Ana Laura Magaloni, *El ‘Alegato de Oreja’: Inequidad y mediocridad*, nueva serie, año XLVIII, núm. 144, *Boletín Mexicano de Derecho Comparado*, 10005, 10006 (2015) (stating that the majority of judicial codes of ethics in the world prohibit and punish these types of meetings).

<sup>218</sup> Interview with Gretchen Kuhner and Lorena Cano Padilla, IMUMI Director and Legal Clinic Coordinator, respectively, legal representatives of the victims (on file with authors).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* Right wing actors often use anti-trafficking rhetoric “to bolster arguments for harsh immigration policies,” simultaneously advocating against support for non-citizen victims. Jenna Krajeski, *The Hypocrisy of Trump’s Anti-Trafficking Argument for a Border Wall*, *New Yorker* (Feb. 5, 2019), <https://www.newyorker.com/news/news-desk/the-hypocrisy-of-trumps-anti-trafficking-argument-for-a-border-wall>.

would the Mexican government's ability to continue limiting migration north on behalf of the United States.<sup>221</sup> Even if the INM is violating human rights, the argument goes, doing so is necessary in service of Mexican immigration policy and bilateral relations with the United States.<sup>222</sup>

While this report only explores the three aforementioned factors contributing to the INM's detention and deportation of indigenous and Afro-descendant Mexicans (racism, patterns of internal migration, and the Law of Migration in its current form), numerous others exist, including: corruption within the INM and its connections with trafficking and organized crime;<sup>223</sup> the INM's partnership with the Federal Police;<sup>224</sup> the involvement of local police and other agencies that conduct migration checkpoints with little regulation or oversight;<sup>225</sup> the investiture of the National Guard with the power to conduct migratory inspections and operations;<sup>226</sup> mounting pressure from the U.S. on Mexico to reduce the influx of migrants arriving to the U.S. and the increasing militarization of Mexico's borders.<sup>227</sup>

## V. CNDH RECOMMENDATIONS

Notwithstanding any challenges to compliance, the CNDH has published multiple recommendations condemning the Mexican government's detention of its citizens as a violation of international, regional, and domestic law. These decisions include the 58/2015 recommendation, involving the illegal migration detention of thirteen Mexican citizens;<sup>228</sup> the 22/2016 recommendation, involving the illegal detention and torture of members of the Tzeltal indigenous community who the INM believed were Guatemalan;<sup>229</sup> and the 31/2017 recommendation, involving a seventeen-year-old Mexican woman who was pulled off of a bus by INM agents who misidentified her as Guatemalan despite her proffered CURP.<sup>230</sup>

Those recommendations conclude that the INM detains individuals based not on objective determinations, but rather on subjective presumptions and individuals' appearances,<sup>231</sup> thus infringing on migrants' human rights—above all, their

<sup>221</sup> Interview with Gretchen Kuhner and Lorena Cano Padilla, *supra* note 218.

<sup>222</sup> *Id.*

<sup>223</sup> See, e.g., *El INM se 'limpia' de la corrupción; despiden a 500 elementos: AML0*, Vanguardia.mx (June 27, 2019), <https://vanguardia.com.mx/articulo/el-inm-se-limpia-de-la-corrupcion-despiden-500-elementos-aml0>. INM agents have been involved in sex trafficking; for example, the CNDH released a recommendation on September 8, 2012 detailing an INM agent's sexual assault of a fifteen-year-old Honduran girl whose migratory situation he promised to regularize in exchange. Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 54/2012 (Sept. 28, 2012) [hereinafter Recomendación No. 54/2012] (explaining that INM agents have been involved in human trafficking and sex trafficking). See also Red Migrante Sonora, *supra* note 33, at 6-7 ("The actions of criminal organizations would not be possible without the permissiveness of the authorities and the absence of the rule of law in the areas").

<sup>224</sup> Although the Law of Migration article 35 grants the INM the exclusive power to monitor and review documentation of Mexicans and foreigners, in June of 2014 the Federal Police and the INM signed an agreement to cooperate in migration enforcement operations. See LM, *supra* note 175, at tit. 4, cap. 1, art. 35; see also Jose Knippen, Clay Boggs, and Maureen Meyer, *An Uncertain Path: Justice for Crimes and Human Rights Violations Against Migrants and Refugees in Mexico 12*, WOLA (Nov. 2015), [https://www.wola.org/sites/default/files/An%20Uncertain%20Path\\_Nov2015.pdf](https://www.wola.org/sites/default/files/An%20Uncertain%20Path_Nov2015.pdf).

<sup>225</sup> See Red Migrante Sonora *supra* note 33, at 6-7; Knippen et al., *supra* note 224, at 12.

<sup>226</sup> In May of 2019, the Official Diary of the Federation published a new law called the Law of the National Guard, empowering the National Guard to coordinate with the INM in the migratory inspections and operations. Ley de la Guardia Nacional [LGN] cap. III, art. 9(XXXV), (XXXVI), Diario Oficial de la Federación [DOF] 05-27-2019 (Mex.).

<sup>227</sup> See, e.g., Louise Radnofsky et al., *Trump Threatens Tariffs on Mexican Imports in Response to Migrant Surge*, Wall Street Journal: Politics: Politics (May 30, 2019), <https://www.wsj.com/articles/trump-threatens-5-tariff-on-mexican-imports-beginning-june-10-11559260679>; Nick Miroff et al., *How Mexico talked Trump out of tariff threat with immigration crackdown pact.* WASH. POST. (June. 10., 2019), [https://www.washingtonpost.com/immigration/trump-mexico-immigration-deal-has-additional-measures-not-yet-made-public/2019/06/10/967e4e56-8b8e-11e9-b08e-cfd89bd36d4e\\_storyhtml?utm\\_term=.b79681b1fab1](https://www.washingtonpost.com/immigration/trump-mexico-immigration-deal-has-additional-measures-not-yet-made-public/2019/06/10/967e4e56-8b8e-11e9-b08e-cfd89bd36d4e_storyhtml?utm_term=.b79681b1fab1); Maureen Meyer and Adam Isacson, *The 'Wall' Before Wall: Mexico's Crackdown on Migration at its Southern Border*, WOLA (Dec. 17, 2019), <https://www.wola.org/analysis/mexico-southern-border-report/#keyfindings> (describing the inhumane conditions, extreme overcrowding in detention centers, and the INM's failure to screen for protection needs before prompt deportation); Eric L. Olson, *Southern Exposure*, The Wilson Quarterly (Fall 2019), <https://www.wilsonquarterly.com/quarterly/borders-and-beyond/southern-exposures/>; James Fredrick, *How Mexico Beefs Up Immigration Enforcement To Meet Trump's Terms*, NPR (July 13, 2019), <https://www.npr.org/2019/07/13/740009105/how-mexico-beefs-up-immigration-enforcement-to-meet-trumps-terms>.

<sup>228</sup> Recomendación No. 58/2015, *supra* note 67.

<sup>229</sup> Recomendación No. 22/2016, *supra* note 71.

<sup>230</sup> Recomendación No. 31/2017, *supra* note 90.

<sup>231</sup> Recomendación No. 22/2016, *supra* note 71, 134.

right to not be discriminated against, which is protected by domestic and international law.<sup>232</sup> That discrimination affects non-Mexican nationals in transit through Mexico as well as Mexican citizens who are mistakenly targeted by migration agents as undocumented migrants.<sup>233</sup> This section summarizes the violations cited in the CNDH decisions.

### A. The Right to Nationality

The 58/2015, 22/2016, and 31/2017 CNDH recommendations conclude that the INM and other state and federal authorities violated the human right to nationality. The CNDH finds that the INM employs irregular, inconsistent methods of determining nationality, which results in the arbitrary violation of the right to nationality of certain Mexican citizens via detention and subsequent deportation.<sup>234</sup> In finding that the INM violated Mexican citizens' right to nationality, CNDH recommendations 58/2015, 22/2016 and 31/2017 cite Mexican constitution articles 11 and 30;<sup>235</sup> Law of Migration articles 1, 3(XV),<sup>236</sup> and 36;<sup>237</sup> and Law of Nationality article 3, which lists documents Mexicans can use to prove citizenship.<sup>238</sup> In the 58/2015 recommendation, for example, the CNDH states that "Nationality is a fundamental human right that establishes a legal link of protection of the State towards people, since it gives them belonging and identity," and the non-recognition of designated documentary evidence leaves people in the "defenseless position of being unable to prove their nationality."<sup>239</sup> Thus, by failing to consider the documentation the victims presented to prove their Mexican nationality and instead using subjective assessments, the INM violated the victims' right to nationality.<sup>240</sup>

In reaching this conclusion, the 22/2016 and 31/2017 recommendations also cite the Case of Ivcher-Bronstein v. Peru, in which the Inter-American Court of Human Rights ("the Inter-American Court," or "the Court") analyzes arbitrary deprivations of the right to nationality.<sup>241</sup> Specifically, the Court finds that Peru violated article 20 of the ACHR because its annulment of Ivcher-Bronstein's nationality did not comply with domestic legislation and the authorities responsible lacked the authority to annul nationality.<sup>242</sup> The annulment was thus arbitrary and consequently in violation of the right to nationality.<sup>243</sup>

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<sup>232</sup> *Id.* 196-216; CPEUM, *supra* note 141, cap. I, art. 1, párr. I; see also G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); American Convention on Human Rights, *supra* note 214, at art. 1, I.

<sup>233</sup> Díaz Prieto, *supra* note 16.

<sup>234</sup> Recomendación No. 58/2015, *supra* note 68, 168; Recomendación No. 22/2016, *supra* note 71, 54.

<sup>235</sup> CPEUM, *supra* note 141, at tit. 1, cap. I, art. 11 ("Every person has the right to enter the Republic, to leave, to travel within the territory and move residency, without the necessity of a card of security, passport, safe conduct or other similar requirements"), art. 30 (describing how citizenship is acquired).

<sup>236</sup> LM, *supra* note 175, at tit. 1, cap. I, arts. 1, 3(XV).

<sup>237</sup> *Id.* at tit. 4, cap. I, art. 36.

<sup>238</sup> Ley de Nacionalidad [LN], art. 3, Diario Oficial de la Federación [DOF] 1-23-1998, Últimas reformas DOF 04-23-2012.

<sup>239</sup> Recomendación No. 58/2015, *supra* note 68, 123.

<sup>240</sup> The CNDH also cites the Ley General de los Derechos de Niñas, Niños y Adolescentes [LGDNNA] (General Law for Girls, Boys, and Adolescents), tit. 1, art. 1 (II), Diario Oficial de la Federación [DOF] 12-4-2014, últimas reformas DOF 06-20-2018 [hereinafter LGDNNA]; *Id.* at cap. 3, art. 19(II), (IV); and domestic judicial holdings: the Mexican Supreme Court's finding on "Poverty, Marginalization, and Vulnerability (Pobreza, Marginación y Vulnerabilidad. Conforme a lo establecido en la Ley General de Desarrollo Social no constituyen sinónimos, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXX, Agosto de 2009, Tesis 166608.P/J. 85/2009) and the Collegiate Circuit Courts' finding on "Right to Identity" (Derecho a la identidad. El reconocimiento del estado civil derivado del matrimonio forma parte de aquél y, por tanto, debe ser objeto de protección constitucional (Legislación del Estado de Jalisco), Tribunales Colegiados de Circuito [TCC], Gaceta del Semanario Judicial de la Federación, Libro 28, Décima Época, Marzo de 2016, 2011192. III.2o.C.37 C (10a)).

<sup>241</sup> Case of Ivcher-Bronstein v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 74, 85-97 (Feb. 6, 2001).

<sup>242</sup> *Id.* 97.

<sup>243</sup> *Id.* 96.

## B. The Right to Personal Liberty

The CNDH determines in both its 58/2015 and 22/2016 recommendations that the INM also violated the victims' right to personal liberty:

[U]nder no circumstances should a Mexican citizen be taken to a migration detention center . . . because the migratory authority always has the obligation to corroborate the Mexican's identity in the same moment as the migratory inspection is occurring, and if that is not possible, the person should be permitted to continue in their travel inside the national territory.<sup>244</sup>

The CNDH cites laws that protect this right.<sup>245</sup> Both the 58/2015 and the 22/2016 recommendations reference the Case of Fleury and Others vs. Haiti,<sup>246</sup> a 2011 Inter-American Court decision addressing the arbitrary detention and abuse of a human rights defender by the Haitian state.<sup>247</sup> The Inter-American Court explains that "a detention, whether for a brief period or a 'delay,' even if merely for identification purposes, is a form of deprivation of physical liberty of the individual;" to be legal, the detention must "adhere strictly to the relevant provisions of the America Convention and domestic law, provided that the latter is compatible with the Convention."<sup>248</sup>

The recommendations also cite constitutional articles 14 and 16;<sup>249</sup> and Law of Migration articles 3 (XX),<sup>250</sup> 98,<sup>251</sup> 100,<sup>252</sup> 119 (VI),<sup>253</sup> and 144.<sup>254</sup>

## C. Forced Disappearances

Of the three CNDH recommendations discussed above, only the 31/2017 recommendation addresses the issue of forced disappearances as a right distinct from the right to personal liberty. In that recommendation, the CNDH finds

<sup>244</sup> Recomendación No. 22/2016, *supra* note 71, 97. See also Recomendación No. 58/2015, *supra* note 68, 143-75 (finding that the INM violated the victims' right to personal liberty by the INM's arbitrary and illegal detention practices).

<sup>245</sup> The legal authorities the CNDH cites include G.A. Res. 217(III) A, Universal Declaration of Human Rights Art. 9 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights] ("No one shall be subjected to arbitrary arrest, detention, or exile"); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights Arts. 9(1), 12 opened for signature Dec. 16, 1966, entered into force March 23, 1976 [hereinafter International Covenant on Civil and Political Rights]; Organization of American States, American Declaration on the Rights and Duties of Man chap. I, art. I (XXV) (1948) [hereinafter American Declaration on the Rights and Duties of Man]; American Convention on Human Rights, *supra* note 214, at art. 7; and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. Comm'n. H.R. (March 3-14, 2008), <http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp>.

<sup>246</sup> Case of Fleury and Others vs. Haiti, Inter-Am. Ct. H.R. (ser. C) No. 236, 57 (Nov. 23, 2011). Note: both the 58/2015 and the 22/2016 recommendations also cited the Case of González Medina and Family v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 240, 359, 372 (Feb. 27, 2012); Derechos y garantías de niñas y niños en el context de la migración y/o necesidad de protección internacional, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (Aug. 19, 2014).

<sup>247</sup> Anna Taylor, *Haiti Violates the Rights of a Haitian Human Rights Defender*, Human Rights Brief (Sept. 5, 2012), <http://hrbrief.org/hearings/haiti-violates-the-rights-of-a-haitian-human-rights-defender/>.

<sup>248</sup> Case of Fleury and Others vs. Haiti, *supra* note 246, 54.

<sup>249</sup> "No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedures are observed and in accordance with laws issued prior to the act." CPEUM, *supra* note 141, tít. I, cap. I, art. 14, translated in *Constitution of Mexico*, Organization of American States (OAS), [https://www.oas.org/juridico/mla/en/mex/en\\_mex-int-text-const.pdf](https://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf) (last visited July 12, 2019); see also Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, *supra* note 245, at General Provision.

<sup>250</sup> LM, *supra* note 175, at tít. I, cap. I, art. 3(XX) ("Migration Detention Center: the physical facility established by the Institute to temporarily house foreigners that have not accredited their migratory situation until their migratory situation is resolved.")

<sup>251</sup> *Id.* at tít. 6, cap. IV, art. 98 ("If during a migratory inspection it is detected that a foreigner does not have documents that prove their regular migratory situation in the country, proceed with the terms of article 100 OF THIS LAW.")

<sup>252</sup> *Id.* at tít. 6, cap. IV, art. 100.

<sup>253</sup> *Id.* at tít. 6, cap. VIII, art. 119 (VI) ("That the Institute makes sure that the foreigner has the nationality or regular residence of the receiving country.")

<sup>254</sup> *Id.* at tít. 7, cap. III, art. 144, fac. I-VI ("A foreigner presented before the Institute will be deported from the national territory that: has been admitted to the country without the required documentation or by an unauthorized place of international transit; having already been deported, entered into the national territory again without having obtained the Agreement of readmission, even if one has obtained a legal stay; falsely present oneself as Mexican before the Institute; be subject to a penal process or have been condemned for a grave crime in conformance with national penal laws or with the terms found in international treaties and conventions of which Mexico is a party, or due to one's background in Mexico or abroad one might compromise national or public security; provide false information or display before the Institute apocryphal, altered, or fraudulently obtained legitimate documentation, and having not complied with an order issued by the Institute to exit the national territory. In all of these cases, the Institute will determine the period of which the deported foreigner cannot reenter the country, in conformance with what is established in the Regulation. During this period, one only would be re-admitted with an express agreement from the Secretary.")

that the INM violated the right to be free from forced disappearance by citing the Inter-American Convention on Forced Disappearance of Persons, article II of which defines forced disappearance as:

[T]he act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.<sup>255</sup>

The 31/2017 recommendation cites additional conventions and numerous Inter-America Court cases on forced disappearance,<sup>256</sup> including the Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia.<sup>257</sup> In that case, the Inter-American Court finds Bolivia responsible for the forced disappearance of Rainer Ibsen Cárdenas and the death of José Luis Ibsen Peña<sup>258</sup>. The Court reiterates its jurisprudence that “the forced disappearance of persons constitutes a multiple violation of several rights” and “places the victim in a state of complete defenselessness, giving rise to other related violations, and is particularly serious when it is framed within a systematic pattern or practice applied or tolerated by the State.”<sup>259</sup> The 31/2017 recommendation also bases its conclusion on several previous CNDH recommendations,<sup>260</sup> as well as the Mexican Constitution,<sup>261</sup> Federal Penal Code,<sup>262</sup> General Law for Girls, Boys, and Adolescents,<sup>263</sup> and state law.<sup>264</sup>

#### D. The Right to Freedom of Movement

In its 58/2015, 22/2016, and 31/2017 recommendations, the CNDH finds that the INM also violated the victims' right to freedom of movement.<sup>265</sup> The CNDH states that Mexican migration authorities violated the right to free transit as codified in article 12 of the International Covenant on Civil and Political Rights (“ICCPR”),<sup>266</sup> the ACHR,<sup>267</sup> and in United Nations Human Rights Committee General Comment 27, which states that “[l]iberty of movement is an indispensable condition for the free development of a person” and “interacts with several other rights enshrined in the [ICCPR].”<sup>268</sup>

<sup>255</sup> Inter-American Convention on Forced Disappearance of Persons art. II, May 28, 1996 [hereinafter Inter-American Convention on Forced Disappearance of Persons].

<sup>256</sup> Citations include Human Rights Situation in Mexico 169, Dec. 31, 2015, Organization of American States, OEA/Ser.L/V/II, doc. 44/15; International Covenant on Civil and Political Rights, *supra* note 245, at arts. 9(1), 9(3); American Convention on Human Rights, *supra* note 214, at arts. 5(1), 5(2), 7(1), 7(5); American Declaration on the Rights and Duties of Man, *supra* note 245, at arts. I, XXV; Inter-American Convention on the Forced Disappearance of Persons, *supra* note 255, at arts. I, 2(1), 11; G.A. Res. 61/177, annex, International Convention for the Protection of All Persons from Enforced Disappearance arts. 2, 3, 21 (Dec. 20, 2006).

<sup>257</sup> Recomendación No. 31/2017, *supra* note 90, 83-84, 95, 104, 119-121, 124.

<sup>258</sup> Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 217, 103, 237 (September 1, 2010).

<sup>259</sup> *Id.* 59.

<sup>260</sup> Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 34/2012 [hereinafter Recomendación No. 34/2012]; Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 38/2012 [hereinafter Recomendación No. 38/2012]; Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 42/2014 [hereinafter Recomendación No. 42/2014]; Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 14/2015 [hereinafter Recomendación No. 14/2015]; Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 31/2015 [hereinafter Recomendación No. 31/2015]; Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 11/2016 [hereinafter Recomendación No. 11/2016].

<sup>261</sup> CPEUM, *supra* note 141, at arts. 2, 14, 129.

<sup>262</sup> Código Penal Federal [CPF], arts. 17(1), 18, Diario Oficial de la Federación [DOF] 08-14-1931, últimas reformas DOF 06-22-2017.

<sup>263</sup> LGDNNA, *supra* note 240, at arts. 1(II), 2, 17(I), 18, 19(II), (IV), 82.

<sup>264</sup> Ley para la prevención y sanción de la desaparición forzada de personas en el estado de Chiapas art. 3, Segunda Sección del Periódico Oficial del Estado de Chiapas 09-23-2009, últimas reformas 11-27-2014.

<sup>265</sup> Recomendación No. 22/2016, *supra* note 71, 99-119; Recomendación No. 58/2015, *supra* note 67, 176-195; Recomendación No. 31/2017, *supra* note 89, 196-216.

<sup>266</sup> International Covenant on Civil and Political Rights, *supra* note 245, at art. 12.

<sup>267</sup> American Convention on Human Rights, *supra* note 214, at art. 12.

<sup>268</sup> United Nations Human Rights Committee (HRC), CCPR General Comment No. 27: article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, § 1 (Nov. 2, 1999). When restrictive measures are imposed that infringe upon the right to liberty of movement, these “measures must conform to the principle of proportionality; they must be appropriate to

In all three recommendations, the CNDH cites the Case of Ricardo Canese v. Paraguay, in which the Inter-American Court addresses the right to freedom of movement.<sup>269</sup> In that case, a presidential candidate was convicted of defamation and consequently sentenced to imprisonment, forced to pay a fine, and prohibited from leaving the country; the Interamerican Court concludes that the Paraguayan State had violated his freedom of thought and expression, protected by Article 13 of the American Convention on Human Rights, and “applied a restriction to Ricardo Canese’s right to leave the country without observing the requirements of legality, necessity and proportionality, necessary in a democratic society; thereby violating Article 22(2) and 22(3) of the American Convention.”<sup>270</sup> When restrictions on freedom of movement are established by law, the Court added, the “regulation should lack any ambiguity so that it does not create doubts in those charged with applying the restriction, or the opportunity for them to act arbitrarily and discretionally, interpreting the restriction broadly.”<sup>271</sup>

The CNDH cites several other Inter-American Court holdings, as well as Mexican law and domestic judicial decisions.<sup>272</sup> Specifically, the CNDH finds that the INM violated Article 11 of the Mexican Constitution, which states: “Everyone has the right to enter and leave the Republic, to travel through its territory and to change his residence without necessity of a letter of security, passport, safe-conduct or any other similar requirement . . . ,”<sup>273</sup> and articles 7, 77 and 100 of the Law of Migration,<sup>274</sup> as the victims were Mexican citizens traveling within Mexico and therefore had no obligation to present documentation proving their nationality.<sup>275</sup>

## E. The Right to Non-Discrimination

The CNDH holds that Mexican migration authorities’ practice of targeting individuals for inspections based on skin color, language, and facial features, detaining and/or deporting them on the same bases, constitutes a violation of the right to non-discrimination.<sup>276</sup> Article 1 (1) of the ACHR obligates member states “to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or

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achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.” *Id.* 3, § 14.

<sup>269</sup> Case of Ricardo Canese v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 111, 110(i) (Aug. 31, 2004).

<sup>270</sup> *Id.* A presidential candidate was convicted of defamation and was sentenced to imprisonment, forced to pay a fine, and prohibited from leaving the country; the Interamerican Court concludes that the Paraguayan State had violated the freedom of thought and expression of the convicted, protected by Article 13 of the American Convention on Human Rights, and “applied a restriction to Ricardo Canese’s right to leave the country without observing the requirements of legality, necessity and proportionality, necessary in a democratic society; thereby violating Article 22(2) and 22(3) of the American Convention.” *Id.* at 135.

<sup>271</sup> *Id.* 125.

<sup>272</sup> Cited Inter-American Court cases include: Case of Valle Jaramillo y Others vs. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, 138 (Nov. 27, 2008); Case of the “Mapiripán Massacre” v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, 168 (Sept. 15, 2005); Case of the Ituango Massacres v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, 206 (July 1, 2006); Case of the Moiwana Community v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, 110 (June 15, 2005). Cited Mexican judicial decisions include: Arraigo Penal. El artículo 122 bis del Código de procedimientos penales del estado de Chihuahua que lo establece, viola la libertad de tránsito consagrada en el artículo 11 de la Constitución Política de los Estados Unidos Mexicanos, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXIII, Febrero de 2006, Tesis P:XXIII/2006; In dubio pro reo. Interpretación del concepto de “duda” asociado a este principio, Primera Sala de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación, Décima Época, Libro 19, Junio de 2015, Tesis Constitucional Registro 2009463.

<sup>273</sup> CPEUM, *supra* note 141, tít. 1, cap. I, art. 11, translated in *Constitution of Mexico*, *supra* note 249.

<sup>274</sup> LM, *supra* note 175, at tít 2, art. 7, (“The freedom of every person to enter, stay, transit and leave the national territory will have the limitations established in the Constitution, international treaties and conventions of which the Mexican State is part, this Law and other applicable legal provisions. Free transit is the right of everyone and it is the duty of any authority to promote it and respect it. No person will be required to verify their nationality and immigration status in the national territory, other than by the competent authority in the cases and under the circumstances established in this Law.”), tít. 6, cap. I, art. 77 (“Migratory administrative procedure will be governed by the provisions contained in this Title, in the Regulations and in the general administrative provisions issued by the Secretary, and in a supplementary way by the Federal Law of Administrative Procedure. During its processing, the human rights of migrants will be fully respected.”).

<sup>275</sup> Recomendación No. 22/2016, *supra* note 71, 117. The 22/2016 recommendation also attributes to the INM a violation of the Ley Federal de Procedimiento Administrativo [LFPA], art. 51, Diario Oficial de la Federación [DOF] 08-04-1994, últimas reformas 05-18-2018 [hereinafter LFPA].

<sup>276</sup> Recomendación No. 22/2016, *supra* note 71, 121; Recomendación No. 58/2015, *supra* note 68, 197.

any other social condition.”<sup>277</sup> Various other international and regional agreements provide support for the CNDH’s condemnation of the INM’s discriminatory actions.<sup>278</sup>

The CNDH also cites the Case of Expelled Dominicans and Haitians v. Dominican Republic, in which government officials of the Dominican Republic targeted five families of Haitian descent, detaining and deporting them despite their Dominican citizenship.<sup>279</sup> In that case, the Inter-American Court finds that the state violated the Convention,<sup>280</sup> affirming that “whatsoever its origin or form, any treatment that can be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is per se incompatible with it.”<sup>281</sup> The right to nationality, for example, works in conjunction with the right to non-discrimination, thereby requiring “States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights.”<sup>282</sup> The CNDH also cites domestic judicial holdings that elaborate the right to non-discrimination.<sup>283</sup>

Additionally, the recommendations cite the Mexican Constitution, which prohibits discrimination motivated by ethnicity or national origin, gender, age, ability, social condition, medical conditions, religion, opinions, sexual preferences, marital status or any other basis that violates human dignity.<sup>284</sup> The Constitution contains specific provisions on indigenous communities, including ones establishing policies and institutions to protect their rights.<sup>285</sup> In contrast, the Constitution does not mention Afro-Mexicans. They are, however, included in some legislation cited by the CNDH,<sup>286</sup> such as the Federal Law to Prevent and Eliminate Discrimination.<sup>287</sup> Though the recommendations focus on indigenous Mexicans and make no mention of Afro-descendant victims, their conclusions apply to all racial discrimination.<sup>288</sup>

## F. Best Interest of the Child

The 58/2015, 22/2016, and 31/2017 recommendations involve minors, and consequently the CNDH concludes that the INM violated the principle of best interest of the child, which, as codified in the Convention on the Rights of the Child, requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare

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<sup>277</sup> American Convention on Human Rights, *supra* note 214, at arts. 1(1), 24.

<sup>278</sup> These include Movilidad humana Estándares interamericanos, Inter-Am. Comm’n. H.R., Doc. 46/15, OEA/SER.L/V/II. 204-206 (Dec. 31, 2015); Additional Protocol on the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” O.A.S. No. 69, art. 3 (Nov. 16, 1999); *The Right to a Life Free from Discrimination and Violence: Indigenous Women of Chiapas, Guerrero and Oaxaca* 37, Mexican Office the High Commissioner of the UN (2007) (Mex.), [https://www.hchr.org.mx/index.php?option=com\\_content&view=article&id=146:el-derecho-a-una-vida-libre-de-discriminacion-y-violencia-mujeres-indigenas-de-chiapas-guerrero-y-oaxaca-2008&catid=17&Itemid=278](https://www.hchr.org.mx/index.php?option=com_content&view=article&id=146:el-derecho-a-una-vida-libre-de-discriminacion-y-violencia-mujeres-indigenas-de-chiapas-guerrero-y-oaxaca-2008&catid=17&Itemid=278).

<sup>279</sup> Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014); see also Loyola of Los Angeles International and Comparative Law Review, *Case of Expelled Dominicans and Haitians v. Dominican Republic*, <https://iachr.ils.edu/cases/case-expelled-dominicans-and-haitians-v-dominican-republic> (last visited August 2, 2019). Note: the CNDH also cites the Case of Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, 268 (Aug. 24, 2010); Case of Rosendo Cantú et al. vs. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, 206 (Aug. 31, 2010).

<sup>280</sup> Case of Expelled Dominicans and Haitians, *supra* note 279, 276.

<sup>281</sup> *Id.* 262. note that this case is cited by the 58/2015, 22/2016, and 31/2017 recommendations.

<sup>282</sup> *Id.* 264.

<sup>283</sup> Personas Indígenas, Primera Sala de la Suprema Corte de Justicia [SCNN], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 1, Mayo de 2017, Jurisprudencia La/]. 59/2013; Persona indígena con carácter de indiciado, Tribunales Colegiados de Circuito, Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 7, Junio de 2014, Tesis Aislada 2006714. (VIII Región).

<sup>284</sup> CPEUM, *supra* note 141, at tít. I, cap. I, art. 1, 5.

<sup>285</sup> *Id.* at tít. I, cap. I, art. 2(B).

<sup>286</sup> *Id.* at cap. IV, art. 15 (8) (discussing groups eligible for affirmative action).

<sup>287</sup> Ley Federal Para Prevenir y Eliminar la Discriminación [LFPED], art. I (III), Diario Oficial de la Federación [DOF] 06-11-2003, últimas reformas DOF 06-21-2018.

<sup>288</sup> See G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, at art. 5(d)(i) (Dec. 21, 1965) (requiring State Parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, including the right to freedom of movement and residence with the border of the State”).

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>289</sup> In the 31/2017 recommendation, for example, the CNDH states that authorities are obligated to make decisions for children with attention to each child’s specific needs and taking into account any statements made by the child.<sup>290</sup> Those obligations were not met in that case, the CNDH decides, since INM officers ignored the minor’s insistence that she was Mexican and the CURP she presented as evidence.<sup>291</sup> The authorities also failed to safeguard the minor’s physical integrity and safety as required by law.<sup>292</sup>

The recommendations also cite international law,<sup>293</sup> Inter-American Court cases,<sup>294</sup> and an Inter-American Court Advisory Opinion that states, “the deprivation of liberty of [unaccompanied] children based exclusively on migratory reasons [whether regular or irregular] . . . can never be understood as a measure that responds to the child’s best interest.”<sup>295</sup> Finally, the CNDH bases its conclusion in the Mexican Constitution,<sup>296</sup> domestic legislation and regulations,<sup>297</sup> its previous recommendations,<sup>298</sup> and domestic judicial decisions.<sup>299</sup>

### G. The Right to Legal Security

The 58/2015 and 31/2017 CNDH recommendations refer to the right to legal security, which “establishes that public authorities should be subject to the law under a coherent, permanent juridical system endowed with certainty and stability, that specifies the limits of the State in its different spheres of authority in regards to the rights of individuals, guaranteeing the respect of their fundamental human rights.”<sup>300</sup> Noncompliance with the right to legal security “can materialize in the unjustified limitation or the violation of any other human right, such as due process.”<sup>301</sup> The recommendations state that the INM violated the right to legal security by failing to comply with the legal requirements for migration checkpoints; its inobservance of the principle of the best interest of the child; the subsequent impact on the victims’ families; and the lack of protection or acknowledgment of victims’ vulnerabilities.<sup>302</sup> The CNDH cites

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<sup>289</sup> G.A. Res. 44/25 art. 3(1), Convention on the Rights of the Child (Sept. 2, 1990).

<sup>290</sup> Recomendación No. 31/2017, *supra* note 90, 221.

<sup>291</sup> *Id.* 222.

<sup>292</sup> *Id.* 227.

<sup>293</sup> *Id.*; American Convention on Human Rights, *supra* note 214, arts. 1(1), 5(1), 5(2), (19); G.A. Res. 44/25 General Observation No. 14 6-7 (May 29, 2013).

<sup>294</sup> Case of Furlan and Family v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, 126 (Aug. 31, 2012); Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, 134 (Sept. 8, 2005).

<sup>295</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Art. 64(1) American Convention on Human Rights), Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (Ser. A) No. 21, 154 (Aug. 19, 2014).

<sup>296</sup> CPEUM, *supra* note 141, at arts. 4, 29.

<sup>297</sup> LM, *supra* note 175, at art. 2; LGDNNA, *supra* note 240, at arts. 2, 18, 91, 92 (III), 97; Reglamento de la Ley de Migración, art. 169, Diario Oficial de la Federación [DOF] 11-28-2012, últimas reformas DOF 05- 23-2014 [hereinafter RLM].

<sup>298</sup> Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 33/2006 (Sept. 14, 2006); José Luis Soberanes Fernández, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 51/2008 (Oct. 14, 2008); Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 18/2010 (Sept. 21, 2010); Recomendación No. 36/2013, *supra* note 71; Raúl Plascencia Villanueva, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 17/2014 (Apr. 29, 2014); Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 22/2015 (July 27, 2015); Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 27/2015 (Aug. 24, 2015) [hereinafter Recomendación No. 27/2015].

<sup>299</sup> Interés Superior del Menor. Su función normativa como principio jurídico protector; Primera Sala de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Décima Época, libro IX, Junio de 2012, Tesis la. CXXII/2012 (10a.), Página 260; Interés Superior del Menor como elemento de interpretación en el ámbito jurisdiccional, Primera Sala de la Suprema Corte de Justicia [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, libro 15, Febrero de 2015, Tesis 2008546 la. LXXXIII/2015 (10a.), Página 1397; Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, Interés Superior de menor: Su alcance y función normativa aplicable en materia de patria potestad, reconocimiento de paternidad y guarda y custodia, Relevantes de la Suprema Corte de Justicia de la Nación, Serie No. (2015).

<sup>300</sup> Recomendación No. 31/2017, *supra* note 90, 135.

<sup>301</sup> *Id.*

<sup>302</sup> Victim 9 could not read or write, had never applied for photo identification, was the first in his family to leave his community, had been separated from his cousin, and had no contact with his family. Recomendación No. 58/2015, *supra* note 68, 244-253.

international law,<sup>303</sup> Inter-American Court cases,<sup>304</sup> previous CNDH recommendations,<sup>305</sup> the Mexican Constitution,<sup>306</sup> domestic legislation and regulations,<sup>307</sup> and domestic judicial decisions.<sup>308</sup>

## H. The Right to Access to Justice

Similar to the right to legal security is the right to access to justice, discussed in both the 22/2016 and the 31/2017 recommendations. Article 17 of the Mexican Constitution defines this right as every person's right to tribunals that administer justice "within the terms established by law, issuing resolutions promptly, competently, and impartially."<sup>309</sup> In finding that the INM violated the right to access to justice, the CNDH cites the ACHR,<sup>310</sup> the International Convention for the Protection of All Against Forced Disappearances,<sup>311</sup> decisions by the Inter-American Court,<sup>312</sup> previous CNDH recommendations,<sup>313</sup> the Constitution,<sup>314</sup> domestic legislation and regulations,<sup>315</sup> decisions by domestic courts,<sup>316</sup> and state law.<sup>317</sup>

<sup>303</sup> Universal Declaration of Human Rights, *supra* note 245, at arts. 8, 10; International Covenant on Civil and Political Rights, *supra* note 245, at arts. 8, 25.

<sup>304</sup> Case of Expelled Dominicans and Haitians v. Dominican Republic, *supra* note 279, 359 (Aug. 28, 2014); Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, 526 (Nov. 14, 2014).

<sup>305</sup> Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 13/2006 (May 12, 2006); Recomendación No. 27/2015, *supra* note 298; Recomendación No. 58/2015, *supra* note 68; Recomendación No. 22/2016, *supra* note 71.

<sup>306</sup> CPEUM, *supra* note 141, at arts. 14, 16.

<sup>307</sup> LGDNNA, *supra* note 240, at arts. 82, 92(III); LM, *supra* note 175, at arts. 2, 97; RLM, *supra* note 297, at art. 201.

<sup>308</sup> Formalidades esenciales del procedimiento. Son las que garantizan una adecuada y oportuna defensa previa al acto privativo, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación, Octava Época, Núm. 53, Mayo de 1992, Tesis P. LV/92, Página 34; diciembre de 1995, registro 200 234; Acuerdo para el que se emiten las normas para el Funcionamiento de las Estaciones Migratorias y Estancias Provisionales del INM art. 14(III), Diario Oficial de la Federación [DOF] 11-08-2012; La adopción y uso por la Administración Pública Federal De la Clave Única de Registro de Población, Diario Oficial de la Federación [DOF] 10-23-1996.

<sup>309</sup> CPEUM, *supra* note 141, art. 17, 2.

<sup>310</sup> American Convention on Human Rights, *supra* note 214, at arts. 8(1), 25(1).

<sup>311</sup> International Convention for the Protection of All Persons from Enforced Disappearances art. 12(1), United Nations Human Rights Office of the High Commissioner (Feb. 6, 2007).

<sup>312</sup> Case of Tiu Tojín v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, 100 (Nov. 26, 2008); Fernández Ortega et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, 201 (Aug. 30, 2010); Case of Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, 199 (Oct. 24, 2012); Case of López-Álvarez v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, 126 (Feb. 1, 2006); Case of García-Asto and Ramírez-Rojas v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 137, 148 (Nov. 25, 2005); Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, 167 (Sept. 7, 2004); Case of Acosta Calderón v. Ecuador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 129, 103 (June 24, 2005); Case of González et al. ("Cotton Field") v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, 139, 289-90 (Nov. 16, 2009); Case of Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, 49-50 (Jan. 24, 1998); Case of Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, 13, 130-31 (July 29, 1998); Case of Bámaca Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 128 (Nov. 25, 2000); Case of Rochac Hernández et al. v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 285, 139 (Oct. 14, 2014); Case of Vásquez Durand et al. v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 332, 110 (Feb. 15, 2017); Case of Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. of H.R. (ser. C) No. 202, 31 (Sept. 22, 2009); Case of Osorio Rivera and Family Members v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 274, 178 (Nov. 26, 2013).

<sup>313</sup> Recomendación No. 31/2015, *supra* note 260, 96; Luis Raúl González Pérez, Comisión Nacional de los Derechos Humanos (CNDH), Recomendación No. 43/2016 198 (Sept. 14, 2016).

<sup>314</sup> CPEUM, *supra* note 141, at arts. 2(A)(VIII), 17, 21.

<sup>315</sup> LM, *supra* note 175, at arts. 14, 77, 109(VI); LFPA, *supra* note 275, at arts. 3, 6; Código Federal de Procedimientos Penales [CFPP] arts. 1(VII), 2(II), Diario Oficial de la Federación [DOF] 08-30-1934, últimas reformas 06-09-2009; Ley General de Derechos Lingüísticos de los Pueblos Indígenas [LGDLP], art. 10, Diario Oficial de la Federación [DOF] 03-13-2003, últimas reformas 06-20-2018; Ley Orgánica de la Procuraduría General de la República [LOPGR], arts. 4(I)(A)(b), 6(I)(a)(2), Diario Oficial de la Federación [DOF] 05-29-2009; RLM, *supra* note 297, at art. 226(VIII).

<sup>316</sup> Sergio Méndez Silva, et al., *Investigar penalmente con debida diligencia ejecuciones extrajudiciales o familiares, homicidios o desapariciones de personas. Guía de estándares básicos 101-102*, Fundación para la Justicia y el Estado Democrático de Derecho (Jan. 2016), [https://www.fundacionjusticia.org/wp-content/uploads/2016/07/Guia\\_estandares\\_investigacion\\_homicidiosydesapariciones\\_FJEDD.pdf](https://www.fundacionjusticia.org/wp-content/uploads/2016/07/Guia_estandares_investigacion_homicidiosydesapariciones_FJEDD.pdf); Personas indígenas. Interpretación del derecho fundamental de ser asistidos por intérpretes y defensores que tengan conocimiento de su lengua y cultura, Primera Sala de la Suprema Corte de la Justicia [SCJN], Semanario Judicial de la Federación, Décima Época, libro I, Diciembre de 2013, Tesis 1a./J. 60/2013 (10a.), Página 283.

<sup>317</sup> Constitución Política del Estado de Chiapas art. 49, Periódico Oficial del Estado de Chiapas [PO] 02-03- 1921, últimas reformas PO 03-02-2018 (Mex.); Código de Procedimientos Penales para el Estado de Chiapas, art. 133(b), 133(g), Periódico Oficial del Estado de Chiapas [PO] 02-12-1938, últimas reformas PO 09-21-2015.

## CONCLUSION

Two years after one of Duarte's many detentions, she received an official document stating that INM officials were not present when she was detained.<sup>318</sup> Duarte believes she was detained by INM contractors, noting that while in the past migration checkpoints displayed INM insignia and federal and municipal authorities accompanied INM agents, in recent years she has heard of migration checkpoints carried out at three or four o'clock in the morning, far from cities, by armed agents dressed in black who provide no identification.<sup>319</sup> Duarte's experiences and the INM's response to her official inquiry demonstrate some of the challenges to INM reform, such as corruption and the divergent actors involved.

The INM states that it has tried to change its behavior. According to the CNDH's notes on compliance to its 2015 recommendation, the INM and individuals named therein accepted the recommendation and have provided proof of partial compliance,<sup>320</sup> including: the General Legal Director of Human Rights and Transparency of the INM sending the General Director of Migratory Control and Verification a set of procedures for public servants to follow during migration checkpoints when encountering Mexican nationals so as to uphold human rights; the collaboration between the INM and National Electoral Institute for a faster exchange of information; the creation of a database of nationals registered in civil registries in conjunction with the CURP National Database to allow for more efficient corroboration of documentation; and the training of 1,239 INM agents on human rights.<sup>321</sup>

The 2016 and 2017 recommendations have also been accepted by the INM with proof of partial compliance.<sup>322</sup> Measures taken to comply with the recommendations include the (15-day) suspension of several of the parties responsible for the violations in the 2016 recommendation; recording the misconduct in the personnel files of the agents in the 31/2017 recommendation; collaboration between the CNDH, the National Institute of Anthropology and History, the Migratory Policy Unit, and the Secretary of the Interior's General Deputy Director for the Implementation of Constitutional Reform on Human Rights; and trainings in 2017 for INM agents on human rights including the right to legal security, the right to freedom of movement, best interest of the child, and the right to non-discrimination.<sup>323</sup> In 2018, the Executive Commission for Victim Assistance ("CEAV" for its Spanish

acronym: Comisión Ejecutiva de Atención a Víctimas)—which is empowered to resolve requests for compensation for human rights violations—mandated that, in accordance with the General Law of Victims, the INM publicly apologize to the victims from the 22/2016 recommendation.<sup>324</sup>

The apology took place on November 7, 2019 in San Cristóbal de las Casas, Chiapas; the Commissioner of the INM, Francisco Garduño Yañez, stated: "The INM promises to implement means of no repetition, so that the facts that

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<sup>318</sup>. Interview with Tanya Duarte, *supra* note 19.

<sup>319</sup>. *Id.*

<sup>320</sup>. Recomendación: 2015/58, CNDH Informe Anual de Actividades 2018: Búsqueda de Recomendaciones, Comisión Nacional de los Derechos Humanos. (CNDH), <http://informe.cndh.org.mx/recomendaciones.aspx> (last visited Jan. 1, 2020).

<sup>321</sup>. *Id.*

<sup>322</sup>. Recomendación: 2016/22, CNDH Informe Anual de Actividades 2018: Búsqueda de Recomendaciones, Comisión Nacional de los Derechos Humanos. (CNDH), <http://informe.cndh.org.mx/recomendaciones.aspx> (last visited Jan. 1, 2020); Recomendación: 2017/31, CNDH Informe Anual de Actividades 2018: Búsqueda de Recomendaciones, Comisión Nacional de los Derechos Humanos (CNDH), <http://informe.cndh.org.mx/recomendaciones.aspx> (last visited Jan. 1, 2020).

<sup>323</sup>. *Id.*

<sup>324</sup>. Resolución de reparación integral del daño (CEAV/CIE/0158/2017), Comisión Ejecutiva de Atención a Víctimas (CEAV) at 15, 27 (on file with authors).

violated the human rights of these people does not occur again. We have the conviction that the eradication of these practices will guarantee the full exercise of human rights and constitutional guarantees."<sup>325</sup> Gretchen Kuhner, Director of the Institute for Women in Migration, accepted the apology on behalf of the victims and posed four questions for the INM's consideration: 1) who were the individuals that caused the harm against the victims? 2) why did those individuals cause this harm? 3) what were the sanctions brought against those who caused this harm? 4) what is the INM going to do so that nobody has to experience this type of harm again?<sup>326</sup>

The CEAV also imposed measures of non-repetition: specifically that, in coordination with CONAPRED, the INM undergo trainings to strengthen their capacity to protect human rights and prevent discrimination; employ video cameras at migration checkpoints; provide interpreters; and investigate the detention and deportation of indigenous Mexicans based on their appearance.<sup>327</sup> In addition to the CNDH and CEAV's recommendations, Afro-Mexican rights advocates point to the inclusion of Afro-Mexican history and culture in INM trainings, as well as in school curricula, textbooks, museums (such as the National Museum of Anthropology), and popular culture as an important step towards curbing INM agents' racism.<sup>328</sup>

Though the current political context has exacerbated barriers to curbing INM abuses against indigenous and Afro-descendant Mexicans, a Supreme Court decision in favor of victims and recognizing the Law of Migration's unconstitutionality may spur government compliance with CNDH recommendations and a renewed interest in racial inclusion; only time will tell.

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<sup>325</sup> IMUMI. (@IMUMIIDF). Twitter. (Nov. 9., 2019. 8:46. AM), <https://twitter.com/IMUMIIDF/status/1193208344439349248> (transcript on file with authors).

<sup>326</sup> INM. (@INAMI\_mx). Twitter. (Nov. 7., 2019. 11:41. AM), [https://twitter.com/INAMI\\_mx/status/1192527540461678594](https://twitter.com/INAMI_mx/status/1192527540461678594) (transcript on file with authors).

<sup>327</sup> Resolución de reparación integral del daño, *supra* note 324, at 27-28.

<sup>328</sup> See, e.g., Interview with Tobbyane Ledesma Rivera, *supra* note 2; interview with Tanya Duarte, *supra* note 19.



