

# Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges

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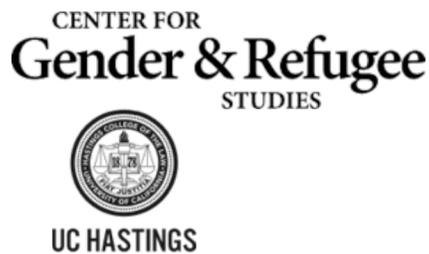


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# Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges

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## Executive Summary

### I. Introduction

Migration affects millions of children and adolescents worldwide. Over the past decade, international bodies and agencies, governments, and civil society groups have increasingly engaged in dialogue on children and adolescents affected by migration—either their own or that of their parents. These entities have noted the importance and complexity of the phenomenon, as well as the range of problems these children and adolescents confront. They conclude that there is an urgent need to understand this phenomenon—in particular in those regions or corridors with the highest rates of child migration. One such region is the Central America–Mexico–United States migration corridor that has seen a nearly tenfold growth in child migration in recent years.

With the support of a generous grant from the John D. and Catherine T. MacArthur Foundation supplemented by the Ford Foundation, the current book analyzes the conditions for children and adolescents in Central and North America who are affected by migration throughout every stage of the process, including in their countries of origin, during transit, in destination countries, and following repatriation. It concludes by proposing short-, medium-, and long-term regional, bilateral, national, and local solutions grounded in human rights—including the right to human development, humanitarian principles, and international refugee law.

*Human Rights, Children, and Migration* results from a two-year, multi-partner, multi-national and regional investigation into the treatment of Honduran, Salvadoran, Guatemalan, Mexican, and United States citizen and permanent resident children affected by migration. The book illuminates the overall gaps in protection and in guaranteeing rights for children and adolescents affected by migration. It examines the root causes of children and family migration in the region and its recent spike, and explores whether conditions and policies in children's countries of origin, transit countries, and destination countries in the region protect their best interests and ensure their rights. It also assesses whether host or destination countries effectively integrate children and adolescents affected by migration, and whether existing programs ensure—on a case-by-case basis—safe and sustainable reintegration of repatriated children and adolescents. Interviews with children and adolescents, parents, and key social and political actors in the five countries studied, combined with the experience of experts working with migrant children and adolescents on a range of issues, form the basis of the book's findings and recommendations.

This study was directed by the Center for Gender and Refugee Studies at the University of California Hastings College of the Law (CGRS) and the Migration and Asylum Program, Center for Justice and Human Rights at the National University of Lanús, Argentina (CDHUNLa) in partnership with Casa Alianza (Honduras), la Universidad Centroamericana “José Simeón Cañas” (El Salvador); Pastoral de la Movilidad Humana and Asociación Pop No'j (Guatemala); Centro de Derechos Humanos Fray Matías de Córdova and the Programa de Defensa e Incidencia Binacional—including Casas YMCA de Menores Migrantes and Coalición Pro-Defensa del Migrante, A.C. (Mexico); Kids in Need of Defense (KIND) and the Women's Refugee Commission (USA).

## **II. General findings**

Children and adolescents affected by migration in Central and North America represent an urgent human rights, human development, refugee, and humanitarian challenge. The crux of the problem lies in the sending countries of Honduras, El Salvador, Guatemala, and Mexico where childhood has become synonymous with witnessing or suffering violence; experiencing human rights violations and discrimination on various grounds; suffering from social exclusion; and being deprived of education, employment opportunities, medical services, and even food. These conditions force children and/or their parents to migrate. The challenges continue during transit, especially in Mexico—with governmental actors and criminal syndicates preying on children and families by raping, kidnapping, extorting, or beating them, and with the governmental institutions enforcing migration control policies that are designed to punish and deter migration rather than to protect children and respect their human rights.

The problem endures in the destination countries of Mexico and the United States, where policies focused on migration enforcement take priority over children's best interests and rights, resulting all too often in children and adolescents being repatriated to the very conditions they fled. It also persists in Mexico and the United States for migrant children and children in mixed status families who live in the shadows and on the margins of society, fearing their own or their family members' deportation. Rather than being able to pursue their right to develop, learn, and grow, these children lack access to education, health care and other vital services, and they often land in exploitative labor conditions. Children's rights to family and development are violated when undocumented parents cannot obtain residency status based on having children in regular migration status; are not entitled to work or to other basic rights; and can be deported without consideration of a child's best interests. Finally, the violation of rights comes full circle in children's countries of origin following their return, because the key root causes that forced them to migrate from Central America and Mexico—violence, social exclusion, poverty, and separation from family—remain unchanged.

This complex and multi-faceted human dilemma requires urgent attention and a fundamental paradigm shift. It will only be solved when conditions in children's countries of origin do not force them or their parents to migrate, when increased options exist for children and families to migrate through regular channels, and when policies at the regional, national, and local levels adhere to rights-based principles with the best interests of the child as a core standard and guaranteed access to international protection. Truly resolving this human dilemma may take years, but efforts must begin now.

## **III. Findings by country**

The order of the findings follows the migration route that the majority of children and adolescents take in the Central America–Mexico–United States corridor, traveling from south to north, although some children migrate from south to south (e.g. Northern Triangle countries to Nicaragua, Costa Rica, or Panama). Findings regarding countries of origin focus on the root causes of migration—including rights violations experienced by children left behind by parents who migrate; the role of States in protecting children's welfare and rights before and during migration (through consular officials); and the existence or lack of state-sponsored programs enabling

repatriated children to remain safely in their countries. Multiple intertwined factors drive the migration of children and families from Central America to Mexico. We focus here on the chief factors. Findings concerning Mexico and the United States examine the policies and procedures that affect the rights of children and adolescents in the context of migration—including migrant children and adolescents, as well as children born in those countries.

## *A. Honduras*

### *1. Root causes*

Violence and the threat of violence, deprivation of fundamental human rights—in particular the right to develop—and the right to reunite with family members are the three main factors that propel Honduran children and adolescents to travel north.

Sixty five percent of the 200 Honduran children and adolescents interviewed for this study indicated that violence was the main reason they decided to migrate. Honduran children and adolescents suffer multiple forms of violence perpetrated by numerous different actors in society. They frequently witness violence and murder. Honduras had the world's highest murder rate for a non-war zone in 2013 with 79 homicides per 100,000 inhabitants. In 2013, murder claimed the lives of 187 out of every 100,000 residents in San Pedro Sula, the murder capital of the world.

Children and adolescents primarily flee two types of violence: violence perpetrated by organized criminal syndicates and violence experienced in the home. Gangs and other organized criminal syndicates threaten, stalk, beat, rape, dismember, and murder Honduran children and adolescents with impunity and threaten to harm their families. Rampant intrafamilial violence, including child abuse and incest, as well as widespread gender-based violence, drive many Honduran children and adolescents to run for their lives, and help explain the increase in the number of girls migrating alone. Between 2005 and 2012 there was a massive (246%) increase in the number of femicides or feminicides (both terms are used to define gender-motivated killings of women) of Honduran women and girls, many of whose bodies showed signs of sexual abuse or mutilation. In addition, 9,881 Hondurans under the age of 23 have been murdered since 1998; 767 of them were killed between January 28 and October 31, 2014 alone. This violence occurs in a context in which extrajudicial killings of children and adolescents have become commonplace and children's lives have little value.

Honduran children and adolescents regularly endure deprivation of the very right to survival and of other internationally recognized human rights, in particular the right to develop. Six thousand Honduran children and adolescents live on the streets without any access to services; many of them have taken to the streets to escape violence in the home. Whether homeless or not, lack of access to education, food, health care, job opportunities, and protection from discrimination, compels many Honduran children and adolescents to migrate in order to survive.

Thousands of Honduran children and adolescents have also been left behind by parents who have departed for Mexico or the United States. Typically, extended family members provide informal care for children in this situation, but no one has legal responsibility for them. Without parents to protect and support them, and in the context of either failed or inefficient public social policies,

these especially vulnerable children and adolescents are targeted by gangs. Caregivers themselves may also abuse or neglect them. Despite the dangers involved, children and adolescents will often choose to migrate rather than remain in circumstances of such great vulnerability.

## 2. *Role of the State*

Although Honduras has enacted progressive laws regarding children's rights and protection from harm, in practice the State fails to enforce these laws and to protect its children and adolescents from violence. The Honduran Institute for Children and Family (*Instituto Hondureño de la Niñez y la Familia* or IHNFA), the national child welfare agency, has a weak infrastructure (exacerbated by the fact that it is underfunded) and enforcement powers, and fails to adequately respond when children and adolescents have been subjected to violence and deprivation of fundamental rights. Moreover, in the majority of cases, the criminal justice system does not prosecute cases of intrafamilial and gender-based violence. The absence or failure of social policies aimed at guaranteeing social rights, such as employment opportunities, deepen root causes of migration of both children and families, as well as parents who migrate and leave their children behind.

At the same time Honduran military officials—with training and support from the United States—have begun stopping children and adolescents from attempting to emigrate, regardless of their reason(s) for leaving. Their actions have trapped children in dangerous and harmful situations without any hope of meaningful State intervention. As of October 31, 2014, Honduran military officials had stopped 135 Honduran children and adolescents from leaving the country.

Honduran consular officials also fail to secure the rights of Honduran children and adolescents in transit and destination countries, contrary to the mandates in the Vienna Convention and the Migrant Workers Convention—which require consular officials to defend the rights of their nationals and to ensure special protections for unaccompanied migrant children and children born to migrant parents. The consulate typically sticks to the traditional, unsubstantial role of preparing travel and identity documents for unaccompanied children and adolescents, but does not tend to analyze whether repatriation would be safe or in their best interests. As neither Mexico nor the United States implements a best interests standard in making repatriation decisions, Honduran migrant children and adolescents are detained and repatriated from those countries in violation of their human rights.

## 3. *Lack of support for repatriated children and adolescents*

Honduras does not ensure safe repatriation, and currently has no programs in place to enable returned children and adolescents to remain safely in Honduras. Although IHNFA officials interview all children and adolescents repatriated from Mexico and the United States, they do so in settings that lack privacy and therefore do not elicit reliable information. IHNFA officials return repatriated children and adolescents to families without conducting a home study or using any official process to verify that return is safe and in a child's best interests.

At bus stations, immediately following their deportation from Mexico, smugglers approach children and adolescents to offer their services, while sometimes traffickers attempt to coerce them into exploitative circumstances. IHNFA claims it cannot protect children and adolescents in this

situation. Once children and adolescents have been reunified with family members, IHNFA does not check on them or follow up with services to the child or family. There are no job or skills training programs or targeted education programs for these children.

IHNFA returns children and adolescents repatriated once or twice to their families, but has a policy of placing children and adolescents repatriated a third time in state-run at-risk child shelters. However, no such shelters exist for 12-17 year old boys, the age group which makes up the greatest percent of Honduran migrant children. If these boys leave abusive families, they have nowhere to turn for help.

While root causes remain unaddressed, children are pushed back to the same unsafe environment that they fled. This leads many children and adolescents to migrate again, even though they may face even greater risks than they previously did.

## *B. El Salvador*

### *1. Root causes*

Similar to the case of Honduras, violence and the threat of violence, poverty coupled with deprivation of human rights, and the need to reunify with family members are the three leading reasons Salvadoran children and adolescents leave home.

El Salvador is a highly patriarchal society in which women are subordinate to men; within that context, children are viewed as having even fewer rights. Children are often treated as if they were simply the property of their parents. El Salvador is also one of the most violent countries in the world. Youth, gender, and sexual orientation are factors that increase Salvadorans' vulnerability to violence.

Violence by gangs and organized crime have proliferated in the country, disproportionately victimizing children and adolescents. Intrafamilial violence also pushes children to leave, with 7 out of 10 Salvadoran children and adolescents suffering physical violence in the home. Girls in El Salvador endure frequent sexual abuse, much of it occurring within the home. Additionally, El Salvador has the world's highest rate of femicide/femicide. More than 25% of these killings are of girls under the age of 19.

Within this deeply patriarchal context, children and adolescents confront discrimination and experience habitual deprivation of their right to develop. In particular, children and adolescents do not have access to education, skills training, job opportunities, and health care. Thirty percent of the Salvadoran population live in conditions of poverty. In the context of the widespread poverty that exists in El Salvador, children and adolescents also migrate in order to pursue opportunities for education and employment. They also seek opportunities to survive and thrive in societies not overrun by violence and discrimination against children.

Many Salvadoran children and adolescents have parents who migrated to Mexico or the United States, which leaves them especially vulnerable to abuse, exploitation, and neglect while in the care of extended family members or friends. Some Salvadoran children and adolescents migrate

in order to seek their parents, desiring the care and nurture that is absent in their lives, as well as to escape situations of neglect, abuse, or other harm. In light of the absence of adequate avenues for regular migration based on family reunification, unaccompanied children seeking to reunify with family have no choice but to take dangerous routes, during which they confront multiple dangers and risk being repatriated from the U.S. or Mexico without due consideration of their rights, needs and interests.

## 2. *Role of the State*

Despite El Salvador's progressive laws on both gender and children's rights, the government does not protect its children and adolescents, allowing violent perpetrators to harm them with impunity. El Salvador has been unable to ensure children's right to development and related rights, as well as to prevent the growth or escalation of violence by gangs and organized crime. It also remains either unable or unwilling to protect children and adolescents from intrafamilial violence and gender-based violence. Unlike Honduras, El Salvador's Foreign Ministry recently committed to developing protocols to ensure that consular officials protect and defend the rights of Salvadoran nationals overseas, including their rights as migrants, and will provide nationals with consular assistance. However, budgetary constraints and insufficient training of consular officials have thus far limited the development and implementation of any such protocols.

In addition, little information exists regarding foreign children and adolescents in El Salvador and children born in El Salvador to migrant parents residing in or transiting through El Salvador. Thus, there are no public policies aimed at addressing their needs and rights with respect to health care, education, birth registration, or protection from risks in transit.

## 3. *Repatriation and reintegration*

Children and adolescents repatriated to El Salvador face great challenges reintegrating. Once back in their homes and communities, repatriated Salvadoran children and adolescents often re-experience the violence and rights deprivation that may have caused their initial departure, but lack viable avenues to obtain state protection. Repatriated children and their families often face crushing debts to smugglers from previous migration journeys, which is especially dire for children and adolescents who left in part to escape poverty. As in Honduras, children and adolescents also face significant challenges in returning to school following repatriation.

The National Council for Childhood and Adolescence (*Consejo Nacional de la Niñez y de la Adolescencia* or CONNA) and the Salvadoran Institute for the Comprehensive Development of Children and Adolescents (*Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia* or ISNA) are government agencies tasked with protecting the mental and physical health of El Salvador's children and adolescents. Until recently, however, no one from either agency performed intake interviews with repatriated children and adolescents upon their return to El Salvador. Instead, migration officials, who lack the expertise to adequately meet children's needs and vulnerabilities, would interact with children and adolescents upon their return. These officials did not conduct interviews with the returning child or adolescent alone and automatically placed the children with any family member who arrived to meet them at the bus stop. In July 2014, officials from CONNA assumed responsibility for interviewing repatriated El Salvadoran

children and adolescents. According to advocates, however, CONNA's interviews have focused on dissuading children and adolescents from attempting to migrate again, rather than assessing them for risk—such as past abuse, neglect, or mistreatment—or risk of trafficking in *order to ensure their safety*.

Institutional weakness of state agencies means that the basic health, education, and security needs of returning children and adolescents are not met. CONNA has been largely inactive on the issue of repatriated children and adolescents. The National Council for the Protection and Development of the Migrant Individual and Family (*Consejo Nacional para la Protección y Desarrollo de la Persona Migrante y su Familia* or CONMIGRANTES) was created in 2012 to fill the void left by CONNA's inactivity, but is still relatively new and underfunded. El Salvador lacks programs to assist returning children and adolescents with safe, meaningful, and sustainable reintegration into society, which makes even more problematic the enforcement practices in Mexico and the United States that fail to take into account migrant children's best interests.

Despite its general inactivity, in response to the increase in the number of unaccompanied Salvadoran children and adolescents arriving in the United States, in 2014 CONNA began threatening pecuniary sanctions ranging from \$6,000 to \$12,000 (U.S. dollars) against parents whose children make a subsequent attempt to migrate after having been deported from the United States or Mexico. This policy is driven more by a desire to show goodwill to the United States than to protect the best interest of the child or support the child's reintegration into Salvadoran society. El Salvador lacks programs to assist returning children and adolescents to reintegrate into and remain in society.

### *C. Guatemala*

#### *1. Root causes*

The violation of rights in a context of extreme poverty; ethnic, gender, and other types of discrimination; violence and the threat of violence; and family reunification are the central factors causing children and adolescents to migrate from Guatemala.

Poverty is closely linked to inequality, and Guatemala has one of the highest levels of inequality and poverty in the world. Fifty four percent of the population live in conditions of poverty, and 13% in conditions of extreme poverty. The indigenous population has suffered systematic racism and discrimination, resulting in fewer opportunities for education and employment and greater inequality. The vast majority of children and adolescents who migrate from Guatemala are indigenous; they come from Guatemala's extremely poor regions, often lacking food and access to the most basic medical and other services. Indigenous children and adolescents regularly suffer discrimination and social exclusion. In addition, deeply entrenched discrimination against women and unequal gender relations result in fewer educational and employment opportunities for Guatemalan girls and women. Indigenous girls and women thus suffer from double discrimination. These combined factors of poverty, inequality, and discrimination push children and adolescents out of Guatemala. Some intend to leave permanently, while a significant number of Guatemalan children and adolescents migrate to southern Mexico temporarily in order to work.

High incidences of violence also correlate with increased migration of Guatemalan children and adolescents. In 2010, 49.4% of homicides in Guatemala occurred in the five departments with the highest levels of migration (Guatemala, San Marcos, Huehuetenango, Quetzaltenango, and Jutiapa). Guatemalan children, especially girls, experience high levels of intrafamilial violence, including incest. Between 2003 and 2012, intrafamilial violence grew by more than 500%; the largest proportion of its victims were female. Sexual abuse by family members is common, but it often remains hidden, both because children and adolescents are fearful and ashamed to report it and because they lack confidence that the authorities can protect them. Violence associated with gangs and organized crime has also risen in Guatemala, disproportionately affecting youth. Children and adolescents flee to escape violence in the home or coercion to join violent groups.

Similar to Honduran and Salvadoran children and adolescents, some Guatemalan children and adolescents also migrate in order to reunify with their parents in Mexico and the United States.

## 2. *Role of the State*

The efforts of the Guatemalan State to guarantee basic social rights, justiciability, and the integrity and capacity of public institutions remain weak and limited. Guatemala also lacks a differentiated approach to indigenous migrant children, increasing their vulnerability.

The Guatemalan government must confirm and verify the situation of Guatemalan migrant children in transit and in destination countries in order to guarantee their protection. Consular protection policies are still fragile and lack mechanisms for documenting and monitoring cases of abuse and human rights violations. However, the Ministry of Foreign Relations (*Ministerio de Relaciones Exteriores* or MINEX) is carrying out important and specific efforts concerning child migration, focusing especially on psychosocial needs.

Some public institutions have procedures and guidelines in place for migrant children. However, Guatemala still lacks an inter-institutional protocol to guide the different actions, roles, and competencies of these public institutions. Similarly, with respect to prevention of harms, the Guatemalan government focuses solely on designing and promoting informative campaigns that warn of the dangers and risks faced by migrant children. Guatemala's biggest pending challenge is the development and implementation of short- and long-term rights-based processes for monitoring repatriated children and adolescents.

## 3. *Repatriation*

There is a clear difference between institutional commitment and institutional capacity to address the arrival of unaccompanied children and adolescents repatriated to Guatemala from Mexico or the United States. Both MINEX and the Secretariat of Social Welfare (*Secretaria de Bienestar Social* or SBS) carry out specific actions geared toward increasing the attention and protection provided to migrant children. The Office of the Attorney General is the weakest institution with respect to attention to migrant children. Additionally, public institutions in general lack a mechanism that uses the best interest of the child as the fundamental criterion for making decisions and developing procedural guidelines.

Guatemala faces challenges that must be confronted in the short-, medium-, and long-term. Issues that should be resolved immediately include: the repeated requesting of information from children and adolescents; the lack of interpreters for Mayan languages; provision of emergency psychosocial attention; and reintegration monitoring and follow-up. Solutions should be sustainable in the long-term. During the return process, the utmost priority should be given to the safety and protection of the child, both immediately and in the medium-term. This should be accompanied by measures and policies geared toward guaranteeing access to rights such as education, family life, work opportunities, social assistance, healthcare, psychological care, etc. These measures, as well as the search for and location of appropriate guardians, should be carried out delicately and thoroughly.

Currently, institutions tasked with child protection—with the assistance of other relevant institutions, according to the particularities of each case—do not provide comprehensive monitoring of and follow-up on the reintegration of migrant children and adolescents. It is imperative that they do so. This will require decentralization at the departmental, municipal, and local levels, as well as other measures.

#### *D. Mexico: as a country of origin/sending country*

##### *1. Root causes*

Mexican children and adolescents migrate to the United States to reunify with family members, to seek the opportunity to develop, and increasingly to escape violence and the threat of violence.

Many Mexican children and adolescents live in homes in which one or both parents have migrated to the United States; family separation and disintegration caused by migration motivates many Mexican children to travel to the United States. Deprivation of children's rights to survive and develop because of extreme poverty, as well as a dearth of opportunities to study and work, leads Mexican children and adolescents to leave the country. Indigenous children and adolescents suffer the greatest social exclusion and deprivation of rights.

Violence perpetrated by drug cartels, gangs, and other criminal syndicates causes internal displacement in Mexico as well as the migration of children and adults from Mexico. Drug cartels, gangs, and criminal syndicates have spread throughout the country, and children and adolescents—including migrants from Mexico and Central America crossing the country—have increasingly become their victims. Child abuse, neglect, and abandonment, as well as ingrained, tolerated, and widespread violence against children, and gender-based violence in the home and in the broader society also force Mexican children and adolescents to flee. Mexico had the fifth highest rate of homicide of children and adolescents in the world in 2012.

##### *2. Role of the State*

High levels of impunity and corruption exist in Mexico, particularly for violence by organized criminal syndicates, but also for intrafamilial violence. In addition to failing to protect children and adolescents from different sources of violence, Mexico does not guarantee children the right to develop. It has failed to address the discrimination and social exclusion that indigenous children and adolescents, in particular, experience daily.

Until recently, Mexico's consular policies included very little attention to migrant children's rights. No child-focused program was implemented until the end of 2014, when the Secretary of Foreign Affairs developed a protocol aimed at protecting migrant children's rights in the United States through consular assistance.

### 3. *Repatriation and reintegration of Mexican children and adolescents*

The National Migration Institute (*Instituto Nacional de Migración* or INM) and Mexican consulates have signed numerous bilateral agreements with the United States regarding the repatriation of Mexican nationals. Although the agreements touch on repatriation of "vulnerable migrants," including unaccompanied children and adolescents, they focus on the logistics of return, rather than the protection, welfare, and rights of children and adolescents. Mexican consular officials facilitate the repatriation of Mexican children and adolescents directly from the border, often without investigating the situation to which they will be returned. Mexican consular officials working along the border have recently begun interviewing unaccompanied children and adolescents with the goal of ensuring that they are not returned to danger. While well intentioned, screening by Mexican consular officials cannot relieve the United States of its duty under the Trafficking Victims Protection Reauthorization Act (TVPRA) to screen Mexican children and adolescents for protection needs and other vulnerabilities.

Mexican child welfare officials with the Integral Family Development agency (*Sistema Nacional para el Desarrollo Integral de la Familia* or DIF) take custody of repatriated Mexican children and adolescents and screen them to determine whether they should return to family members. DIF involves social workers and doctors in the determination, but it does not conduct home studies prior to reunifying children and adolescents with family, and it provides no follow-up services to them. Children and adolescents waiting for family members to claim them stay either at state-run shelters or private shelters run by civil society organizations. Family members must show proof of identification in order to take children and adolescents out of the shelters, but no additional screening of adults occurs. Some Mexican children and adolescents leave the shelters "voluntarily," on their own, without any adult claiming them. Some of these children and adolescents attempt to cross the border again, and some become victims of human or drug trafficking rings.

No programs exist to support the sustainable reintegration of children and adolescents into their communities. DIF does not provide job training, financial support, mental health services, or counseling for children and their families.

#### *E. Mexico: as a transit and destination country*

Mexico's laws and policies regarding migrants focus on enforcement rather than human rights and protection needs. These laws and policies apply with equal force to children and adults. With training and support from the United States, Mexico has significantly increased its enforcement efforts along its southern border with Guatemala. Increased enforcement, however, has not deterred migration. If anything, amplified enforcement, particularly in the case of child migrants,

makes children and adolescents even more vulnerable following repatriation and often leads to remigration.

### *1. Detention*

Mexico detains migrants, including unaccompanied children and families, and holds them in migration stations. The country has not implemented the positive reform enacted in 2011 that requires the INM to transfer children to DIF following apprehension. Children and adolescents detained in migration stations lack edible food, have no privacy, are denied access to medical and psychological services, are under constant surveillance, and are detained along with adult non-relatives. Children and adolescents seeking asylum are detained throughout the asylum process—which can take several months—leading many children to abandon their applications out of frustration with their detention. Those who abandon their application risk *refoulement* (return to persecution).

### *2. Lack of due process*

Mexico does not provide migrant children or adolescents with counsel and does not give children any information about their rights. In addition, Mexico does not appoint a guardian or child advocate for unaccompanied children and adolescents. Migration authorities interview children and adolescents and later decide how to handle their cases based on information obtained during the interview; however, children and adolescents have no access to legal proceedings in which to challenge their detention, demand their rights, or seek immigration relief. Without information and an attorney or other adult to help them navigate the system and demand their rights, Central American migrant children suffer regular due process violations in Mexico.

### *3. Lack of access to substantive relief including asylum or humanitarian protection*

Migrants, including children and adolescents, lack access to adequate asylum processes. Migrants must affirmatively request asylum, requiring knowledge on their part that they have the right to seek asylum. Migrant children and adolescents likely lack such knowledge, significantly limiting their access to asylum. Children and adolescents who seek asylum face other challenges as well. Mexico keeps asylum seekers detained throughout the process, deprives them of the opportunity to participate in the process—for example by not allowing them to submit evidence and not informing them of the date of their asylum interview—and provides them with little to no information about the status of their cases. In addition, Mexico approves only about 20% of all asylum applications; it does not maintain separate statistics on the number or percent of children's asylum cases.

### *4. Deportation*

INM deports more than 85% of unaccompanied migrant children and adolescents from Central America. Mexico fails to abide by reforms to its migration law in 2011, including a requirement that Mexico develop a procedure to conduct best interests determinations prior to repatriating migrant children and adolescents. Instead, it responds to migrant children and adolescents

primarily by detaining and deporting them. Initiatives aimed at developing a best interests standard as required by Mexico's migration law have begun, but to date the standard does not exist.

5. *Lack of child-sensitive policies for migrant children and families living in Mexico*

Although an increasing number of Central American children and families have settled in Mexico, most of them in Soconusco, Chiapas, there are no policies in Mexico aimed at ensuring the rights of migrant children and adolescents and children born to migrant parents. Many migrant children and adolescents perform child labor, often in exploitative conditions or as victims of trafficking, yet these children generally cannot access child protection programs and generally do not qualify for residence permits. Instead of protecting these particularly vulnerable children and adolescents, Mexico subjects them to harsh detention and deportation mechanisms.

F. *United States*

1. *Screening*

Customs and Border Protection (CBP), the migration control agency responsible for screening unaccompanied children, fails to fulfil its duty to identify Mexican unaccompanied children with protection needs. Under federal law, unaccompanied Mexican children must be placed in federal custody in the United States if they are at risk of trafficking or persecution, or if they are unable to make an independent and voluntary decision to return to Mexico. Instead, CBP repatriates nearly all Mexican children and adolescents it apprehends, under the presumption that they are not at risk. CBP does not have a specific, adequate protocol for working with children and adolescents and lacks the training, sensitivity, and child welfare framework essential to interviewing children and adolescents. Additionally, CBP uses expedited removal (summary expulsion) procedures for adults, including adults traveling with their children and adolescents, from Central America and Mexico. These expedited procedures place children and adolescents traveling with their parents at risk of return to persecution or torture, or to situations harmful to their best interests. Despite international and domestic commitments to *non-refoulement*, CBP tends not to interview children separately from their parents to determine if they have an independent claim for international protection.

2. *Detention*

CBP temporarily detains the migrants apprehended at and near the border, including unaccompanied children and families. CBP officers and conditions in CBP holding cells violate children's rights under federal law and international human rights law. Some CBP agents have verbally, physically, or sexually abused children and adolescents. CBP holding facilities deprive children of adequate nutrition, bedding, recreation, and fresh air, and lack basic medical care and psychological services. The holding rooms, essentially jail cells, are often kept at extremely cold temperatures.

CBP transfers unaccompanied children, other than Mexican children designated for immediate repatriation, to the Office of Refugee Resettlement (ORR) for longer-term custody. ORR aspires to protect, not punish, unaccompanied children until they can be reunified with family members,

but falls short of protection in many respects. ORR has moved toward greater institutionalization of children in recent years, both by using larger facilities and by increasing security measures at smaller facilities. In addition, many ORR facilities are located far from legal, medical, and mental health services, impeding detained children's access to services. ORR has significantly expedited the release process of children and adolescents in its custody in order to respond to the increase in unaccompanied children arriving in the United States in recent years. Some children and adolescents are released to adults that ORR does not adequately screen, leaving them vulnerable to abuse and exploitation. Once released, only a small percentage of children and adolescents receive follow-up services to help them adjust to their new life and family in the United States, or to address any prior trauma suffered during migration or in their home countries.

In 2009, the United States closed a large family detention facility in Texas that had been the focal point of lawsuits, advocacy, and critical media—in recognition that detaining families is inhumane. At that time, the United States committed to using alternatives to detention for migrant families apprehended at or near the border. However, in response to the increase in children and families arriving in the United States in the summer of 2014, the United States instead made the regressive decision to return to jailing migrant families once again.

CBP releases some families it apprehends, and transfers others to Immigration and Customs Enforcement (ICE) detention facilities. CBP's process for determining which families to release and which to detain is arbitrary. The decision hinges not on an individual family's circumstances, but rather on the availability of beds in facilities. Children and adolescents held in family detention centers face daily violations of their rights under federal law and detention standards, as well as under international human rights law. Rather than detain families—many of whom have fled violence or other violations of their human rights—the U.S. government should protect them.

### *3. Procedural deficiencies*

The United States has not adopted the best interests of the child standard for migrant children and adolescents; accordingly, procedures in place for migrant children and adolescents are not based on any assessment under that standard. In addition, the United States places migrant children and adolescents in removal proceedings without the right to appointed counsel, in violation of their due process rights. The lack of counsel renders many of children's rights under U.S. immigration law meaningless, as children and adolescents lack the skill, knowledge, and maturity to secure these rights on their own. Additionally, the vast majority of unaccompanied children have no child advocate (or guardian) to advise or support them through the immigration process, contrary to international standards.

### *4. Insufficient forms of immigration relief*

U.S. immigration remedies were not designed for children and adolescents, and existing immigration relief options do not cover all migrant children in need of protection. The United States does not set out a separate standard for children's claims for relief; does not require a child-sensitive analysis of applications for relief; and in the case of asylum and Convention against Torture claims, applies overly restrictive interpretations of the law that are inconsistent with

international norms and interpretations. Most importantly, perhaps, the United States does not offer immigration relief, simply based on the fact that repatriation is not in a child's best interests.

### *5. Family separation*

The United States tears families apart without considering the best interests of the child, in complete contravention of international law. U.S. migration law does not prioritize family reunification, and avenues for regular immigration status for family members of those residing in the United States fall far short of the need for relief. Increased immigration enforcement—through an emphasis on detention and deportation, greater criminalization of immigrants who have committed minor crimes, and use of local law enforcement to administer immigration law—has led to the detention and deportation of many more parents of U.S. citizen children. Once placed in immigration detention or deported, parents lose control of decisions regarding the custody and care of their children and face immense challenges maintaining contact with them. Thousands of U.S. citizen children land in foster care as a result of immigration enforcement actions against their parents. These parents risk termination of their parental rights even though they have not abused, abandoned, or neglected their children.

Although President Obama's November 2014 executive action on immigration will offer legal reprieve to some undocumented parents of U.S. citizens and permanent residents, many individuals will fail to qualify as a result of exclusions under the program. For example, residence requirements, criminal history ineligibility, and travel limitations are projected to exclude millions of individuals who might otherwise qualify. Moreover, as of this writing, it remains to be seen how the executive action will be implemented.

### *6. Deportation, repatriation, and reintegration*

Despite significant advances in U.S. law intended to ensure the safe repatriation and sustainable reintegration of unaccompanied children, the United States continues to repatriate migrant children and adolescents without considering the best interests of the child. The United States has returned some children back to persecution or death, and returns children and adolescents to the very circumstances that compelled them to leave. Following repatriation, the United States provides no support for children's reintegration, despite the great need for medical, mental health, educational, and job training support, as well as the need for basic safety.

A major deficiency in the U.S. repatriation program is its failure to address root causes of migration. Another major problem is the false belief underlying the U.S. repatriation system that deportation deters future migration. Sending children back to desperate conditions does not stop others from coming, nor even stop returned children and adolescents from re-entering the United States. The United States has also not developed a model for repatriating and reintegrating children, although federal law requires it to do so.

### *G. Regional approach*

Although the regional phenomenon of children in the context of migration in Central and North America must be addressed through regional responses, existing bilateral and regional accords

regarding migration in Central and North America fall far short of an adequate response. Existing accords lack a binding rights-based approach, or enforcement mechanisms to ensure compliance. Current accords do not focus on, provide for, or require substantive protection of children's rights. For example, they do not include concrete obligations for transit and destination countries to respect the rights and guarantees of children and adolescents in migration procedures, such as by prohibiting detention, guaranteeing due process, and requiring formal best interests determinations. They also do not require countries of origin to design and implement adequate reintegration policies in coordination with the other countries.

Instead, regional and bilateral agreements regarding migration procedures tend to be logistical in nature, focusing, for example, on the logistics of repatriation. Even these accords, however, are not respected, repatriating children and adolescents in and to very risky circumstances, making them even more vulnerable than they may have been before they migrated. In addition, regional and bilateral security initiatives have exacerbated the vulnerability of migrant children and adolescents. Increased security measures are associated with growing inequality and exclusion of broad sectors of the population in the countries of origin. They have also led to growing militarization of the borders and the reinforcement of migration controls, which has strengthened organized criminal networks, made the journey more dangerous, and resulted in detention and deportation of migrant children and adolescents in need of international protection. Finally, regional and bilateral economic accords contribute directly to the root causes of the migration of Central American and Mexican children. Agreements such as the North American Free Trade Agreement (NAFTA) and the Central America Free Trade Agreement (CAFTA) benefit multinational companies and the U.S. economy generally, at the expense of the economies and communities in Central America and Mexico. The results—unemployment, extreme poverty, and a decaying socioeconomic structure—reinforce and exacerbate the violence and other factors that cause migration.

#### **IV. Overarching recommendations**

##### *Comprehensive regional plan of action*

El Salvador, Guatemala, Honduras, Mexico, and the United States should immediately develop and implement a *Comprehensive Regional Plan on Children, Migration, Human Rights, Refugee Rights, and Human Development* focused on addressing the root causes of migration in sending countries. Civil society organizations and international organizations with expertise in human rights, migration, and refugee protection should participate in creating and evaluating the plan.

##### *Best interests of the child*

National governments throughout the region should review and amend their laws, policies, procedures, and practices to require and ensure that the best interests of the child is a primary consideration in all actions and decisions regarding children and adolescents, including migrant children and adolescents. Local governmental bodies should review and amend their laws, policies, practices, and procedures to reflect this change in national law.

*Family unity*

Regional and national migration policies should promote family unity. National governments throughout the region, especially Mexico and the United States, should provide avenues for regularizing immigration status based on family ties, time spent in the territory, labor roots or ties, and the best interests of the child.

*Alternatives to detention*

Children and families should never be detained for reasons of migration status. National governments throughout the region should develop alternatives to detention. Child welfare agencies should take custody of unaccompanied migrant children and adolescents until they can be reunited with family members or until child welfare officials find another appropriate placement.

*Non-deportation*

Migrant children and adolescents should never be deported; deportation is a punitive measure that comes with future immigration consequences, and children should not be punished for their forced migration. Any child or adolescent being returned to his or her country should be returned through non-punitive measures, such as voluntary return, rather than deportation. More importantly, children and adolescents should only be returned when return is in their best interests. Although migrant children and adolescents may not qualify for immigration relief, repatriation may not be in their best interests. National governments should develop a best interests of the child determination (BID) procedure for all migrant children and adolescents. Migrant children and adolescents should only be repatriated following a BID, conducted by a child-sensitive agency, when the agency finds that repatriation is in their best interests.

*Cease summary / expedited removal*

Transit and destination states, especially Mexico and the United States, should cease all expedited or summary removal procedures used with unaccompanied migrant children and adolescents and/or migrant families. These proceedings have proven inadequate to identify children in need of protection. Expedited proceedings return children and adolescents to dangerous situations, sometimes in violation of their right to *non-refoulement*. Mexico, the United States, and other transit and destination countries should grant all unaccompanied children and adolescents and migrant families access to full and fair legal proceedings in which they can seek asylum and other forms immigration relief. In order to make proceedings meaningful, Mexico and the United States should ensure that all migrant children and adolescents (unaccompanied or not) have free legal representation and a guardian or child advocate assigned to their cases.

*Child-sensitive procedures*

Mexico and the United States and other destination countries should issue regulations requiring a child-sensitive analysis of applications for immigration relief filed by migrant children and adolescents.

*Violence prevention*

Countries of origin, working closely with civil society organizations, should design and develop policies to prevent and sanction all forms of violence: gender-based violence, intrafamilial violence including child abuse, violence against children and adolescents in schools and other institutions, and violence against children and adolescents by gangs and other criminal syndicates. Policies should address the many factors which have resulted in weak and ineffective justice systems, and should include strategies to reduce corruption in police, military, and judicial agencies. States should invest in programs to provide youth with alternatives to joining gangs and support for leaving gangs and reintegrating into communities. International organizations—including aid organizations—should support these efforts with a rights-based, comprehensive approach, rather than with a narrow one focused on enforcement and militarization.

*National development plans*

Countries of origin, working closely with civil society organizations, should design national development plans that address migration, human security, and human rights in order to respond to the problem of children and adolescents affected by migration in a holistic manner. Plans should include increasing access to education, developing job skills and training programs, and work opportunities. Plans should also include greater dedicated resources to strengthen child welfare systems. International aid should support these efforts.

*Sustainable reintegration*

Countries of origin, working closely with civil society organizations, and with financial support from the United States and other countries of the region and international organizations, should develop and implement programs to ensure the sustainable reintegration of repatriated migrant children and adolescents. Reintegration programs should address and provide support for social integration, family reintegration and challenges, educational needs, labor-reintegration (if age appropriate), and services such as mental health and medical services.

*Binding regional accord*

El Salvador, Guatemala, Honduras, Mexico, and the United States should develop a binding regional accord on migration to ensure the respect, protection, and rights of migrant children and adolescents and of children of migrants throughout the region.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Preface

On November 20, 2014, as this report was going to press, President Obama announced several components of an executive action to provide temporary deferral of deportation and relief to immigrants who meet certain eligibility requirements.<sup>1</sup> This executive action, issued through a series of Department of Homeland Security (DHS) memoranda, has the potential to impact millions of undocumented immigrants in the United States. These directives have not yet been formally implemented, and many questions remain over what their impact will actually be. However, key provisions include prosecutorial discretion to use deferred action, providing temporary relief from threat of deportation, for two categories of immigrants in irregular status:

Implementation of **Deferred Action for Parental Accountability (DAPA)**, providing relief to immigrants who are parents to a U.S. citizen or legal permanent resident child as of the date of the memos, with five years of continuous presence in the United States;

An expansion of the **Deferred Action for Childhood Arrivals (DACA)** program for immigrants who entered the United States before the age of 16 (also commonly known as DREAMers); while the old directive had an age limit of 31 at the time of application, the executive action removes the age limit.

In addition to these deferred action programs, the executive action will also affect individuals who would be eligible to apply for legal status but for bars due to being in the United States without documentation. It further expands authority to certify visas for victims of crime or trafficking. The action also eliminates the highly controversial Secure Communities program, under which anyone in local law enforcement custody whose fingerprints trigger a match in immigration databases may be held beyond the expiration of lawful local custody on a “detainer” to facilitate transfer to immigration custody. The action replaces Secure Communities with a Priority Enforcement Program (PEP), under which immigration authorities request only notification from (rather than detention by) local authorities, and only with regard to individuals who pose a national security risk or have certain criminal convictions.

Finally, the action clarifies enforcement priorities, directing that border and immigration officials focus on those with criminal convictions and those apprehended after recently crossing the border (though the government’s interpretation of “recent border crosser” can include areas up to 100 miles inland from a border and years after a post-July 21, 2014 entry). A memo focusing on enforcement specifically outlines primary caretakers and nursing or pregnant women as a category of individuals who should *not* be detained.

Despite the positive developments in the executive action, which intersect directly with many of the issues outlined throughout the chapters on the United States, the Administration’s memoranda also contain directives that fail to address core issues or that negatively impact immigrant children

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<sup>1</sup>American Immigration Council, Immigration Policy Center. (2014, December). A Guide to the Immigration Accountability Executive Action. Retrieved from <http://www.immigrationpolicy.org/special-reports/guide-immigration-accountability-executive-action#enforcement>.

and families. Many millions of children and families will be excluded from the benefits of this executive action. For example, children who entered the U.S. after January 1, 2010—including as part of the 2014 influx—and undocumented immigrants who have non-U.S. citizen or permanent resident children will not be eligible for deferred action. Moreover, the DAPA program applies only to the parent-child relationship, excluding other caretaker relationships. The high prioritization of recent border crossers for immigration enforcement will certainly include children and families attempting to reunite with others already in the country, or fleeing violence and persecution and seeking protection in the United States. This prioritization may override due consideration of vulnerabilities that should result in protection rather than enforcement and deportation. In addition, oversight and accountability will remain key to implementing the new directives, enforcement priorities, and the Priority Enforcement Program.

Finally, above all else, executive action via deferred action remains a limited and temporary measure. It is a policy of the administrative branch and not formal law, and thus fails to regularize status or confer citizenship. President Obama directed that the protection offered by deferred action for youth or parents be valid for up to three years. We cannot know what will happen to these individuals after three years, or whether a new administration will choose to reverse or end the protection offered by this temporary measure. Ultimately, only legislative immigration reform can truly solve the uncertainty and trauma faced by so many immigrant children and families in the United States today. Until then, even where executive action offers a temporary reprieve, the concerns outlined throughout the U.S. chapters will continue to be relevant and in need of a solution.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Introduction

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Over the past decade, the issue of children and adolescents<sup>1</sup> in the context of international migration has gradually gained attention and visibility in several countries and regions of the world. Many varied government institutions, international agencies, and civil society organizations have noted the enormous importance and complexity of child migration, placing particular emphasis on the need to analyze and explain why children cross international borders, and to seek solutions to the human rights problems posed by this migration.

This study grows out of an understanding and conviction that this complex issue must be addressed using the international principles governing the human rights of children and adolescents, supplemented by the norms of international humanitarian law and international refugee law. Such an approach requires a comprehensive, regional focus; that is, it must propose a coordinated response by the States that addresses all the issues underlying this phenomenon and that is based on the rights of the child, including the human right to development and the human right to asylum.

A number of state and international entities have undertaken migration initiatives. Especially noteworthy in the governmental realm are the decisions and/or declarations adopted by the Organization of American States (OAS),<sup>2</sup> the Regional Conference on Migration,<sup>3</sup> and Common Market of the South (*Mercado Común del Sur* or MERCOSUR);<sup>4</sup> several States have also addressed migrant children's rights.<sup>5</sup> Among international human rights bodies, the recent advisory opinion of the Inter-American Court of Human Rights (I/A Court HR) constitutes an important milestone.<sup>6</sup> The Inter-American Commission on Human Rights (IACHR),<sup>7</sup> the Office

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<sup>1</sup> In this book, we refer to children and adolescents as the groups and categories included in the concept of "child" defined in the International Convention on the Rights of the Child, that is, all persons under 18 years of age.

<sup>2</sup> Declaration on Central American Unaccompanied Child Migrants, Organization of American States. Dec. S-008/14. (2014, July 23). *See also* International Conference on Migration, Childhood and Family. (2014, July 16-17). *Speech of the Secretary General of the Organization of American States.*

<sup>3</sup> Regional Conference on Migration. (2014, June 26-27). *Managua Extraordinary Declaration.*

<sup>4</sup> MERCOSUR. (2014, 29 de julio). Comunicado sobre derechos de niños, niñas y adolescentes migrantes. Retrieved from <http://www.ippdh.mercosur.int/comunicado-mercursosobre-derechos-de-ninos-ninas-y-adolescentes-migrantes/>. (Requesting an Advisory Opinion from the Inter-American Court of Human Rights on the rights of migrant children.)

<sup>5</sup> *See, e.g.,* Deutsche Presse-Agentur (DPA). (2014, 28 de junio). Presidentes de SICA piden a EU respetar derechos niños migrantes. *Vanguardia.* Retrieved from <http://www.vanguardia.com.mx/presidentesdesicapideaeurespetarderechosninosmigrantes-2100771.html>.

<sup>6</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 127-128 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

<sup>7</sup> *See, e.g.,* Inter-American Commission on Human Rights, Organization of American States (IACHR). (2014, October 2). Press Release: IACHR Wraps Up Visit to the United States of America. Retrieved [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/110.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp); IACHR. (2013, December 30). Human Rights

of the United Nations Special Rapporteur on the Human Rights of Migrants,<sup>8</sup> the United Nations Committee on the Rights of the Child,<sup>9</sup> and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, among others, have also issued statements on child migration.<sup>10</sup>

Several specialized international agencies, such as the United Nations International Children's Emergency Fund (UNICEF),<sup>11</sup> the United Nations High Commissioner for Refugees (UNHCR),<sup>12</sup> the International Organization for Migration (IOM),<sup>13</sup> and the Office of the High Commissioner for Human Rights (OHCHR)<sup>14</sup> have written reports on the topic. In addition,

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of Migrants and Other Persons in the Context of Human Mobility in Mexico. Retrieved from <http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf>; IACHR. (2013, December 30). Report on Immigration in the United States: Detention and Due Process. Retrieved from <http://cidh.org/countryrep/USImmigration/TOC.htm>.

<sup>8</sup> See Rep. of the Special Rapporteur on the Human Rights of Migrants, Human Rights Council, 11th Sess., 2009, May 14, ¶¶ 26-33, U.N. Doc. A/HRC/11/7 (2009), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/132/23/PDF/G0913223.pdf?OpenElement>; Rep. of the Special Rapporteur on the Human Rights of Migrants, Human Rights Council, 17th Sess., 2011, March 21, ¶¶ 26-33, U.N. Doc. A/HRC/17/33 (2011), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/83/PDF/G1112183.pdf?OpenElement>; Rep. of the Special Rapporteur on the Human Rights of Migrants, Human Rights Council, 20th Sess., 2012, April 2, ¶¶ 38-41, 72.h, U.N. Doc. A/HRC/20/24 (2012), retrieved from [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf); Rep. of the Special Rapporteur on the Human Rights of Migrants, Human Rights Council, 26th Sess., 2014, April 3, ¶¶ 55-56, 95, U.N. Doc. A/HRC/26/35 (2014), retrieved from <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf>.

<sup>9</sup> U.N. Comm. on the Rights of the Child, *Human Rights of All Children in the Context of International Migration Background Paper*, 2012, Sept. 28 (2012, Sept. 28), retrieved from <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/2012DGDBBackgroundPaper.pdf>. See also Comm. on the Rights of the Child, *General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, 39th Sess., 2005, May 17 – June 3, U.N. Doc. CRC/GC/2005/6 (2005, Sept. 1), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>.

<sup>10</sup> OHCHR. (2014, July 3). Statement by Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) on Ending Immigration Detention of Children, Retrieved from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14825&LangID=E>.

<sup>11</sup> See, e.g., UNICEF Guatemala. (2009, agosto). *Camino al norte*, Reseña sobre la niñez migrante en Guatemala. Retrieved from [http://www.unicef.org/guatemala/spanish/recursos\\_20207.htm](http://www.unicef.org/guatemala/spanish/recursos_20207.htm); UNICEF Mexico. (2011, noviembre). *La travesía, Migración e infancia*. Retrieved from [http://www.unicef.org/mexico/spanish/Unicef\\_Migracion\\_web%282%29.pdf](http://www.unicef.org/mexico/spanish/Unicef_Migracion_web%282%29.pdf); UNICEF Oficina Regional para América Latina y el Caribe & Universidad Nacional de Lanús (UNLA). (2009, diciembre). *Estudios sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular en América Latina y el Caribe*. Retrieved from [http://www.unicef.org/lac/UNICEF\\_MIGRACION\\_NINOS.pdf](http://www.unicef.org/lac/UNICEF_MIGRACION_NINOS.pdf).

<sup>12</sup> UNHCR. (2014). *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*. Retrieved from [http://www.unhcrwashington.org/sites/default/files/UAC\\_UNHCR\\_Children%20on%20the%20Run\\_Full%20Report\\_ver2.pdf](http://www.unhcrwashington.org/sites/default/files/UAC_UNHCR_Children%20on%20the%20Run_Full%20Report_ver2.pdf).

<sup>13</sup> Organización Internacional para las Migraciones (OIM) Oficina Regional, UNICEF, oficina para Costa Rica, & la Organización Internacional del Trabajo (OIT) oficina para Centroamérica, Haití, Panamá y República Dominicana. (2013, enero). *Niños, niñas y adolescentes migrantes América Central y México*. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

<sup>14</sup> OHCHR. *Study on the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration*, U.N. Doc. A/HRC/15/29 (2010, July 5), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/151/41/PDF/G1015141.pdf?OpenElement>.

numerous reports issued by civil society in recent years have made reference to the human rights challenges faced by children under the current scenario of international mobility, including several specifically devoted to the situation in Central and North America.<sup>15</sup>

Migration directly and indirectly involves tens of millions of persons under the age of 18, in particular unaccompanied migrant children and adolescents; children and adolescents who migrate with their family members; children and adolescents born in the countries of destination whose parents are migrants; and children and adolescents in the countries of origin whose parents have migrated, or children and adolescents who return to their countries of origin, either voluntarily or forcibly. The phenomenon of childhood migration is marked by at least ten characteristics:

- It is a complex and multidimensional phenomenon, determined by a wide variety of social, political, cultural, economic, and family-related factors, among others, that are intrinsically interrelated and find expression in all facets of migration, especially in its causes and effects.
- The number of children and adolescents who migrate, whether alone or accompanied, has been climbing steadily over the past decade, both internationally and in certain regions in particular.
- Even though the majority of children who migrate are adolescents, year after year there are growing numbers of migrant children under 12 years of age, both unaccompanied and with their families.
- Children and adolescents affected by migration include those who migrate alone or with their parents, as well as the children of migrants.

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<sup>15</sup> See Center for Gender and Refugee Studies & Kids in Need of Defense. (2014). *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (hereinafter “Treacherous Journey”). Retrieved from [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf); Celesia, A., Morlachetti, A., & Luna, M. por Red Latinoamericana de Acogimiento Familiar (RELAF), Save the Children, & UNICEF. (2014, septiembre). *Manual sobre estándares internacionales de derechos humanos aplicables a los niños, niñas y adolescentes migrantes*. Retrieved from [http://www.unicef.org/lac/Manual\\_estandares\\_DDHH\\_NNA\\_migrantes.pdf](http://www.unicef.org/lac/Manual_estandares_DDHH_NNA_migrantes.pdf); Ceriani Cernadas, P. (coord.). (2013). *Niñez detenida: los derechos de los niños, niñas y adolescentes migrantes en la frontera México-Guatemala*. Mexico City: Distribuciones Fontamara; Universidad Centroamericana José Simeón Cañas (UCA). (2012). *Atrapados en la tela de araña: Migración irregular de niñas y niños salvadoreños hacia los Estados Unidos*; Casa Alianza Honduras. (2012, junio). Análisis de la situación de Derechos de la Infancia Migrante No Acompañada en el marco de los procedimientos de deportación y retorno a Honduras. Retrieved from <http://www.casa-alianza.org.hn/images/documentos/Informes.Especiales/Inf.2012/2.%20informe%20infancia%20migrante%202012.pdf>; Women’s Refugee Commission. (2012). *Forced From Home: The Lost Boys and Girls of Central America* (hereinafter “Forced From Home”). Retrieved from <http://womensrefugeecommission.org/forced-from-home-press-kit>; Cavendish, B., and Cortazar, M. (2011). *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*. Retrieved from <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>; Catholic Relief Services. (2010, January). *Child Migration: The Detention and Repatriation of Unaccompanied Central American Children from Mexico*. Retrieved from <http://www.crsprogramquality.org/storage/pubs/peacebuilding/LACRO%20Migration-final.pdf>.

- The circumstances and living conditions for the majority of children and adolescents affected by their own migration or that of their parents, as well as by the policies that regulate their mobility, are marked by high levels of vulnerability.
- Such vulnerability is principally determined by the wide range of challenges to, and violations of, children's basic human rights, which find expression in the factors that drive them to migrate, as well as throughout the migration cycle (departure, transit, destination, return).
- In addition to these characteristics, migrating children and adolescents face specific factors and challenges based on their gender, ethnic origin, or age, among other factors.
- The migration of children and adolescents principally takes the form of irregular migration processes (departure, transit, destination) that contribute to increased levels of vulnerability.
- The States' responses to irregular migration status reinforces children's vulnerability by restricting their access to fair procedures for relief—a right to which every child is entitled; or by erroneously denying substantive rights and guarantees that must be ensured for every qualified child and adolescent, including the human right to asylum.
- The policies and practices that affect children and adolescents who migrate or whose parents have migrated either ignore and/or fail to protect the specific needs and rights of children and adolescents.

These characteristics of child migration manifest with particular intensity, both quantitatively and qualitatively, in Central and North America, especially in the countries of Honduras, Guatemala, El Salvador, Mexico, and the United States. This is the region we studied.

The research project *Human Rights, Children, and Migration in Central and North America: Causes, Policies, Practices, and Challenges* was conducted from January 2013 to October 2014. Coordinated by the Center for Gender and Refugee Studies (CGRS) of the University of California, Hastings College of Law (United States) and the Migration and Asylum Program, Center for Justice and Human Rights at the National University of Lanús (Argentina), this initiative also included the following partners: Casa Alianza (Honduras), Universidad Centroamericana “José Simeón Cañas” (El Salvador), Human Mobility Ministry and Asociación Pop No'j (Guatemala), Centro de Derechos Humanos Fray Matías de Córdova and the Programa de Defensa e Incidencia Binacional—including Casas YMCA de Menores Migrantes and Coalición Pro-Defensa del Migrante, A.C. (Mexico), and Kids in Need of Defense and the Women's Refugee Commission (United States). Grants from the John D. and Catherine T. MacArthur Foundation and the Ford Foundation made this project possible.

## **I. Research**

The principal objective of this initiative was to identify the main advances, setbacks, and challenges to the human rights of children and adolescents in the context of migration in Central and North America. The project sought to determine how migration per se, its causes, and the policies and practices implemented by countries in regard to migration directly or indirectly affect the human rights and guarantees of the various categories of children and adolescents who migrate alone or accompanied, as well as how these factors affect the sons and daughters of migrants. We set out to examine these policies and processes, along with the challenges they entail, from a regional perspective.

When we discuss the categories of children and adolescents affected by migration, we are referring to: (1) children and adolescents who migrate with their parents or other formally responsible adults; (2) children and adolescents who migrate unaccompanied; (3) children and adolescents who remain in their countries of origin, but whose parents have migrated to another country in the region; (4) children and adolescents born in countries of destination, who are the sons or daughters of migrants; and (5) migrant children and adolescents who return, voluntarily or forcibly, to their country of origin.

Members of the project team collected and analyzed data and prepared a report that seeks to reflect how this migration concretely takes shape in each of the countries, as well as the interrelationships of migration effects between one country and another. We wanted to learn how the circumstances and policies in place in each country affect the situation in the other countries, and vice versa. This research also looks at how countries in the region have responded to childhood migration through bilateral and regional accords.

The chapters on El Salvador, Guatemala, and Honduras (chapters 2-4) examine issues such as: the varied factors that lead children and adolescents and/or their parents to migrate to Mexico or the United States; conditions for children and adolescents in each of these countries; the situation of children and adolescents whose parents have migrated; challenges of social reintegration faced by children and adolescents who return to their countries; and the treatment of migrant children and adolescents from other countries in transit through or residing in their territories. For each of these issues, we conducted interviews with children and adolescents and, in several cases, with other key social and political players, in order to evaluate the regulatory and legal framework; the public policies and practices implemented in each case; the institutional structures developed to respond to migration; and, in particular, the concrete reality faced by various categories of children and adolescents.

The two chapters regarding Mexico (6 and 7) are preceded by a general introduction on childhood and migration in Mexico, addressing laws and regulations (in particular, laws on childhood and adolescence, migration, and refugees and their protection); the institutions entrusted with responding to migration; the causes behind the migration of Mexican children and adolescents; the concrete policies and programs implemented in recent years; and selected statistics on the situation of children in the country. Then these chapters address the situation in the context of Mexico's two borders (southern and northern).

The analysis of Chiapas clearly reflects both the diversity of situations affecting various categories of children and adolescents and the magnitude of the challenges to their rights. Focusing particularly on the region of Soconusco (and within it, the city of Tapachula), chapter 6 analyzes problems and challenges for safeguarding the rights of migrant children and adolescents and the sons and daughters of migrants who live in this sub region; children and adolescents from Chiapas who migrate to the United States or return from there; and migrant children and adolescents (alone or with their families) who are detained at the Siglo XXI Migration Station after being intercepted in some part of Mexican territory who are then, in the vast majority of cases, repatriated to their countries of origin.

Chapter 7 on northern Mexico also addresses the various categories of children and adolescents affected by migration, particularly children who travel through the states of northern Mexico with the objective of crossing into the United States, those who are returned by U.S. authorities upon being detained in the border zone, as well as those referred to as *niños de circuito*. This term refers to children recruited and exploited by organized crime and other criminal actors to guide people or drugs across the border; they are called “circuit” children because of their repeated border crossings. This chapter pays particular attention to the violence that affects migrating children through this area, and thus to the extreme vulnerability marking the circumstances in which these children and adolescents find themselves. The chapter also looks at programs and practices for reintegration put into place by Mexican institutions.

The four chapters on the migration situation in the United States (9-12) provide a comprehensive analysis of the multiple problems and challenges affecting the rights of migrant children and adolescents and the sons and daughters of migrants in the United States. We particularly examine how immigration enforcement affects migrants’ rights, especially border control, detention practices, and deportations of children and/or their parents, including enforcement policies that separate families. In addition, we analyze U.S. repatriation policies and U.S. reintegration programs. We focus on the procedures designed for resolving cases of unaccompanied children and adolescents, the legal remedies available for migrants, asylum applicants, and victims of human trafficking, and the obstacles for accessing resources to help immigrants navigate these procedures.

This book devotes a specific chapter (13) to analyzing initiatives adopted by the countries in the region with respect to migrant children, adolescents, and families caught up in bilateral and regional migration processes. Our research objective was, first, to evaluate the extent to which the rights of children and adolescents have been taken into account in such initiatives, both in cases of accords referring exclusively to childhood migration and in general migration agreements. Second, this chapter succinctly examines other agreements signed by these countries—for example economic and trade agreements—that directly or indirectly affect migratory movements in the region, including those of children and adolescents and their parents.

Finally, this book includes a chapter written by the Washington office of UNHCR (1). That chapter, which synthesizes the UNHCR report *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* published in early 2014, and based on interviews conducted along the southern border of the United States,

analyzes the causes that lead Central American and Mexican children and adolescents to leave their countries of origin unaccompanied.

## **II. A human-rights, humanitarian, human development, and refugee crisis: a quadruple crisis that requires a comprehensive regional response**

In mid-2014, the government of the United States used the term “crisis” to describe the increase in the number of unaccompanied children and adolescents who were arriving in the United States. Although initially the term appeared to allude to the conditions the children and adolescents had experienced and their needs for protection, it quickly came to refer to concerns about the possible effects that the increase in migrant children would have on the U.S. immigration system. Some decision-makers, for example, commented on the lack of shelters or centers for handling those children, overcrowding in the Border Patrol stations, and the need for funds to respond to this situation. The discussion then focused, as this book discusses, on how to detain and return these children and adolescents as swiftly as possible.

In contrast, this book uses the concept of “crisis” in its genuine meaning, not only literally, but also with respect to the reality faced by children in the region. In effect, we are witnessing a profound crisis that affects all the countries of the region, and with particular intensity El Salvador, Guatemala, Honduras, and Mexico. It is a crisis that began a few decades ago, but has expanded dramatically in recent years. Above all else, this crisis is marked by the systematic violation of the human rights of children—throughout the region, at the point of origin, throughout transit, and in the countries of destination.

In effect, the analysis provided throughout this study, in each chapter and in the interaction among the chapters, tells the story of a highly complex and critical human rights situation affecting children and adolescents in the context of migration in Central and North America. It also confronts a situation that could be classified as a humanitarian crisis, given the various forms of violence that affect the lives and physical integrity of these children and adolescents. At the same time, the States’ enforcement-focused responses to the protection need for protection of thousands of children have created a crisis in basic aspects of international refugee law.

Finally, considering the current situation of all categories of children and adolescents affected by migration in the region, it is fair to state that we are in the face of a true human-development emergency for hundreds of thousands of children, not only in terms of the reasons these children, adolescents, and families leave their countries and the conditions in which children and adolescents whose parents have migrated are living, but also in terms of the challenges they face in transit, in the country where they reside and when and if they return to their place of origin.

As other reports have indicated in regards to some of the issues we examine or the areas in the region that we have studied, the situation as a whole paints a picture characterized by a diminution of practically all internationally recognized rights for all persons under the age of 18. These rights, we emphasize, must be respected, protected, and guaranteed in all cases, regardless of nationality, ethnic origin, migratory status (of the children and/or their parents), sex, or any

other factor precluded under the principle of nondiscrimination, which is considered *jus cogens*, which is to say, a peremptory or overriding norm of international law.<sup>16</sup>

The rights of children and adolescents to life, physical integrity, housing, education, health, a family life, an adequate standard of living, access to the justice system, and to be heard, among many others, face various situations of risk, threat, or direct violation in the context of migration in the region. This is due to the situations in their countries of origin and destination that lead them to migrate, as well as the treatment accorded migrant children and adolescents and asylum seekers—and/or their parents—in the countries of transit and destination, and also upon return to their countries of origin.

At stake is one of the guiding rights/principles of the International Convention on the Rights of the Child: the right to life, survival, and development, set forth in Article 6, although interdependent and interrelated with all the other provisions of the Convention. This right means, first, the right to physical, mental, emotional, spiritual, moral, and social development. Second, it includes access to social rights fundamental for ensuring certain minimum conditions, such as education, health, housing, food, the right not to be exploited, and the prohibition on child labor, among other factors. Yet it also includes the right not to be arbitrarily detained and not to be returned to a country where one's life and physical integrity are at risk.

The development of children and adolescents is intimately connected to their family ties (and the rights/duties of each family member, in particular parents, guardians, or other legal representatives), following Articles 9, 10, 16, 18, and 27 of the Convention. For this reason, the right to development of children and adolescents in the context of migration is affected by adverse impacts on the right to family life. Arbitrary or disproportionate intrusions on the right to family unity (due to irregular migration status), as well as the lack of mechanisms to protect family life in countries of origin and destination, all have negative repercussions on the lives of children and adolescents, particularly on their right to development, in which parents can and must play a fundamental role, with the support of the State, as established in the Convention on the Rights of the Child.

In order to satisfy and, above all, protect all the elements that contribute to the right to development, it is necessary to guarantee due process (and access to the justice system) in any procedure that could directly or indirectly affect those rights, in keeping with the age and maturity of each child. In particular, this includes *the right to be heard*, a pillar of the Convention on the Rights of the Child, based on the principle of progressive autonomy of Article 5. Immigration and asylum procedures, as well as border control practices, severely limit to the participation and right to be heard of children and adolescents' participation right to be heard. Nor are the children involved taken into account in the design, implementation, and evaluation of

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<sup>16</sup> The Inter-American Court of Human Rights, in its Advisory Opinion on Rights of Undocumented Migrants, reaffirmed this inalienable and universal nature of the principle of nondiscrimination. See *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (2003, September 17). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf). It confirmed this position in its recent opinion on migrant children and adolescents. See *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 127-128 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

policies and programs that affect the rights of children and adolescents in the context of migration, in both countries of origin and destination.

Finally, the way in which these rights—which are essential for guaranteeing the lives, survival, and integral development of all children and adolescents—are interpreted, regulated, applied, and ensured must also guarantee, in form and in substance, the other core principles of the Convention: the best interests of the child and nondiscrimination. According to the Committee on the Rights of the Child, the principle of the best interests of the child has three intertwined characteristics: it is a right, it is a principle, and it is a procedural rule.<sup>17</sup>

Nonetheless, we will see that this principle is not taken into account in the context of migration in Central and North America, nor is it seen as a right or as providing guidance for procedures that may affect the rights of children and adolescents. Factors such as rejection at the border, repatriation, detention, deportation of parents, the formal and practical obstacles to family reunification, the lack of mechanisms for protecting life and physical integrity in the countries of origin and transit, as well as the denial of basic rights in the country of origin, reveal that both by action and by omission the States' policies and practices are not determined by the best interests of the child.

Along these lines, the principle of non-discrimination, crucial not only for the protection of children, but for all international human rights law, is severely impaired in the context of migration. Migration processes omit consolidated standards that dictate not detaining children and adolescents, the right to be heard, and the protection of family life based on the nationality or migratory status of the child or his or her parents. Similarly, direct and indirect discrimination contribute to the leading causes of migration, as along with undue restrictions on the social rights of migrant children and children of migrants.

Many interrelated structural factors make up the causes of the migration of children and adolescents and/or their parents. These factors represent a bleak view of human rights and integral human development. Migration, in turn, arises from the diversity and magnitude of challenges to their rights that children and adolescents and their families face along the entire migratory route, as well as in the country in which they temporarily or permanently reside, and even when they return or are returned to their countries of origin. This profoundly complex reality requires an extensive battery of responses – in the form of public policies, legal and regulatory frameworks, and practices – that derive from a comprehensive human rights approach, including the supplementary components of the human right to development, humanitarian law, and international refugee law. In addition, the following elements must always be considered:

- The underlying causes of migration, forms of migration, protection of children and adolescents in transit, and access to their rights in the countries of destination and countries of origin, among many other factors.

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<sup>17</sup> U.N. Comm. on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, U.N. Doc. CRC /C/GC/14 (2013, May 29). Retrieved from <http://www.refworld.org/docid/51a84b5e4.html>.

- Short-, medium-, and long-term perspectives, and, accordingly, concrete objectives and measures in the short-, medium- and long term.
- Accounting for local, national, bilateral, and, in particular, regional levels of action in an interconnected fashion.
- Reliable information to ensure a comprehensive human development plan focused on the rights of children and adolescents.

Next, we briefly describe and examine the principal findings of our research, structured around: (1) causes of migration; (2) rights of children and adolescents in transit; (3) rights of children and adolescents in their countries of destination; (4) the right to consular protection; and (5) policies of return and reintegration of children and adolescents in the countries of origin.

### **III. The causes of migration: a structural, multidimensional, and regional problem**

Analyzing the reasons children and adolescents migrate, whether alone or accompanied, as well as the reasons adults leave their children behind in the country of origin, reveals, first, the complexity of the phenomenon, the depth of the problems underlying migration in the region, and thus the need to address them in an adequate, timely, and effective manner. The situation of children in the three countries of the Northern Triangle of Central America (El Salvador, Guatemala, and Honduras), as well as in Mexico, is marked by considerable shortcomings in the policies intended to provide for their protection.

El Salvador, Guatemala, and Honduras profoundly and systematically fail to carry out essential duties required of them as States parties to the Convention on the Rights of the Child; major shortcomings in democracy and the rule of law frame permit these failures to occur. Shortcomings include the lack of laws and regulations, or the failure to enforce them; institutional weaknesses and inadequacies; lack of resources or other budget priorities; inadequate implementation of public policies; arbitrary practices contrary to a rights-based approach; discrimination; widespread corruption; and high levels of impunity.

These failures underscore a most worrisome denial of the basic rights of the child revealed by the statistical data regarding poverty, illiteracy, school drop-out rates, lack of opportunity, and unemployment among adolescents and youths. These phenomena are accompanied by varied and growing forms of violence (social, institutional, organized crime, gender violence, and domestic violence); impunity for these acts of violence; obstacles for access to justice; widespread corruption; collusion between public agencies and persons involved in organized crime; policies of institutionalization of children and adolescents in vulnerable situations; dysfunctional child welfare systems; separation from parents; housing and sanitation deficits; gender inequality and inequality based on ethnic origin (indigenous populations); exploitation of children and child labor; and human trafficking, among other indicators.

While El Salvador, Guatemala, and Honduras are ranked 115th, 125th, and 129th, respectively, on the global Human Development Index,<sup>18</sup> the indicators associated with the principal causes of migration (poverty, violence, and social exclusion) reveal how children and adolescents are hit especially hard, both quantitatively and qualitatively.

Guatemala, one of the most unequal countries in the world, had a population estimated by UNICEF, as of 2013, of approximately 15.4 million, almost half of whom were children and adolescents, with more than 17% under 5 years of age. According to the National Survey on Living Conditions 2011 (ENCOVI 2011), 53.7% of the population lives in conditions of poverty, while 13.3% lives in conditions of extreme poverty. The latest statistics for 2012 reveal that 19% of children 7 to 14 years of age work in the labor market, with the highest rate of child labor in rural areas.<sup>19</sup> According to the United Nations Development Program (UNDP), while 49.8% of children under the age of 5 suffer from chronic malnutrition, the average educational level of children and adolescents is a mere 4 years.<sup>20</sup> As occurs with most social indicators, the statistics on malnutrition among children in the case of the indigenous population are significantly higher, reaching 65.9%.<sup>21</sup>

In El Salvador, the majority of the population is young, with 63.7% under the age of 30.<sup>22</sup> In 2011, institutional access to pre-school education among children under 3 years of age was less than 2%; access to kindergarten education was 54.2%, and just slightly more than one-third of the population had access to a high school education (UNICEF, 2013a, based on data from the Ministry of Education—MINED, School Census, and the Multi-Purpose Household Survey—EHPM, 2011). For its part, while net enrollment in basic education is 93.7% of children, it reaches only 35.4% for high school.<sup>23</sup> Currently, the percentage of underweight children and adolescents is 5.5%, and the percentage of those with chronic malnutrition is 19%. Among children and adolescents whose mothers lack an education, the percentage of those underweight is 15.7% and of those with chronic malnutrition is 36.6%.<sup>24</sup>

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<sup>18</sup> United Nations Development Programme (UNDP). (2014). Human Development Index. Retrieved from <http://hdr.undp.org/en/data>.

<sup>19</sup> Instituto Centroamericano de Estudios Fiscales (ICEFI), Suecia, & UNICEF. (2012, diciembre). Análisis del Presupuesto General del Estado de Guatemala aprobado para 2013, Enfocado en la niñez y adolescencia y en seguridad alimentaria y nutricional. *Serie de documentos de análisis ¡CONTAMOS! 12*. Retrieved from [http://www.unicef.org.gt/1\\_recursos\\_unicefgua/publicaciones/2012/Contamos12%20Presupuesto2013.pdf](http://www.unicef.org.gt/1_recursos_unicefgua/publicaciones/2012/Contamos12%20Presupuesto2013.pdf).

<sup>20</sup> Programa de las Naciones Unidas para el Desarrollo en El Salvador (PNUD). *El Salvador en Breve*. Retrieved from [http://www.sv.undp.org/content/el\\_salvador/es/home/countryinfo/](http://www.sv.undp.org/content/el_salvador/es/home/countryinfo/).

<sup>21</sup> Instituto Centroamericano de Estudios Fiscales (ICEFI) & UNICEF. (2011, septiembre). Protegiendo la nueva cosecha, Un análisis del costo de erradicar el hambre en Guatemala, 2012-2021. *Serie de documentos de análisis ¡CONTAMOS! 4*. Retrieved from [http://www.unicef.org.gt/1\\_recursos\\_unicefgua/publicaciones/contamos\\_4.pdf](http://www.unicef.org.gt/1_recursos_unicefgua/publicaciones/contamos_4.pdf).

<sup>22</sup> PNUD. *El Salvador en Breve*. Retrieved from [http://www.sv.undp.org/content/el\\_salvador/es/home/countryinfo/](http://www.sv.undp.org/content/el_salvador/es/home/countryinfo/).

<sup>23</sup> UNDP. (2013). Human Development Report 2013, El Salvador. Retrieved from <http://hdr.undp.org/sites/default/files/Country-Profiles/SLV.pdf>. See also PNUD. (2013). Informe sobre Desarrollo Humano El Salvador 2013, Imaginar un nuevo país. Hacerlo posible, Diagnóstico y propuesta, p. 4. Retrieved from [http://www.sv.undp.org/content/dam/el\\_salvador/docs/povred/UNDP\\_SV\\_IDHES-2013.pdf](http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_IDHES-2013.pdf).

<sup>24</sup> Informe sobre Desarrollo Humano El Salvador 2013, Imaginar un nuevo país. Hacerlo posible, Diagnóstico y propuesta, p. 130. Retrieved from [http://www.sv.undp.org/content/dam/el\\_salvador/docs/povred/UNDP\\_SV\\_IDHES-2013.pdf](http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_IDHES-2013.pdf).

Honduras is one of the lowest-income countries in Latin America and the Caribbean, with a poverty rate, according to the National Statistics Institute (INE), of 59.9% of households in 2006, which remained practically unchanged, at 60.0%, in 2011. Poverty is accentuated in rural areas, which experience the most severe limitations in the coverage and quality of social services. The rural population, which represents approximately 53% of the country's total population, has a level of poverty of 65.4% as of 2010.<sup>25</sup> Acute malnutrition affects more than half of the children ages 1 to 5 years, and average schooling for the population of Honduras is a mere 4.3 years in rural regions and 7 years in urban areas.<sup>26</sup>

In Mexico, a study conducted by UNICEF and the National Council for the Evaluation of Social Development Policy (CONEVAL) indicates that 53.8% of the population ages 0 to 17 years of age lives in poverty, that is, 21.2 million children and adolescents, with 12.1% living in conditions of extreme poverty.<sup>27</sup> This situation, as in Guatemala, is more extreme for the indigenous population, where 78.5% of children and adolescents from 0 to 17 years of age live in poverty, with 33.4% percent living in extreme poverty.

These figures represent merely a sample; this book explains in greater detail the dire situation of children and adolescents in these four countries. Unquestionably, we are dealing with a situation in which key factors basic to the human development of millions of children and adolescents are not being guaranteed. Added to this scenario, ever since the periods of armed conflict in Central America, and, in the case of Mexico, with particular intensity in the past decade, there has been dramatic growth of various forms of violence that directly harm the lives and development of hundreds of thousands of children and adolescents in their communities of origin.

The right to development does not consist merely of its material components (in other words, economic and social rights), but of the totality of material, spiritual, emotional, and psychological factors, as established in the Convention on the Rights of the Child, that ensure such development will take place free from all forms of violence. The data we have collected from various sources—interviews with children and adolescents and other key players, governmental reports from international agencies, universities and social organizations—provide evidence of a context in which the development of children and adolescents is permeated on a daily and generalized basis by multiple forms of violence. The data highlight the impact on children and adolescents of violence and abuses in the home environment; gender-based violence, particularly against girls and adolescent young females; violence based on ethnic origin and sexual orientation; violence related to gangs and, increasingly, a number of organized crime rings; as well as institutional violence by security forces.

While in South America there has been a significant decrease in the homicide rate (from 26.1 per 100,000 population in 2000 to 21.1 per 100,000 population in 2010), Central America, in contrast, has seen a clear increase, with a homicide rate that has almost doubled in the same

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<sup>25</sup> PNUD. *Reducción de la Pobreza*. Retrieved from <http://www.hn.undp.org/content/honduras/es/home/library/poverty/>.

<sup>26</sup> UNICEF Honduras. *Contexto de país*. Retrieved from [http://www.UNICEF.org/honduras/14241\\_16946.htm](http://www.UNICEF.org/honduras/14241_16946.htm).

<sup>27</sup> Consejo Nacional de Evaluación de la Política de Desarrollo Social (CONEVAL) & UNICEF. (2013, abril). *Pobreza y derechos sociales de niñas, niños y adolescentes en México, 2010-2012*. Retrieved from [http://www.unicef.org/mexico/spanish/UN\\_BriefPobreza\\_web.pdf](http://www.unicef.org/mexico/spanish/UN_BriefPobreza_web.pdf).

decade, from 26.6 per 100,000 to 43.3 per 100,000. Similarly, worldwide, 42% of homicides committed in the world in 2010 involved a firearm. In the Western Hemisphere, this figure was much higher, with an average of 75%. In Guatemala and Honduras, the proportion of homicides committed with firearms (as a proportion of total homicides) was even greater: 84% and 83% respectively.<sup>28</sup>

This violence particularly affects children and adolescents. Several studies underscore the growing presence of these threats in schools, noting that gang activities are undermining the effectiveness of schools as an environment for developing the capacities of children and adolescents. According to the UNDP, evidence indicates that territorial control exercised by gangs in the vicinity of school zones is a major contributor to school drop-out rates, and that public schools are no longer perceived as a space of protection, but as one of risk.<sup>29</sup>

In the past decade, the prevalence of violence has become increasingly alarming, as has its impact both on migration (violence as a cause of migration) and on the migrant population—who are direct victims of various forms of violence, which particularly affects children and adolescents. The statistics indicate that in Mexico during last six-year presidential term, more than 60,000 persons were murdered and some 150,000 persons were displaced as a result of drug-related violence perpetrated by cartels and gangs in collusion with public entities and/or officials.<sup>30</sup>

Domestic violence, femicides/feminicides (murders of women, and murders specifically targeting women based on their gender) as well as other forms of gender-based and sexual violence, in addition to impunity for these crimes (lack of access to the justice system, but also failures to protect victims), specifically affect children and adolescents in the Central American countries and Mexico, especially girls and adolescent females. The United Nations Special Rapporteur on Violence against Women, in her report on her visit to Honduras, noted the extent of this type of crime and called attention to the 263% increase in the violent deaths of women from 2005 to 2013.<sup>31</sup> After her visit to El Salvador, she also indicated that children and adolescents, especially girls, are particularly exposed to situations of domestic violence.<sup>32</sup> In Mexico, which ranks 16th worldwide for homicides against women, the rates have climbed steadily since 2007.<sup>33</sup>

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<sup>28</sup> Economic Commission for Latin America and the Caribbean (ECLAC). (2013, December). Social Panorama of Latin America 2013. Retrieved from <http://www.cepal.org/en/publications/social-panorama-latin-america-2013>.

<sup>29</sup> UNDP. (2013). Human Development Report 2013, El Salvador, p. 14. Retrieved from <http://hdr.undp.org/sites/default/files/Country-Profiles/SLV.pdf>.

<sup>30</sup> Amnesty International. (2013, May). Annual Report: Mexico 2013. Retrieved from <http://www.amnestyusa.org/research/reports/annual-report-mexico-2013?page=show>.

<sup>31</sup> OHCHR. (2014, July 7). Special Rapporteur on Violence against Women Finalizes Country Mission to Honduras and Calls for Urgent Action to Address the Culture of Impunity for Crimes against Women and Girls. Retrieved from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14833&LangID=E%20URL>.

<sup>32</sup> Rep. of the Special Rapporteur on Violence against Women, its Causes and Consequences, Addendum, Human Rights Council, 17th Sess., 2011, February 14, U.N. Doc. A/HRC/17/26/Add.2 (2011), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/112/37/PDF/G1111237.pdf?OpenElement>.

<sup>33</sup> Católicas por el Derecho Decidir & Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C. (2012, July 17). Femicide and Impunity in Mexico: A context of structural and generalized violence. Retrieved from [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CDDandCMDPDH\\_forthesession\\_Mexico\\_CEDAW52.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CDDandCMDPDH_forthesession_Mexico_CEDAW52.pdf).

A range of factors explain the current levels of violence in Central America. One of those factors involves the history of U.S. foreign policy in the region. U.S. intervention in the region dates back to 1954, when the U.S. government—specifically the CIA—orchestrated the overthrow of legally elected Guatemalan president Jacobo Arbenz. President Arbenz was a leader whose plans for agrarian reform were opposed by the United Fruit Company, the U.S. company that owned most of Guatemala’s arable land and infrastructure. The overthrow of the Arbenz government destroyed Guatemala’s democracy, and laid the foundation for a bloody civil war that claimed at least 200,000 lives, particularly those of indigenous Guatemalans. The 1954 coup signaled the beginning of region-wide political instability that would last for decades.<sup>34</sup>

During the 1980s, the U.S. government, under the leadership of President Ronald Reagan who viewed Central American civil wars as “theaters in the Cold War,” actively supported repressive regimes in El Salvador and Guatemala, while undermining the socialist Sandinista government of Nicaragua through support of the Contras.<sup>35</sup> While civil wars raged on in El Salvador and Guatemala, the U.S. also funded counterinsurgency efforts in Honduras, which served as a staging ground for the Contras.<sup>36</sup>

In addition to U.S. foreign policy in the region, U.S. immigration law and policy also contributed to the spread of gang violence in the region:

Lacking legal status and seeing no way forward in the United States, many undocumented youths found solace and support in gangs. The most infamous, Mara Salvatrucha [MS-13], was founded by Salvadorans in the Pico-Union neighborhood of Los Angeles in the mid-1980s. When undocumented gang members were apprehended and deported, gang violence was then exported to El Salvador. Transnational gang networks took hold.<sup>37</sup>

During the 1990s, the U.S. sent a wave of gang members back to Central America. After serving their criminal sentences in the U.S., deported gang members returned to their home countries, becoming a dominant force in an environment where gang culture thrived.<sup>38</sup>

Both the information gathered in the course of this research project and the conclusions of numerous analyses and studies by a wide range of social players and academics indicate, first, that it is violence and lack of protection for their basic living conditions that lead children and

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(Presenting the report before the Committee on the Elimination of all forms of Discrimination Against Women, CEDAW.)

<sup>34</sup> Grim, R. (2014, July 18). Here’s How The U.S. Sparked A Refugee Crisis On The Border, In 8 Simple Steps. Huffington Post. Retrieved from [http://www.huffingtonpost.com/2014/07/18/refugee-crisis-border\\_n\\_5596125.html](http://www.huffingtonpost.com/2014/07/18/refugee-crisis-border_n_5596125.html). See also Schlesinger, S. (2011, June 3). Ghosts of Guatemala’s Past. *The New York Times*. Retrieved from [http://www.nytimes.com/2011/06/04/opinion/04schlesinger.html?\\_r=0](http://www.nytimes.com/2011/06/04/opinion/04schlesinger.html?_r=0).

<sup>35</sup> See Gzesh, S. (2006, April 1). Central Americans and Asylum Policy in the Reagan Era. Migration Policy Institute. Retrieved from <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

<sup>36</sup> Grim, Here’s How The U.S. Sparked A Refugee Crisis On The Border, In 8 Simple Steps.

<sup>37</sup> Massey, D., Princeton University. Children of Central American Turmoil and the U.S. Reform Impasse. *Scholars Strategy Network*. Retrieved from <http://www.scholarsstrategynetwork.org/page/children-central-american-turmoil-and-us-reform-impasse>.

<sup>38</sup> Grim, Here's How The U.S. Sparked A Refugee Crisis On The Border, In 8 Simple Steps.

adolescents to migrate, alone or with their parents. Second, these factors, in the overwhelming majority of cases, are inseparable from one another, which is fundamental to consider when designing adequate, comprehensive, and effective responses, locally, nationally, and regionally. Even though in each case the decision to migrate responds more to one factor (for example, violence) than another (for example, social exclusion), all these factors are present in practically every case, because the causes of migration in the region are structural and deeply interconnected.

Policies in destination countries both cause an increase in migration and affect the form it takes—leading children to migrate through irregular channels. One such factor is the presence of child labor in areas with fewer protections in the labor market. While on a global scale, migration is associated with child labor in countries of destination,<sup>39</sup> in the United States this phenomenon is present in the sectors with the greatest irregular migration, such as among domestic workers and in agriculture.<sup>40</sup> It is also important to note, as we describe in this book, that certain bilateral or regional initiatives (such as NAFTA) have also led to an increase in migration of adults, families, and children and adolescents arriving alone, especially adolescents and youths.

Family reunification also motivates the choice of destination country (particularly in the United States), but also affects the vulnerability of children and adolescents in the community of origin; it is a major driving force behind the migration of thousands of Mexican and Central American children and adolescents. In fact, as the interviews conducted with children and adolescents in the five countries and even the statistics of several public institutions (for example, the Office of Refugee Resettlement (ORR) in the United States and the Office of the Department of Social Welfare in Guatemala)—notwithstanding gaps and deficiencies in the official data—demonstrate, a significant percentage of children and adolescents who leave their countries do so based on a combination of causes associated with the denial of basic social rights, situations of violence and abuse, and the need to rejoin their parents—or one parent—in the United States after a separation of a few or many years (the absence of parents, in turn, may contribute to children and adolescents being exposed to different forms of violence).

The lack of programs for obtaining regular immigration status in the United States, and the difficulties migrant workers face in gaining formal recognition for their work, their presence, and their many contributions to U.S. society, have made it impossible for thousands of children and adolescents to migrate regularly to reunite with their parents. Indeed, for those who already have a work permit, the delays, restrictions, and hindrances in family reunification procedures<sup>41</sup> impair the right to family reunification to such an extent that many children decide to migrate by irregular means.

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<sup>39</sup> See van de Glind, H. for International Programme on the Elimination of Child Labour, International Labour Organization. (2010, September). Migration and child labour - Exploring child migrant vulnerabilities and those of children left behind.

<sup>40</sup> See generally Human Rights Watch (HRW). (2010, May 5). Fields of Peril, Child Labor in US Agriculture. Retrieved from [http://www.hrw.org/sites/default/files/reports/crd0510webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/crd0510webwcover_1.pdf). See also HRW. (2014, May 14). Tobacco's Hidden Children, Hazardous Child Labor in United States Tobacco Farming. Retrieved from [http://www.hrw.org/sites/default/files/reports/us0514\\_UploadNew.pdf](http://www.hrw.org/sites/default/files/reports/us0514_UploadNew.pdf).

<sup>41</sup> Hwang, M. C. and Salazar Parreñas, R. (2010). Not Every Family: Selective Reunification in Contemporary US Immigration Laws. *International Labor and Working-Class History*, 78(01), pp. 100-109.

We conclude, in the light of our research in the region, that violence, extreme poverty, and family reunification are the central factors that cause children and adolescents to leave their countries of origin. In particular, crime, gang threats, and other forms of violence are among the strongest determinants (amounting to more than 60%), even though in some areas extreme poverty also plays a fundamental role.<sup>42</sup> The UNHCR report details the ever greater impact of several forms of violence as drivers of the migration of unaccompanied children and adolescents in the region, while also noting that this migration unfolds in a complex scenario with several interrelated causes. While violence, persecution, poverty, family reunification, and the search for employment can be, singly, the principal motivator of migration by children and adolescents, most children and adolescents surely migrate because of a combination of these factors.<sup>43</sup>

These factors have not only contributed to the increase in the migration of children and adolescents (alone or with family), but also to a high number of irregular migration flows. Migration becomes a survival strategy in the search for the right to development, life, and family unity in the face of the violation of fundamental rights, but the channels for regular migration have become ever more limited. The factors that have forced this increase in irregular migration have placed children and adolescents in ever riskier circumstances, with a proliferation and consolidation of human smuggling and human trafficking rings whose aims include labor and sexual exploitation.

Likewise, because of the irregular migration status of their parents and the formal and/or practical obstacles for their parents to obtain residency, thousands of children and adolescents can be united with their families only by assuming growing risks to their lives and to their physical and psychological integrity along the migration route, and by enduring incarceration, detention, or arbitrary expulsion. For children and adolescents who migrate irregularly, the best interests of the child, among other factors, are not taken into consideration. Situations of new, accentuated, growing forms of violence against children and adolescents in transit have further contributed to the complexity of the situation for many children who migrate between the countries of the region. Accordingly, in this context of denial of basic rights, threats, and abuses of the rights of children and adolescents to life, development, and survival, destination countries should prioritize protection and the exercise of children's rights over policies that cause growing violence in transit. In addition, destination countries must recognize that punitive migration enforcement mechanisms contribute—by act or omission—to creating the causes of migration.

With respect to why people migrate, it is important to mention another phenomenon in the countries of origin: the high number of children and adolescents whose parents have migrated to other countries. Some chapters of this book describe the vulnerability of many of these children and adolescents, which finds expression in psychological problems and other adverse impacts resulting from the separation of families as well as from abuses suffered at the hands of the adults who take charge of them in their parents' absence.

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<sup>42</sup> See generally Kennedy, E. (2014, July). No Childhood Here: Why Central American Children are Fleeing their Homes. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

<sup>43</sup> See generally Bhabha, J. (2014). *Child Migration & Human Rights in a Global Age*. Princeton: Princeton University Press.

The absence or weakness of policies to adequately and specifically protect children and adolescents in the countries of origin exacerbate these problems. In a context in which rights are denied, physical integrity is threatened, and the State fails to protect its citizens, family reunification takes on special importance, even if migration might entail new risks in the course of transit, given that families can reunite only through an irregular and ever more dangerous migration. The lack of proper consideration for the human rights of children and adolescents in the countries of transit and destination aggravates this situation and contributes to it being repeated day after day, with ever more adverse effects on children, intensifying the incidence of violence along the migratory route in all its phases: at the point of origin, in passage, and at the destination.

#### **IV. The human rights of migrant children and adolescents in countries of transit**

The growing number of children and adolescents who migrate among the countries of Central and North America has steadily turned the region into a transit zone for children and adolescents who are forced to leave their countries of origin. While Mexico is the country of transit *par excellence* (in addition to being a country of origin and, as we shall see, of destination) in view of the number of both Central American and Mexican children and adolescents who cross Mexico headed for the United States, many children also cross through Honduras, El Salvador, and/or Guatemala in the course of their journeys.

This migration is characterized by its irregular nature, because there are multiple obstacles to regular migration. It is also characterized by lack of information and awareness; the prevalence of smuggling and human trafficking networks; and pull factors in the destination countries, among other factors. The vulnerability in which thousands of children live in their countries has contributed to a worsening of this phenomenon in recent years. The various risks children face along the route at the hands of several players (migration agents, security forces, and third parties such as organized criminals) have also aggravated their vulnerability. Other dangers include sexual violence—which particularly affects girls; human trafficking; kidnapping, robbery, and other crimes; the risk of being arbitrarily detained and deported; and the risk of facing hunger, serious health problems, and serious train accidents, including amputations of their limbs, as is documented in the chapter on migrant children and adolescents from Honduras, and many other reports, articles, and documentaries on transit through Mexico.

Chapters 6 and 7 regarding the situation in Mexico, particularly the one addressing its border with Guatemala, offer insights into Mexico's key migration enforcement function for south-to-north migration. As other reports have indicated, Mexico's principal response to the phenomenon of child migration—both unaccompanied children and adolescents and those who migrate with their families—has been characterized by detention and almost automatic return, with little attention to comprehensively protecting children and adolescents through a focus on their rights. For the overwhelming majority of the thousands of children who transit through the country or who live in Mexico without a residence permit (see the table below), detention at migration stations and subsequent repatriation to the country of origin are the norm. Decisions regarding

detention and repatriation, in turn, are made using procedures that fail to consider the most basic guarantees of due process.<sup>44</sup>

<b>Year</b>	<b>Children and Adolescents Detained</b>	<b>Children and Adolescents Deported</b>	<b>Percentage of Children and Adolescents Detained who are Deported</b>
<b>2014</b>	23096	18169	78.66%
<b>2013</b>	9,893	8,350	84.40%
<b>2012</b>	6,107	5,966	97.70%
<b>2011</b>	4,160	4,129	99.30%

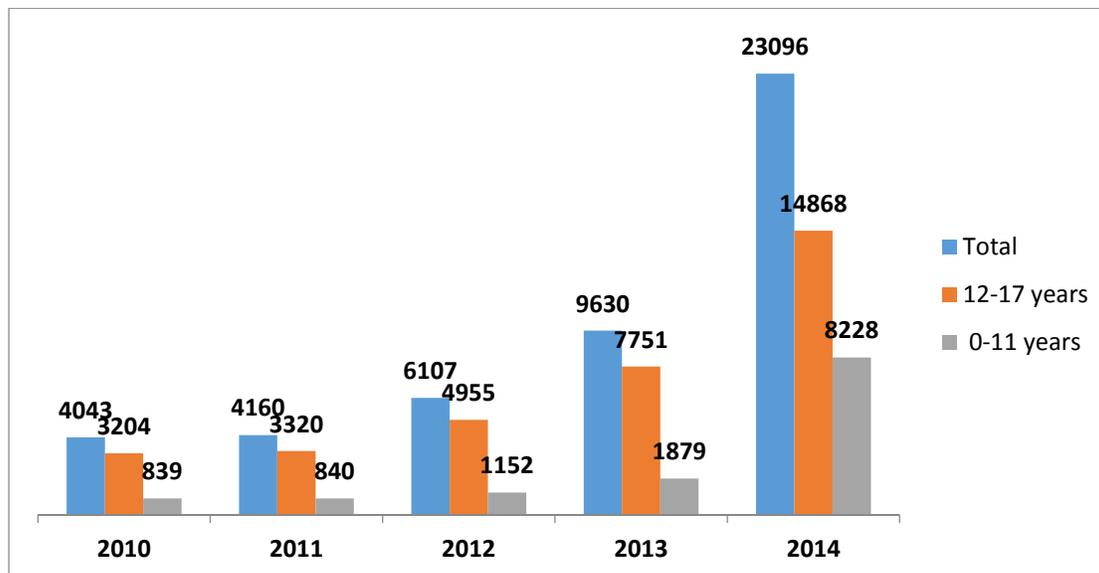
**Children and Adolescents Detained and Deported from Mexico to El Salvador, Guatemala, and Honduras**

Source: The authors, based on official statistics of the National Institute of Migration, Mexico

These statistics not only reveal the predominance of detention and repatriation as the central mechanism of Mexico's public policy in response to child migration, whether accompanied or unaccompanied, but they also attest to three other major factors. First, the statistics show that enforcement is highly ineffective enforcement as a solution to the irregular migration of children and adolescents in the region. Second, they demonstrate the notable increase in detentions of children year after year and, most markedly, so far in 2014. In response to the greater visibility of child migration into the United States, Mexico's reaction, lamentably, has been to reinforce practices that, rather than contributing to solutions, have contributed to the scenario of vulnerability, violence, and lack of protection of rights that we have documented. Third, the following chart illustrates the ever younger ages at which children and adolescents set out on the migration trail. Whereas in 2010 839 children under the age 12 were apprehended by the National Institute of Migration, in 2014 8,228 children under 12 were apprehended by the same agency.

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<sup>44</sup> Ceriani Cernadas, P. (coord.). (2013). *Niñez detenida: los derechos de los niños, niñas y adolescentes migrantes en la frontera México-Guatemala*. Mexico City: Distribuciones Fontamara.



Despite the migration reform enacted in Mexico in May 2011, explained in the chapter devoted to the Mexico-Guatemala border, children and adolescents continue to be detained without respecting the mandate to send them to a DIF (*Sistema Nacional para el Desarrollo Integral de la Familia* or Agency for Integral Development of the Family) shelter. Following detention, they are arbitrarily repatriated; no procedure for determination of the best interests of the child (Best Interests Determination) required under Article 74 of the law has yet to be implemented. Certain normative and operating initiatives have been designed for drafting such a procedure, but as of November 2014, the political will and institutional consensus needed for their approval have been absent.

Children and adolescents who are asylum seekers also face this widespread practice of detention, as well as a procedure that does not provide them with legal counsel, psychological care, or other services to assist in ensuring their human right to a fair asylum hearing. Therefore, as occurs with children and adolescents who are victims of human trafficking or other crimes in transit, detention and the lack of adequate protection programs leads to a high number of repatriations, which could, in turn, have a series of grave consequences, either due to the risks they face in their country of origin, or precisely because repatriation induces them to head north once again in search of appropriate protection.

This situation negatively affects all migrants and asylum seekers who transit through Mexican territory—especially weakening their rights, including the rights to life and physical integrity; with respect to children and adolescents, the priority placed on security and migration enforcement has even more profound and severe repercussions, insofar as it increases the risks of transit itself. The annual increase in the number of children and adolescents crossing Mexico, as well as repeated attempts at migration on the part of thousands of children and adolescents subsequent to their repatriation, not only illustrates the limited effectiveness of a response that fails to account for the structural factors leading to migration, but also results in children, adolescents, and families increasingly turning to smuggling rings in order to bypass migration controls. Furthermore, transit becomes more and more dangerous due to the climatic conditions,

the precarious nature of the transportation and, above all, the control of certain regions by organized crime.

Even though Mexico is the principal country of transit, in many cases children and adolescents also cross the territories of Guatemala, Honduras, and El Salvador. In these countries, children also face detention, deportation, arbitrary procedures, and no guarantee of their rights. Child migration is an invisible issue in these countries, and they lack quantitative and qualitative information about child migrants, especially from a human rights perspective. The chapters regarding the Central American countries attest to a significant and worrisome invisibility of the situation of child migrants, which contributes to the lack of specific laws, regulations, and programs to protect children and adolescents who cross through their territories.

Among the few measures that the States of the region have taken, particularly in recent years (with special intensity since mid-2014), are programs geared towards alerting children, adolescents, and families of the risks in transit. Although this might contribute in some measure to preventing some young people from migrating, these initiatives are far from what is needed to adequately and comprehensively address the factors that cause children and adolescents to leave their communities. The widespread problems we have described (multiple forms of violence, social exclusion, poverty, discrimination on several accounts) comprise a scenario in which the dangers of the migration route have become a significant obstacle to overcome in order to survive.

Numerous interviews with children and adolescents and their parents, conducted for this and other initiatives, attest to this dilemma, that is, the assumption of risks in transit—undertaken as irregular migration due to the above factors—given an even more imminent, palpable, known danger occurring in the daily lives of many children in their homes, neighborhoods, communities, schools, and elsewhere.<sup>45</sup> Thus, in addition to the concrete obligations of each country (especially Mexico) with regard to the rights of children and adolescents, the situation in transit underscores the pressing need for a regional, structural, and comprehensive approach, and thus the need to understand that increasing migration enforcement and sanctions against irregular status is not an adequate solution to this complex, multidimensional phenomenon.

## **V. Violations of the rights of children and adolescents in countries of destination**

The United States is unquestionably the principal country of destination for unaccompanied migrant children and adolescents, those who migrate with their families, and parents who migrate alone. Mexico also receives adult, child, and adolescent migrants, principally from Guatemala, as described in chapter 6 regarding the Mexico's southern border. Honduras, El Salvador, and Guatemala are also receiving countries of migrant populations. Therefore, even though we focus in particular on the United States, and to a lesser extent on Mexico, certain conclusions are valid for all these countries as destination points for migrants, and the complete report examines the challenges posed in each of the countries in greater detail.

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<sup>45</sup> See *Forced From Home*, p. 7.

A. *United States*

The statistics available in the United States on children and adolescents in the context of migration attest to the impact of the issue on the lives – and rights – of millions of families and/or migrant children and adolescents in various categories. The data shows the growth in the number of children who have migrated to the United States unaccompanied.

<b>Country</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014*</b>
<b>El Salvador</b>	1,221	1,910	1,394	3,314	5,990	16,404
<b>Guatemala</b>	1,115	1,517	1,565	3,835	8,068	17,057
<b>Honduras</b>	968	1,017	974	2,997	6,747	18,244
<b>Mexico</b>	16,114	13,724	11,768	13,974	17,240	15,634

*\* Through September 2014.*

**Unaccompanied Children and Adolescents, by Fiscal Year and Nationality (2009-2014)**

Source: Department of Homeland Security (DHS)

<http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>

Our research has identified various human rights challenges for children and adolescents in the context of migration in the United States, in particular (1) practices of deporting unaccompanied children and adolescents, as well as families or parents of children born in the country; (2) detention of children and adolescents and/or families; (3) procedural guarantees governing each case, both in the processes that impose penalties and in those that decide whether to grant regular status; and (4) family reunification procedures. We provide a brief description of each of these challenges, breaking the analysis down, when applicable, according to the category of children and adolescents involved.

*1. Returns, repatriations, deportations*

The principal concerns—evaluated in detail in the chapters regarding the United States—can be categorized as those related to unaccompanied children and adolescents of Mexican nationality; those related to migrant children and adolescents—mainly from Central America—who are deported if they fail to win their cases through one of the mechanisms provided for by law; and those regarding children and adolescents of U.S. nationality whose parents are deported.

In addition to repatriation from the border or from the interior, the United States has contributed to the formation and strengthening of the security forces in Mexico in order to deter migration before migrants are able to cross the border. This kind of response has no impact on the causes that lead children and adolescents to migrate, which explains its ineffectiveness. To the contrary, such responses may exacerbate the dangerous conditions to which these children and adolescents are exposed, especially during transit, as well as exposing them to situations in which the principle of *non-refoulement* is violated to their detriment.

Most egregious is the practice through which unaccompanied children and adolescents of Mexican nationality are returned to Mexico without adequate screening, a practice that has a complex recent history. Prior to 2008, the great majority of unaccompanied Mexican children apprehended while seeking entry to the United States were repatriated to Mexico directly from the border, without any safety net to prevent the return of children in need of international protection.<sup>46</sup> In 2008, Congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA). Among other provisions, the TVPRA created a screening system intended to stop the immediate repatriation of unaccompanied Mexican children at risk of trafficking or persecution and of those not old enough to make an independent decision to return to Mexico.

Yet despite TVPRA's safety net for unaccompanied Mexican children, the vast majority of them continue to be subject to immediate repatriation, based on a presumption that they are not in need of international protection. In fiscal year 2013, Customs and Border Protection (CBP) apprehended 17,240 unaccompanied Mexican children, but they screened and placed in federal custody only 740.<sup>47</sup>

These numbers make clear what advocates have long argued: CBP agents lack the experience, training, and institutional mandate to carry out a procedure and make decisions based on protecting children and adolescents. For this reason, the distinction in the legislation for Mexican children and adolescents—which allows repatriation at the border—makes it impossible to identify those children who, based on the TVPRA, should not be repatriated directly from the border, and in respect of whom it is not possible to reach an independent decision to reject their applications for entry. This no doubt affects the right to an adequate evaluation, and, therefore, to a determination of the best interests of the child.<sup>48</sup>

The inadequate implementation by the United States of TVPRA's provisions regarding Mexican children raises serious concerns, given its impact on the rights of these children and adolescents, including their rights to life and physical integrity, protection from exploitation and trafficking in persons, and so on. Unaccompanied Mexican children repatriated from the border are denied an opportunity to speak to an immigration judge or access to due process of law to determine whether they qualify for immigration relief or have international protection needs. Moreover, they are not entitled to an attorney when being screened by CBP agents, even though their answers to the questions CBP asks determine whether they will be screened into the United

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<sup>46</sup> See Thompson, A. (2008, September 1). *A Child Alone and Without Papers*, A report on the return and repatriation of unaccompanied undocumented children by the United States, p. 25. Retrieved from [http://www.aecf.org/m/resourcedoc/CPPP-A\\_Child\\_Alone\\_and\\_Without\\_Papers-2008.pdf](http://www.aecf.org/m/resourcedoc/CPPP-A_Child_Alone_and_Without_Papers-2008.pdf).

<sup>47</sup> The Office of Refugee Resettlement's statistics show that out of the 24, 668 unaccompanied children in its custody in fiscal year 2013 only 3% (740) were Mexican. Office of Refugee Resettlement, *Unaccompanied Children's Services*. General Statistics about UAC. Retrieved from [https://www.acf.hhs.gov/sites/default/files/orr/uac\\_statistics.pdf](https://www.acf.hhs.gov/sites/default/files/orr/uac_statistics.pdf).

<sup>48</sup> See *Forced From Home*, pp. 22-23. See also UNHCR. (2014, June). *Findings and Recommendations Relating to the 2012 – 2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border*, p. 5. Retrieved from [http://americanimmigrationcouncil.org/sites/default/files/UNHCR\\_UAC\\_Monitoring\\_Report\\_Final\\_June\\_2014.pdf](http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf). (Finding that Customs and Border Protection agents continue to presume “the absence of protection needs” for unaccompanied Mexican children, rather than going through the process of “ruling out” protection needs, as the law requires.)

States, transferred to the custody of the Office of Refugee Resettlement (ORR) and placed in legal proceedings where they can seek immigration relief, or returned immediately to Mexico.

Mexican and Central American unaccompanied migrant children placed in ORR custody also confront potential removal to their countries of origin. Whether held in federal custody or released to family, unaccompanied children must defend themselves against charges that they entered the United States without authorization and are “removable” (deportable). Once placed in removal proceedings, children may be granted immigration relief, granted temporary reprieve from removal, ordered removed, or granted voluntary departure to return to their countries without a future immigration penalty.

The United States does not take issues of family unification into consideration when deciding a child’s disposition, and even children reunified with family, sometimes after years apart, face potential separation depending on the outcome of their immigration cases. An immigration judge can order a child removed and the Department of Homeland Security (DHS) can execute that removal order regardless of whether the order will result in separation from parents (a second separation, with the traumatic effect it may have). DHS has the authority to suspend removal, and in some cases agrees not to remove a child whose parents live in the United States.

However, this decision is entirely up to DHS discretion. There is no *right* or *guarantee* to remain with family, and having family in the U.S. does not, on its own, provide a path to regular status. Parents can petition for their children only if they have the type of immigration status that permits them to do so.<sup>49</sup> These serious limitations are tied to an underlying problem: the lack of a procedure for determining the best interests of the child, which should be determined in every case of unaccompanied children and adolescents who reach U.S. territory, just as best interests determinations should be used in every immigration proceeding that could affect the rights of migrant children and adolescents and children of migrants.

Finally, for children and adolescents of U.S. nationality whose parents are migrants, the principal problem lies in the separation of families consequent to the decisions to deport their parents, without consideration for the rights – such as the right to family unity – of their children born in the country who are U.S. citizens. The problem goes beyond the decision to deport a parent, failing to adequately consider the rights of children and adolescents that may be at stake. In fact, those children and adolescents do not even participate in the procedure, thus violating a core principle, according to which children have a right to be heard. As explained in detail in chapter 11 regarding the separation of families, when immigration judges and DHS officers make decisions about whether to detain or deport parents, they do not consider the best interests of the child. Numerous reports and articles have highlighted the devastating impact of immigration enforcement on U.S. citizen children whose parents have been detained and/or deported. When parents are deported, children may suffer mental health problems, face financial instability, and perform poorly in school.<sup>50</sup>

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<sup>49</sup> See Treacherous Journey, pp. 54, 56.

<sup>50</sup> See Dreby, J. (2012, January). How Today’s Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground, pp. 9-14. Retrieved from <http://cdn.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

Existing statistics attest to the extent, and thus the impact, of these practices. Each year, about 152,000 U.S. citizen children lose a parent to deportation.<sup>51</sup> Furthermore, an estimated 4.5 million U.S. citizen children live with an undocumented parent, placing them at risk of losing that parent(s) to removal.<sup>52</sup> In 2013 alone, DHS deported 368,644 individuals<sup>53</sup>; according to DHS, 72,410 of them were parents of U.S. citizen children.<sup>54</sup> Thousands of children who lose a parent to deportation have landed in the U.S. foster care system, despite having parents or other family members willing and able to care for them.

## 2. *Detentions and alternative measures*

When CBP apprehends children, it places them in short-term detention for processing and screening. CBP detention conditions for children fall below what federal law requires and are at odds with the international standards that prohibit the deprivation of liberty of children for adolescents for immigration-related reasons. This impairment of the right to liberty is aggravated on occasion due to arbitrary practices and conditions in detention, such as depriving detainees of food, water, and necessary medical care.<sup>55</sup> In addition, some CBP officers verbally, physically, or sexually abuse children, in clear violation of the law and the children's fundamental rights.<sup>56</sup>

CBP transfers those unaccompanied children from Central America and, in a few cases, unaccompanied Mexican children not repatriated from the border and all other unaccompanied migrant children to the custody of ORR, under the Department of Health and Human Services, the federal child welfare agency. ORR does not detain children for punitive reasons; rather, the agency views its role as providing care for unaccompanied children until they can be released to family or other appropriate sponsors. Long-term care is available for children who have no family or other potential sponsor in the United States, but ORR releases about 90% of children in its custody to family in the United States following short-term custody.<sup>57</sup>

ORR has significantly improved treatment and conditions for unaccompanied children, for example by increasing the use of foster care and other services. However, ORR continues to

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<sup>51</sup> Cervantes, W., & Gonzales, R. (2013, October 17). The Cost of Inaction, Why Children Can't Wait for Immigration Reform, p. 2. Retrieved from <http://firstfocus.org/resources/report/cost-inaction/>.

<sup>52</sup> Passel, J., & Cohn, D. (2011, February 1). Unauthorized Immigrant Population: National and State Trends, 2010. Retrieved from <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/>.

<sup>53</sup> See Immigration and Customs Enforcement. (2013, December 19). ICE announces FY 2013 removal numbers. Retrieved from <http://www.ice.gov/news/releases/ice-announces-fy-2013-removal-numbers>.

<sup>54</sup> See Foley, E. (2014, June 25). Deportation Separated Thousands of U.S.-Born Children from Parents in 2013. *Huffington Post*. Retrieved from [http://www.huffingtonpost.com/2014/06/25/parents-deportation\\_n\\_5531552.html?utm\\_hp\\_ref=tw](http://www.huffingtonpost.com/2014/06/25/parents-deportation_n_5531552.html?utm_hp_ref=tw).

<sup>55</sup> See Forced From Home, p. 21; Office of the Inspector General, Department of Homeland Security. (2010, September). CBP's Handling of Unaccompanied Alien Children (hereinafter "OIG Report"), pp. 21-24. Retrieved from [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-117\\_Sep10.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf).

<sup>56</sup> See ACLU Border Litigation Project, Americans for Immigrant Justice, Esperanza Immigrant Rights Project, Florence Immigrant and Refugee Rights Project, & National Immigrant Justice Center. (2014, June 11). Complaint Regarding the Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection. Retrieved from <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

<sup>57</sup> See Treacherous Journey, p. 76.

place some facilities in remote locations far from legal and other services, and it favors the use of large facilities that tend to be institutional in nature. In addition, as we analyzed in depth in the book, ORR lacks an independent monitoring system to hold facilities accountable for their conditions and their treatment of children in their custody. Even when children are released to their families, they are in removal proceedings and remain at risk of deportation, hence their need for appropriate services.

CBP also apprehends Central American children who arrive with adult family members and places many of these family units in detention centers. In 2009, the United States had practically stopped detaining families in response to sustained advocacy by civil society organizations that highlighted the unique needs of families and the horrendous conditions in they were being detained. The Inter-American Commission on Human Rights also brought pressure to bear to change this practice. However, when the number of family units apprehended in 2014 rose to 60,000, from 11,000 families detained in 2013, DHS reverted to its practice of detaining families in large detention centers, imprisoning up to 2,500 individuals at a time. In centers characterized by lack of medical and psychological services, food that makes children and their families sick, verbal abuse by detention center staff, and inhumane rules such as not allowing babies to crawl.

The United States not only detains families, it also expedites their removal. Children and their families are ordered removed directly from detention, sometimes without even seeing an immigration judge. In addition, the United States generally does not separately screen children traveling with their families for international protection needs, a practice that risks returning children to persecution, torture, or other grave harm, in violation of their right to *non-refoulement*.

Alternatives to the detention of children and families exist. Clearly, as described in greater detail in this book, these alternatives have not only been insufficient to stop the detention of thousands of children and adolescents and families by CBP. In addition, since mid-2014, the U.S. has used regressive measures that impair the right to liberty of migrant children and adolescents, as well as migrant families and families seeking asylum.

### *3. Due process guarantees and immigration remedies for children and adolescents*

Migrant children do not have meaningful procedural rights or substantive legal protections in the U.S. immigration system.<sup>58</sup> Most importantly, there is no binding best interests standard for migrant children in the United States, thus the authorities are not required to make decisions on the basis of that principle. In addition, even though the United States has not ratified (though it signed) the Convention on the Rights of the Child, both the federal government and the states have accepted the need to determine the best interests of the child in decisions affecting children, particularly through the courts.<sup>59</sup>

Even though ORR appoints child advocates in a growing number of unaccompanied children's

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<sup>58</sup> See Treacherous Journey, pp. 72-79.

<sup>59</sup> Child Welfare Information Gateway (U.S. Department of Health & Human Services & Administration for Children & Families). (2012, November). Determining the Best Interests of the Child. Retrieved from [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf).

cases, migrant children (unaccompanied and accompanied) have no right to an attorney and no right to a child advocate to speak for their interests and needs. Those procedural protections and rights that *do* exist for migrant children in the immigration system are wholly insufficient.

For example, all child migrants should be permitted to seek asylum in a non-adversarial setting outside of court, but currently only unaccompanied children may do so. Migrants should be entitled to procedures appropriate to their status and needs as children. Non-binding “guidance” – guidelines for judges regarding accommodating unaccompanied children in removal proceedings and for immigration officers about the importance of interviewing children sensitively – are not enforced or enforceable. What children need are binding standards to protect their rights at every stage of proceedings (see chapter 10 on Immigration Remedies and Procedural Rights of Migrant Children and Adolescents.)

Existing immigration relief options are insufficient for migrant children. Some migrant children can qualify for immigration relief. In particular, children may qualify for Special Immigrant Juvenile Status (SIJS), asylum, a T-visa for victims of trafficking, or a U-visa for victims of certain crimes who assist law enforcement in the investigation or prosecution of the crime.

However, winning asylum has been a significant challenge for both children and adults from Central America. Beginning with the refugee crisis in the 1980’s the United States has resisted recognizing Central Americans as refugees. Between 1981 and 1990, an estimated one million Salvadorans and Guatemalans made the dangerous journey across Mexico into the U.S. to seek safety from the violence and repression of civil war and unrest.<sup>60</sup> But the Reagan administration refused to acknowledge the violence taking place in Central America. The U.S. State Department actively intervened in Central Americans’ asylum cases, denying well-documented massacres in El Salvador and downplaying the genocide of indigenous peoples in Guatemala.<sup>61</sup> The

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<sup>60</sup> Gzesh, Central Americans and Asylum Policy in the Reagan Era.

<sup>61</sup> Lastra, P. (2014, August 11). Who Counts as a Refugee in US Immigration Policy—and Who Doesn’t. *The Nation*. Retrieved from <http://www.thenation.com/article/180929/who-counts-refugee-us-immigration-policy-and-who-doesnt>.

government's characterization of these refugees as "economic migrants"<sup>62</sup> influenced immigration judges to deny them asylum.<sup>63</sup>

Border patrol agents also treated Central American refugees as economic migrants. Immigration officials herded them into crowded detention centers and—rather than allowing them the opportunity for legal advice or to be informed of the possibility of applying for refugee status—pressured them to agree to "voluntary return" to their country of origin.<sup>64</sup> Ultimately, it took a national class action lawsuit, *American Baptist Churches v. Thornburgh*,<sup>65</sup> to force the Immigration and Naturalization Service to change its approach to Central American asylum applicants, reopening denied political asylum claims and allowing late applications by individuals who had been afraid to apply. Language in the 1991 settlement stated that foreign policy and border enforcement considerations are not proper factors in determining statutory eligibility for asylum.<sup>66</sup> Although the settlement gave some a second chance at asylum, the majority of Salvadorans and Guatemalans remained without legal status because U.S. policies regarding them "bounced between aggressive enforcement and humanitarian accommodation, [therefore leaving them] without any kind of permanent reconciliation."<sup>67</sup> With respect to the current wave of Central American migrants, despite its role in the spread of gang violence in the region, the U.S. continues to resist recognizing Central Americans as refugees, especially asylum seekers whose claims are based on fear of gang violence.

However, only one form of immigration relief—SIJS—requires that the court consider the best interests of the child. Other forms of relief, especially asylum, are interpreted or applied in a restrictive manner that denies protection to children who should qualify. Moreover, the U.S. government interprets the definition of refugee in a way that is inconsistent with the international

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<sup>62</sup> Poverty in and of itself does not qualify an individual for refugee status, as the definition of a refugee requires a fear of persecution on account of specific grounds – race, religion, nationality, political opinion, or membership in a particular social group. The United States has used the term "economic migrant" to distinguish between bona fide refugees who are deserving of refugee protection, and individuals seeking to immigrate to improve their quality of life, who under current law are not deserving of protection if they enter the country through irregular channels. This distinction is misleading, however, because of the multiple and frequently intermingled reasons for migration – including violence, poverty, social exclusion, and others – discussed in this introduction and throughout this book. In the case of a child, social exclusion—especially with regard to deprivation of education, health care, food, and other aspects of a child's rights to physical integrity and to development—may support a claim for refugee protection, and must be considered in upholding the right to *non-refoulement*. See General Comment Number 6 to the Convention on the Rights of the Child: Upholding the Rights of Unaccompanied and Separated Children Outside Their Country of Origin, Thirty Ninth Session, Committee on the Rights of the Child at section IV, f (2005). Labeling the Central Americans who fled the ruthless violence of the civil wars and repression of the 1980s and early 1990s and those who escape violence suffered in the home or meted out by gangs today as economic migrants patently misconstrues the conditions in the region and has been used to justify the use of punitive immigration enforcement measures in response to irregular migration.

<sup>63</sup> In 1984, for example, less than three percent of Salvadorans and Guatemalans seeking asylum received grants. "In the same year, the approval rate for Iranians was 60 percent, 40 percent for Afghans fleeing the Soviet invasion, and 32 percent for Poles." Gzesh, Central Americans and Asylum Policy in the Reagan Era.

<sup>64</sup> Gzesh, Central Americans and Asylum Policy in the Reagan Era.

<sup>65</sup> *American Baptist Churches et al., v. Richard Thornburgh, et al.*, 760 F. Supp. 796 (N.D.Cal., 1991).

<sup>66</sup> Blum, C., (1991). The Settlement of *American Baptist Churches v. Thornburgh*: Landmark Victory for Central American Asylum-Seekers. *International Journal of Refugee Law*, Vol. 3, No. 2. See also Gzesh, Central Americans and Asylum Policy in the Reagan Era.

<sup>67</sup> Meade, E. (2014, July 25). Lessons from the Last Central American Refugee Crisis. *Times of San Diego*. Retrieved from <http://timesofsandiego.com/opinion/2014/07/25/lessons-last-central-american-refugee-crisis/>.

definition. Also, some children may not qualify for protection even under a correct application of the law, but they may still be in danger of great harm if returned to their countries, and that should be taken into consideration.<sup>68</sup> These children are at risk of removal to the same dangerous or harmful circumstances they fled, once again aggravating their vulnerability.

#### 4. *The right to family life*

There are major limits to family reunification through the existing family immigration system. First, limited options exist for Central American parents to obtain a visa for themselves and their families based on employment because of a bias in U.S. immigration law against low-skilled workers (domestic workers, service industry workers, farm laborers, and others) and in favor of high-skill or technical industries.

Second, there are restrictions in the immigration system itself with respect to who can confer status to whom and the limit on the number of permanent resident applications the United States will grant per country. U.S. citizens over the age of 21 can petition for their parents and siblings, but U.S. citizen *minor* children cannot. U.S. citizen and lawful permanent resident parents can apply for their children, but some applicants must wait for years because of a per-country limit on the number of permanent residence applications granted each year. This limitation indicates that the right to family life does not enjoy the same protection in the case of foreign persons, even if those who make the application are permanent residents or have acquired citizenship. This is not only a discriminatory practice, but also a factor that contributes to increasing the irregular and dangerous migration of children and adolescents seeking to reunite with their parents.

At the same time, it is important to note that the United States has not authorized a broad scale immigration regularization program since 1986. The legalization program put into place under the 1986 Immigration Reform and Control Act did not provide an avenue for legalization of immediate family members of individuals who qualified for the program, if the family members did not themselves meet the requirements. This led to mixed immigration status among family members, which has become a significant problem. When the United States established a process for immediate family members who did not qualify under the 1986 Act to regularize their status, huge backlogs ensued. Both of these problems persist today.<sup>69</sup>

On this last issue, the right of children and adolescents not to be separated from their parents encounters severe limitations in the U.S. if any family member has irregular immigration status. The punitive response to an administrative infraction is accorded priority over a child's right to family life. This criterion still applies even when the child or adolescent has U.S. nationality because, unlike all other countries in the Americas, that situation is not considered sufficient for extending a residence permit on the basis of family unity. While the recent decision by the U.S. administration can be expected to temporarily quell many families' fears of deportation, it has three serious limitations: it is temporary and does not offer a path to citizenship; it does not include reentry of those already deported, thus separating families; and it considers family unity

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<sup>68</sup> See Treacherous Journey, pp. 56-59.

<sup>69</sup> See Cooper, B., & O'Neil, K. (2005, August). Lessons from the Immigration Reform and Control Act of 1986, Policy Brief. Retrieved from <http://migrationpolicy.org/research/lessons-immigration-reform-and-control-act-1986>.

not as a right, but as a mere discretionary concession. And even this limited reform may subsequently be blocked by Congress or suspended by the next administration.

### *B. Mexico and Central America*

We have described the practices of detaining and repatriating children and adolescents systematically and automatically carried out by Mexico. Here we focus on other issues that impair the rights of children and adolescents, looking at Mexico and Central America as destinations of migrant children, adolescents, and families.

As the chapters on Mexico indicate, in particular chapter 6 on Chiapas, a significant number of migrant children and adolescents as well as children of migrants reside in Mexico, many of them without a residence permit. The 2010 National Census reveals an almost 100% increase in the number of foreigners living in Mexico. According to the most recent census, almost 80% of the Central American population in Mexico is living in the city of Tapachula, Soconusco Region, in Chiapas.

Among the problems that affect their rights are those identified in the section on Mexico as a transit country, since the children and adolescents living in the country irregularly are likewise subjected to mechanisms of detention and repatriation. Because Mexico does not apply a formal best interests determination either for children and adolescents in transit or for those residing in the country, it is not possible for authorities to determine fairly whether repatriation is the most suitable measure. In any event, the fact that children and adolescents are taken to a migration station following enforcement activities at a workplace or on a highway reflects a series of gaps in existing policies and programs for the protection of migrants' rights in Mexico, and specifically of the rights of children and adolescents.

Child labor under these conditions represents a particular problem, as numerous child migrants are working under entirely inadequate conditions (see chapter 6 on Mexico's southern border). Taking into account the age of the child, this often consists of child labor prohibited by national and international legislation. In all these cases, children perform tasks that are precarious to their safety, their employment is informal, and their rights are not protected. In recent years, the problem of human trafficking has also intensified in the region, for both labor and sexual exploitation.

To summarize, the following are among the principal challenges, problems, and advances for migrating children residing in Central America and Mexico:

- Obstacles in the way of regularization of migration status that affect migrant children and adolescents with their families, the sons and daughters of migrants, and, with special intensity, unaccompanied children and adolescents, who are highly vulnerable.
- Restrictions on access to health services: Since 2010, the “Cartilla de Salud del Migrante” (“Migrant Health Card”) has sought to cover the health needs of migrants in the state of Chiapas. However, practical obstacles—in particular, for persons with irregular migration status, the impossibility of enrolling with the Mexican Social Security Institute (IMSS) or

the Seguro Popular insurance program—create limitations on this right, which particularly affect migrant children and adolescents or the sons and daughters of migrants.

- Cases of labor exploitation, working conditions that are completely inappropriate for adolescents, or situations of abuse and mistreatment, and the like.
- Numerous migrant children and adolescents live on the streets, working as street vendors or engaged in other dangerous activities that make them extremely vulnerable.
- Notwithstanding the social assistance provided by certain agencies (such as DIF Tapachula, through its day shelter), programs focused on the comprehensive protection of children leave migrant children out or completely disregard their needs, especially the needs of those whose migration status is irregular, making these children and adolescents virtually invisible.
- Migrant girls and adolescents endure sexual exploitation, particularly in the areas along the border with Guatemala.
- Several improvements have been made to eliminate obstacles to registering births of children of migrants who lack a residence permit, affecting their rights to an identity, a name, and a nationality. The federal and state legal framework has been brought into line with international obligations, although some problems persist in practice.
- Little qualitative or quantitative information exists or has been collected on migrant children and adolescents, their needs, living conditions, etc., making it difficult to develop policies aimed at protecting their rights.

Finally, the massive invisibility of migrant children and adolescents as well as of sons and daughters of migrants living in the Central American countries we analyzed—for example, children and adolescents of Honduran or Nicaraguan origin in rural areas of El Salvador—reveals that very little information is available. Accordingly, there is an absence of sound, comprehensive public policies to protect the rights of these populations.

At the same time, our analysis of the legal provisions and practices in the three countries indicates a failure to refrain from incarcerating migrant children and adolescents based on their migration status, or to determine the best interests of the child in cases of unaccompanied children and adolescents, to identify risks and vulnerabilities for each child, and to prevent and sanction situations where migrant children and adolescents become victims of human trafficking.

## **VI. Weaknesses and limitations of consular protection policies**

The research conducted in the three Central American countries, in Mexico, and in the United States brings to light a series of major deficits with respect to the central function that the countries of origin of migrant children and adolescents and/or of their parents can and must perform. Even accounting for the differences between each of these countries, each lacks an adequate public policy that includes a legal framework, budget, goals, and duly trained human resources for fairly handling migrant children and adolescents. Consequently, practices that are hardly adequate for effectively protecting the rights of children and adolescents in transit and at their destinations (generally in Mexico and the United States) remain in place.

For Guatemala, a significant consular network does exist in Mexico (10 consulates) and in the United States (11 consulates), yet these consulates provide only traditional consular services and not consultations or programs for protecting the rights of migrants or protocols for communicating with the authorities of the country of destination regarding a violation of rights. Of even greater concern is that the consular representatives of Guatemala provide only consular accompaniment, with no attorneys providing legal information to their compatriots abroad—for example, regarding their rights or legal aid services available in the destination country—or who assist in challenging practices that might affect the rights of children and adolescents, such as detention at a migration station in Mexico.

For a long time, Salvadoran consular offices were limited almost exclusively to providing “traditional” consular services such as identification documents (passports, the *Documento Único de Identidad* or Standardized Identification Document and others), processing vital statistics registration (registration of changes in family composition of Salvadorans abroad), and serving in the capacity of a notary to authenticate personal documents before the authorities of the migrant’s country of origin and country of destination. Following the massacre of 72 migrants in Tamaulipas in 2010, a change in consular services was introduced under which a commitment was made to protect the rights of migrants. In this new consular service model, the protection and defense of migrants’ rights constitutes the core of their work. Nonetheless, there are still many challenges when it comes to applying this rights-based approach in practice in the actions of the consulates, including issues such as a need for improved training and awareness-raising among consular personnel, a mechanism for collecting information from a rights-based perspective, and an adequate budget.

The consular assistance for children and adolescents provided by Honduran authorities is plagued by serious problems. In addition to the same deficiencies as the other countries in a lack of human rights training and failures to develop and implement policies for protecting migrants in transit and at their destination, Honduran consular services are hindered by a series of more general limitations. These include inadequate budgets, infrastructure, and staff size, among other factors, that significantly limit the consulates from taking actions to protect the human rights of migrant children and adolescents.

The case of Mexico’s consular assistance is more complex and varied. Mexico has an extensive consular network in the United States that has expanded over time, and it undertakes specific actions and programs to protect and promote the rights of Mexican nationals. In mid-2014, the

Mexican Ministry of Foreign Affairs, in cooperation with UNICEF, launched an initiative based on a protocol for providing consular protection to unaccompanied children and adolescents in the United States. It remains to be seen, as in the other countries, whether those protocols are ratified in a legal and public policy framework that ensures their effective implementation and a clear rights-based perspective.

The widespread practices of detention and repatriation of children, adolescents, and families in Mexico, as well as the arbitrary returns of Mexican children and adolescents from the United States border (subsequent to detention in DHS establishments), coupled with the separation of hundreds of thousands of families due to deportations, among other situations, have not resulted in a reformulation of consular assistance practices and strategies. These practices demonstrate the limitations that still exist in understanding the rights of children and adolescents that are at stake in the context of migration.

Also of concern are the bilateral accords for repatriation of children and adolescents that have been adopted by countries of the region, as explained in chapter 13. Their gaps with respect to rights and guarantees contribute to placing the consulate in an administrative role that is often limited to managing a repatriation that has already been decided. The consultants do not sufficiently consider the rights of the children and adolescents at stake in each case, and do not report—based on information produced by social work agencies and child and adolescent protective agencies in the countries of origin—on the possible risks of repatriation, so as to advocate for an alternative solution more in keeping with the best interests of the child, mindful of the circumstances in each case.

Other key factors in Mexican consular protection include: (1) the role of the consulate as articulator and facilitator of support networks and political organization of the communities, helping its nationals participate and organize to defend their own rights; (2) the production of consular information as the basis for consular actions and strategies (including periodic evaluation and reformulation), supplementing the information that should be produced by other agencies in the country of origin (those entrusted with the protection of children and the judiciary, among others); and (3) coordination with the competent agencies in the country of origin, in particular those entrusted with the protection of children, since consular actions in a repatriation procedure, or a formal best interests determination, should such a procedure exist, should be based on information produced by the government agencies mandated to protect the rights of children and adolescents.

Ultimately, protecting and defending the rights of migrants constitutes the core of consular work. To that end, the design and production of procedural instruments (protocols, manuals, database systems, and directives) are crucial for making the work more efficient. By now migration policies of the States of origin should regulate this consular role by legislation under which consulates would provide adequate protections, coupled with other elements of a public policy to ensure the rights of migrant children and adolescents through consular representation. That, of course, also encompasses the primary responsibility for the rights of children and adolescents corresponding to the State in whose territory the child is living.

To conclude, one should recall the recent decision of the Inter-American Court of Human Rights, which stated:

. . . owing to the special vulnerability of children who are away from their country of origin and, especially, of those who are unaccompanied or separated, access to communication with consular authorities and to consular assistance becomes a right that has particular relevance and that must be guaranteed and implemented on a priority basis by all States, especially because of its possible implications on the process of gathering information and documentation in the country of origin, as well as to ensure that voluntary repatriation is only ordered if it is recommended as the result of proceedings held with due guarantees to determine the best interests of the child, and once it has been verified that this can be carried out in safe conditions, so that the child will receive care and attention on her or his return.<sup>70</sup>

## **VII. Gaps and deficiencies in the policies of return and adequate reintegration**

The chapters on the Central American countries, as well as the one on Mexico's northern border, note several serious problems, and elaborate on the practices of repatriating, returning, and deporting migrant children and adolescents from Mexico and the United States. We document serious shortcomings—from a human rights perspective, but also in terms of effectiveness—in the programs for receiving and reintegrating unaccompanied migrant children and adolescents once they return (generally against their will) to their communities of origin.

The principal problems we identified are:

- The countries of origin do not have adequate return and reintegration policies, especially from a rights-based perspective.
- There are no policies aimed at aligning the actions for the arrival and reinsertion of returnees with the public policies that ought to resolve the structural causes that led children and adolescents, families, and/or parents to migrate in the first place.
- There are no adequate mechanisms to prevent situations of violence that could endanger the lives and physical integrity of children and adolescents who are returned, to protect children and adolescents who have been victims of violence and other related crimes, or to keep them from migrating or crossing the border again, which usually occurs under more vulnerable and higher-risk circumstances than the previous time.
- Several of the initiatives developed have been limited to handling the arrival of children and adolescents and, to a degree, their return to family members, but in almost all cases, without policies, programs, or subsequent actions that accompany a real process of social reintegration as an immediate and lasting solution.

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<sup>70</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 127-128 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

- There is a significant lack of coordination among the public entities—ranging from consulates in other countries, to social protection and other agencies in the country of origin—that should be in charge of a comprehensive reintegration policy in cases involving the return of children and adolescents, based on the best interests of the child.
- No policies exist for the periodic production of reliable information to make it possible to design and/or reformulate adequate reintegration programs in the context of a broader policy that addresses the causes of migration of children and adolescents.
- The countries lack sufficient specific programs for follow-up on children and adolescents who have already migrated and who have been returned, in order to support them socially and psychologically.
- Some interesting initiatives with respect to the reintegration of returned children and adolescents have been developed by civil society organizations, as described in chapter 12 written by KIND, but these initiatives are not adequately supported or broad enough to address the needs of all children repatriated to a particular country, and they have not been replicated throughout the region.
- Even though the delivery of children and adolescents to their family members is an important part of reintegration programs, the countries have not designed responses to the thousands of cases in which the parents of those children and adolescents live in the United States with irregular status, a factor that in many cases leads children and adolescents to once again migrate after being handed over to other relatives.
- Programs for return and reintegration require a more solid normative basis, ensuring a rights-based approach, an adequate budget, agencies placed in charge and their respective coordination, and public human rights bodies entrusted with monitoring their implementation, among other aspects.

In Mexico, El Salvador, and Guatemala, certain levels of coordination and support are provided when deported migrant children and adolescents return, but a comprehensive strategy has yet to be developed, and effective measures assuring their lasting resettlement and reintegration in their countries of origin are clearly lacking. The countries need to develop a policy regarding migrants who have or will be deported from the countries of destination, in order to strengthen the possibility that such reintegration into society will produce lasting solutions, in particular for children and adolescents. Such a policy would necessarily consider migrant children and adolescents as an especially vulnerable group with special rights.

The reintegration of children and adolescents into their countries of origin must not merely entail their transfer, receipt and, sometimes, delivery to family members. From a comprehensive rights-based perspective, reintegration is the return to a life where one effectively exercises one's rights, with sufficient opportunity for development, without discrimination, and without violence. Because no policies with this scope and focus have been put into place in countries such as Mexico and the United States, the lack of formal procedures for a best interests

determination is particularly serious. This absence is coupled with severely limited consular activity. Furthermore, in the countries of origin, there are policy shortcomings in matters of reintegration as well as underlying deficiencies in addressing the causes of migration. The combination of these factors forms the setting for the principal adverse impacts on the rights of children and adolescents in the context of migration for both those left behind when their parents migrate and those who migrate alone or with their families.

### **VIII. Bilateral and regional initiatives: limited approaches without a rights perspective**

At the outset of this introduction, we said that the phenomenon of children in the context of migration in Central and North America is, at its core, a regional matter. Accordingly, any effort to identify responses that are adequate, effective, and legitimate must necessarily take a regional approach. In other words, such efforts need to ensure the individual, collective, and interconnected involvement of the five countries most affected. For this reason, chapter 13 focuses on evaluating what the States have done internationally, especially on a bilateral and regional basis. And the assessment is equally worrisome at the national level.

The bilateral and regional accords that to date have been adopted in the region in the area of migration (including accords in conjunction with the Regional Conference on Migration) have omitted commitments and issues that are essential for a sound and integrated approach to children and migration. First, these accords do not include concrete obligations for the countries of transit and destination with respect to the rights and guarantees of children and adolescents in migration procedures. The accords do not include a prohibition on detention, or fundamental guarantees of due process, or the duty to establish a formal procedure for a best interests determination. These accords have also failed to include a commitment by the countries of origin to design and implement adequate reintegration policies in coordination with the other countries. Moreover, the agreements signed, in addition to their limitations in terms of recognizing rights, have no follow-up or enforcement mechanisms.

Most of these agreements define initiatives that have prioritized aspects of the management and logistics of repatriation, rather than providing for substantive protection of rights, which would entail a search for substantive solutions. Even so, it is important to note that some of the chapters of this book, such as chapter 2 on Honduras and chapter 7 on Mexico's northern border, attest to the fact that in many situations even those logistical aspects are not implemented, such as those involving the time of day of repatriation and other formalities observed in repatriations of children and adolescents. This further exacerbates the level of vulnerability of children to violations of their rights.

A number of different types of agreements affect the migration of adults as well as children and adolescents. For this reason, chapter 13 also analyzes regional economic and security agreements and initiatives that have direct and indirect consequences on the situation. The report examines how some economic integration initiatives have only exacerbated the causes of migration in the region, as they have expanded the gaps and disparities within and among the countries.

The security initiatives that have been promoted [in the region] have had two major effects. First, they have reinforced enforcement measures to expand security, which is also associated with

growing inequality and the exclusion of broad social sectors in the countries of origin. And second, they have led to growing militarization of the borders and the reinforcement of migration controls, with consequences such as a dramatic increase in the risks in transit, arbitrary detention, rejection at the border, and repatriation, as well as the inadvertent strengthening of organized crime networks.

This book clearly and in detail shows that we find ourselves facing four serious shortcomings that deny the basic rights of children and adolescents in the context of migration, with particular intensity for unaccompanied children and adolescents: (1) lack of attention to the structural causes of migration; (2) prioritizing migration enforcement over the rights of children and adolescents and, in many cases, over refugee law; (3) an absence of adequate reintegration programs, which once again starts the cycle of migration over again, and accentuating the impetus to migrate when, for example, children and adolescents face reprisals or an increase in the risks they assume in transit; and (4) the lack of comprehensive responses at the regional level informed by rights, human development, humanitarian law, and international refugee law.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

# Chapter 1      Children on the Run: Unaccompanied Children Leaving El Salvador, Guatemala, Honduras, and Mexico and International Protection

United Nations High Commissioner for Refugees

## **I. Introduction**

This chapter provides an overview of recent findings and recommendations of the United Nations High Commissioner for Refugees (UNHCR) regarding unaccompanied migrant children in the United States arriving from Central America and Mexico.<sup>1</sup> As described below, UNHCR plays a key role in the protection of such children, particularly those fleeing persecution and violence. This chapter provides an overview of the circumstances of unaccompanied children arriving to the United States, and describes UNHCR's findings—based on interviews of 404 unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico—with respect to the protection needs of such children. Although a multiplicity of reasons underpin children's reasons for leaving, UNHCR's study unequivocally demonstrates that a significant proportion of displaced children, including over half of those interviewed, have potential international protection needs that must be addressed in a targeted, child-sensitive manner. However, many gaps in protection persist in the current mechanisms in place for such children. To address these gaps, this chapter concludes with several key recommendations for national and regional authorities.

## **II. UNHCR and unaccompanied and separated children**

UNHCR is the sole international, intergovernmental United Nations organization entrusted by the UN General Assembly with responsibility for providing international protection to refugees and others of concern and, together with governments, for seeking permanent solutions to their problems.<sup>2</sup>

UNHCR provides international protection and direct assistance to refugees throughout the world in some 125 countries. UNHCR has over sixty years of experience supervising the international

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<sup>1</sup> This chapter is an adaptation of United Nations High Commissioner for Refugees (UNHCR). (2014). *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (hereinafter "Children on the Run"). Retrieved from [http://www.unhcrwashington.org/sites/default/files/UAC\\_UNHCR\\_Children%20on%20the%20Run\\_Full%20Report\\_ver2.pdf](http://www.unhcrwashington.org/sites/default/files/UAC_UNHCR_Children%20on%20the%20Run_Full%20Report_ver2.pdf). Children on the Run and other information about unaccompanied children can be found at [www.unhcr.org/children](http://www.unhcr.org/children). The names of the children whose comments are included in this chapter have been changed to protect confidentiality; ages and countries of origin are accurate.

<sup>2</sup> The duties and responsibilities of UNHCR are found in the Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. Doc. A/RES/428(V) (1950, December 14), retrieved from <http://www.refworld.org/docid/3ae6b3628.html>; the Convention relating to the Status of Refugees, 1951, July 28, 189 U.N.T.S. 137 (hereinafter "1951 Convention"), retrieved from <http://www.refworld.org/docid/3be01b964.html>; Protocol relating to the Status of Refugees, 1967, January 31, 606 U.N.T.S. 267 (hereinafter "1967 Protocol"), retrieved from <http://www.refworld.org/docid/3ae6b3ae4.html>. The singular purpose of the 1967 Protocol was to universalize the refugee definition by removing any temporal or geographic references to World War II contained in the original 1951 Convention definition; the 1967 Protocol incorporates by reference all the substantive provisions of the 1951 Convention.

treaty-based system of refugee protection and has twice received the Nobel Peace Prize for its work on behalf of refugees. UNHCR works closely with governments and others to best ensure the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol relating to the Status of Refugees* are honored and that national and regional migration policies are sensitive to the potential protection needs of all individuals. Central to international refugee protection—and UNHCR’s mandate—are providing refugees the protection of asylum, ensuring their human rights are respected, and safeguarding the fundamental principle of *non-refoulement*—the prohibition against returning any refugee to a place where she or he would face danger.<sup>3</sup> UNHCR would not be able to carry out its essential duties without the support, cooperation, and participation of States around the globe.

The protection of children is a core priority of UNHCR at the global, regional, and national levels.<sup>4</sup> UNHCR has long recognized the right of children to seek asylum in their own stead and their inherent vulnerability—especially those children who are unaccompanied by or have been separated from their families.<sup>5</sup> UNHCR has also long recognized certain child-specific forms of persecution that may give rise to a claim for refugee protection. Of foremost concern to UNHCR is that all unaccompanied and separated children be consistently and appropriately screened for international protection needs and, once identified, have full access to seek and receive international protection that takes into account their age and experiences in a child-sensitive manner.<sup>6</sup> A fundamental goal is to ensure that all “girls and boys are safeguarded from all forms

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<sup>3</sup> 1951 Convention, Article 33.

<sup>4</sup> See UNHCR. (2012, June 26). A Framework for the Protection of Children (hereinafter “Child Protection Framework”). Retrieved from <http://www.refworld.org/docid/4fe875682.html>. (Affirming “the centrality of children’s protection to UNHCR’s work.”) The Child Protection Framework also highlights the fundamental principle to “do no harm” in working with children, which calls for consideration of “the child’s family, culture and social situation and conduct[ing] actions, procedures and programmes in a manner that does not put the child at risk of harm” (Child Protection Framework, p. 16). See also UNHCR. (1997, February). Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (hereinafter “Guidelines on Unaccompanied Children”). Retrieved from <http://www.refworld.org/docid/3ae6b3360.html>; UNHCR. (2008, May). Guidelines on Determining the Best Interests of the Child (hereinafter “Best Interest Guidelines”), p. 17. Retrieved from <http://www.refworld.org/docid/48480c342.html>. (Stating that “[i]t is the responsibility of States to promote the establishment and implementation of child protection systems, in accordance with their international obligations” and that “[a] comprehensive child protection system comprises laws, policies, procedures and practices designed to prevent and respond effectively to child abuse, neglect, exploitation and violence.”); UNHCR. (2009, December 22). Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (hereinafter “Child Asylum Guidelines”). Retrieved from <http://www.refworld.org/docid/4b2f4f6d2.html>.

<sup>5</sup> UNHCR defines an unaccompanied child as any child under the age of 18 who has been “separated from both parents and other relatives and [is] not being cared for by an adult who, by law or custom, is responsible for doing so,” while a separated child is one who is “separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives” (Best Interests Guidelines, p. 8). For purposes of this chapter, the term “unaccompanied children” is used to refer to both unaccompanied and separated children unless stated otherwise. El Salvador, Guatemala, Honduras, Mexico, and the United States, likewise consider anyone under the age of 18 years old to be a child, although in some cases, children between the ages of 12-17 are referred to as adolescents, a designation that has no bearing on the substance of the issues discussed here.

<sup>6</sup> The Guidelines on Unaccompanied Children provide comprehensive guidance on procedures for receiving, identifying, and protecting unaccompanied and separated children arriving to a country in search of safe haven and underscore that “[b]ecause of their vulnerability, unaccompanied children seeking asylum should not be refused access to the territory” (Guidelines on Unaccompanied Children, p. 1). Children should always have access to asylum procedures, regardless of their age. Children seeking asylum, particularly if they are unaccompanied, are

of violence, abuse, neglect, and exploitation.”<sup>7</sup> All actions taken concerning refugee children should be guided by the principle that “the human rights of the child, in particular his or her bests interest, are to be given primary consideration.”<sup>8</sup>

“States are primarily responsible for the protection of all children and should promote the establishment and implementation of child protection systems, in accordance with their international obligations, ensuring access to all children under their jurisdiction.”<sup>9</sup> In addition, the *Convention on the Rights of the Child*, the fundamental international framework for the rights and protection of children, gives particular attention to the special protection needs of children deprived of their family environment and of children who are refugees or are seeking asylum, and states that all the provisions of the Convention apply without discrimination to all children under the jurisdiction of a State.<sup>10</sup>

Many unaccompanied children leave their countries of origin in the context of “mixed migration” movements, which include both individuals in need of international protection and migrants without international protection needs. The number of refugees and asylum-seekers is a relatively small portion of the global movement of people, and in view of their vulnerability, “steps must be taken to establish entry systems that are able to identify new arrivals with international protection needs and which provide appropriate and differentiated solutions for them.”<sup>11</sup>

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entitled to special care and protection. *See generally* Child Asylum Guidelines (discussing a “child-sensitive” approach to interviewing and assessing the international protection needs of children).

<sup>7</sup> Child Protection Framework, p. 19.

<sup>8</sup> UNHCR. (1994). *Refugee Children: Guidelines on Protection and Care*, p. 19. Retrieved from <http://www.refworld.org/docid/3ae6b3470.html>.

<sup>9</sup> Child Protection Framework, p. 15.

<sup>10</sup> *Convention on the Rights of the Child* (hereinafter “CRC”), 1989, November 20, 1577 U.N.T.S. 3, retrieved from <http://www.refworld.org/docid/3ae6b38f0.html>. The CRC embodies four central principles: the best interests of the child shall be a primary consideration in all actions affecting children (Art. 3); there shall be no discrimination on the grounds of race; colour; sex; language; religion; political or other opinions; national, ethnic or social origin; property; or disability, birth or other status (Art. 2); State parties recognize that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child (Art. 6); and children shall be ensured the right to express their views freely in all matters affecting them, with their views being given due weight in accordance with the child’s age and level of maturity (Art.12). The CRC includes among the fundamental rights of children the need for protection from abuse, exploitation, and neglect, and the importance of the physical and intellectual development of the child, and underscores the special needs of unaccompanied children who may be in need of international protection. El Salvador, Guatemala, Honduras, and Mexico are all signatories to the CRC.

<sup>11</sup> UNHCR. (2011, February). *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, p. 10 (hereinafter “The 10-Point Plan”), Retrieved from <http://www.refworld.org/docid/4d9430ea2.html>. This edition contains the original 2007 10-Point Plan of Action and identifies and discusses best practices across the globe relating to each of the 10 points in the plan. The 10-Point Plan is “a tool developed by UNHCR to assist governments and other stakeholders to incorporate refugee protection considerations into migration policies” (10-Point Plan, p. 8). Significantly, the 10-Point Plan contains an entire section on “child protection systems” as well as one on identifying women and girls at risk and another on protecting victims of trafficking (*Id.*, pp. 152-168). The report focused on the reasons children gave for leaving and any harm they feared or experienced in their countries of origin; the report was not able to accommodate questions specific to the elements of trafficking in sex or labor or the identification of possible trafficking victims. Moreover, the report was comprised of children who all had their journeys to the U.S. interrupted by their apprehension, which means there may have been children destined to be caught up in trafficking but were not yet aware of it. These factors support the need for further research on trafficking-related issues concerning displaced children from these four countries.

In accordance with these priorities, and as a central component of its work relating to children, the UNHCR Regional Office for the United States and the Caribbean in Washington, D.C. (UNHCR Washington) conducted an in-depth investigation into the potential international protection needs of unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico arriving to and within the United States.

### III. Unaccompanied children arriving to the United States

Since 2008, UNHCR has registered an ever-growing number of asylum-seekers—both children and adults—from El Salvador, Honduras, and Guatemala lodging claims throughout the Americas region.<sup>12</sup> The combined number of asylum claims brought by individuals from these three countries in Mexico, Panama, Nicaragua, Costa Rica, and Belize reflect a 435% increase from 2008 to 2012. The United States recorded the largest number in the region, having received eighty-five percent of all the asylum applications brought by individuals from these three countries in 2012. The number of adults claiming fear of return to their countries of origin to government officials upon arriving at a port of entry or being apprehended by immigration authorities at or near the southern U.S. border increased sharply from 5,369 in fiscal year (FY) 2009 to 36,174 in FY 2013<sup>13</sup> with individuals from El Salvador, Honduras, Guatemala, and Mexico comprising seventy percent of this increase.<sup>14</sup>

Beginning in October 2011, the United States Government recorded a particularly dramatic rise—commonly referred to as “the surge”—in the number of unaccompanied children arriving to the United States from El Salvador, Guatemala, and Honduras.<sup>15</sup> The total number of unaccompanied children from these three countries combined who were apprehended by U.S. Customs and Border Protection (CBP) authorities jumped from 4,059 in FY 2011 to 10,443 in FY 2012 and then more than doubled again to 21,537 in FY 2013.<sup>16</sup>

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<sup>12</sup> See generally UNHCR. Statistical Online Population Database. Retrieved from [http://popstats.unhcr.org/?\\_ga=1.143814012.896502820.1389886259](http://popstats.unhcr.org/?_ga=1.143814012.896502820.1389886259). In 2008, the total number of asylum applications for individuals from El Salvador, Guatemala and Honduras in the countries of Belize, Costa Rica, Mexico, Nicaragua and Panama, was 155. This number increased to 486 applications in 2010 and increased again to 830 applications in 2012.

<sup>12</sup> See generally UNHCR. Statistical Online Population Database. Retrieved from [http://popstats.unhcr.org/PSQ\\_RSD.aspx](http://popstats.unhcr.org/PSQ_RSD.aspx).

<sup>13</sup> The U.S. fiscal year (FY) runs from 1 October–30 September in any given year; thus FY2012 began 1 October 2011 and ended 30 September 2012.

<sup>14</sup> Within U.S. Customs and Border Patrol (CBP), the U.S. Border Patrol (USBP) is the agency responsible for screening and processing individuals who have entered or attempted to enter the U.S. unlawfully by evading a lawful port of entry and the Office of Field Operations (OFO) is responsible for screening and processing individuals seeking to enter the U.S. at a lawful port of entry. These numbers are a compilation from multiple sources, including USBP and OFO unofficial statistics shared with UNHCR for the purposes of the UNHCR study.

<sup>15</sup> For more information on U.S. immigration enforcement practices and screening obligations with respect to these children, see chapter 9 on unaccompanied children at the U.S.-Mexico border. For a discussion on governing law and bilateral agreements regarding the safe return of such children, see chapter 12 on repatriation and reintegration. Both chapters identify significant problem areas with respect to the proper treatment, screening, and protection of such children by government officials.

<sup>16</sup> USBP country-specific statistics for FY 2011 and 2012 (Unaccompanied Children (Age 0-17) Apprehensions: Fiscal Year 2008 through Fiscal Year 2012) were previously available on CBP's website and were recently cited to in several recent reports about unaccompanied children. See, e.g., Women's Refugee Commission. (2012). *Forced From Home: The Lost Boys and Girls of Central America* (hereinafter “Forced From Home”). Retrieved from

Over an even longer period of time, a tremendous number of children from Mexico have been arriving to the U.S. and although as of FY 2013 the gap is narrowing, the number of children from Mexico continues to far outpace the number of children from any one of the three Central American countries. For example, in FY 2011, the number of Mexican children apprehended was 13,000, rising to 15,709 in FY 2012 and reaching 18,754 in FY 2013.<sup>17</sup> Unlike the unaccompanied children arriving to the U.S. from other countries, including El Salvador, Guatemala, and Honduras, most of these children were promptly returned to Mexico after no more than a day or two in the custody of the U.S. authorities.<sup>18</sup>

<b>Number of Apprehensions of Arriving Unaccompanied Children<sup>19</sup></b>						
<b>Country</b>	<b>FY 2011</b>		<b>FY 2012</b>		<b>FY 2013</b>	
	<b>USBP*</b>	<b>OFO**</b>	<b>USBP</b>	<b>OFO</b>	<b>USBP</b>	<b>OFO</b>
<b>El Salvador</b>	1,394	58	3,314	123	5,990	230
<b>Guatemala</b>	1,565	43	3,835	80	8,068	194
<b>Honduras</b>	974	25	2,997	94	6,747	308

<http://womensrefugeecommission.org/forced-from-home-press-kit>; Center for Gender and Refugee Studies & Kids in Need of Defense. (2014). A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System. Retrieved from [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf). The annual totals of USBP Juvenile and Adult Apprehensions for FY 2012 and FY 2013 are now available through the following resources: United States Border Patrol (USBP). (2012). USBP Sector Profile – Fiscal Year 2012 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202012%20Sector%20Profile.pdf>; USBP. (2013). USBP Sector Profile – Fiscal Year 2013 (Oct. 1st through Sep. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>.

<sup>17</sup> USBP country-specific statistics for FY 2011 and 2012 (Unaccompanied Children (Age 0-17) Apprehensions: Fiscal Year 2008 through Fiscal Year 2012) were previously available on CBP’s website and were recently cited to in several recent reports about unaccompanied children. The annual totals of USBP Juvenile and Adult Apprehensions for FY 2012 and FY 2013, are now available through the following resources: USBP. (2012). USBP Sector Profile – Fiscal Year 2012 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202012%20Sector%20Profile.pdf>; USBP. (2013). USBP Sector Profile – Fiscal Year 2013 (Oct. 1st through Sep. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>.

<sup>18</sup> For more information on the differential treatment of Mexican unaccompanied children by U.S. border officials, see chapter 9, on unaccompanied children at the U.S.-Mexico border.

<sup>19</sup> This chart represents statistics compiled from multiple USBP sources; the annual totals for FY 2012 and 2013 are available through the following resources: USBP. (2012). USBP Sector Profile – Fiscal Year 2012 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202012%20Sector%20Profile.pdf>; USBP. (2013). USBP Sector Profile – Fiscal Year 2013 (Oct. 1st through Sep. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>. The remainder of the USBP and OFO figures cited are based on unofficial statistics shared with UNHCR for purposes of its study.

<b>Mexico</b> <sup>20</sup>	11,768	1,232	13,974	1,735	17,240	1,514
<b>All Others</b>	355	361	361	540	788	811
<b>TOTAL</b>	16,056	1,719	24,481	2,572	38,833	3057
*U.S. Border Patrol (USBP), **Office of Field Operations (OFO)						

Additionally, in FY 2014, U.S. Border Patrol apprehended 68,631 unaccompanied children.<sup>21</sup> These included 16,404 children from El Salvador, 17,057 children from Guatemala, 18,244 children from Honduras, and 15,634 children from Mexico apprehended at the southern border.<sup>22</sup> In view of the sharp and on-going rise in asylum claims from these four countries, UNHCR has been examining the evolving nature of harms that children and adults are experiencing in parts of Central America and Mexico to more fully understand and demonstrate the extent to which these harms—including the escalating violence due to armed criminal actors, and the increasing inability of the governments of these countries to stem this growing tide, redress harms committed, and protect others from these harms—give rise to international protection concerns.

One study in particular, *Forced Displacement and Protection Needs produced by new forms of Violence and Criminality in Central America*, demonstrates the pervasive, pernicious, and often-uncontrollable violence and disruption in the region perpetrated by organized armed criminal actors, including gangs.<sup>23</sup> Victims of these criminal actors are likely to experience a high level of harm, deprivation of life and liberty, and the State cannot provide the required individual protection, particularly in the most affected areas. The violence in these countries influences every aspect of the societies, and the human rights violations that stem from this violence are accompanied by a lack of State protection.

The *Forced Displacement and Protection Needs Study* makes a number of findings particularly relevant to the concerns of the children discussed here. For example, the study explains that Organized Crime (OC) “forms an organized and internally coordinated structure, which includes drug trafficking networks, gangs and criminal groups that operate from the local to the transnational level.” These criminal entities were found to have functional systems to exert control

<sup>20</sup> CBP reports the number of apprehensions made, not the number of children apprehended. Because CBP returns to Mexico most Mexican unaccompanied and separated children directly at the border, unlike the procedures for unaccompanied children from non-contiguous countries, a certain percentage, number unknown, of CBP’s apprehensions reflects the multiple attempts one Mexican child might make in a year to enter the U.S. It is therefore unknown the exact number of individual Mexican children who have been apprehended in any given year.

<sup>21</sup> USBP. (2015). USBP Sector Profile – Fiscal Year 2014 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>.

<sup>22</sup> USBP. (2015). United States Border Patrol Southwest Border Sectors. Retrieved from [http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Aps%20FY13%20-%20FY14\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Aps%20FY13%20-%20FY14_0.pdf).

<sup>23</sup> International Centre for the Human Rights of Migrants (CIDEHUM) at the request of UNHCR. (2012, May). *Forced Displacement and Protection Needs produced by new forms of Violence and Criminality in Central America* (hereinafter “Forced Displacement and Protection Needs”). Retrieved from <http://www.rcusa.org/uploads/pdfs/Violence%20in%20CA%20Final20%20July2012.pdf>. See also, e.g., UNHCR. (2010, March 31). Guidance Note on Refugee Claims Relating to Victims of Organized Gangs. Retrieved from <http://www.refworld.org/docid/4bb21fa02.html>; UNHCR. (2011, July). Living in a World of Violence: An Introduction to the Gang Phenomenon. Retrieved from <http://www.refworld.org/docid/4e3260a32.html>.

in strategic territories and their activities generate forced displacement, which “has been seen with greater intensity in the last three years.” The increased presence and negative effects of organized crime “can be seen through extortion, killings, forced recruitment, strategic control of territory, generalized fear among the population, the rise in violence levels (historically high in these countries), and collusion within and weakening of the States’ structure,” which is “reflected in the rise in the levels of violence (homicides, criminality) precisely in the zones of impact and the zones of risk of OC activities.”<sup>24</sup>

The study observes a “lack of infrastructure and empowerment of local Migration and Police authorities . . . to control and protect victims and those vulnerable to being caught up in OC,” finding that “[n]ational protection mechanisms are undeveloped and insufficient.”<sup>25</sup> It acknowledges that this lack of effective protection exists “not for lack of political will on the part of the States, but because of the greater presence of organized crime and the violence generated by its activities.”<sup>26</sup> There is also evidence that State actors in these countries have been co-opted and corrupted by highly organized non-State criminal actors in many areas, creating “zones of impunity.” These countries do not lack the general political will to address the rampant violence and State corruption, but their protection mechanisms are weak at best and often ineffective.<sup>27</sup>

Strikingly the *Forced Displacement and Protection Needs Study* concludes that it “must be understood that OC’s activity and scope is [sic] transnational . . . [and] should not [be treated] as if it were only a question of domestic crime limited by a national sovereignty focus; this lack of visibility of the phenomenon could work to strengthen organized crime and its greater spread throughout the region.”<sup>28</sup> The *Forced Displacement and Protection Needs Study* identifies unaccompanied children as one of the populations most vulnerable to organized criminal elements

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<sup>24</sup> Forced Displacement and Protection Needs, pp. 5-6. The study further states that “[w]hile the number of [refugees and asylum seekers mainly from Guatemala, El Salvador and Honduras] has risen in recent years, it represents only a portion of the population that has been displaced and may be in need of international protection. This [situation] could intensify because of problems of security and violence produced by the activities of OC” (Forced Displacement and Protection Needs, p. 5). See also WRITENET (Commissioned by UNHCR). (2008). Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations (hereinafter “Patterns of Human Rights Violations”). Retrieved from <http://www.refworld.org/docid/48ad1eb72.html>. (Discussing the increasing gang-related violence in the region and the “evidence that some gangs are part of transnational networks, using modern forms of communication to participate in organized criminal activities such as trafficking in drugs and humans.”)

<sup>25</sup> Forced Displacement and Protection Needs, p. 8.

<sup>26</sup> Forced Displacement and Protection Needs, p. 6.

<sup>27</sup> Forced Displacement and Protection Needs, p. 7.

<sup>28</sup> Forced Displacement and Protection Needs, p. 10. There are differing views as to the extent to which “gangs” operate transnationally. While some have found that they do (e.g., Forced Displacement and Protection and Patterns of Human Rights Violations), others have found that for the most part, the gangs are not transnational (e.g., United Nations Office on Drugs and Crime (UNODC). (2012, September). Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment (hereinafter “Transnational Organized Crime”) pp. 13, 28. Retrieved from [http://www.unodc.org/documents/data-and-analysis/Studies/TOC\\_Central\\_America\\_and\\_the\\_Caribbean\\_english.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf)), and still others have found that there is a need to determine the degree to which gangs operate transnationally (e.g., Congressional Research Service (CRS). (2014). Gangs in Central America, p. 20. Retrieved from <http://www.fas.org/sgp/crs/row/RL34112.pdf>).

asserting that the international protection needs at stake “are related to protecting their lives and personal integrity.”<sup>29</sup>

The chapters on Honduras, El Salvador, Guatemala, and Mexico in this book confirm these findings, and further illuminate the reasons for the increased migration of children from those countries.<sup>30</sup> While the circumstances vary country-by-country, instability, violence, and unavailability of State protection are key drivers of the migration of children.

Thus, notwithstanding differences in the situations in each of the countries these children are coming from, the baseline common denominator is that high numbers of unaccompanied children from all four of these countries are arriving at the southern border of the United States. UNHCR Washington sought to ascertain the connection between the findings of recent studies on the increasing violence and insecurity in the region and potential international protection needs of these children based on the children’s own experiences and reasons for leaving, and to that end conducted in-depth individual interviews with 404 unaccompanied children.

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<sup>29</sup> Forced Displacement and Protection Needs, p. 8. The study underscores the concern that “[t]he international protection needs of victims as refugees are not being assessed through the prism of applicable international instruments, obscuring more and more the forced displacement caused by OC and the situation of people needing international protection,” and offers several key examples of this failure stating: “In some claims for recognition of refugee status, the authorities of the receiving States do not consider OC as an agent of persecution but as an agent of common crime . . . [i]n other cases . . . , it is seen as national or local common crime, failing to recognize or obscuring its character as Transnational Organized Crime. . . . In general, in some States there are difficulties in establishing the causal link between the well-founded fear of being persecuted by OC activity and one of the grounds of the refugee definition enshrined in the 1951 Convention (i.e. race, religion, nationality, membership of a particular social group or political opinion) . . . The same happens with regard to the understanding of whether national protection exists or not and why this is not available or is not effective” (*Id.*). The study also recognizes positive developments in Mexico and Costa Rica that provide complementary forms of protection but cautions that these “should not be used as a substitute or to the detriment of the recognition of the international protection needs of those who qualify validly as refugees, including in cases of victims of organized crime” (*Id.*). The study further states that “[P]eople who leave the country because they lack protection from organized crime, once deported or expelled become even more vulnerable to OC activity, and can therefore again suffer the same violent situations that caused them to leave the country in the first place” (*Id.*, p. 7). In Transnational Organized Crime, the UNODC also makes some relevant points, among them that “territorial groups [(gangs)] appear to be involved in migrant smuggling, human trafficking, and the firearms trade” that to effectively address the violence from organized armed criminal actors, “Governments need to develop the capacity to assert control over their entire territories and consolidate democracy through justice” (Transnational Organized Crime, p. 5). A recent Congressional Research study identified several key areas that warrant further exploration, some of which highlight the concerns presented here, and include investigating the extent to which gangs in Central America are becoming more organized and sophisticated; the extent and types of ties they have with other criminal organizations based in Central America and Mexico, and the extent to which their concerns are primarily local, or transnational (Gangs in Central America, p. 20).

<sup>30</sup> See chapters 2-7 for an in-depth analysis of root causes of migration in Honduras, El Salvador, Guatemala, and Northern and Southern Mexico.

#### IV. The approach to interviewing the children

UNHCR conducted in-depth, individual interviews with 404 unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico.<sup>31</sup> All the children interviewed were part of the surge that began in October 2011.<sup>32</sup>

##### A. Characteristics of the children interviewed

- Ages 12-17
- Entered US during or after October 2011
- Held at some point in U.S. federal custody
- Sex distribution of Central American Children mirrors children in ORR custody
- Those in U.S. Government shelters had been there more than five days
- Randomly selected within these parameters
- Voluntary Participation with Express Written Consent

##### *Number of Children Interviewed from Each Country of Origin*

<b>Country</b>	<b>Boys</b>	<b>Girls</b>	<b>Total</b>
El Salvador	67	37	104
Guatemala	79	21	100
Honduras	69	29	98
México	98	4	102
<b>Totals</b>	<b>313</b>	<b>91</b>	<b>404</b>

In light of the special vulnerability of children, in particular children for whom there is no parent or lawful guardian present to protect their interests, the design and implementation of the UNHCR study incorporated a child-sensitive approach and were guided by the fundamental principles of the best interests of the child; “do no harm” to any child in the course of conducting any research; nondiscrimination; confidentiality; and voluntary and informed participation.

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<sup>31</sup> The original plan was to interview 100 children from each of the four countries but for a variety of reasons, including achieving the intended breakdown by gender and type of federal custody placement of the child, this was not possible; nevertheless, the final numbers are very close to this goal. The distribution of Central American boys and girls mirrored that of the children from these countries in the distribution of the children in the custody of the Office of Refugee Resettlement (ORR) in the first half of FY 2013. The majority of the Mexican children interviewed were in the custody of CBP rather than the custody of ORR. Because the Mexican children available to be interviewed depended on CBP’s daily apprehensions, UNHCR was not able to control the sex distribution of the Mexican children interviewed for its study and as a result only four (four percent) of the 102 Mexican children were girls. Unofficial CBP statistics show that eleven percent of Mexican unaccompanied children apprehended in FY 2013 were girls. The age range reflects the ages of most of the children who have been arriving to the U.S. since the surge began. Two of the children were 18 years old age at the time of interviewing but were 17 at the time of arrival in the United States. UNHCR also conducted a review of the literature from 2004 to 2013 discussing the reasons why unaccompanied children were migrating from El Salvador, Guatemala, Honduras, and Mexico, which is available at [www.unhcrwashington.org/children](http://www.unhcrwashington.org/children).

<sup>32</sup> A few of the children interviewed had entered the U.S. before the onset of the surge but had been apprehended in the interior and referred to ORR after October 2011. Children in this situation constitute a percentage of the “surge” numbers and were kept in the interview sample.

The interview process included two components. The first component was an introductory overview in small groups, which underscored the voluntary nature of the children's participation, including the option to stop the interview at any time; the confidentiality and anonymity of their identity and answers; the lack of any connection of the interviewers to any government official; the fact that their responses would have no bearing whatsoever on their ability to remain in the U.S. or to seek or be eligible for any form of protection from return to their countries of origin; and the purpose of the interview. This introduction was followed by an individual interview with each child who agreed and signed a written consent to participate in the study.<sup>33</sup>

The questions were designed and presented to each child in a manner that would best address the difficulties that frequently arise when interviewing children. Children were first asked basic and less potentially traumatic questions such as their country of origin, date of birth and other biographical information. After this initial questioning, the children were asked five different open-ended questions related to the potentially sensitive topic of their reasons for leaving their countries of origin and any harm or threats they might have received.<sup>34</sup> This approach provided greater opportunity to build rapport and increase trust and confidence in the interviewer and the interview process and ensured that each child had more than one opportunity to reflect on, share the factors and articulate the reasons that influenced the decision to leave. This interview format also better accommodated the varying ways children often have of telling their stories and recounting events—especially when these events might be painful or difficult to recall or to disclose out loud, in particular to a stranger from a different culture in the context of being at the mercy of a foreign government authority.

### *B. Questions asked to each child*

The questions asked to each child related to the types of harms they faced and their reasons for leaving were as follows:

- Why did you want to leave your country? What was the most important reason?
- Were there any other reasons? What were they?
- Has anyone made you suffer at some point in your country or in your home?
- Has anyone hurt you at some point in your country or in your home?
- Have you been in danger at some point in your country or in your home?

The heart of the interview was to learn from the children in their own words the reasons behind their decision to leave their countries of origin. The ultimate goal of this study was to ascertain whether the recent surge in unaccompanied and separated children from El Salvador, Guatemala, and Honduras to the United States reflects an increase in children from these countries with

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<sup>33</sup> The individual interview began by reviewing the points made in the orientation and the child was given the opportunity to decline or to sign the consent form at that time. A two-person UNHCR team met with each child, one of whom conducted the interview while the other took notes. The interview was conducted based on a questionnaire of seventy-three open- and closed-ended questions to ensure that both qualitative and quantitative data would be provided. The interviews typically lasted sixty to ninety minutes.

<sup>34</sup> Although three of the five were posed as “yes or no” questions, if a child opted to simply answer yes to one of those, the interviewer followed with open-ended questions to provide the opportunity for the child to elaborate. Very few children gave a simple yes or no, and of those who did, every child offered further details when asked open-ended follow-up questions.

international protection needs. And although there has not been a similar surge in arrival of children from Mexico, given that their numbers have been consistently high over several years, the goal was the same—to ascertain whether they too are increasingly in need of international protection. The purpose of the interview was to determine whether the children’s responses indicated a potential need for international protection and not to make a firm determination as to whether any given child did, in fact, merit international protection.

The children were asked two questions about their reasons for leaving followed by three questions as to whether they had ever experienced harm, been made to suffer, or been in danger in their home countries. The narrative responses to each of these five of questions were organized thematically under a series of broad categories and narrower sub-categories to facilitate the identification of trends or patterns in the responses. Among the broader categories of reasons are those related to family reunification and better opportunity; violence in society, including by armed criminal actors; abuse in the home; and deprivation and social exclusion. The children’s responses to all five of these questions were considered in the analysis of the nature and extent of their potential international protection needs.

## **V. What the children’s responses revealed**

The responses of the 404 children were analyzed with a view to answer two questions:

*Why are these children leaving their countries of origin?  
Are any of these children in need of international protection?*

The central finding of this analysis is that a significant number of these 404 children—58 percent—expressed types of harm or situations that raised actual or potential international protection needs.<sup>35</sup>

<b>Children with Potential International Protection Needs</b>	
El Salvador	72%
Guatemala	38%
Honduras	57%
Mexico	64%
<b>TOTAL</b>	<b>58%</b>

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<sup>35</sup> The study was specifically designed to be representative and statistically significant for drawing conclusions and inferences and, as such, this finding that fifty-eight percent of the children raised potential international protection means that in general, fifty-eight percent of all the unaccompanied and separated children in this same age range, from these four countries, arriving to the U.S. would likewise raise potential international protection needs. This assertion is based on a ninety-five percent confidence level and a maximum margin of error of plus or minus five percent in relation to the size of the random sample in the study. More precisely, given that this study reflects the standard margin of error of plus or minus five percent, between fifty-three and sixty-three percent of children in this same 12-17 years old age range from these four countries arriving to the U.S. would also have a potential international protection needs. The calculations associated with the maximum margin of error were conducted by German J. Pliego Hernandez, Associate Professor, Department of Computer & Information Sciences, Professor of Statistics, St. Thomas University.

The two predominant types of international protection related harm that emerged from the children's narratives are violence by armed criminal actors and violence in the home. Forty-eight percent of the displaced children interviewed shared experiences of how they had been personally affected by the ever-increasing violence by organized armed criminal actors, including drug cartels and gangs or, in at least some cases, by State actors, throughout the region. One particular form of crime-related violence arose only among the children from Mexico— recruitment into and exploitation by the criminal human smuggling industry, that is, luring Mexican children into the criminal enterprise of guiding others in crossing unlawfully from Mexico into the United States, which affected thirty-eight percent (thirty-nine) of the children from Mexico. These Mexican children are included in the forty-eight percent who feared or experienced harm based on criminal violence.

Twenty-one percent of the children (eighty-five) confided that they had survived abuse or violence in their homes by their caretakers. Eleven percent of the children reported having suffered or being in fear of *both* violence in society and abuse in the home. A small number of children, four percent (eleven girls and six boys), indicated either that they could not obtain protection from the State, that such protection would not be available to them, or that they were afraid to seek such protection from the State for fear that it would be futile and may even lead to more harm.

The paramount conclusion UNHCR reached from the analysis of the children's responses is that all unaccompanied children from these four countries must be carefully screened for international protection needs consistent with the fundamental obligation of States to ensure that such children are not rejected at the border or returned to situations of harm or danger. This conclusion is also supported by the harms documented in the country-specific chapters of this book.<sup>36</sup>

## VI. The special needs of children

Children are inherently vulnerable due to their age, their physical, mental, and emotional development and maturity, and other factors. These attributes of childhood affect the manner in which children understand and process their experiences as well as their understanding of questions about these experiences and the ways in which they respond to such questions.<sup>37</sup> Children also often recount events and relate their stories in indirect, circumscribed ways and often have difficulty articulating their fears. In view of these and other factors, to best ensure the necessary information is obtained and to safeguard a child's well-being and safety requires a child-sensitive approach to interviewing and assessing information they provide.<sup>38</sup> A child-sensitive approach requires building trust between the child and the interviewer, and includes moving gradually from basic information-gathering questions such as biographical data to the more involved and potentially sensitive questions about reasons for leaving the country of origin and

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<sup>36</sup> For example, in the chapters on El Salvador, Guatemala, Honduras, and Southern and Northern Mexico, authors conclude that child migration is driven in large part by violence and the threat of violence, as well as the lack of effective State protection from harm. See chapters 2-7.

<sup>37</sup> "In the examination of the factual elements of the claim [for international protection] of an unaccompanied child, particular regard should be given to circumstances such as the child's state of development . . . as well as his/her special vulnerability" (Guidelines on Unaccompanied Children, pp. 2-3). "Alongside age, factors such as rights specific to children, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered" (Child Asylum Guidelines, ¶ 4).

<sup>38</sup> Child Asylum Guidelines, ¶¶ 71-72.

fears of return. Open-ended questions asked at different times in different ways to provide the child more than one opportunity to reflect on, share, and articulate responses to more complex and fundamental questions will better ensure fuller information from the child. This is important especially when the answers to such questions might be painful, traumatic, or otherwise difficult to recall or to disclose out loud, in particular when the interviewer is a government authority with the power to detain, return, and otherwise control the child's circumstances and destiny.

There are a number of ways a child's perspective may affect the way she answers questions and provide information. Children not only relate their situations differently from adults but, equally importantly, they perceive, understand, and process their experiences differently.

Children are more susceptible to harm and often experience it differently than adults.<sup>39</sup> Precisely because of their age, lack of maturity, and vulnerability, the very fact of being a child renders them susceptible to harm that only applies to or disproportionately affects children.<sup>40</sup> Children are often subject to harm by non-State actors such as, for example, militarized groups; members of organized criminal gangs or cartels; close family members, including parents; and other caregivers.

Children are more sensitive to acts that target family and community members and are more likely to be emotionally affected by hostile situations in general. A child who has witnessed these kinds of acts may be traumatized even if the child was not the direct target of them. Memories of traumatic events may linger in a child's mind and may result in ongoing, long-term psychological harm.

Especially when questioned under stressful circumstances, such as by officials of a foreign country about situations or experiences that may be difficult or traumatic to discuss, children may provide answers that are simple, "safe," and more easily repeated, and sometimes children provide information based on what they have heard from others. They may wish to avoid talking about difficult subjects, or they may not directly connect hardships or other experiences or fears with the questions they are being asked. They may provide superficial or even artificial answers about experiences or events that were harmful or traumatizing. Children may feel ambivalent about their decision to leave their homes or despondent about being apprehended by immigration officials, both of which may impact how they relate their situations, experiences, fears, and concerns. And of course, in some cases, children may be too young or immature to be able to understand what information is important or to interpret and convey what they have witnessed or experienced in a manner that is easily understandable to an adult.

As emphasized throughout this chapter and the remainder of this book, the fundamental "best interests of the child" principle requires assessing protection needs from the child's perspective. This encompasses an examination of the impact of the harm—already experienced or potential—on the child's rights or interests, and means that any assessment of potential protection needs must be conducted in a child-sensitive manner in view of age and maturity, as well as other factors relating to a child's development and ability to identify and articulate what are often complex and intertwined aspects of their young lives. These same factors relating to a child's stage of

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<sup>39</sup> Child Asylum Guidelines, ¶ 15. ("Actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child.")

<sup>40</sup> Child Asylum Guidelines, ¶ 16.

development and vulnerability may also be directly related to how a child experiences, fears, and articulates harm. A full consideration of the unique perspectives of children is essential not only in the interview process but equally so in the context of assessing their experiences and fears to best ensure that no child is denied international protection in error.<sup>41</sup>

## VII. The meaning of international protection

Three essential dimensions must be taken into account to fully understand the ways in which these children's narratives give rise to international protection concerns: the meaning and purpose of international protection and in particular refugee protection; the fears expressed by the children in the context of the current situation in each of the four countries of origin and within the region; and the unique ways that unaccompanied and separated children fear and experience harm.

Every State bears the responsibility to protect its own citizens and others within its borders. When Governments are unwilling or unable to provide protection, individuals who suffer or are at risk of suffering violations of their human rights may be forced to leave their homes—often even their families—to seek safety in another country where international and regional obligations require States to ensure the protection of these individuals.

The principle means for providing international protection to individuals unable to receive protection in their countries of origin is the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol*. To receive protection under these instruments, an individual must satisfy the refugee definition and, as articulated under Article 1F of the 1951 *Convention*, there must not be any reason to exclude an individual from such protection.<sup>42</sup> Once an individual is found to be a refugee and does not fall under any of the exclusion grounds, protection under the 1951 *Convention* and 1967 *Protocol* must be granted.

The term “international protection” was originally crafted and associated with refugee protection. With the progressive development of international law, the term now refers to a broader range of protection for those who may not meet the refugee definition but nevertheless do not enjoy the protection of their countries of origin and are in need of international protection. As discussed below, other international instruments also call for providing international protection for certain individuals who have crossed a border from their own State into another.

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<sup>41</sup> Child Protection Framework, pp. 23. (“Girls and boys have access to age and gender-sensitive protection procedures. . . . Procedures and decisions relating to children are informed by their age, maturity, gender, language, social and ethnic background and take into account the individual experience of the child.”) See also Child Asylum Guidelines, ¶¶ 1-2.

<sup>42</sup> The “exclusion clauses” render an individual who meets the refugee definition ineligible for protection when “there are serious reasons for considering that” such individual has: “committed a crime against peace, a war crime or a crime against humanity”; “committed a serious non-political crime outside the country of refuge”; or “been guilty of acts contrary to the purposes and principles of the United Nations.” These exclusion grounds are meant to be interpreted restrictively, that is narrowly rather than broadly, and are meant to be exhaustive. See UNHCR. (2013, September 4). Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, ¶¶ 2, 3. Retrieved from <http://www.refworld.org/docid/3f5857684.html>.

### A. *The refugee definition*

The refugee definition contained in 1951 *Convention* and its 1967 *Protocol*, provides that a refugee is any individual who has a well-founded fear of being persecuted based on race, religion, nationality, membership of a particular social group or political opinion; is outside the country of origin; and the country of origin is unwilling or unable to provide protection to that individual.<sup>43</sup> As discussed in greater detail in later chapters of this book,<sup>44</sup> each of the five countries discussed in this chapter have adopted a refugee definition consistent with the 1951 *Convention* and its 1967 *Protocol*. The core of these two instruments is the obligation to provide protection to refugees, to ensure their human rights are respected, and to safeguard the principle of *non-refoulement*, which is the obligation not to return a refugee to any country where she or he would face danger.<sup>45</sup> Each of the key terms of the refugee definition has been subject to interpretation, and UNHCR provides the key international sources for such interpretation through the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*.<sup>46</sup>

### B. *Children with potential international protection needs*

Central to the potential international protection needs of the unaccompanied children from Central America and Mexico, is understanding that the harm feared or experienced by these displaced children may rise to the level of persecution; that the harm may have been or may be directed at these children due to one of the five protected grounds—race, religion, nationality, membership in a particular social group, and political opinion; and that the State is responsible for the harm if it is the actual perpetrator or it is either unwilling or unable to provide protection from it.<sup>47</sup>

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<sup>43</sup> Article 1.A(2) of the 1951 Convention, as amended by Article I(2) of the 1967 Protocol, states in relevant part that a “refugee” shall mean any person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality or last habitual residence [referring to individuals who are stateless] and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.” The singular purpose of the 1967 Protocol was to universalize the refugee definition by removing from it all temporal and geographical references to World War II contained in the original 1951 Convention definition.

<sup>44</sup> See chapters 2-7 and 10, on Honduras, El Salvador, Guatemala, Southern Mexico, Northern Mexico, and immigration relief and procedures in the United States.

<sup>45</sup> This principle is found in Article 33 of the 1951 Convention; Article I(1) of the 1967 Protocol incorporates by reference this and all other substantive provisions of the Convention. Other fundamental human rights as articulated in these and other international and regional instruments must also be respected, among them the rights to livelihood, education, and religious expression.

<sup>46</sup> UNHCR. (2011, December). *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (hereinafter “Handbook”), ¶ 65. Retrieved from <http://www.refworld.org/docid/4f33c8d92.html>. The Handbook was the first comprehensive guidance on interpreting the refugee definition and related aspects of the 1951 Convention and 1967 Protocol and has subsequently been complemented by UNHCR Guidelines on International Protection. To date, ten Guidelines on International Protection have been issued; the first eight are contained in the 2011 edition of the Handbook and Guidelines. All ten Guidelines are available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=home&skip=0&cid=49aea93ae2&comid=4a27bad46&keywords=RSDguidelines>.

UNHCR issues a range of other documents that are relevant to the interpretation of the refugee definition and other aspects of refugee protection. The Handbook and Guidelines as well as other UNHCR resources can be found on the UNHCR website, [www.unhcr.org](http://www.unhcr.org), and on RefWorld, the UNHCR research website, [www.refworld.org](http://www.refworld.org).

<sup>47</sup> For purposes of meeting the refugee definition, it may be that a child—or any other asylum-seeker—is targeted by a non-State actor because of a protected ground, or it may be that, regardless of the reasons the non-State actor has,

Because of their age, lack of maturity and vulnerability, the very fact of being a child may itself be a key factor in the harm they have experienced or fear and makes them susceptible to specific forms of harm that only apply to or disproportionately affect children such as physical and mental violence, abuse, neglect, and exploitation. Harm that might not be considered persecution to an adult may very well be sufficient to reach the threshold of persecution to a child and includes the cumulative effect of isolated incidents of lesser forms of harm.<sup>48</sup> Children are often subject to harm by non-State actors such as, for example, militarized groups; members of armed criminal gangs or cartels; close family members, including parents; and other caregivers. Where the harm is feared or experienced at the hands of a non-State actor, consideration must be given as to whether the State is unable or unwilling to provide protection. In addition, where the harm is based on forced recruitment of any child below the age of 18 years by a non-State armed actor, this would be considered persecution.<sup>49</sup> Children may also have protection-related fear of return arising from the treatment they are subjected to<sup>50</sup> or conduct they are required to engage in by such actors.<sup>51</sup>

In view of their vulnerability and unique circumstances, all unaccompanied children should be identified by the State authorities who first encounter a child and referred as appropriate to an agency with specially trained officers who can conduct a more detailed interview under more secure and less threatening or traumatic circumstances to assess whether a child may have international protection needs.<sup>52</sup> It is only at the point of a full assessment of a claim for international protection that all the elements of the refugee definition would need to be examined, such as whether the harm feared or experienced rises to the level of persecution, the connection of the harm to a protected ground under the refugee definition, or, in the case of a non-State actor, whether the State is unable or unwilling to accord protection to a child from such harms.

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the State is unwilling or unable to provide protection from such non-State actor because of one of the five protected grounds.

<sup>48</sup> Child Asylum Guidelines, ¶¶ 15, 16, 18.

<sup>49</sup> Child Asylum Guidelines, ¶¶ 19, 21. This principle applies equally in the context of forced recruitment by a State, which was not an issue of key concern among the children interviewed in this study and so is not discussed here. *See* UNHCR. (2013, December 3). Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees. Retrieved from <http://www.refworld.org/docid/529ee33b4.html>.

<sup>50</sup> For example, girls are sometimes raped or otherwise forced into sexual relations with members of these groups, a situation raised by a small number of girls in the UNHCR study.

<sup>51</sup> “[I]t is important to take into account the circumstances under which the applicant joined the gang. An individual who has been forcibly recruited into a gang would primarily be considered a victim of gang practices rather than a person associated with crime. This applies in particular to young people who may have less capacity or means to resist gang pressures. Children who lack the requisite maturity and mental capacity would normally not be considered to have voluntarily joined a gang. However, even if gang association occurred on a voluntary basis, former gang members, including those who have engaged in, or have been convicted of, criminal activity, may constitute a particular social group under certain circumstances provided they have denounced their affiliation with the gang and credibly deserted from it.” UNHCR. (2010, March 31). Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (hereinafter “Guidance Note on Organized Gangs”), ¶ 44. Retrieved from <http://www.refworld.org/docid/4bb21fa02.html>.

<sup>52</sup> The fact that a child arrives to a country unaccompanied by a parent or lawful guardian should be sufficient to refer that child. To the extent a State requires some initial screening, only the most elemental threshold standard—one that requires a finding that the child does not present any potential international protection needs—should be required before referring a child for a fuller assessment of any potential international protection needs.

### *C. Complementary forms of international protection*

There may be individuals who are found not to meet the refugee definition contained in the 1951 *Convention* or 1967 *Protocol* but are nevertheless in need of international protection due to their lack of safety or security and inability to receive State protection in their countries of origin.<sup>53</sup> In general, these are persons fleeing armed conflict, serious internal disorder, massive human rights violations, generalized violence, or other forms of serious harm with no link to a refugee protection ground as contained in the international refugee definition. Such individuals should be given complementary protection that confers a formal, legal status with defined rights and obligations for the period of time necessary to safeguard their safety and security. These obligations flow from a range of human rights instruments and domestic laws, and are discussed in more detail in Chapters 6, 7, and 10 on Mexico and the United States.<sup>54</sup>

## **VIII. What the children from these countries said**

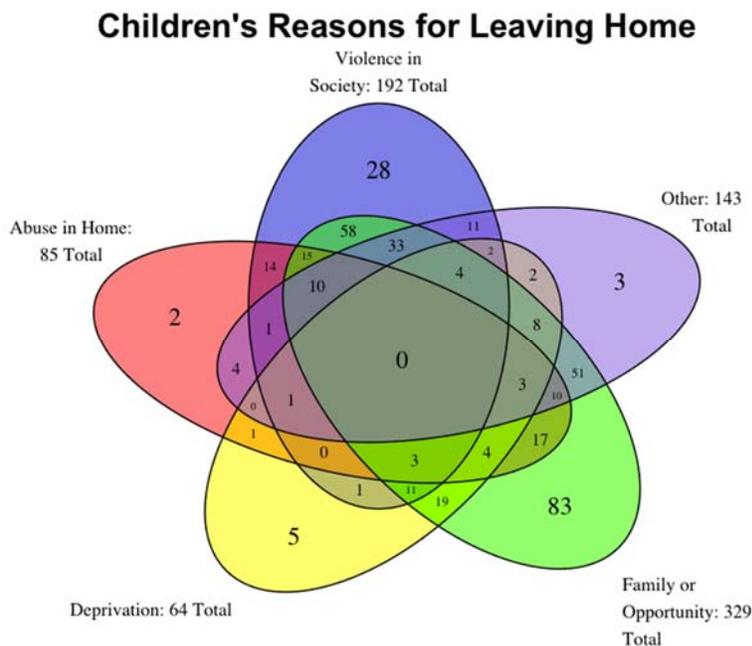
The responses of the 404 children UNHCR interviewed reveal an unsettling number of children who had suffered one or more types of harm that could give rise to international protection needs. These children came from diverse countries, cities, towns, and villages. Some had close family members living in the United States while others left behind the only family they ever knew. Many feared violence at the hands of gang members, cartel affiliates or their own family members. Others feared a life of deprivation and desperation due to lack of basic necessities, education, jobs, and hope. Their responses to the questions about why they left and whether they had experienced any suffering, harm, or danger are as complex as the children themselves. Yet they all shared two things: alone and uncertain, they were forced to make a decision no child should ever have to face,

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<sup>53</sup> Some of these individuals may fall within the broader refugee definitions contained in the Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969, September 10, 1001 U.N.T.S. 45, retrieved from <http://www.refworld.org/docid/3ae6b36018.html>, which expands the refugee definition to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” or the *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration*, 1984, November 22, retrieved from <http://www.refworld.org/docid/3ae6b36ec.html>, which expands the refugee definition to include, “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Others may not be in a location where either of these definitions apply or simply may not meet any of the applicable refugee definitions.

<sup>54</sup> For a discussion of available immigration relief as well as impediments to access in Mexico, see chapters 6 and 7 on Southern and Northern Mexico. For a discussion of available forms of relief in the United States and barriers faced by children in obtaining them, see chapter 10 on immigration remedies and procedures in the United States. See also *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 1949, December 2, 96 U.N.T.S. 271, retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, December 10, 1465 U.N.T.S. 85, retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; *Convention on the Rights of the Child (CRC)*; *International Labour Organization (ILO), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (hereinafter “Child Labour Convention”), 1999, June 17, 2133 U.N.T.S. 161, retrieved from <http://www.refworld.org/docid/3ddb6e0c4.html>; *Organization of American States (OAS), Inter-American Convention on International Traffic in Minors*, 1994, March 18, O.A.S. T.S. No. 79, retrieved from <http://www.refworld.org/docid/3de4ba054.html>.

and they all chose to escape. In all, fifty-eight percent of the children expressed in their reasons for leaving or in harm that they had suffered, been threatened with, or feared that UNHCR identified as raising potential—if not actual—international protection concerns.<sup>55</sup>



Family unity and lack of meaningful opportunity were recurrent themes in the children's narratives. Twenty-seven percent (110) of the children raised family reunification as a reason for leaving and only fourteen percent (fifty-seven) of the children raised it as their only reason. Eighty-one percent (329) of the children said they had planned to join a family member in the U.S. or left to pursue better opportunities such as attending school or finding work as part of their reasons for deciding to travel to the United States; yet fifty-one percent (169) of these children also raised at least one international protection-related concern. Of the ninety percent (362) of children who gave either family reunification, better opportunities, deprivation, or other non-protection related reasons for leaving their countries, over half, fifty-three percent (192) of these children also gave international protection-related reasons. Thirty-six percent (146) of the children said one or both of their parents lived in the U.S., yet only twenty-one percent (eighty-six) of the children gave joining a family member as one of their reasons for leaving their home countries.<sup>56</sup>

<sup>55</sup> This result stands in stark contrast to the finding of a 2006 UNHCR study that found of the seventy-five children interviewed in all from El Salvador, Guatemala, and Honduras at the southern border of Mexico, only thirteen percent (eleven children) described harms that warranted further review for international protection needs. UNHCR. (2008, October). *The International Protection of Unaccompanied or Separated Children Along the Southern Border of Mexico (2006-2008)* (hereinafter "Children Along the Southern Border"), p. 3 n.2. Retrieved from [www.unhcr.org/4cbeb6a96.html](http://www.unhcr.org/4cbeb6a96.html). That study found the large majority of those children, eighty-seven percent (sixty-four), left their homes to reunite with family members or for better opportunities including access to education and work. A 2007 study assessed the situation of those children interviewed in 2006 who had been returned from Mexico to their countries of origin and made recommendations to each country for improving their reception and repatriation procedures. The results of both studies are published in *Children Along the Southern Border*.

<sup>56</sup> Interestingly, the children from Mexico were the least likely to have one or both parents in the U.S., comprising only ten of the total 146 of these children.

Some of the children who first said they came to the U.S. to reunite with family or for better opportunities later spoke of fear of harm, in particular of criminal violence by gangs or other actors. Other children spoke first about the danger they had faced or feared and only when questioned further mentioned reasons unrelated to protection needs. In many cases, the children left a parent, grandparent, or other close family member in their home to make the journey north. Fifty-three percent (215) of the children gave economic opportunity as one reason for leaving their home countries yet only six percent (twenty-six) of the children gave this as their only reason. Twenty-five percent stated they were seeking a better future and nineteen percent gave attending school as a reason. The poverty and lack of opportunity in El Salvador, Guatemala and Honduras are compounded by the long-term effects of years of civil war and repression and the long-standing climate of violence engendered by this strife; in Mexico, the ever-escalating violence was related to drug cartels and other criminal actors. In all four countries, the lack of consistent effective ability to stem the widespread and escalating violence, to prosecute and appropriately punish the perpetrators, and most importantly from the international protection perspective, to provide meaningful and adequate protection and redress to members of the societies affected by this violence.

<b>Harm Experienced or Feared by the Children</b>			
<b>Total Number of Children Interviewed by Country of Origin</b>	<b>Violence in Society</b>	<b>Abuse in the Home</b>	<b>Exploitation by Human Smuggling Industry</b>
El Salvador—104	69 — 66%	21 — 20%	0
Guatemala—100	20 — 20%	23 — 23%	0
Honduras—98	43 — 44%	24 — 24%	0
Mexico—102	60 — 59%	17 — 17%	39 — 38%
<b>TOTAL—404</b>	<b>192 — 48%</b>	<b>85 — 21%</b>	<b>39 — 10%</b>

*Sarah, Mexico, Age 16*

*I don't understand why there are so many criminals who want to be more powerful than the authorities in our countries. We have to work hard and reduce the violence and the criminal organizations. Many people can't complete their education because of the social instability. Our countries are allowing themselves to be controlled by the gangs and by people who only think about themselves and not the well-being of their own country. I want the president of this country to help us because all we want is a better future.*

#### A. *El Salvador*

Of the 104 children from El Salvador UNHCR interviewed, seventy-two percent were forcibly displaced because of severe harm that requires a closer review for international protection needs, representing the largest group among the four countries. While eighty percent of children from El Salvador shared their hopes for reuniting with a relative, finding better opportunities to work or study, or helping their families as a reason for going to the U.S., sixty-six percent reported having left because of some form of violence in society at the hands of organized armed criminal actors

or others in the community, or due to lack of State protection from these types of harm. Twenty percent disclosed abuse in the home. Fifteen percent reported being the victims of more than one of these categories of harms. Twenty-eight percent of the children did not mention fear or experience of any serious harm.

The predominant narrative of harm suffered by the children of El Salvador was that of violence and threats of violence by armed criminal actors. The children described their everyday challenges of evading extortion, witnessing murders, and navigating threats to themselves, and their family, friends, and neighbors. Children who had not yet been victims of violence spoke of their own fears as well as their families' fear with the same inevitability. The girls shared their fears of sexual violence. Most children described their flight with urgency, without having planned the details in their attempt to survive, and finding little hope for resolution or protection from the adults in their lives, including caretakers, teachers, and government authorities.

These findings are consistent with the discussion in Chapter 4 on El Salvador, which documents rampant violence in El Salvador and demonstrates that youth and gender are factors that increase Salvadorans' vulnerability to such violence. The chapter also demonstrates the failure of State protection, as El Salvador has been unable to prevent the escalation of gang violence despite progressive laws on gender-based violence and children's rights—consistent with the reports of children interviewed by UNHCR.<sup>57</sup>

### *B. Guatemala*

Thirty-eight percent of the 100 Guatemalan children raised international protection concerns. Overall, the three dominant themes that emerged were deprivation, discussed by twenty-nine percent of the children; abuse in the home, discussed by twenty-three percent; and violence in society, discussed by twenty percent. Five percent of the children reported that they had been victims of both violence in society and abuse in the home. Sixty-two percent of the Guatemalan children did not raise any serious harm as a reason for leaving. Eighty-four percent of the children shared hopes for family reunification, better opportunities for work or study, or helping their families as a reason for coming to the U.S.

Almost half of the Guatemalan children, forty-eight percent—forty-one boys and seven girls—were from indigenous populations.<sup>58</sup> The protection-related concerns discussed by these children were similar to those discussed by the Ladino Guatemalan children overall, with some notable differences. The indigenous children comprised fifty-five percent of all the Guatemalan children who discussed deprivation and social exclusion; thirty percent of those who discussed abuse in the home, and twenty-five percent of those who discussed violence in society.

These findings are consistent with those developed in greater detail in Chapter 3 on Guatemala, which documents the vulnerability of indigenous Guatemalan migrant children and in particular

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<sup>57</sup> For a more detailed discussion on the types of harm faced by children in El Salvador, including gang violence, child abuse, and sexual violence reported later in this chapter, see chapter 4.

<sup>58</sup> Altogether, fifty-seven indigenous children were interviewed. In addition to the forty-eight from Guatemala, there were six from Mexico and three from Honduras. These children were not selected based on their indigenous backgrounds but rather simply came up as part of the random selection process.

of indigenous girls. The later chapter also demonstrates that Guatemala, which suffers one of the highest impunity rates in the world, fails to protect children from violence and discrimination, which often underpins their decisions to migrate.<sup>59</sup>

### *C. Honduras*

Of the ninety-eight children from Honduras, fifty-seven percent raised potential international protection concerns. Forty-four percent experienced or were threatened with some form of violence in society. Twenty-four percent raised issues of abuse in the home. Eleven percent reported that they had been subjected to more than one of these serious harms. Twenty-one of the percent discussed situations of deprivation. Chapter 2 on Honduras similarly documents that Honduran children experience high rates of violence and threats of violence from these two sources: violence perpetrated by gangs and violence experienced in the home.<sup>60</sup>

Less than half of children, or forty-three percent, did not mention serious harm as a reason for leaving. Twenty-one percent of the children discussed situations of deprivation. Similar to the children from Guatemala, eighty percent of the Honduran children shared their hopes for family reunification, better opportunities to work or study, or to help their families as a reason for leaving but few gave any of these as the only reason.

### *D. Mexico*

As is true of all the children, Mexican children gave a broad range of factors driving their departures. Out of the 102 Mexican children interviewed, a total of sixty-four percent raised potential international protection needs. Thirty-two percent of the children spoke of violence in society, seventeen percent spoke of abuse in the home and twelve percent spoke of both. Seven percent discussed situations of deprivation. Eighty percent of the Mexican children spoke of the desire to reunite with family, to help their families, to study, or to pursue other opportunities.

The children from Mexico presented a particular protection-related concern not raised by children from any of the other countries—being used as “guides” for human smuggling operations to bring people across the border from Mexico into the U.S. A striking thirty-eight percent of these children had been recruited into the human smuggling industry.<sup>61</sup> Over and above the international protection implications for the Mexican children who were caught up in the human smuggling

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<sup>59</sup> For a more detailed discussion on the types of harm faced by children in Guatemala, including gang violence, child abuse, and sexual violence, see chapter 3.

<sup>60</sup> For a more detailed discussion on the types of harm faced by children in Honduras, including gang violence, child abuse, and sexual violence, see chapter 2.

<sup>61</sup> Because the vast majority of unaccompanied children from Mexico arriving to the U.S. are returned directly to Mexico and are not referred into the U.S. immigration system, almost all of Mexican children in the study—eighty-four of the 102—were in the custody of the U.S. Border Patrol waiting to be returned to Mexico. To best ensure a sufficient number of Mexican children were included in the study, these interviews were held in the Rio Grande Valley in South Texas where UNHCR was informed there was a regularly high volume of Mexican children. This area also has one of the highest rates of crossings from Mexico into the U.S. and an accompanying high volume of guides for human smuggling operations. An unanticipated consequence of this was that a large number of the Mexican children interviewed for this study were ensnared in the human smuggling industry, representing the single largest protection-related category for the children from Mexico.

industry, twenty-one of them identified one or more of the other protection-related concerns, in addition to the twenty-six other Mexican children who raised international protection needs and who were not involved in human smuggling, for a total of forty-six percent of the Mexican children raising international protection-related concerns apart from those related to the human smuggling industry.

Chapters 6 and 7 on Mexico also explore in detail the victimization of children by drug cartels and gangs, and the failure of the State to protect children from such harms. In addition, the chapters document how abuse in the home has forced many children to flee north—consistent with the reports of many children interviewed by UNHCR.<sup>62</sup>

### *E. Violence in society*

A full forty-eight percent of the children raised potential international protection concerns based on violence in the society. These 192 children shared that they feared, had been threatened with, or had already experienced, harm related to violence in society. The harms the children disclosed stemmed from organized armed criminal actors, including gangs<sup>63</sup> and cartels as well as those involved in the human smuggling industry, and in a few cases from State actors. There are important distinctions between the various organized, armed criminal actors in these countries, such as, for example, between the drug cartels and the gangs, yet at the same time, they often work collaboratively, and their activities may overlap. Significantly, these criminal actors—including gangs—often wield political power, influence and control in each of the four countries and the States are not able to provide meaningful protection from these actors.<sup>64</sup> The reports of these children are consistent, by and large, with the high levels of violence, and in particular gang-related violence, documented in the country-specific chapters of this book.<sup>65</sup>

Over a quarter of the children, thirty-one percent, discussed violence or threats of violence by gangs or cartels. Of these, the vast majority, 108 children, spoke specifically about gangs: sixty-four children from El Salvador, thirty-three from Honduras, ten from Guatemala, and one from Mexico.<sup>66</sup> The children spoke of a range of gang-related criminal violence including forced

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<sup>62</sup> For a more detailed discussion on the types of harm faced by children in Mexico, including gang violence, child abuse, sexual violence, and targeting by human smuggling rings, see chapters 6 and 7 on Southern and Northern Mexico.

<sup>63</sup> The term “gang” has been criticized by some as giving a false impression as to the extent of power and control these criminal entities have and more apt terminology has been explored; no clear consensus has yet been reached as to how best to refer to them. *See, e.g.*, Brookings Institution, (2014), *Central Americans Displaced by Criminal Violence: A Roundtable Discussion: Summary Report*, p. 2. Retrieved from <http://reliefweb.int/sites/reliefweb.int/files/resources/Central%20American%20Displaced%20by%20Criminal%20Violence.pdf>.

<sup>64</sup> *See, e.g.*, Guidance Note on Organized Gangs, ¶ 47, which states: “It is important to consider, especially in the context of Central America, that powerful gangs . . . may directly control society and de facto exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials.”

<sup>65</sup> See chapters 2-7 on Honduras, El Salvador, Guatemala, and Southern and Northern Mexico.

<sup>66</sup> This number reflects the fact that unlike the three Central American countries, in Mexico drug cartels constitute the predominant form of criminal violence. *See* Migration Policy Institute (MPI). (2012). *Transnational Crime in Mexico and Central America: Its Evolution and Role in International Migration*. Retrieved from <http://www.migrationpolicy.org/research/RMSG-CentAm-transnational-crime>.

recruitment; physical violence, including rape and severe beatings; extortion; and threats of these harms. These children also reported either a lack of confidence in or actual lack of State protection.

The fact that it is typically non-State actors who commit the harms stemming from crime-related violence does not undermine the potential international protection needs. Protection-based harms may “emanate from sections of the population that do not respect the standards established by the laws of the country concerned” and “[w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.”<sup>67</sup>

The majority of the 108 children who discussed gang-related violence—seventy-five children, sixty-nine percent—talked about at least one specific incident, such as having been beaten, robbed, or threatened by gangs. More than half of the children who discussed gang violence issues—sixty-four children, fifty-nine percent—talked about the rampant threat of harm by armed criminal groups in their communities including inter-gang conflict and the extent of the control gangs exercise in different neighborhoods, such as determining who may enter and exit these neighborhoods—even among residents and relatives of residents in the community. Some children described the potentially life-threatening dangers of being misidentified as a member of one gang while in rival territory of another gang. Children shared the dangers they faced through their efforts to avoid gang recruitment, harassment by gangs while commuting to school, and the extortion exacted by gangs on children and their families.<sup>68</sup>

Twenty-nine girls and ninety-four boys raised gang-related violence concerns, and their responses reveal a gender difference in the frequency of certain types of harm. For example, twenty-nine of the thirty-one children who discussed violent forced conscription into gangs were boys and seven of the eight children who reported rape, other sexual violence, or threats of such violence were girls.

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<sup>67</sup> Handbook, ¶ 65.

<sup>68</sup> Although gang-related issues were more prevalent in the responses of children from urban areas, at fifty-six percent, the remaining forty-four percent also indicate a significant number of children from rural communities raising gang-related violence.

Select Examples of Gang-Related Harm By Gender		
Type of Gang-Related Harm	Number and Percentage of Girls Out of 29 Total	Number and Percentage of Boys Out of 94 Total
Violent Forced Conscription	2 7 %	29 37%
Rape, Other Sexual Violence or Threats of Same	7 24%	1 1%
Extortion	7 24%	11 14%
School-related Danger	8 28%	12 15%
Gang Violence in the Community	16 55%	48 61%
Specific Fearful Incident	20 69%	55 70%

Of the twenty-one children who raised concerns about cartels, fifteen of them were from Mexico, four from Guatemala, one from Honduras, and none from El Salvador. A total of ten children, all from Mexico, mentioned harm at the hands of State actors. Sixteen children from Honduras expressed concern about generalized violence, as did eleven children from Mexico, eight from Guatemala, and six from El Salvador. Thirteen children from El Salvador raised concerns about insufficient State protection, followed by three from Honduras, one from Guatemala, and none from Mexico.<sup>69</sup>

*Alfonso, El Salvador, Age 17*

*Where I studied and lived was under control of the other gang, the MS-13. The M-18 gang thought I belonged to MS-13. They killed the two police officers who protected our school and killed two kids I went to school with. They waited for me outside the school. The gang told me if I returned to school I wouldn't make it home alive. After that, I couldn't even leave my neighborhood. The gang prohibited me. The gang threatened someone I knew this way and he didn't take the threats seriously. They killed him. He was wearing his school uniform. If I hadn't had these problems, I wouldn't have come here.*

The displaced children from El Salvador had the highest number of organized criminal related violence, at sixty-six percent, followed by forty-four percent of the Honduran children, thirty-two percent of the Mexican children and twenty percent of the Guatemalan children. Thirty-eight percent of the Mexican children were caught up in the human smuggling trade. Of these thirty-nine children, twelve of them also reported harm from other criminal elements. When these thirty-nine children involved in smuggling are added to the thirty-three Mexican children who said they were affected by other crime-related entities, the total number of Mexican children affected by criminal elements rises considerably to fifty-nine percent (sixty children).<sup>70</sup> As later chapters in the book will demonstrate, these reports are consistent with high rates of organized criminal violence, coupled with a failure of state protection, in all four countries: Guatemala, Honduras, El Salvador, and Mexico.

<sup>69</sup> See also Chapters 2-7 on Honduras, El Salvador, Guatemala, and Southern and Northern Mexico.

<sup>70</sup> This total reflects a subtraction of twelve to avoid double counting the twelve children who fell into both categories. Not all the children who gave human smuggling as a reason expressed a fear or experience of overt violence, but the exploitation and harm to which these children are subjected clearly constitute violations of their fundamental rights.

## 1. El Salvador

Sixty-six percent of the Salvadoran children raised the threat of serious harm at the hands of armed criminal actors, the highest number of any country. Sixty-five of the sixty-nine Salvadoran children who discussed violence in society specifically identified gang-related violence as the source of the harm experienced or threatened. The boys spoke largely of fear of gang recruitment and retaliation for refusing to join or cooperate.

### *Mario, El Salvador, Age 17*

*I left because I had problems with the gangs. They hung out by a field I had to pass to get to school. They said if I didn't join them they would kill me. I told them I didn't want to. Their life is only death and jail. The more I refused to join, the more they threatened me and told me they would kill me if I didn't. They beat me up five times for refusing to help them. The pain from the beatings was so bad I couldn't even stand up. I have many friends who were killed or disappeared because they refused to join the gang. They killed a friend of mine in March and his body wasn't found until May. I went to the police twice. They told me that they would do something but when I saw they weren't doing anything to help, I knew I had to leave.*

Salvadoran girls expressed fears of rape, other forms of sexual violence, and even death if they refused to be the girlfriend of a gang member.

### *Dinorah, El Salvador, Age 14*

*The biggest problem in my country is the gangs. They go into the schools and take girls out and kill them. Sometimes girls are involved in gangs and other gangs kill them. Sometimes girls are dating boys who are in the gangs and members from other gangs kill them. Sometimes gangs kill a girl because they hate her family. I used to see reports on TV every day about girls being buried in their uniforms with their backpacks and notebooks. I had to go very far to get to school and I had to walk by myself. There was nowhere I could go where it would have been safe for me.*

The children from El Salvador who had not yet been victims of the violence spoke of their own fears and that of their families with the same inevitability as those who had been targeted.

### *Henrique, El Salvador, 16*

*There are lots of gangs in my country. They force you to do bad things to other people, or they force you to get involved with them or to use drugs. I didn't want to do that, and so my whole family agreed that I should come here.*

Thirteen Salvadoran children spoke about concerns related to insufficient State response to reports of threats or harm or an inability to protect from these harms. These concerns include children who unsuccessfully approached the authorities to report a crime and seek protection, as well as those children who explained why it was not realistic for them to even attempt to ask the police or other authorities for protective action.

## 2. Guatemala

Twenty percent of the Guatemalan children suffered or had been threatened with serious harm by some form of violence in society, including from gangs or other organized armed criminal actors, other violence in the community, or failure of the State to protect them against these forms of societal violence. Twelve of the children reported harm or fear of harm by gangs or cartels, another eight discussed generalized violence, and one reported insufficient protection from the State. Some of the children spoke about the impact of the violence on their daily lives.

*Mauricio, Guatemala, Age 16*

*It was hard for me to study because of the gangs. It didn't happen to me, but sometimes they assaulted people. They did it to my friends. They were always on the road leading into the school, watching to see who they could attack.*

## 3. Honduras

When asked why they left their country, thirty-four percent of the Honduran children said they fled because they had experienced or feared violence at the hands of organized criminal actors. Sixteen percent spoke about generalized violence, and three percent expressed concerns about the failure or inability of the State to protect them from these kinds of harms. Some of these children detailed escalating events in their lives that left them with no choice but to flee.

*Jorge, Honduras, Age 16*

*The area I lived in is known as the worst for gangs in all of Honduras. They want to kill you. They almost killed my older brother. They shot him three times. They assaulted my other brother. They shot me as well. Another time some gang members attacked me with some friends and shot at us. A bullet hit me in the arm. It's dangerous for girls, too. They will make girls be with them by force. Last year the gang members told everyone in my neighborhood that they were in control and everyone had to get out. My entire family left the area because we knew it was dangerous.*

The girls also spoke about the effects of gang violence, raising in particular forced sexual relationships and other forms of sexual violence.

*Silvia, Honduras, Age 17*

*I was raped in Honduras on my way home from work. The gang members threatened me with guns and I am so scared to see guns or knives anywhere. They did it to me four times. I felt so bad about myself, I wanted to kill myself.*

Other children spoke with a sense of inevitability of becoming targeted.

*Alfredo, Honduras, Age 16*

*You feel afraid when you live in a place where there is nothing but violence. It's very dangerous there. The gangs are everywhere. You become accustomed to*

*hearing gunshots. You wonder if something will happen to you if you go out to the store, whether someone will shoot you or tell you that you have to join the gangs.*

*Angela, Honduras, Age 12*

*In the village where I lived there were a ton of gang members. All they did was bad things, kidnapping people. My mother and grandmother were afraid that something would happen to me. That's why my mother sent me here. They rape girls and get them pregnant. The gang got five girls pregnant, and there were other girls who disappeared and their families never heard from them again.*

#### 4. Mexico

Twelve percent of the Mexican children who had not been recruited into the human smuggling industry identified risks from cartels or dangers they experienced as reasons for coming to the U.S. Three of the four Mexican girls interviewed spoke of cartel violence. Ten of the children spoke of fears due to generalized violence, and two spoke of harm at the hands of State actors.

*Juan, Mexico, Age 13*

*I like playing [soccer] outside, but I can't really play anymore. My friends from my neighborhood all moved because their brothers were killed. The cartel killed them and the entire family left. So now I don't have anyone to play soccer with.*

#### F. Recruitment and exploitation in the human smuggling industry

Mexican children are frequently recruited by criminal rings and other adults to work as human smuggling guides, because, in view of their age and vulnerability, it is widely understood that if they are caught, they are typically returned to Mexico without delay.<sup>71</sup> Recruitment into the criminal human smuggling industry affected thirty-eight percent of the Mexican children, who said they had come into the U.S. as part of their “duties” as smugglers.<sup>72</sup> All of these children stated they were doing this on behalf of an adult. In addition to the crime-related protection needs of these children, concerns about exploitative labor also arose in this context. The *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* includes in the definition of “worst forms of child labour” “the use, procuring or offering

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<sup>71</sup> Many of the children who disclosed involvement in human smuggling confided that one reason they were recruited is because adults know that children will more than likely be sent back to Mexico directly and will not be prosecuted under U.S. criminal law. Certainly, prosecuting children for crimes committed at the behest and under the orders of adults would be an inappropriate and ineffective response; at the same time, this reflects one key dimension of the level of deliberate exploitation by adults of these children.

<sup>72</sup> Factors that may have contributed to this high percentage are that, due to the limited number of Mexican children referred to ORR custody within the U.S., eighty-two percent (eighty-four) of the Mexican children interviewed were being held in the custody of the U.S. Border Patrol in the South Texas Rio Grande Valley waiting to be returned to Mexico. This area has one of the highest crossing rates from Mexico into the U.S. including a high number of Mexican children, and an accompanying high volume of guides for human smuggling operations. An unanticipated consequence was that a large number of the Mexican children interviewed were caught up in the human smuggling industry, representing the single largest protection-related category for the Mexican children.

of a child for illicit activities . . . [and] work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”<sup>73</sup>

Children are lured in with the promise of money, the likes of which cannot be earned through the few legitimate work opportunities that might be available to these children. The children are then made to engage in unlawful and dangerous activities. Once ensnared, it is generally very difficult for the children to be released from their smuggling “duties” and they remain caught in a web of criminal activity and threats to their safety and well-being.

The children interviewed did not suggest they were literally forced to engage in human smuggling; however, their ages, the rampant poverty, lack of opportunity, and often-unchecked crime-related violence in at least parts of Mexico, are strong indicators that these children are unlikely to be able to make informed and voluntary decisions to participate in human smuggling.

Ten percent of these children spoke of being harmed or threatened with harm by the Mexican military because of their actual or presumed work in the smuggling industry. Eight of these ten children had actually been recruited into the smuggling industry and of these, three were beaten or tortured by the military soldiers, two were shot at by them, and three feared such abuse. Both of the two children who were not working in the human smuggling industry stated Mexican soldiers accused them of working for a cartel and beat them because of this.

The Mexican children who discussed involvement in the human smuggling industry were placed in situations of danger to their safety and well-being, in direct conflict with their moral and social development. These children were repeatedly exposed to and made to engage in the dangerous and often violent world of unlawful border crossings. In combination with the poverty, lack of opportunity, and lack of State protection, these children are caught in a vicious cycle. The exploitation of these and other children represents serious human rights violations and is a strong indication that these children may be in need of international protection.

### *G. Abuse in the home*

“All violence against children, including physical, psychological, and sexual violence, while in the care of parents or [other caregivers] is prohibited [under international law].”<sup>74</sup> Such harm is recognized as a potential basis for providing international protection because of the child’s vulnerability, dependency and, in many cases, a lack of ability to access effective recourse or protection by the State.<sup>75</sup> Twenty-one percent of the children disclosed that they had experienced some form of abuse in the home, including physical abuse, emotional abuse, sexual abuse, sibling violence, intimate partner violence, and abandonment. Although less than half of the children who reported some form of abuse were female, these thirty-six girls represent forty percent of all the

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<sup>73</sup> Child Labour Convention, Article 3, ¶¶ (c) and (d). All five countries discussed here have ratified this Convention.

<sup>74</sup> Child Asylum Guidelines, ¶ 32. *See also, e.g.*, UNHCR. (2002, May 7). Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees. Retrieved from <http://www.refworld.org/docid/3d36f1c64.html>. (Discussing, among other issues, the context and circumstances under which domestic violence may serve as the basis for refugee protection.)

<sup>75</sup> Questions such as the severity of the abuse, whether the State is willing or able to provide protection to the child from it, and whether the actual or feared harm is connected to one of the five grounds in the refugee definition are all factors that would appropriately be considered in the context of an assessment of a full protection claim.

females interviewed, whereas the forty-nine boys who reported some form of abuse in the home, represent only sixteen percent of all the boys interviewed.

The children identified a range of abusers including parents, siblings, grandparents, other care-givers, and domestic partners. Twenty-two children spoke of care-givers getting ill, dying or being otherwise unable to care for them as a reason for leaving; ten of these children were among those who reported abuse in the home.

Across all nationalities except Guatemalans, children raised abuse in the home much more frequently as a form of suffering or harm than as an explicit reason for leaving. There are many possible explanations for this, among them that children may have viewed their decision to leave as separate from their maltreatment, even if the maltreatment had caused them to seek a safer life elsewhere; they may have felt ashamed or afraid to talk about the abuse and thus only disclosed it after several probing questions or after developing more rapport with the interviewer; or it may not have seemed out of the ordinary, if it was all the child had known. Whether or not the child herself identifies abuse in the home as a motivation for leaving, however, children should be carefully screened for protection-related needs resulting from this form of abuse.

<b>Children Reporting Abuse in the Home by Country and Sex</b>				
<b>Nationality</b>	<b>Number of Girls</b>	<b>Percentage of Girls to Total Number by Country</b>	<b>Number of Boys</b>	<b>Percentage of Boys to Total Number by Country</b>
El Salvador 21 out of 104	14	67%	7	33%
Guatemala 23 out of 100	9	39%	14	61%
Honduras 24 out of 98	11	46%	13	54%
Mexico 17 out of 102	2	12%	15	88%
<b>TOTALS</b>	<b>36</b>	<b>40%</b>	<b>49</b>	<b>16%</b>

*Lydia, Honduras, Age 16*

*When I was four years, my stepfather abused me. I told my mother and she left him. After that he threatened to kill her.*

*Ana, Honduras, Age 13*

*When I was six years old, my stepfather raped me.*

*Oscar, Honduras, Age 12*

*My grandmother mistreated me. She forced my siblings and me to work. She was mean to me and finally told me to leave the house, but where was I supposed to go? The only place I could come was here. I wanted to be with my mother. I miss her a lot.*

The issue of abuse, especially when it occurs in the home, highlights some of the key reasons that both the process of eliciting information from children and the analysis of the information they provide require a clear understanding of a child's ability to talk about sensitive or potentially traumatic experiences. Children may feel ashamed to discuss experiences of abuse or may have difficulty articulating or recounting an experience. A child may feel that discussing abuse in the home will bring shame on his or her family. Children may not consider it relevant, important, or safe to mention. Some children may not even recognize their experiences as abusive because it is all they have known. For example, one 17-year-old from Honduras gave a variety of reasons for leaving including numerous attempts by a gang to recruit him, lack of work, and wanting to help his mother. When later asked whether anyone had ever made him suffer, he replied simply that his father beat him regularly.

Twenty-four percent of the Honduran children disclosed abuse in the home, along with twenty-three percent of the Guatemalan children, twenty percent of the Salvadoran children, and seventeen percent of the Mexican children. Salvadoran girls reported the highest rate of abuse in the home, at fourteen girls, constituting sixty-seven of all the Salvadoran children who mentioned this form of abuse. The eleven girls from Honduras made up forty-six percent of the total number of Honduran children facing abuse in the home out of a total of twenty-four children. Of the twenty-three Guatemalan children who reported abuse in the home, thirty-nine percent (nine), were girls. Seventeen Mexican children reported abuse in the home—fifteen boys and two girls.<sup>76</sup>

### 1. El Salvador

Twenty percent of the Salvadoran children said they made the journey north at least in part because of abuse they suffered at home. These children were primarily girls who spoke of abuse by family members or by their boyfriends. One 15-year-old spoke of being raped by her boyfriend, only to have him threaten to take her child from her when she got pregnant as a result.

#### *Tito, El Salvador, Age 15*

*My stepfather tried to rape me a few times. This started in October 2011. I told my mother, but she didn't believe me. She beat me as well. I reported my stepfather to the police, and there was a court case. He didn't end up in prison. I had to leave my house and go live with my neighbor and then with my brothers.*

One 17-year-old Salvadoran boy spoke of having been abandoned by his father and beaten often by his mother. Adding to this the intimidation and threats of forced recruitment programs by armed criminal actors in his neighborhood, he felt he had no other choice than to set out on his own for safety.

### 2. Guatemala

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<sup>76</sup> Only four of the 102 Mexican children were girls and all four had been referred to ORR custody. Two of these girls reported abuse in the home. The incidence of family abuse of girls in Mexico may be higher than the numbers reflect but the limited pool of girls interviewed did not provide enough evidence to make any substantiated inferences.

Twenty-one percent of the Guatemalan children raised abuse in the home by a family member or other caregiver. One young girl confided that her stepmother beat her several times a week and forced her to quit her studies so she could begin working.

*Corina, Guatemala, Age 16*

*I had problems with my grandmother. She always beat me from the time I was little. That's why I went to live with my boyfriend—and because I was lonely and sad. But after we had been living together for about a month, my boyfriend also beat me. He beat me almost every day. I stayed with him for four months. I left because he tried to kill me by strangling me. I left that same day.*

*Francisco, Guatemala, Age 16*

*My father was deported from the United States for domestic violence. When he came back he was violent and angry, and he wanted to take his anger out on me. He would insult me and say mean things. He never hurt me physically, but he hurt me psychologically.*

3. *Honduras*

Twenty-four percent of the Honduran children talked about abuse at the hands of family members or other caregivers. One 16-year-old girl spoke of abuse by her stepfather when she was young. He threatened to kill her when her mother decided to leave him. For years afterward, the girl continued to feel afraid and spoke of this when she described her reasons for leaving Honduras. Another girl fled when she was 17, after her abusive father was released from prison.

*Hector, Honduras, Age 17*

*My father beat me my whole life. He abused me and my sister. He was an alcoholic. He raped my sister and got her pregnant. He was in jail for five years, even though it was supposed to be nine years. He got out of jail in March 2012. I didn't want to be around him because I was afraid he would beat me and mistreat me again, so I decided to leave.*

*Angelo, Honduras, Age 17*

*My father would get mad at me and beat me all the time. Sometimes he would beat me with a belt every day for days. My mother couldn't really defend me because he would beat her, too.*

4. *Mexico*

Seventeen percent of the Mexican children—two girls and fifteen boys—spoke of abuse in the home. Nine of these children were also among those who had been exploited by the human smuggling industry.

*Carlitos, Mexico, Age 14*

*My stepmother hit me and yelled at me every day. When my dad was there, she treated me well, more or less, but when he wasn't there, she didn't. My dad also beat me.*

## H. Sexual violence

Sexual abuse revealed by children during their interviews was recorded under three categories: violence by armed criminal actors, violence in the community, and abuse in the home. A relatively small number of children disclosed that they had suffered some form of sexual violence, including rape. Twenty children in all, nineteen of whom were girls, mentioned this issue.<sup>77</sup> Four of these children reported two different types of sexual violence: two were abused by both a gang member and by a family member, and the other two suffered sexual violence by someone in the community and by a family member. More Honduran and Salvadoran children, nine and seven, respectively, revealed sexual violence than Guatemalan and Mexican children, three and one, respectively. Although only a few children discussed issues relating to sexual violence, it is difficult, if not impossible to draw clear conclusions about the extent of sexual abuse these children as a whole may have suffered. This is because, as is well documented, among all forms of violence, sexual violence is generally the most difficult to disclose—by children and adults—due to its highly sensitive nature and the stigma and shame felt by many of its victims.<sup>78</sup> As the later chapters of this book will document, sexual abuse and other forms of gender-based violence pose serious problems in all four countries.<sup>79</sup> Thus, the relatively small numbers reported by the children interviewed by UNHCR do not demonstrate the absence of gender-based violence in these countries, but rather may reflect barriers to disclosure.

### 1. Deprivation and social exclusion

Clearly, not all children leaving situations of deprivation of basic survival necessities warrant international protection and, for purposes of its study, UNHCR did not include these factors in assessing the children's potential international protection needs. This section, however, discusses

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<sup>77</sup> The one boy who revealed an experience of sexual abuse stated he had been touched inappropriately by a gang member. A troubling note is that staff members at two different ORR facilities stated they are seeing an increase in male residents reporting incidents of sexual abuse, occurring particularly during their journey to the U.S.

<sup>78</sup> See, e.g., National Society for the Prevention of Cruelty to Children (NSPCC). (2010). Research Briefing: Children and Young People Disclosing Sexual Abuse: An Introduction to the Research (hereinafter "Disclosing Sexual Abuse"), pp. 6, 9. Retrieved from [http://www.nspcc.org.uk/inform/research/briefings/children\\_disclosing\\_sexual\\_abuse\\_wda75965.html](http://www.nspcc.org.uk/inform/research/briefings/children_disclosing_sexual_abuse_wda75965.html). Also available at <http://www.childmatters.org.nz/file/Diploma-Readings/Block-2/Sexual-Abuse/3.4-children-and-young-people-disclosing-sexual-abuse-updated.pdf>. Disclosing Sexual Abuse found that 46% to 69% of adults who were sexually abused as children never disclosed this abuse during childhood, and those children who did choose to disclose were less likely to tell a professional (less than 10% of children who disclosed in the studies cited) than to tell a friend or their mother (*Id.*, pp. 6, 9). The study states that "[g]ender differences have also been identified as impacting on the disclosure of sexual abuse. Although there are similarities between boys and girls in how they feel about it (e.g. fear, shame, guilt) . . . boys fear being stigmatised [sic] as a homosexual and/or victim, whereas girls are more likely to fear that they will not be believed" (*Id.*, p. 9). Other studies have described adolescent boys as "least likely to report their sexual victimization." Paine, M., & Hansen, D. (2002). Factors Influencing Children to Self-Disclose Sexual Abuse, *Clinical Psychology Review*, 22(2), p. 274. Retrieved from <http://digitalcommons.unl.edu/psychfacpub/59/>. It is important to note that neither of these two studies cite to research conducted by any of the countries under discussion in this chapter.

<sup>79</sup> See chapters 2-7 on Honduras, El Salvador, Guatemala, and Southern and Northern Mexico.

the circumstances that may give rise to international protection needs in the context of deprivation and social exclusion. In addition, deprivation and social exclusion are well-documented contributors to violence in society, particularly in some Latin American countries.

Children's very survival and development depend on their ability to access adequate food, shelter, health care, and education. Human rights also protect the enjoyment of basic economic, social, and cultural rights, which include the ability to meaningfully engage in social, cultural, and religious activities. Violation of any of these rights may cause the need for international protection where not realizing minimum core standards, such as, for example, denial of a child's right to an adequate standard of living, including access to food, water, or housing, could lead to an intolerable situation threatening that child's development and survival.<sup>80</sup>

A significant number of the children, fifty-three percent, discussed issues related to poverty and lacking basic survival necessities, needing to provide support to family members, or lacking meaningful opportunity for work or education as one reason—but only fifty-five of these children reported it as their *only* reason—for leaving.

“Children's socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child's [international protection needs] as that of civil and political rights. It is important to . . . assess the overall impact of the harm on the child. The violation of one right often may expose the child to other abuses; for example, a denial of the right to education or an adequate standard of living may lead to a heightened risk of other forms of harm, including violence and abuse.”<sup>81</sup> An accumulation of less serious violations may also give rise to international protection needs, as can discriminatory acts when they may lead to seriously prejudicial consequences for the child. As with other types of harm to a child, it is essential to assess the consequences of such acts for the child concerned—now and in the future.<sup>82</sup>

## **IX. Conclusion**

The responses of the 404 children from El Salvador, Guatemala, Honduras, and Mexico interviewed for this study lead to several significant conclusions. First, the reasons these children have for leaving their countries of origin are complex and interrelated, and can be understood only when examined from a child-sensitive perspective and taken as a whole and in context. Related to this multiplicity of reasons, there is no single dominant place of origin within or among the different countries from where these children are coming. Second, across the broad array of their responses, these children also clearly share commonalities within and among all four countries. Third, the many compelling narratives gathered in this study—only some of which are relayed in this report—demonstrate unequivocally that many of these displaced children face grave danger and hardship in their countries of origin. Fourth, there are significant gaps in the existing protection mechanisms currently in place for these displaced children. The extent of these gaps is not fully

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<sup>80</sup> See Child Asylum Guidelines, ¶ 35. (Noting that “[a] violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized.”)

<sup>81</sup> Child Asylum Guidelines, ¶ 14.

<sup>82</sup> Handbook, ¶¶ 53, 55; Child Asylum Guidelines, ¶ 36.

known because much of what happens to these children is not recorded or reported anywhere. As such, it is reasonable to infer that the gaps may be even wider than what the available data indicates. By all accounts, children arriving to the U.S. from these four countries continue to rise in numbers and in the numbers among them with potential international protection needs. Through the children's own words, the critical need for enhanced mechanisms to ensure these displaced children are provided access to international protection is abundantly clear. The experiences they have recounted are consistent, by and large, with the trends and problem areas identified in later country-specific chapters of this book. The critical question is how the five States, civil society, and UNHCR can work together to best ensure these children are carefully screened and provided the protection they so desperately need and deserve.

## **X. Recommendations**

Based on the findings and conclusions of its study, UNHCR made recommendations regarding the potential or actual international protection needs of unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico to the five countries involved—El Salvador, Guatemala, Honduras, Mexico and the United States.<sup>83</sup>

### **Recognize Newly Emerging Forms of Forced Displacement in Central America and Mexico and the Correlative Emergence of International Protection Concerns**

1. **Recognize** specifically that the violence and insecurity within El Salvador, Guatemala, Honduras, and Mexico as well as across borders have led to the forced displacement of children and others in the region; their implications as foreign policy and political issues; and their connection with international protection needs.
2. **Recognize** the international protection needs—actual and potential—at stake and the need to ensure these displaced children are provided safety upon arrival, screening for any international protection needs, access to the asylum adjudication process and the provision of international protection for those found to be refugees or otherwise unable to safely return to their countries of origin.
3. **Bring** the international protection needs of these displaced children to the forefront and ensure their inclusion to the fullest extent possible in all national and regional efforts concerning mixed migration, refugees and asylum-seekers.
4. **Incorporate** formally the international protection needs of these children into official discussions concerning them in the region and into the final guidelines to be published by the Regional Conference on Migration.

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<sup>83</sup> In *Children on the Run*, in addition to providing its recommendations to the governments of El Salvador, Guatemala, Honduras, Mexico, and the United States, UNHCR acknowledged a number of the requests and concerns raised by government representatives, civil society and other stakeholder participants from these five countries made at the Roundtable on the Displacement of Unaccompanied and Separated Children convened by UNHCR in San Juan, Puerto Rico on January 22-23, 2014. Although, they were beyond the scope of the findings and conclusions of the UNHCR study, given the important issues addressed, they are reproduced in the study and can be found at <http://www.unhcrwashington.org/children>.

## **Strengthen and Harmonize Regional and National Frameworks for Ensuring International Protection**

5. **Establish and promote** more consistent and child-sensitive approaches to displaced children in the region through the development of regional protocols that address their international protection needs, and that incorporate the principle and practice of determining the best interest of the child at all decision points affecting their well-being, beginning with their first encounter of authorities in the country they have entered or are seeking to enter.
6. **Ensure** the principle of the best interests of the child is a central component of all responses, approaches, guidelines, and tools concerning the protection needs of children including the assessment of a claim for refugee status, asylum or any other form of international protection.
7. **Enhance capacity**, through increased staff and training and other mechanisms, to ensure the systematic identification of children with potential international protection needs, in particular children in high risk situations; appropriate referrals for their care and assessment of their international protection needs; and access to guardians and legal representation.
8. **Harmonize** national legislation, policies, and practices with the resulting regional framework and tools.
9. **Develop and disseminate** common tools to support the government function of screening for international protection needs with special attention to methods and practices that promote a child sensitive environment.
10. **Develop and Implement** mandatory training for all authorities engaged in activities relating to the protection and other assistance of children with potential or actual international protection needs on the basic norms and principles of international human rights and refugee law including the fundamental principles of: non-discriminatory treatment; best interests of the child; *non-refoulement*; family unity; due process of law; and non-detention or other restriction of liberty.
11. **Strengthen** collaboration, exchange of information, and sharing of best practices relating to the identification, referral, and assessment of children with potential international protection needs among governments and UNHCR and between governments and civil society.

## **Address Root Causes**

12. **Undertake** measures both regionally and nationally to address the root causes of flight of these displaced children in an effort to reduce—if not eliminate—the factors that lead to their forced displacement.

13. **Engage** the Commission on Security for Central America to address the issues of children displaced due to violence and insecurity in further support of State efforts concerning these issues.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 2 Honduras

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### **I. Introduction**

This chapter analyzes the situation of children and adolescents in the context of migration in Honduras. Two phenomena define this situation: (1) an increasing number of Honduran children and adolescents are leaving their country for Mexico and—especially—the United States; and (2) several structural factors, including violence, poverty, and social exclusion, intertwine to contribute to migration patterns for children and adolescents.

First, we briefly describe migration in Honduras, highlighting the periods when large outflows of Hondurans migrated north. To analyze the current period, we emphasize qualitative and quantitative data that paints a complex picture of how human development, violence, and institutional weakness affect migration.

Next, we analyze in detail the situation of Honduran children in order to explain the increasing numbers of children and adolescents leaving the country. Statistical data about violations of basic rights—such as the right to education and healthcare—and different forms of violence, among other issues, allow us to identify some of the main structural causes that push thousands of children and adolescents to leave the country. Interviews with repatriated children also explain this phenomenon from the perspective of its protagonists, the victims of rights violations in their countries of origin, transit, and destination.

Then, we analyze Honduras' current legal framework on children, as well as on the protection of Honduran migrants abroad. We devote a sub-section to the Protocol for the reception of children who were victims of trafficking and are in a vulnerable situation. In addition to describing the legal framework, this section assesses the government institutions in charge of protecting children in general and migrant children and adolescents in particular.

We devote a core section of this chapter to describing procedures for the reception, protection, and family reintegration of migrant children and adolescents who are repatriated to Honduras, focusing especially on the serious failures of existing mechanisms. On the one hand, these failures reinforce the limitations of Mexican and U.S. procedures for repatriating children to their countries of origin. On the other hand, they also reinforce the vulnerabilities and human rights violations suffered by children when they return to the country under these conditions. We also highlight some specific civil society initiatives to accompany children returning with disabilities.

This chapter also discusses two particular categories of children and adolescents whose lives and rights are affected by migration: Honduran children and adolescents living in the country whose parents have migrated, and foreign migrant children and adolescents in transit through Honduras as they try to reach the United States.

## II. Migration context in Honduras

Honduras' social context, similar to that of other Central American countries, is characterized by political repression, violence, and insecurity created by petty criminals, gangs—*maras and pandillas*<sup>1</sup>—and organized crime, as well as by the lack of social and economic opportunities. Irregular migration has become the only way out for hundreds of thousands of Hondurans who seek a future in which they can live freely and without fearing losing their lives due to violence, achieve a decent standard of living, and allow their children to enjoy fundamental human rights.

Central America has historically been a transit zone for migrants seeking to reach Mexico and the United States, with the last three decades particularly intense periods of migration. However, the process of migration has become more complex and has begun to involve groups that are especially vulnerable. Along with the longstanding increase in the number of women and girl migrants, often called the feminization of migration, increasing numbers of children and adolescents at increasingly younger ages are participating in the dynamics of human mobility.

Migration is not a recent phenomenon in Honduras; since the 1980s, at least three historic events have generated significant outflows of Hondurans. First, and on the advice of the U.S. government, the Honduran government implemented the National Security Doctrine (NSD). This doctrine represented a repressive response to left-leaning social movements calling for changes in the political and economic structures of the country. The NSD was fundamentally premised on the existence of an *external enemy*; in this case, the revolutionary movements taking shape in neighboring Guatemala, El Salvador, and Nicaragua. According to NSD ideologues, this external enemy had the potential to influence domestic actors to become *internal enemies* willing to resort to violent means to seize power in order to rebuild the country's political and economic systems.<sup>2</sup>

To confront this internal enemy, the State was expected to employ all available resources, especially its security and defense agencies, even if their actions fell outside of the constitutional and human rights frameworks.<sup>3</sup> Practices implemented by the State included kidnappings, torture, forced disappearances, and murders of leftist militants in the country, carried out by “death squads.” According to the Committee of Relatives of Detained and Disappeared Persons in Honduras (*Comité Familiares de Detenidos y Desaparecidos en Honduras* or COFADEH), during the 1980s, forced disappearances totaled over 200 cases, proving unequivocally that the State not only tolerated these activities, they were in fact a State policy during those years.<sup>4</sup> The implementation of the NSD in Honduras forced left-wing militants, union leaders, students,

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<sup>1</sup> While both *maras* and *pandillas* are gangs, they differ in power, scope, and focus. *Pandillas* are gangs whose power structure is local and whose influence does not reach beyond the local vicinity; whereas *maras* are national and transnational criminal organizations with national and transnational—as well as local—reach. *Maras* have a highly organized power structure that includes local leadership, but top leadership is not local. *Maras* have much more power, many more resources, and much greater reach than *pandillas*.

<sup>2</sup> Meza, V. (2012, February). Honduras: Seguridad y Defensa. *Boletín Especial No. 96, Centro de Documentación de Honduras (CEDOH)*. Retrieved from <http://www.cedoh.org/resources/Publicaciones/Lo-que-publicamos/Boletin-96.pdf>.

<sup>3</sup> Meza, Honduras: Seguridad y Defensa.

<sup>4</sup> Comité de Familiares de Detenidos Desaparecidos en Honduras. *Desaparecidos*. Retrieved from <http://www.cofadeh.org/html/desaparecidos/index.htm>.

workers, and other social movement activists to leave the country with their families and seek asylum abroad to save their lives.

Second, in October of 1998, a natural disaster produced one of the worst humanitarian crises in Honduras' history. The effects of Hurricane Mitch, amplified by vulnerability in most of the Honduran territory, killed more than 7,000 people, left 8,000 missing and 12,000 injured, and affected 1.5 million people in total.<sup>5</sup> An estimated 35,000 houses were destroyed and another 50,000 were partially affected with damages ranging from 10% to 50% of the structures. In the education sector, damages were estimated to cost 446 million lempiras (33 million dollars in 1998).<sup>6</sup> The total cost of Hurricane Mitch was estimated at 3.8 billion dollars, equal to 70 percent of Honduras' Gross Domestic Product (GDP) at the time.<sup>7</sup> Hurricane Mitch also severely affected the country's productive infrastructure, further weakening Honduras' underdeveloped economy and pushing thousands of Hondurans to migrate abroad to seek better opportunities to solve their economic problems.

Third, on June 28, 2009, Latin America's first coup d'état of the 21<sup>st</sup> century took place in Honduras. During the political crisis created by the coup, the *de facto* government imposed a series of measures to repress social movements that were opposing the coup by mobilizing in the streets and demanding the return of the constitutionally elected president. Among these measures were the suspension of constitutional rights, the closing of opposition media outlets, the use of police and military force to repress social protests, and a strong media campaign to legitimize the events of June 28, 2009 before the domestic and international community. Reports from human rights organizations documented cases of persecution, threats, harassment, and even murders carried out by individuals linked to the State's security apparatus.

In a report titled "The Most Authorized Voice is that of the Victims" (*La voz más autorizada es la de las víctimas*), released in October 2012, the Truth Commission (*Comisión de Verdad*)<sup>8</sup> stated that the irregular actions attributed to the State's security forces during the 2009 political crisis "were and continue to be part of a State policy that also includes private groups operating with procedures and methods reminiscent of the death squads."<sup>9</sup> This report was based on 1,966 testimonies collected throughout the country documenting 5,418 human rights violations, which, the authors conclude, show "the patterns of systematically repeated violations. These patterns

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<sup>5</sup> Comisión Económica para América Latina y el Caribe – CEPAL Naciones Unidas, *Honduras: Evaluación de los daños ocasionados por el Huracán Mitch, 1998. Sus implicaciones para el desarrollo económico y social y el medio ambiente*, U.N. Doc. LC/MEX/L.367 (1999, January 26).

<sup>6</sup> Comisión Económica para América Latina y el Caribe – CEPAL Naciones Unidas, *Honduras: Evaluación de los daños ocasionados por el Huracán Mitch, 1998. Sus implicaciones para el desarrollo económico y social y el medio ambiente*, U.N. Doc. LC/MEX/L.367 (1999, January 26).

<sup>7</sup> Comisión Económica para América Latina y el Caribe – CEPAL Naciones Unidas, *Honduras: Evaluación de los daños ocasionados por el Huracán Mitch, 1998. Sus implicaciones para el desarrollo económico y social y el medio ambiente*, U.N. Doc. LC/MEX/L.367 (1999, January 26).

<sup>8</sup> The Truth Commission is integrated by organizations participating in the Human Rights Platform, such as the Committee of Relatives of Detained and Disappeared Persons in Honduras (COFADEH), the Committee for the Defense of Human Rights (CODEH), the Center for Research and Promotion of Human Rights (CIPRODEH), the Center for Women's Rights (CDM), the International Federation for the Right to Food of Honduras (FIANH), and the Center for the Prevention, Reintegration, and Treatment of Victims of Torture (CPTRT).

<sup>9</sup> Truth Commission Report (2012). *La voz más autorizada es la de las víctimas*. Tegucigalpa, Honduras.

include the application of repressive measures in a systematic and generalized way against key actors and leaders of the opposition to the coup, as well as the politicization of justice (improper political influence over legal institutions).”<sup>10</sup>

The political repression of the 1980s and the repression that took place after the 2009 coup d'état are clear examples of the structural violence embedded in Honduran history. The State has often exercised its power to promote violence by endorsing the concentration of resources in the hands of the few at the expense of the basic needs, the well-being, and the liberty of the large majority of the Honduran people.

Structural violence creates despair and frustration among citizens who cannot develop their potential because they have been deprived of the capacity and skills they need to participate in the productive world, and at the same time are excluded from the social and political dynamics of their country. This despair and frustration are determining factors in their decision to migrate to other countries to seek better economic and social opportunities.

Government institutions' loss of legitimacy has worsened as a consequence of the infiltration of organized crime into government apparatuses, especially in the National Police (*Policía Nacional*) and the Office of the Attorney General (*Ministerio Público*), drastically weakening their law enforcement capacities. In addition, the expansion and territorial fighting among gangs—both *maras* and *pandillas*, the increase in drug and arms trafficking, as well as the generalized impunity in the country, have led to a significant increase in crime, including homicides, massacres, kidnappings, and extortions. This has resulted in higher levels of violence and insecurity in Honduras.

It is in this context that Honduras has become one of the most violent countries in Latin America, with homicide rates higher than the world average, according to estimates from the United Nations Office on Drugs and Crimes (UNODC): 6.9 per 100,000 residents.<sup>11</sup>

Data from the Observatory on Violence (*Observatorio de la Violencia*) at the Autonomous University of Honduras (*Universidad Autónoma de Honduras* or UNAH) indicate that homicides have increased in the country, from a rate of 66.8 homicides per 100,000 residents in 2009<sup>12</sup> to 79 by the end of 2013,<sup>13</sup> peaking at 86.5 in 2011.<sup>14</sup>

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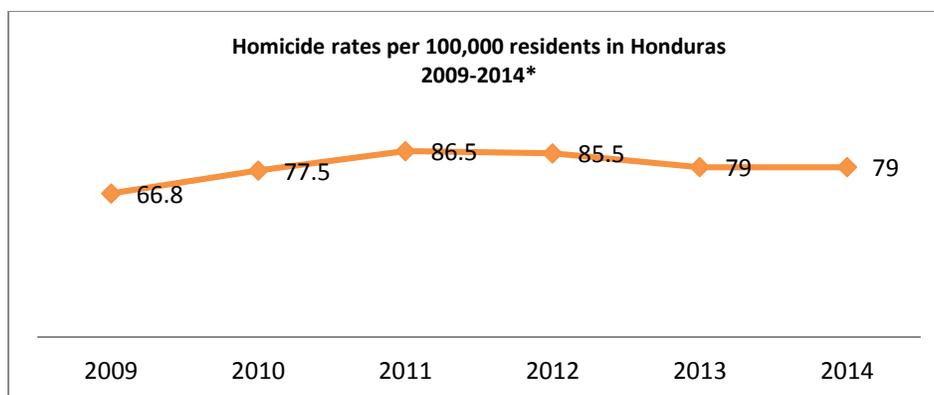
<sup>10</sup> Truth Commission Report (2012). *La voz más autorizada es la de las víctimas*. Tegucigalpa, Honduras.

<sup>11</sup> Oficina de las Naciones Unidas contra la Droga y el Delito UNODC. (2011). Estudio Mundial sobre el Homicidio. Tendencias, Contextos, Datos. Retrieved from [http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/BOOK\\_Global\\_study\\_on\\_homicide\\_2011\\_Spanish\\_ebook.pdf](http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/BOOK_Global_study_on_homicide_2011_Spanish_ebook.pdf).

<sup>12</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2010, March). Observatorio de la Violencia Mortalidad y Otros. *Boletín Nacional*, 17. Retrieved from <http://www.iudpas.org/pdf/Boletines/Nacional/NEd17EneDic2009.pdf>.

<sup>13</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2014, February). Observatorio de la Violencia Mortalidad y Otros. *Boletín Nacional*, 32. Retrieved from <http://www.iudpas.org/pdf/Boletines/Nacional/NEd32EneDic2013.pdf>.

<sup>14</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2012, March). Observatorio de la Violencia Mortalidad y Otros. *Boletín Nacional*, 24. Retrieved from <http://www.iudpas.org/pdf/Boletines/Nacional/NEd24EneDic2011.pdf>.



Source: Casa Alianza's estimate based on data from the Observatory on Violence at the UNAH\*  
June 2014

In 2013, there were 6,757 homicides, which amounts to 563 homicides per month and 19 victims per day. 59.7 percent of all homicides occurred in the departments of Cortés, Francisco Morazán, and Yoro. 83.3 percent of homicides were committed with firearms; 78.8 percent of victims were between 15 and 44 years old.<sup>15</sup>

### III. Migration of children and adolescents in Honduras: structural causes and figures

In the context briefly described of a lack of basic rights, institutional weakness, and growing violence, it is important to observe specific aspects of those factors that influence the migration of children and adolescents from Honduras. Undoubtedly, many factors pushing children and adolescents to migrate are not very different from the factors affecting adult migrants. However, some factors are exclusively associated with the migration of children and adolescents. In addition, both child-specific causes and general causes of migration have a particularly acute effect on children and adolescents (for example, with respect to their right to develop adequately and free from violence), or affect them in a more generalized and intentional way, with respect to—for example—gangs that target them for violence, and arbitrary actions by security forces. In all cases, children and adolescents are more vulnerable—compared to adults—with respect to the primary causes of migration: violence, poverty, and social exclusion in the country.

This section presents some statistical information in order to describe the difficult conditions that compel Honduran children and adolescents to migrate. In Honduras, the number of children between the ages of 5 and 17 is estimated to be 2,661,272, or 31.2 percent of the country's population. 49.8 percent of these children and adolescents are male and 50.2 percent are female.<sup>16</sup>

<sup>15</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2014, February). Observatorio de la Violencia Mortalidad y Otros. *Boletín Nacional*, 32. Retrieved from <http://www.iudpas.org/pdf/Boletines/Nacional/NEd32EneDic2013.pdf>.

<sup>16</sup> Instituto Nacional de Estadísticas. (2013, May). XLIV Encuesta Permanente de Hogares de Propósitos Múltiples (EPHPM). Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

Socioeconomic and cultural circumstances surrounding families and communities affect the health status of children and adolescents as well as their access to education and employment. Conditions such as low birth-weight, serious respiratory infections, and diarrhea occur with high prevalence among Honduran children, especially those from poor and marginalized families. The limitations and deficiencies of health policies also contribute to a bleak picture. These health problems, besides being frequent and chronic, exacerbate malnutrition, which in turn produces a greater predisposition among children and adolescents to fall ill, and hinders their capacity to learn and adapt to a changing social context.<sup>17</sup>

A useful tool to assess the Honduran education system is the “Coverage Rate,” which contrasts the number of children who attend school with the total number of school-age children.<sup>18</sup> In 2013, an estimated 1,680,006 children ages 3 to 17 attended school, which represents only 55.4 percent of the total number of children in that age group. Nationwide, this same rate for children ages 6 to 11 was 92.3 percent.<sup>19</sup> Among children between 15 and 17, school attendance is only 27.1 percent. This means that less than one third of children in this age group are enrolled in school. Even more worrisome is the difference between the Coverage Rate in urban areas (44.7 percent) and rural areas (15.1 percent).<sup>20</sup>

In 2013, an estimated 371,386 children between the ages of 5 and 17 worked, which represents 14 percent of the population in this age group in the country. 74 percent of working children are concentrated in rural areas, and the remaining 25.9 percent live in urban areas.<sup>21</sup> Working children are employed primarily in agriculture, forestry, hunting, and fishing (59.9 percent), trade (wholesale and retail), hotels and restaurants (19 percent), manufacturing (9.4 percent), and construction and community, social, and personal services (10 percent).<sup>22</sup>

At the same time, an estimated more than 6,000 children and adolescents live in the streets in Tegucigalpa and San Pedro Sula. A study by Casa Alianza, released in 2013, identified 364 children and adolescents in Tegucigalpa and San Pedro Sula, of whom more than half affirmed

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<sup>17</sup> Instituto Nacional de Estadísticas. (2013, May). Encuesta Nacional de Demografía y Salud (ENDESA) 2011-2012. Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

<sup>18</sup> Instituto Nacional de Estadísticas. (2013, May). XLIV Encuesta Permanente de Hogares de Propósitos Múltiples (EPHPM). Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

<sup>19</sup> Instituto Nacional de Estadísticas. (2013, May). XLIV Encuesta Permanente de Hogares de Propósitos Múltiples (EPHPM). Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

<sup>20</sup> Instituto Nacional de Estadísticas. (2013, May). XLIV Encuesta Permanente de Hogares de Propósitos Múltiples (EPHPM). Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

<sup>21</sup> Instituto Nacional de Estadísticas. (2013, May). XLIV Encuesta Permanente de Hogares de Propósitos Múltiples (EPHPM). Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

<sup>22</sup> Instituto Nacional de Estadísticas. (2013, May). XLIV Encuesta Permanente de Hogares de Propósitos Múltiples (EPHPM). Retrieved from: <http://www.ine.gob.hn/index.php/censos-y-encuestas/encuestas-todos-las-encuestas-de-honduras/encuesta-permanente-de-hogares>.

having suffered different forms of mistreatment in their homes that led to their becoming homeless.<sup>23</sup>

These data paint a picture of a widespread deprivation of basic rights affecting a sizable percentage of Honduran children and adolescents. The right to development, one of the pillars of the Convention on the Rights of the Child, is seriously compromised by these conditions. The last two decades have witnessed a gradual increase in several forms of violence. While this violence affects the entire society, it affects children and adolescents in unique ways, often directly and exclusively. Under conditions of widespread violence, each and every right that children have as human beings in general, and as children in particular, are constantly violated.

Intrafamilial violence, threats from gangs and other organized crime groups in the communities, or from common criminals, as well as institutional violence, lack of education opportunities, and limited access to quality healthcare, specifically and increasingly affect children and adolescents. For this reason, it is necessary to measure the immediate impact that these conditions have on children, as well as their long-term consequences.

During the last 16 years, 9,881 cases of summary executions and violent deaths of children and youths under the age of 23 have been recorded in Honduras. Of these, 767 cases took place from January 28 through October 31, 2014.<sup>24</sup> According to data from the National Bureau of Criminal Investigation (*Dirección Nacional de Investigación Criminal* or DNIC), from January 2010 through September 2012, the most common sexual crimes against children were rape, with 1,886 complaints brought before the police; statutory rape,<sup>25</sup> with 1,796 complaints; lascivious acts, with 1,689 complaints; and unlawful acts of sex with minors, with 1,008 complaints.<sup>26</sup>

Domestic violence has also gradually increased, including physical, psychological, and sexual violence, as well as abuse and economic violence against women and children and adolescents. In Tegucigalpa alone, from January through August of 2014, 1,155 complaints of domestic violence were brought before the Special Prosecutor for Women (*Fiscalía Especial de la Mujer*), with an average of 144 complaints per month and 4.8 per day.<sup>27</sup> Violence against women and

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<sup>23</sup> Casa Alianza Honduras. (2013). Niñas, Niños y Jóvenes Sobreviviendo en las Calles en las ciudades de Tegucigalpa, Francisco Morazán y San Pedro Sula, Cortés. Report on file with authors.

<sup>24</sup> Casa Alianza Honduras, (2014). Informe Mensual de la Situación de los Derechos de los Niños, Niñas y Jóvenes en Honduras. Retrieved from [http://www.casa-alianza.org.hn/index.php?option=com\\_content&view=article&id=143&Itemid=83](http://www.casa-alianza.org.hn/index.php?option=com_content&view=article&id=143&Itemid=83).

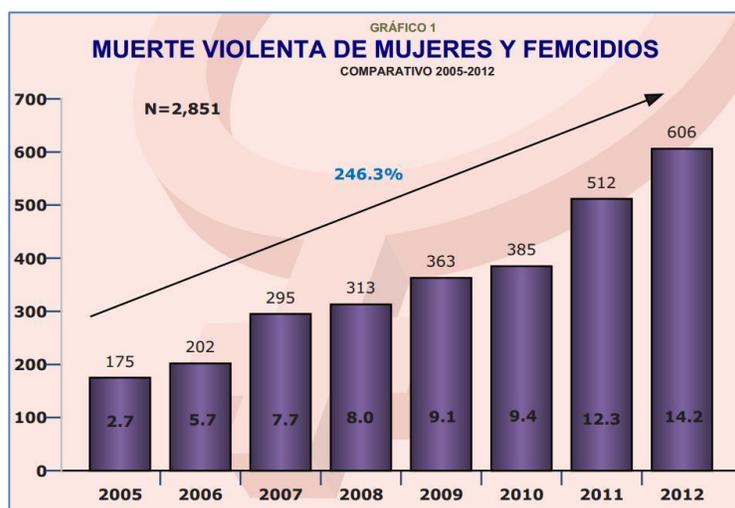
<sup>25</sup> According to the Honduran Criminal Code, decree 144-83, statutory rape (*violación especial*) is defined as a special type of rape involving sexual intercourse without violence or threats in the following circumstances: when the victim is younger than 14; when the victim is mentally incapacitated or cannot resist the assault for any reason, or when the aggressor is the custodian of the victim and uses his or her authority to coerce the victim into sexual acts. Decreto No. 144-83, 1983, September 26 (Hond.).

<sup>26</sup> Casa Alianza Honduras. (2013, March) Violencia sexual e infancia en Honduras. Un acercamiento a las principales formas de explotación sexual-comercial y trata de niños y niñas. Retrieved from [http://casa-alianza.org.hn/images/documentos/Informes.Especiales/Inf.2013/3.%20informe%20violencia%20sexual%20y%20trata\\_casa%20alianza%20honduras.pdf](http://casa-alianza.org.hn/images/documentos/Informes.Especiales/Inf.2013/3.%20informe%20violencia%20sexual%20y%20trata_casa%20alianza%20honduras.pdf).

<sup>27</sup> El Heraldo. (2014, August 22). Más de mil denuncias por violencia doméstica en la capital de Honduras. *El Heraldo*. Retrieved from <http://www.elheraldo.hn/inicio/740623-331/más-de-mil-denuncias-por-violencia-doméstica-en-la-capital-de-honduras>.

children is widespread, both in the public and the private spheres. In 2012, the Observatory on Women at the UNAH documented 606 cases of women who were violently assassinated in the country. This represents a rate of 14.2 cases per 100,000 residents, and an average of 51 deaths per month and one every 14 hours.<sup>28</sup>

The figures indicate that between 2005 and 2012, the cases of violent deaths of women grew exponentially, from 175 cases in 2005 to 606 in 2012: a 246 percent increase.<sup>29</sup>



Graphic 1  
**VIOLENT DEATHS OF WOMEN  
AND FEMICIDES**  
2005-2012

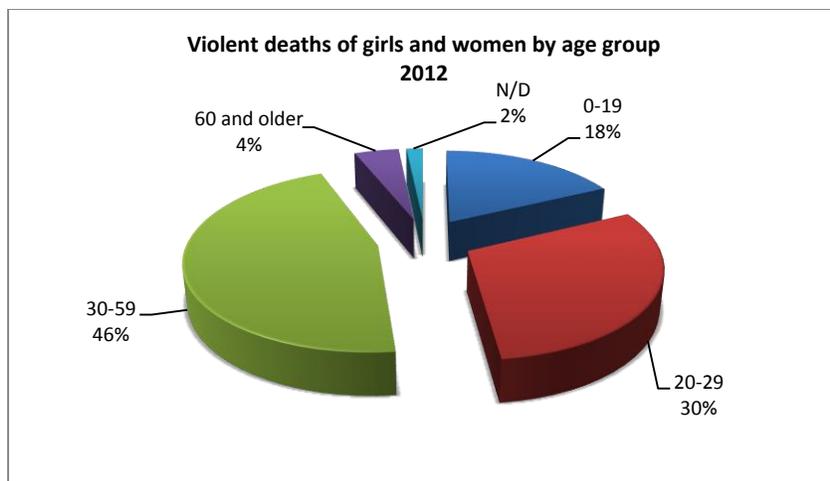
Source: Observatory on Violence at the UNAH

In 2012, the violent deaths of girls and young women, ages 0–30 comprised 48 percent of 606 recorded cases of murders of women and girls.<sup>30</sup>

<sup>28</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2013, August). Observatorio de Muertes Violentas de Mujeres y Femicidios. *Boletín*, 5. Retrieved from <http://www.iudpas.org/pdf/Boletines/Genero/MMEd05EneDic2012.pdf>.

<sup>29</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2013, August). Observatorio de Muertes Violentas de Mujeres y Femicidios. *Boletín*, 5. Retrieved from <http://www.iudpas.org/pdf/Boletines/Genero/MMEd05EneDic2012.pdf>.

<sup>30</sup> IUDPAS – UNAH Instituto Universitario de Democracia, Paz y Seguridad. (2013, August). Observatorio de Muertes Violentas de Mujeres y Femicidios. *Boletín*, 5. Retrieved from <http://www.iudpas.org/pdf/Boletines/Genero/MMEd05EneDic2012.pdf>.



Source: Casa Alianza's estimate based on data from the Observatory on Violence at the UNAH.

Femicides/feminicides in Honduras are characterized by their level of cruelty. Many victims display signs of sexual abuse before being murdered, and their bodies are frequently mutilated in ways that show an extreme hatred against women and girls because of their gender.

Honduran children suffer daily the violence generated by adults who are often their own relatives. However, the majority of violence comes from organized criminal groups. Since the 1990s, Honduran gangs began exerting control in many of neighborhoods in the country's larger cities, gradually expanding their territories and increasing their visibility. These groups have engaged in a series of violent acts, not only as a part of the initiation rituals for new members, but also in disputes against members of rival gangs for territorial control. Another form of violence suffered by children is their cooptation by criminal gangs. Older gang members train children to commit crimes for the gang. Children between 12 and 25 years old are the main targets of gang recruitment, but trustworthy sources claim that children as young as 6 are sometimes targeted. If a child refuses to join the gang, he or she can be forced into participating through threats, intimidation, violence, and other forms of harm, including threats against his or her family.

#### IV. Causes of migration in the children's own words

For this report, we conducted 200 interviews with children and adolescents who had been deported from Mexico by land, received at the Corinto border crossing, and assigned to the "Hogar El Edén" shelter, run by the Honduran Institute for Children and Families (*Instituto Hondureño de la Niñez y la Familia* or IHNFA) in San Pedro Sula. Interviews took place at "Hogar El Edén" between February 27 and March 20, 2014. Out of 200 interviewees, 62 percent were boys and 38 percent were girls. The age range was 10 through 17 years old. 65 percent of the children interviewed stated that the main reason they decided to migrate was to escape from the violence in their communities. The most common forms of violence they mentioned included death threats from criminal groups, the continuous fighting between rival gangs, common crime, and domestic violence.

The children we interviewed frequently mentioned intrafamilial violence, abuse and mistreatment by family members or close acquaintances, lack of education and work opportunities, and the violations of their rights as citizens as factors leading to their decision to leave. The children also mentioned factors indirectly linked to violence, such as the search for better opportunities to improve their families' economic conditions and the desire to reunite with one or both of their parents living in the United States.

Most of the children we interviewed considered violence to be the main cause of their migration. This conclusion is consistent with the growing level of insecurity in the country, as the data concerning violent deaths and arbitrary executions of children and adolescents demonstrates. The dramatic and recurring child murders have also become more savage in their execution. The below example of a Honduran family's experience with violence reflects the circumstances of one family among the hundreds that are affected by violent criminal acts every day.

In the span of three weeks from April to May 2014, nine children, aged 7 to 17, were cruelly assassinated in the "Colonia La Pradera" neighborhood of San Pedro Sula. The office of the Attorney General (*Ministerio Público*) carried out an investigation that identified at least five people, all members of the *Mara 18* gang, as the perpetrators.<sup>31</sup> Two of the nine children killed were the brothers Keneth and Anthony Castellanos, aged 7 and 13. Their mother, Wendy Castellanos, decided to migrate with her remaining two sons, aged 15 and 17. "I ran away so they wouldn't kill my other two sons," she said.<sup>32</sup> After receiving no support from the government, following the murder of her sons, Wendy had to make the difficult decision to emigrate and leave behind her life and family in order to save her older sons' lives.



Source: Diario La Prensa

Wendy's case reflects the hard realities faced by thousands of Honduran and Central American families who decide to emigrate from their countries for fear of losing their lives because of the

<sup>31</sup> Pineda, N. (2014, May 7). Hay 5 pandilleros identificados por crímenes de niños. *La Prensa*. Retrieved from <http://www.laprensa.hn/lasultimas24/707212-98/hay-5-pandilleros-identificados-por-crímenes-de-niños>.

<sup>32</sup> Mendoza, J. E. (2014, July 16). Madre de niños asesinados en La Pradera: "Huí para que no me maten a mis otros dos hijos." *La Prensa*. Retrieved from <http://www.laprensa.hn/honduras/apertura/729649-96/madre-de-niños-asesinados-en-la-pradera-huí-para-que-no-me?m=1#panel1-3>.

insecurity, even though they are fully aware of the great dangers they will confront on the migration trail.

*Testimony of Wendy Castellanos*

*I'm very disappointed with the Honduran authorities. Now we can only continue our trek and we're going to get to where God takes us. I haven't lost hope that maybe in the future they [the Honduran government] will help me. Very often, we receive in other places what in Honduras they don't want to give us.*

*Everything has been a nightmare. After having my own established home, I lost two children without explanation and had to leave my house, where despite the poverty we had a secure roof. Now I have to sleep anywhere and go hungry just to stay alive one more day because on this trail we never know what will happen.*<sup>33</sup>

Through the “Frontera” (Border) program of Casa Alianza Honduras, migrant children and adolescents who have been deported are provided with support, as are their families, especially in the north of the country. In 2012, the team of Casa Alianza’s Observatory on the Rights of Children and Youth in Honduras (*Observatorio de Derechos de Niñas, Niños y Jóvenes en Honduras*) had the opportunity to document the living conditions of a boy who had recently been deported from Mexico. He had been constantly exposed to situations of violence, social exclusion, lack of access to education, and problems of alcoholism, among others. His family lives on a plot of land they take care of for another person on the banks of the Bermejo River, one of the most violent zones of San Pedro Sula. The family’s members are the boy’s mother (a jobless 40-year-old woman), father (a 50-year-old alcoholic former peasant), three school-age girls; and a young man. The boy in this case is 15 years old; he tried to travel to the United States. His mother told us this story:

*We're very poor so he (referring to her son, the boy) sought to have a better life. We don't have a house, we only take care of the boss's house. We don't have anything here, only yuca. His father doesn't work, he's always drunk. Also, some squatters took over some of our land. The little we grow, we load onto our little donkey to go sell. He (her son, the boy) told us that he wanted to go to the States. It was his decision. He's 15 years old, almost 16. I am the mother. I had 16 children. One of them was killed right there in the grazing area. Another one drowned in the river. And some others died when they were very little.*

Testimonies such as this show the hardships many families endure in Honduras. Knowing these stories helps us better understand the causes of migration and how children make migration decisions. In addition to the life stories of people such as Wendy Castellanos and other families, several studies carried out by domestic and international institutions, as well as information collected by the US government, paint a very complex picture of violence in Central America in general, and in Honduras in particular. The next section describes some of those complexities.

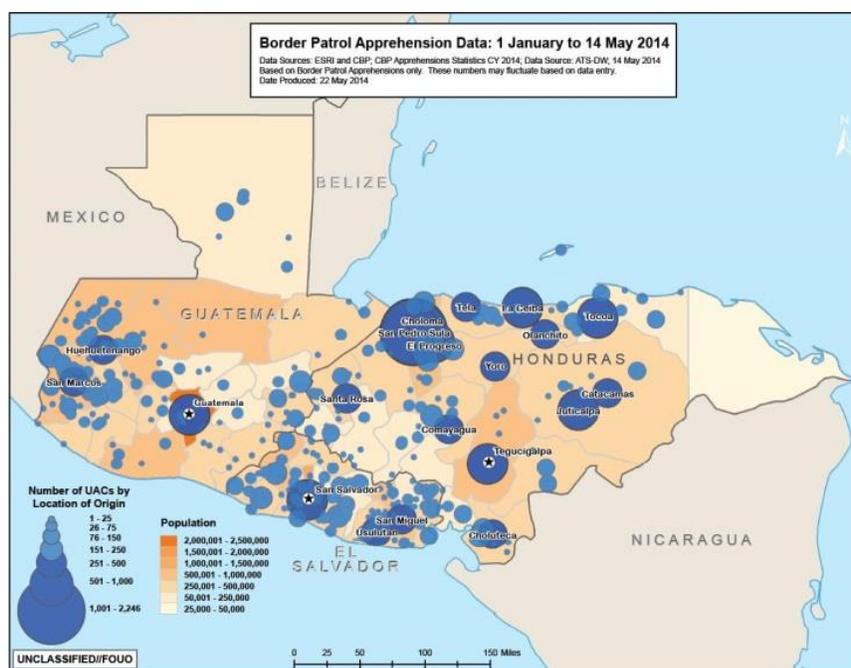
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<sup>33</sup> Mendoza, J. E. (2014, 16 de julio). Madre de niños asesinados en La Pradera: “Huí para que no me maten a mis otros dos hijos.” *La Prensa*. Retrieved from <http://www.laprensa.hn/honduras/apertura/729649-96/madre-de-niños-asesinados-en-la-pradera-huí-para-que-no-me?m=1#panel1-3>.

### A. Some figures about migration outflows of Honduran children and adolescents

Given the circumstances of children and adolescents in Honduras, it is no surprise that the number who have left the country in search of protection for their basic rights has increased dramatically. Not only has the number of migrant children and adolescents increased, but there has also been an increase, largely due to the same factors that cause migration, in (1) the number of younger migrants, including children under the age of 12; (2) the irregular status of migrants due to the many obstacles to regular migration, the vulnerability of migrants in irregular status, and related issues; and (3) the risks migrants face during the journey, which are linked to the same structural causes.

According to data from the U.S. Border Patrol, in fiscal year 2014, U.S. Border Patrol apprehended 68,631 unaccompanied children.<sup>34</sup> These included 16,404 children from El Salvador, 17,057 children from Guatemala, 18,244 children from Honduras, and 15,634 children from Mexico apprehended at the southern border.<sup>35</sup> The map below shows the communities of origin of Honduran, Salvadoran, and Guatemalan unaccompanied children apprehended by U.S. Border Patrol from January 1, 2014 through May 14, 2014.<sup>36</sup>



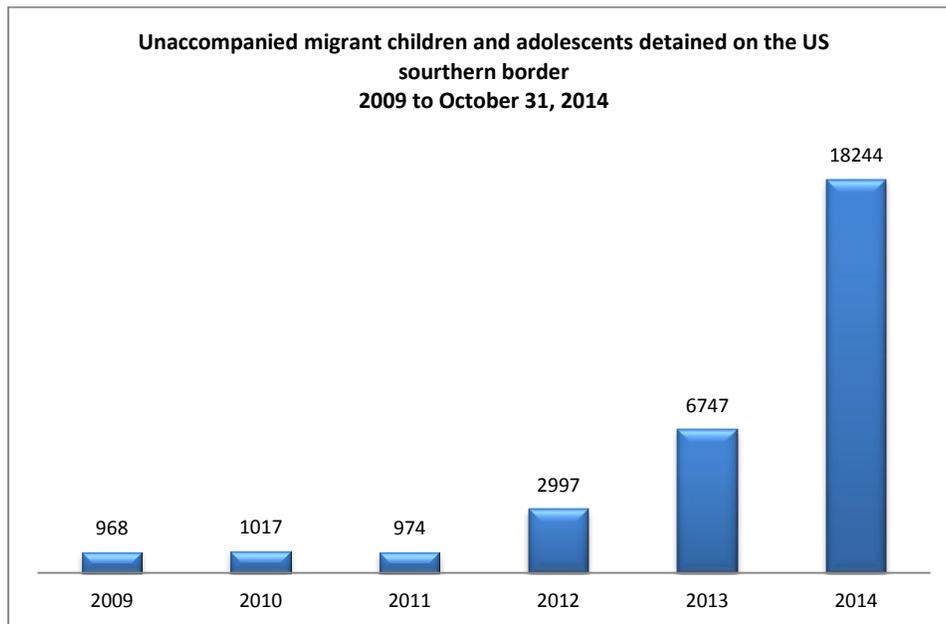
Source: [http://www.lib.utexas.edu/maps/americas/central\\_america-unaccompanied\\_children-2014.pdf](http://www.lib.utexas.edu/maps/americas/central_america-unaccompanied_children-2014.pdf)

<sup>34</sup> USBP. (2015). USBP Sector Profile – Fiscal Year 2014 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>.

<sup>35</sup> USBP. (2015). United States Border Patrol Southwest Border Sectors. Retrieved from [http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf).

<sup>36</sup> U.S. Department of Homeland Security. (2014, May 27). Homeland Intelligence Today Unaccompanied Alien Children (UACs) by Location of Origin for CY 2014: Honduras, El Salvador, and Guatemala. Retrieved from [http://www.lib.utexas.edu/maps/americas/central\\_america-unaccompanied\\_children-2014.pdf](http://www.lib.utexas.edu/maps/americas/central_america-unaccompanied_children-2014.pdf).

Data from the U.S. Customs and Border Protection Office indicates that from 2009 through October 31, 2014, 185,265 unaccompanied children and adolescents from Mexico, Guatemala, El Salvador, and Honduras were detained at the U.S. southern border. 31,206 (17 percent) of those children were Honduran.<sup>37</sup>

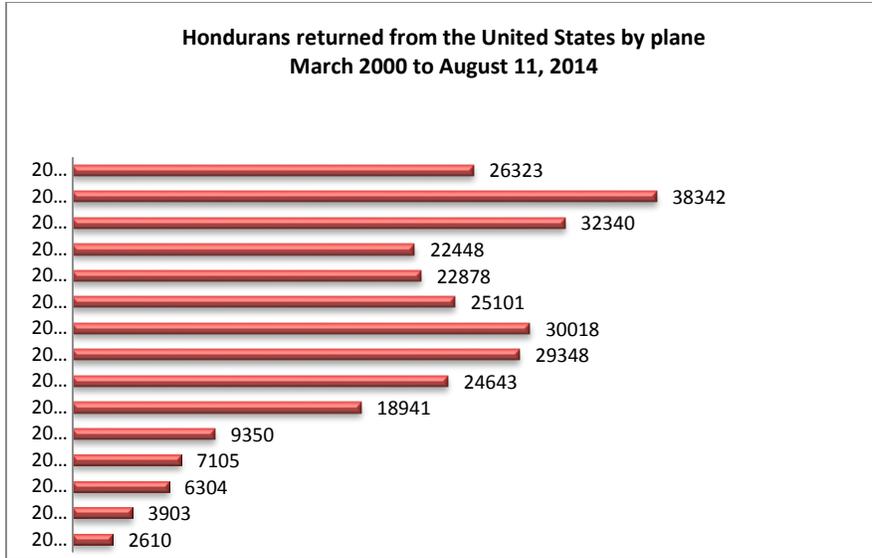


Source: Casa Alianza's estimate based on data from U.S. Customs and Border Protection.

These statistics show significant increases in the number of Honduran migrants deported from the United States in recent decades. Data provided by the Center for Returned Migrants (*Centro de Atención al Migrante Retornado* or CAMR) of Honduras indicate that between 2000 and 2014,<sup>38</sup> 299,654 Hondurans were deported by plane. 2013 was the year with the most cases, with 38,342 deportations.

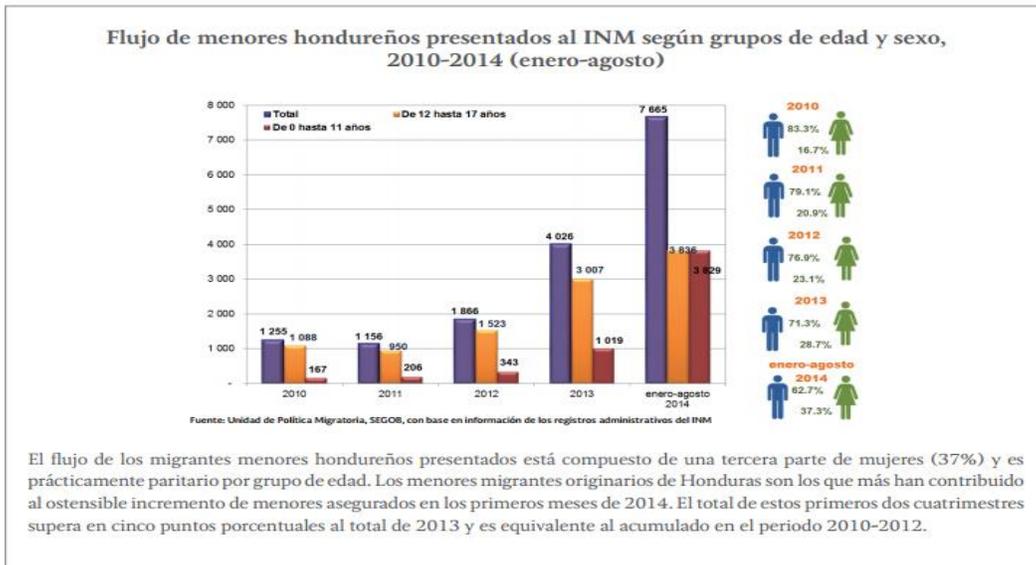
<sup>37</sup> U.S. Customs and Border Protection. Southwest Border Unaccompanied Alien Children. Retrieved from <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

<sup>38</sup> March 2000 to August 11, 2014.



Source: Casa Alianza’s estimate based on data from the Center for Returned Migrants, CAMR

Information from Mexican sources confirms the growing trend of deportation. On the one hand, an increasing number of Honduran children and adolescents migrate. On the other hand, Mexican authorities detain and deport more Hondurans than ever before. These figures also confirm that children and adolescents are migrating, alone or accompanied, at an increasingly younger age (note the significant increase in children and adolescents younger than 12).



Title: Number of Honduran minors appearing before INM by age and sex  
2010-2014 (January-August)

Color Coded Key:

**TOTAL**

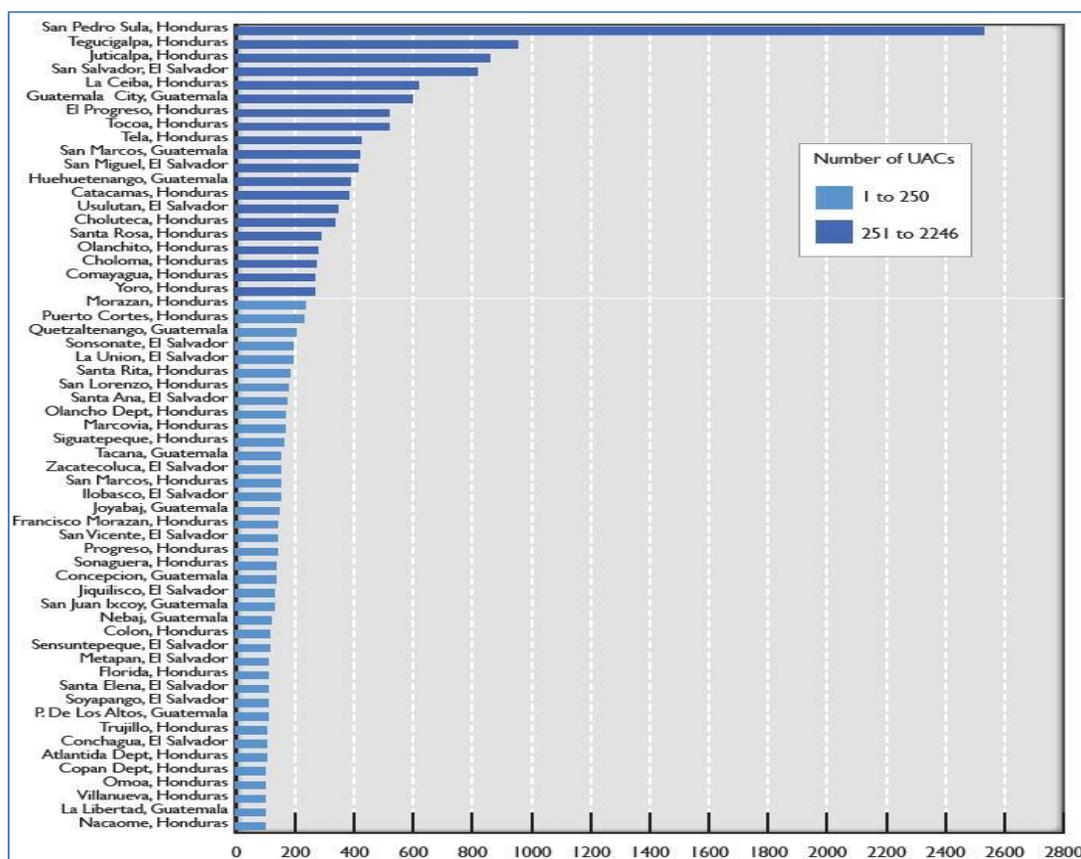
**AGE 0-11**

**AGE 12-17**

One third of Honduran children and adolescents brought before the INM are female (37 percent). IN 2014, Children ages 0-11 and 12-17 were detained at equal rates. Honduran migrant children and adolescents are the group that contributed most to the significant increase in children detained by the INM in the first 8 months of 2014. The number of children and adolescents detained by INM during the first 8 months of 2014 was 5 percent higher than the total number of children detained by INM in all 2013, and is equal to the aggregate number of children detained from the 2010-2012 period.

Source: Mexican Secretariat of the Interior (*Secretaría de Gobernación*).  
Department of Migration Policy. Statistics  
August 2014

Data reveals that most migrating Honduran children and adolescents come from the departments of Cortés, Francisco Morazán, Atlántida, Colón, Yoro, Comayagua, Olancho, Copán, and Choluteca. These Honduran children prefer to assume and face the risks associated with the migrant trail rather than to stay in their communities and become victims of some form of violence, or be killed.



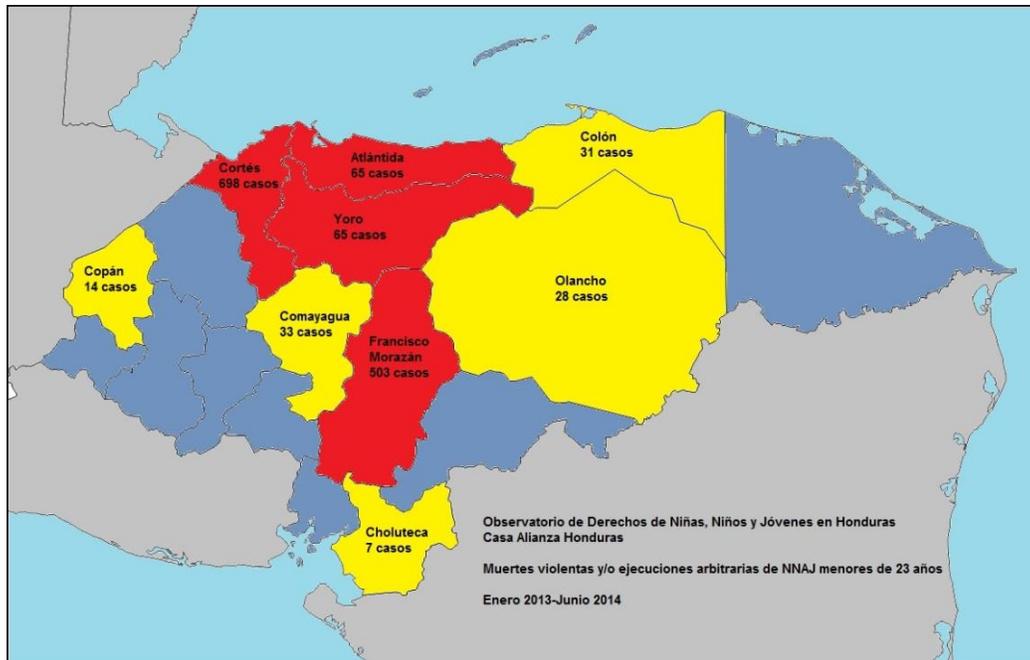
Source: [http://www.lib.utexas.edu/maps/americas/central\\_america-unaccompanied\\_children-2014.pdf](http://www.lib.utexas.edu/maps/americas/central_america-unaccompanied_children-2014.pdf)

In 2013, the city of San Pedro Sula in the north ranked as the most violent city in the world, with a murder rate of 187 homicides per 100,000 residents, while the Central District<sup>39</sup> was ranked 6<sup>th</sup> in the same year with a rate of 79.42 homicides per 100,000 residents.<sup>40</sup> The departments identified by the U.S. Border Patrol as having the highest rates of migration coincide with information generated by Casa Alianza's Observatory on the Rights of Children and Youth in Honduras regarding the departments with the greatest number of violent deaths and arbitrary executions of children and youth under the age of 23: Cortés, Francisco Morazán, Atlántida, Yoro, Comayagua, Colón, Copán, and Choluteca.<sup>41</sup> The map below corresponds to data on the period from January 2013 through June 2014.

<sup>39</sup> The Capital of the Republic of Honduras, the Central District (Distrito Central) is made up of the twin cities of Tegucigalpa and Comayagüela.

<sup>40</sup> See <http://www.seguridadjusticiaypaz.org.mx/sala-de-prensa/941-por-tercer-ano-consecutivo-san-pedro-sula-es-la-ciudad-mas-violenta-del-mundo>.

<sup>41</sup> Own estimates based on figures from Casa Alianza's monthly reports on the situation of children and youths in Honduras during the period from January 2013 through June 2014.



Departments
Cortés 698 cases
Yoro 65 cases
Atlántida 65 cases
Francisco Morazán 503 cases
Copán 14 cases
Comayagua 33 cases
Choluteca 7 cases
Olancho 28 cases
Colón 31 cases

Casa Alianza's Observatory on the Rights of Children and Youth in Honduras  
Violent deaths and arbitrary executions of children and youth  
under the age of 23  
January 2013-June 2014

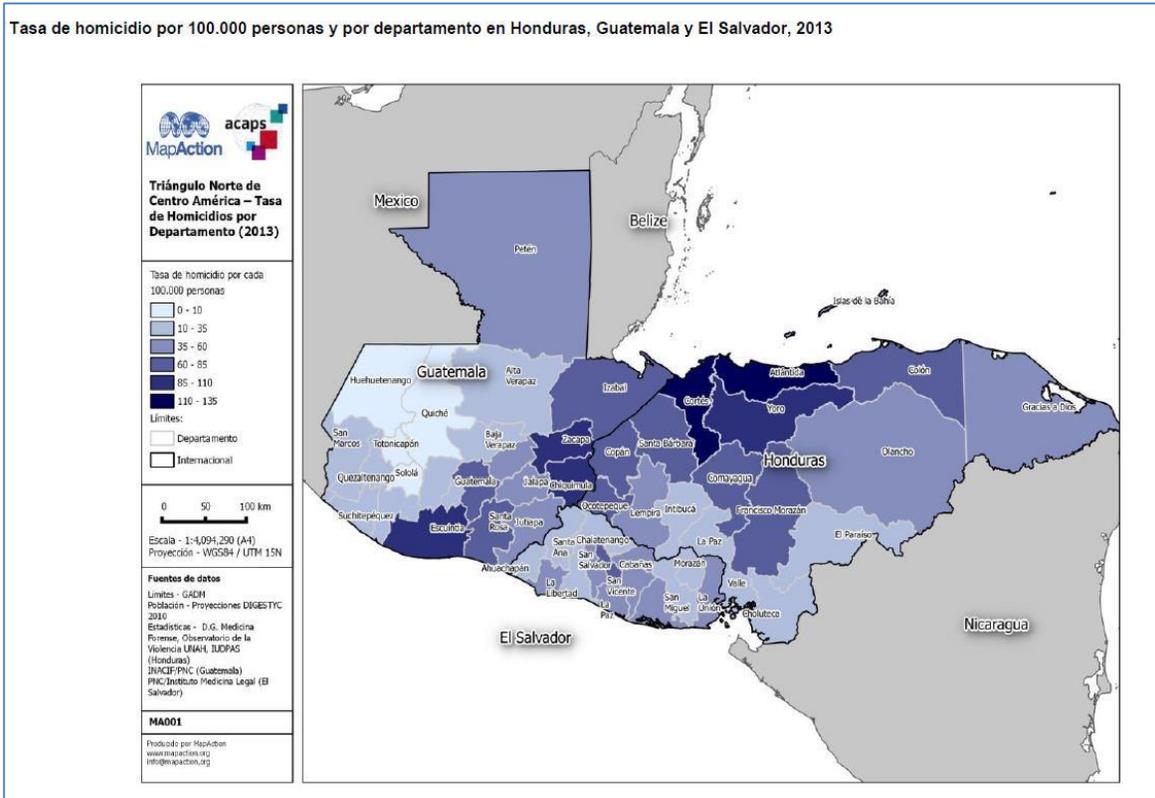
Source: Estimates based on data collected by Casa Alianza's Observatory on the Rights of Children and Youth in Honduras

Similarly, ACAPS, a platform created by three NGOs (HelpAge International, Merlin, and Norwegian Refugee Council) released a report in May 2014<sup>42</sup> addressing the homicide rates per 100,000 residents by department in the three countries of Central America's Northern Triangle: Guatemala, El Salvador, and Honduras. According to the report, in Honduras, the departments of Cortés and Atlántida had homicide rates in 2013 of over 110 homicides per 100,000 residents.

<sup>42</sup> ACAPS. (2014, May). Otras Situaciones de Violencia en el Triángulo del Norte Centroamericano, Impacto Humanitario. Retrieved from [http://www.iecah.org/web/images/stories/Otras\\_situaciones\\_de\\_violencia\\_ACAPS\\_Mayo\\_2014.pdf](http://www.iecah.org/web/images/stories/Otras_situaciones_de_violencia_ACAPS_Mayo_2014.pdf).

Yoro’s rate was between 85 and 110 homicides. Colón, Copán, Comayagua, Santa Bárbara, and Francisco Morazán had homicide rates between 65 and 85.

The ACAPS report states that “such levels of violence further exacerbate the situation of vulnerability of a large segment of the population; people who are forced to leave their homes and become internally displaced persons, refugees, asylum seekers, or economic immigrants in other countries.”



**Title: Homicide rate per 100,000 people by department in Honduras, Guatemala, and El Salvador, 2013.**

Northern Triangle of Central America – Homicide Rate by Department (2013)

Homicide Rate per 100,000 people

0-10

10-35

35-60

60-85

85-110

110-135

Borders

Department

**International**

Scale

Projection

Sources:

Borders

Population

Statistics

MA001

Made using MapAction

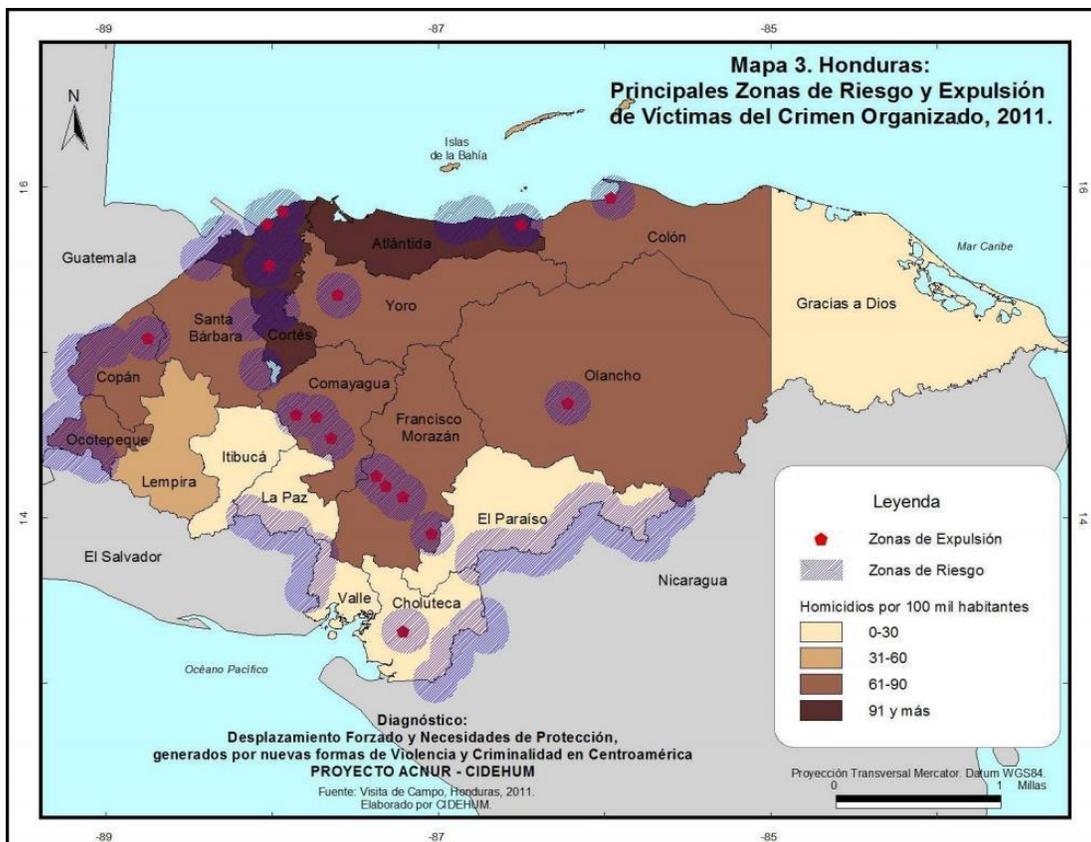
Source: ACAPS

May 2014

Another study that identifies violence as a cause of the movement or displacement of persons was conducted by the International Center for the Human Rights of Migrants (CIDEHUM) at the request of the UN High Commissioner for Refugees, UNHCR (ACNUR).<sup>43</sup> This study describes the main danger zones in Honduras and the areas that force residents to leave due to violence at the hands of organized crime. These areas, including Cortés, Atlántida, and Francisco Morazán, among others, are the main communities of origin of the unaccompanied migrant children and adolescents who were apprehended in the United States in 2014.

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<sup>43</sup> Centro Internacional para los Derechos Humanos de los Migrantes, CIDEHUM. (2012, May). Desplazamiento Forzado y Necesidades de Protección, generados por nuevas formas de Violencia y Criminalidad en Centroamérica. Retrieved from <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2012/8932.pdf?view=1>.



Map 3. Honduras: Main Danger Areas and Expulsion Areas of Victims of Organized Crime, 2011.

Diagnostic:  
Forced Displacement and Protection Needs due to new forms of Violence and Crime in Central America  
UNHCR – ICHRM

Source: Field Visit, Honduras, 2011  
Conducted by ICHRM

Key  
★ Expulsion Area  
▨ Danger Area  
Transversal Mercator Projection  
0 ----- 1 miles

Source: International Center for the Human Rights of Migrants CIDEHUM

A recent article titled “Violence and Migration in Central America”<sup>44</sup> finds that both actual victimization and the fear of crime are significantly linked to the decision to migrate. Although first-hand victimization is a greater cause of migration, fear of the criminal wave currently sweeping across a large part of Central America also contributes to the growing number of people seeking to leave their countries.

## **V. Legal framework on childhood and migration in Honduras**

### *A. Domestic and international instruments on human rights, migration, and childhood*

The legal framework for protecting migrant children and adolescents includes multiple domestic and international instruments whose implementation requires coordination among different institutions in all of the countries involved, whether they are countries of origin, transit, or destination.

At the international level, there are more than 20 relevant instruments, including conventions, protocols, pacts, memoranda of understanding, and regional guidelines. Some instruments for the protection of human rights include the UN Convention on the Rights of the Child, the American Convention on Human Rights, and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

At the regional level, some of the instruments include the Regional Conference on Migration’s General Guidelines for the Protection of Unaccompanied Migrant Children and Adolescents in Cases of Repatriation, and the Memorandum of Understanding among the governments of Mexico, El Salvador, Guatemala, Honduras, and Nicaragua, for the Orderly, Dignified, Expeditious, and Safe Return of Central American Migrants by Land. These two instruments are analyzed in chapter 13 prepared by the National University of Lanús (*Universidad Nacional de Lanús*).

Domestically, Honduras has a significant legal framework for the protection of children and adolescents set out in a range of instruments, including:

- The Code for the Protection of Children and Youth (*Código de la Niñez y la Adolescencia de Honduras*, 1996)
- The Law for the Protection of Honduran Migrants and their Families (*Ley de Protección de los Hondureños Migrantes y sus Familiares*, 2013)
- The Organic Law of the Honduran Institute for Children and Families (*Orgánica del Instituto Hondureño de la Niñez y Familia*, IHNFA, 1997)<sup>45</sup>

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<sup>44</sup> Hiskey, J., Malone, M., & Orcés, D. (2014). Violence and Migration in Central America. *AmericasBarometer Insights: 2014*, 101. Retrieved from <http://www.vanderbilt.edu/lapop/insights/IO901en.pdf>.

<sup>45</sup> This Law provided for the creation of the IHNFA. However, this agency was supplanted by the Executive Decree N. PCM-26-2014, issued by the Diario Oficial La Gaceta N° 33,446, on June 6, 2014. See Consortium Centro América Abogados. (2014, June). Newsletter Consortium, Leyes Aprobadas en Honduras. Retrieved from: <http://www.consortiumlegal.com/images/news/julio2014/es/notas/leyeshonduras.pdf>.

- The Protocol for the Repatriation of Children and Adolescent Victims of or Vulnerable to Trafficking in Persons, (*Protocolo para la Repatriación de Niños, Niñas y Adolescentes Víctimas o Vulnerables a la Trata de Personas*, 2006)
- The Executive Decree for the Creation of the Department on Children and Families (*Decreto Ejecutivo para la creación de la Dirección de Niñez, Adolescencia y Familia*, DINAFA, 2014)<sup>46</sup>

The next section analyzes some of these legal instruments.

### B. Law for the protection of Honduran migrants and their families

On December 26, 2013, the Honduran National Congress passed the Law for the Protection of Honduran Migrants and their Families through Legislative Decree No. 106-. This legal instrument's contents are organized as follows:

Title	Chapter	Articles
<b>Preliminary Title</b>	General Provisions	Object of this Law Subjects of this Law
<b>Title II - Rights</b>	Civil and Political Rights	Right to nationality Right to vote and be elected Assistance and protection of Hondurans abroad Right to lodge a petition Right to appeal to the National Commissioner on Human Rights Right to information. Right to participation in the representative migration bodies. Right to participate in trade unions and employer organizations Right to association.
	Social Rights.	Right to social security and other benefits Social and labor-related information, and participation in programs of occupational training for returned persons Rights related to employment and occupation
	Rights on Education and Culture	Right to education Mechanisms for the recognition of schooling received abroad Spanish language and Honduran culture.
<b>Title III – Comprehensive Policy on Protection and Return</b>	Protection Policy.	Objectives of the protection policy.
	Return Policy.	Objectives of the return policy.

<sup>46</sup> Consortium Centro América Abogados. (2014, June). Newsletter Consortium, Leyes Aprobadas en Honduras. Retrieved from <http://www.consortiumlegal.com/images/news/julio2014/es/notas/leyeshonduras.pdf>.

<b>Title IV – Institutional Framework.</b>	National Council for the Protection of Honduran Migrants.	National Council for the Protection of Honduran Migrants ( <i>Consejo Nacional para la Protección del Migrante Hondureño</i> or CONAPROHM) Functions of CONAPROHM Intergovernmental collaboration and Inter-Sectorial Technical Commission
	Department of Protection of Honduran Migrants.	Department of Protection of Honduran Migrants. Office of Protection of Honduran Migrants (OPROHM) Office of Assistance for Returned Migrants (OFAMIR) Centers for the Attention of Returned Migrants Collaboration among Honduran consulates and communities
	Solidarity Fund for Honduran Migrants.	Solidarity Fund for Honduran Migrants ( <i>Fondo de Solidaridad con el Migrante Hondureño</i> , FOSMIH)
	Final Provisions.	Regulations

Source: Chart created by Casa Alianza based on data from the Law for the Protection of Honduran Migrants and their Families

One of the goals of the law for the protection of Honduran migrants and their families is to establish norms and conditions that make it possible for Hondurans abroad to exercise their constitutional rights and obligations. It also provides for comprehensive protection and return policies for Honduran migrants regardless of their legal status. The law established the institutional framework for protecting Honduran migrants by creating the National Council for the Protection of Honduran Migrants (CONAPROHM). This consulting and advising body has representatives from government institutions, the private sector and non-governmental organizations involved in migration issues. The law also created the Solidarity Fund for Honduran Migrants (FOSMIH), which is to be funded by the profits of the Central Bank of Honduras from its currency exchange operations, in an amount not less than five million dollars.

The law reinforces existing mechanisms to fight child exploitation and expand the Honduran government’s protection actions for Hondurans abroad who are experiencing hardship, especially children. Subjects of this law are defined as the *underage descendants* of Hondurans, whether living abroad, temporarily traveling abroad, or returning to resettle in the country. This term suggests that unaccompanied migrant children and adolescents are not explicitly included among the subjects protected by the law.

Article 11 covers the right to freedom of association and establishes that “the active participation of children and adolescents in the associations established by Hondurans abroad shall be promoted.”<sup>47</sup> Article 18 covers the objectives of the protection policy and mandates

<sup>47</sup> Decreto No. 106-2013, 2014, February 15, Ley de Protección de los Hondureños Migrantes y sus Familiares, 2014 (Hond.).

implementation of a special consular protection program to “assist in the repatriation of people with illnesses, disabilities, or in terminal condition, as well as children.”<sup>48</sup>

Article 22 creates CONAPROHM and requires that the council include representatives of, among others, “non-governmental organizations implementing migration, human rights, childhood, women and youth programs, who shall be appointed by the Secretary of External Relations.”<sup>49</sup> This article excludes the government institution in charge of protection programs for children and youth from the CONAPROHM.

Regulations governing the implementation of this law are currently being drafted. This process will enable participation and discussion among the different sectors working on migration issues, especially those who work with children and youth.

### *C. Protocol for the Repatriation of Children and Adolescents Victims of or Vulnerable to Trafficking in Persons*

In 2006 the Protocol for the Repatriation of Children and Adolescents Victims of or Vulnerable to Trafficking in Persons was passed. This legal instrument established the procedures to be followed for the repatriation of children and adolescents who have been victims of—or are vulnerable—to trafficking. The new procedures must be followed in every process involving the deportation of Honduran children and adolescents, whether those children were victims of trafficking or are considered to be at risk of being trafficked. Migrant children and adolescents are all considered potential victims of trafficking given the many dangers they face on the migration route.

The subsequent section includes part of the analysis of the protocol, which was completed by Casa Alianza in 2012;<sup>50</sup> it highlights the processes of reception and reintegration of migrant children and adolescents.

### *D. Repatriation procedure*

The protocol established procedures to guide the actions of the institutions involved in repatriating migrant children and adolescents. The following sections analyze these procedures. The main objective of the protocol is to establish procedures that every institution must follow in the repatriation of children and adolescents who have been victims of trafficking in persons or who are vulnerable to trafficking, either from foreign countries back to Honduras or from Honduras to foreign countries. This repatriation must be carried out in compliance with the principles set forth by the domestic and international legal frameworks.

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<sup>48</sup> Decreto No. 106-2013, 2014, February 15, Ley de Protección de los Hondureños Migrantes y sus Familiares, 2014 (Hond.).

<sup>49</sup> Decreto No. 106-2013, 2014, February 15, Ley de Protección de los Hondureños Migrantes y sus Familiares, 2014 (Hond.).

<sup>50</sup> Casa Alianza Honduras (2012, June) *Análisis de la situación de Derechos de la Infancia Migrante No Acompañada en el marco de los procedimientos de deportación y retorno a Honduras*. Retrieved from <http://casa-alianza.org.hn/images/documentos/Informes.Especiales/Inf.2012/2.%20informe%20infancia%20migrante%202012.pdf>.

To comply with the protocol, all public and private institutions involved in repatriation of migrants must abide by the domestic and international legal instruments. They must ensure due attention and protection to repatriated children and adolescents, as well as the reinstatement of their fundamental rights. An analysis of the protocol raises the question of whether the repatriation procedures currently applied comply with domestic and international legal norms, governing approaches, and established principles.

Among its governing principles, the protocol sets forth a conceptual approach for institutions and organizations involved in repatriation to take, specifying that they consider access to rights and take into account the gender and age of the child when they design their interventions. The general principles also include considering the children's best interests, respecting confidentiality, ensuring non-re-victimization, having an integral approach, having a perspective of shared responsibility, and adopting the presumption of minority of age of the child. It is important to note the absence of other fundamental principles in the protocol, such as the rights to due process, non-discrimination, and cultural identity.

In addition to excluding some fundamental principles, the repatriation practices on the ground fail to adhere to the principles and approaches established by the protocol. In fact, our findings prove that, in practice, the repatriation procedure has severe gaps and weaknesses in relation to compliance with the protocol's norms. For example, the "return" or "release" of deported children and adolescents to their families is almost immediate, sometimes even occurring at the border crossing. This speed is inconsistent with the claim that the procedure ensures the security and physical and emotional integrity of the children and adolescents, much less serves as a mechanism for social and family reintegration that is efficient, effective, adequate, and legitimate from a rights-based perspective.

The protocol defines repatriation as a process of protection for children and adolescents that guarantees assistance to victims of trafficking or persons who are vulnerable to trafficking, and ensures their dignified, safe, and orderly return, and prioritizes—above all else—their best interests. According to the protocol, repatriation begins with the detection of a migrant child or adolescent, and does not conclude until the return and social reintegration of a child has been secured. We consider it necessary to revise the definition of "repatriation" in the protocol, because the current definition assumes that this process always "begins with the detection of the child," which implies that every child who is "detected" will be repatriated.

However, under the principles of the child's best interest, once a child has been "detected," there should be an exhaustive, individualized evaluation of his or her case (personal, family, and emotional conditions, as well as a risk assessment) in order to determine whether repatriation is the most appropriate choice. Assuming that every detained or detected child or adolescent will be repatriated negates the duty to ensure that every decision protects the rights of the child, both by respecting due process and by adhering to the fundamental principles set forth in the legal framework, which guarantee the rights of children and adolescents.

The protocol emphasizes that whenever an individual or an institution knows about a child or adolescent who was a victim of trafficking or is vulnerable to becoming one, such individual or institution must provide immediate attention to the victim or potential victim and refer him or her

to the competent institutions, as stipulated in Article 7 of the protocol (referring to the immediate and temporary attention to child migrants), so that all necessary measures, including urgent ones, can be taken to protect the lives and mental and physical integrity of victims or vulnerable children and adolescents.

We identified the following limitations with respect to current repatriation practices:

- The limited time children and adolescents stay at the shelters of the National Directorate for Children, Adolescents, and Families (*Dirección Nacional de Niñez, Adolescencia y Familia* or DINAF) in San Pedro Sula before being “released” to their families does not allow for a comprehensive assessment to detect whether a child or adolescent has been a victim of trafficking or other rights violations.
- The decision to keep children and adolescents for short periods of time at the DINAF may be due to limited human, financial, and administrative resources to assist deported children and adolescents. Thus, “releasing” children to their relatives as soon as possible is less onerous for the institution.
- After reviewing the format of the interviews conducted by the DINAF, we observed that no interview question is framed so as to detect a situation of victimhood or vulnerability to trafficking. Only the “repatriated” portion of the interview, question 5.21, asks if “there was any problem during their trip to their destination or during the return trip.”
- The context in which the interviews are conducted is inadequate to ensure a climate of trust or empathy that would facilitate children and adolescents’ ability to acknowledge having been victims of trafficking, especially because the large majority of children do not even know what trafficking in persons is.

#### *E. Institutional framework for the repatriation of children and adolescents to Honduras*

IHNFA is the government agency in charge of receiving, protecting, and facilitating family reintegration of deported migrant children and adolescents. IHNFA was created in 1997 through the legislative decree number 199-97. It is a social development institution, granted autonomous legal status and control of its own budget. Its main objective is to provide comprehensive protection of children and full family integration.

Since its inception, the IHNFA has undergone a series of internal changes, such as the implementation, among other measures, of review boards to manage the periods of crisis the agency has endured. In 2012, a process began in which government, civil society, and international cooperation agencies drafted a bill to create a specialized agency to design and oversee public policies on children’s issues.<sup>51</sup>

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<sup>51</sup> Casa Alianza Honduras. (2012, October) Contexto Situacional del Instituto Hondureño de la Niñez y la Familia IHNFA. Retrieved from <http://casa-alianza.org.hn/images/documentos/Informes.Especiales/Inf.2012/2.%20informe%20infancia%20migrante%202012.pdf>.

In August, 2012, the President's Office (*Secretaría de Estado del Despacho Presidencial*) submitted for congressional discussion a bill to create the National Children's Ombudsman's office (*Defensoría Nacional de la Niñez* or DNN),<sup>52</sup> a public institution in charge of designing, coordinating, managing, monitoring, and evaluating public policies, programs, and services for children. However, this process has stalled to date.

Following the inauguration of a new administration in early 2014, changes and restructuring in the Honduran government have included the merger of some institutions and the consolidation of ministries according to their area of work. Through this restructuring process, executive decree number PCM-27-2014 (dated June 6, 2014) created DINAF, which will replace the IHNFA as the State institution responsible for children in Honduras.

This new institutional framework was conceived as a decentralized entity within the Secretariat of Development and Social Inclusion (*Secretaría de Estado en los Despachos de Desarrollo e Inclusión Social*), with technical, operating, and administrative autonomy to better carry out its tasks. The DINAF will operate through decentralized local units adapted to the characteristics of each region in the country and will have a basic administrative and technical structure whose operations will be set forth by a special regulation.

However, the responsibilities and functions of the new entity have not yet been clearly delimited. There is uncertainty about the new structure and the service offerings for children, as well as a lack of trust in DINAF to successfully fulfill its role of protecting the rights of the country's children. With regard to assisting deported migrant children, the DINAF has assumed the responsibility of coordinating the process, but IHNFA officials continue to provide services. For this reason, we will refer to IHNFA in our analysis of institutional work with Honduran migrant children and adolescents.

In light of the increased numbers of children and adolescents in detention centers in 2014 in the United States, the Honduran Government's Council of Ministers passed the Executive Decree No. PCM-033-2014, declaring the situation of migrant children to be a "Humanitarian Emergency."<sup>53</sup> This resulted in the creation of the Joint Task Force for Migrant Children, made up of several institutions, including the National Department for Children and Families; the Secretariats of Development and Social Inclusion; Human Rights and Justice; the Interior and Decentralization; Education; Health; and Labor and Social Security. Additionally, the Department of Transportation (*Dirección General de Transporte*), the Permanent Commission for Emergencies (*Comisión Permanente de Contingencias*), as well as autonomous entities such as the National Human Rights Commissioner, the Public Ministry, through the office of the Special Prosecutor for Children, the National Registry of Persons, and the Office of the First Lady participated in the Task Force.

Unfortunately, the Task Force operated only during the time the so-called "humanitarian crisis" received media coverage. Currently, attention paid to deported migrant children and adolescents

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<sup>52</sup> Secretaría de Estado del Despacho Presidencial. (2012, August 27). Oficio No. SDP 691-2012, dirigido a la Secretaría del Congreso Nacional. On file with the authors.

<sup>53</sup> Centro Nacional de Información del Sector Social. (2014). Informe Estadístico de las Personas Repatriadas/Retornadas a Honduras. Período Enero A Diez De Octubre-2014.

and their families has reverted solely to DINAF and the IHNFA, while the true crisis—as described in the introduction of this report—remains unchanged and is not being addressed in a comprehensive, regional way based on a rights-centered perspective.

The Honduran government has also militarized the Honduras-Guatemala border as a migration control measure to stop children and adolescents from leaving the country.<sup>54</sup> Elite units of the Honduran National Police and the Armed Forces are deployed in the border area between Honduras and Guatemala to stop children and youth under the age of 21 from traveling to Mexico or the United States without at least one of their parents. From June 20 through August 11, 2014, these Special Forces detained 134 children aged between 4 and 17 as well as eight adults who were charged with trafficking in persons.<sup>55</sup> However, officials did not determine whether these adults were “coyotes” or simply adults traveling with children who were not their relatives.

Funds from the U.S. Department of State created these elite units and have trained them since 2012. Their initial tasks were to prosecute kidnappers, narco-traffickers, corrupt politicians, money launderers, and pedophiles. It was not until June 2014 that these units were given the task of stopping children and adolescents at the border from emigrating. The Special Tactical Operations Group (*Grupo de Operaciones Especiales Tácticas* or GOET), one of the elite forces operating in the border areas, outfits its members with bullet-proof vests and badges that read “POLICÍA” (police) and display the slogan “Honor y Patria” (“honor and patriotism”) along with a scorpion. Their weapons include knives and pistols. The Intelligence Troop and Special Security Response Group (*Tropa de Inteligencia y Grupos de Respuesta Especial de Seguridad* or TIGRES) also participates in the operations. The members of this unit wear camouflage; they have long-range weapons and telecommunications equipment. The Transnational Criminal Investigative Unit (*Unidad Transnacional de Investigación Criminal* or UTIC), another elite group, is tasked with investigating individuals suspected of being coyotes. The members of these units have been trained by the FBI, the Border Patrol Tactical Unit, and other U.S. agencies, as well as by specialized units from other countries.

“The (U.S.) embassy approved the support requested by the Director of the National Police, General Ramón Sabillón, to succeed in rescuing [from migration] as many children as possible,” said Commissar Miguel Martínez Madrid, the coordination of the GOET.<sup>56</sup>

One of these operations was named “[operation] rescue angel.” It has had three main results: (1) to present as a child protection action what in reality is a migration control mechanism; (2) to promote the militarization of the border, potentially leading to an increase in the vulnerability of

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<sup>54</sup> El Nuevo Diario. (2014, October 22). Experto dice que es inadmisibile que EEUU expulse a niños migrantes de CA. *El Nuevo Diario*. Retrieved from <http://www.elnuevodiario.com.ni/nacionales/332923-experto-dice-que-inadmisibile-que-eeuu-expulse-a-ninos-migrantes-de-ca>.

<sup>55</sup> See El Diario. (2014, August 24). Cacería de ‘Ángeles.’ *El Diario*. Retrieved from <http://www.eldiariodecoahuila.com.mx/notas/2014/8/24/caceria-angeles-451305.asp>; El Telégrafo. (2014, September 4). Honduras ha rescatado 134 niños migrantes en 2 meses. *El Telégrafo*. Retrieved from <http://www.telegrafo.com.ec/mundo/item/honduras-ha-rescatado-134-ninos-migrantes-en-2-meses.html>.

<sup>56</sup> See El Diario. (2014, August 24). Cacería de ‘Ángeles.’ *El Diario*. Retrieved from <http://www.eldiariodecoahuila.com.mx/notas/2014/8/24/caceria-angeles-451305.asp>.

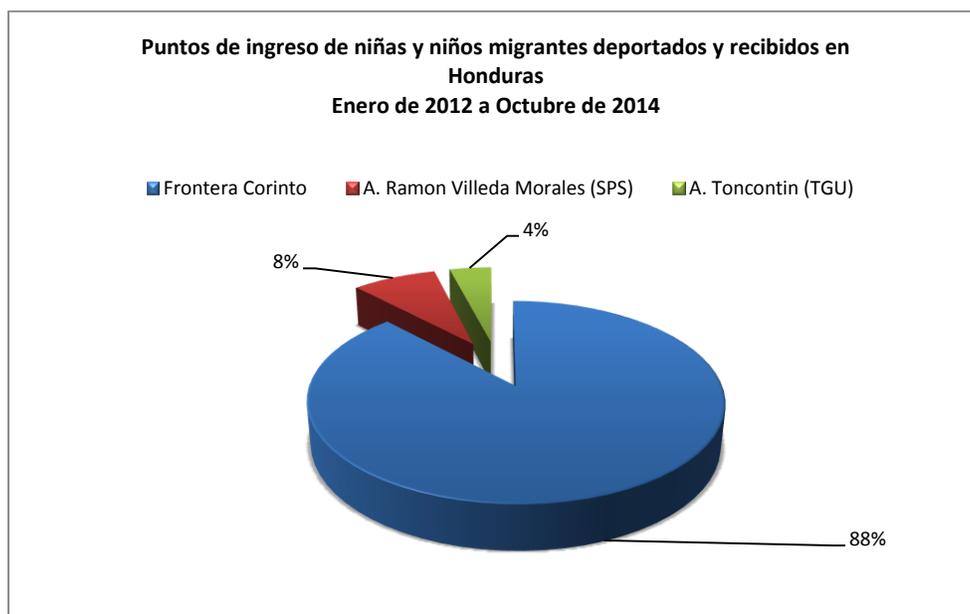
children and adolescents, as well as the risks in transit, and to strengthening organized criminal syndicates connected to the trafficking of persons; and (3) to obscure the structural causes of migration of children and adolescents and, consequently, to abstain from taking measures that can truly address those root causes in a comprehensive and effective way focused on the human rights of children and adolescents.

*F. Statistical information about deportations of children and adolescents to Honduras*

Information provided by the Coordinating Committee on Migrant Children at the IHNFA about children who were deported to Honduras from January 2012 through October 2014, indicates that in this period, there were 15,492 deportations of children and adolescents who arrived in Honduras at three specific places:

- The Honduras-Guatemala border crossing at Corinto, in the Omoa municipality of the Cortés department, and from there to the “El Edén” shelter, run by the IHNFA in San Pedro Sula, Cortés.
- The “Ramón Villeda Morales” international airport in San Pedro Sula, Cortés, and from there to the “El Edén” shelter, run by the IHNFA in San Pedro Sula, Cortés.
- “Toncontín” international airport in Tegucigalpa, and from there to the “Casitas Kennedy” shelter in Tegucigalpa.

These figures demonstrate that the Corinto border crossing receives the greatest number of deported children and adolescents.

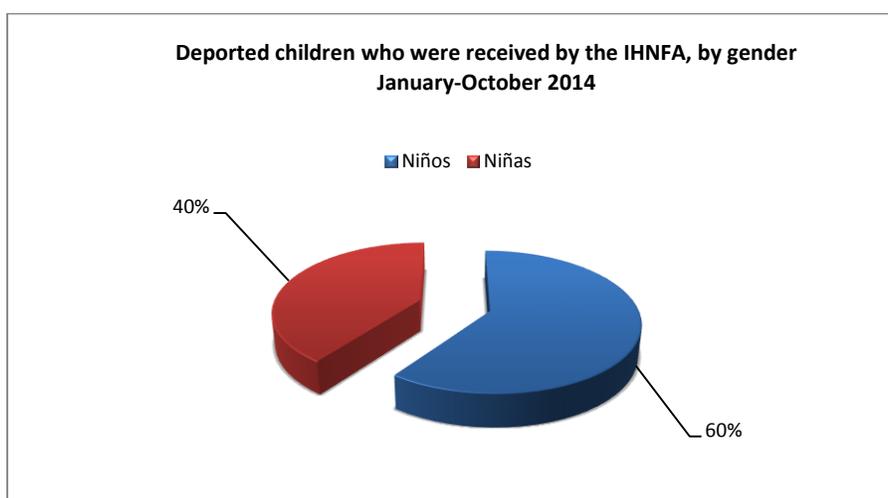


Points of entry for deported migrant children returning to Honduras  
January 2012 to October 2014

**Corinto Border**  
**A. Ramon Villeda Morales (SPS)**  
**A. Toncontin (TGU)**

Source: Casa Alianza’s estimate based on data provided by the IHNFA

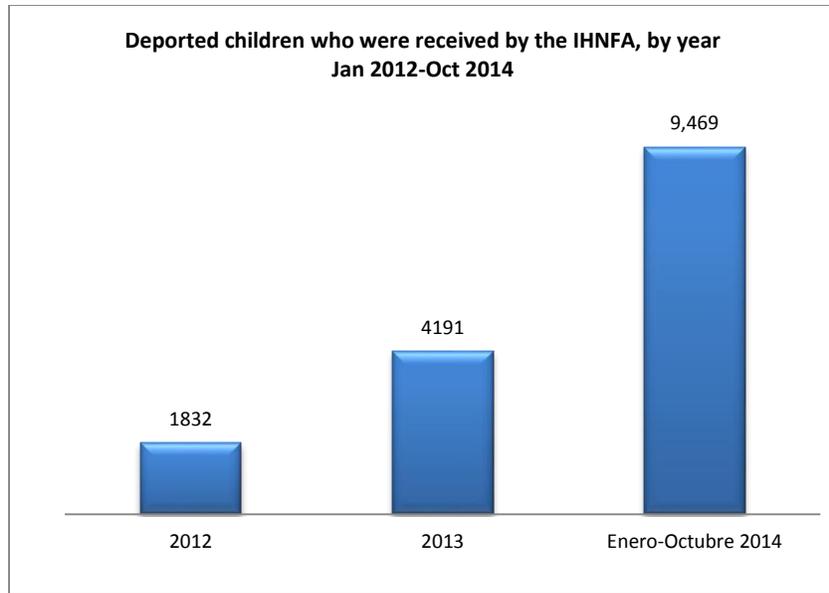
In 2014, the majority of deported children and adolescents were male (60 percent). However, the number of girls who are detained and deported from Mexico and the United States is considerably high (40 percent of the total).



Source: Casa Alianza’s estimate based on data provided by the National Center of Social Sector Information

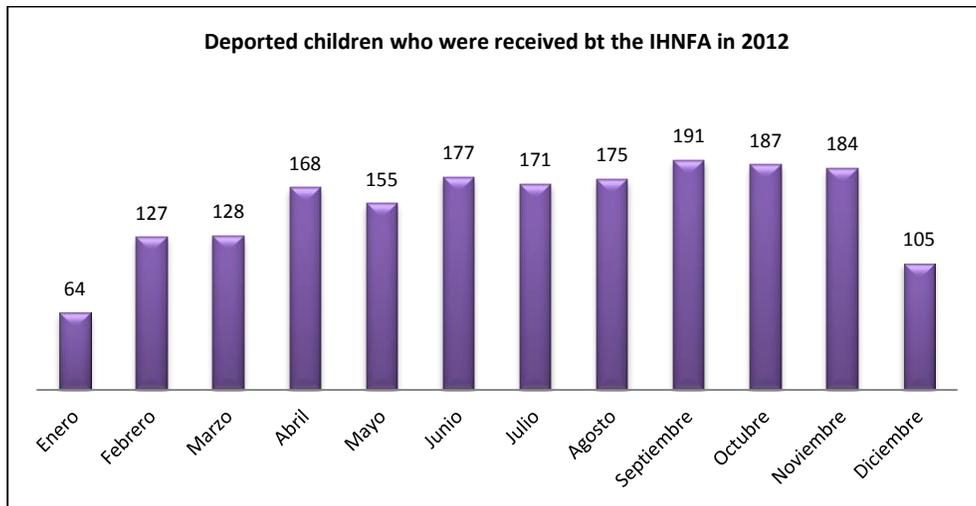
In 2012, 1,832 children and adolescents were deported to Honduras; in 2013, this figure grew to 4,191, and in 2014, the sum of both prior years was surpassed, with 9,469 children and adolescents deported between January and October alone.<sup>57</sup>

<sup>57</sup> Centro Nacional de Información del Sector Social. (2014). Informe Estadístico de las Personas Repatriadas/ Retornadas a Honduras. Período Enero A Diez De Octubre-2014.



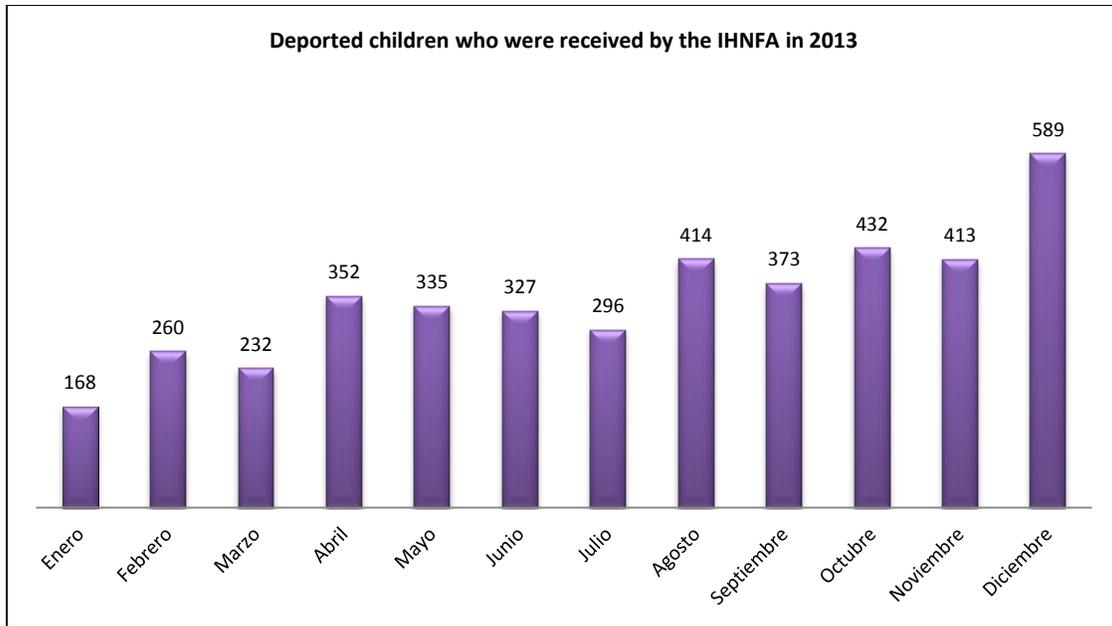
Source: Casa Alianza’s estimate based on information provided by the IHNFA

In 2012, September and October were the months with the highest numbers of deported children and adolescents. Most returns occurred by land through the Corinto border crossing, and from there children were sent to the “El Edén” shelter in San Pedro Sula.



Source: Casa Alianza’s estimate, based on data provided by the IHNFA

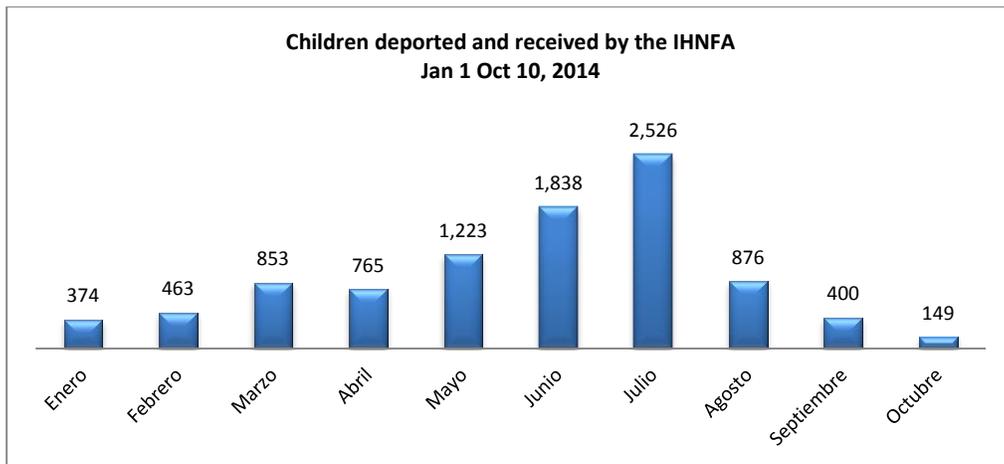
Then in 2013, the months with the highest number of deportations were August, October, November, and December.



Source: Casa Alianza’s estimate based on data provided by the IHNFA

During 2014, this situation grew exponentially, with an upward trend in June and July, coinciding with the so-called “crisis” on the U.S. southern border.<sup>58</sup>

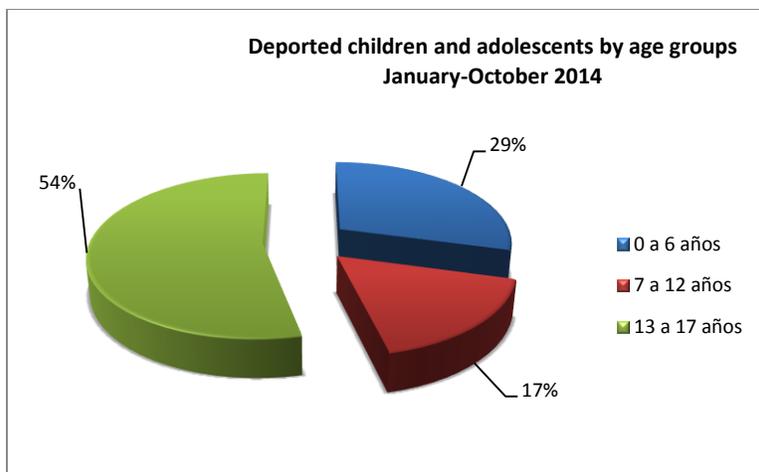
It is important to mention that the figure corresponding to October only covers until October 10, 2014.



Source: Casa Alianza’s estimate based on data provided by the National Center of Social Sector Information

<sup>58</sup> In the Introduction of this report, we noted that this is a humanitarian, human rights, human development, and refugee protection crisis with a structural and regional character. This is to say, this phenomenon is not centered on the U.S. southern region, and its magnitude and nature demands very different responses, broader than the control measures implemented by the U.S. and other countries under its influence.

Data for 2014 indicate that among all children deported, adolescents between the ages of 13 and 17 are the primary targets of deportations, with a total 5,076 cases. Next come children aged 0 to 6, with 2,765 cases of deportation, and finally 1,618 cases of deportation of children aged 7 to 12 were recorded in the same time period.



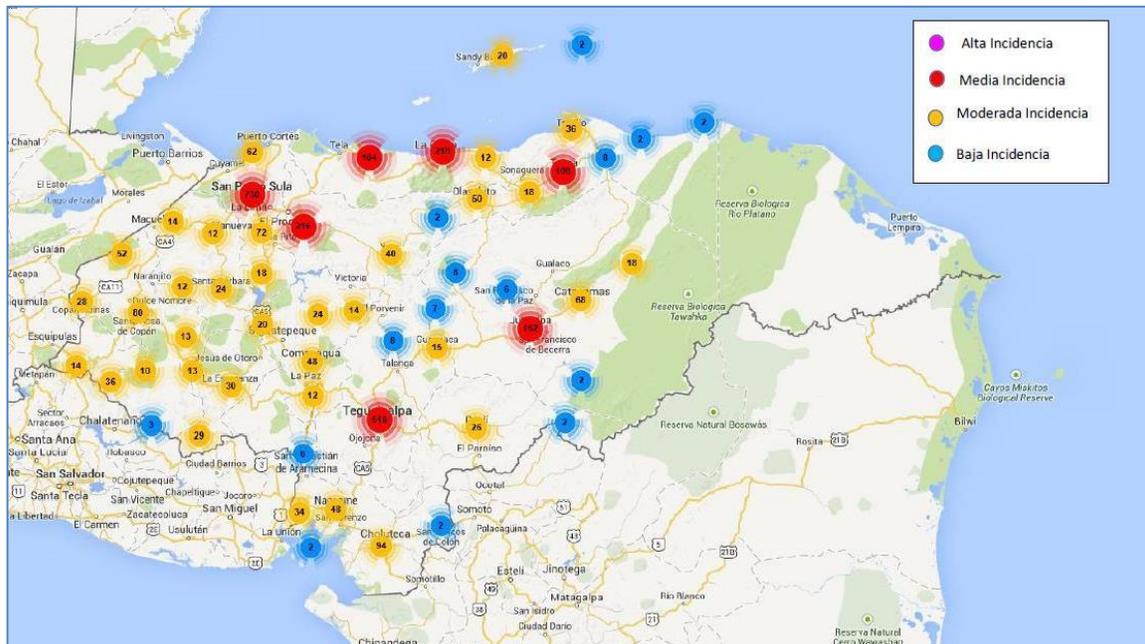
Source: Casa Alianza's estimate based on data provided by the National Center of Social Sector Information

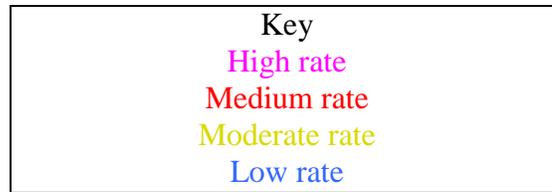
62% of the Honduran children and adolescents deported to Honduras in 2014 came from the departments of Cortés, Yoro, Atlántida, Francisco Morazán, and Olancho.

Deported children and adolescents by department of origin January-October, 2014	
Department	Deported children
Cortés	2,422
Yoro	1,073
Atlántida	869
Francisco Morazán	791
Olancho	703
Colón	616
Copán	476
Comayagua	405
Santa Bárbara	305

Choluteca	254
Valle	224
Intibucá	163
Lempira	159
Ocatepeque	148
El Paraíso	84
La Paz	49
Islas de la Bahía	42
Gracias a Dios	1
No answer	573
Not specified	112
TOTAL	9,469

Source: Casa Alianza’s estimate based on data provided by the National Center of Social Sector Information





Map showing areas of origin of migrant children and adolescents from Honduras. January - October 2014.<sup>59</sup>

*G. Reception of children and adolescents upon arrival in Honduras*

IHNFA personnel receive deported children and adolescents three days a week at the Corinto border crossing between Honduras and Guatemala. Since May 30, 2014, the deportee convoys from the “Siglo XXI” Migration Station in Tapachula, México have been arriving directly at the “El Edén” shelter in San Pedro Sula.



Source: Photo taken by Casa Alianza Honduras

When the IHNFA receives the lists of deported children and adolescents, it contacts their families to coordinate their release following their arrival in Honduras. IHNFA personnel meet the buses at the border crossing. However, there are also people unrelated to the return process who wait near the buses containing returning children. As discussed below, these individuals can be smugglers or human traffickers.

The IHNFA personnel are not properly identified and so can be easily mistaken by individuals unfamiliar with the process for persons who are not related to the repatriation or reception process or who are not at that moment present for the purpose of ensuring the protection of the children and adolescents and their families.

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<sup>59</sup> Centro Nacional de Información del Sector Social. (2014). Informe Estadístico de las Personas Repatriadas/ Retornadas a Honduras. Período Enero A Diez De Octubre-2014.



Source: Casa Alianza Honduras

Among the dangers at the Corinto border is the constant presence of people involved in human smuggling, commonly known as “coyotes,” who wait for deportee convoys and harass children and their families, offering to take them back on the migrant trail. Individuals involved in human trafficking also pose a danger to returning children. In the photograph below, a group of between 4 and 8 people can be seen trying to convince a mother (wearing red pants and a blouse with blue and red stripes) who had just been deported from Mexico with her 5-year-old daughter to come with them.



Source: Casa Alianza Honduras

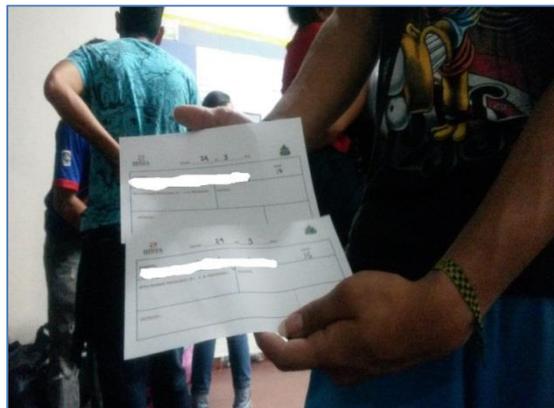
The authorities argue that they cannot do anything to stop these activities because they lack resources and personnel to confront these criminal groups. They also argue that they would be risking their lives if they tried to intervene.

Returning children and adolescents are received at the “El Edén” shelter in San Pedro Sula. Once the bus arrives, the children wait for their relatives. If the relatives do not arrive, the children sleep at the IHNFA, which has rooms adapted for this purpose.



Source: Casa Alianza Honduras

Each child who enters the shelter is given a form which must ultimately show the stamp or seal from the institution's social workers and medical and psychological staff. A child must have a completed, stamped form in order to leave the shelter.

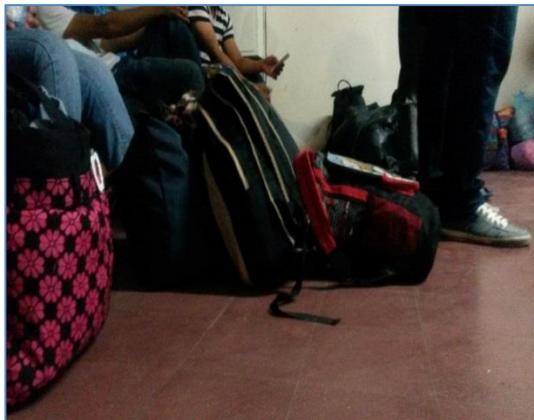


Source: Casa Alianza Honduras

When children have to spend the night at the facilities, IHNFA personnel give them dinner. According to the IHNFA team, "the food budget they have allows only for one meal a day for the children and adolescents."<sup>60</sup>

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<sup>60</sup> Centro Nacional de Información del Sector Social. (2014). Informe Estadístico de las Personas Repatriadas/ Retornadas a Honduras. Período Enero A Diez De Octubre-2014.



Source: Casa Alianza Honduras

When a child or adolescent is deported for the first time, IHNFA always attempts to reintegrate the child or adolescent with his or her family. If the child is deported a second time, IHNFA staff speak with the family to find protection measures and prevent another attempt at migrating. When the same child is deported a third time, he or she is referred to a child protection program according to his or her age and gender. Boys aged 12 or under are sent to the “Hogar Nueva Esperanza” shelter; girls aged 12 to 18 are sent to “Casitas Adolescentes” (adolescent housing). The “El Edén” shelter houses those children and adolescents whose relatives were unable to pick them up, but only for up to 24 hours. It is important to highlight the absence of a program to serve deported adolescent boys between ages 12 and 17, although they comprise the largest group of deported children.

The fact that some children are repeatedly deported proves a failure to determine whether the child really has an opportunity to be reintegrated with his or her family and community circle. If the child makes the same decision to migrate over and over, there must be a very strong reason for him or her to do so. However, arbitrary deportation policies and a lack of procedures to identify the children’s best interests in the destination countries (as the Mexico and U.S. chapters discuss), combined with the lack of an adequate and efficient reintegration mechanism in Honduras, allow the unchanged structural causes to continue to push children and adolescents to leave the country. The repeated deportation of a child demonstrates the State’s inability to ensure meaningful family reintegration for deported children and adolescents. The high levels of violence and insecurity that children and adolescents suffer in their communities of origin provide another cause for this repeated cycle of deportation (and repeated attempts to migrate).

#### *H. “Release” of children and adolescents to their relatives*

Some children are picked up by their relatives at “El Edén” shelter in San Pedro Sula. The procedure followed there is the same as the one at the border: documents showing the family relation to the child must be presented in order for a child to be released and a certificate of “release” is signed. At “El Edén,” none of the children waiting for relatives are given a meal while they wait. According to members of the IHNFA team, “our institution has neither the resources nor the responsibility to house children and adolescents whose parents have not picked them up at the bus stations, but sometimes we do it voluntarily . . . . Sometimes, the children

have to wait for days and that frustrates them. Our institution does not have available vehicles, and sometimes we also have to wait for days to be able to move the children.”<sup>61</sup> 61 percent of children who arrive at the IHNFA after being deported are “reintegrated with their families” (n=357 reintegrated out of 589 children in total).<sup>62</sup>

IHNFA uses a concept of “family reintegration” that should be analyzed, because the family reintegration procedure set forth in the protocol and its implementation in practice differ. According to the principles set forth in the repatriation protocol, in order for family reintegration to take place without compromising the child’s best interests, it is necessary to assess each family’s situation in advance. To this end, the IHNFA is required to assess the family situation and identify possible measures in favor of underage persons. This assessment must be completed within 15 calendar days and contain the following information:

1. Identification of the family or assessment of the family’s resources to which the child will return. Assessment of the security conditions for the child, family, and community.
2. Determination of the causes that created the situation of risk (that led the child to migrate).
3. Protection measures to be taken by the IHNFA to assist in the child’s full reintegration to society, school, and everything necessary for his or her comprehensive development.
4. If no relative can be identified to care for the child, the IHNFA will identify alternatives for the child’s social reintegration.

In addition, the Secretariat of Foreign Relations (*Secretaría de Relaciones Exteriores*), in coordination with the IHNFA, will contact the child or adolescent’s family to inform them about the conditions in which the child was found and the next steps to repatriate him or her, establishing to the degree possible direct communication between the child and his or her relatives.

However, our investigation found that the measures required by the protocol on repatriation are not being followed for these reasons:

- The child’s best interests is not the guiding principle for decisions about detention and repatriation. Consular authorities and migration agencies are oriented towards repatriation and fail to consider alternative such as asylum or other forms of international protection.
- This failure is aggravated in the cases of children and adolescents who migrate to rejoin their families in the U.S. Deportation procedures are taking place to repatriate and reintegrate children with their “families” (e.g. uncles, aunts, grandparents) in their countries of origin when those children’s immediate families reside in the U.S.

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<sup>61</sup> Centro Nacional de Información del Sector Social. (2014). Informe Estadístico de las Personas Repatriadas/ Retornadas a Honduras. Período Enero A Diez De Octubre-2014.

<sup>62</sup> Instituto Hondureño de la Niñez y la Familia (IHNFA). Retrieved from <http://www.ihnfa.gob.hn/>.

- Logically, if their families have irregular status in the United States, it will be difficult to promote family reunification by legal means, but the authorities consider only the option of direct return to the country of origin without investigating what the real family situation is in each case.
- Mexican migration authorities are sending information about children who will be deported back to Honduras only three days in advance of their deportation, according to IHNFA officials in San Pedro Sula. This does not comply with the 15-day period established by the protocol as the time frame necessary to conduct an individual assessment of the family situation. Under these circumstances, it is very difficult for IHNFA to investigate the children's family situations.

### 1. Repatriated migrant children and adolescents with disabilities

Migrant children and adolescents who become disabled due to accidents suffered on the migrant trail and then are deported face particularly complex repatriation issues. In addition to the problems faced by all migrant children and adolescents, they also now have to contend with a disability. The failure of a child's plan to migrate, in and of itself, can have traumatic effects on children and adolescents, and these are exacerbated by the disability. The failure of the migration plan can be particularly devastating in cases where children left the country for reasons linked to violence, family reunification, and other serious human rights violations. Second, new obstacles and problems arise for the children to face in their country of origin as a result of the disability, and these problems affect their community, educational, family, emotional, or labor integration, depending on their ages.

Even without knowing exact figures, it is clear that numerous children and adolescents experience disabling accidents on their North-bound trek. In this context of lack of public policies to serve this particularly vulnerable population, some initiatives offer support, such as the work of the International Committee of the Red Cross (*Comité Internacional de la Cruz Roja* or CICR).<sup>63</sup>

The CIRC's work in support of individuals who have suffered amputation or other severe injuries on the migrant trail begins with the organization of humanitarian chains for victims and their families, with the support of the National Commission of Support for Returned Migrants with Disabilities (*Comisión Nacional de Apoyo al Migrante Retornado con Discapacidad* or CONAMIREDIS), the Center for Attention to the Returned Migrant (*Centro de Atención al Migrante Retornado* or CAMR), and the Honduran Red Cross in the most severe cases. Among their programs is the pilot project MEI,<sup>64</sup> which supports repatriated individuals in their social

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<sup>63</sup> This information was obtained from two focus groups held in June of 2014 at the office of National Forum for Migrations in Honduras (FONAMIH). In these focus groups there was participation by relatives of migrants and migrants with disabilities organized in the Committees of Relatives of Migrants (*Comités de Familiares de Migrantes*) from Colomoncagua, El Progreso, Choluteca, Goascorán, Cedros, Talanga, San Ignacio, Vallecillos, and El Porvenir, which are all part of FONAMIH.

<sup>64</sup> MEI Project (*Proyecto MEI*): Microeconomic initiatives for severely amputated and injured persons. See <https://www.icrc.org/en/download/file/3669/mexico-rd-icrc-january-august-2014-english.pdf>.

reintegration, in seeking work opportunities, and in finding adaptive equipment such as prostheses in cases of amputations, among other services. The MEI project contributes to the social and economic reintegration of a large number of persons who have endured amputation or severe injury.

Later, CONAMIREDIS provides monitoring, connecting people with disabilities to three centers that offer physical rehabilitation and fit prostheses. The CICR has signed collaboration agreements with Teletón (San Pedro Sula), Fundación Vida Nueva (Choluteca), and San Felipe Hospital (Tegucigalpa). In these centers, repatriated migrants receive prostheses and learn to walk again through physical rehabilitation.

While these programs provide important support, these cases exemplify the high level of vulnerability faced by children and adolescents in search of a life with full rights. The depth of the causes of migrations, the restrictions on regular movement and the difficulty of obtaining asylum through international protection, as well as the growth of different forms of violence in the region, lead to the many dangers that cause disabling accidents. For these migrants, in addition to needing appropriate services related to their migration status, they also need medical, educational, social, and employment services to protect their rights.

## *2. The situation of other categories of children and adolescents in the Honduran migration context*

This section addresses two situations linked to other categories of children and adolescents whose rights are affected by migration. First, we discuss Honduran children whose parents have migrated to the United States. We analyze their circumstances from a human rights perspective, including the rights to education, healthcare, and protection of life, emphasizing the levels of violence and insecurity that these children and adolescents experience.

Next, we briefly analyze Honduras's treatment of foreign children and adolescents who migrate to Honduras, whether in transit or as a destination country. Although the phenomenon of migrant children in Honduras is almost unknown, due in part to limited information and quantitative data available, it is important to acknowledge this category of children and adolescents as part of the regional migration phenomenon.

## *3. Honduran children whose parents have migrated*

There is no doubt that the migration of one or both parents has serious emotional, psychological, and socio-economic repercussions in a child's life, including effects on the protection of his or her life and physical integrity.

Children and adolescents whose parents have migrated suffer the same structural deprivations and limitations that affect the large majority of Honduran children with respect to access to rights. These deprivations frequently lead parents, families, or children to migrate unaccompanied to another country. Family separation caused by migration significantly affects children. The impact of family separation on a child becomes more complex and serious as time passes and can be affected by changing migration policies related to family reunification.

The Honduran legal framework, especially the Constitution, ratified international treaties, and several other laws, grant all children fundamental rights in accordance with the Convention on the Rights of the Child. As current data show, a significant percentage of Honduran children have been deprived of these rights or must exercise them in precarious, uneven, irregular, discriminatory, and fragmented conditions. In the context of these limitations, the children and adolescents whose parents have migrated experience unique difficulties.

For example, with regard to the right to education, relatives of migrants affirm that in their communities, children have problems accessing education when the family members with whom they are left in the absence of parents lack resources. Children and adolescents do not have their own economic means to study, and if family members can't provide these means, they are excluded from education. However, children whose parents have lived abroad for many years and have obtained regular migration status may have greater access to education than other children in their communities because their parents may have the income to pay for private schools in their communities of origin, or to invest more in their children's education. Children whose parents are recent migrants, however, tend to be in the most precarious position with respect to education, because of their parents' tenuous economic and migration status. These children typically cannot even access public education in their communities.

Relatives who are left in charge of children and adolescents whose parents have migrated lack motivation to ensure the children's education. This is clear from the little attention they pay to the children's homework, either because they work or have problems at home. As a result, even children (whose parents have migrated) who do manage to access public education do not have the necessary support from their families to succeed in school, and thus are denied their right to development under the CRC.

Access to healthcare for children and adolescents whose parents have migrated does not differ much from the healthcare reality experienced in a large part of the country. However, the system fails to address aspects of the psycho-emotional health of children whose parents have migrated due to the lack of specific programs that focus on these situations. Similarly, as is the case with education, in the absence of parents, the children's access to healthcare can be affected negatively if the adults in charge do not substitute adequately for the parents' duties.

Teenage pregnancies are a national problem in Honduras, and the communities we studied are no exception. Relatives of migrants affirm that in their communities, girls get pregnant at an early age, as young as 11 years old in some cases. They state that this occurs more frequently in rural areas, because of ignorance about family planning methods, rape and sexual abuse, lack of support from parents, and poverty, among other factors. These testimonies are consistent with figures about the high levels of intrafamilial violence, including sexual abuse, suffered by Honduran children and adolescents.

Abuses against young and adolescent girls by gang members, who force them in some cases to provide sexual services or favors, can especially affect children without parental care (or protection). Similar observations can be made about children and adolescents who are victims of violence or intrafamilial abuse at the hands of adults who are left in charge of caring for them,

such as relatives or neighbors, or even by the parent who did not migrate. According to the families of migrants, the main forms of violence affecting children and adolescents include physical, sexual, and psychological aggression, as well as harassment at school.

*4. Migrant children in transit in Honduras*

As a part of the Central American region, Honduras is also a transit country for migrants from both within the region and from South American countries, and even from other continents. According to information provided by the Office for Coordination of Migrant Children at the IHNFA, between 2013 and 2014, 21 children and adolescents from other nationalities were detained while in transit in Honduras. Of them, 10 were Nicaraguan, 9 Salvadoran, and 2 Ecuadoran. Their ages ranged from 2 to 17. Of 21 children, 12 were male and 9 female.

Year 2013

DATE OF ARRIVAL	M	F	SCHOOL LEVEL (U.S. equivalent)	AGE	COUNTRY OF ORIGIN
18/01/2013	X		2 <sup>nd</sup> Grade	8	Ecuador
7/03/2013	X		None	16	Nicaragua
7/03/2013	X		6 <sup>th</sup> Grade	14	Nicaragua
7/03/2013		X	6 <sup>th</sup> Grade	17	Nicaragua
22/10/2013	X		9 <sup>th</sup> Grade	15	Ecuador

Year 2014

DATE OF ARRIVAL	M	F	SCHOOL LEVEL (U.S. equivalent)	AGE	COUNTRY OF ORIGIN
26/03/2014	X		None	16	Nicaragua
26/03/2014	X		9 <sup>th</sup> Grade	16	Nicaragua
26/03/2014	X		4 <sup>th</sup> Grade	16	Nicaragua
26/03/2014		X	9 <sup>th</sup> Grade	15	Nicaragua
26/03/2014		X	2 <sup>nd</sup> Grade	8	Nicaragua
26/03/2014		X	6 <sup>th</sup> Grade	13	Nicaragua
26/03/2014		X	8 <sup>th</sup> Grade	17	Nicaragua
10/06/2014		X	None	2	El Salvador
10/06/2014	X		5 <sup>th</sup> Grade	11	El Salvador
10/6/2014	X		Finished 9 <sup>th</sup> grade	17	El Salvador
10/6/2014	X		8 <sup>th</sup> Grade	14	El Salvador
10/6/2014	X		7 <sup>th</sup> Grade	13	El Salvador
10/6/2014		X	10 <sup>th</sup> Grade	17	El Salvador
10/6/2014		X	1 <sup>st</sup> Grade	7	El Salvador
10/6/2014		X	5 <sup>th</sup> Grade	12	El Salvador
10/6/2014	X		7 <sup>th</sup> Grade	16	El Salvador

The authorities<sup>65</sup> claim that IHNFA provides these children and adolescents (migrating from other countries to or through Honduras) with safe and adequate care based on its responsibilities. To this end, the IHNFA operates the “La Misericordia de Dios” shelter for migrant children, located at the IHNFA’s Kennedy Complex. This center provides children with food, medical and psychological attention, legal advice, and protection inside the shelter.

When the shelter receives a child or adolescent, the staff take measures to confirm his or her nationality and to learn why he or she left his or her country of origin. Once coordination is established between the relevant agencies in the country of origin, the shelter contacts the consulate of the child or adolescent’s country. The consulate verifies that the information about the child is correct and obtains all necessary documentation, in order to ensure the child’s safe return.

While all necessary procedures are carried out, the child remains at the “La Misericordia de Dios” shelter. There is no evidence that the shelter provides any kind of legal assistance or a guardian to protect the child’s rights and make sure all decisions made are in the child’s best interests. The day of the child’s scheduled repatriation, the child is transferred from the shelter by IHNFA personnel and the child’s country’s consul to the facilities of the office of Migration and Foreign Nationals (*Migración y Extranjería*), where the child or adolescent’s exit from the country is processed. Once the child or adolescent is delivered to *Migración y Extranjería*, this entity has custody.

The phenomenon of children and adolescents migrating to or through Honduras is of little quantitative relevance, especially in light of the far higher number of Honduran children and adolescents who migrate northward. However, given the antiquated nature of the Honduran laws on migration, the protection of foreign children in transit in the country lacks an adequate legal framework. Also missing is any procedure to determine the children’s best interests or any mechanism to ensure the protection of their rights and guarantees when they are repatriated to their countries.

## **VI. Conclusions**

This analysis of the situation of children in the context of migration in Honduras reveals several serious structural problems that affect the most basic rights of thousands of children and adolescents.

This scenario is determined, in the first place, by the reasons children, families, and adults migrate. The lack of essential rights, such as the right to life, physical integrity, development, health, education, and family life, among others, is a growing danger for a significant percentage of the Honduran population. Lack of protection for basic rights has been gradually aggravated by widespread and diverse forms of violence to which children and adolescents are particularly vulnerable. Available statistics and other information indicate serious shortcomings in the public policies that should ensure the right to comprehensive human development free from violence for all children, as well as the guarantee of their right to family.

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<sup>65</sup> These statements were made by the Coordinator for Migrant Children at the IHNFA.

We also conclude that Honduras lacks a migration policy adequate for the country's migration reality as well as for the human rights commitments that the Honduran State has assumed. The gap between the laws, policies, and the reality includes the absence of programs addressing migrant children and adolescents, and the children of migrants. This results in, among other things, procedures that are insufficient to ensure minimum standards of care necessary for this segment of the population.

The IHNFA's role in protecting migrant children is limited to its reception of deported children and adolescents and their return to their families. There is no real protection for these children, and there are no investigations of family to evaluate whether repatriation is appropriate. There is also uncertainty regarding the new institutional framework, which lacks clarity about DINAF's role with regard to caring for migrant children. It is necessary to provide government agencies with all human, technical, and financial resources to carry out these tasks in order to ensure that children and adolescents can exercise the rights established for them in the legal framework, including international treaties.

In addition to the deficiencies and inadequacies of the norms and procedures to protect the rights of migrant children, another set of problems derives from the lack of adequate funding for State institutions. For example, the protocol for the protection of repatriated children and adolescents does not allocate funding that corresponds to the procedures it establishes. As a result, the agencies in charge of implementing these procedures perceive the protocol as a strictly theoretical tool that is impossible to implement in practice.

The reception of deported children and adolescents by land at the Corinto border crossing does not take place under appropriate conditions to ensure the children's protection and safety. As a result, some children and adolescents immediately undertake the trip north again. The interviews with deported children and adolescents are not conducted under adequate conditions for their privacy, which makes it difficult for them to calmly answer the questions asked by the IHNFA staff. Additionally, the interview format does not include questions to identify children who have been victims of trafficking.

There are serious deficiencies regarding the treatment and protection of children and adolescents under IHNFA custody while they are waiting to be claimed by their families. The conditions at the temporary shelter are far from adequate. The children receive some kind of healthcare and psychological attention, but given the growing demand for these services, they are limited. In practice, the procedures for "release" of children and adolescents to their relatives are more of a requirement to fulfill than a true interest in promoting the reunification of children with their families, much less a process of reintegration into the family.

The most worrisome problem is the lack of policies and mechanisms to guarantee true reintegration from a rights perspective and to ensure a dignified, violence-free life for the children to exercise their right to develop. Children and adolescents who return with a disability due to an accident on the migration route face even greater obstacles, despite the work of humanitarian agencies.

The testimonies of the children and adolescents themselves and of the institutions that serve them during their migratory journey (*Casas de Atención al Migrante*), as well as reports from organizations that have been working on migration issues for years contain much criticism of the passive role assigned to Honduran consular authorities. Deported children and adolescents, as well as authorities such as DIF and civil society organizations in charge of providing humanitarian support and human rights assistance to children and youths share the view that consular support is deficient. Honduran consular officials in Tapachula fail to defend the rights of children and adolescents in the migration process—when they are detected and taken into custody, during their detention (both short and long term), and with regards to their deportation. The consulates' role is limited to bureaucratic management of the repatriation process following issuance of a repatriation order (frequently in the form of a deportation order) by Mexico or the United States, rather than taking actions that protect the rights of children and adolescents.

Finally, we have briefly analyzed the lack of policies aimed at the comprehensive attention to those children and adolescents whose parents have migrated. Although these children face rights violations that are no different from the general conditions of poverty, social exclusion, and violence in the country, the absence of their parents places them in heightened conditions of vulnerability that need to be taken into account in public policies regarding children and adolescents. In addition, practices regarding foreign children and adolescents in transit or residing in Honduras need to be revised in order to conform to the country's obligations, such as the obligation not to detain children and implementation of the principle of the children's best interests, as a guide for decisions and procedures that affect these populations.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 3 Guatemala

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Asociación Pop No'j

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### **I. Introduction**

The migration of Guatemalan children and adolescents is determined by a combination of sociopolitical, economic, cultural, family, and climatic events. Especially significant among these is the fact that the vast majority of children and adolescents who emigrate from the country have experienced violations of their human rights. Rights violations occur particularly in circumstances of extreme poverty, discrimination (ethnic, gender, and other), and violence, a combination that increases forced migration precisely because of the deprivation of basic rights.

Efforts to address the issues faced by children and adolescents affected by their or their parents' migration are relatively recent in Guatemala. While there have been several academic investigations, articles, and publications that address the subject, the majority of these studies focus on the population of children accompanying their parents. Only in recent years have specific and thorough analyses of the dynamics of child migration been undertaken with regard to points in time of their journey: apprehension, detention, and return (voluntary or forced). However, these analyses pay limited attention to the impact of migration on the rights and living conditions of children and adolescents, including on children whose parents have migrated.

This chapter describes the reality in Guatemala for children and adolescents affected by migration, especially regarding violations of their rights. We pay special attention to unaccompanied Guatemalan migrant children and adolescents, and we base our conclusions on the testimony of those who have traveled with Mexico and the United States as their main destinations, but who were then detained and returned to Guatemala. We devote a special discussion to the situation of unaccompanied indigenous children and adolescents. In a context of racism and discrimination, the fact of being indigenous makes them particularly vulnerable and poses barriers to gaining access to care and protection from State institutions.

This chapter also discusses the impact of adult migration, especially of parents, on the sons and daughters who remain behind in the care of other family members and neighbors in the community. What happens to these children and adolescents sheds light on community dynamics and the local support systems that have emerged and developed.

Finally, this chapter addresses what little is known about the situation of migrant children and adolescents in Guatemala, either as a transit or destination country.

## II. Methodology

We approached this study first by reviewing the Guatemalan legislative framework on migration, as well as laws related to children in Guatemala more generally, and the State institutions whose mandate and competence is to attend to and protect children and adolescents. We also used secondary sources, including specialized literature, United Nations and Inter-American System reports, and reports by key Guatemalan institutions such as the Human Rights Ombudsman's Office.

This qualitative methodology also included in-depth interviews with children and adolescents, their family members, and other adults related to their migration process. These enabled us to: (1) describe the migration of unaccompanied Guatemalan children and adolescents; (2) to understand the triggers and main causes leading to the migration of unaccompanied children and adolescents; (3) to identify risk situations faced by Guatemalan children and adolescents on the migration route; (4) to identify changes caused by international migration, especially in indigenous communities; (5) to determine the situation of children who have fathers or mothers in the United States or Mexico; and (6) to analyze State responses to child migration.

To achieve these objectives, we interviewed children and adolescents who had been deported by air or land from Mexico or the United States at reception centers for deported children, as well as in the children's communities of origin. The age range of the interviewees was between 12 and 17, although some interviews were conducted with young people over the age of 18 who had emigrated when they were under 18. Interviews were conducted in November and December of 2013.

We interviewed 20 children and adolescents at Our Roots Shelters (*Casa Nuestras Raíces*) in Guatemala City and in Quetzaltenango. The *Nuestras Raíces* shelter in Quetzaltenango attends to children deported by land from Southern Mexico, whereas the shelter in Guatemala City cares for children and adolescents deported by air from the United States and Northern Mexico. Eighteen of the children and adolescents interviewed were boys and 2 were girls; 11 were indigenous Mayans and 9 were of mixed ethnicity.

We also interviewed 27 indigenous children and adolescents in their rural communities of origin, including Colotenango, Huehuetenango, and Concepción Chiquirichapa (Quetzaltenango). Most of these children come from the Mam Maya linguistic community. To complement this information, we also interviewed 8 relatives of the children and adolescents in these same towns, as well as other adults who knew of the children's decisions to migrate and of their subsequent journeys.

During the in-depth interviews, we posed questions about the children's and adolescents' opinions and perceptions related to their migration, treating them as important social actors. We tried to understand their motivations, their participation in the decision to travel or remain in the country, and their experience throughout the process. We were then able to analyze the way in which children and adolescents experience migration, the factors that determine and shape their understanding, and their points of view.

Prior to conducting the interviews, we created a methodological instrument that took into account the target population and determined the location of interviews. Researchers conducted all interviews in accordance with the human subjects protections set by the Western Institutional Review Board (WIRB), the ethics board that reviewed and approved this study for the University of California Hastings College of the Law.

Second, we coordinated implementation of the interviews in the field. The interviews were planned to take place over a two-month period in each of the *Nuestras Raíces* shelters—which are under the auspices of the Secretariat of Social Welfare (*la Secretaría de Bienestar Social* or SBS)—and in the communities of origin. We also obtained the required institutional permits.

Third, we conducted the interviews at selected locations during the months of November and December 2013. We read the informed consent form for child and adolescent interviewees orally and described in simple terms the objectives of the interview, explaining that participation would be anonymous. We conducted interviews in the *Nuestras Raíces* shelters in the presence of staff from the institution (a psychologist and/or social worker).

Selecting the locations and centers for the interviews was critical. The *Nuestras Raíces* shelters use similar procedures for the protection and security of unaccompanied children and adolescents; however, these children and adolescents come from different places and follow different repatriation routes (by land through Southern Mexico and by air from Northern Mexico and the United States). We took these differences into account in analyzing the impact of the deportation process on the children and adolescents, and thus understood it to be critical to diversify the interview venues.

One limitation for conducting interviews in the *Nuestras Raíces* shelters was the short amount of time available. This was due to several factors, including the fact that the unaccompanied children and adolescents were tired because of their long repatriation journey or the relatively lengthy process for transferring them to their families (see section 7.c on procedure). We overcame this challenge by coordinating with personnel from the different shelters (psychologists and social workers) so that we could complement the interviews with information contained in the SBS databases.<sup>1</sup> In doing this, we were able to avoid re-victimizing our interviewees by acquiring personal data through other sources. In addition, this procedure gave us more time to inquire about other matters during the interviews.

### **III. Situation in Guatemala: causes of child and adolescent migration**

#### *A. Social and political context*

A diversity of events has caused Guatemalan migration to permeate the country's national and social reality. Significant events include: the internal armed conflict (1960-1996); a neoliberal

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<sup>1</sup> It is significant that despite the large number of indigenous children and adolescents who do not speak Spanish, neither the SBS nor the Office of the Procurator General of the Nation (PGN) use interpreters during interviews to determine whether they can or should be returned to their families. In SBS centers where psychosocial services are provided, there is no interpretation into indigenous languages. Moreover, the process undertaken by the PGN is very superficial and short, and not well designed to identify whether a child is at risk.

economic system that has furthered social exclusion and poverty—including extreme poverty; diverse and growing forms of violence; and climatic events. These factors have had a direct impact on the country and its inhabitants.

Sociopolitical, economic, and climatic events are intrinsically linked, complementing and reinforcing each other and affecting migration patterns. In fact, much evidence links social exclusion (or marginalization) and forms of violence, as well as poverty and the aftermath of climatic events; and explains the specific and aggravated influence of these events on certain population groups—particularly children and adolescents, women, and indigenous peoples.

*Sociopolitical events* develop at the heart of Guatemalan politics, including regional and bilateral political processes. In particular, growing forms of violence, the internal armed conflict, and the lack of protection of children's rights have all had a significant effect on migration patterns. These events have arisen as a result of power struggles related to public policy priorities, or the interests of the most influential social and political actors in the country and region (of Central and North America), including criminal actors.

Recently, fights between gangs, drug traffickers, and organized crime, including highly organized crime and kidnapping groups that occasionally contain members of the National Civil Police, have erupted in efforts to gain control of trafficking routes and/or drug sales. These struggles have occurred in the absence of any public policies to control or eliminate these situations, and organized violence has killed or forced the migration of adolescents who are persecuted by gangs for not wanting to join their organizations. At the same time, there has been an increase in other forms of violence such as violence against women—including femicides/feminicides and increased sexual abuse of women, particularly girls and young women—ethnic discrimination, social exclusion, land appropriation and forced displacement, and the widespread deterioration of basic social services.

The internal armed conflict that began in 1960 and concluded with the signing of the Peace Accords on December 29, 1996 strongly affected migration in Guatemala. During that 36-year period, people migrated to escape the intense armed and ideological struggle. Peasants and indigenous people, intellectuals and artists, and other groups whose lives were endangered were forced to flee, with regular or irregular status, to neighboring countries, especially Mexico and the United States. According to Rodríguez de Ita,<sup>2</sup> three peak migration periods in Guatemala result from the internal armed conflict: the first took place when Jacobo Arbenz Guzmán's government was overturned; the second occurred during the counterrevolutionary government of Carlos Castillo Armas; and the third was during the counterinsurgency governments of General Romeo Lucas García and General Efraín Ríos Montt.

Added to these events, children and adolescents face obstacles regarding the protection of their civil, economic, social, and cultural rights. As we discuss in the section on legislation and institutional frameworks, Guatemala has ratified the major human rights treaties and enacted legislation that provides for the adequate and comprehensive protection of children; however, institutional responses have not protected children and adolescents from being deprived of

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<sup>2</sup> Rodríguez de Ita, G. (2013). La patria. . . en y desde el exilio en México. In V. Álvarez Aragón, C. Figueroa Ibarra, A. Taracena Arriola, S. Tischler Visquerra, E. Urrutia Garcia (Eds.), *Guatemala: Historia Reciente (1954-1996)* (pp. 339-373). Guatemala: Editorial de Ciencias Sociales.

certain social rights such as guarantees of an adequate standard of living, nor have they been protected from an increase in the levels and types of violence.

*Economic events*, structurally related to *political* factors, are those tied to increases or decreases in foreign currency in the country. These events have involved signing agreements, conventions, and/or treaties between countries that affect regional markets. These events have a direct impact on the country's economy, affecting the living conditions of its inhabitants.

Dardón Sosa,<sup>3</sup> Academic Coordinator of the Central American Institute for Social and Development Studies, indicates that in the 1980s, the national economy suffered a massive flight of capital and a sharp drop in private investment. He ascribes this to trade openness, deregulation of financial markets and services, and a macroeconomic policy that focused solely on controlling the growth of inflation. On the heels of the challenges of the 1980s, Guatemala's economy suffered great loss as a result of the "coffee crisis" that occurred in the early 2000s. Prior to the "crisis," Guatemala and other Central American countries exported coffee at a profit to coffee growers. Over time, however, the coffee market became flooded with significantly more coffee being sold than consumed. This drove down the price of coffee beans and forced growers to sell to large corporations in order to remain in business.<sup>4</sup> Large corporations such as Kraft Foods began buying coffee beans at a low cost and in bulk from growers in Central America and Mexico, and processing and selling the coffee at a profit to the corporation. As this was happening, growers received far less money for coffee per pound than they previously had and thousands lost their jobs.<sup>5</sup> The coffee crisis led many Guatemalans to migrate to Southern Mexico and the United States as an economic and livelihood alternative.

*Climatic events* are environmental disturbances that alter the infrastructure in rural areas of the country and harm the quality of land and access to basic services, thus causing high human and material losses. Some of these events have been associated with anthropomorphic "climate change."<sup>6</sup>

Recent natural events that have had tragic effects on Guatemalan migration include Hurricane Stan (2005), the 2009 drought, Tropical Storm Agatha (2010), and the earthquake in San Marcos (2012). These climate disasters are related to political, social, and economic factors in that they have principally affected regions where the population is mainly indigenous, with high rates of

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<sup>3</sup> Dardón Sosa, J. J. (2005, noviembre). Pobreza, migración internacional y regiones excluidas. *Cuadernos de Guatemala*, 10 & 11, p. 1-28. Retrieved from

[http://www.aapguatemala.org/03\\_publicacions/cuadernos/descarrega/10Pobreza%20y%20migracion.pdf](http://www.aapguatemala.org/03_publicacions/cuadernos/descarrega/10Pobreza%20y%20migracion.pdf).

<sup>4</sup> In 1997 coffee sold for \$3.15 U.S. per pound on the New York stock exchange; by 2002 coffee sold for only \$0.50 per pound on the same. See Fritsch, Peter. (2002, July 8). An Oversupply of Coffee Beans Deepens Latin America's Woes. *Wall Street Journal*. Retrieved from <http://www.wsj.com/articles/SB1026078773964234000>.

<sup>5</sup> The World Bank estimated that about 600,000 coffee workers lost their work in 2001 and 2002. In Guatemala, 6,000 children of unemployed coffee workers were at risk of starvation. See Fritsch, Peter. (2002, July 8). An Oversupply of Coffee Beans Deepens Latin America's Woes. *Wall Street Journal*. Retrieved from <http://www.wsj.com/articles/SB1026078773964234000>.

<sup>6</sup> Climate change is understood as: "a substantive change in climate patterns and parameters as a result of variations in natural factors and human influence, specifically through emissions of greenhouse gases such as carbon dioxide and methane; the effect of the urban heat island, changes in rural land use patterns, and deforestation." Dionisio, S.L. & Ibarra, G. (2013, March). *El tiempo está envejeciendo: respuestas locales frente al cambio climático en una comunidad de retornados en Guatemala*, p. 44. Guatemala: FLASCO.

poverty and social exclusion, and where the food supply is predominantly based on agricultural production. These events have caused devastation and death, and have rendered hundreds of people homeless, leading to what has been called “environmental migration.”<sup>7</sup>

Climate change and environmental migration<sup>8</sup> are interrelated in Guatemala and Central America. It is significant that “Guatemala has been regarded as the second most vulnerable country to climate change in the world based on disasters that have occurred in the last fifteen years,”<sup>9</sup> which has led to an increase in environmental migration.<sup>10</sup>

### *B. Reasons Guatemalan children and adolescents migrate*

In recent years, Guatemala has experienced a considerable increase in the number of children and adolescents who migrate, including those who are unaccompanied.

Migration occurs because of a combination of structural factors that are not always easy to identify and understand. As Girón Solórzano has pointed out, the dynamics and context of migration causes may change from one period to another, and there may even be unexpected events that define migration patterns.<sup>11</sup>

Many reasons underpin children’s decisions to migrate, whether accompanied or not, and with or without the consent of their parents or legal guardians. Children may be motivated by the need to provide financial support for their families, by social or economic insecurity, or by violence in many forms (extortions, threats, gang recruitment, intrafamilial violence), and some may seek to reunify with family members.<sup>12</sup> These causal factors are interlinked and inseparable in a large and growing number of cases, and derive specifically from a series of recent political, economic, social, and even climatic events, not only in Guatemala but throughout Central and North America.

<sup>7</sup> This list should also consider the effects of El Niño in 2014, drought being one of the most significant consequences.

<sup>8</sup> An environmental migrant is understood to be: “any person who leaves his country of habitual residence mainly or very significantly due to environmental impacts, whether gradual or sudden, whether moving within a State or across international borders (including refugees and internally displaced persons).” Castillo, J. (2011, January). *Migraciones Ambientales: Huyendo de la crisis ecológica en el siglo XXI*, p. 16. Retrieved from <http://www.viruseditorial.net/pdf/migraciones%20ambientales.pdf>.

<sup>9</sup> Dionisio, S.L. & Ibarra, G., *El tiempo está envejeciendo*, p. 17.

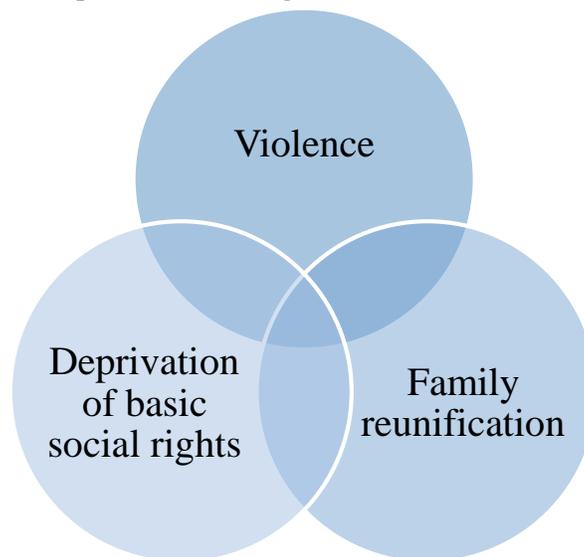
<sup>10</sup> According to Vega García, environmental migration is a result of the inter-relation of three types of factors: (1) factors related to potential environmental migration which define a greater possibility of the occurrence of population movement because of an environmental situation; (2) trigger factors that could result in environmental migration; and (3) attenuating factors that result in environmental migration not occurring or being reduced. Vega García, H. (2011), *Centroamérica: un territorio vulnerable con sociedades frágiles: Reflexiones sobre el cambio climático y su relación con el desplazamiento humano. ÍSTMICA*, 14, pp. 69-88. Retrieved from <http://www.revistas.una.ac.cr/index.php/istmica/article/view/5332>.

<sup>11</sup> Girón Solórzano, C. L. (Ed.). (2014, March). Actualización: Diagnostico Nacional Sobre la Situacion de Niños, Niñas y Adolescentes Migrantes no Acompañados, en el Proceso Migratorio, p. 17. Retrieved from <http://www.movilidadhumana.com/wp-content/uploads/2014/08/revista-actualizacion-pmh.pdf>.

<sup>12</sup> Girón Solórzano, C. L. (Ed.) (2014, March). Actualización: Diagnostico Nacional Sobre la Situacion de Niños, Niñas y Adolescentes Migrantes no Acompañados, en el Proceso Migratorio (hereinafter “Actualización”), p. 17. Retrieved from <http://www.movilidadhumana.com/wp-content/uploads/2014/08/revista-actualizacion-pmh.pdf>.

The most important destinations for Guatemalan child and adolescent migrants are Mexico and the United States. However, the magnitude of this movement has been very difficult to establish and characterize because most of the children and adolescents have been forced to make the journey illegally, even though they may have migrated to seek reunification with one or both parents in the destination country. Statistics on apprehension and deportation reported by immigration enforcement agencies provide an indirect assessment showing not only that migration has not stopped, but also that it has intensified over time.<sup>13</sup> In 2011, for example, Mexico deported 1,935 Guatemalan children and adolescents; 1,301 of them were unaccompanied.<sup>14</sup> In 2014—just three years later—Mexico deported 7,973 Guatemalan children and adolescents.<sup>15</sup>

Using information from interviews and other sources described in our methodology section, we analyze the causes that prompt children and adolescents to migrate. We base our analysis on accounts and experiences of children we interviewed, information provided by key actors, and relevant literature (official reports, international agencies, academics, and others with experience in the subject). We conclude that there are three main intersecting causes of the migration of children and adolescents, as depicted in the diagram below:



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<sup>13</sup> While these figures represent apprehensions and deportations, they are likely related to the increased volume of migrants crossing the Guatemala–Mexico border in order to reach Mexico or the United States. While these figures could be explained by some degree of greater effectiveness in the control, detention, and deportation of undocumented migrants, they may also be used to indirectly determine the upward trend in the number of migrants. Statistics on the number of children apprehended by the U.S. Customs and Border Protection agency (CBP) also show an increase in Guatemalan children and adolescents attempting to migrate north in recent years. According to CBP the agency apprehended 1,115 Guatemalan unaccompanied children in fiscal year 2009, 1,517 in 2010, 1,565 in 2011, 3,835 in 2012, 8,068 in 2013, and 17,057 in 2014. See U.S. Customs and Border Protection. Southwest Border Unaccompanied Alien Children. Retrieved from <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>; see also chapter 1 by UNHCR.

<sup>14</sup> OIM. (2013, January). *Niños, Niñas y Adolescentes Migrantes América Central y México*, p. 17. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

<sup>15</sup> Lakhani, Nina. (2015, February 4). Mexico departs record numbers of women and children in US-driven effort. *The Guardian*. Retrieved from <http://www.theguardian.com/world/2015/feb/04/mexico-deports-record-numbers-women-children-central-america>.

The relative importance of each cause is difficult to determine because different studies reach varying conclusions about the causes of migration, likely due in part to *when* the studies were carried out.<sup>16</sup> While earlier studies tended to find that Guatemalan children migrated more for economic reasons and for family reunification than to escape violence, recent studies have recognized that a more nuanced range of factors cause children to migrate. These studies find that by 2014 violence is a significant driver of children’s migration from Guatemala.

According to a survey conducted in 2010, the main causes for the emigration of persons under 17 years of age were improving economic conditions (43%), securing employment (39%), achieving family reunification (11.7%), and fleeing violence (1.4%).<sup>17</sup> These four causes were found to account for 95.1% of emigration in this age group in Guatemala at that time.

Another study, by UNICEF (2011), indicates that 51.7% of Guatemalans who leave the country consider migration as an opportunity to improve and increase their income. The study revealed that 37.2% leave the country in search of better employment opportunities, and 1.6% of people emigrate to save or send back money to build a house.

Furthermore, the International Organization for Migration (IOM) Migration Profile for Guatemala,<sup>18</sup> which is based on the 2010 survey cited above, found that 51.7% of migrants emigrated in order to improve their economic conditions. According to these statistics, 1.6% left Guatemala for family reasons, while 0.6% did so for reasons of widespread violence or because their personal integrity (safety) was at risk. Meanwhile, a 2013 study conducted by IOM indicates that the search for better living conditions and the possibility to join family members who have left were the main motivations for migrating from the perspective of child and adolescent returnees in Guatemala.<sup>19</sup>

By 2014, studies concluded that violence is a significant driver of children’s migration from Central America to the south, as well as to Mexico and the United States. The United Nations High Commissioner for Refugees (UNHCR) 2014 study, the abridged version of which forms chapter 1 of this book, determined that 38 of 100 Guatemalan children interviewed expressed the need for international protection from intrafamilial abuse and societal violence—by gangs or

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<sup>16</sup> The UNHCR study notes that in 2006 only 13% of unaccompanied children migrants interviewed by UNHCR on the Mexico-Guatemala border indicated a need for international protection; this equates to 11 of the 75 children in the report sample. The vast majority of these children stated that the reason for migrating was to become reunited with their family members or to seek better opportunities, such as access to education and employment. In contrast, of the 404 children interviewed for the study conducted in 2013, over half (53%) of those who mentioned the objectives of family reunification, schooling or better opportunities in general, also referred to reasons related to the prevalence of intrafamilial abuse and violence committed by armed criminals. For further information, see UNHCR. (2014). *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (hereinafter “Children on the Run”), p. 24. Retrieved from [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf).

<sup>17</sup> Organización Internacional para las Migraciones (“OIM”). (2010). *Niños, niñas y adolescentes migrantes no acompañados. La experiencia del viaje y el retorno*. Sin publicar.

<sup>18</sup> OIM. (2013, June). *Perfil Migratorio de Guatemala 2012*, p. 201. Retrieved from [http://costarica.iom.int/public/pdf/Perfil\\_Migratorio\\_Guatemala\\_2012.pdf](http://costarica.iom.int/public/pdf/Perfil_Migratorio_Guatemala_2012.pdf).

<sup>19</sup> OIM. (2013, January). *Niños, Niñas y Adolescentes Migrantes América Central y México*, p. 26. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

other organized crime. According to the UNHCR report, 62 of the children did not mention the existence of serious harm as a reason to flee, while 84 of the children expressed the hope that they would be reunited with their families and/or would find better work or study opportunities as reasons for going to the United States.

Another 2014 report indicates that the main reasons for emigrating from Guatemala are violence, lack of opportunities, and family reunification, in that order.<sup>20</sup> Similarly, an investigation conducted by Elizabeth Kennedy finds that while family reunification, poverty, and lack of opportunity are common considerations in the decisions of children and adolescents to emigrate, the most common reason for the Central American exodus has been and continues to be gangs and violence that affect young people disproportionately.<sup>21</sup>

The differences between the 2010 and 2011 studies and the more recent ones can likely be explained through Cantor's analysis<sup>22</sup> based on interviews conducted from 2012–2014 that revealed that violence has become the most important reason for migration. Additionally, violence is often concealed because it is committed by close members of the family, which can explain its lesser reported occurrence in earlier studies. Because of fear and shame, children and adolescents avoid talking about intrafamilial violence and refrain from reporting it; they also lack knowledge about where to report their experiences, and distrust the authorities.<sup>23</sup>

We discuss the three main causes of child and adolescent migration separately in order to facilitate interpretation and understanding. However, these factors are intrinsically and structurally related, and have complementary impact on the majority of decisions to migrate. Additionally, these three causes are of course also aggravated by structural discrimination for reasons of ethnicity and gender, widespread impunity, and weak democratic mechanisms.

### *1. Poverty and the search for dignified living conditions*

Poverty is closely related to inequality, associated with scarcity and deprivation. Thus, poverty produces systematic limitations for individuals to exercise their freedom to achieve self-realization. Furthermore, many factors worsen this situation, such as the absence of State institutions and lack of access to justice, health services, and education.<sup>24</sup>

Guatemala has one of the highest levels of inequality in the world. According to the 2011 National Survey of Living Conditions,<sup>25</sup> 53.7% of the population lives in poverty, while 13.3%

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<sup>20</sup> Orozco, M., & Yansura, J. (2014, August). Understanding Central American Migration: The crisis of Central American child migrants in context. Retrieved from [http://www.thedialogue.org/PublicationFiles/FinalDraft\\_ChildMigrants\\_81314.pdf](http://www.thedialogue.org/PublicationFiles/FinalDraft_ChildMigrants_81314.pdf).

<sup>21</sup> Kennedy, E. (2014). No Childhood Here, Why Central American Children are Fleeing their Homes. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

<sup>22</sup> Cantor, D. J. (2014, June 24). The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico. *Refugee Survey Quarterly*, 33(3), p. 27. doi: 10.1093/rsq/hdu008.

<sup>23</sup> Girón Solórzano, C. L., Actualizacion, p. 20.

<sup>24</sup> Girón Solórzano, C. L., Actualizacion, p. 7.

<sup>25</sup> Encuesta Nacional de Condiciones de Vida (ENCOVI). (2011, November). Pobreza en Guatemala. Retrieved from <http://www.ine.gob.gt/sistema/uploads/2014/12/03/qINtWPkxWyP463fpJgnPOOrjox4JdRBO.pdf>.

lives in extreme poverty.<sup>26</sup>

As a result of social and economic decisions related to neoliberal policies implemented in the region, malnutrition is one of the main problems in Guatemala. Forty-one point seven percent (41.7%) of children suffer from chronic malnutrition, and this percentage is higher in regions with large indigenous populations. In the Northwest, where the majority of unaccompanied migrant children come from, the malnutrition rate is 64.8%.<sup>27</sup>

One significant motivation for the migration of Guatemalan children and adolescents to Mexico has been their search for employment opportunities and access to the labor market. Children and adolescents participate from an early age in family economic production and must contribute as family members. In Guatemala, 18% of children under 13 years of age are already working; this high percentage of child labor affects children's rights and is compounded by extremely unstable conditions and vulnerability in their jobs.<sup>28</sup>

Children and adolescents working outside the home often receive income inadequate for the number of family members they have to help maintain. The shortage of jobs and saturation of local markets force many to move to new places in search of work and income.

In many cases, children and adolescents from border communities, especially San Marcos and Huehuetenango, travel to villages of Southern Mexico to search for work and income. This circular flow occurs legally through the Border Worker Migration Form<sup>29</sup> or Local Visitor Migration Form, although a significant number of people also cross the border without showing any migration document.<sup>30</sup>

Although Guatemalan labor is key to farm development and production in Soconusco (Southern Mexican border), working conditions are poor, wages are often below minimum, and there are no social benefits. Despite this, these conditions are usually better than those in Guatemala. The majority of migrant children and adolescents work in agriculture, construction, services, and trade, participating very little in the manufacturing sector. Those engaged in agriculture are usually provided with housing and food.

The children and adolescents we interviewed report that, linked to the lack of opportunities is a lack of access to a small area of land to farm for family subsistence. Since Guatemala is predominantly agricultural, an absence of land has serious implications for households that depend on family food planting and harvests. The main economic household activity of

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<sup>26</sup> Encuesta Nacional de Condiciones de Vida (ENCOVI). (2011, November). Pobreza en Guatemala. Retrieved from <http://www.ine.gob.gt/sistema/uploads/2014/12/03/qINtWPkxWyP463fpJgnPOQrjox4JdRBO.pdf>.

<sup>27</sup> López Robles, C., & Danilo Rivera, A., Aproximaciones de Política Migratoria para Guatemala.

<sup>28</sup> Programa de las Naciones Unidas para el Desarrollo (PNUD). (2012). Movilidad Forzosa: Buscando la inclusión "al otro lado," p. 74. Retrieved from

[http://www.centrodesarrollohumano.org/pmb/opac\\_css/index.php?lvl=notice\\_display&id=1729#\\_VNN4m2TF9H1](http://www.centrodesarrollohumano.org/pmb/opac_css/index.php?lvl=notice_display&id=1729#_VNN4m2TF9H1).

<sup>29</sup> During the third quarter of 2013 about 53% had the Border Worker Migration Form and 46% had the Local Visitor Migration Form. These are migration documents issued by the Mexican authorities so that Guatemalan residents in border departments can enter some southern states of Mexico. EMIFSUR. (2012) p. 7.

<sup>30</sup> According to EMIFSUR, data related to the percentage of migrants from Guatemala who have documents for entering Mexico, on average 80% applied for the migration document between 2010 and 2013.

agriculture has faced serious economic and environmental crises that have eroded income, leading to an increase in difficulties meeting basic needs. The families continue to work in agriculture and replicate the knowledge they possess, but they do so in large Mexican farms rather than in Guatemala.

Even when young people have technical skills that can be used in the country, the demand for these services is low or the work is underpaid. Combined with deprivation of other basic rights, situations of violence, and, in many cases, loss of care from parental emigration, young people must increasingly search for labor markets elsewhere in order to take advantage of their experience or knowledge.

The story of a 17-year-old boy from Huehuetenango shows how the need to seek work pressures children to migrate: “I am going because my mother is alone with my sisters [he explains with great difficulty because his native language is Mam], because I lost my job in the community and even though [I’m looking for work] I haven’t been able to find a job.” Thus, the saturation of local labor markets also compels young people to leave their communities.

Our interviews make clear that children and adolescents are aware of the situations their families face on a daily basis and have their own opinions about their circumstances. They recognize that opportunities for personal development and achievement are extremely limited in their country of origin. Furthermore, these limitations occur in a context of violence, discrimination, and/or family separation, demonstrating that public policies for the comprehensive development of children (ensuring basic social rights in conditions of freedom and free of violence) are inadequate. Young people themselves understand the complex and structural factors that result in child and adolescent migration.

For many children and adolescents, migration to the United States is perceived as the only possibility for leading a dignified life free of violence. In practice, they are willing to pay the cost of the journey—in economic terms, but also in terms of the danger it represents to their lives and physical integrity—to obtain those minimum levels of freedom, security, and socio-economic conditions for themselves and their families.

Guatemalan children and adolescents who have managed to enter the labor market are mainly those who chose Mexico as their country of destination; however, most of this group said that their preferred destination was the United States:

*It’s difficult to get across [the border to the United States], but I wanted to go and work there in whatever I could.*

16-year-old boy

*I was very sad when they caught us because I want to go to the United States and now I can’t.*

15-year-old indigenous girl

Despite difficulties getting to the United States, these young people express confidence that they will find opportunities there that they lack in their communities, both in socioeconomic terms as well as in relation to security and freedom. In many cases, these opportunities include family reunification.

For children and adolescents, the United States is synonymous with greatness, prosperity and economic growth, well-being and tranquility, and freedom and physical safety (protection against threats, abuse, and violence). In their discourse, they associate the United States with the possibility of obtaining employment, earning income in U.S. dollars to send back as remittances, acquiring material goods, and contributing to better living conditions in their communities of origin, as well as escaping social or family situations of abuse and violence. They also mention anticipating a country with modern technology and infrastructure, and with a diverse population as a result of immigration.<sup>31</sup>

Part of the income that children and adolescents receive from their work goes to their families, so the pattern of family subsistence started by their relatives before they left their communities of origin continues to be reproduced. This income is doubled or tripled when they work in Mexico and/or the United States:

*When I worked here [in Guatemala] with my father they paid me fifty quetzals a day and I would give some of what I earned to my mother and the rest was for me. On the farm [in Mexico] they paid me seventy pesos [Mexican currency] for one 'cuerda' [almost 69 feet] of corn and a hundred and fifty pesos for one 'cuerda' of sesame because it costs more. For sesame you have to tie the bunches and stand them up against each other, but for corn you just cut it and leave it all together.*

#### 16-year-old boy

According to our interviewees, some parents refuse to accept or authorize their children's decision to emigrate. However, many of the children and adolescents choose to emigrate with cousins or friends who are not necessarily 18 or over, without the knowledge or authorization of their parents. In some communities, migrants have become role models to look up to for children and adolescents, especially when they experience deprivation of their basic rights such as health, employment, education, physical integrity, etc.

Another motivation for migration reflected in our interviews is a desire for the possibility of further study, because it is difficult in Guatemala to fully exercise the right to education, despite being fully guaranteed by the Law on the Comprehensive Protection of Children and Adolescents (hereinafter "PINA Law").<sup>32</sup> Despite this law, Guatemala has the lowest number of

<sup>31</sup> Palma, C. S. I., & Girón Solórzano, C. L. (2004, September). Condicionantes sociales para la migración: procesos de construcción de imaginarios – representaciones sociales asociados entre población joven, p. 19.

<sup>32</sup> Decreto No. 27/2003, 2003, 4 de junio, Ley de Protección Integral de la Niñez y Adolescencia [PINA Law][Law on the Comprehensive Protection of Children and Adolescents] 1996 (Guat.). Article 36 of the PINA Law states: "Children are entitled to receive a comprehensive education in accordance with the family's ethical, religious, and cultural choices. This should develop personality and citizenship, further understanding and exercise of human

years of schooling in Central America (on average 4.1 years for adults). While schooling for young people between 13 and 30 years of age has increased in recent years,<sup>33</sup> the majority of children and adolescents in our sample who had basic schooling still found their level of education to be insufficient for obtaining decent work and putting a halt to the inter-generational transmission of poverty.

At the same time, the intention of the children and adolescents to continue with their studies in Guatemala is minimal, and some said they did not know whether they had passed their last school year because they had emigrated during the last month of the academic calendar. Guatemalan children thus do not consider education to lead to skill development or capability that will give them access to better job opportunities, reflecting a failure of the education system.

The level of schooling of our interviewees is low, and children are typically not placed in the appropriate grade for their age. Illiteracy in their places of origin is high. Schooling levels are also influenced by the limited reach of the national education system in Guatemala. Many children and adolescents who wish to continue their studies must walk up to three hours a day to reach the nearest school where their grade is taught, and the journey from one community to another may expose them to risks because of distances, road conditions, time schedules, etc.

Still, migrant children and adolescents repeatedly state that one of the reasons they decided to travel to the United States is their intention to continue their studies, since their family's socioeconomic situation and poverty prevent them from having access to education in Guatemala. Many children and adolescents have to compete with their siblings to continue attending school, and the final criteria for deciding who is able to continue school is determined by the (male) head of household, often based on age, number of children, and gender. In many communities in the country's interior, especially among indigenous peoples, only eldest sons are given the opportunity to study. Furthermore, the number of grades that each child and adolescent manages to complete depends on the number of children in the family; sometimes the priority is for all of them to learn to read and write, even if it means dropping out after the third grade of primary school.

Girls face greater barriers to study because they are constantly pressured to marry, have children, and raise a family. In fact, the only employment option for girls is generally domestic work in private homes. Thus, gender combines with age, ethnicity, and perhaps rural-urban origins to determine access to education and influence absenteeism, grade repetition, low achievement, and school dropout. Moreover, socially accepted practices such as sexism and gender discrimination contribute to the educational exclusion of girls.

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rights, and promote the importance and necessity of living in a democratic society with peace and liberty in accordance with the law and justice, in order to prepare for the full and responsible exercise of rights and duties.”

<sup>33</sup> It increased from 4.0 years in 1989 to 6.5 years in 2011. For the group of 15-24 year-olds, the corresponding values are 4.3 and 6.9. Currently, men and women between 15-24 years of age living in urban areas have the highest level of schooling (8.2), as well as non-indigenous women and men in the same age range (7.7). *See* PNUD, *Movilidad Forzosa*, p. 109.

## 2. Multiple forms of violence

The law in Guatemala prohibits violence against children and adolescents. Article 53 of the PINA Law states that every boy, girl, or adolescent has the right not to be the object of any form of negligence, discrimination, marginalization, exploitation, violence, cruelty, or oppression. Moreover, the law specifies that all children and adolescents have the right to be protected from all forms of abuse. The ill-treatment and abuse listed in the Law include physical, sexual, and emotional abuse as well as negligence or neglect.

Article 54 of the PINA Law defines physical abuse as the excessive use of power and provocation of non-accidental harm to a child that results in body injuries. Sexual abuse is understood to occur when a person takes advantage of his/her power or relationship of trust with a child or adolescent in order to involve him or her in any type of sexual activity that may include harassment. Negligence or neglect extend to actions in which the person(s) responsible for the care and upbringing of the child fail(s) to comply with satisfying his/her basic needs for food, clothing, education, and health care, while having the resources to do so. Finally, emotional abuse occurs when a person harms the self-esteem or development of a child or adolescent. Any person having knowledge of an event in which one of the above situations occurs is under obligation to immediately inform the nearest competent authorities so that those responsible can be sanctioned.

The State has the obligation to ensure that competent institutions protect and secure the rights of children and adolescents who are under threat or whose rights have been violated, using violence prevention policies or programs, access to information, and sex education. However, the increase in two types of violence—persecution by gangs and intrafamilial violence—demonstrates that the State response to protect this social group has been inadequate, and there is less State presence and structure in municipal districts on the Mexican border.

According to a study by UNICEF, 2,305 cases of intrafamilial violence were reported in 2010; the direct victims were children or adolescents in 182 of these cases. However, because of the frequent fear of reporting, this statistic conceals whether the violence was perpetrated by family members or by a State and/or community authority. One study indicates that in 2010, 11,356 children were victims of sexual abuse, 7,002 of physical abuse, and 1,152 were injured as a result of negligence.<sup>34</sup> In Guatemala, according to UNICEF, the number of cases of intrafamilial violence registered in 2012 increased by 7.8% compared to 2011. Over the years, this trend has increased: from 2003 to 2012, intrafamilial violence grew by 546.2%.

The courts heard 3,096 cases of intrafamilial violence against children in 2013 (January to September). In 2012, nine out of 10 victims of intrafamilial violence were female and one was male. Fifty-six point two percent (56.2%) of the victims were women between 20 and 34 years of age. Likewise, according to the National Statistics Institute, violence against women (physical, sexual, emotional, and economic) was the crime most frequently reported in the judicial system. In 2011, there were 23,721 cases of intimate partner violence, 90% perpetrated by men and 10% by women.

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<sup>34</sup> Valladares, D. (2011, July 8). GUATEMALA: Child Abuse Starts at Home. *IPS News*.  
<http://www.ipsnews.net/2011/07/guatemala-child-abuse-starts-at-home/>.

The UNHCR study<sup>35</sup> reports that 21% of the Guatemalan children and adolescents interviewed described intrafamilial abuse perpetrated by a family member or other caregiver. For example, a young interviewee told UNHCR that she was beaten several times a week and was forced to leave school to start work.

During our observation of the arrival and reception of repatriated children at government-run shelters and our interviews with migrant children and adolescents, several told us that they were trying to reach the United States because they were fleeing violence. These interviewees saw reaching the United States as the only way to safeguard their lives and survive persecution, gang recruitment, intimidation, threats, and other harms.

Structural and intrafamilial violence occurs with alarming frequency in Guatemalan homes. Previous studies have revealed that “49.4% of all homicides registered in 2010 occurred in the five departments with the highest migration rates (Guatemala, San Marcos, Huehuetenango, Quetzaltenango, and Jutiapa).”<sup>36</sup> This information supports our conclusion that violence reinforces the decision of Guatemalan children and adolescents to emigrate in order to survive.

Several of the children and adolescents we interviewed revealed that, for some of them, the search for better opportunities grew out of situations in which they had previously suffered some form of violence, especially child abuse (physical beatings). Children usually perceive that physical abuse and punishment, such as beatings, are a part of the normal exercise of parental discipline. To break these cycles of violence in the country, the practices and patterns of correction and discipline by parents towards their children should be changed.

It is highly probable that many children and adolescents flee because they are victims of sexual abuse by a family member or acquaintance; however, cultural obstacles make it difficult to address this issue with the children. According to the Secretariat of Sexual Violence, Exploitation, and Trafficking (SVET), sexual violence against children occurs when an adult or older person abuses their power, close relationship, or authority over a child and/or takes advantage of the relationship of trust and respect to force a child to engage in sexual activities—for which children are incapable of giving consent, even if the child realizes the implications of the activity.<sup>37</sup>

According to UNHCR, persecution by organized crime and the lack of protection for the population at risk leads to a cycle of forced displacement.<sup>38</sup> People are forced to leave their homes to search for relatives elsewhere in the country, moving to other more remote areas and often crossing international borders. Twenty percent (20%) of the Guatemalan children and

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<sup>35</sup> UNHCR, *Children on the Run*, p. 34.

<sup>36</sup> Embajada Suecia & UNICEF. (2012). *Jurimetric Study: Evaluación de la aplicación de la Convención sobre los Derechos del Niño y la legislación desarrollada a su amparo*, p. 48. Retrieved from [http://www.academia.edu/8093802/Estudio\\_Jurim%C3%A9trico\\_Evaluaci%C3%B3n\\_de\\_la\\_aplicaci%C3%B3n\\_real\\_de\\_la\\_Convenci%C3%B3n\\_Sobre\\_los\\_Derechos\\_de\\_los\\_Ni%C3%B1os\\_y\\_la\\_Legislaci%C3%B3n\\_Realizada\\_a\\_su\\_amparo](http://www.academia.edu/8093802/Estudio_Jurim%C3%A9trico_Evaluaci%C3%B3n_de_la_aplicaci%C3%B3n_real_de_la_Convenci%C3%B3n_Sobre_los_Derechos_de_los_Ni%C3%B1os_y_la_Legislaci%C3%B3n_Realizada_a_su_amparo).

<sup>37</sup> Secretaría Contra la Violencia Sexual, Explotación y Trata de Personas (SVET), Gobierno de Guatemala. *Marco Legal en Violencia Sexual*. Retrieved from <http://www.osarguatemala.org/userfiles/Boletin%20SVET-OSAR.pdf>.

<sup>38</sup> PNUD, *Movilidad Forzosa*, p. 7

adolescents interviewed by UNHCR (or twenty children) reported that they had suffered or been threatened with serious harm as a result of violence in their society (not including violence in the home). That figure includes violence perpetrated by gangs or other types of organized crime, which occurs in the absence of State protection.<sup>39</sup> Of the 20 children who reported experiencing violence in society, 12 suffered harm by or fear of gangs or cartels.<sup>40</sup>

The majority of victims of intrafamilial violence in Guatemala are women. Violence against women in Guatemala is associated with structural gender violence based on socio-cultural patterns that discriminate against women. Article 3 of the law against femicide/feminicide and other forms of violence against women states that violence against women is “any act or omission based on being female that results in immediate or subsequent physical, sexual, economic, or psychological harm or suffering for women, as well as threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public life or privately.”<sup>41</sup>

According to the United Nations High Commissioner for Human Rights, 198 complaints of femicide/feminicide and 31,836 complaints of other forms of violence against women were reported in 2013.<sup>42</sup> Specialized justice for these crimes and other forms of violence against women have generated improvement with respect to the issuance of court rulings, and the SVET has strengthened inter-institutional coordination for implementing the Law against Sexual Violence, Exploitation, and Trafficking. However, there remains a high level of impunity for these crimes—nearly 93%. Moreover, there is a lack of statistics regarding such violence.<sup>43</sup>

Elisa Portillo Nájera, Guatemalan expert on women’s rights and violence against women reports that:

the legal system and a culture of disrespect for women is a signal to men that they will not be punished for committing acts of violence against women. The number of murders is extremely high. . . . While statistics show that 5,500 femicides/feminicides occurred between January 2000 and December 2010, the actual number is probably much higher, because in fact the majority of femicides/feminicides are not reported, and many murders of women are not properly labeled as femicide/feminicide. Of the 5,500 documented cases, a minority has been investigated. Investigations are often inadequate, partly because of the lack of interest of public officials in solving crimes of violence against women[.]

Violence against women is widespread in Guatemala, where patriarchal social norms assign a subordinate role to women. . . . Officials and institutions responsible for the protection of women share these cultural attitudes which are deeply ingrained in the society. The 2008 Law, which aimed to address these

<sup>39</sup> UNHCR, *Children on the Run*, p. 35.

<sup>40</sup> UNHCR, *Children on the Run*, p. 35.

<sup>41</sup> Decreto No. 22/2008, 2008, 2 de mayo, *Ley contra el Femicidio y otras Formas de Violencia Contra la Mujer* [Law Against Femicide and other Forms of Violence Against Women] (Guat.). Retrieved from [http://oas.org/dil/esp/Ley\\_contra\\_el\\_Femicidio\\_y\\_otros\\_Formas\\_de\\_Violencia\\_Contra\\_la\\_Mujer\\_Guatemala.pdf](http://oas.org/dil/esp/Ley_contra_el_Femicidio_y_otros_Formas_de_Violencia_Contra_la_Mujer_Guatemala.pdf).

<sup>42</sup> UNHCR, *Children on the Run*, p. 12.

<sup>43</sup> UNHCR, *Children on the Run*, p. 12.

serious problems, has not yet been effectively implemented because of these attitudes[.]<sup>44</sup>

### 3. Family reunification

Children and adolescents in situations of violence, who lack opportunities, and whose relatives have already emigrated often make the difficult decision to emigrate and face the risks of the migratory route. The absence of programs and mechanisms to facilitate family reunification—especially programs for regular and safe migration—has forced sons and daughters left behind in communities of origin to seek riskier ways to reunite with parents who are mostly in the United States.

In Guatemala, the motivation for family reunification has evolved over time. Traditionally, parents initiated this process without consulting their children. When parents settle in the United States, they may think of bringing their children, especially the younger ones. These journeys are usually made with a guide or *coyote* who is often from the same village as the family and negotiates arrangements with the parents by telephone.

*My parents called me and told me that I had to go with a man [the coyote] who would take me to them and that I should just prepare a backpack and do everything the man told me to do.*

It is difficult to analyze migration on the basis of family reunification.<sup>45</sup> Studies conducted from the perspective of destination countries are limited by an inevitable ethnocentric bias when they assume that the family will reunify in the destination country. This approach presumes a linear migration process that begins with adult migration, and the cycle concludes or is completed when the children arrive, “Without aiming to, a particular normative view of the essentially nuclear family group is re-created, without considering the arrangements and various family structures in each territory.”<sup>46</sup> The second limitation occurs when the family migration process is studied from an adult perspective; so although it is a child who is migrating, studies assume the participation of children to be based on a decision-making process by adults as an expression of generational power relations. Several studies indicate that children in these circumstances are treated and seen as passive objects and recipients of adult decisions, being practically “dragged” by their relatives to their destinations.<sup>47</sup>

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<sup>44</sup> Portillo Najera, E. (2012, Feb. 3). Declaration of Elisa Portillo Najera. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Elisa\\_Portillo\\_Najera\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Elisa_Portillo_Najera_Affidavit.pdf).

<sup>45</sup> Gaitán, L., Diaz, M., Sandoval, R., Unda, R., Granda, S., & Llanos, D. (2008). Los Niños Como Actores En Los Procesos Migratorios, Implicaciones para los proyectos de cooperación. Retrieved from [http://www.de0a18.net/pdf/doc\\_infancia\\_risc\\_los%20ninos\\_como\\_actores.pdf](http://www.de0a18.net/pdf/doc_infancia_risc_los%20ninos_como_actores.pdf).

<sup>46</sup> It has already been shown that family migration processes are complex transnational trends that are not necessarily linear, especially during times of crisis, constantly generating new return journeys and circular movement for family and children. Pedone, C. (2010). “Lo de migrar me lo tomaría con calma”: representaciones sociales de jóvenes en torno al proyecto migratorio familiar. Retrieved from <http://www.uned-illesbalears.net/Tablas/inmiju7.pdf>.

<sup>47</sup> Pedone. (2007); Carrasco, S. (2004). Infancia e inmigración: proyectos y realidades. En Gómez-Granell, Carme, et. al (Coord.), *Infancia y familias: realidades y tendencias* (pp. 205-231). Barcelona: Ariel - CIIMU; and Gaitán, L., Diaz, M., Sandoval, R., Unda, R., Granda, S., & Llanos, D. (2008). Los Niños Como Actores En Los Procesos

This change of perspective within the family reunification process coincides with the point made by Girón Solórzano that, at present, many young people are demanding that their parents in the United States send for them because they feel a strong need to reconnect and enjoy their right to family life, and even more so when they experience violence and deprivation of basic rights in their communities.<sup>48</sup> When this demand occurs, children and adolescents participate significantly in the decision to move and negotiate within the family.

However, the recent migration of unaccompanied children and adolescents has revealed that, in communities with a long history of migration, new support networks for migration are emerging. These consist of a young group of migrants who are already settled in the United States and are between 18 and 25 years of age. These new support networks emerged from the need to establish close emotional ties similar to family relationships. The networks are conducive to building strong relationships among the youngest migrants in the destination country. They also provide new information about transit and destination associated with the use of technology and telecommunications.

#### IV. Risks associated with the migration of children and adolescents

Irregular migration necessarily includes risks. The majority of migrants, including children and adolescents, are aware or at least have heard that irregular migration represents a danger to their lives. However, their reasons for deciding to leave are so strong that they “accept” and “live with” the risks of “viajar mojado” (literally “traveling wet,” but used in this sense to indicate an irregular status).

*I knew it wouldn't be easy but necessity forces you to do things. Why should I stay? In any case, I probably wouldn't die of hunger but I'm not going to achieve anything here . . . . Look, those who stay here in the village never achieve anything. My father lost his crop and is already going crazy with so much debt, in the end my brother had to send money from the United States to pay. If you don't have anybody up there, people won't survive here either.*

15 year-old girl

*On the road I met all kinds of people: gang members—yes I was afraid of them and they mean what they say; thieves—that stole the new tennis shoes I was wearing; policeman—who asked me for money; some nice women that gave me food; you meet all kinds . . . there were some girls in my group . . . they weren't as lucky.*

17 year-old indigenous boy

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Migratorios, Implicaciones para los proyectos de cooperación. Retrieved from [http://www.de0a18.net/pdf/doc\\_infancia\\_risc\\_los%20ninos\\_como\\_actores.pdf](http://www.de0a18.net/pdf/doc_infancia_risc_los%20ninos_como_actores.pdf).

<sup>48</sup> Girón Solórzano, Actualización.

Guatemalan children and adolescents appear to assimilate the risk as part of migration and so accept the dangers and damages they suffer during the journey as normal and common situations faced by irregular or unauthorized migrants. They describe themselves as “illegal,” believing that they have no rights and that they are “deserving” of certain types of abuse because of their immigration status.<sup>49</sup>

*One thing I was sure of was that it wouldn't be easy, but I was prepared. Being locked up [by smugglers] was nothing—because they kept us in a house so as not to be caught [by INM officials]—the important thing was that we'd managed to get to the north of Mexico, [before being detected by INM officials] but the way my other friends spoke [not with a Mexican accent or words commonly used in Mexico] gave me away too. I'd learnt my lesson well, I gave the right answers [to INM officials] and I knew what to do, but that's the way it was.*

#### 16 year-old indigenous girl

The history of this girl shows how migrants prepare themselves mentally and physically before starting the trip, preparing to face a series of events and challenges. For indigenous children and adolescents, challenges include the need to conceal their indigenous identity by not speaking their native language and not wearing traditional clothing that is common among girls and women in different indigenous groups. Children and adolescents prepare for the journey through Mexico by learning phrases or words commonly used in Spanish spoken in Mexico.

Because many migrant children and adolescents accept as natural the possibility of being a victim of abuse, investigations require additional strategies and time to investigate and detect these situations. Our findings demonstrate that the majority suffer abuse and human rights violations, especially during transit, interception, and detention by authorities and third parties (for example, organized criminal groups or common criminals). However, it was not always possible to accurately detect what kind of abuse they had suffered or who had committed it. Combatting these risks requires specific and appropriate rights-based policies, practices, and mechanisms, including appropriate training for those responsible and adequate resources.

During the interview of a 17-year-old indigenous girl, we were struck by what happened while she was staying at the migration center. According to her, the treatment she received at the Federal Detention Center in Mexico was “acceptable” because although the food was cold and sometimes uncooked, at least they gave her something to eat. She clearly identifies the Child Protection Officer and calls her “OPI.”

*Good people the OPI, there was one of them that they call 'Cariñitos' [term of affection] because she'd let us call our parents on the phone. Poor thing though because she was just one person for so many girls that she didn't have enough*

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<sup>49</sup> Girón Solórzano, C. L. (2013). La migración de niños, niñas y adolescentes guatemaltecos al sur de México: ¿una forma de vida? En Zapata Martelo, E., Martínez Ruiz, R., & Rojo Martínez, G., *Escenario del Trabajo Infantil. Diversos Estudios de Caso*, (pp. 25-46). México: Universidad Autónoma Indígena de México y Colegio de Postgraduados.

*time, but she had good intentions [laughs], she was always dead tired, because she was on her own all weekend and they'd call on her for everything.*

When asked about what worried them or affected them the most, they immediately brought up being detained.

*Ugh, being locked up. Look, they'd tell us, the OPI, the Immigration people and even the Consul who visited us told us: you're not locked up, you're here for your own protection before sending you back to your country [raises her arm], of course, we were imprisoned, would they let us out? Yes, they certainly had us locked up.*

As the interview progressed, this girl revealed more about the detention experience. The investigator was surprised to discover this explanation:

*Oh, yes in Mexico City at the detention center, it's dreadful, but really dreadful, there you have to behave. I could hardly wait to go back or be sent back, I told the consul, send me back right now. Why was it so dreadful there? At night it was haunted, look, you could hear the other girls and women screaming in the night, it was horrible. Where did the screams come from? Well we thought it was from the bathroom near the hallway, but ugh what screams and someone asking for help, we couldn't sleep we were so frightened, and that lasted a few hours every night, it was horrible, that and being locked up I couldn't stand it while I was there. That's why I wanted to come back. And what happened? Well, at night we just heard noises and screams, but loud screams. The next day we asked the people from immigration and they said, ah, it's haunted here at night, you'd better just go back to sleep because if not then they'll come and scare you!*

Accounts of this nature should prompt the State to conduct a serious and thorough review of their detention practices and develop and implement alternatives to the detention of migrants without exception for children, adolescents, and families.

The States focus attention on migrant children traveling alone or unaccompanied allegedly to protect this population, but utilizing detention, deprivation of liberty, and automatic deportation.<sup>50</sup> Detention practices and policies should be reviewed in countries of transit and destination, recalling recent Advisory Opinion 21/14 of the Inter-American Court of Human Rights that has forcefully affirmed that:

*States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a*

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<sup>50</sup> Solórzano, G., C. L. (2013). La migración de niños, niñas y adolescentes guatemaltecos al sur de México: ¿una forma de vida? En Zapata Martelo, E., Martínez Ruiz, R., & Rojo Martínez, G., *Escenario del Trabajo Infantil. Diversos Estudios de Caso*, (pp. 25-46). México: Universidad Autónoma Indígena de México y Colegio de Postgraduados.

country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have other less harmful alternatives and, at the same time, protect the rights of the child integrally as a priority.<sup>51</sup>

## V. Migration of indigenous children and socio-cultural changes

Cultural diversity is particularly complex with respect to Guatemalan migration. According to official statistics, 40% of the Guatemalan population is indigenous, mostly of Mayan origin.<sup>52</sup> However, this percentage may be under-representative in part because some indigenous people do not want to identify themselves due to prevalent racism and discrimination against indigenous peoples in Guatemala. In addition, arbitrarily-conducted censuses result in surveyors deciding what ethnic identity to attribute to interviewees. There are also significant levels of under-registration. For this reason, it is widely accepted that over half of Guatemala's population is indigenous, mostly of Mayan origin, but also from the Xinka and Garifuna ethnic groups.

The Spanish invasion of the Americas established economic, political, social, and cultural structures in which inequality prevails, resulting in the oppression, marginalization, and exploitation of indigenous peoples. Thus, these sectors of the population have fewer opportunities and live in conditions of greater material poverty.

Racism and discrimination are structural constants that justify and underpin inequality for indigenous populations in a system where colonialism sought, by various means, to destroy indigenous cultures and identities. Nevertheless, indigenous peoples have resisted and preserved their ethnic identities and cultural wealth, maintaining a worldview of their own that provides alternatives for a more harmonious life between human beings and nature.

Most Guatemalans who migrate hail from the Northwestern departments of San Marcos, Huehuetenango, Quetzaltenango, and Quiché, parts of the country with a majority indigenous population. Migration occurs mainly in the sociolinguistic Mam and Kiche' communities, where dire poverty and extreme poverty rates combine with high levels of violence.

This section focuses on the cultural effects of the international migration of unaccompanied indigenous children and adolescents, particularly those who travel to the United States. Individual and family perspectives expressed in the interviews we conducted, rather than the views of the larger community, form the basis of our discussion.

Unaccompanied indigenous children and adolescents, most from the Maya Mam ethnic group in the departments of Huehuetenango, San Marcos, and Quetzaltenango, comprise most of the migrants interviewed. Our informants traveled with *coyotes* and were returned to Guatemala

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<sup>51</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, ¶ 160, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

<sup>52</sup> National Institute of Statistics (Instituto Nacional de Estadísticas or INE). (2013, November). Caracterización estadística Republica de Guatemala. Retrieved from <http://www.ine.gob.gt/sistema/uploads/2014/02/26/5eTCcFIHErnaNVeUmm3iabXHAKgXtw0C.pdf>.

after being detained in Mexico or the United States. We also consulted their relatives and other adults.

Guatemalan children and adolescents, especially indigenous children, participate in migration in large numbers. Studies in their communities of origin<sup>53</sup> have shown that they form part of this circular migratory process from birth, when they travel in family groups with their parents. In fact, while migratory trajectories in Guatemalan communities are continuously reproduced, they have also led to new migration pathways with the increase in children and adolescents traveling alone or unaccompanied by an adult.

Their communities and the Guatemalan State treat children and adolescents as persons who “accompany” their parents as long as they travel as a family. This way of seeing child migration restricts and fails to acknowledge children and adolescents as subjects of rights, because it is the adults who decide and negotiate on their behalf.

Guatemala’s political and economic life rests on the subordination of indigenous people, often under conditions of exploitation, marginalization, and discrimination. Furthermore, in Guatemala having darker skin, belonging to an indigenous group, and speaking a Mayan language places people in a category that excludes them from “non-indigenous” society. Systematic discrimination against the minority has been normalized in Guatemalan society. According to the Human Development Report, “skin color is a visible physical difference which becomes a parameter for differentiation. It is structured as a form of inferiority in the relationships established, where dark or light skin establishes a hierarchy.”<sup>54</sup>

The link between indigenous peoples, land and territory, and their appreciation of agricultural work creates a cultural aspect to migration. These links form the basis of indigenous community existence, although the emphasis on land and agriculture has been disappearing among young people. As the 2006 Report of the Human Rights Ombudsman’s Office indicates, transculturation processes do not necessarily have a negative impact; cultural exchange can lead to enrichment of the cultural heritage.<sup>55</sup> However, this change has one negative element, in that it may lead to denial of the right to cultural identity.

Guatemala shares a border with Mexico, and the majority of migrants leave from departments close to this border (particularly San Marcos and Huehuetenango), so they are influenced daily by Mexican culture as a normal fact of life. In fact, it is common to hear the opinion that in the Mam area of San Marcos, people have abandoned their ancestral culture and become “Mexicanized.” There are even radio stations in border areas that have a bi-national function, transmitting programs to Mexico and Guatemala with announcements and messages specifically for Guatemalans and Mexicans living in the border area.

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<sup>53</sup> See Caggiano, S., Piedad Caicedo, L., Girón, C., with Torres, A. (Coord.) for FLASCO Ecuador, AECID, & UNICEF. (2010, May). *Niñez indígena en migración. Derechos en riesgo y tramas culturales*. Retrieved from [http://www.unicef.org/lac/Ninez\\_Indigena\\_en\\_migracion%281%29.pdf](http://www.unicef.org/lac/Ninez_Indigena_en_migracion%281%29.pdf).

<sup>54</sup> HDR-UNDP. (2005) p. 248.

<sup>55</sup> Human Rights Ombudsman’s Office. (2006). *Informe Annual Circunstanciado*. Retrieved from <http://www.pdh.org.gt/archivos/descargas/Documentos/Informes%20Anuales/informe2006.pdf>.

On their way to the United States, migrants are encouraged to acquire cultural Mexican characteristics to allow them to go unnoticed. Children and adolescents reported receiving preparation lasting approximately one week at locations close to the border before undertaking their journey. During this orientation, *coyotes* instruct them on how to dress, talk, and behave so they will seem to be Mexican, and they are told how to change their demeanor as they travel through Mexico to the United States. Consequently, children and adolescents who migrate are forced to conceal or hide their cultural identity, abandoning the use of the mother tongue and traditional dress. This is particularly true for girls.<sup>56</sup>

*Straightaway they can tell we're from Guatemala, that's why we don't wear our traditional dress [she smiles and covers her face with her hand] so they tell us what words not to use, that we shouldn't talk, and that's how we go. . . .*

17-year-old indigenous girl

Moreover, child and adolescent migrants often spend a period of time in Mexico before embarking on the journey to the “North.” Of the children and adolescents we interviewed, several reported that before starting their journey across Mexico to the United States, they worked in Chiapas for 15 days or more, on farms or in jobs the *coyotes* got for them. They do this because they need to obtain money to pay extortions, illegal charges, and other expenses on the way that are not covered by the payment made to the *coyote*.

The children and adolescents who migrate from rural indigenous communities, usually because of their age, life experience, and low level of education, have no concept of country or State until they have to cross borders. At that time, they have to accept that they are foreigners or migrants with irregular status, and they start to perceive xenophobia. For children and adolescents, the journey represents a discovery of larger realities and other knowledge that place their identity in doubt.

One adult we interviewed, referring to indigenous children and adolescents, said, “those who migrate do not know Guatemala.” Or, as a Catholic priest said, there is “very little knowledge of Guatemalan identity, of the nation as such. Because the nation has consisted of the Ladinos [non-indigenous people], for the people who came from Spain, people who have owned the country. But the Mayans have never felt that they are owners of this country.”<sup>57</sup>

Guatemala’s national identity as a multiethnic, pluricultural, and multilingual nation has not been developed. Also important is the fact that, for indigenous peoples, national boundaries after “independence” from the colonial powers were impositions that are not consistent with their history. In several cases, indigenous peoples were divided between two or more countries, as is the case of the Maya Mam people who live in Guatemala and Mexico.

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<sup>56</sup> It is the Guatemalan indigenous women who still use their traditional dress, which in many cases consists of a blouse called a “güipil” and a skirt made of a length of cloth wrapped around their waist and fastened with a belt.

<sup>57</sup> Camus, M. (Ed.). (2007, April 3). Comunidades en movimiento, La migración internacional en el norte de Huehuetenango, p. 207. Retrieved from [http://rimd.reduaz.mx/documentos\\_miembros/76manuelacamus.pdf](http://rimd.reduaz.mx/documentos_miembros/76manuelacamus.pdf).

In recent decades, however, indigenous identity has been revitalized and strengthened in an ongoing way. Indigenous men and women, who had internalized oppression, are ceasing to be “ashamed” of their condition and starting to feel their identity as a source of pride. They are additionally using “politically correct” language in referring to themselves as “Mayan people,” a phrase recognized in the Peace Accords, particularly the Accord on the Identity and Rights of Indigenous Peoples, signed between the government of Guatemala and the Guatemalan National Revolutionary Unity (URNG) on March 31, 1995.

Unaccompanied migrant children and adolescents often speak little Spanish, let alone English. This makes them more vulnerable, because during transit they often encounter environments where only those languages are spoken. Consequently, they have difficulties understanding their environment and making themselves understood by others. Also, because of the way they speak Spanish, they are mocked, even by other Latin Americans, who refer to them as “Indians.”

As a result of racism and deeply-rooted ethnic, social, and cultural discrimination, it is common for indigenous Guatemalan children and adolescents to be insulted because of their ethnicity by the authorities and even by other migrants, who use expressions such as “stinking peasants.” Even if they are not wearing their native dress, the women, particularly, are referred to as “Guatemalan Indians,” or even such vulgar expressions as “Guatemalan shit.” They receive the same treatment from drug traffickers, who might intercept migrants on their journey, often with the complicity of *coyotes*. These criminal groups may additionally force the children and adolescents to transport drugs across borders.

Particularly serious is the fact that women—and especially girls, whose situations are extremely vulnerable—appear to accept rape by *coyotes*, traveling companions, State officials, and others as part of the cost of the trip. Some interviewees said that the *coyotes* themselves, in the guise of giving the girls the “opportunity” to travel, encourage them to take contraceptives, with parental consent, so that they do not become pregnant en route.

A 17-year-old Maya Mam girl we interviewed said that an alternative to not being raped and/or sexually abused is to agree with a fellow traveler to pretend to be her boyfriend or husband before the others, which also represents an economic cost because the girl has to pay the person who pretends to be her partner.

Discrimination is a constant in the lives of indigenous Guatemalan migrants. En route to and when arriving in the United States, migrant children and adolescents continue to experience the same racism and discrimination that they experienced at home, in violation of their cultural identity. Nevertheless, when they are returned to Guatemala, they may find it difficult to go back to traditional aspects of indigenous culture (language, dress, food, behavior patterns, etc.). For example, some girls no longer want to wear indigenous dress nor do they want to speak their native language. They also refuse to eat tortillas and prefer bread, even expressing contempt for traditional food: “I’m not eating those” (referring to tortillas). People who have migrated even see other children and adolescents who have not done so as “inferior;” in other words, the fact of having migrated seems to confer status.

Even so, indigenous migrants make notable efforts to maintain their cultural identity and community cohesion in their country of destination: “Although they are poor in material resources, Mayan immigrants have brought a tradition of community organization and religious practice that provides them with support against separation and the hardships of migration to a strange land.”<sup>58</sup>

## **VI. Child and adolescent migrants in transit through Guatemalan territory and migrants who are living in Guatemala indefinitely**

Because Guatemala is predominantly a country of origin for migrants, our investigation focused on Guatemalan children and adolescents who leave. There are no studies about Guatemala specifically as a country of transit or destination for children and adolescents, and no systematic quantitative data or qualitative information exists on the situation of accompanied or unaccompanied migrant children and adolescents who transit through or who remain in Guatemala. Therefore, it is difficult to address the protection status of in-country migrants or discuss their access to rights, and the scope of this study did not include interviews with migrant children and adolescents living in Guatemala.

While Guatemala continues to be a country of origin for many migrants, in recent years it has also become a migrant-receiving country, usually for people from the rest of Central America (mainly from El Salvador, Honduras, and Nicaragua) who participate in economic activities related to agriculture, construction, and domestic service.<sup>59</sup> Furthermore, Guatemala is a country that most Central American children and adolescents have to traverse to get to Mexico and the United States. The children and adolescents who fail to reach their destination often stay in Guatemala indefinitely. But child and adolescent migrants in transit or residing in Guatemala are also invisible to the Guatemalan State and, therefore, there is no special protection or specific program for them. The lack of information available on this population highlights the urgent need to address and respond to migration to Guatemala, primarily as a State responsibility, but also as a matter for other stakeholders.

## **VII. Guatemala’s legislative and policy framework regarding migrant children and adolescents**

In this section, we analyze the legislative and public policy framework that applies to migration and children. We try to determine whether existing legislation takes a rights-based approach, and describe the situation of children and adolescents who migrate. We also look at public policy on children and adolescents to determine to what extent those who migrate with their families or alone are visible, as well as the circumstances of those who remain in the country of origin while their parents have migrated. To the extent possible, we examine migrant children and adolescents from other countries who remain in Guatemala as a destination or transit country. We also address the status of Guatemalan ratification of the main international and regional universal human rights treaties, and their hierarchical value in relation to the country’s constitutional framework.

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<sup>58</sup> Odem, 2007, p. 206.

<sup>59</sup> OIM. (2013, January). Niños, Niñas y Adolescentes Migrantes América Central y México. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

Guatemala has ratified all of the fundamental treaties of the United Nations and Inter-American Human Rights System (IAHRS).<sup>60</sup> However, it has neither signed nor ratified the Third Optional Protocol to the Convention on the Rights of the Child (CRC), which would allow the Committee on the Rights of the Child to consider individual complaints of violations of the rights enshrined in the Convention, including those suffered by migrant children and adolescents. Nor has it ratified Convention 143 of the International Labour Organization (ILO) on migrant workers.

Article 46 of the Guatemalan Constitution declares that human rights treaties ratified by the Guatemalan State take precedence over domestic law. This principle is complemented by the primacy of respect for human rights through which Guatemala regulates its relations with other States.<sup>61</sup>

With regard to children and adolescents, the Constitution specifies that the State shall protect their physical, mental, and moral health and guarantee their right to food, health, education, security, and social welfare.<sup>62</sup>

#### A. *Legal and institutional migratory framework*

The law currently in force on migration in Guatemala is the Migration Law and its regulations.<sup>63</sup> Migration is the responsibility of the Ministry of the Interior, which delegates responsibility to the General Directorate of Migration (DGM) to design and implement migration policy.

Decree 95/98 and its regulations regulate migration in the country by regulating the entry and exit of citizens and non-citizens in Guatemalan territory as well as the residence of non-citizens in the country. It is a rigid and restrictive legal framework that criminalizes people with irregular migration status by labeling them as “illegal,” an indicating term that reveals the orientation of this Decree and its lack of a rights-based approach. The law also mandates migration authorities to prevent the departure of persons who do not have the required documentation, and establishes

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<sup>60</sup> It has ratified the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Convention on the Worst Forms of Child Labour (ILO No. 182), the American Convention on Human Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>61</sup> Constitución Política de la República de Guatemala, 1993, 17 de noviembre, art. 149.

<sup>62</sup> Constitución Política de la República de Guatemala, 1993, 17 de noviembre, art. 51.

<sup>63</sup> Acuerdo Gubernativo No. 383/2001, 2001, 14 de septiembre, Reglamento para la protección y determinación del estatuto de refugiado en el territorio del estado de Guatemala [Regulation regarding the protection and determination of refugee status in Guatemala] 2001 (Guat.); Decreto No. 95/98, 1998, 26 de noviembre, Ley de Migración [Immigration Law] 1998 (Guat.); Acuerdo Gubernativo No. 529/99, 1999, 20 de julio, Reglamento de la ley de Migración [Regulation of the Migration Law] 1999 (Guat.).

penalties—as if they were crimes—with prison sentences for people who conceal or hire migrants with irregular status.

Moreover, this Decree establishes the functions of the DGM and defines the institutional mandate of this office and its branches, specifying sanctions and the powers of the migration authorities to regulate, manage, authorize, or deny the entry and exit of people to the country. It confirms the “illegal” nature of the residence of a non-citizen who has entered through a location that is not authorized for this purpose, and who fails to comply with the rules governing entry and residence, such as by remaining in the country after the expiration of the period authorized.

The Guatemalan migration policy framework makes no mention of rights that provide special protection for children and adolescents (non-discrimination, best interests, survival and development, the right to family life, unrestricted access to social rights, and so on). Consequently, the legislation is not rights-based, but rather uses an approach based on security and migration control; it therefore contradicts the principles contained in several of the international instruments on human rights and migration signed by Guatemala.

There is no doubt that Guatemala’s legislative framework for migration requires urgent harmonization with the major international human rights instruments, all ratified by Guatemala. This was expressed by the Special Rapporteur on the Human Rights of Migrants during his mission to Guatemala in 2008<sup>64</sup> and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families in its concluding observation of 2011.<sup>65</sup>

In particular, the Rapporteur indicated that:

[T]he existing legislative framework contains numerous inaccuracies and gaps that in their practical application result in situations that violate the fundamental rights of migrants transiting through Guatemala. In this context, migration and police authorities have considerable leeway for controlling migration and implementing procedures for the identification and return of undocumented migrants, these procedures often taking longer than necessary and not being subject to any accountability mechanism.

He also noted violations of due process, particularly with regard to free legal aid and the availability of an interpreter for migrants who do not speak the language.<sup>66</sup>

In 2007, Decree 46/2007 of the Guatemalan Congress created the National Council for Assistance to Guatemalan Migrants (CONAMIGUA). This government body coordinates, defines, supervises, and oversees the actions and activities of State agencies that have the responsibility to protect and provide assistance and relief to Guatemalan migrants and their

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<sup>64</sup> Report of the Special Rapporteur on the Human Rights of Migrants, 11th Sess., 2009 May 14, ¶ 122, U.N. Doc. A/HRC/11/7/Add.3. (2009, May 18).

<sup>65</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Consideration of reports submitted by States parties under article 74 of the Convention Concluding Observations: Guatemala*, 15th Sess., 2011, September 12 - 23, U.N. Doc. CMW/C/GTM/CO/1 (2011, October 18).

<sup>66</sup> Report of the Special Rapporteur on the Human Rights of Migrants, 11th Sess., 2009 May 14, ¶ 122, U.N. Doc. A/HRC/11/7/Add.3. (2009, May 18).

families in Guatemala, and to other migrants present in the country.<sup>67</sup> However, the functions of CONAMIGUA have been aimed almost exclusively at the protection of the rights of Guatemalans abroad and, except for some very general references to the families of migrants, no mention is made of the rights of children and adolescents—particularly those who have migrated unaccompanied and/or separated from members of their family.

The country still has no specific public policy on migration. However, some informal efforts are being made in this area. For instance, CONAMIGUA disseminated a draft migration policy document in 2013, although it has not yet been adopted. Furthermore, the Civil Society Networking Group on Migration<sup>68</sup> recently presented a paper entitled “Migration Policy Approaches in Guatemala”<sup>69</sup> for the purpose of generating public policy input related to migration and the needs of the migrant population and their families.

According to the Special Rapporteur on the human rights of migrants, in practice there is no comprehensive national regulation on migration. This situation results in a significant lack of coordination between the competent State institutions related to migration. He therefore urges the State to effectively strengthen migration coordination mechanisms.<sup>70</sup>

Guatemala has a Commission for Migrants in Congress made up of 15 Congress members from different political parties. Its strategic objectives include the promotion and realization of the functions of representation, legislation, political, and budgetary control, and all actions and institutions/organizations concerned with issues of national and international migration within

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<sup>67</sup> Decreto No. 46/2007, 2007, 10 de octubre, Ley de Consejo Nacional de Atención al Migrante de Guatemala [CONAMIGUA] [Law on the National Council for Migrants in Guatemala] 2007 (Guat.).

<sup>68</sup> The Networking Group is a forum for political, social, and media advocacy through the development of strategic alliances between civil society organizations, church, academic sectors, family members, and migrants committed to migration management. It was started in 2010 after the preparation of the Alternative Report on compliance with the provisions of the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. One of the first results was the document “Migration: a State commitment, 2012 – 2016.” In Guatemala the Networking Group consists of the following entities: Comprehensive Health Association (ASI); Child Refuge Association; Alliance Association; Civil Association of Guatemalans United for Our Rights (AGUND); Local Development Study and Support Center (CEADEL); CODEPI Center; Guatemala Study Center (CEG); Council of Christian Women; Migrant Shelters, Guatemala City and Tecun Uman; Project Counselling Service (PCS); Defense Office for Uprooted and Migrant Population of the Human Rights Ombudsman's Office (PDH); Central American Institute for Social and Development Studies (INCEDES); Institute for Historical, Anthropological, and Archaeological Research of the San Carlos University of Guatemala (IIHAA/USAC); Institute for Social Protection (IPS); Institute for Research and Policy Management of the Rafael Landívar University (INGEP/URL); National Migration Working Group in Guatemala; Social Movement for the Rights of Children and Adolescents; Latin American Faculty of Social Sciences Guatemala Office (FLACSO); Guatemalan Federation of Radio Schools (FGER); OTRANS Queens of the Night Organization; Organization of Women for Justice; Education and Recognition (WOMEN); Pastoral of Human Mobility of the Episcopal Conference of Guatemala; International Network Against Sexual Exploitation (ECPAT); Jesuit Service for Migration (SJM); and Trafficking Unit of the Human Rights Ombudsman's Office (PDH).

<sup>69</sup> López Robles, C., & Danilo Rivera, A. (2014, mayo). Aproximaciones de Política Migratoria para Guatemala. Retrieved from

<https://www.url.edu.gt/PortalURL/Archivos/100/Archivos/Aproximaciones%20de%20Pol%C3%ADtica%20P%C3%BAblica%20Migratoria%20Grupo%20Articulador.pdf>.

<sup>70</sup> Report of the Special Rapporteur on the Human Rights of Migrants, 11th Sess., 2009 May 14, ¶ 122, U.N. Doc. A/HRC/11/7/Add.3. (2009, May 18).

their jurisdiction that promote, channel, support, and/or manage processes through a stronger Commission for Migrants.<sup>71</sup>

The Directorate General of Consular and Migration Affairs, in accordance with Government Decree 415-2003, is responsible for the protection of Guatemalans abroad through an extensive consular network in Mexico<sup>72</sup> and the United States.<sup>73</sup>

Several instruments that support bilateral relations between Mexico and Guatemala have been developed since 1989, when the Bi-National Group on Migration was created. The most significant documents include:<sup>74</sup>

- Memorandum of Understanding on Matters Related to the Human Rights of Migrants, Mexico-Guatemala (2002)
- Memorandum of Understanding for the Protection of Women and Children Victims of Trafficking and Smuggling of Persons on the Border between Mexico and Guatemala (2004)
- Memorandum of Understanding between the governments of the United Mexican States, the Republic of El Salvador, the Republic of Guatemala, the Republic of Honduras, and the Republic of Nicaragua on the Dignified, Orderly, Agile, and Safe repatriation of Central American migrants by land, signed on May 5, 2006<sup>75</sup>

Chapter 13 by Center for Justice and Human Rights of the National University of Lanús, Argentina analyzes the limitations of these agreements as well as problems related to their implementation.

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<sup>71</sup> In 2013, the commission presented Bills 4388 and 4560. These provide for the reform of decree 46/2007 of the Congress of the Republic, the Law on CONAMIGUA and its regulations. However, none of these has been passed by Congress.

<sup>72</sup> The Guatemalan consular network in Mexico consists of 10 general consulates in the following cities and states: Tijuana, Baja California; Arriaga, Chiapas; Ciudad Hidalgo, Chiapas; Comitán, Chiapas; Tapachula, Chiapas; Tuxtla Gutiérrez, Chiapas; Oaxaca, Oaxaca; Tenosique, Tabasco; Veracruz, Veracruz; and, Acayucan, Veracruz.

<sup>73</sup> The Guatemalan consular network in the United States consists of 11 general consulates in the following cities and states: Chicago, Illinois; Denver, Colorado; Houston, Texas; Los Angeles, California; Miami, Florida; New York; San Francisco, California; Atlanta, Georgia; Phoenix, Arizona; Providence, Rhode Island; and Silver Spring, Maryland. According to the Ministry of Foreign Affairs (MINEX), there are plans to open a consulate general in McAllen, Texas in the near future. MINEX also indicates that in the United States “there are 15 honorary consulates which have limited authority and receive no remuneration for their work.” See López Robles, C., & Danilo Rivera, A. (2014, mayo). *Aproximaciones de Política Migratoria para Guatemala*, p. 39. Retrieved from <https://www.url.edu.gt/PortalURL/Archivos/100/Archivos/Aproximaciones%20de%20Pol%C3%ADtica%20P%C3%ABlica%20Migratoria%20Grupo%20Articulador.pdf>.

<sup>74</sup> OIM. (2013, January). *Niños, Niñas y Adolescentes Migrantes América Central y México*, p. 26. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

<sup>75</sup> Includes specific references to protocols for the return of vulnerable populations and explicitly for the return of unaccompanied children. These provisions include specific times of day during which children must be repatriated to ensure their safety (during the day), requirements for notification to the consulates of the date and time of repatriation, and separate transport and services specifically adapted to children. See Catholic Relief Services. (2010, January). *Child Migration: The Detention and Repatriation of Unaccompanied Central American Children from Mexico*. Retrieved from <http://www.crsprogramquality.org/storage/pubs/peacebuilding/LACRO%20Migration-final.pdf>.

Guatemala also integrates regional coordination initiatives for migration and the Central American Integration System (SICA), which allows free entry, transit and residence of citizens from Honduras, Nicaragua, El Salvador, and Guatemala for a period not exceeding 90 days, the only requirement being an identification document from their country. However, since the regulations of the Law on Migration have not been changed, there have been arbitrary applications and abuses of authority by the migration authorities and security forces of the National Civil Police regarding migrants from those countries.<sup>76</sup>

### *B. Legislative and policy frameworks for children*

Guatemala passed the PINA Law through Decree Number 27/2003. According to Article 1, the law is a legal instrument for family integration and social promotion that seeks the comprehensive and sustainable development of Guatemalan children and adolescents within a democratic framework and with unrestricted respect for human rights.

The adoption of the law has represented significant progress regarding the guarantee and protection of children's and adolescents' rights, in line with the regional trend to pass Children's Codes and comprehensive protection laws to bring legislation into line with the precepts of the CRC.

In general, the PINA Law incorporates the rights recognized in the CRC as well as its main principles (non-discrimination, best interests, survival, development, and the right to be heard). As specified in Article 82 of this law, the policies of comprehensive protection for children are:

- ***Basic social policies:*** to guarantee full enjoyment of rights for all children and adolescents.
- ***Social welfare policies:*** to guarantee the right to an adequate standard of living through family support and assistance programs for all children and adolescents living in extreme poverty or in a state of emergency.
- ***Special protection policies:*** to guarantee physical, psychological, and moral recovery for all children and adolescents who have been threatened or whose rights have been violated.
- ***Guarantee policies:*** to provide minimal procedural guarantees for children and adolescents subjected to judicial or administrative legal proceedings.

The Public Policy on Comprehensive Protection and the National Action Plan for Children and Adolescents in Guatemala were approved as State policy for 2004-2015 through Decree 333-2004, whose main objective is to unite State institutions' priorities and approaches in order to enforce children's and adolescents' rights.

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<sup>76</sup> Civil Society Networking Group. (2010, October). Alternative Report on Guatemala regarding the Application of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The PINA Law contains an article on the rights of children and adolescents who request or have refugee, returnee, or uprooted status under applicable national or international procedures. Whether alone or accompanied by their parents, relative, or any other person, they are entitled to receive adequate protection and humanitarian assistance for the enjoyment of the rights expressed in the Political Constitution of the Republic, domestic legislation, and international conventions, treaties, agreements, and other human rights instruments accepted and ratified by Guatemala. The PINA Law also provides for the protection of children and adolescents against trafficking for any purpose or in any form.

Neither the PINA Law nor the Comprehensive Protection Policy includes any other mention or special protection for children and adolescents in the context of migration. Hence, all of the rights stipulated to in the legislative framework of Guatemala and actions proposed by the policy arguably include children and adolescents affected in any way by migration and do not discriminate against them. These would include, for example, child and adolescent migrants in Guatemala and Guatemalan children migrating to other countries or left behind by their parents.

But the absence of special protection clauses and specific actions regarding migration in the framework law and Action Plan on children reveals a serious omission by the State. The gap reflects a failure to target a key problem area in the rights-protection of children in Guatemala and Central America.

The SBS should be the corresponding authority with the responsibility to implement all actions concerning compliance with protection measures and the PINA Law. Article 85 of this law designates the National Commission on Children and Adolescents as responsible for formulating comprehensive protection policies for children, and for integrating those into the system of urban and rural development councils and the policies of State ministries and departments. Finally, compliance with these plans should also be guaranteed.

Beyond the shortcomings of the State response to migrating children and adolescents, the PINA Law does not clearly identify the governing body for policy and enforcement of children's rights in general; thus, the institutional response related to children has been inadequate.<sup>77</sup>

The Committee on the Rights of the Child noted in its Concluding Observation on Guatemala in 2010 its concern about the insufficient implementation of the Comprehensive Protection System established by the PINA Law, and regretted that its institutions had failed to provide effective horizontal and vertical coordination. It also indicated that the Social Welfare Secretariat seems to have taken on the task of coordinating the Comprehensive Protection System. Therefore, the Committee recommended to Guatemala that it consider establishing a high-level authority to act

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<sup>77</sup> Morlachetti, A. (2013, January). *Sistemas Nacionales de protección integral de la infancia: fundamentos jurídicos y estado de aplicación en América Latina y el Caribe*, pp. 28-29. Retrieved from [http://repositorio.cepal.org/bitstream/handle/11362/4040/S2012958\\_es.pdf?sequence=1](http://repositorio.cepal.org/bitstream/handle/11362/4040/S2012958_es.pdf?sequence=1); Embajada Suecia & UNICEF. (2012). *Jurimetric Study: Evaluación de la aplicación de la Convención sobre los Derechos del Niño y la legislación desarrollada a su amparo*. Retrieved from [http://www.academia.edu/8093802/Estudio\\_Jurim%C3%A9trico\\_Evaluaci%C3%B3n\\_de\\_la\\_aplicaci%C3%B3n\\_real\\_de\\_la\\_Convenci%C3%B3n\\_Sobre\\_los\\_Derechos\\_de\\_los\\_Ni%C3%B1os\\_y\\_la\\_Legislaci%C3%B3n\\_Realizada\\_a\\_su\\_amparo](http://www.academia.edu/8093802/Estudio_Jurim%C3%A9trico_Evaluaci%C3%B3n_de_la_aplicaci%C3%B3n_real_de_la_Convenci%C3%B3n_Sobre_los_Derechos_de_los_Ni%C3%B1os_y_la_Legislaci%C3%B3n_Realizada_a_su_amparo).

as the secretariat of childhood and adolescence at the ministerial level in order to coordinate implementation of the Convention and its two Protocols.<sup>78</sup>

The Law on Social Development of Guatemala stipulates that all persons have the rights and freedoms enshrined in the Political Constitution of the Republic, the Universal Declaration of Human Rights, and international Treaties, Programs, and Conventions ratified by Guatemala.<sup>79</sup> Article 16 highlights the groups or sectors that deserve special attention in the design, implementation, monitoring, and evaluation of the Social Development and Population Policy—including children and adolescents in vulnerable situations, as well as women and migrants.

This law also declares that, through the Ministry of Public Health and Social Welfare and the Ministry of Education, the State shall promote access to health services, education, and other basic services for migrant workers and their families that will improve their living conditions in their places of temporary residence.<sup>80</sup>

The law stipulates that the State shall promote the study and analysis of international migration and transmigration in order to understand these phenomena. Thus, the law could suggest criteria and recommendations to strengthen the government in decision-making and in international negotiations, as well as in defending the human rights of migrants.

In 2009, Guatemala adopted the Law against Sexual Violence, Exploitation, and Trafficking in Persons, which represents a step forward in national legislation. That law prioritizes care for victims and led to the creation of the Secretariat against Sexual Violence, Exploitation, and Trafficking. As a complement, the Law on the Alba-Kenneth Warning System established coordinated inter-institutional actions for the location and immediate protection of children who have been abducted, kidnapped, or disappeared.<sup>81</sup> The Office of the Procurator General of the Nation (PGN) has responsibility for implementing this Law through the Operational Unit of the Kenneth-Alba Warning System.

### *C. Relevant institutional jurisdiction and interventions for the protection of migrant children's rights*

The main State institutions responsible for protecting children are: the SBS; the First Lady's Social Works Secretariat (SOSEP); the Department for Children of the PGN; the Ombudsman's Office for Child and Adolescent Rights; the Office for Defense of the Rights of Children and

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<sup>78</sup> Comm. on the Rights of the Child, *Consideration of reports submitted by the States Parties under article 44 of the Convention Concluding observations: Guatemala*, 55th Sess., 2012, September 13 - October 25, ¶ 12, U.N. Doc. CRC/C/GTM/CO/3-4 (2010, October 25).

<sup>79</sup> Decreto No. 42/2001, 2001, 4 de junio, Ley de Desarrollo Social [Law on Social Development] 2001 (Guat.).

<sup>80</sup> Decreto No. 42/2001, 2001, 4 de junio, Ley de Desarrollo Social [Law on Social Development] art. 35, 2001 (Guat.).

<sup>81</sup> Decreto No. 28/2010, 2010, 10 de agosto, Ley del Sistema de Alerta Alba-Keneth [Law on the Alba-Keneth Alert System] 2001 (Guat.); Decreto No. 5/2010, 2010, 31 de enero, Reforma la Ley del Sistema de Alerta Alba-Keneth, 2010 (Guat.).

Adolescents, the Prosecutor of the Public Ministry;<sup>82</sup> the Peace Courts;<sup>83</sup> and the Courts for Children and Adolescents.<sup>84</sup>

A review of the institutional framework suggests that the State is providing unequal and incomplete responses to children in relation to migration, because these are not yet based on the principle of the child's best interests. Migration is not explicitly understood as requiring support or responses at the level of the community and families. General reference is made to the need for inter-sectoral coordination and community participation for the comprehensive care of children and adolescents who, because of their vulnerability, require special protection. This favors actions to support families so that they are capable of fulfilling their responsibilities of care, protection, and development of their children.

The SBS promotes the Migrant Program for the reception and handover of children and adolescents as part of deportation proceedings by air and land, mainly from the United States and Mexico. This program includes care and protection at the *Nuestras Raíces* shelters in Quetzaltenango and Guatemala before the children are transferred to their families.

According to the PINA Law, Article 108, PGN is the State institution responsible for legally representing children and adolescents who lack such representation. This office investigates cases of children or adolescents who have been threatened or whose rights have been violated; if it determines that a crime has been committed against children or adolescents who lack legal representation, the PGN must file a complaint to the Public Ministry's office. For the repatriation of unaccompanied children and adolescents, the PGN is the legal representative responsible for the reception and transfer of the children and adolescents to the most appropriate family members.

For children and adolescents returning by land from Mexico, the Social Welfare Secretariat provides support to the representative of the PGN's office to transport children from the border town of El Carmen, San Marcos, to Quetzaltenango. At the *Nuestras Raíces* shelter, International Red Cross volunteers provide medical care, the shelter's psychologist provides psychological care, the shelter's social worker provides social care, and finally, PGN offers legal services. The support the shelter provides is limited to 72 hours after admission of the child or adolescent.

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<sup>82</sup> This Office is responsible for ensuring compliance with the Law on Comprehensive Protection through specialized Prosecution Offices. It is also responsible for investigating events in which illicit acts are attributed to young people. As part of this function, it will request and provide evidence; perform all acts necessary to promote and exercise public prosecutions as a matter of course, except for certain exceptions; and request court sanctions that it deems most appropriate for the adolescent offender.

<sup>83</sup> Regarding the rights of children and adolescents, the Peace Courts may hear and resolve cases in which precautionary measures for protection are being requested and some cases of misdemeanors by young people who have broken the law. In all cases within their jurisdiction, the judge of the Peace Courts will transmit proceedings to the Children's and Adolescents' Court or to the Adolescents' Court for cases of young people who have broken the law, at the beginning of the following business day so that the case can be heard.

<sup>84</sup> These courts are responsible for hearing, processing, and resolving, through court orders, all cases which represent a threat to or violation of children's rights, seeking restitution of the right violated, the cessation of the threat or violation, promotion of the family reintegration of the child, and guidance or punitive measures against the rights violator. In this regard, sometimes SBS child migrant shelters receive orders from the Children's and Adolescents' Courts to assist and provide shelter for Central American children with irregular status while this can be resolved. The resolution usually consists of the child's repatriation to his/her place of origin.

When children and adolescents are repatriated by air from the United States, the SBS assists with Guatemalan Air Force flights and commercial flights for unaccompanied children and adolescents from Northern Mexico. In both cases, the SBS facilitates the children's and adolescents' migration control process in coordination with the DGM so that they can be immediately transferred to the *Nuestras Raíces* shelter in Guatemala City. This shelter provides the same care as the shelter in Quetzaltenango. In both cases, the Secretariat provides shelter for children and adolescents who require it, supporting and accompanying them when transferred to a family member, but have no strategy to follow up to ensure successful reintegration.

In the repatriation process in Quetzaltenango, the PGN is responsible for receiving the unaccompanied children and adolescents from the National Migration Institute (INM), using a list provided by the Mexican authorities on the border at El Carmen, San Marcos. The children are then transferred to the *Nuestras Raíces* shelter in Quetzaltenango together with representatives from the SBS. The PGN is responsible for locating the appropriate family members to take custody of the child or adolescent.

However, this procedure is often carried out by the SBS without the participation or approval of the PGN. The children and adolescents are taken to the most suitable family member following an administrative report proceeding. The administrative report is a document by which the PGN, through its delegates, hands over the child or adolescent who is now "guaranteed" to the family member who receives him or her. If there is no suitable family member to receive the unaccompanied child or adolescent, the case is taken to the Peace Court, which starts the corresponding protection proceeding as established under the PINA Law.

When unaccompanied children and adolescents are repatriated by air from Central or Northern Mexico and from the United States, they are received at the Guatemalan Air Force base or at the International Airport of La Aurora, where the PGN is responsible for assisting reception. The process is facilitated in conjunction with the DGM and the SBS. If the children or adolescents have not informed the Mexican and U.S. authorities of their real age, once identified as under 18 years of age, they are taken to the *Nuestras Raíces* shelter in Guatemala City. In these cases, the shelter has the same functions as the shelter in Quetzaltenango.

The Human Rights Ombudsman plays an important role in these processes, as a commissioner of the Congress for the defense of human rights and as stipulated in the Constitution. The Ombudsman has broad powers: to promote the smooth operation and efficiency of governmental administrative proceedings regarding human rights; to investigate and denounce administrative conduct harmful to people's interests; to investigate all complaints presented by any person regarding violations of human rights; and to promote legal or administrative proceedings or remedies. To comply with its functions, the Ombudsman's Office has established a series of Defense Offices, including the Defense of Uprooted and Migrant Populations, Defense of Children's and Adolescents' Rights, and Defense of Women and Victims of Trafficking.

The Defense Office for Children's and Adolescents' Rights has the power to investigate complaints or attend them as a matter of course when children's and adolescents' rights have been violated. Thus, this office determines responsibilities, orders cessation of violations, and

takes measures or complaints before competent bodies. This office also oversees governmental and nongovernmental institutions providing care for children and adolescents in order to ensure appropriate measures and conditions for protecting children.

The Defense Office for Uprooted and Migrant Population aims to provide support, advice, and guidance to migrants, and monitors and oversees public institutions providing care to migrants.<sup>85</sup> From January to October 2013, this office heard 42 cases, including three reports of Guatemalan migrants in transit in Mexico. They were arrested and charged with high impact crimes without having access to a lawyer to defend them. This Defense Office also supported two similar cases in the United States. Of most concern in these situations is the fact that Guatemalan consulates provide only consular support, but do not have lawyers to provide nationals with legal counsel when abroad.

The same Office conducts monthly monitoring of the Guatemalan Air Force, anonymously interviewing migrants deported from the United States to gather information on the process of arrest, detention, and deportation. Unaccompanied children and adolescents are frequently detected on these flights. However, there is no systematic or continuous monitoring of the repatriation of unaccompanied children and adolescents arriving by land from Mexico or via commercial flights at La Aurora Airport.

#### *D. The legislative, institutional, and political situation*

As this account clearly demonstrates, the Guatemalan legal framework for migration urgently needs to be changed to include fundamental human rights principles and move beyond a predominant emphasis on national security.

The Human Rights Ombudsman of Guatemala strongly agrees that the Law on Migration and its Regulations need review to include a human rights-based approach in line with international treaties and conventions signed and ratified by Guatemala. The Ombudsman also highlights the need to develop a comprehensive policy to ensure the full recognition of migrants' human rights, clearly defining institutional responsibilities and allocating necessary resources.<sup>86</sup>

As a destination country, Guatemala lacks a migration law that recognizes the rights of migrants and facilitates regularization processes for undocumented Central American migrants in the country. There is no institution responsible for addressing migration of this kind in order to provide care, protection, and control of irregular migration. Both policy and legislation fall short

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<sup>85</sup> Procurador de los Derechos Humanos. Defensoría de la Población Desarraigada y Migrante. Retrieved from <http://www.pdh.org.gt/defensorias/de-la-poblacion-migrante.html>.

<sup>86</sup> Government Decree No. 528/2003 should also be reformed, as a decree that contains the Regulation for the authorization of non-nationals for private sector employers in the country, so that it is in line with the Convention. This regulation does not allow less-skilled migrant workers to work (for example, under the Convention on the Rights of Migrant Workers and Their Families), providing instead only for managers, directors, administrators, superintendents, general managers of companies, etc. This gap forces most migrants to work in the informal economy with fear of deportation, and without protection for their labor rights and other basic rights. See Human Rights Ombudsman's Office. Detailed Annual Report: Human Rights Situation from the Detailed Annual Report of the Congress on activities and the situation of human rights in Guatemala in 2013. Retrieved from [http://www.pdh.org.gt/archivos/descargas/Documentos/Informes%20Anuales/iac\\_2013\\_situacion.pdf](http://www.pdh.org.gt/archivos/descargas/Documentos/Informes%20Anuales/iac_2013_situacion.pdf).

of addressing the particularities of Guatemala as a country of origin, destination, transit, and return for migrants.<sup>87</sup>

There have been various attempts to change the Law on Migration, the most recent being Bill 4126, presented by the Congressional Commission on Migrants. This proposal was initially criticized, despite being developed with the participation of civil society and international agencies. In 2012, the Networking Group, in coordination with the Congressional Commission on Migrants, introduced significant changes that include a human rights perspective, including fundamental principles for protecting populations in vulnerable situations (women, unaccompanied children, trafficking victims, asylum seekers, refugees, disabled persons, older people, and others). Instruments related to migration and human rights, children's rights, women's rights, refugees, asylum-seekers, victims of trafficking, and other issues provided a basis to update this proposal. Its new content includes creating an autonomous Migration Institute, considering migrants with irregular or unauthorized migration status as subjects of rights, promoting a regularization program in the country, and introducing a series of definitions and concepts relating to migration that are consistent with international standards.

The absence of an adequate legal framework for protecting migrants' rights is compounded by the lack of a comprehensive and explicit public policy on migration. Thus, State expression is reduced to a series of *ad hoc* programs, regulations, and actions that seek to respond to the demands and needs of Guatemalan migrants abroad, attend to groups of forced returnees, and address temporary agricultural workers in border areas.<sup>88</sup>

CONAMIGUA initiated a process for formulating, consulting on, validating, and constructing a comprehensive public migration policy, but this has not yet materialized due to a legal loophole that impedes the allocation of work to a specific governmental body. The mandates of the DGM and CONAMIGUA also overlap, so it is essential to establish an agreement between these institutions to resume and complete formulation of a comprehensive migration policy—urgently needed for a country in which migration has critical economic, social, and political effects.<sup>89</sup>

Any initiative for developing a migration policy should include the National Working Group on Migration (MENAMIG) as a reference group, given the key impact of its analyses, studies, advocacy processes, and communication strategies on migration issues in Guatemala. The Civil Society Networking Group on Migration should also be included to promote discussion and structure public policy proposals and a legislative framework.

A comprehensive public migration policy proposal should use a rights-based lens to view Guatemalan migrants abroad and include an active consular staff to defend migrants' rights in their countries of destination. This policy should also provide programs for the families of migrants who have been deported, for reintegrating migrants forced to return to their

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<sup>87</sup> OIM. (2013, January). Niños, Niñas y Adolescentes Migrantes América Central y México, p. 201. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

<sup>88</sup> OIM. (2013, January). Niños, Niñas y Adolescentes Migrantes América Central y México. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

<sup>89</sup> OIM. (2013, January). Niños, Niñas y Adolescentes Migrantes América Central y México. Retrieved from [http://costarica.iom.int/public/pdf/ninez\\_america\\_latina.pdf](http://costarica.iom.int/public/pdf/ninez_america_latina.pdf).

communities of origin, and for migrants from other countries who are in transit or for whom Guatemala is their country of destination. This policy should address the need to protect the rights of the most vulnerable migrant populations, such as children and adolescents.

The Guatemalan legislative framework for migration reflects most of the provisions of the CRC, and thus responds to the child protection system. Guatemala has also adopted a policy from 2004 to 2015 to implement commitments adopted under national and international law.

However, inadequate implementation of this legislative and policy framework for children has seriously affected the country's ability to enforce children's rights. As the Committee on the Rights of the Child in its evaluation of Guatemala has found, the Comprehensive Protection System has been poorly applied with regard to institutional structure, coordination, planning, data collection, and budget.<sup>90</sup>

A study by UNICEF evaluating implementation of the CRC and legislation developed in Guatemala also identified weak mechanisms and procedures with respect to the protection of children. This study points out that the PINA Law does not specifically regulate the coordination of institutions responsible for the protection system. Regulation of procedures to ensure actions of prevention, detection, attention, and family reintegration of children whose human rights have been violated is also weak at the municipal and departmental levels.<sup>91</sup>

As we have described, some level of inter-institutional coordination of the Protection System exists, led by the SBS, to accompany the restoration of the rights of unaccompanied migrant children, achieve family reunification, and promote attention for migrant children and adolescents who have been threatened or whose rights have been violated.

The Office of the Procurator General of the Nation plays an important role in guaranteeing due process in repatriation, thus providing protection for unaccompanied children and adolescents during the process of reception and transfer to family members. When relatives cannot be located, the judge of the Peace Court who is on duty is notified, and legal proceedings begin with protection measures and shelter in public or private institutions; this concludes the intervention of Procurator. The Human Rights Ombudsman, exercising his own powers or through the Defense Offices specialized in children's rights and migrants' rights, may play a central role in defending, promoting, and protecting the rights of children and adolescents in the context of migration. It is crucial to promote inter-institutional coordination as well as to adopt legislative frameworks and protocols to make these rights effective.

In the field of social policy and development, the intervention of the Secretariat for Planning and Programming of the Presidency (SEGEPLAN) is crucial as a body involved in State planning to

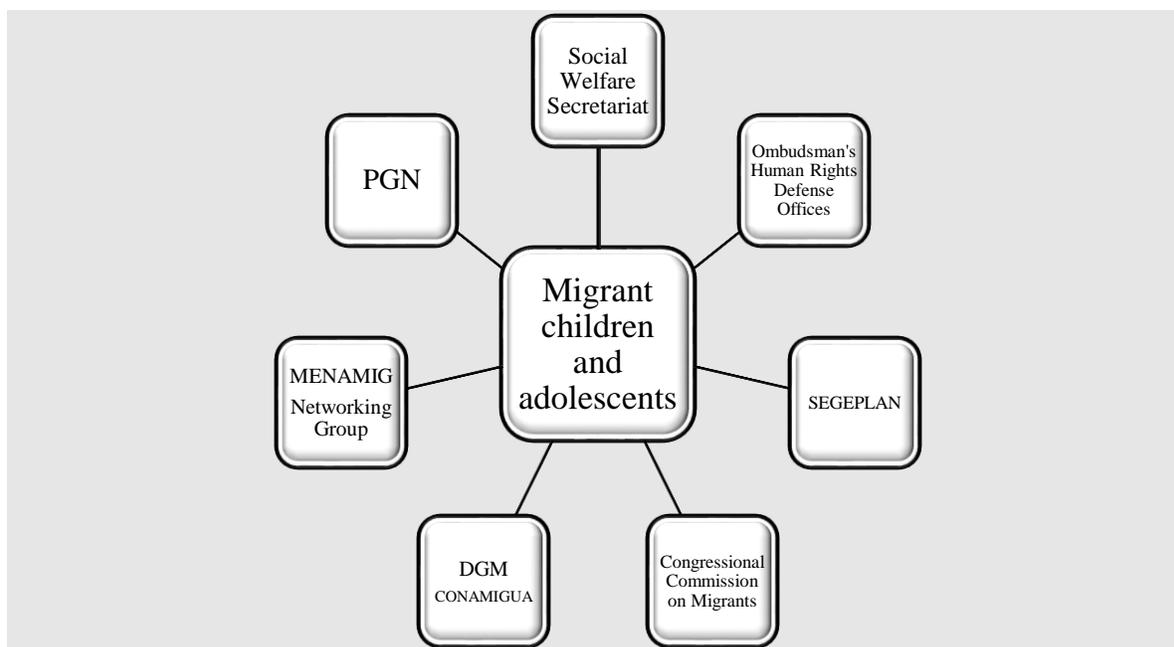
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<sup>90</sup> Comm. on the Rights of the Child, *Consideration of reports submitted by the States Parties under article 44 of the Convention Concluding observations: Guatemala*, 55th Sess., 2012, September 13 - October 25, ¶ 12, U.N. Doc. CRC/C/GTM/CO/3-4 (2010, October 25).

<sup>91</sup> Embajada Suecia & UNICEF. (2012). Jurimetric Study: Evaluación de la aplicación de la Convención sobre los Derechos del Niño y la legislación desarrollada a su amparo. Retrieved from [http://www.academia.edu/8093802/Estudio\\_Jurimetrico\\_Evaluacion\\_de\\_la\\_aplicacion\\_de\\_la\\_Convencion\\_sobre\\_los\\_Derechos\\_del\\_Niño\\_y\\_la\\_legislacion\\_desarrollada\\_a\\_su\\_amparo](http://www.academia.edu/8093802/Estudio_Jurimetrico_Evaluacion_de_la_aplicacion_de_la_Convencion_sobre_los_Derechos_del_Niño_y_la_legislacion_desarrollada_a_su_amparo).

combat the root causes of the forced migration of so many children and adolescents. This Secretariat has responsibility for assisting in the formulation of the Government's Social Development Policy and evaluating its implementation and effects in relation to the Social Development Law—which includes migrants among its priority populations.

Relevant Institutions for Developing Policy and Institutional  
Coordination to Protect Children's and Adolescents' Rights in  
the Context of Migration



**Recommendations by United Nations Committees on the Protection of Child and Adolescent Migrants in Guatemala<sup>92</sup>**

*Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families*<sup>93</sup>

- Take the necessary measures to complete an early review of bill No. 4126 and ensure that it is fully in line with the Convention.
- Ratify ILO Convention 143 as soon as possible.

<sup>92</sup> These recommendations are not those of the authors. The authors' recommendations on Guatemala are part of the regional, bilateral, and national recommendations section at the end of this book. The national level recommendations include recommendations to the main sending (Honduras, El Salvador, and Guatemala), transit (Mexico), and destination (Mexico and the United States of America) countries in the region.

<sup>93</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Consideration of reports submitted by States parties under article 74 of the Convention Concluding Observations: Guatemala*, 15th Sess., 2011, September 12 - 23, U.N. Doc. CMW/C/GTM/CO/1 (2011, October 18).

- Improve conditions at the shelter for migrants, ensuring the provision of basic social services, including food, health care, and hygienic conditions. Expedite exit procedures and ensure that men and women are duly separated.
- Establish, implement, and disseminate a comprehensive migration regularization policy that satisfies the principle of nondiscrimination for all migrant workers and their families in irregular situations.
- Ensure access to emergency medical care and ensure that the children of migrant workers in an irregular situation have access to, and remain in, the education system.
- Implement a comprehensive migration policy to facilitate improved coordination between institutions on migration matters. The Committee also recommends that the State party (Guatemala) incorporate the protection of the rights of all migrant workers and members of their families, in accordance with the Convention. It also urges the State party to strengthen the CONAMIGUA as a mechanism for overseeing the institutions and government organs entrusted with protecting and helping all migrant workers and members of their families.
- Develop policies that address the difficulties faced by unaccompanied migrant children and adolescents, and set up mechanisms for their identification and protection, taking into account the guidelines of the Regional Conference on Migration on assisting unaccompanied children.
- Carry out studies on the situation of children and adolescents in Guatemala whose parents have emigrated, with a view to developing policies on care, protection, and family reunification

*Committee on the Rights of the Child*<sup>94</sup>

- Adopt technical criteria to ensure that priority is given to families who need positive action measures, such as migrant families and children whose parents have migrated.
- Enact a migration law that addresses the situation faced by migrant children and create tools to address existing problems, especially with regard to unaccompanied migrant children. The Committee brings to the Guatemalan State party's attention its general comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin.<sup>95</sup>

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<sup>94</sup> Comm. on the Rights of the Child, *Consideration of reports submitted by the States Parties under article 44 of the Convention Concluding Observations: Guatemala*, 55th Sess., 2012, September 13 - October 25, U.N. Doc. CRC/C/GTM/CO/3-4 (2010, October 25).

<sup>95</sup> Comm. on the Rights of the Child, *General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, 39th Sess., 2005, May 17 – June 3, U.N. Doc. CRC/GC/2005/6 (2005, Sept. 1), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>.

- Develop a comprehensive public policy to address the social factors and root causes of juvenile violence, such as social exclusion, lack of opportunities, culture of violence, and migration flows. It also recommends investing in prevention activities, with an emphasis on the school, the family, and social inclusion measures.

### **VIII. Final reflections**

The migration of Guatemalan children and adolescents results from a combination of factors that strengthen their desire to migrate. In all cases these factors are linked to the violation of their rights.

Beyond a few isolated institutional efforts, the absence of an adequate legislative and policy framework for those affected by migration, and the lack of enforcement of existing legislation related to children, results in the denial of rights and basic services.

Accordingly, it is urgent and necessary to develop rights-focused policy responses in the short, medium, and long term. Through the adoption of a new legislative framework and migration policy, and the application of existing laws (the PINA Law and the Law on Development), the specific needs of migrant populations can be addressed, and existing institutions can be strengthened and provided with budgetary resources. Capacity building is also necessary to provide relevant personnel with specific mandates to protect and promote children's and adolescents' rights. Obstacles and severely harmful practices should be eliminated.

Immediate, comprehensive, and adequate attention to the structural causes of the migration of Guatemalan children, adolescents, and families is necessary, and must be approached from a human rights perspective. Different forms of violence that affect children and adolescents deprivation of basic social rights, and the lack of opportunities for children, adolescents, and/or their parents, increasingly and seriously affect the right to development of Guatemalan children. Family separation also aggravates this situation. The combination of these elements systematically forces children and adolescents to leave the country at younger and younger ages without due regard for the risks.

Current policies on reception and reintegration of repatriated children and adolescents thus far have had limited effect. The reasons children and adolescents leave their homes, communities, and country have not been adequately addressed. Nor has the situation of children whose parents live in the United States with irregular status. These cases and others—including the forced return of children who fear violence—result in young people compelled to leave the country once again under even riskier conditions.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 4 El Salvador

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### I. Introduction

Over the last three years, the number of children and adolescents from the Northern Triangle countries of Honduras, Guatemala, and El Salvador attempting to reach the United States border by irregular means has increased dramatically. Of these, approximately four out of five children and adolescents who have been detained at the U.S. border were unaccompanied.<sup>2</sup>

The current irregular migration of Salvadoran children and adolescents to the United States is a historical phenomenon. To explain this phenomenon, we examine the structural and systemic factors that result in children facing social exclusion and other risks, which prevent them from receiving the protection and opportunities needed to fully develop—free from violence—in El Salvador. Violence on the part of gangs, the community at large, and within the home—coupled with a lack of state protection—is a primary factor driving migration of children. El Salvador has one of the highest murder rates in the world, including high rates of femicide/feminicide, with 1 in 4 female victims between the ages of 0 to 19. Adolescents as a group comprise more than 90% of all homicide victims.<sup>3</sup> Children, especially girls, are also particularly vulnerable to sexual violence in El Salvador.<sup>4</sup> Cultural and family issues also come in to play, especially when a child or adolescent has a parent living in the United States,<sup>5</sup> a circumstance that amplifies the child’s desire or need to reunite with family and instigates a lifelong migrant identity. (Chapter 1 of this book contains an additional discussion of migration causes.)

We obtained and analyzed information and statistics from reports from governmental institutions, international organizations, civil society groups, and academic research, among other sources. We also conducted extensive, in-depth interviews with 83 Salvadoran children and adolescents

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<sup>1</sup> We would especially like to thank Georgina Villalta, former Deputy Inspector General for the Defense of the Rights of Children and Young People in El Salvador (sections II and III), and Juan José García, former Vice-Minister for Salvadorans Living Abroad (section III), for their contributions.

<sup>2</sup> The term “unaccompanied children” is defined by the UN Committee on the Rights of the Child General Comment 6, Article III.7. as “children . . . who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.” Comm. on the Rights of the Child, *General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, 39th Sess., 2005, May 17 – June 3, U.N. Doc. CRC/GC/2005/6 (2005, Sept. 1), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>. See also Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>3</sup> Small Arms Survey (2012, February). Femicide: A Global Problem. *Research Notes*, 14. Retrieved from [http://www.smallarmssurvey.org/fileadmin/docs/H-Research\\_Notes/SAS-Research-Note-14.pdf](http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-14.pdf); Procuraduría la Defensa de los Derechos Humanos (“PDDH”). (2013, March). Informe especial sobre el impacto de la violencia en los derechos de las niñas, niños y adolescentes en El Salvador. Retrieved from [http://www.redlamyc.info/images/stories/INFORME\\_ESPECIAL-2.pdf](http://www.redlamyc.info/images/stories/INFORME_ESPECIAL-2.pdf).

<sup>4</sup> Procuraduría la Defensa de los Derechos Humanos (“PDDH”). (2013, March). Informe especial sobre el impacto de la violencia en los derechos de las niñas, niños y adolescentes en El Salvador. Retrieved from [http://www.redlamyc.info/images/stories/INFORME\\_ESPECIAL-2.pdf](http://www.redlamyc.info/images/stories/INFORME_ESPECIAL-2.pdf).

<sup>5</sup> Villacorta, A.E., Loya, N., Tablas, V., Moreno, M.E., & Sáenz, C. (2011, October). Migración internacional, niñez y adolescencia en El Salvador. Retrieved from <http://www.fundaungo.org.sv/pdf/2012/migracioninternacional.pdf>.

repatriated from Mexico upon their arrival in El Salvador; 13 relatives who had come to receive children and/or adolescents; and 14 children and adolescents during their detention at the Century XXI Migration Station in Tapachula, Mexico (an immigration detention center). In addition, we held focus groups with potential migrant children and adolescents throughout El Salvador (in Suchitoto, La Unión, San Pablo Tacachico, and San Miguel).<sup>6</sup>

This chapter begins by analyzing two key aspects of the relation between children and migration in El Salvador: migratory flows, their characteristics, and related statistical data, particularly from recent years; and structural causes (i.e., political, social, economic, and labor policies) behind the growing phenomenon of Salvadoran children migrating, alone or unaccompanied, to Mexico and the United States. The denial of basic rights, such as healthcare or education and the increasing and diverse forms of violence that affect children and adolescents play a decisive role in the migration of Salvadoran children and adolescents.

Then we examine the legal and institutional framework currently in place to protect the rights of children and adolescents in the country, in particular migrant children, closely evaluating migration legislation, including laws concerning the rights of Salvadorans living abroad. We also review the creation of bodies and institutional spaces for dialogue about migration and children's issues, including consular assistance and protection provided to Salvadoran children and adolescents in both transit and destination countries.

Finally, we briefly examine the situation of another category of children and adolescents affected by migration: migrant children and adolescents and the children of migrants residing either temporarily or permanently in El Salvador. This final section looks at policies geared toward these children and the principal threats to their fundamental rights.

## **II. Migration in El Salvador: migrant children and adolescents**

The international migration of Salvadorans is not a recent phenomenon. Its history can be divided into phases, each with its own contextual factors. In its 2005 Human Development Report,<sup>7</sup> the United Nations Development Program (UNDP) in El Salvador identified at least four phases: the first between 1920 and 1969; the second between 1970 and 1979; the third between 1980 and 1991, ending along with the country's civil war; and the fourth beginning in 1992 following the end of the civil war. The final phase formally ends in 2005 and coincides with the year the UNDP report was published. However, this phase in effect continues, as predominant structural factors have not varied substantially.

The first period (1920-1969) was characterized by the migration of Salvadorans to United Fruit Company banana plantations in northern Honduras, where they sought employment. Previously, Salvadorans had migrated to Panama to work on the construction of the Panama Canal, forming

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<sup>6</sup> Among other sources, interviews with key actors were also carried out by the University of California Hastings College of Law Refugee and Human Rights Clinic in collaboration with the Center for Gender and Refugee Studies. UC Hastings interviewed, among others, Aracely Bautista Bayona, Roberto Rodriguez Melendez, Maria Teresa Delgado de Mejia, Marlon Montoya, and Ana Georgina Ramos de Villalta.

<sup>7</sup> Programa de las Naciones Unidas para el Desarrollo ("PNUD"). (2005). *Informe sobre desarrollo humano El Salvador 2005, Una mirada al nuevo nosotros: el impacto de las migraciones, Sinopsis*. Retrieved from <http://www.pnud.org/sv/migraciones/content/view/9/105/>.

part of a contingent of approximately 2,113 Central Americans, according to Panamanian immigration records.<sup>8</sup> García Cuadra calculates that by the end of the 1960's, approximately 350,000 Salvadorans had left the country looking for work.

The second period (1970-1979) saw a substantial increase in migration to the United States. This growth was due to the closure of migration routes to Honduras as a result of the armed conflict between the two countries, and the worsening of the socioeconomic situation following the break-up of the Central American Common Market. The UNDP report states that migration increased 73% during this decade. According to the report, this migratory flow led to the formation of the first migration networks. These networks were vitally important in subsequent years, because many Salvadorans regularized their migration status, enabling the regular and irregular migration of relatives, friends, and neighbors.

The third phase corresponds with the country's civil war. Migration to the United States was much greater during this phase, reaching an increase of 307%. This increase was also stimulated by modifications to migration law in the United States, such as the Immigration Reform and Control Act (IRCA) in 1986. IRCA allowed for the regularization of many immigrants' status, in turn facilitating family reunification processes.

The fourth phase began in 1992 with the signing of the Peace Accords. This phase was characterized mainly by flows of returning political refugees, ex-combatants, and members of the middle and upper classes who had fled the war. It was also characterized by a large flow of migrants leaving the country beginning in 1996 as a result of an economic slowdown. It is estimated that between 1996 and 2005, the net international migration of Salvadorans reached 100,000 per year, the largest migratory flow in comparison with earlier phases. The effects of Hurricane Mitch and two large earthquakes one month apart in 2001 also contributed to this migration. Growing violence in the country, particularly violence perpetrated by gangs and common criminals, has also spurred migration.

In response to the earthquakes in January and February 2001, the United States government granted Temporary Protected Status (TPS) to approximately 250,000 Salvadorans in March 2001 (Salvadorans were initially designated for TPS in 1990 due to the civil war). TPS has been renewed every 18 months since then for these individuals, most recently in May 2013 until March 2015. The concession and extension of TPS over the past decade has resulted in a continuous flow of migration related to desires for family reunification and the configuration of transnational networks of Salvadorans who have, in turn, encouraged and supported the migration of thousands of relatives, friends, and neighbors.

However, TPS does not include provisions that permit those who have the status to confer it on other family members who do not qualify for temporary protection. In other words, Salvadoran parents who received protection cannot request the same status or any other regular migratory status for their children, unless the children themselves qualify for temporary protection. Salvadoran children and adolescents arriving in the United States to reunite with parents holding TPS are

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<sup>8</sup> García Cuadra, R. & Guillén, E. (2002). Panamá. En *Seminario y conferencias, Informes nacionales sobre migración internacional en países de Centroamérica, Taller de capacitación para el análisis de información censal sobre migración internacional en América Central*, 24.

subject to deportation. Government authorities can use their discretionary power to not charge and punish these children and adolescents. Even if that occurs, however, it does not grant them the right to remain in the United States based on their parents' status.<sup>9</sup>

Although estimates vary, it is clear that the population of Salvadorans in the U.S. is significant. U.S. immigration officials estimated that the population of Salvadorans living in the United States with different migratory statuses, regular or irregular, in 2002 was 1,271,703.<sup>10</sup> The Ministry of Foreign Relations of El Salvador (*Ministerio de Relaciones Exteriores de El Salvador*) calculated that the population of Salvadorans living in the United States in 2002 was 2,510,000. More recently, the UNDP estimated that close to 2.2 million Salvadorans were living outside of El Salvador, with 85% (1,870,000) in the United States, and 5% in Canada.<sup>11</sup>

These disparities in calculations reflect the fact that figures on the migration of Salvadorans to the United States are approximate, because the information and calculation methods used differ. Furthermore, customs exit records do not include irregular migrants, and there are no records for those who die in transit. Therefore, it is difficult to know the precise number of Salvadorans migrating irregularly to the United States. The U.S. Department of Homeland Security's (DHS) Office of Statistics reports that in January 2010, there were 620,000 undocumented Salvadorans in the United States.

Salvadoran children and adolescents were part of each phase of migration to the United States described above, but the particular characteristics of these young migrants were not studied in detail until recently. Factors contributing to this increased attention and visibility are, among others: the growing number of children and adolescents migrating to Mexico and the United States from all Central American countries; the new risks facing unaccompanied children and adolescents while in transit; their vulnerability and the lack of respect for children's fundamental human rights while in transit; inhumane institutional treatment during detention and deportation processes in Mexico and the United States (as described in chapters 6 and 14 in this book); and the difficulty of reintegrating into their communities upon the children's return.

Most Salvadoran children and adolescents migrating irregularly are unaccompanied males between the ages of 12 and 17, although the number of even younger migrant children has increased. According to data from 2013, 67.9% of the 1,327 Salvadoran children and adolescents deported from Mexico between January and September of that year were male, and 7 in 10 were unaccompanied. In the case of migrant girls, 6 in 10 were travelling accompanied. This is a relatively small difference considering the increased risks and the vulnerability facing girls and adolescent women in transit.

Official records on the irregular migration of Salvadoran children and adolescents to the United States are mainly documented by three different sources. Some records relate to apprehensions of children in the United States made by U.S. Border Patrol. Others record the detention of children

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<sup>9</sup> For a more in-depth analysis, see chapter 10.

<sup>10</sup> Andrade-Eekhoff, K. (2003, December). *Mitos y realidades. El impacto económico de la migración en los hogares rurales*. San Salvador: FLACSO El Salvador.

<sup>11</sup> Programa de las Naciones Unidas para el Desarrollo ("PNUD"). (2005). *Informe sobre desarrollo humano El Salvador 2005, Una mirada al nuevo nosotros: el impacto de las migraciones, Sinopsis*. Retrieved from <http://www.pnud.org/sv/migraciones/content/view/9/105/>.

and adolescents in different Mexican National Migration Institute (*Instituto Nacional de Migración de México* or INM) migration stations—the colloquial term for immigration detention facilities in Mexico—and deportations from these migration stations to El Salvador. The Salvadoran General Directorate of Migration (*Dirección General de Migración y Extranjería*) also keeps records of entry into the country. This information is far from an accurate reflection of the magnitude of the irregular migration of Salvadoran children for two fundamental reasons: (1) children and adolescents apprehended while migrating irregularly to the United States represent only a subset of all migrant children, as many reach their destinations or disappear along the way, among other possible outcomes; and (2) some unaccompanied children and adolescents stop along the way in Mexico and obtain temporary work, as do some migrant adults.

Migrants who successfully cross the border and reach their destination, as well as children and adolescents who die or “disappear” along the way, are not included in these records. Nor are victims of the diverse forms of human trafficking: kidnapping for extortion or sexual exploitation, child prostitution, drug trafficking, and forced recruitment by organized criminal groups. In addition, some migrant children and adolescents work informally or engage in begging in Mexico along the way in order to pay for continuing their journey, among other reasons. Nevertheless, the data we have enables us to approximate a characterization of the irregular migration of Salvadorans under the age of 18.

Between 2008 and 2012, the U.S. Border Patrol apprehended 7,926 unaccompanied Salvadoran children of both sexes between the ages of 0 and 17 migrating irregularly at the border. The percentage increase in apprehensions of Salvadoran children during that period of 2008 to 2012 was 44%, compared to an average of 39% for all Central American countries during the same timeframe. The sharp rise in apprehensions of Salvadoran children at the U.S. border in this time period suggests that the overall number of Salvadoran child and adolescent migrants to the United States similarly increased. The apprehensions of children increased yet again in 2013, reaching apprehensions of 5,990 Salvadoran children in just one year alone.<sup>12</sup> In 2014, that figure jumped to 16,404 apprehensions of unaccompanied Salvadoran children.<sup>13</sup>

The growth in the rate of Salvadoran children apprehended between 2008 and 2010 was 5 times higher than that of all Salvadorans apprehended during the same period (37.3% and 8%, respectively). Apprehension of children, due to the nature of detention processes, increases the vulnerability of children to violations of their fundamental rights. The deprivation of liberty and other rights afforded to children associated with detention have been documented and reported by the United Nations and human rights organizations.<sup>14</sup>

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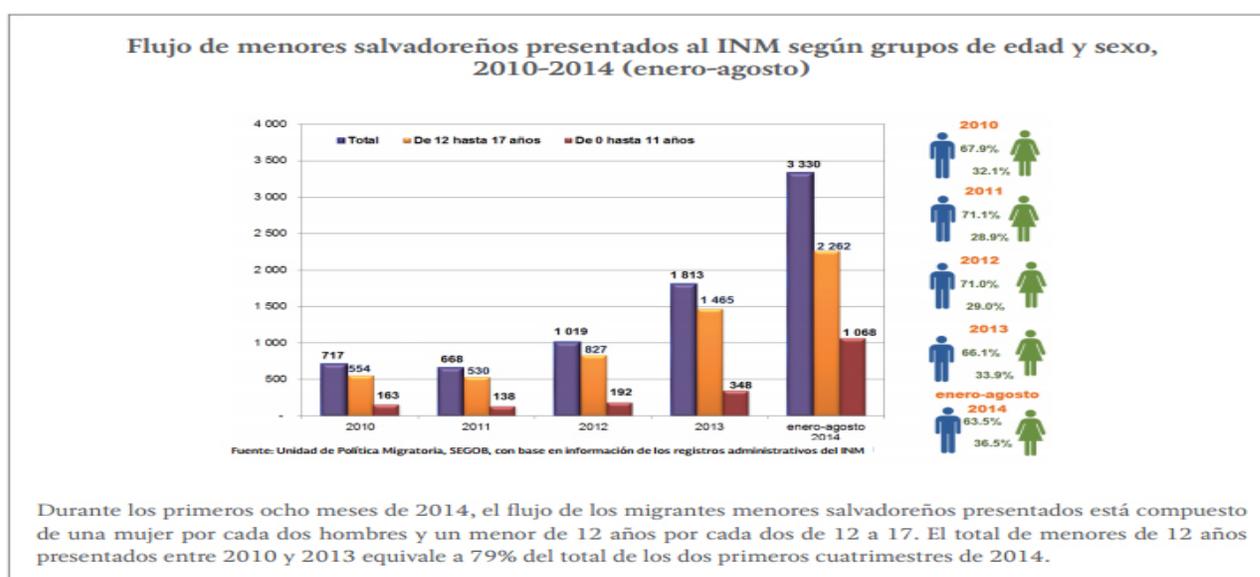
<sup>12</sup> U.S. Customs and Border Protection. (2015). Southwest Border Unaccompanied Alien Children. Retrieved from <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

<sup>13</sup> U.S. Customs and Border Protection. (2015). Southwest Border Unaccompanied Alien Children. Retrieved from <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

<sup>14</sup> Amnesty International. (2012). *Informe Anual. El estado de los Derechos Humanos en el mundo*. Madrid: Amnistía Internacional. Retrieved from <http://www.amnesty.org/es/annual-report/2012>. See also Comm. on the Rights of the Child, *General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, 39th Sess., 2005, May 17 – June 3, U.N. Doc. CRC/GC/2005/6 (2005, Sept. 1), retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>.

Many migrants, therefore, in particular children and adolescents from Central America, prolong their transit through Mexico for extended and undefined periods in search of the necessary means to continue their journeys. There are no precise statistics on the number of migrant Salvadoran children and adolescents working in Mexico. However, in the case of Chiapas, for example, a large percentage of the 200,198 children between the ages of 5 and 17 working in the state in 2007 were migrant Central American children and adolescents.<sup>15</sup> Chapter 6 of this book, exploring the Mexico-Guatemala border, demonstrates in detail the vulnerability of these children and adolescents.

An examination of the data will enrich the understanding of the irregular migration of Salvadoran children and adolescents through Mexico. Data on detention and deportation by Mexican authorities are particularly relevant. These detentions and deportations have been growing in number each year, as the following graphic illustrates:



*Source: Secretaría de Gobernación, México, August 2014*

<sup>15</sup> Consejo Nacional para Prevenir la Discriminación (“Conapred”). (2007). Retrieved from [http://www.conapred.org.mx/documentos\\_cedoc/DocumentoInformativo-TrabajoInfantil.pdf](http://www.conapred.org.mx/documentos_cedoc/DocumentoInformativo-TrabajoInfantil.pdf).

*Explanation/Translation of Graphic*

Title: Number of Salvadoran children appearing before the INM by age and sex, 2010-2014 (January-August)

Color-coded key:

**Total**

**Age 12 to 17**

**Age 0 to 11**

Source: Migration Policy Unit, SEGOR, based on information from INM administrative records.

During the first eight months of 2014, the number of migrant Salvadoran children processed by the INM was comprised of one girl for every two boys and one child under 12 for every two aged 12 to 17. The total number of children under 12 processed between 2010 and 2013 is equivalent to 79% of the total number in the first two quarters of 2014.

Source: Secretary of Government (*Secretaría de Gobernación*)  
Mexico, August 2014

This information shows a noticeable rise in Salvadoran children and adolescents migrating in an attempt to reach the United States. It also shows some of the characteristics of that migration, including the gender and age of the migrants and the types of transportation they employ. Other studies have described the migratory process in general, emphasizing the fact that migration (including that of children and adolescents) should be understood as a process that goes well beyond the journey itself. These studies characterize migration as a complex and subjective process with various identifiable phases (consultation, deliberation, and reaction), as well as a number of defining elements such as: processes and mechanisms of socialization; the formation of the image and idea of migration; the construction of migrant identities and plans; the objective and subjective process of calculating risks and how to confront them according to gender; and the definition and redefinition of meaningful concepts. Some of these occur before and/or after the actual decision to migrate, the migration journey, and return.<sup>16</sup>

Other studies have shown how the so-called security (“aseguramiento”) and repatriation measures applied to children and adolescents are actually deprivations of liberty and arbitrary deportations that deny their best interests and violate their basic human rights—including rights to due process, liberty, identity, family unit, and asylum, among others.<sup>17</sup> This occur because migration policies are grounded in a focus on national security rather than on the comprehensive protection of the

<sup>16</sup> Gaborit, M., Zetino Duarte, M., Brioso, L., & Portillo, N. (2012). La esperanza viaja sin visa: Jóvenes y migración indocumentada de El Salvador. Retrieved from [http://www.unfpa.org.sv/index.php?option=com\\_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales](http://www.unfpa.org.sv/index.php?option=com_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales).

<sup>17</sup> Ceriani Cernadas, P. (2011). Luces y sombras en la legislación migratoria latinoamericana. *Nueva Sociedad*, 233, pp. 68-86. Retrieved from [http://www.nuso.org/upload/articulos/3775\\_1.pdf](http://www.nuso.org/upload/articulos/3775_1.pdf); Ceriani Cernadas, P. (Coord.). (2013). *Niñez detenida: los derechos de los niños, niñas y adolescentes migrantes en la frontera México-Guatemala*. Ciudad de México: Distribuciones Fontamara).

child (also referred to as “integral” protection).<sup>18</sup> These focalized, partial, and inadequate perspectives omit the consideration of, among other things, the complex and deeply rooted structural causes driving the migration of thousands of children and adolescents.

### III. Causes for the migration of Salvadoran children and adolescents

Access to social rights, such as basic services, greatly influences the decision to migrate for children and adolescents. Community, family, and institutional factors that intersect with and affect their civil rights, such as the right to life and physical integrity, also contribute to their decision. Among the salient factors that prompt the decision to leave one’s country are the existence of different forms of violence against children—including in the home, the need to contribute economically to meet their family’s basic needs, and the intention to reunite with family members who have already migrated.

According to the 2007 census, 40.4% (2,231,631) of the Salvadoran population was under the age of 18. This figure demonstrates the significance of this population for the present and future of the country. The geographic distribution of the under-18 population shows a greater concentration in urban areas (57.7%) than in rural areas (42.3%), consistent with the geographic distribution of the total population. In general, the population of boys and adolescent men (54.39%) is larger than that of girls and adolescent women (48.61%). In adulthood, the figures reverse, with women comprising the majority of the over-20 population.<sup>19</sup>

According to the 2012 Multi-Purpose Housing Survey (*Encuesta de Hogares de Propósitos Múltiples* or EHPM), 34.5% of households were living in poverty, of which 8.9% were living in extreme poverty and 25.6% were living in relative poverty. 29.9% of urban households were living in poverty, with 6.5% in extreme poverty and 23.4% in relative poverty. 43.3% of rural households were living in poverty, with 13.6% in extreme poverty and 29.8% in relative poverty.<sup>20</sup>

According to the Ministry of Health (*Ministerio de Salud* or MINSAL), the poverty rate fell 11% between 2009 (40%) and October 2013 (28.9%). This represents the lowest poverty rate in the country’s recent history (MINSAL, 2014).<sup>21</sup> In spite of these improvements, it is clear that almost one in three households remains in poverty.

Of households living at poverty levels, 32.4% reported receiving remittances from relatives residing in the United States; of these, 22.7% were living in extreme poverty. Notably, households with lower poverty levels reported receiving a greater proportion of remittances (67.6%). The majority of remittances were spent on consumption (food, clothing, and other necessities), followed by education, housing, and healthcare. Children and adolescents working irregularly in the United States also contributed to these remittances. According to the Central Reserve Bank of El Salvador (*Banco Central de Reserva de El Salvador*), family remittances reached nearly 4 billion dollars in

<sup>18</sup> Integral or comprehensive protection refers to ensuring all rights are respected to ensure adequate development.

<sup>19</sup> Dirección General de Estadísticas y Censos (DIGESYC). (2013, May). Encuesta de Hogares de Propósitos Múltiples 2012. Retrieved from <http://www.digestyc.gob.sv/EHPM2012/digestyc/resultado.pdf>.

<sup>20</sup> Dirección General de Estadísticas y Censos (DIGESYC). (2013, May). Encuesta de Hogares de Propósitos Múltiples 2012. Retrieved from <http://www.digestyc.gob.sv/EHPM2012/digestyc/resultado.pdf>.

<sup>21</sup> Ministerio de Salud de El Salvador. (2014, May 13). Boletín epidemiológico de situación de dengue por la Comisión Especial de análisis para la Determinación Social de la Salud (CDSS).

2013 and accounted for nearly 16% of Gross Domestic Product (GDP); remittances from the U.S. continue to be the country's most dynamic source of income. As a consequence, recent government administrations have tended not to discourage illegal emigration in spite of the dangers and human rights vulnerabilities faced by Salvadoran migrants.

As reported by the National Council on Children and Adolescents (*Consejo Nacional de la Niñez y de la Adolescencia* or CONNA), people living in poverty do not all experience their situation in the same manner.<sup>22</sup> Not every impoverished person is equally vulnerable; nor do all poor people have the same opportunities to overcome their poverty. In particular, in the case of children and adolescents, conditions that diminish health, opportunities to attend school, and their physical, social, psychological, and moral development, can have limiting effects for the rest of their lives. Hence, together with other factors, the deprivation of fundamental rights such as these cause children and adolescents to migrate.

*A. The deprivation of social rights: housing, healthcare, and education—the problem of child labor*

Children and adolescents identify the lack of access to social rights as a push factor for migration; this is a reflection of the greater, more complex problem of the social exclusion and deprivation of rights they face in El Salvador. The children and adolescents we interviewed stated that the migration of their parents or siblings had remedied their lack of basic resources, even if their reality does not adequately reflect this assertion. Thus, the departure of their parents to the United States, and the remittances parents send home, have allowed Salvadoran children who have stayed behind in the care of other family members to extricate themselves from poverty and cover their most basic needs.<sup>23</sup>

Nevertheless, children and adolescents continue to face social exclusion (or marginalization) in El Salvador, which denies them their right as children and adolescents to participate fully in economic, social, and political life and to achieve their full development and welfare.<sup>24</sup> The unfolding drama of child migration demonstrates that, while poverty and exclusion share common social elements, they are two different phenomena. It is not only poverty that propels children and adolescents toward the United States, but also the structural social exclusion confronting them, especially those residing in rural areas. Among the major difficulties Salvadoran children and adolescents face are the fragmentation and lack of coordination throughout the child protection system; the absence of measures geared toward remedying the exclusion of children and the disparities in guaranteeing of their rights; current cultural and family frameworks that threaten their integral development; social

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<sup>22</sup> Consejo Nacional de la Niñez y la Adolescencia (“CONNA”). (2013, December). Estado de situación de los derechos de las niñas, niños y adolescencia en El Salvador.

<sup>23</sup> Programa de las Naciones Unidas para el Desarrollo (“PNUD”). (2005). *Informe sobre desarrollo humano El Salvador 2005, Una mirada al nuevo nosotros: el impacto de las migraciones, Sinopsis*. Retrieved from <http://www.pnud.org/sv/migraciones/content/view/9/105/>.

<sup>24</sup> For a discussion of social exclusion/marginalization of children and adolescents in El Salvador, see, e.g., Stinchcomb, D. & Hershberg, E. (2014, November). Unaccompanied Migrant Children from Central America: Context, Causes, and Responses. *Center for Latin American & Latino Studies Working Paper Series*, 7. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2524001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524001); Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf).

tolerance vis-à-vis violations of the rights of children; a lack of relevant laws; and scant application of existing laws.<sup>25</sup>

In terms of health indicators, MINSAL correlates the situation facing children and adolescents with living conditions and access to basic services. Housing insecurity resulting from the poorest families migrating from rural areas to marginalized urban settlements that lack basic services, proper nutrition, and citizen safety is one of the key contributors to the growing vulnerability of Salvadorans. Information gathered from the 2011 EHPM demonstrates that households that receive remittances generally rent rather than own their homes.<sup>26</sup> Only 30% of recipient households reported using remittances to pay a mortgage, purchase land, or build a house.

Statistics indicate that children and adolescents are highly vulnerable to illness in El Salvador. In the last decade, the passage of the General Medicine Law, the creation of the General Directorate of Medicines (*Dirección Nacional de Medicamentos*), and the creation of the National Institute of Health (*Instituto Nacional de Salud*) in November 2010, have been fundamental for healthcare management. The Office of the Human Rights Ombudsman (*Procuraduría para la Defensa de los Derechos Humanos* or PDDH)<sup>27</sup> recognizes that, while there have been state efforts to guarantee the right to healthcare for Salvadoran children and adolescents, advances have been slow to materialize. According to the PDDH, the healthcare system has been characterized by an inadequate budget, a lack of resources and personnel, high segmentation, inequality, fragmentation, significant limitations in geographic reach, and serious problems with service and overall quality.

Since 2000, education levels have increased; each year more children and adolescents enroll in grade levels that correspond with their age. However, net coverage rates for primary (54%) and secondary (35%) education remain low. El Salvador has struggled to fulfill its international commitment to Education for All (EFA) and the Millennium Development Goals. The educational system's structure is pyramidal, as basic education (through 9th grade) is prioritized over other educational levels, such that many fewer Salvadorans continue beyond basic grades.

The rate of students reaching fifth grade is 89%, and 11% of students do not finish sixth grade. The rate of students reaching sixth grade (the final year of primary school) has increased significantly to 84% in 2012, with 82% of boys and 86.3% of girls successfully completing sixth grade. Rural areas have the lowest levels of completion, at 77.1%. The opportunities for finishing primary school are limited by poverty and the low social value placed on education in rural areas. In spite of this, there has been progress. However, a lack of coverage and opportunities is also related to the quality of schools. The massive enrollment of students in primary school has affected the quality and equality of educational services. According to the Ministry of Education's (*Ministerio de Educación* or MINED) 2010 School Census, demand in rural areas surpasses the education system's capacity and ability to function.

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<sup>25</sup> Rivas Villatoros, 2012.

<sup>26</sup> DIGESYC. (2012, June). Encuesta de Hogares de Propósitos Múltiples 2011. Retrieved from [http://www.digestyc.gob.sv/phocadownload/DIVISION\\_DE\\_ESTADISTICAS\\_SOCIALES/Publicacion\\_EHPM\\_2011.pdf](http://www.digestyc.gob.sv/phocadownload/DIVISION_DE_ESTADISTICAS_SOCIALES/Publicacion_EHPM_2011.pdf).

<sup>27</sup> Procuraduría la Defensa de los Derechos Humanos ("PDDH"). (2013, March). Informe especial sobre el impacto de la violencia en los derechos de las niñas, niños y adolescentes en El Salvador. Retrieved from [http://www.redlamyc.info/images/stories/INFORME\\_ESPECIAL-2.pdf](http://www.redlamyc.info/images/stories/INFORME_ESPECIAL-2.pdf).

Part of the student population aged 5 to 17 works in addition to attending school, another important factor affecting how long children and adolescents continue their education. The need to work burdens many children and adolescents in El Salvador. According to the EHPM, in 2013, El Salvador's population included nearly 1.7 million children/adolescents ages 5 to 17. Of these, 11.1% reported working. A significant number worked in conditions considered dangerous (84,029) or were under the legal age to work (60,139). A higher proportion of boys report that they work (15.7%) than girls (6.3%). However, girls tend to do domestic work, both inside and outside their own homes, that is largely invisible.

CONNA considers that the precarious economic situation facing many families leads children and adolescents to formal or informal work at increasing rates.<sup>28</sup> This, in turn, prevents them from fully exercising their rights to education, recreation, and relaxation, as well as other rights and principles that support the comprehensive development of the child.

At the same time, the high youth unemployment rate (twice the national rate), presents challenges for adolescents without work and drives adolescents and children who see no work opportunities in their future to migrate.<sup>29</sup> Young people have a higher propensity to emigrate at the beginning of their work lives. They are also more likely to be involved in violent activities, particularly young people with low education levels and a lack of contacts in the labor market. Irregular migration appears as a “solution” vis-à-vis this panorama of exclusion and the growing levels of violence—to be discussed later on—that are so difficult to escape for the majority of children and adolescents. Importantly, this makes it especially difficult for many young people and adolescents to imagine themselves as self-reliant members of the workforce.

Changes in the modes of consumption and access to services in their municipalities of origin also reaffirm the exclusion facing children and adolescents. In municipalities that have generated some level of investment in tourism, recreation, or the promotion of arts and culture geared toward children and adolescents, the desire to migrate continues to prevail. In recent years, the Salvadoran Ministry of Tourism (*Ministerio de Turismo*) has developed and promoted tourist routes and identified municipalities—referred to as *pueblos vivos*—with the potential to attract foreign tourists with the purchasing power to stimulate local economies. However, the lifestyle created in *pueblos vivos* that have succeeded in attracting foreign tourists produces the opposite of the intended effect on children and adolescents. Instead of motivating young people to stay in their communities or municipalities, it reaffirms their desire to leave, as they see themselves excluded from the new social, commercial, and recreational dynamic. They desire to leave and then return as tourists with more purchasing power, wanting to achieve the affluence promoted in their municipalities of origin.

The educational level of returning children and adolescents is in many cases higher than that possessed by the majority of Salvadorans. Interviews with migrants repatriated to El Salvador suggest that these child migrants tend to undervalue the education they received in El Salvador and overvalue the educational quality and opportunities they experienced in the United States.

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<sup>28</sup> Consejo Nacional de la Niñez y la Adolescencia (“CONNA”). (2013, December). Estado de situación de los derechos de las niñas, niños y adolescencia en El Salvador.

<sup>29</sup> PNUD. (2013). Informe sobre desarrollo humano El Salvador 2013. Informe sobre Desarrollo Humano El Salvador 2013, Imaginar un nuevo país. Hacerlo posible, Diagnóstico y propuesta. Retrieved from [http://www.sv.undp.org/content/dam/el\\_salvador/docs/povred/UNDP\\_SV\\_IDHES-2013.pdf](http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_IDHES-2013.pdf).

Approximately 8 out of 10 returning children and adolescents who were interviewed reported that they had completed an average of 8 years of schooling and had an educational level corresponding to their age. As a point of comparison, the average number of years of schooling is 5 in the returning children and adolescents' municipalities of origin.<sup>30</sup> Our data also reveals that children and adolescents migrating from their communities spend a higher average number of years in school than children who remain. This contradicts the popular perception that the children and adolescents who migrate are those who have abandoned the educational system, have achieved below their grade level, or have fewer years of schooling.

### *B. Forms of violence against children and adolescents*

The levels of insecurity, violence, and delinquency in El Salvador are alarming, making El Salvador one of the most violent countries in the world, along with Guatemala and Honduras. The homicide rate per 100,000 residents is three times the global average.

Children and adolescents identify violence and insecurity as important push factors.<sup>31</sup> Indeed, most of them recognize that the generalized violence throughout the country is one of the factors motivating their migration. The direct violence carried out against them by gangs, in a context where the state is perceived as incapable of protecting them and their families, makes the decision to migrate even more urgent. The forced migration of many Salvadoran children and adolescents in recent years results from threats they receive from criminal organizations, particularly street gangs. In practice, this direct violence not only triggers the migration process, but also makes it irreversible. Given this panorama, neither the family nor the child or adolescent will abandon their attempt to reach the United States or seek asylum in Mexico.

A 2014 report revealed that 59% of Salvadoran boys and 61% of Salvadoran girls interviewed identified crime, threats from gangs, and violence as primary push factors of migration. "Men fear being assaulted and killed for not joining gangs or for interacting with corrupt government officials, while women fear the possibility of being raped or disappeared by gangs."<sup>32</sup> "More than 85% of children and adolescents interviewed from Cuscatlán and Usulután stated that they were fleeing violence. More than 50% of children and adolescents interviewed in the following departments

<sup>30</sup> Programa de las Naciones Unidas para el Desarrollo ("PNUD") & Fundación Dr. Guillermo Manuel Ungo ("FUNDAUNGO"). (2009). *Almanaque 262. El estado del desarrollo humano en los municipios de El Salvador*. Retrieved from <http://www.revistahumanum.org/revista/almanaque-262-el-estado-del-desarrollo-humano-en-los-municipios-de-el-salvador/>.

<sup>31</sup> See Consejo Nacional de la Niñez y la Adolescencia ("CONNA"). (2013, December). *Estado de situación de los derechos de las niñas, niños y adolescencia en El Salvador*. See also Camargo M., Abbdel con Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados ("ACNUR"). (2014, August). *Arrancados de Raíz*. Retrieved from

<http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/Publicaciones/2014/9828;>

Kennedy, E. (2014). *No Childhood Here, Why Central American Children are Fleeing their Homes*. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf); Stinchcomb, D. & Hershberg, E. (2014, November). *Unaccompanied Migrant Children from Central America: Context, Causes, and Responses*. Center for Latin American & Latino Studies Working Paper Series, 7. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2524001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524001).

<sup>32</sup> Kennedy, E. (2014). *No Childhood Here, Why Central American Children are Fleeing their Homes*. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

identified violence as a primary push factor: La Libertad (53.8%), La Paz (64.7%), La Unión (67.6%), Morazán (52.6%), San Miguel (67.6%), San Salvador (65.9%), San Vicente (61.1%), Santa Ana (58.8%), and Sonsonate (67.7%),” according to the same report.<sup>33</sup> Under these circumstances, “parents and guardians expressed much anxiety when weighing the risks of travelling to the United States against the extremely dangerous climate for children and adolescents in El Salvador.”<sup>34</sup>

### 1. The growing gang phenomenon and its impact on children and adolescents

Adolescent boys run a high risk of being homicide victims given their participation—many times forced—in street crime, gangs, weapons possession, and other violent activities. They also run a high risk of being direct victims of these crimes in their communities. The culture of impunity for crime in El Salvador leads to higher levels of violence. A lack of security puts human development at risk and is associated with higher levels of poverty and lower rates of school enrollment and attendance. Insecurity also affects access to healthcare, education, and other social services, which, in turn, exacerbates the vulnerability of children and adolescents.

Violence and crime directly impede the human development and safety of children and adolescents. Between 2005 and 2013, approximately 6,300 Salvadoran children and adolescents were murdered, with 984 killed in 2012 alone. The graph below presents statistics on murders and disappearances of children and adolescents in 2013. This situation has not changed in 2014; during the first two months of 2014, there were 326 homicides and 322 reported disappearances.

#### Homicides and Disappearances of Children and Young People in 2013

Age	Homicides	Disappearances*
0-12	14	45
13-17	251	447
18-30	1,123	378
Total	1,388	870

\*Reported to the National Police

Source. National Police (*Policía Nacional Civil*), Statistics, 2013

In addition to homicide, other types of violence are committed against children and adolescents. UNICEF reports that in 2012 and 2013, the Departmental Councils for the Protection of Children and Adolescents (*Juntas Departamentales de Protección de la Niñez y Adolescencia*)—established as a focal part of the Law, Policy, and Integral Protection System for Children and Adolescents (*Ley, Política y Sistema de Protección Integral de la Niñez y Adolescencia*)—received 18,754 cases

<sup>33</sup> Kennedy, E. (2014). No Childhood Here, Why Central American Children are Fleeing their Homes. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

<sup>34</sup> Kennedy, E. (2014). No Childhood Here, Why Central American Children are Fleeing their Homes. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

of violations of the rights of children and adolescents. Of these, 8,627 were violations of the right to personal integrity (or physical integrity, to wit, the right to be free from physical harm), representing a 159% increase from 2012 to 2013. There was also a 78% increase in reported violations of the right to protection from mistreatment, and a 38% increase in reported violations of the right to protection from sexual abuse and exploitation.<sup>35</sup>

Violent deaths, high levels of crime victimization, and systematic impunity have affected the lives, integrity, and economic well-being of people throughout El Salvador and particularly harms children, adolescents, and young people. Many analyses confirm this situation; in recent years, crime and violence have been identified as the principle problems facing the country, in large part because 67% of Salvadorans live in areas controlled by local gangs.<sup>36</sup> Gangs violate human liberties, beginning with the rights to life and physical integrity. Violence perpetrated by these groups not only causes the premature deaths of many children, adolescents, and young people, but also affects the daily life of communities and restricts individual behavior due to concrete threats and general fear.

However, the deprivation of liberties began before the upsurge of gang activity as a consequence of diverse forms of violence. Gangs arose from a context characterized by the convergence of fragile family structures; scarce parental control; an insufficient presence of social protection institutions; deficient public policies to guarantee social rights; corruption; obstacles in accessing justice; poor interaction between primary socializing agents (such as family and school); serious economic and social disadvantages; and the rise of underground or illegal markets as a response to a socioeconomic structure incapable of formally meeting the basic needs of the population. These factors, among others, lead young people to participate in gangs, either of their own volition or by force.

Thus, gangs threaten the present and future of thousands of children and adolescents who live in precarious conditions. They also affect the present and future of society in general, as they undermine the effectiveness of institutions geared toward developing and strengthening human capacities. Consequently, efforts to reverse the growing gang phenomenon must be multidimensional and include, in addition to the State, a broad spectrum of social actors, particularly those most affected, such as communities, families, and schools.

High levels of violence and youth deaths reveal the gravity of the gang problem. Before the gang truce brokered in March 2012,<sup>37</sup> El Salvador had one of the highest murder rates in the world, with an average of 63 of every 100,000 inhabitants killed between 2007 and 2011. That rate reached 70

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<sup>35</sup> UNICEF. (2014). *The State of the World's Children 2014 In Numbers, Every Child Counts, Revealing disparities, advancing children's rights*. Retrieved from [http://www.unicef.org/gambia/SOWC\\_report\\_2014.pdf](http://www.unicef.org/gambia/SOWC_report_2014.pdf).

<sup>36</sup> IUDOP. (2010) *Los salvadoreños y salvadoreñas evalúan la situación del país en 2010*. Boletín de prensa, año XXV. Retrieved from [http://www.uca.edu.sv/publica/iudop/Web/2010/boletin2\\_2010.pdf](http://www.uca.edu.sv/publica/iudop/Web/2010/boletin2_2010.pdf).

<sup>37</sup> Although there was a decline in the number of homicides, many question whether the truce made El Salvador safer; benefits afforded to gang leaders by the government may have actually increased power of the gangs and rates of other forms of violence. See, e.g., Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf); Stinchcomb, D. & Hershberg, E. (2014, November). Unaccompanied Migrant Children from Central America: Context, Causes, and Responses. Center for Latin American & Latino Studies Working Paper Series, 7. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2524001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524001).

of every 100,000 inhabitants in 2011, the second highest murder rate in the world. The murder rate grew steadily between 1999 and 2011, with a few exceptions. The ceasefire produced an important shift, as the murder rate fell from 70 to 41 of every 100,000 inhabitants between 2011 and 2012.<sup>38</sup> However, since the truce ended in 2014, the daily murder rate has returned to pre-truce levels.<sup>39</sup>

The murder rate in El Salvador evinces a pattern differentiated by age and sex. Over the past 10 years, the murder rate for young people between 18 and 30 has been twice the national level, and the murder rate for men has been 9 times higher than that for women, documenting that violence principally affects young men whose profile is similar to those involved in gangs. According to UNDP reports, those most affected by violence are 15 to 19 years old.<sup>40</sup>

Estimates of the number of gang members vary by source and year. The lowest estimates are approximately 10,500 gang members, while the highest are approximately 80,000 gang members.<sup>41</sup> The profile of gang members has changed very little since the 1990's. They are mostly young men, although their average age has decreased. In 1996, the average age of entry into gangs was estimated between 17 and 24, while in 2006, that age had fallen to approximately 15. This is especially important for children pressured or forced to join gangs. Additionally, the presence of gangs throughout the country has increased quantitatively and qualitatively. Thus, their so-called "territorial dominion" transcends geography and encompasses social complicity, the substitution of the state, power through intimidation, global interconnection, and the reinforcement of delinquent culture. These factors consolidate the control of criminal groups, to the detriment of the liberties of those not involved with them.

As underscored by the UNDP, not even schools are exempt from threats. The effectiveness of schools to develop the capacities of children and adolescents is decreasing due to gang activities. The presence of gang members in the classroom has diminished the authority of teachers. The territorial control exercised by gangs in areas surrounding schools is another important factor leading children and adolescents to drop out of school. The UNDP also indicated the decay of merit-based structures within schools overrun by gangs, and that public schools are no longer perceived as protective spaces, but rather as dangerous places.<sup>42</sup>

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<sup>38</sup> Procuraduría la Defensa de los Derechos Humanos ("PDDH"). (2013, March). Informe especial sobre el impacto de la violencia en los derechos de las niñas, niños y adolescentes en El Salvador. Retrieved from [http://www.redlamyc.info/images/stories/INFORME\\_ESPECIAL-2.pdf](http://www.redlamyc.info/images/stories/INFORME_ESPECIAL-2.pdf).

<sup>39</sup> Kennedy, E. (2014). No Childhood Here, Why Central American Children are Fleeing their Homes. Retrieved from [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf).

<sup>40</sup> PNUD. (2013). Informe sobre desarrollo humano El Salvador 2013. Informe sobre Desarrollo Humano El Salvador 2013, Imaginar un nuevo país. Hacerlo posible, Diagnóstico y propuesta. Retrieved from [http://www.sv.undp.org/content/dam/el\\_salvador/docs/povred/UNDP\\_SV\\_IDHES-2013.pdf](http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_IDHES-2013.pdf).

<sup>41</sup> Procuraduría la Defensa de los Derechos Humanos ("PDDH"). (2013, March). Informe especial sobre el impacto de la violencia en los derechos de las niñas, niños y adolescentes en El Salvador. Retrieved from [http://www.redlamyc.info/images/stories/INFORME\\_ESPECIAL-2.pdf](http://www.redlamyc.info/images/stories/INFORME_ESPECIAL-2.pdf).

<sup>42</sup> PNUD. (2013). Informe sobre desarrollo humano El Salvador 2013. Informe sobre Desarrollo Humano El Salvador 2013, Imaginar un nuevo país. Hacerlo posible, Diagnóstico y propuesta, p. 14. Retrieved from [http://www.sv.undp.org/content/dam/el\\_salvador/docs/povred/UNDP\\_SV\\_IDHES-2013.pdf](http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_IDHES-2013.pdf).

The same report cites a recent study<sup>43</sup> that identifies the following municipalities in El Salvador as high risk zones with large numbers of victims fleeing organized crime: La Libertad, Ciudad Arce, Sacacoyo, Colón, Soyapango, Mejicanos, Panchimalco, Aytuxtepeque, Ilopango, Juquilisco, Santa María, Santiago de María, San Miguel, El Tránsito, Ciudad Barrios, Carolina, La Unión, Conchagua, Santa Rosa, San Alejo, and Intipucá. Other sources have cited massive migrations of girls under the age of 12 from certain areas of Colón where they are “taken” by gang members beginning at that age.<sup>44</sup>

Direct violence perpetrated by gangs is a key push factor for children and adolescents to leave El Salvador; this violence makes the decision to migrate even more urgent for them. Threats against and attacks on children and adolescents occur during daily interactions, in school, and in the community.<sup>45</sup> A threat made by or an altercation with gang members hastens the journey, and can lead to sudden departures. In addition, indirect violence and the perception of insecurity and feelings of being constantly at risk instilled in Salvadoran children are in themselves powerful push factors for migration. As signaled in other studies, the climate of generalized violence in El Salvador motivates children and adolescents to minimize exposure to the risks they are told they will face in the future.<sup>46</sup>

## 2. Gender violence

There is a body of law in El Salvador aimed at guaranteeing the right to a life free from violence for women. Notable among these laws are: the Law Against Intra-Family Violence; the Penal Code; the Procedural Penal Code; the Special and Comprehensive Law for a Life Free from Violence for Women; the Law for the Integral Protection of Children and Adolescents; the Law to Establish the Salvadoran Institute for the Development of Women; and the Law for Equality, Equity and the Eradication of Discrimination Against Women.

According to reports by the Salvadoran Institute for the Advancement of Women (*Instituto Salvadoreño para el Desarrollo de la Mujer* or ISDEMU),<sup>47</sup> in 2010, almost half (44.6%) of women victims of domestic violence were between the ages of 26 and 37. The most common forms of violence against women were psychological (38.2%), physical (22%), and economic. This trend was similar in 2009 and 2012.

<sup>43</sup> Centro Internacional para los Derechos Humanos de los Migrantes. (“CIDEHUM”). (2012, May). Desplazamiento Forzado y Necesidades de Protección, generados por nuevas formas de Violencia y Criminalidad en Centroamérica. Retrieved from <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2012/8932.pdf?view=1>.

<sup>44</sup> PNUD. (2013). Informe sobre desarrollo humano El Salvador 2013. Informe sobre Desarrollo Humano El Salvador 2013, Imaginar un nuevo país. Hacerlo posible, Diagnóstico y propuesta, p. 212. Retrieved from [http://www.sv.undp.org/content/dam/el\\_salvador/docs/povred/UNDP\\_SV\\_IDHES-2013.pdf](http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_IDHES-2013.pdf).

<sup>45</sup> Procuraduría la Defensa de los Derechos Humanos (“PDDH”). (2013, March). Informe especial sobre el impacto de la violencia en los derechos de las niñas, niños y adolescentes en El Salvador. Retrieved from [http://www.redlamyc.info/images/stories/INFORME\\_ESPECIAL-2.pdf](http://www.redlamyc.info/images/stories/INFORME_ESPECIAL-2.pdf).

<sup>46</sup> Gaborit, M., Zetino Duarte, M., Brioso, L., & Portillo, N. (2012). La esperanza viaja sin visa: Jóvenes y migración indocumentada de El Salvador. Retrieved from [http://www.unfpa.org.sv/index.php?option=com\\_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales](http://www.unfpa.org.sv/index.php?option=com_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales).

<sup>47</sup> Instituto Salvadoreño para el Desarrollo de la Mujer (“ISDEMU”). (2011). Segundo informe nacional sobre la situación de violencia contra las mujeres. Retrieved from [http://www.isdemu.gob.sv/index.php?option=com\\_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es](http://www.isdemu.gob.sv/index.php?option=com_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es).

Homicides of women have increased at an alarming rate over the last decade. In 2000, there were 193 reported murders of women. This number reached 580 in 2010.<sup>48</sup> In 2000, femicides/feminicides accounted for 5.4% of all homicides in El Salvador. In 2010, that number had risen to 14.5%. The Small Arms Survey (2012)<sup>49</sup> identified El Salvador as the country with the highest femicide/feminicide rate, with 12 per 100,000 women. Alarming, 1 in 4 women killed in El Salvador are between the ages of 0 and 19; that is, girls or adolescent women. This age group represented 27.9% of all homicides committed in 2009, and 26.6% of those committed in 2010.<sup>50</sup>

According to ISDEMU, between January and December 2011, there were 1,552 reported crimes of sexual abuse against women (*delitos contra la libertad sexual de mujeres*), consisting of rapes, other sexual assaults, statutory rape, and sexual harassment.<sup>51</sup> Of these reported crimes, 42.46% were rapes; 23.39% were other sexual assaults; 22.81% were sexual harassment; and 11.34% were statutory rapes. National Civil Police (*Policía Nacional Civil* or PNC) figures on rapes of women in 2011 show that most rapes were committed against 12 to 18 year olds, followed by 27.64% committed against 18 to 25 year olds, 14.26% against 25 to 35 year olds, and 12.68% against women 35 to 60 years old. Although the numbers and percentages vary for 2012 and 2013, the same pattern continues; during these years, most rapes were committed against 12 to 18 year olds, followed by 18 to 25 year olds. This has been the situation for over a decade.<sup>52</sup>

### *Discrimination and femicide/feminicide*

#### Declaration of Aracely Bautista Bayona

Salvadoran lawyer, legislative advisor, specialist in human rights and victimology. Mediator and Notary specializing in women's rights and laws pertaining to family and child children.

April 2013

Patriarchal norms define the fundamental sociopolitical structure of El Salvador and disadvantage women in every aspect of Salvadoran society. Among the most entrenched characteristics of Salvadoran society is machismo[.] . . . Society accepts and tolerates men who violently punish women for violating these gender roles or disobeying male relatives. . . . [These grave punishments] include emotional abuse,

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<sup>48</sup> ISDEMU. (2011). Segundo informe nacional sobre la situación de violencia contra las mujeres. Retrieved from [http://www.isdemu.gob.sv/index.php?option=com\\_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es](http://www.isdemu.gob.sv/index.php?option=com_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es).

<sup>49</sup> Small Arms Survey (2012, February). Femicide: A Global Problem. *Research Notes*, 14. Retrieved from [http://www.smallarmssurvey.org/fileadmin/docs/H-Research\\_Notes/SAS-Research-Note-14.pdf](http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-14.pdf).

<sup>50</sup> ISDEMU. (2011). Segundo informe nacional sobre la situación de violencia contra las mujeres. Retrieved from [http://www.isdemu.gob.sv/index.php?option=com\\_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es](http://www.isdemu.gob.sv/index.php?option=com_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es).

<sup>51</sup> ISDEMU. (2012). Informe Nacional, 2012. Estado y situación de la violencia contra las mujeres. Retrieved from [http://www.isdemu.gob.sv/index.php?option=com\\_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es](http://www.isdemu.gob.sv/index.php?option=com_phocadownload&view=category&id=137%3Ainformes-nacionales-de-violencia-contra-las-mujeres&Itemid=0&lang=es).

<sup>52</sup> Gaborit, M., Rodríguez Burgos, M., Santori, A., y Paz Narváez, C. (2003). Más allá de la invisibilidad. Disparidad de género en El Salvador.

deprivation of personal autonomy [financial as well as] physical as well as sexual violence.

. . .

The persistence of feminicides is intrinsically linked to the social norms that condone or permit violence against women and the impunity that results when the existent laws are not enforced or when the opinions of officials within the justice system are biased. In my professional opinion, approximately 40% of feminicide victims were also victims of domestic violence who the system had failed to protect. . . . The police and the media regularly refer to feminicides as “crimes of passion,” “crimes of jealousy” and “crimes related to social violence generated by gangs” – failing to recognize that these are killings motivated by visceral hate towards women, and justified by social norms which accept the use of violence against women. . . .

El Salvador is a source and transit point in the international trafficking of girls and women. Traffickers target women – especially girls and young women who are vulnerable to kidnapping and disappearance – simply because they are women. Organized criminal networks engaged in drug and human trafficking control vast territorial regions in El Salvador. In these areas, traffickers can easily kidnap, hide and transport women without police interference . . . .

The Law Against Intrafamilial Violence (LVI), which has been the primary law addressing domestic violence against women since its enactment in 1996, has largely been . . . ineffective. . . . [While the] LVI created special administrative and civil judicial procedures to prevent domestic violence and help women seek protection from abusive partners. . . . Nonetheless, judicial officials . . . value family unity over the needs of victims . . . , and judges exert pressure on women victims to reconcile with their partners before adjudicating their legal claims [for protection]. . . . Judges generally lack gender sensitivity training. . . .<sup>53</sup>

Within this context of gender violence and deficient healthcare policies—particularly concerning sexual health and reproductive rights—there is a high rate of child and teen pregnancy and a large number of single mothers. Currently, gang violence is one of the causes of the deaths of pregnant adolescents.

Another consequence of teen pregnancy is suicide. In 2013, there were 12 deaths of mothers under the age of 18; of these, six were suicides. Between January and April 30 2013, MINSAL reported the suicides of three adolescent mothers. The suicide rate among adolescent mothers between the ages of 15 and 19 rose from 14% of all deaths in that demographic in 2006 to 50% in 2013.

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<sup>53</sup> Bautista Bayona, A. (2013, April 12). Declaration of Legal Expert on the Situation of Violence Against Women In El Salvador, Aracely Bautista Bayona. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Aracely\\_Bautista\\_Bayona\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Aracely_Bautista_Bayona_Affidavit.pdf).

### 3. Violence against children and adolescents

In addition to violence perpetrated by gangs and other organized criminal groups, and other community violence, household violence—in particular rape, incest, and other sexual abuse against girls and adolescent females—also motivates migration.<sup>54</sup>

According to María Teresa Delgado de Mejía, a protection official with the UNICEF office in El Salvador, violence in the country has reached endemic proportions, and one of its most prominent forms is violence in the home: 7 out of 10 children are subject to physical violence at the hands of their parents. Severe physical punishment, including the use of blunt objects, is a common and accepted practice. Additionally, the number of sexually abused children and adolescents is very high, according to Marlon Montoya, National Protection Advisor for World Vision in El Salvador. The majority of sexual violence against girls (and boys) occurs in their own homes at the hands of fathers or stepfathers.<sup>55</sup> There is also a high level of psychological abuse in households and schools.<sup>56</sup>

According to Ana Georgina Ramos de Villata, Deputy Inspector General for the Rights of Children and Adolescents, families, and society in general, perceive children and adolescents as objects. As such, physical punishment is widely accepted. The drafting of the Law for the Comprehensive Protection of Childhood and Adolescence (*Ley de Protección Integral de la Niñez y Adolescencia* or LEPINA) demonstrates this acceptance; the original language of LEPINA Article 38 prohibited any form of physical violence, but the final version permits “moderate physical punishment.” However, Article 38 does not define what constitutes “moderate physical punishment.”

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<sup>54</sup> See, e.g., Camargo M., Abdel con Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (“ACNUR”). (2014, August). Arrancados de Raíz. Retrieved from <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/Publicaciones/2014/9828>; Stinchcomb, D. & Hershberg, E. (2014, November). Unaccompanied Migrant Children from Central America: Context, Causes, and Responses. *Center for Latin American & Latino Studies Working Paper Series*, 7. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2524001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524001); Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf) (report addressing factors that motivate migration including household violence, including sexual violence, abandonment).

<sup>55</sup> See Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf).

<sup>56</sup> Interviews with Nori Flores and Viviana Bonilla, Office of the Prosecutor General of the Republic (Unit for Minors and Women).

*The impact of violence on children and adolescents*

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El Salvador is among the most dangerous places in the world for a child or adolescent to live. El Salvador is known internationally for its very high level of violence, and recently for having the highest rate of murder of children in the world. This violence disproportionately impacts El Salvador's youth and children. According to a recent report by the Office for the Defense of Human Rights, adolescents make up the vast majority (92%) of all homicide victims in the country, and female adolescents and female children are twice as likely to become victims of rape, as compared to adult women.

The strong patriarchal norms in El Salvador are another detrimental factor for children, especially female adolescents and girls. Because women are seen as subservient to men, and children as subservient to adults, young girls are particularly vulnerable to abuse, which is often sexual in nature. In a country with a high rate of sexual abuse against women generally, female children and adolescents face twice the rate of sexual abuse as do adult women.

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In El Salvador, rape mostly takes place within the home. And, the vast majority of the sexual aggressors (90%, according to the PDDH Report) are close male relatives of the child or youth – uncles, godparents, stepfathers, fathers, and grandfathers. Because these rapes happen at home, by family members, sexual abuse of children regularly goes unreported to keep family members from facing any prospect – however unlikely – of prosecution. Often, sexual abuse is made visible only once the child or adolescent becomes pregnant. The pregnant youth could face serious criminal consequences for terminating a pregnancy because abortion is criminalized in El Salvador.<sup>57</sup>

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<sup>57</sup> Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf).

### C. In search of family reunification

In many cases, Salvadoran children and adolescents decide to leave the country within a context of family and community migration.<sup>58</sup> They make this decision within a relational dynamic involving different actors: family in the United States, family in El Salvador, friends, and community members, among others.<sup>59</sup> The decision to migrate is rarely made exclusively by children and adolescents, and underlying motives are complex and multi-faceted. Thus, in many cases family reunification should be added to the list of motivators for migrating (poverty, lack of basic rights, and the various forms of growing violence). That is, the migration of children and adolescents is spurred by, among other factors, the need to reunite with a parent or parents who have previously migrated.

Salvadoran children are involved in a relational dynamic moving in two directions: toward El Salvador (for children repatriated from the United States and Mexico) and towards the United States. This section focuses on the movement of Salvadoran children and adolescents towards the United States. In some cases, the characteristics of migration and the decision to migrate vary from the established trend. However, the migration of children and adolescents is generally a part of a family's life plan when leaving the country appears superior to any potential personal or collective life plan in El Salvador. For families, migration is part of an exodus that does not end until it has touched all or the majority of family members. Proof of this is the generalized perception held by children that, with time, more members of their community will be living in the United States than in their municipalities of origin. Migration is not only part of how they imagine a personal or nuclear family life plan; rather, it possesses a clear logic: to be with family. In this context, the socialization of children and adolescents instills in them a migrant identity and image.<sup>60</sup>

Children and adolescents discover that they are already part of life plans involving migration, and they take on this project as their own primary life plan--or at least the one that is most within their reach. This identification affects how they think about every other aspect of their life. Slightly more than 70% of children and adolescents repatriated from Mexico have at least one member of their nuclear family in the United States, so family reunification is an important pull factor. Memories of their mother or father and long-distance family ties imbue the image with family reunification. In some cases, it has fantasy-like qualities and, in others, the image is filled with significant inaccuracies and mixed emotions. A 15-year-old girl we interviewed at the Century XXI Migration Station (Tapachula, Mexico) indicated that her father left when she was 7 and her mother when she was 8. She said that she did not remember what it was like to live with them and that (living together as a family) would be new for her, her mother, and her father.

It is especially worrisome that while in transit, Salvadoran children increasingly migrate accompanied by coyotes or within a system of guides who are unknown to their parents. Parents

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<sup>58</sup> Gaborit, M., Zetino Duarte, M., Brioso, L., & Portillo, N. (2012). La esperanza viaja sin visa: Jóvenes y migración indocumentada de El Salvador. Retrieved from [http://www.unfpa.org/sv/index.php?option=com\\_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales](http://www.unfpa.org/sv/index.php?option=com_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales).

<sup>59</sup> Ansion, J., Mujica, L., Piras, G. y Villacorta, A.M. (2013). *Redes y maletas. Capital social en familias de migrantes*. Lima: FIUC-PUCP.

<sup>60</sup> Ansion, J., Mujica, L., Piras, G. y Villacorta, A.M. (2013). *Redes y maletas. Capital social en familias de migrantes*. Lima: FIUC-PUCP. Martín-Baró, 1983.

do not know who the people accompanying their children are or how they operate. The increasing use of coyotes among migrant Salvadoran children elevates their vulnerability, because the coyote could, in reality, be part of a complex organized criminal network involved in human trafficking, sexual slavery, and other crimes.<sup>61</sup>

The social representation of the coyote has changed in recent years from an image of the “community” or “family” coyote to a system with different actors and roles. A “family coyote” is someone who has accompanied various family or community members, has demonstrated their trustworthiness during successful journeys, and accompanies the migrant from the beginning to the end of their journey. Currently, the individual coyote is no longer spoken of and has been supplanted by a “system of coyotes,” the characteristics of which are precisely those increasing the vulnerability of children and adolescents. In many cases, children and adolescents enter a system of human trafficking where they are passed along from guide to guide and perceived as “merchandise.” In turn, they are dehumanized and lack protection. Within this system, human trafficking is tied in with other organized criminal activities, among them sexual slavery, kidnapping, drug trafficking, and organ trafficking.

The cost of hiring a coyote in El Salvador is high. Children and adolescents we interviewed reported that their relatives had paid between \$7,000 and \$11,000 (USD) to reach the United States. The cost of the journey depends on the conditions under which it is carried out: journeys during which children and adolescents do not have to walk or walk very little, sleep in hotels as opposed to sleeping outside, and travel in automobiles cost more. This kind of journey is called a “special journey.” However the “special” aspects of the journey often do not materialize. This idea of the “special journey” remains in the imaginations of Salvadoran parents and family members who can only hope for the well-being of migrant children and adolescents. Family members in the United States and El Salvador are often aware of the risks implicit in the coyote system.

Because the person hired to protect the physical integrity of children and adolescents is a potential aggressor, families may try to send their children in the company of another relative in an attempt to guarantee their physical and emotional well-being. However, this protection is illusory, as some of these accompanying family members are other children and adolescents. Half of the returning children and adolescents we interviewed were traveling in the company of a relative. However, in half of these cases, that relative was another child or adolescent, so these children cannot be considered as accompanied.<sup>62</sup>

Salvadoran children and adolescents migrating within the coyote system also risk being kidnapped by other criminal groups involved in human trafficking and ransomed to their families in El Salvador or the United States for exorbitant prices. Again, children in transit are objectified and treated as merchandise by these groups. While there are no exact numbers on how many children and adolescents travel with coyotes, girls are more likely to migrate within the coyote system. This

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<sup>61</sup> Gaborit, M., Zetino Duarte, M., Brioso, L., & Portillo, N. (2012). La esperanza viaja sin visa: Jóvenes y migración indocumentada de El Salvador. Retrieved from [http://www.unfpa.org.sv/index.php?option=com\\_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales](http://www.unfpa.org.sv/index.php?option=com_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales).

<sup>62</sup> See definition of unaccompanied child, note 2, supra.

increases their vulnerability compared to that of boys, as the highest risks for girls are clearly sexual harassment and sexual abuse.

Journeys undertaken within the coyote system also take on an irreversible nature. Contracts with coyotes include a number—usually three—of agreed upon attempts. That is, if the child is detained by migration authorities while in transit to the United States, the coyote agrees to accompany him or her at least twice more. These children and adolescents find themselves trapped by contractual agreements that, in most cases, they did not negotiate themselves.

This modality of migration increases the vulnerability of children and adolescents vis-à-vis violence and other crimes to which they were already exposed before migrating. The irregularity of their migration is associated with increasing migration controls in Mexico and the United States, and the lack of avenues for regular migration to the United States for purposes of family reunification. Therefore, irregularity is a key factor for understanding the increasing risks and violence confronting child and adolescent migrants.

#### **IV. Legal and institutional framework for children and migration**

The objective of this section is twofold: to analyze the legal, institutional, and political framework in place for the protection of children and adolescents in El Salvador; and to determine the framework's effectiveness in protecting children and adolescents in general, as well as those migrating alone or accompanied by relatives, and those whose parents have emigrated.

##### *A. Legislation*

El Salvador has ratified the principal treaties of the United Nations and Inter-American systems, including the Convention for the Protection of the Rights of All Migrant Workers and Members of their Families. It has also ratified other important treaties and conventions regarding the protection of children and adolescents and migrants such as: International Labor Organization (ILO) Conventions No. 97 (the Migration for Employment Convention), and No. 143 (the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers); and the International Convention for the Protection of All Persons from Enforced Disappearance. However, the non-ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Third Optional Protocol to the Convention on the Rights of the Child (CRC) is particularly worrisome. Both instruments establish processes for submitting individual cases to the Committees that monitor compliance with both conventions.

Domestically, the Salvadoran legal framework contains several instruments for the protection of the rights of children and adolescents. Title II of the 1983 Constitution lays out fundamental individual rights, as well as social and civil guarantees, such as the right to life and liberty (Articles 2 and 70). In particular, Articles 24 and 35 refer to the right to special protection, the right for children to live in conditions that promote their comprehensive development, and the right to State protection.

An ample body of national law advocates for the protection of Salvadoran children in different ways and capacities, among them: The General Education Law (1996); the Law Against

Intrafamily Violence (1996); the Penal Code (2007); the Juvenile Penal Code (1994); the Law for Access to Public Information (2010); the General Medicine Law (2012); the Vaccine Law (2012); the General Youth Law (2012); the Special and Comprehensive Law for a Life Free from Violence (2010); the Law for Equality, Equity and the Eradication of Discrimination Against Women (2011); the Organic Laws of the PGR (*Procuraduría General de la República*, Procurator General of the Republic), FGR (*Fiscal General de la República*, General Prosecutor of the Republic), and PNC (*Policía Nacional Civil*, National Civil Police); the PDDH Law; the Organic Judicial Law; and the Law on Breastfeeding (2013). The LEPINA should also be included in this list. In addition, regulations of the protection system were established in 2012 for CONNA, the courts for the Protection of Children and Adolescents, and the Shared Protection Network (*Red de Atención Compartida* or RAC).

The LEPINA is the fundamental Salvadoran legal framework for the protection and promotion of the rights of children and adolescents, because it attempts to bring El Salvador into compliance with its obligations as a signatory of the Convention on the Rights of the Child. According to LEPINA, all children and adolescents within Salvadoran territory are individuals with full rights, regardless of nationality (Articles 5 and 6). The law extensively lays out the rights of children and adolescents. Title I includes the rights to survival and full development, including the rights to life, healthcare, social security, and the environment; Title II includes rights to protection, including the rights to personal integrity, freedom, and the protection of adolescent workers; Title III includes further rights to full development, such as the rights to personality, education and culture; and Title IV includes the right to participation.

The LEPINA mandates that national policy for the protection of children and adolescents be in accordance with the following principles (Art. 112):

- The best interests of children and adolescents
- Absolute priority
- The full protection of rights
- Social participation for children and adolescents
- Equality and non-discrimination
- Gender equity

Current migration legislation is profoundly out of date; the Migration Law (Legislative Decree No. 2272) was passed in 1958, and its language bears little relevance to the reality and challenges of migration in the modern era. The law does not include a host of human rights that the state is obligated to guarantee based on national and international laws in effect in El Salvador, such as the Convention of the Rights of the Child.

Efforts to reform the law have so far been unsuccessful. In 2014, the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Committee on Migrant Workers) advised the State to adopt the necessary measures to ensure that the draft bill on migration and foreigners complies with the Convention. The UN Committee on Migrants also

urged the State to submit this draft bill to the Legislative Assembly for approval as soon as possible.<sup>63</sup>

*B. Institutions responsible for the protection of children and adolescents*

The LEPINA established the National System for the Protection of Children and Adolescents (*Sistema Nacional de Protección de la Niñez y la Adolescencia*), which is comprised of the following institutions, in accordance with Article 105: CONNA; Local Committees for Children's and Adolescent's Rights (*Comités Locales de Derechos de la Niñez y la Adolescencia*); Protection Boards for Children and Adolescents (*Juntas de Protección de la Niñez y la Adolescencia*); Promotion and Assistance Associations (*Asociaciones de Promoción y Asistencia*); the Salvadoran Institute for the Integral Development of Children and Adolescents (*Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia* or ISNA); the Judicial Branch; the PGR; the PDDH; and members of the RAC.

Other government bodies involved in the Protection System are: Family Courts (*Juzgados y Cámaras de la Familia*); Children's Courts and Courts for Enforcement Measures (*Juzgados y Cámaras de Menores y de Ejecución de Medidas*); the Family and Juvenile Divisions of the PNC (*Divisiones de la Familia de Asuntos Juveniles*); and the PDDH's Office of the Associate Procurator for Children and Youth (*Procuraduría Adjunta de la Niñez y la Juventud*).

The CONNA Executive Committee is comprised of a high level individual from each of these executive branch agencies: (1) the Ministers of Public Security and Justice, Housing, Education, Labor and Social Services, and Public Health and Social Assistance (*Seguridad Pública y Justicia, Hacienda, Educación, Trabajo y Previsión Social, Salud Pública y Asistencia Social*); (2) The PGR; (3) the organization of municipalities of the Republic of El Salvador (*Corporación de Municipalidades de la República de El Salvador*); and (4) four civil society representatives selected by the RAC, two of whom must belong to non-governmental human rights organizations.

The LEPINA represents a serious step forward in terms of child law in El Salvador. However, the Comprehensive Protection System (*Sistema de Protección Integral* or SPI), designed to protect the rights enshrined in the law, has suffered serious delays in implementation. These delays have resulted in a lack of efficiency and confidence, as well as an inadequate budget. The Legislative Assembly issued transitory legislative decree No. 581 (January 6, 2011), which gave ISNA the authority to grant administrative protective measures until January 1 2012, because the Protection Boards had not yet been created. In 2012, the process of implementing the LEPINA was accelerated; in May, the Executive Director of CONNA took office and new civil society representatives were elected to the Executive Board.<sup>64</sup>

Other difficulties include a lack of capacity building and best practices for properly addressing claims. For example, in general, police do not have the capacity to attend to children and

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<sup>63</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

<sup>64</sup> Morlachetti, A. (2013, January). *Sistemas Nacionales de protección integral de la infancia: fundamentos jurídicos y estado de aplicación en América Latina y el Caribe*. Retrieved from [http://repositorio.cepal.org/bitstream/handle/11362/4040/S2012958\\_es.pdf?sequence=1](http://repositorio.cepal.org/bitstream/handle/11362/4040/S2012958_es.pdf?sequence=1).

adolescents. Additionally, there are many reports of human rights abuses carried out by the police. Members of the Children's Courts have traditional backgrounds in civil and family law, and generally hold outdated attitudes towards children that prevent them from acting with a perspective truly rooted in the best interests of the child.

In addition to implementation inadequacies, there are other troublesome aspects of LEPINA's framework. One of the greatest challenges is consolidating the relationship between CONNA—as the body that guides national policy and has authority over the system—and ISNA—which is part of the Protection System and is charged with providing attention by means of the RAC. There are different visions regarding the roles that these two autonomous institutions should play. Furthermore, ISNA is perceived as an institution that represents the entrenched system, holds outdated attitudes towards children, and maintains practices that are not consistent with LEPINA's integral protection perspective.<sup>65</sup>

Ana Georgina Ramos de Villalta, Deputy Inspector General for the Rights of Children and Adolescents, stated that none of the 262 local committees, charged with providing local enforcement of children's rights, have been launched. The absence of local committees, in conjunction with the distance and overflow of the Protection Boards, results in the invisibility of human rights violations and violence perpetrated against children and adolescents, and leaves children with no recourse to state protection mechanisms.

According to Roberto Rodríguez Melendez:

Severe fiscal limitations and institutional weakness have hampered the effective implementation of the LEPINA. The law has gone into effect slowly and in stages, with substantial portions of the Comprehensive System of Protection still not in place today. Even with its limited implementation, it has served to make visible the enormity of the harms El Salvador's children face. Unfortunately, it is also having substantial unintended negative consequences, which diminish public trust in the law, and put at risk the advances that have been made, and the likelihood that the many remaining gaps to ensuring children's rights will be filled.

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... the LEPINA only requires at least one Board per department, although more than one can be established in a department. This compromise significantly undercuts the central premise of the LEPINA, which is to give children access to protection regardless of where they live. Even with one Board per department (and two in San Salvador), it is often difficult for children to reach the Boards on their own. Despite [this], the Boards have been flooded with many more cases than they can effectively handle. In 2012, with only 8 of a planned 15 Child Protection Boards in place, over 7,000 reports of children's rights violations were received, most of which described very serious harms to children. This caseload far exceeded the capacity of the system, even though at the time a study showed that most

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<sup>65</sup>Morlachetti, A. (2013, January). *Sistemas Nacionales de protección integral de la infancia: fundamentos jurídicos y estado de aplicación en América Latina y el Caribe*, p. 61. Retrieved from [http://repositorio.cepal.org/bitstream/handle/11362/4040/S2012958\\_es.pdf?sequence=1](http://repositorio.cepal.org/bitstream/handle/11362/4040/S2012958_es.pdf?sequence=1).

Salvadorans had not yet even heard of the LEPINA because CONNA had no budget to promote the law. In 2013, as of October, 8,000 reports of violations had already been received. This flood of cases leads to very slow processing which diminishes public trust in the system.<sup>66</sup>

Rodríguez Melendez continues:

The Local Committees are to be established in each of El Salvador's 262 municipalities; as such, they represent the Comprehensive System of Protection at its most local level. The Local Committees are charged with implementing and making known the National Policy on Children and Adolescents at the municipal level. The Local Committees also are meant to advise CONNA on the status of children's rights in the municipality, and provide guidance to municipal governments on how best to safeguard children's rights locally. The Local Committees, however, cannot resolve any cases themselves, and can only report any rights violations to the Child Protection Boards, the Specialized Courts, or to the police. . . . [In any case], the Local Committees have not been established in more than a small number of municipalities. Since the [RAC] is insufficient and does not exist in many areas of the country, at the local level there is no legal authority to establish the Local Committees.<sup>67</sup>

This represents a substantial deficiency of LEPINA's implementation.

Efficiently implementing the Comprehensive Protection System would give life to the LEPINA. However, barriers to implementation seriously impede the promotion and protection of the rights of children and adolescents, as well as the prevention of rights violations. As a consequence, there is a failure of protection for children's and adolescents' basic rights to healthcare, education, and adequate living conditions; measures for preventing violence or addressing violence committed; and punishment for those carrying out violent acts. This situation leads many children and adolescents to develop their own survival strategies, including migration.

These serious limitations harm migrant children and adolescents in many ways. In order to successfully overcome these challenges, the government must institute comprehensive, adequate, and timely policies that acknowledge the causes of migration; provide attention to children and adolescents whose parents have migrated; and implement effective reintegration programs with a focus on basic rights and human development.

The migration of children and adolescents should be addressed from a perspective of rights and gender, and in a coordinated manner that grapples with root causes and key effects. For example, if responses to child migration focus only on family reunification, leaving aside issues such as social exclusion and violence, improved prevention of irregular migration is highly unlikely.

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<sup>66</sup> Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf).

<sup>67</sup> Rodríguez Meléndez, R. (2014, November 26). Declaration of Dr. Roberto Rodríguez Meléndez, Legal Expert on the Situation of Violence Against Children in El Salvador. Retrieved from [http://cgrs.uchastings.edu/sites/default/files/Roberto\\_Rodriguez\\_Melendez\\_Affidavit.pdf](http://cgrs.uchastings.edu/sites/default/files/Roberto_Rodriguez_Melendez_Affidavit.pdf).

Rather than implementing a coordinated effort, however, CONNA has developed counterproductive policies. These include threatening parents with fines between \$6,000 and \$12,000 (USD) if they send their children on subsequent migration attempts after being deported from the United States and/or Mexico. Blaming families for the irregular migration of their children is a repressive, rather than protective, state measure. This demonstrates that CONNA is still seriously unaware of the dynamic of irregular child and adolescent migration and its causes. CONNA should prioritize structural issues—such as the true reasons for migration, reintegration processes for repatriated children, and the development of short- and medium-term measures to ensure the best interests of the child.

### *C. Protection for migrant children: the Council for the Protection of Migrants*

The 2011 Special Law for the Protection and Development of Salvadoran Migrants and their Families specifically addresses the protection of migrant children and adolescents, based on the following principles:

- Respect for the human rights of migrants regardless of their migratory status
- Non-discrimination
- The obligation to protect the human rights of Salvadorans abroad, regardless of their migratory status
- Special protection for vulnerable groups, including children, adolescents, and women
- The best interests of children and adolescents

The law applies to returning migrants and the reintegration process. To that end, the National Council for the Protection and Development of Migrants and their Families (*Consejo Nacional para la Protección y Desarrollo de la Persona Migrante y su Familia* or CONMIGRANTES) was created as an inter-agency body with participation from civil society and migrants. CONMIGRANTES is a public, non-profit, autonomous, and decentralized legal institution whose goal is to develop, propose, channel, and verify compliance with comprehensive protection policies, as well as policies related to ties between migration and development.

CONMIGRANTES is an inter-agency and cross-sectorial body that coordinates between the State and migrants. In spite of budget shortages, CONMIGRANTES has successfully placed the issue of assistance for returning migrants and their families on the government's agenda. Even though it was not fully formed until September 2012, its actions have filled the vacuum resulting from inaction on the part of CONNA regarding migration. However, shortcomings persist in the implementation of the LEPINA framework and the Special Law for the Protection and Development of Salvadoran Migrants and their Families.

The UN Committee on Migrant Workers evaluated measures adopted by El Salvador in 2014 to protect Salvadoran nationals in Mexico and the United States, particularly children and adolescents.<sup>68</sup> The Committee expressed its concern over a lack of information on current measures

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<sup>68</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

to adequately identify and protect children and adolescents in transit, who are at a higher risk of being abused or attacked during their journey. To address this concern, the Committee submitted the following recommendations to the State:

- Strengthen cooperation with transit and destination countries in order to ensure that unaccompanied migrant children are not detained for having entered these countries in an irregular fashion, that minors who are accompanied by family members are not separated from them, and that families are housed in protection centers.
- Strengthen cooperation with transit and destination countries in order to ensure that unaccompanied migrant children who have been the victims of crime receive proper protection and individual care tailored to the specific needs of each case.
- Strengthen cooperation with transit and destination countries to ensure that unaccompanied minors are repatriated only if it is in their best interests and it has been established that the child, upon his or her return, will be safe and receive proper care and custody, under a procedure with appropriate safeguards.
- Take the necessary steps to guarantee that repatriated minors are taken in by family members and ensure their lasting resettlement and reintegration into their communities of origin.
- Develop policies for attending to, protecting, and facilitating family reunification for Salvadoran children whose parents have emigrated<sup>69</sup>

For many years, Salvadoran consulates almost exclusively provided “traditional” consular services for the Salvadoran community living or traveling abroad. “Traditional” consular services refer to three principal functions: providing identification documents (passports, national identification cards, and other documents); processing family registries (registering changes in Salvadoran families living abroad); and notarizing personal documents vis-à-vis authorities in countries of origin and destination. Consuls are also obligated to formally and officially represent Salvadorans in their countries of destination. Consuls and their administrative staffs have become specialized in these areas and have, to a certain extent, become efficient and innovative.

The massive migration of Salvadorans over the past three decades and the intense flow of migrants toward the United States—especially in an irregular fashion—have complicated the migration phenomenon. Compounding these complications are the numerous and frequent dangers facing migrants along the way. For example, the 2010 massacre of 72 migrants in Tamaulipas, Mexico acutely highlights the dangers migrants confront. More effective consular attention is needed to protect the rights of migrants in transit, respond to the current challenges presented by migration, and provide expanded humanitarian services. In fact, the Tamaulipas’ massive murder led to El Salvador’s decision to strengthen their Consulate network in Mexico and create new Consular

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<sup>69</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

representations throughout the country—e.g., in Arriaga, the city where the train “La Bestia” (“The Beast”) departs.

Consular Protection Agencies (*Agencias Consulares de Protección*) in southern Mexico were established just months before the Tamaulipas massacre. The first agencies opened in the most dangerous areas, closer to routes traversed by migrants. These agencies serve four main functions, in addition to providing traditional consular services: (1) defending and promoting the rights of migrants in transit; (2) providing humanitarian services; (3) facilitating a dignified repatriation process respectful of the rights of those apprehended by Mexican authorities; and (4) gathering information on serious crimes and human rights violations committed against migrants. These agencies are small, flexible, and efficient, and can adapt to changes in migration flows.

The functions and goals of Consular Agencies not only developed in response to factors that migrants encounter in transit, but were also legally mandated. Articles 5 and 36 of the Vienna Convention on Consular Relations require consulates to safeguard the rights of nationals abroad. Additionally, the Salvadoran Constitution and the Consular Services Law establish the state’s obligation to protect the rights of Salvadoran citizens abroad. To this end, consular officials must have the management tools necessary to operate adequately and efficiently.

At first, the implementation of these new functions was largely improvised and based on the intuition, goodwill, and personal commitment of consuls. Thus, results varied and were difficult to measure and use for planning and evaluation. Each consul developed its own style and process, which resulted in responses that were, to a certain extent, ad hoc. Personal case-by-case considerations superseded institutional criteria; indeed, there was no institutional framework in place with clearly established criteria for guiding consular protection of migrants’ human rights.

To address this situation, standardized procedures were established in order to make consular work more efficient, predictable, measurable, and regularized. Every consulate designed and adopted management tools defining appropriate steps, criteria, relationships and coordination, instruments to use, and desired results.

In 2012 the following consular protocols were developed:

- Protocol for Attending to Victims of Human Rights Violations
- Protocol for Attending to Victims of Serious Crimes
- Protocol for Locating Salvadorans Lost in Transit and in Destination Countries (additionally, a guide for using a gene bank to identify the bodies of dead migrants was developed)
- Protocol for Attending to Salvadorans Detained in the Penal System
- Protocol for Carrying Out Humanitarian Actions
- Protocol for Attending to Salvadorans Facing Deportation
- Protocol for the Repatriation of Unaccompanied Children and Adolescents

These instruments contain information for identifying the Salvadoran victim or individuals requesting consular services; the person submitting the claim (if applicable); the location where the incident or claim occurred; identifying the perpetrators (if applicable); locating contact information for relatives in El Salvador; defining the proper procedures to follow according to each case;

establishing relationships with relevant local and/or national authorities and civil society organizations; and documenting results. Additionally, the Ministry of Foreign Relations has been developing an information system for monitoring all registered cases of consular protection.

The protection and defense of the rights of migrants is clearly the centerpiece of this new consular model. These areas are new and unknown to most consuls, and not consistent with the traditional bureaucratic and administrative work of consular officials. The design and development of new management tools (protocols, manuals, database systems, guidelines, etc.) is key for improving efficiency. Consuls and administrative assistants at Consular Protection Agencies now have a clearer framework and more thorough guidelines. They possess a clearly defined roadmap defining the steps necessary for providing more systematic and efficient services, useful for all parties involved in the process.

The current challenge is to ensure that these tools effectuate consular protection, and that consuls perceive them as facilitating their work and provision of services. There is a lack of awareness and capacity building for consular personnel regarding these new tools. As a consequence, resistance to implementation remains. The UN Committee on Migrant Workers recommended that the State adopt the necessary measures to effectively respond to the needs of Salvadoran migrant workers and members of their families vis-à-vis the protection of their human rights and access to services. Among these measures are the sufficient allocation of human and financial resources, and the design and implementation of on-going capacity-building programs for consular officials on the Migrant Workers' Convention and other human rights conventions.<sup>70</sup>

These reforms should include specific tools and mechanisms for protecting the rights of migrant children and adolescents vis-à-vis migration proceedings in Mexico and the United States. Reforms should take into account the prevention or termination of detentions of children and adolescents and members of their families, and should state that deportations are not in the best interests of the child.<sup>71</sup>

## **V. Difficulties and limitations in the reintegration of migrant children and adolescents**

The circumstances associated with the irregular migration of children and adolescents, and the legal and institutional deficiencies we have discussed, affect the efforts of many children and adolescents to reintegrate into their families and communities once they have been deported or repatriated. This difficulty of reintegration influences their decision to embark anew or stay. Many repatriated children and adolescents do not view social reintegration as their best option. This view is influenced by strong emotions, including the hope of reuniting with members of their families, the dream of living a life full of possibilities and free from violence, and the fear of returning to the very place they fled because of violence, among other factors. In this regard, the UN Committee also expressed its concern over the increasing number of unaccompanied Salvadoran migrant

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<sup>70</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

<sup>71</sup> There may be situations where it is better for a child to be reunified with family in another country, which could result in return of the child consistent with the best interests of the child.

children and adolescents repatriated to El Salvador, and a lack of effective measures to guarantee their successful and lasting social reintegration.<sup>72</sup>

Factors that cause child and adolescent migrants to place greater value on the notion of a second or third migration attempt (or beyond) include: the impact of having already left the school system in their country of origin; the perception their community has of them; the persistence of structural causes, violence, and other dangers experienced in transit; and the risks of returning to a context of violence. In reality, after they are returned to El Salvador, only a few child or adolescent migrants actually consider abandoning their efforts or intent to migrate without documents. New elements that affect their decision-making processes include pressure to repay debt incurred to make an initial journey. Additionally, the impact of prior factors may shift in subjective and relative importance; for example, children will know more about the risks of the journey, and their fears associated with migration, or their perceptions of their coyotes or other relevant actors, may have changed.

The changes upon the return of children and adolescents to their communities and families may not be apparent. However, under the surface, the decision to migrate once again becomes more complex. These difficulties occur on three levels—personal, family, and community—that, as concentric circles, expand their influence dynamically, bi-directionally, and recursively.

#### A. *Personal difficulties of reintegration*

While in transit, children and adolescents experience the migration process differently than they anticipated they would, as the reality differs substantially from what they had imagined.<sup>73</sup> This discrepancy between the expectations and reality of migration is based on two interrelated psychological processes: the fact that expectations are based on representations of reality—which inevitably involve one’s emotional reactions to their experiences (i.e., the “affective component”)—and the fact that expectations tend to be optimistic.<sup>74</sup>

While this discrepancy is inherent in all decision-making processes, it is particularly problematic in the case of undocumented migration. Negative experiences frequently include traumatic events and conflict with the optimism with which many decided to migrate to achieve family reunification, better living conditions, the opportunity to attend school, and flight from violence. Reality can be grim compared to the expectations of children and adolescents beginning their journeys. Consequently, many children and adolescents must process these events, sometimes with the assistance of professionals, in order to absorb them in a balanced and prudent fashion.

Regrettably, the role of the Salvadoran State in the reintegration process is limited to registering repatriated nationals and facilitating the return of children and adolescents to their families and

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<sup>72</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

<sup>73</sup> Klaaren, K. J., Hodges, S. & Wilson, T. D. (1994). Expectation Whirls Me Round: The Role of Affective Expectations on Affective Experiences. In M. S. Clark (Ed.), *Review of Personality and Social Psychology: Emotion and Social Behavior*, 14, pp. 1-31. Newbury Park: Sage.

<sup>74</sup> Geers, A. L., and Lassiter, G. D. (2002). Effects of Affective Expectations on Affective Experience: The Moderating Role of Optimism-Pessimism. *Personality and Social Psychology Bulletin*, 28, pp. 1026-1039.

communities. The state registers children and adolescents deported from the United States, or by land from Mexico following detention at the Century XXI Migration Station, upon reentry into El Salvador. Prior to their arrival, consular authorities notify and verify the identity of relatives or guardians claiming responsibility for the child or adolescent (in the United States and/or El Salvador).

In the case of recidivism—that is, being deported more than once—children and adolescents are transferred to ISNA to be safeguarded and returned to their families. Following the entry into force of the LEPINA, ISNA—which previously received repatriated children at El Salvadoran reception centers for migrants—ceased to receive children and adolescents at the reception centers. CONNA did not begin meeting repatriated NNA at reception centers until July 2014 during the “humanitarian crisis”<sup>75</sup> involving migrant children.<sup>76</sup>

There is no program in El Salvador for proposing new relevant public policies and/or supporting the reintegration of returning children. The Vice-Ministry’s 2009 strategic plan for Salvadorans Living Abroad (*Vice-Ministerio para Salvadoreños en el Exterior*) created the Program for the Reintegration of Returning Migrants, tasked with raising support for returning Salvadoran migrants and facilitating their social and productive reintegration. But by July 2014, this program, which was aimed at adult migrants, had ceased to function. Upon its inception, CONNA did not take into account the fact that, between 2008 and 2010, irregular migrants were one of the largest groups receiving care from ISNA. In light of the increase in unaccompanied children returning from the United States, CONNA has recently been forced to include migration on its agenda, something they had previously expressly resisted.

No programs, laws, or guidelines exist in El Salvador to establish a clear vision for adequately and sustainably supporting the reintegration of returning irregular migrants. Rather, a purely legalistic and problematic decision has been made to leave this to parents or guardians who have already authorized or supported the irregular migration of children and adolescents in their care.<sup>77</sup>

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<sup>75</sup> In the introduction of this report, we indicated our objections to the United States’ interpretation vis-a-vis this concept. We have also explained why we are facing a regional crisis regarding human rights, humanitarian law, human development, and the rights of refugees.

<sup>76</sup> According to Kennedy, no one from ISNA or CONNA interviewed returning children between 2009 and July 2014. Kennedy also described the lack of training for migration officials, and the absence of procedures for detecting any risks or abuse children or adolescents may have suffered, both before and during their journey. This results in children and adolescents automatically being returned to some member of their family. CONNA began carrying out interviews with repatriated children in 2014. However, this task has been mostly focused on dissuading children and adolescents from migrating again and threatening their parents with fines if they do so. Children and adolescents were not asked whether they had been victims of violence or abuse, or if they had been subjected to human trafficking. Kennedy, E. (2014). *No Childhood Here, Why Central American Children are Fleeing their Homes*. Retrieved from

[http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf)

<sup>77</sup> Aguilar, J. (2014, August 22). *Padres de menores migrantes pueden ser sancionados*. *La Prensa Gráfica*. Retrieved from <http://www.laprensagrafica.com/2014/08/22/padres-de-menores-migrantes-pueden-ser-sancionados>.

### *B. Family difficulties in the reintegration process*

One of the most challenging aspects of reintegration is family reinsertion. While returning children and adolescents detained in transit may at first be apprehensive to reattempt the journey, the environment in their communities soon motivates many to do so. It is difficult for children and adolescents, as well as members of their families, to abandon plans that have taken much time to formulate because of a failed first attempt at reaching the United States. Moreover, the possibility of an unsuccessful first attempt is taken into account in the initial decision to migrate undocumented. Thus, within the dynamic of families with returning children and/or adolescents, there already exists the idea of reattempting the journey.

There are two particularly worrisome consequences of this situation that prevent children and adolescents from returning to a family dynamic favorable to their reintegration. On the one hand, children and adolescents are often subject to family pressure to reattempt the journey, even when the child does not want to do so. These efforts at persuasion very often downplay the potential dangers facing migrants. Families with debt acquired from high-interest loans and mortgages will urge the child or adolescent to leave again as soon as possible. The possibility of not being able to pay off family debt, and the persistence of the structural factors leading to migration, put pressure on children and adolescents to migrate once again. This makes the decision-making process less than thorough, and inadequate attention is given to the potential dangers along the way.

On the other hand, this dynamic results in families reestablishing contact with coyotes in order to reattempt the journey, regardless of whether or not more attempts are stipulated in their contracts. Family pressure on children and adolescents to migrate once again can create tension between the family and the child at a time when positive family support is key in making the repatriation process as painless as possible. Any contact children and adolescents have with persons involved in organized crime puts their security and well-being at risk. This includes coyotes and guides who, as evidence increasingly demonstrates, indeed comprise a criminal network.<sup>78</sup> Migrants and members of their families within different cultural contexts will often refuse to mentally acknowledge the negative role of coyotes, even considering them as good, trustworthy people helping the family in a time of need.<sup>79</sup>

Some children and adolescents leave the country to escape violence, and, in particular, to avoid recruitment by gangs operating within schools or to avoid extortion of their families, which gangs may offer in exchange for non-recruitment. In these cases, families have two choices for protecting children and adolescents from violence: sending them to live with relatives in other parts of the country, or facilitating another migration attempt as quickly as possible. This decision is made quasi-automatically and carried out urgently in light of the extreme forms of violence that motivated the child or adolescent to migrate in the first place.<sup>80</sup>

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<sup>78</sup> García Vásquez, Gaxiola Baquero, & Guajardo. (2007).

<sup>79</sup> Gaborit, M., Zetino Duarte, M., Brioso, L., & Portillo, N. (2012). La esperanza viaja sin visa: Jóvenes y migración indocumentada de El Salvador. Retrieved from [http://www.unfpa.org.sv/index.php?option=com\\_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales](http://www.unfpa.org.sv/index.php?option=com_content&view=article&id=545:la-esperanza-viaja-sin-visa&catid=37:nacionales); Salt, J. (2002). Trafficking and human smuggling: A European perspective. *Internacional Migration*, 38, 31-56.

<sup>80</sup> Bodenhausen & Todd. (2010).

*C. Community difficulties in the reintegration process*

Community difficulties affecting the reintegration process of children and adolescents occur on two levels: (1) the disconnect between the return of children and adolescents and the migrant image held by many members of their communities; and (2) difficulties in resuming schooling and accessing the right to education for all children. These two factors make repatriation an inconvenience or minor delay, given the insistence of children and adolescents to once again set out for the United States.

Upon returning to their communities, children and adolescents tell of their journey, which serves two important social functions. First, the child or adolescent recounts what happened along the way and what they will do in order to develop life plans tied to their communities. This narrative can create difficulties for returning children and adolescents. To a certain extent, their plan to re-migrate eliminates the option of remaining in their communities, as their stay would be imbued with the social perception of failure, or create pressure to leave again. The return process, in particular the recounting of their experience, strengthens their migrant identity. Furthermore, once a person's public identity has been consolidated—in this case the migrant identity—a process of personal choreography begins whereby they migrant searches for consistency between the future and the way they are viewed by others. Each time the migrant identity is even slightly confirmed, the option of breaking with it becomes more complicated and difficult.

Second, the accounts of returning children and adolescents idealize the “American dream” for members of their communities. Other children and adolescents obtain information from these accounts on how to confront similar situations. Potential migrants in different focus groups reported that they received some of their information about the difficulties of the journey from returning migrants. In addition to piquing the curiosity of others, discussing what happened in transit in different groups and in different contexts serves two interrelated functions: (1) other children and adolescents idealize the migrant identity; and (2) the teller unconsciously strengthens his or her migrant identity as returning children and adolescents.

Some children and adolescents have said that they spoke to their teachers before leaving about “holding their place” in case of their return. When their absence is relatively short, returning children and adolescents may attribute it to a family emergency in another part of the country. In the case of short absences, the increasing awareness of teachers and faculty provides children and adolescents the opportunity to effectively reintegrate and access necessary psychological and emotional support. Problems arise when there is a prolonged absence; in this case, it may not be feasible for children and adolescents to resume school where they left off, either because too much time has elapsed or they have returned at the end of the school year.

Finally, community and/or school reintegration for returning children and adolescents is extremely difficult when their primary push factor was violence or extortion by gangs operating in their communities and within their schools.

## VI. The situation of migrant children and adolescents and children of migrants living in El Salvador

While El Salvador is primarily a sending country, it has also increasingly become a receiving country for migrants—mostly irregular migrants—traveling to communities located along the border with Honduras. Most of these children and adolescents enter El Salvador in search of short-term agricultural work due to poverty in their communities of origin, or in order to receive emergency medical care at Salvadoran public health centers located along the border. Many of these children are accompanying their parents to assist them with agricultural work or retail, especially in La Unión. Until now, El Salvador has not been considered a destination country for many migrant children. However, there are Honduran and Nicaraguan children and adolescents living and working in towns along the border for short periods of time, after which they voluntarily return to their countries of origin by their own means.

Non-Salvadoran children and adolescents (mostly Central and South Americans) also pass through El Salvador accompanied by coyotes on their way to the United States. However, the General Directorate of Migration does not have precise data on these non-Salvadoran migrants. The UN Committee on Migrant Workers has lamented the lack of information necessary for evaluating the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families—especially data regarding unaccompanied migrant children and adolescents, and temporary workers along the border.<sup>81</sup>

There is also a dearth of information on the integration of these migrant children and adolescents into Salvadoran society, and on respect for their rights. Although LEPINA guarantees the rights to identity and to education for the children of immigrants, its fulfillment has been difficult given the unknown number of these children, their geographic location, and the length of their stay in El Salvador. The UN Committee on Migrant Workers advised the State to intensify efforts to ensure that the rights enshrined in the Convention of migrant workers and members of their families living in El Salvador are respected. Among these efforts are raising awareness among local authorities, migration officials, and the general public about the rights of migrants and members of their families, and the importance of eliminating discrimination against them; as well as developing programs to guarantee access to healthcare and education for the children of irregular migrant workers.<sup>82</sup>

In short, non-Salvadoran children and adolescents living in the country find themselves almost invisible, with virtually no information or studies concerning the situation of migrants whose destination country is El Salvador. Current migration legislation is out of date and does not include specific provisions for the protection of the rights of migrant adults, children, and adolescents. There are no mechanisms or programs geared toward ensuring the rights of these children.

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<sup>81</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

<sup>82</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the second periodic report of El Salvador*, 2014, April 2, U.N. Doc. CMW/C/SLV/CO/2 (2014, May 2).

## **VII. Conclusions**

The prevalence of adverse living conditions in countries of origin provides a general explanation of migratory processes. The predominant argument made in migration studies is that economic and other objective conditions lead to migration. However, the relationship between risk factors and migration is never mechanical or linear, especially with regard to the irregular migration of children and adolescents. Other motivating factors aside from employment and educational opportunities are the diverse and growing forms of violence in Central America, and the desire to reunite with parents who have already migrated to the United States. A labyrinth of complex motivators intertwine vital psychological aspirations of children and adolescents with their legitimate desire to improve their planned life trajectory relative to those around them, free from violence and with the possibility of exercising their fundamental rights.

Factors that motivate children and adolescents to leave their country, such as family reunification, complicate the phenomenon of migration. Risk factors add to this complexity. Findings in recent studies<sup>83</sup> and research conducted by our work group demonstrate the need to take into account both objective factors (root causes including the economy, violence, poverty, etc.) and subjective factors (personal aspects including agency, family connections, psychological aspects, etc.). The dynamic, ever-changing nature of Salvadoran society indeed pushes migration. This is particularly true with regard to the development of migratory routes and the threats made by the gangs.

The nature and combination of risk factors superimpose themselves to instill a more intense desire to migrate, with complex influences of age and gender. The fact that the majority of migrants are children and adolescents transcends demographics in two key ways. First, it supposes that migration occurs during a formative time in the development of personal identity, which consolidates a migrant identity influenced by the risks encountered while in transit. Second, it means that those who stay behind to take care of the home or who are protected and sheltered from “leaving with just anyone,” are often girls and young women. Consequently, irregular migration redefines and reproduces dynamics of male hegemony.

Evidence shows that the following are fundamental factors for children migrating irregularly: elaborate planning for the journey; underplaying potential risks along the way and believing that one will not succumb to these risks while in transit; the perception of a violent and unsafe environment at home; having a migrant community or family network; possessing a migrant identity; and aspiring to achieve the “American dream.” The personal equation motivating children and adolescents to migrate irregularly persists because of the difficult realities surrounding them. At the very least, child migrants are usually drawn to reunite with their family members abroad, and are already socialized as migrants. But the fact that they are experiencing a difficult and changing reality also weighs heavily, as does the interplay of a number of subjective processes with structural conditions that push them to leave the country.

The role played by irregular migration in the lives of many children and adolescents becomes larger as the impacts of social exclusion and the aforementioned complex psychosocial dynamic are

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<sup>83</sup> Gaborit, M., Orellana, C. I., Orellana Sibrián, R. (2014). Migración infantil irregular salvadoreña: reflexiones desde la psicología social. *Estudios Centroamericanos (ECA)*, 69 (736), pp. 55-59. Retrieved from [http://www.uca.edu.sv/upload\\_w/20/file/736/3-Mauricio-Gaborit.pdf](http://www.uca.edu.sv/upload_w/20/file/736/3-Mauricio-Gaborit.pdf).

increasingly felt. Social exclusion, which is now endemic in El Salvador, especially in rural and marginalized urban areas, will continue pushing many children and adolescents to leave the country.

While many children and adolescents contemplate migrating, forced gang recruitment leads some to depart suddenly for the United States. In the end, threats expel children and adolescents from their communities. These threats, however, do not disappear when the child departs; when children and adolescents are repatriated, the threats reactivate. Under these conditions, some children and adolescents and members of their families report that returning to one's community of origin is very dangerous. As a consequence, migrating again becomes imperative and urgent, even if it is undesired.

It is difficult to imagine a substantial reduction of gang violence in El Salvador given the growing political importance of gangs in recent years due to failed state policies. Gangs have become primary social actors. They almost unilaterally determine the homicide rate—the most extreme expression of social violence—and the crime rate in general. As long as they continue operating within schools freely and with impunity, the number of children and adolescents migrating irregularly will increase. A concerted effort by the state to reduce gang violence in schools and communities is needed to reverse this situation. This effort should be grounded in a comprehensive and transversal focus on human rights and human development.

The fundamental problem with the Salvadoran legal framework is its lack of effectiveness. This has worsened along with the general situation of insecurity caused by gangs. The social problem demonstrates that, as is often the case, the ineffectiveness of legal tools is not due to an absence of laws—which do exist, although they can be improved. Their ineffectiveness is due to the ineptitude of operators, the length of processes, the weakening of institutional responsibility, and a lack of foresight. Moreover, migration law has not been adjusted to meet international human rights standards, as previously explained.

In spite of the existence of international conventions and domestic laws for attending to children and adolescents, the institutional and legal framework most useful for and specific to attending to migrant children in El Salvador is extremely recent. Among other examples, LEPINA has existed for only five years, including one year in moratorium; the National System for the Protection of Children and Adolescents in El Salvador began operating in 2011; the National Policy for the Protection of Children and Adolescents was implemented in 2013; and CONMIGRANTES was established at the end of 2012. All of these initiatives remain in the implementation phase. In some cases, conflicting competencies between different government bodies are still being resolved. Unfortunately, the tragic and dramatic phenomenon of child migration once again demonstrates that the country is slow to react to its most pressing problems, which, in effect, become chronic and insurmountable for even the most well-crafted initiatives.

The most recent domestic laws—and, naturally, international legal instruments—for attending to children and adolescents are grounded in the philosophy of the best interests of the child. However, the social, political, and economic situation in the country neutralizes this focus. CONNA has heavily resisted playing an important role in all the issues affecting the irregular migration of children, demonstrating a lack of understanding of migration as occurring within a framework that affects human rights and the best interests of the child. For example, blaming parents for the

irregular migration of their children and threatening parents with heavy fines removes responsibility from the state for the social exclusion and violence at the core of this migratory phenomenon. It also erodes the right to family reunification, and fails to recognize the agency of children beyond the influence of parents on their lives, even though they play an important role.

While the irregular migration of Salvadoran children and adolescents to the United States dates back many years, attention to this phenomenon is recent. Records of apprehensions at the United States border and deportations from Mexico demonstrate the growing number and increasing vulnerability of Salvadoran migrant children. These records, however, do not accurately reflect the magnitude of the migration; they do not take into account those children and adolescents who travel with family members, successfully reach their destination, or remain trapped in Mexico while in transit.

The difficulties of reintegration for repatriated children and adolescents arise from different yet interrelated spheres. First, when children and adolescents are deported, oftentimes their immediate plan is to reattempt the journey. This is due to several factors, among them: a strong desire to reunite with family in the United States, increasingly serious threats from gangs in El Salvador, a situation of social exclusion that prevents building a dignified life in their home community, the fact that contracts with coyotes often include second or third attempts to migrate for the same price, and the debt incurred from these contracts. In contrast, the dangers associated with irregular migration do not weigh heavily on the decision to reattempt the journey.

Second, Salvadoran institutions are so pervasively weak that there are no programs to facilitate the successful reintegration of children and adolescents and guarantee their basic rights to health, education, security, work, and protection. Third, CONNA—the body responsible for guiding the protection of children and adolescents in the country—appears unwilling to improve its system for reintegrating deported children due to budget limitations, delays in its institutional consolidation, and a legalistic view of the irregular migration of Salvadoran children that is just now beginning to evolve. Finally, the impact of violence as a push factor is so great that children cannot return to their communities of origin because their physical security is put at risk by gangs and other organized criminal groups. As a consequence, migration is longer as optional, but necessary for survival.

Consular protection has improved with the passage of new laws to protect migrant Salvadorans and the design of protocols for attending to victims, which have a clear focus on rights. However, no specific programs for preventing abuses contrary to the rights of the child in destination countries, such as arbitrary detention and deportation, have been created.

There is little information on and specific mechanisms for providing assistance to children, adolescents, and migrant families living in the country—either temporarily or permanently—as well as migrants traveling through the country en route to the United States. This lack, along with a completely outdated legal framework in El Salvador, leads to a dearth of programs for protecting the rights of migrant children and adolescents and the children of migrants.

As long as migration policies in the United States and Mexico are based on national and regional security doctrines, it will be difficult for irregular migration—especially that of children and adolescents—to be framed within a human rights context. Furthermore, human smuggling carried

out by organized criminal elements will continue. The criminalization of irregular migration, and its institutional influence on migration authorities in both transit and destination countries, ignores its structural causes, reinforces the control of organized crime, and reduces opportunities for regular migration. As a result, the dangers facing migrants will increase, especially for the ever-growing number of children and adolescents migrating irregularly every year.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 5 Introduction to Chapters on Children in the Context of Migration in Mexico – Two borders: one childhood

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### **I. Introduction**

This chapter analyzes the main features and effects of the current migration, asylum, and child protection policies in Mexico from a human rights perspective. It is also an introduction to the two chapters that analyze the protection of the rights of children and adolescents in the context of outgoing, in-transit, incoming, and returning migration in Mexico with a focus on the Mexico-Guatemala and the U.S.-Mexico borders.

Both chapters analyze the profile of Mexican and foreign migrant children from different perspectives, highlighting differences based on the nationality and migration status of Mexican and Central American children and adolescents. However, in examining the legal framework, public policies, and programs for the protection of children, those differences tend to fade. Notwithstanding the particularities of Mexico's Northern and Southern border areas and their different impacts on the lives and rights of children and adolescents, common factors are at play in both contexts.

This chapter aims to generally describe issues relating to children and adolescents in the context of migration in Mexico—without glossing over the specificities of each border area—as well as the specific situations faced as a result of their nationality, migration status, and ethnic background. Our first overarching conclusion is that systemic violations of human rights define the lives of North-bound Mexican migrant children and adolescents; Mexican children whose parents migrate irregularly; children and adolescents who are returned from the United States; Central American children and adolescents living or in transit in Mexico; and Mexico-born children of Central American parents living in Southern Mexico.

These human rights violations have three common roots: (1) the national and regional security-based approach to migration by the Mexican government; (2) a paternalistic approach to child protection that neglects the children and adolescents condition as rights-bearing persons; and (3) a context of growing violence throughout Mexico that manifests in multiple ways, has specific and serious impacts on women and children, and is encouraged by the high levels of corruption and impunity. Out of these three elements in the Mexican migration and asylum, security, and child protection systems, several contradictions and limitations arise, affecting the basic rights of migrant children and adolescents.

This chapter will describe the normative, political, and institutional aspects that affect Mexican and foreign migrant children and adolescents in both of Mexico's border zones. We will analyze the legal framework on migration, asylum, and child protection, along with the most relevant programs implemented in the last few years. Advances, setbacks, challenges, limitations, and problems will be highlighted from a human rights perspective. The subsequent two chapters are

devoted to an in-depth analysis of the impact of policies implemented at Mexico's Northern and Southern borders, respectively, on different groups of migrant children and adolescents.

## II. Legal framework on migration, asylum, and child protection

The legal framework for the protection of migrant children and adolescents in Mexico includes the Convention on the Rights of the Child (CRC) and the Convention on the Rights of all Migrant Workers and Members of their Families (international); as well as the Constitution of the United Mexican States, the Law for the Protection of the Rights of Children and Adolescents, the Migration Law, and the Law of Refugees and Supplementary Protections (domestic). Bilateral agreements between Mexico and neighboring countries are also part of this legal framework, analyzed in chapter 13 by the National University of Lanús.

It is important to analyze whether recent changes to this legal framework are advances or setbacks towards comprehensive child protection. In the last few years, the legal framework on each of the themes herein investigated—child protection, migration, asylum, and human rights—has been modified either completely or partially. This includes a significant human rights reform to the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos* or CPEUM). Specifically, on June 10, 2011, amendments to several human rights provisions of the CPEUM were enacted. This chapter does not include an exhaustive analysis of this reform's positive and negative aspects, but does highlight some new provisions that will affect the rights of migrant children and adolescents, as well as the rights of children of migrants.

It is important to emphasize that this reform established the legal primacy of international human rights treaties. The content and applicable standards of those treaties, such as the CRC, have been incorporated at the level of the Constitution. The principle of the child's best interests, among others, is now of binding, constitutional effect.

### A. Legislation on the rights of children and adolescents

In addition to the CPEUM, the 2000 Law for the Protection of the Rights of Children and Adolescents (*Ley para la Protección de los Derechos de Niñas, Niños y Adolescentes*), still in force as of late 2014, was specifically enacted in response to the recommendations of the Committee on the Rights of the Child to the Mexican government.<sup>1</sup> However, child protection organizations have described it as a weak piece of legislation—one that seems unable to significantly influence policies, practices, and programs for the protection of children's rights. Although the Law for the Protection of the Rights of Children and Adolescents is a federal one, child protection is a matter of state jurisdiction. This means that the law's role is merely to

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<sup>1</sup> Among the Recommendations to the Mexican State by the Committee on the Rights of the Child, issued 15 years ago, it is worth quoting the following: "...*The Committee reiterates its recommendation that the State party continue its process of legislative reform to ensure that domestic legislation relating to children's rights, both at the federal and State levels, is in full conformity with the principles and provisions of the Convention and reflects its holistic nature...*" Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Mexico, 22nd Sess., 1999, October 8, ¶ 20, U.N. Doc. CRC/C/15/Add.112 (1999, November 10). See also Red por los Derechos de la Infancia en México. (2005, septiembre). *Infancias mexicanas, rostros de la desigualdad*. Retrieved from <http://derechosinfancia.org.mx/documentos/reportealternativomexico.pdf>.

enunciate the rights of children and thus it is not effective as a tool for comprehensive child protection. Mechanisms and provisions are needed to enforce these rights in practice, both at the state and local level.

For this reason, in the last few years there have been proposals to design and pass legislation that meet all of these challenges. For example, the Legislative Branch<sup>2</sup> has consistently tried to update the legal tools relating to the protection of children and adolescents since 2000. During the term of the LXII Legislature of the Chamber of Deputies (*Cámara de Diputados*), as many as 23 bills have been introduced to partially reform the Law for the Protection of the Rights of Children and Adolescents. Other bills have also been introduced in order to harmonize the legal framework for child protection. In total, 14 different regulations have been marked for reform.

There are several areas of child protection that are targeted by these attempts at reform, such as family life, education, mental and physical well-being programs, and sexuality, among others. This shows the extent of the challenges with regard to the protection of children and adolescents and their rights in Mexico.

Members of congress and the President's office have introduced bills that, rather than amending specific laws and regulations, seek to completely overhaul the legal framework for child protection. None of these initiatives had succeeded until September 2014, when President Enrique Peña Nieto submitted a child protection bill to Congress, using the presidential fast-track prerogative. This bill had hitherto been kept in secrecy, without civil society input.<sup>3</sup> Civil society actors engaged in several attempts to improve this bill, particularly in light of its inadequate provisions on migrant children and adolescents. This intense advocacy work led to some improvements. On December 3, 2014, the General Law of the Rights of Children and Adolescents (*Ley General de los Derechos de Niños, Niñas y Adolescentes*) went into effect by presidential decree.<sup>4</sup>

The advocacy work that resulted in an improved law was carried out by the Working Group on Migration Policy (*Grupo de Trabajo de Política Migratoria* or GTPM), through organizations

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<sup>2</sup> See Gamboa Montejano, C., & Valdés Robledo, S., por Dirección de Servicios de Investigación y Análisis. (2014, abril). NIÑAS Y NIÑOS: Estudio comparativo de las iniciativas a la Ley que Protege sus Derechos, así como de otras relacionadas, presentadas en la LXII Legislatura. At <http://www.diputados.gob.mx/sedia/sia/spi/SAPI-ISS-34-14.pdf>.

<sup>3</sup> Mr. Peña Nieto issued a press release stating that a bill “will be sent to the Senate floor as a fast-track initiative containing the draft of a General Law for the Protection of Children and Adolescents. The new law will establish obligations for federal, state, and local authorities in order to harmonize the child protection framework and better regulate children’s rights . . .” México, Presidencia de la República. (2014, 1 de septiembre). Envía el Presidente Peña Nieto al Congreso Iniciativa de ley general para la protección de niñas, niños y adolescentes. Retrieved from <http://www.presidencia.gob.mx/articulos-prensa/envia-el-presidente-pena-nieto-al-congreso-iniciativa-de-ley-general-para-la-proteccion-de-ninas-ninos-y-adolescentes/>.

<sup>4</sup> See Decreto por el que se expide la Ley General de los Derechos de Niñas, Niños y Adolescentes, y se reforman diversas disposiciones de la Ley General de Prestación de Servicios para la Atención, Cuidado y Desarrollo Integral Infantil, Diario Oficial de la Federación [DO], 2014, 4 de diciembre (Mex.). Retrieved from [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5374143&fecha=04/12/2014](http://www.dof.gob.mx/nota_detalle.php?codigo=5374143&fecha=04/12/2014).

working on children's and migrants' issues. The original presidential bill was based on a security approach, which restricted the rights of migrant children and adolescents.<sup>5</sup>

Among the provisions established by the new law, it is worth highlighting the fact that all categories of migrant children and adolescents are included—both accompanied and unaccompanied, Mexican and foreign. Also, the principle of the child's best interests is clearly established as a fundamental consideration in all migration procedures, regardless of the child's immigration status. Article 92, for example, recognizes due process guarantees, including the right to a hearing and to free legal assistance.

Under the new law, the System for the Comprehensive Development of Families (*Sistema de Desarrollo Integral de la Familia* or DIF) has the obligation to set up shelters for migrant children and adolescents, which must conform to international standards (Articles 94 and 95). The law also prohibits returning or expelling children and adolescents back to their home countries if their lives would be at risk, or where there is a situation of widespread violence and massive human rights violations, as in the case of many Central American countries. Article 97 establishes that the return of children and adolescents can only take place under the principle of the child's best interests.

Regarding Mexican migrant children and adolescents, the law establishes the government's obligation to provide social and consular assistance to Mexicans abroad, especially in cases of repatriation procedures (Article 100). This task corresponds to the Secretariat of External Relations (*Secretaría de Relaciones Exteriores* or SRE), in coordination with the DIF and the National Migration Institute (*Instituto Nacional de Migración* or INM).

Undoubtedly, these provisions require supplementary reforms to ensure their full applicability, from minor adjustments—such as the changes to the migration law that are analyzed in the following section—to major institutional, budgetary, and programmatic reforms. A significant challenge on this reform path is the change in political priorities. The security and control perspective permeates migration and asylum policies, including the responses to migrant children and adolescents.

### B. Legal framework on migration and asylum

Two fundamental legal tools relating to foreign migrant children and adolescents are the May 2011 Migration Law (*Ley de Migración*) and its September 2012 Regulation. The Migration Law, the first in the country's history, arose from widespread violence and human rights violations in several parts of Mexico. These violations called into question the government's commitment to respecting and protecting migrants' human rights. One such event was the massacre of San Fernando, Tamaulipas in August 2010.<sup>6</sup>

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<sup>5</sup> See Estudios Fronterizos.org. (2014, 24 de octubre). Posicionamiento del GTPM, el Foro Migraciones y el COMPA ante la ley general de los derechos de los niños, niñas y adolescentes. Retrieved from <http://estudiosfronterizos.org/2014/10/24/foro-migraciones-foro-migraciones/>.

<sup>6</sup> This heinous crime, attributed to the Zetas Cartel, involved the kidnapping and murder of 72 migrant men and women from México, and Central and South America. See Comisión Interamericana de Derechos Humanos (CIDH). (2013, 30 de diciembre). Derechos humanos de los migrantes y otras personas en el contexto de la movilidad en México. Retrieved from <http://www.oas.org/es/cidh/migrantes/docs/pdf/Informe-Migrantes-Mexico-2013.pdf>.

As a result of this background, the guiding principles of Mexico's migration policies, set forth in Article 2 of the new law, include absolute respect for migrants' human rights, whether Mexican or foreign, as well as the principle of nondiscrimination. The law identifies groups of particular vulnerability, including migrant children and adolescents.

However, despite these advances, there are several contradictions that prevent effective protection of migrant children and adolescents, as well as adult migrants living or in transit in Mexico. The human rights approach is in tension with the national security approach outlined in Article 1 of the law. The latter approach, moreover, is reinforced by the appeal to migration authorities to contribute to border security.

For this reason, although this law is a step forward in facing the challenges that migration poses to Mexico—as shown by the many human rights standards included in the law—it still has serious limitations. One of them is the role assigned to INM regarding migrant children and adolescents. Under the new law, INM is still the authority that decides whether migrant children will be detained, sheltered by DIF, or repatriated. Secondly, the law gives INM the prerogative to detain migrant children and adolescents. Third, the law does not establish fundamental due process guarantees for children and adolescents, especially unaccompanied ones, such as the right to have a guardian.

The Regulation of the Migration Law has even more serious contradictions affecting the rights of migrant children and adolescents. It is important to clarify that the Regulation was drafted and approved without civil society input. It has two significant problems. On the one hand, it does not include certain fundamental human rights standards. On the other hand, it contains mechanisms that neglect basic rights of children and adolescents. These loopholes and omissions contradict the spirit of the CRC, which defines children and adolescents as rights-bearing persons.

Articles 141 to 143 of the Regulation on migrant children and adolescents exhibit confusion, omissions, and errors in securing the best interests of unaccompanied migrant children. Another serious problem in both the law and the regulation is the lack of measures to guarantee due process.

The Law of Refugees and Supplementary Protections (*Ley sobre Refugiados y Protección Complementaria*), passed in January 2011, and its Regulation, are also ambiguous and contradictory. These legal tools include some provisions of the 1951 Geneva Convention on the Status of Refugees and its Additional Protocol of 1967, as well as standards designed by the UN High Commissioner for Refugees (UNHCR) and other international law bodies, such as the definition of “refugee” established by the Declaration of Cartagena of 1984.

The Law of Refugees and Supplementary Protections establishes principles of nondiscrimination, the child's best interests, no punishment for irregular entry, family unity, and no return (Articles 1 and 5 to 9). It also calls for the adoption of measures to ensure the provision of institutional assistance to asylum applicants who need special attention, including children and adolescents, among other vulnerable groups (Article 20). Article 44 recognizes that “in light of the conditions faced by refugees when leaving their countries or origin, compared to other

foreigners, refugees must receive the greatest support to enjoy the rights and guarantees established in the Constitution,” including social rights such as education, healthcare, and the right to family reunification.

The law also includes actions to ensure the right to request asylum, such as training for migration officers and public servants, and requires authorities to immediately notify the Mexican Commission of Support for Refugees (*Comisión Mexicana de Ayuda a Refugiados* or COMAR) when a foreigner plans to request asylum (Article 15, sections IX and XIII, and Article 21). Additionally, the law recognizes the right to receive clear, timely, and free information about the procedure to apply for asylum, the rights of asylum seekers, and the right to have a translator or interpreter (Articles 19 and 40).

The regulation includes a chapter specifically devoted to “Unaccompanied Children and Adolescents,” which recognizes their right to apply for asylum. These applications must be given priority and be determined according to the child’s best interests (Article 35). It also establishes the authorities’ obligation to look for alternatives for temporary care, as well as the children’s right to receive clear information about the asylum procedure. The law additionally calls for the determination of the child’s best interests to take the opinions of children and adolescents themselves into account (Article 36).

However, both the law and its regulation have significant loopholes, aggravated by their implementation. These include problematic limitations specifically related to asylum-seeking children and adolescents, on issues such as due process and detention pending proceedings for asylum or other relief.

Finally, it is necessary to highlight, within the applicable legal framework, the bilateral and regional agreements that have been signed in the last years between Mexico and Central American countries, on the one hand, and Mexico and the United States, on the other—as well as other regional tools designed in the Regional Conference on Migration. In all of these cases, as described in chapter 13, the priority of the agreements prioritize deportation of migrants, including children and adolescents, over protection of their rights. Chapter 7 on the Northern border exposes the harms resulting from these agreements, particularly with regard to the return of Mexican children and adolescents from the United States.

In some ways, these legal tools have helped make more visible the situation of children and adolescents in the context of migration, especially unaccompanied migrant children. However, they demonstrate serious shortfalls in incorporating human rights standards into bilateral and regional agendas. Instead, they prioritize security to the detriment of basic due process guarantees, and neglect to address the structural causes of the migration of thousands of children and adolescents in Mexico and Central America.

### *C. Legal framework on trafficking in persons*

In 2012, the Law for the Prevention, Sanctioning, and Eradication of Trafficking in Persons and for the Protection of its Victims (*Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos*

*Delitos*) was passed. This piece of legislation is relevant in the context of U.S.-bound Mexican and foreign migrant children and adolescents because of the growing number of trafficked children and adolescents for sexual and labor exploitation purposes in Mexico and the United States.

The National Human Rights Commission (*Comisión Nacional de Derechos Humanos* or CNDH), stated that “the information provided by the Office of the Attorney General (*Procuraduría General de la República* or PGR) and its counterparts at the state level, the INM and the DIF, among other agencies, warn that trafficking significantly affects children and adolescents, as 39.8 percent of all recorded victims of trafficking are minors.”<sup>7</sup> Since the enactment of the new legal framework, the 2012 law has been consistently criticized by experts for deficient content.<sup>8</sup> Implementation on the ground has also given rise to challenges, in light of inadequate institutional development.<sup>9</sup> In April 2014, the DIF reported that up to 70,000 children and adolescents are victims of trafficking in Mexico.<sup>10</sup>

In this same vein, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) expressed as follows:

[The committee is] concerned about the connection between the increased numbers of disappearances of women, in particular girls throughout the country, and the phenomenon of trafficking in persons. It is concerned that victims of trafficking are being subjected not only to sexual and labor exploitation, but are also forced to serve, *inter alia*, as mules and sexual slaves. It reiterates its concern at the lack of uniformity in criminalizing trafficking at the state level. It notes with concern that the Office of the Special Prosecutor for Crimes of Violence against Women and Trafficking in Persons (FEVIMTRA) does not have the mandate to follow up on complaints of trafficking in persons when the offence is committed by organized criminal groups. It is further concerned that the State party does not have a system in place to record disaggregated data on the incidence of trafficking and has failed to fully address internal trafficking.<sup>11</sup>

By the end of 2014, there was a partial reform to the Law against Trafficking (*Ley de Trata*) that incorporated some international principles, such as the protection of the victims’ lives, human dignity, safety, and rights. Similarly, all Mexican states are required to set up shelters or transit

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<sup>7</sup> Comisión Nacional de los Derechos Humanos (CNDH). (2013, diciembre). Diagnóstico sobre la Situación de la Trata de Personas en México, p. 135. Retrieved from [http://www.senado.gob.mx/comisiones/trata\\_personas/docs/Diagnostico\\_Trata.pdf](http://www.senado.gob.mx/comisiones/trata_personas/docs/Diagnostico_Trata.pdf).

<sup>8</sup> Observatorio Latinoamericano sobre Trata y Tráfico de Personas. (2013, 23 de mayo). Observaciones, comentarios y propuestas del Capítulo Mexicano del ObservaLATrata (Observatorio Latinoamericano de Trata y Tráfico de Personas); respecto a la Ley General la Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a la Víctimas de estos Delitos en México. Retrieved from [http://www.senado.gob.mx/comisiones/trata\\_personas/reu/docs/Observatorio\\_contra\\_Trata\\_230513.pdf](http://www.senado.gob.mx/comisiones/trata_personas/reu/docs/Observatorio_contra_Trata_230513.pdf).

<sup>9</sup> See CNDH, Diagnóstico sobre la Situación de la Trata de Personas en México.

<sup>10</sup> See Periodico La Jornada. (2014, 25 de abril). Se estima que en México hay 70 mil niñas y niños víctimas de trata. *La Jornada*. Retrieved from <http://www.jornada.unam.mx/2014/04/25/sociedad/042n1soc>.

<sup>11</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Mexico, 52nd Sess., 2012, July 9-27, ¶ 20, U.N. Doc. CEDAW/C/MEX/CO/7-8 (2012, July 27). Retrieved from <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-MEX-CO-7-8.pdf>.

homes for victims of trafficking. However, some aspects of the reform were severely criticized by organizations working on this set of issues. For example, the definition of trafficking seems to have been limited to the final state of exploitation, excluding the entire process of capture and transport for purposes of exploitation—despite the fact that this process is precisely what defines “trafficking,” even if the final goals of exploitations are not met.<sup>12</sup> This could have serious repercussions for migrant children and adolescents who are victims of trafficking on Mexican soil, but who are on their way to be exploited in the border area or on U.S. soil.

### **III. Institutional framework for the protection of migrant children and adolescents in Mexico: a security approach, a paternalistic vision, and lack of human rights perspective**

#### *A. The INM*

One of the agencies addressing the situation of children and adolescents in the context of migration in Mexico is the National Migration Institute. Although its functions are more focused on Central American migrant children and adolescents in transit or living in Mexico, its actions affect all aspects of migration, including U.S.-bound migration from Mexico.

The INM is a national security agency in charge of controlling the movement of persons in Mexico, by coercive means if necessary—including the detention and deportation of migrants, adults and children alike. Because of the primacy of security concerns over the protection of human rights and other considerations, the INM’s actions have a major impact on the rights of migrant children and adolescents. This situation is explained in greater detail in chapter 6 on Southern Mexico.

The report titled “Niñez detenida” describes the establishment of child protection officials (*oficiales de protección a la infancia* or OPI) within the INM.<sup>13</sup> As explained in the report, these officials should have been housed within the Mexican child protection agency, and not the INM. This deficient placement has posed fundamental problems from the start, transforming these officials into immigration agents whose roles do not align with the comprehensive protection of children and adolescents. Rather, they report and respond to the agency in charge of migration control, including the detention and deportation of migrants, both child and adult.

Due to the goals of the INM and its policy functions of migration control, detention, and deportation, it is illogical to expect that the OPIs operate in conformity with the principle of the child’s best interests. The INM’s ultimate institutional objective is deportation, euphemistically called “assisted repatriation.” For this reason, INM officials are hardly in a position to offer intermediate alternatives. The tight timelines set by the INM correspond to repatriation goals, and do not permit a serious evaluation of cases that is consistent with children’s fundamental right to a fair hearing.

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<sup>12</sup> See Ulloa Ziaurriz, T. (2014, 23 de diciembre). Lo que la Cámara de Diputados arruinó en la Ley de Trata. *Cimacnoticias*. Retrieved from <http://www.cimacnoticias.com.mx/node/68476>.

<sup>13</sup> Ceriani Cernadas, P., coord. (2012, septiembre). *Niñez detenida: los derechos humanos de niñas, niños y adolescentes migrantes en la frontera México-Guatemala. Diagnóstico y propuestas para pasar del control migratorio a la protección integral de la niñez.*

The training of the INM staff, both in general and specifically concerning human rights, is also a source of concern. In this respect, the diagnostic of the IMN titled “Towards an Accountability System for the Human Rights of Migrants in Mexico” (*Hacia un Sistema de Rendición de Cuentas en pro de los Derechos de las Personas Migrantes en México*), carried out by the Institute for Security and Democracy (*Instituto para la Seguridad y la Democracia* or INSYDE), highlights the following:

To this date, the INM lacks both a migration training academy and an initial training program. The personnel are not trained before entering service. Instead, after the hiring process, a general introduction to service and some training on specific issues are provided. Likewise, criteria to access training programs are not clearly defined . . . . The lack of training and the current deficiencies in the few programs that exist constitute some of the greatest weaknesses of the INM. As a result, the IMN has not been able to develop a human rights culture or an organizational culture that reflects the highest ethical and professional standards .

. . .<sup>14</sup>

This situation has to do with the priorities of the INM and the current legislation that defines migration policy as a central element of national security policy. Another example of this is the way in which the INM budget is allocated. The largest part of the budget goes to control and surveillance activities, as shown in an analysis published last year by the Center for Analysis and Research (*Centro de Análisis e Investigación* or FUNDAR), which points out that “in 2011, [INM] spent over 2.94 billion pesos (bp). . . . The largest share of these resources, 2,360 bp (82 percent) were allocated for activities relating to migration management and control . . . .”<sup>15</sup>

### *B. The DIF system*

In addition to the deficiencies and loopholes detected in the legal framework for child protection, there are weaknesses and contradictions in the current institutional system. We identify two main problems.

*First*, the DIF system operates with a paternalistic vision targeting certain groups in situations of vulnerability. It is not an institution fully and exclusively devoted to protecting children and adolescents under standards for comprehensive child protection in accordance with the CRC.<sup>16</sup> This perspective affects all the policies and practices relating to children and adolescents in the context of migration in Mexico, including Central American children and adolescents in transit

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<sup>14</sup> El Instituto para la Seguridad y la Democracia (Insyde) & Wolf, S. (Coord.). (2013). Diagnóstico del Instituto Nacional de Migración: Hacia un Sistema de Rendición de Cuentas en pro de los Derechos de las Personas Migrantes en México, p. 364. Retrieved from [http://insyde.org.mx/wp-content/uploads/2013/09/R\\_E\\_Diagn%C3%B3stico\\_INM\\_final.pdf](http://insyde.org.mx/wp-content/uploads/2013/09/R_E_Diagn%C3%B3stico_INM_final.pdf).

<sup>15</sup> Fundar, Centro de Análisis e Investigación & Córdova Alcaez, R. (Coord.). (2013). Una mirada al presupuesto del Instituto Nacional de Migración: ¿Dónde estuvieron sus prioridades durante 2011? p. 8. Retrieved from <http://fundar.org.mx/una-mirada-al-presupuesto-del-instituto-nacional-de-migracion-donde-estuvieron-sus-prioridades-durante-2011/#.VLw48WTF9H2>.

<sup>16</sup> Ceriani Cernadas, P., coord. (2012, septiembre). Niñez detenida: los derechos humanos de niñas, niños y adolescentes migrantes en la frontera México-Guatemala. Diagnóstico y propuestas para pasar del control migratorio a la protección integral de la niñez.

or living in Mexico, Mexicans migrating to the United States or returned from the U.S. across the border, children and adolescents who may migrate due to structural causes (especially the lack of basic rights and growing social, institutional, gender-based and family violence), as well as Mexican children and adolescents whose parents have migrated. The result is that certain rights violations become unavoidable (for example, being irregularly returned from the U.S.), and others are violated precisely because of this inadequate approach, for example, by detaining and repatriating children and adolescents to Central America without due process and without regard for the child's best interests.

*Second*, as explained in section C below on the coordination between INM and DIF, as well as in the chapter on migrant children in Mexico's Southern border, DIF's work to protect the rights of migrant children and adolescents is severely limited by the primacy of security-based concerns. This hierarchy of priorities is the main cause of the most serious abuses against the rights of migrant children and adolescents, committed by both State agents and organized crime syndicates.

Despite its limitations, the DIF national system, along with its offices in each state of the country, have begun to include the protection of migrant children in their programs. To this end, the DIF developed a strategy of prevention and attention to migrant children and adolescents and unaccompanied returned children. Its main goal is to "coordinate efforts and actions among the three levels of government, public and private institutions, and national and international civil society organizations, in order to address the needs of migrant and repatriated children and adolescents traveling unaccompanied, as well as to promote joint protection and family and community actions."<sup>17</sup>

In the last few years, after the Migration Law and its Regulation took effect by transferring responsibility over migrant and asylum-seeking children and adolescents to DIF, some changes in the treatment of children occurred. These, however, were limited by DIF's budget constraints and its paternalistic vision, which lacks an intercultural, rights-based perspective. The latest reform, although not yet published or finalized, is the drafting of the Protocol for Unaccompanied Asylum-Seeking Migrant Children and Adolescents (*Protocolo para los Niños No Acompañados o Separados de sus Familias en Busca de Asilo*).<sup>18</sup> This new piece of legislation seeks to outline procedures for the attention of children at DIF-run shelters and other facilities.

It is also important to discuss the institutional framework for the protection of children and adolescents in light of the several forms of violence that victimize them. We refer here to violence suffered by Mexican children and adolescents that forces them to leave the country. Also, Mexican and foreign migrant children and adolescents suffer abuses while in transit in

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<sup>17</sup> See DIF Nacional, Gobierno de México. (2012, febrero). Estrategia de Prevención y Atención de Niñas, Niños y Adolescentes Migrantes y Repatriados No Acompañados. Retrieved from [http://www.corteidh.or.cr/sitios/Observaciones/5/Anexo\\_8.pdf](http://www.corteidh.or.cr/sitios/Observaciones/5/Anexo_8.pdf).

<sup>18</sup> See Ministerio Público de la Defensa, México. Protocolo para los Niños No Acompañados o Separados de sus Familias en Busca de Asilo. Retrieved from <http://www.mpd.gov.ar/articulo/index/articulo/protocolo-para-los-ni-os-no-acompa-ados-o-separados-de-sus-familias-en-busca-de-asilo-953>.

Mexico, mostly at the hands of organized crime, but also with the complicity of some public security forces.

Organized crime is the main perpetrator of violence in several parts of the country, especially in the northern and southern border areas, where the Mexican government has been unable to reestablish the rule of law. The government has implemented a misguided militarization policy in large parts of its territory, including border zones. In this context of growing violence, there are no specific programs for the protection of migrant children and adolescents in transit through Mexico that include both risk prevention and comprehensive protections to victims. The emphasis on controlling foreign migrants and on facilitating the repatriation of Mexican children and adolescents—in agreement with the United States—is a serious obstacle to effectively addressing violence.

CEDAW has pointed out not only the context of widespread violence against adult women and girls in the country, but also the negative effects of the security-based approach taken by the State to fight organized crime and the resulting impunity for other forms of violence, such as domestic violence. Particularly, the Committee expressed its concern that:

the public security strategy to combat organized crime combined with persistent impunity and corruption have contributed to the intensification of already existing patterns of widespread discrimination and violence against women in the State party, rooted in patriarchal attitudes, and to the minimization and invisibility of this phenomenon. The Committee is concerned that women and girls have been subjected to increasing levels and different types of gender-based violence, such as domestic violence, forced disappearances, torture and murders, especially femicide, by State actors, including law enforcement officials and the security forces, as well as by non-State actors such as organized crime groups.<sup>19</sup>

Based on these conclusions, the Committee exhorted the Mexican government to undertake the following actions:

a) Revise its public security strategy to combat organized crime to accord it with its international human rights obligations, including the Convention and to end the high levels of insecurity and violence in the country, affecting women and girls disproportionately; b) Reverse the strategy's negative impact on women and girls and comply with its due diligence obligations to prevent violence against women, including domestic violence, forced disappearances, torture and murders, especially femicide; investigate, prosecute and punish State and non-State perpetrators, and provide redress to women who have been victims of violence regardless of the context and of the alleged perpetrators; c) Provide systematic training on human rights, in particular on women's rights, to all law enforcement officials, the military and the navy forces involved in operations in the context of the public security strategy and establish and enforce a strict code of conduct so as

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<sup>19</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Mexico, 52nd Sess., 2012, July 9-27, ¶ 20, U.N. Doc. CEDAW/C/MEX/CO/7-8 (2012, July 27). Retrieved from <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-MEX-CO-7-8.pdf>.

to effectively guarantee the respect of human rights; d) Take all necessary measures to establish a standard system for the regular collection of statistical data on violence against women . . . .<sup>20</sup>

### C. Coordination among DIF, INM, and other actors

In order to coordinate efforts among institutions working on migration issues, in March 2007, the Inter-Institutional Dialogue on Migrant Children, Adolescents, and Women (*Mesa de Diálogo Interinstitucional sobre NNA y Mujeres Migrantes*, hereinafter “*Mesa*”) was established. The *Mesa* incorporates disparate public institutions, international agencies, and—sporadically—civil society organizations invited at the authorities’ discretion. (Such invitations are intermittent despite the fact that the *Mesa* is required by its bylaws to include civil society representation.) The *Mesa* promotes initiatives to address the situation of migrant children and adolescents.

This first attempt at institutional coordination produced some limited results, such as the design of a model for the protection of the rights of unaccompanied migrant and returned children and adolescents. The INM created the position of OPIs, and through agreements between DIF and INM, Offices of Attention to Minors in Migration Stations (*Módulos de Atención para Menores Migrantes en las Estaciones Migratorias* or MAEM) were created. However, these two tools show important limitations in terms of human rights, as we have described in other reports.<sup>21</sup> Finally, it is worth mentioning the creation of the Manual for the Protection of Unaccompanied Migrant Children and Adolescents (*Manual de Referencia del Modelo de Protección de los NNA Migrantes no Acompañados*) in 2011, which includes a series of proposals that could produce significant changes if implemented.

After the new federal government took office in 2012, the *Mesa* did not meet until the second half of 2014. The so-called migrant children “crisis”<sup>22</sup> in the United States encouraged the new government to once again convene the *Mesa*, this time with more active participation of civil society organizations. Two meetings have taken place since then, but have ended without agreements on concrete measures to ensure comprehensive protection for migrant children and adolescents.

Additionally, in 2014, new shelters in the state of Chiapas opened for migrant children and adolescents. It is important to make two observations here. *First*, as the Fray Matías de Córdova Human Rights Center has documented after its monitoring of one of these shelters, children still endure conditions similar to those experienced at the Migration Stations, even though no longer detained in the custody of INM. They do not receive adequate food and, because of the closed-

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<sup>20</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Mexico, 52nd Sess., 2012, July 9-27, ¶ 20, U.N. Doc. CEDAW/C/MEX/CO/7-8 (2012, July 27). Retrieved from <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-MEX-CO-7-8.pdf>.

<sup>21</sup> Ceriani Cernadas, P., coord. (2012, septiembre). Niñez detenida: los derechos humanos de niñas, niños y adolescentes migrantes en la frontera México-Guatemala. Diagnóstico y propuestas para pasar del control migratorio a la protección integral de la niñez.

<sup>22</sup> See in the Introduction of this book our criticisms of the depictions of and response to the increase in unaccompanied children and adolescents crossing into the United States in 2014, as well as the characteristics of that child migration phenomenon. We describe this phenomenon as a “crisis,” but use the term to mean a regional crisis of human rights, human development, humanitarian rights, and refugee rights.

door nature of shelters, similar in effect to detention centers, the children experience stress and anxiety due to lack of information.

*Second*, as illustrated by government statistics, the large majority of migrant children and adolescents who are detained on Mexican soil are transferred to Migration Stations as a step prior to repatriation.

#### *D. The role of consulates*

The following chapters also address consular protection. Reform proposals from civil society organizations have not only addressed the legal framework on migration, but have also sought to strengthen the role of the Mexican consulates abroad and Central American consulates in Mexico in protecting migrant children and adolescents. Mexico prides itself on its extensive consular network<sup>23</sup> in the United States. However, several criticisms have been made about the protection departments within the consulates, the budget these departments are allocated, and their staffing levels.

The Mexican protection policy for Mexicans abroad is not as strong as it should be. When serious human rights violations have been committed against Mexican children and adolescents in the United States, the Mexican response to the U.S. government has been weak—limited to submitting lukewarm complaints rather than demanding appropriate responses. Dialogue between the two countries is extremely unbalanced in terms of demands and responses.

Similarly, the role of Central American consulates in Mexico is disappointing. The main problem is the lack of policies and mechanisms specifically designed for the protection of the rights of migrant children and adolescents. This is particularly clear in the widespread practices of detention and repatriation without due process or consideration of the child's best interests. Thus, in addition to budgetary and personnel constraints, the lack of trainings on human rights, and especially children's human rights, is a serious problem. For this reason, consular practices are focused on logistical arrangements (such as accompaniment of children) following decisions of the Mexican authorities, rather than on guaranteeing the rights of children and adolescents. Chapters 2, 3, and 4 on Honduras, El Salvador, and Guatemala document these issues in greater detail.

## **IV. Conclusions**

The following two chapters on the situation of children and adolescents in the context of migration in Mexico document the extent of the challenges for protection of their rights and physical integrity. These challenges have two main sources. First, among these is the nature of the migration phenomenon, which includes several categories of children and adolescents in a situation of acute vulnerability. The Mexican context of direct and indirect violence against children and adolescents, both Mexican and foreign, determines all aspects of their migration throughout the Mexican territory.

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<sup>23</sup> Currently there are more than 142 Mexican consulates abroad. See Secretaría de Relaciones Exteriores, México. Consulados de México en el Exterior. Retrieved from <http://www.sre.gob.mx/images/stories/infografias/consul/consulado.html>.

The other source of challenges is the policies and practices implemented in this context. We identify three main spheres in which policies and practices are problematic, to be analyzed in depth in the following chapters: (1) deficiencies and limitations for the comprehensive protection of children and adolescents—particularly to ensure their rights to personal development, an adequate standard of living, nondiscrimination, and a dignified life free of violence; (2) a paternalistic approach that prevents the design of comprehensive protection policies; and (3) the primacy of migration control and security goals over the protection of the rights of children and adolescents.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 6 Southern Mexico

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## Chapter 8 Introduction to Chapters on Children in the Context of Migration in the United States

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### I. Introduction

A founding human rights treaty, the International Covenant of Civil and Political Rights (ICCPR), proclaims: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State.”<sup>1</sup> Elaborating on the rights provided in the ICCPR, the Convention on the Rights of the Child (CRC) declares: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>2</sup> Unfortunately, these principles are far from reality for immigrant children in the United States. The United States has signed but not ratified the CRC, and has not incorporated the best interests of the child<sup>3</sup> standard into immigration law or policies regarding children. Policies regarding children affected by migration are not created through a child welfare or human rights lens. Instead, security concerns and enforcement principles, such as preventing terrorism and stopping irregular migration, drive the U.S. immigration system.

U.S. immigration policies and decisions made in individual immigration cases rest on domestic immigration law, not international norms or obligations.<sup>4</sup> Even the application of the U.S. refugee

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<sup>1</sup> International Covenant on Civil and Political Rights (ICCPR) art. 24.1, 1966, December 16, 999 U.N.T.S. 171. Ratified by the U.S. in 1992.

<sup>2</sup> Convention on the Rights of the Child (CRC) art. 3(1), 1989, November 20, 1577 U.N.T.S. 3. The United States signed the CRC in 1995, but has not ratified it. Nevertheless the U.S. must not take actions to defeat its object or purpose. *See* Vienna Convention on the Law of Treaties, art. 18(a), 1969, May 23, 1155 U.N.T.S. 331. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

<sup>3</sup> The “best interests” of the child is a fundamental principle in child welfare law and has become enshrined in international law. The actual best interests of a child must be determined case by case, but the United Nations Committee on the Rights of the Child has identified certain factors to consider in making the determination. They include: the views of the child, cultural factors, preserving the family relationship, the child’s care, protection, and safety, the right to health, and the child’s situation of vulnerability. UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the Rights of the Child to have His or Her Best Interests Taken as a Primary Consideration (art. 3, para 1)*, CRC/C/GC/14, ¶¶ 46-79. Retrieved from <http://www.refworld.org/docid/51a84b5e4.html>.

<sup>4</sup> For example, when international law and norms arguments have been made to support the interpretation or application of the federal immigration statute, courts have responded that domestic statutes and caselaw controls the reading and outcome of a case, and that international law or norms are persuasive at best. *See, e.g.* *Guaylupo-Moya v. Gonzalez*, 423 F.3d 121, 135-136 (2d Cir. 2005) (“If a statute makes plain Congress’s intent...then Article III courts...must enforce the intent of Congress irrespective of whether the statute conforms to customary international law” (citing *United States v. Yousef*, 327 F.3d 56 (2d Cir.) (per curiam), *cert. denied*, 540 U.S. 933, 124 S.Ct. 353, 157 L.Ed.2d 241 (2003)). Treaties that are not self-executing do not provide independent, privately enforceable rights; *INS v. Aguirre-Aguirre*, 526 U.S. 415, 428 (1999)(Finding that while United Nations High Commissioner for Refugees Handbook on Criteria for Determining Refugee Status is a useful interpretive aid it is “not binding on the Attorney General, the BIA, or United States courts.”).

definition to individual asylum claims—deriving from the United States’ efforts to conform to its obligations under the 1967 Protocol relating to the Status of Refugees—often strays from the international interpretation of the same. If the United States is serious about developing a regional approach to unaccompanied and other children in the context of migration, it must consider migration an international human rights issue that requires a solution based in international principles.

This introductory chapter provides an overview of the challenges that children affected by migration meet in the U.S. immigration system and the child welfare system. It begins with a brief discussion of the historic treatment of unaccompanied children in the immigration system, as well as the historic treatment of Central American asylum seekers in the United States. The chapter next addresses the progress made for children in the immigration system in the past ten year, then briefly addresses the factors that influence U.S. immigration policy. The chapter proceeds with an overview of the key federal agencies involved in children’s immigration issues. It concludes by examining, in brief, how the child welfare system treats children affected by migration.

## **II. Children in the U.S. immigration system, a brief history**

### *A. Historic rise in children coming to the United States*

Until recent years when the number of unaccompanied children entering the United States increased significantly, unaccompanied children were on the margins of the U.S. immigration debate. The number of unaccompanied children apprehended by U.S. Border Patrol jumped from 16,056 in 2011 to 24,481 in 2012, then to 38,833 in 2013.<sup>5</sup> In 2014, the figure skyrocketed to 68,631 unaccompanied children.<sup>6</sup> In other words, the number of children coming to the United States, as reflected by U.S. Border Patrol statistics, quadrupled between 2011 and 2014.

### *B. U.S. foreign policy in Central America*

Inextricably linked to U.S. policies toward Central American migrant children is the history of the United States’ foreign policy in Central America and its historic treatment of Central American asylum seekers. Throughout the 1970s and 1980s, and in the case of Guatemala well into the 1990s, civil wars raged throughout Central America and led millions of Central Americans to seek safe haven abroad.<sup>7</sup> The United States “systematically denied [Guatemalans and Salvadorans] asylum as Cold War paranoia over revolutionary movements in Central America motivated successive U.S. administrations to ally with repressive military governments.”<sup>8</sup> The Reagan Administration characterized Salvadoran and Guatemalan refugees as “economic migrants” and denied the rapes, forced disappearances, and murders happening in those countries, rejecting nearly 100% of their

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<sup>5</sup> See Section III of Chapter 1 by UNHCR (listing detailed statistics).

<sup>6</sup> See USBP. (2015). USBP Sector Profile – Fiscal Year 2014 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>.

<sup>7</sup> See Stinchcomb, D. & Hershberg, E. (2014, November). Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 10. Retrieved from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2524001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524001).

<sup>8</sup> Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 10.

asylum claims.<sup>9</sup> Many asylum seekers were coerced into accepting “voluntary return” to their countries without even being informed of their right to seek asylum.<sup>10</sup>

In the 1980s some members of Congress attempted to pass bills to suspend the deportation of Salvadorans who had fled the civil war, but were ultimately unsuccessful. Congress enacted Temporary Protected Status (TPS) in 1990 to provide safe haven to nationals from countries designated by the president as needing temporary protection.<sup>11</sup> TPS has benefitted about 280,000 Hondurans, Salvadorans, and Nicaraguans in the United States,<sup>12</sup> but—as explored in chapter 10—falls far short of providing the range of benefits of refugee protection, most critically a path to permanency and the right to family reunification. Remnants of this history appear to linger at least with respect to the low asylum grant rates for Central Americans proceeding before immigration judges.<sup>13</sup>

### *C. Enforcement-focused INS regime*

Since Congress enacted the first bill directed at solving the problem of irregular migration to the United States, the Immigration Reform and Control Act of 1986 (IRCA), “illegal immigration and enforcement have been the dominant focus and concern driving immigration policymaking for more than 25 years.”<sup>14</sup> The bill proposed to address the immigration problem by granting legal status to qualifying immigrants with irregular status, while prohibiting the hiring of unauthorized immigrants and strengthening border enforcement. This dominant enforcement focus has increased over time, with the terrorist attacks of September 11, 2001 leading the United States to conflate “antiterrorism measures with immigration control,”<sup>15</sup> as explained in greater detail in chapter 10. This immigration control mentality affects policies on children as well as adults.

Prior to 2003, the former Immigration and Naturalization Service (INS) maintained legal and physical custody over unaccompanied children apprehended at the U.S. border or in the interior of the United States. The INS was a massive agency responsible both for immigration enforcement (the detention and removal of irregular immigrants) and conferring immigration benefits to eligible immigrants; its enforcement branch was responsible for unaccompanied children. INS served both as the legal custodian of unaccompanied children in federal custody and as their deportation agent. Unaccompanied children held in INS detention centers were placed in removal proceedings where they had to defend themselves against an INS attorney arguing for their deportation. INS

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<sup>9</sup> In 1984 only 3% of Salvadoran and Guatemalan asylum seekers were granted protection. See Gzesh, S. (2006, April 1). Central Americans and Asylum Policy in the Reagan Era. Retrieved from <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

<sup>10</sup> Central Americans and Asylum Policy in the Reagan Era.

<sup>11</sup> Central Americans and Asylum Policy in the Reagan Era.

<sup>12</sup> See Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 11.

<sup>13</sup> Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 32, finding that the average asylum grant rate for asylum applicants in immigration court was 53% in fiscal year 2013, whereas judges granted asylum to only 14% of Central American asylum seekers that same year.

<sup>14</sup> See Meissner, D., Kerwin, D. M., Chishti, M., & Bergeron, C. (2013, January). Immigration Enforcement in the United States: The Rise of A Formidable Machinery, p. 1. Retrieved from <http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf>.

<sup>15</sup> See Rosenblum, M. R. (2011, August). US Immigration Policy Institute Since 9/11: Understanding the Stalemate Over Comprehensive Immigration Reform, p. 4. Retrieved from <http://www.migrationpolicy.org/sites/default/files/publications/RMSG-post-9-11policy.pdf>.

contracted with agencies like Catholic Charities to run the detention centers, but INS Juvenile Deportation Officers maintained a regular presence at the centers—blurring the lines between custodian and deportation agent. Information provided by detained children to caseworkers was handed directly over to INS and used against children in their removal (deportation) hearings.<sup>16</sup> Advocates criticized INS’s conflicting roles, arguing that an agency charged with controlling immigration law was not the appropriate body to care for unaccompanied children.<sup>17</sup>

INS policies around release were restrictive and punitive. A federal settlement required that unaccompanied children be placed in the “least restrictive environment” while fighting their deportation cases, and included a list of preferences for placement that prioritized release to a family member, friend, or agency over detention.<sup>18</sup> Irrespective of the settlement agreement, INS’s model was one of detention. INS released children to parents, siblings, aunts and uncles, and grandparents; but rarely to cousins, family friends, or agencies willing to care for them. Release from custody took months, and in some cases children were held in immigration detention for over one year.<sup>19</sup> INS took advantage of children’s vulnerability and their separation from family as a means to obtain information from children about family members in the United States lacking regular immigration status. The agency also used unaccompanied children as bait to enforce immigration laws on their family members. Family members were required to meet the INS Juvenile Deportation Officer (JDO) in person in order for a child to be released. When they did, some JDOs would place parents in deportation proceedings.<sup>20</sup>

As a result of the lengthy detention of many children in INS custody, immigration judges presiding over detained children’s cases required them to proceed with their claims while in custody.

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<sup>16</sup> Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), U.S. immigration law distinguished between immigrants who were “deportable”—those immigrants who were physically inside the territory of the United States and were subject to potential deportation—and immigrants who were “excludable”—those immigrants who sought entry to the United States at a port of entry or entry/departure route and were found inadmissible. IIRIRA took away the distinction between “deportable” and “excludable” aliens and “deportation” and “exclusion” proceedings, instead using the term “removable” to describe all immigrants subject to deportation, and the term “removal proceedings” to describe the legal proceedings all immigrants subject to potential removal must navigate. While “removal” and “removal proceedings” are the technical terms used in U.S. law, they are synonymous with deportation and deportation proceedings.

<sup>17</sup> See Human Rights Watch. (1997, April). *Slipping Through the Cracks, Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service*, p. 82. Retrieved from <http://www.hrw.org/sites/default/files/reports/us974.pdf>; *An Overview of Asylum Policy: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Wendy Young, Women’s Commission for Refugee Women and Children). Retrieved from <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg77386/html/CHRG-107shrg77386.htm>.

<sup>18</sup> *Stipulated Settlement Agreement, Flores v. Reno*, January 17, 1997, retrieved from: [https://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf). The preference list for release favors a parent, followed by a legal guardian, an adult relative (brother, sister, aunt, uncle, or grandparent), and then programs, entities, or individuals designated by parents or approved by the federal government.

<sup>19</sup> See Schmitt, E. (2001, June 25). INS Both Jailer and Parent to Children Without a Nation. *New York Times – The Learning Network*. Retrieved from [http://www.nytimes.com/learning/teachers/featured\\_articles/20010625monday.html](http://www.nytimes.com/learning/teachers/featured_articles/20010625monday.html). (Describing the case of an eight-year-old Nigerian girl detained in INS custody for 13 months).

<sup>20</sup> See Florida Immigrant Advocacy Center. (2002, October). “I Running out of Hopely...” Profiles of Children in INS Detention in Florida, p. 5. Retrieved from [http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/269/attachments/original/1390426185/ChildrensReport\(pg1-25\).pdf?1390426185](http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/269/attachments/original/1390426185/ChildrensReport(pg1-25).pdf?1390426185).

Children most impacted were those without family in the United States—who essentially had no hope of release from custody unless they won their case—and children whose family members lacked regular status and hesitated to put themselves and their families at risk of deportation by meeting with INS officers. Children released from detention could ask the court to move their case to their new city of residence.

Immigration judges assigned to cases of detained children had no specialized training. Some heard adult detention cases all day every day, and treated detained children no differently than the adults typically before them.<sup>21</sup> Some of the judges hearing detained children's cases granted only a very small percent of all cases they heard, meaning that detained children in some courts were assigned to the most restrictive judges. Not only were inappropriate judges assigned to children's cases, but in some parts of the country the cases were heard in courtrooms at adult detention centers, wholly inappropriate for children.<sup>22</sup> Making matters worse, children had no right to counsel in their cases. Some children were forced to represent themselves against a seasoned INS attorney, in court. Their experiences paint a picture of a system designed to deport children rather than protect them.<sup>23</sup> Children who lost their cases were generally ordered deported and returned to their countries with deportation orders, which have long-term immigration consequences.<sup>24</sup>

Advocates argued that this enforcement-driven model harmed children and failed completely to recognize their vulnerability and unique protection needs. Some members of Congress were persuaded and introduced legislation to change the system for unaccompanied children. One bill introduced in 2000, again in 2001, and then again in the following years called for the appointment of attorneys to represent unaccompanied children in removal proceedings and guardians ad litem to advocate for their best interests.<sup>25</sup> Although the bill did not pass on its own, it was enacted into law as part of the Trafficking Victims Protection Reauthorization Act of 2008, a landmark bill discussed below.

#### *D. Advancements for children in the U.S. immigration system*

Between 2002 and 2014, legislation and administrative advocacy yielded positive changes for children in the immigration system. Many of those advancements came under attack as a result of the 2014 influx of unaccompanied children.

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<sup>21</sup> See "I Running out of Hopely..." Profiles of Children in INS Detention in Florida, p. 18.

<sup>22</sup> See "I Running out of Hopely..." Profiles of Children in INS Detention in Florida, p. 18.

<sup>23</sup> See Bhabha, J. & Schmidt, S. (2006, June). Seeking Asylum Alone, Unaccompanied and Separated Children and Refugee Protection in the U.S., pp. 146-156, Retrieved from [http://www.law.yale.edu/documents/pdf/Clinics/Seeking\\_Asylum\\_Alone\\_US\\_Report.pdf](http://www.law.yale.edu/documents/pdf/Clinics/Seeking_Asylum_Alone_US_Report.pdf) (giving examples and quotations from children regarding their difficult and stressful experiences before immigration judges).

<sup>24</sup> INS refused to agree to voluntary departure, a form of repatriation that does not have long-term immigration consequences. Amended in 2008, the prior statute did not explicitly say that the government would pay for voluntary departures of children and the INS refused to do so.

<sup>25</sup> See Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. (1999-2000); Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001-2002); Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108th Cong. (2003-2004); Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005-2006); Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. (2007-2008).

### *1. Transfer to the Department of Health and Human Services*

In 2002 Congress passed the Homeland Security Act to dedicate more resources to preventing terrorism and defending the United States against natural disasters. Congress enacted the bill in response to claims that the U.S. government could have, but failed to prevent the terrorist attacks of September 11, 2001. The Act dissolved the INS, replacing it with the Department of Homeland Security (DHS), a massive organization comprised of many sub-organizations to prevent terrorism, stop irregular migration, administer immigration benefits, and other functions. The Act also made a significant change in the regime for unaccompanied children, transferring their care and custody out of the hands of an immigration enforcement agency and into the hands of a child welfare agency, the federal Department of Health and Human Services (HHS). This shift, which took effect in 2003, was one of the first major recognitions within the U.S. immigration system that children should be treated differently than adults. Enforcement, however, remains a focus even in the treatment of children. Chapter 9 explores the treatment and detention of migrant children in federal custody.

### *2. Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)*

In 2008, Congress passed the TVPRA,<sup>26</sup> a landmark bill that built on improvements made for unaccompanied children under the Homeland Security Act. It expanded the concept of unique treatment for children across many aspects of the immigration system, starting from moment of apprehension and ending with safe repatriation practices for children being returned.

The TVPRA includes both substantive and procedural provisions addressing issues affecting children. It significantly advanced unaccompanied children's rights and treatment in the U.S. immigration system, for example by requiring consideration of their best interests in government decisions about their placement, increasing access to counsel, authorizing the federal government to appoint child advocates to especially vulnerable children, and requiring that repatriation be safe. At the same time the legislation is lacking in certain areas. Most importantly, the TVPRA does not adopt the best interests of the child as a substantive standard for all policies and decisions affecting immigrant children. It distinguishes Mexican (and Canadian) children from children from other countries for purposes of initial screening and creates a default position that Mexican (and Canadian) children can and should be repatriated directly from the border, rather than being given the opportunity to seek immigration relief. These distinctions are discussed in greater detail in chapter 9. The TVPRA is also limited to unaccompanied children; none of its provisions address immigrant children who enter the United States with their families, even though these children also require unique treatment in light of their vulnerability. Despite TVPRA's progress, the U.S. has failed to fully implement some of its provisions. For example, inadequate screening of Mexican children has been a chronic problem, and the United States has not yet developed best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied migrant children. These problem areas are explored in chapter 9 on detention and chapter 12 on repatriation and reintegration.

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<sup>26</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457. 122 Stat. 5076 (2008) (hereinafter "TVPRA of 2008").

### 3. Administrative Improvements

Advocacy with the administrative agencies involved in unaccompanied children's cases also resulted in improvements for unaccompanied children in the U.S. immigration system. The government formed an interagency working group on unaccompanied and separated children that allowed for regular dialogue between advocates and the key agencies working with unaccompanied children.<sup>27</sup> The Executive Office for Immigration Review (EOIR), the agency responsible for deciding cases of individuals in removal proceedings issued guidelines on children's cases, calling on judges to employ child-sensitive procedures,<sup>28</sup> and EOIR recently instituted specialized children's dockets in all immigration courts throughout the country. However, the policies and procedures set forth in the EOIR guidance do not have the force of binding law. Meanwhile, United States Citizenship and Immigration Services (USCIS), the branch of DHS that decides a range of children's immigration claims, improved its training on children and its adjudication of children's cases.

## III. Politics and public opinion influence child migration policy

### A. Politics

U.S. politics, or the ongoing battle between Democrats and Republicans as the two parties vie for the presidency and control of Congress, is a major factor underlying immigration policy. Since 2007, for example, Republicans in Congress have blocked about 500 legislative proposals supported by President Obama.<sup>29</sup> Immigrants, including children, have paid the price. Although the Senate introduced and passed a bipartisan immigration reform bill in 2013, House Republicans refused to take action on comprehensive reform. The failure of federal immigration reform has led some states to introduce and in some cases to enact anti-immigrant measures like Arizona's infamous SB 1070 bill,<sup>30</sup> restricting the rights of immigrants to services and allowing state law enforcement agents to demand proof of immigration status from individuals they believe to be in the country without authorization—a policy that has engendered and often encouraged the rampant racial profiling of Latinos, Asian Americans, and others.<sup>31</sup>

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<sup>27</sup> See Center for Gender & Refugee Studies, and Kids In Need of Defense. (2014, February). *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, p. 81. Retrieved from <http://cgrs.uchastings.edu/our-work/treacherous-journey> (hereinafter "A Treacherous Journey").

<sup>28</sup> See Neal, D. L. (2007, May 22). *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Retrieved from <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

<sup>29</sup> See Topaz, J. (2014, May 8). *President Obama: Republicans Blocked 500 Bills*. *Politico*. Retrieved from <http://www.politico.com/story/2014/05/republicans-legislation-obama-dccc-event-106481.html>.

<sup>30</sup> The U.S. Supreme Court overturned some provisions of the Arizona law, but upheld the provision requiring law enforcement officials to determine the immigration status of an individual who has been stopped or arrested, and in whose case the official has a "reasonable suspicion" that the individual is in the U.S. without authorization. See Liptak, A. (2012, June 25). *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*. *New York Times*. Retrieved from [http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?pagewanted=all&_r=0).

<sup>31</sup> See Gordon, I. & Raja, T. (2012, March/April). *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis*. *Mother Jones*. Retrieved from <http://www.motherjones.com/politics/2012/03/anti-immigration-law-database>; *Anti-Illegal Immigration Laws in States*. (2012, April 22). *New York Times*. Retrieved from <http://www.nytimes.com/interactive/2012/04/22/us/anti-illegal-immigration-laws-in-states.html>. Some states have

Unaccompanied migrant children and migrant families were the unfortunate victims of the partisan political showdown over their influx across the border in the spring and summer of 2014. President Obama requested emergency supplemental funding to care for unaccompanied children. The Democratic-led Senate responded by passing a bill that provided supplemental funding. Meanwhile, the Republican-led House of Representatives passed legislation providing some supplemental funding, in exchange for the heavy price of eviscerating critical provisions of the TVPRA and blocking President Obama from providing administrative relief to the 11 million migrants in the United States with irregular immigration status.<sup>32</sup> The Obama Administration, under pressure from Congress, instituted measures focused on deporting unaccompanied children and families in order to deter future flows. These measures, as well as the recent action of Congress, are explored in greater detail in chapter 10.

### B. Public opinion

Public opinion also plays an important role in shaping U.S. immigration policy, including with regards to migrant children. Immigration is a hotly contested issue in the United States, with anti-immigrant voices charging that “illegal aliens” are taking U.S. jobs, using up resources in schools and hospitals on the taxpayer dime, refusing to learn or speak English, and committing crimes that endanger their communities.<sup>33</sup> These allegations extend to public opinion about unaccompanied children. For instance, in July 2014 anti-immigrants engaged in highly-publicized and widely-reported protests against the arrival of unaccompanied migrant children in local communities. These children, part of the influx of migrant children and families across the border, were sent to various cities and towns across the United States after being processed by immigration authorities.<sup>34</sup> Immigrants’ rights, children’s rights, and human rights supporters in the United States have also been vocal in their demands for a humane system for migrant children and families, as well as migrant adults. They have called for family reunification policies and comprehensive immigration reform, urging the U.S. government to protect, not deport, unaccompanied children and families who arrived as part of the 2014 “surge.”<sup>35</sup>

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enacted positive bills, permitting immigrants to obtain a driver’s license or identification card, regardless of immigration status.

<sup>32</sup> See Sakuma, A. (2014, August 2). House Passes \$694 Million Border Bill. *MSNBC*. Retrieved from <http://www.msnbc.com/msnbc/house-republicans-attempt-second-shot-border-bill>.

<sup>33</sup> See, e.g., Federation for American Immigration Reform. (2013, March). *Illegal Aliens Taking U.S. Jobs* (2013). Retrieved from <http://www.fairus.org/issue/illegal-aliens-taking-u-s-jobs>; Mass, W. (2014, April 1). Obama Administration Releases 68,000 Illegal Immigrant Criminals. *The New American*. Retrieved from <http://www.thenewamerican.com/usnews/immigration/item/17963-obama-administration-releases-68-000-illegal-immigrant-criminals>; Hayes, B. (2014, March 13). ‘Anchor Baby’ Outrage: Americans Pay BILLIONS for Illegal Alien Births (Video). *Top Right News*. Retrieved from <http://toprightnews.com/?p=1333>.

<sup>34</sup> See, e.g., Johnson, M. A. (2014, July 15). Arizona Residents Protest Arrival of Undocumented Immigrant Children. *NBC News*. Retrieved from <http://www.nbcnews.com/storyline/immigration-border-crisis/arizona-residents-protest-arrival-undocumented-immigrant-children-n155941>; Martinez, M. & Yan, H. (2014, July 3). Showdown: California Town Turns Away Buses of Detained Immigrants. *CNN*. Retrieved from <http://www.cnn.com/2014/07/02/us/california-immigrant-transfers/>.

<sup>35</sup> See, e.g., Hebrew Immigrant Aid Society. (2014, July 8). Jewish Organizations Call on U.S. Government to Protect Unaccompanied Immigrant Children and Refugees. Retrieved from <http://www.hias.org/jewish-organizations-call-us-government-protect-unaccompanied-children-and-refugees>; Price, C. (2014, July 31). L.A. City Council Members Call for the Humane Treatment of Unaccompanied Minors and Consideration of their Status as Refugees. Retrieved from <http://www.the-new->

#### IV. Remaining gaps for children in the immigration system

Despite the advancements made for children in the U.S. immigration system, major shortfalls persist. These deficits start with the flawed screening of immigrant children by Custom and Border Protection (CBP) and continue through the repatriation of children who have potential claims for relief and/or have no safe caretaker to receive them in their country of origin. Chief among the shortfalls is the fact that the United States does not apply a rights-based approach to migrants—whether children or adults. The United States lacks a requirement that all procedures in place for children in the immigration system and all decisions made regarding placement, immigration relief, and repatriation should be made based on the best interests of the child. In the absence of a “best interests” standard, children face repatriation to danger and endure the consequences of other decisions that are harmful to their welfare.

One especially alarming flaw in the U.S. immigration system that has deleterious effects on migrant children is the use of expedited removal for migrant families. Expedited removal permits the summary removal of applicants for admission to the United States who are apprehended at or near the border who do not express a fear of persecution or who are deemed not to have a “credible fear” of persecution. Many migrants removed under these expedited procedures never have an opportunity to speak with a judge before their removal. Unlike unaccompanied migrant children whose screening process is governed by the TVPRA, children arriving with their families are subject to expedited removal, as explained in chapter 9. As a policy, expedited removal threatens to return refugees to persecution, contrary to the international and domestic principle of *non-refoulement*.<sup>36</sup> In practice, CBP has returned Central American migrants—including families with children—to persecution under the expedited removal scheme, often without screening children separately for fear or risk of persecution.<sup>37</sup> The United States’ flagrant violation of the *non-*

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[ninth.com/la\\_city\\_councilmembers\\_call\\_for\\_the\\_humane\\_treatment\\_of\\_unaccompanied\\_minors\\_and\\_the\\_consideration\\_of\\_their\\_status\\_as\\_refugees](http://ninth.com/la_city_councilmembers_call_for_the_humane_treatment_of_unaccompanied_minors_and_the_consideration_of_their_status_as_refugees).

<sup>36</sup> Expedited removal is a process that involves CBP screening applicants for admission for a fear of persecution. If the applicant does not express a fear of persecution, under expedited removal she is immediately ordered removed. If the applicant expresses a fear of persecution she is technically supposed to be referred for a more in depth screening process in which an asylum officer interviews the applicant to determine if she has a credible fear of persecution. Applicants found to have a credible fear are given an asylum hearing before an immigration judge; applicants found not to have a credible fear of persecution can request review by an immigration judge. If the judge upholds the determination that the individual does not have a credible fear of persecution then she is removed with no further access to appeals. See INA §235(a), (b), 8 U.S.C.A. § 1225(a), (b) (West). Laplante, L. J. (1999). Expedited Removal at U.S. Borders: A World Without a Constitution. *New York University Review of Law and Social Change*. 25 N.Y.U Rev. L. & Soc. Change 213 (1999).

<sup>37</sup> See Civil Rights Complaint filed with the DHS Office of Civil Rights and Civil Liberties and the Office of the Inspector General titled, “Inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process,” 2014, November 13. Retrieved from <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%202011.13.14%20FINAL%20PUBLIC.pdf>. USCIS conducts “credible fear interviews” in which the agency determines whether an arriving asylum applicant has established a credible fear of persecution. In 2014 USCIS elevated the standard for proving a credible fear of persecution; USCIS’s application of the new standard has also resulted in the summary removal of migrant families back to their countries. See Letter to President Obama from faith based, human rights, immigrant rights, domestic violence, and refugee assistance organizations, 2014, November 20. Retrieved from <http://www.humanrightsfirst.org/sites/default/files/Letter-Pres-Asylum.pdf>.

*refoulement* principle shows that it values immigration enforcement over child welfare and refugee protection.

Also glaringly absent from the U.S. immigration system are the rights to an attorney to represent all children in immigration proceedings and to a child advocate (or guardian) to advocate for the best interests of unaccompanied children. Although the Office of Refugee Resettlement (ORR) and EOIR have recently taken an important step to dedicate money to providing counsel for some unaccompanied migrant children and adolescents, as explained in chapter 10, these efforts do not substitute for a legal right to counsel for *all* migrant children. ORR has also announced an initiative to appoint child advocates in a greater number of cases; while positive, this development will not benefit the majority of unaccompanied children.

When it comes to immigration relief, migrant children and adolescents seem to have been an afterthought. Most forms of relief were written for adults, have stringent eligibility requirements that are difficult to prove, and do not require a child-sensitive analysis. Chapter 10 explores these gaps in relief in detail. The U.S. government is required to issue regulations regarding the substantive application of unaccompanied children's applications for relief (and procedures for the same), but those regulations have not issued; when they do they will be limited to unaccompanied children rather than all child applicants.<sup>38</sup>

Children left behind in their countries by parents who have migrated as well as children in the United States suffer as a result of deficient family reunification policies. Family reunification policies do not create sufficient avenues to keep children, parents, and siblings together, or to allow children left behind in their countries to reunite with family in the United States. The lack of family reunification policies leads to irregular migration of some children and adults, resulting in mixed status family situations in which some members have regular status, while others do not. Mixed status families suffer devastating consequences when their families are torn apart as a result of immigration enforcement policies that lead to detention and/or deportation. As explained in chapter 11, family separation and living in mixed status families both have significant detrimental effects on migrant children and families.

## **V. Children affected by migration and the child welfare system**

Children affected by migration—whether migrants themselves or whether in regular status but living in mixed-status families—also face significant challenges outside the immigration system. In particular, they are more likely to live in conditions of poverty and “substandard housing,” suffer worse health, lack access to health care, and achieve “low educational attainment” than children born in native families.<sup>39</sup> Some of these difficulties are driven by federal laws that restrict certain federal benefits to U.S. citizens and lawful permanent residents who have maintained their status for five years or longer. Migrants with irregular status and individuals who have been lawful permanent residents for less than five years are ineligible for federal financial support—such as food stamps, Temporary Assistance to Needy Families (TANF), and Social Security Income

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<sup>38</sup> See TVPRA of 2008 § 235(d)(8).

<sup>39</sup> See American Academy of Pediatrics, Council on Community Pediatrics. (2013, May 6). Policy Statement, Providing Care for Immigrant, Migrant, and Border Children. *Pediatrics*, 131(6), e2028-e2034. Retrieved from <http://pediatrics.aappublications.org/content/131/6/e2028.full>

(SSI)—as well as for federal health care, such as non-emergency Medicaid for low income families and President Obama’s federal health care plan, known as “Obamacare.”<sup>40</sup> States and counties can, and in many cases do, provide some of the above types of benefits to migrants and permanent residents barred under federal law. Not all states have acted to fill the void, however, and those that have only partially meet the need due to state budget shortages.<sup>41</sup> Although federal law entitles migrant children to public education regardless of their immigration status, both migrant children and the U.S. citizen children of migrants face barriers to enrolling in school.<sup>42</sup>

Children affected by migration also experience unique challenges related to the child welfare system. The federal government has historically played an important role in developing national child welfare policy and influencing the development and administration of state child welfare laws. The Department of Health and Human Services (HHS), the agency responsible for the care and custody of unaccompanied children apprehended by immigration agents, is the federal child welfare agency. The federal government grants funding to states to support the costs of the child welfare system; these grants are conditional on state compliance with federal standards. While the federal government plays an important role in the U.S. child welfare system, the system is state-based, meaning that child welfare laws are enacted at the state level and differ state by state.<sup>43</sup> Local county governments implement state child welfare laws. Some counties have resisted placing immigrant children in the child welfare system; others lack culturally or linguistically appropriate services for immigrant children or parents caught up in the child welfare the system.

The main federal law that influences state child welfare laws is the Child Abuse Prevention and Treatment Act (CAPTA).<sup>44</sup> First enacted in 1974, and reauthorized and expanded over time, CAPTA funds research on child abuse and neglect. CAPTA created reporting requirements for cases of child abuse and neglect and required states to appoint guardians ad litem to represent the best interests of children in state dependency (child welfare) legal proceedings.<sup>45</sup> One of CAPTA’s accomplishments was to set certain minimum child welfare standards. States can choose to enact higher standards, but cannot lower standards without losing eligibility for federal funds.<sup>46</sup> For example, CAPTA defines the term child abuse to include “death, serious physical or emotional

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<sup>40</sup> See National Immigration Law Center, Broder, T., & Blazer, J. (2011, October). Overview of Immigrant Eligibility for Federal Programs. Retrieved from <http://www.nilc.org/overview-immeligfedprograms.html>.

<sup>41</sup> Overview of Immigrant Eligibility for Federal Programs.

<sup>42</sup> See Barkoukis, L. (2014, May 8). Obama Admin to Public Schools: You Must Enroll Children of Illegal Immigrants. *Townhall.com*. Retrieved from <http://townhall.com/tipsheet/leahbarkoukis/2014/05/08/obama-admin-says-schools-cant-favor-citizens-over-illegal-immigrants-n1835362> (reporting that in response to reports that some school districts were refusing to register children for school, U.S. Attorney General Holder and the Secretary of Education issued guidance clarifying that under federal law schools districts must register migrant children and children with migrant parents).

<sup>43</sup> For example, states may have different definitions of “neglect” or states may include different bases for removing a child from a parent’s custody and placing the child in state custody.

<sup>44</sup> The Child Abuse Prevention and Treatment Act (CAPTA) of 1974, P.L. 93-247(1974); 42 U.S.C.A. §5106 (West).

<sup>45</sup> See National Child Abuse and Neglect Training and Publications Project, U.S. Department of Health and Human Services, Children’s Bureau. (2014). The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America’s Children. Retrieved from <http://www.pal-tech.com/web/NCCAN/files/CAPTA40yrs508.pdf>.

<sup>46</sup> Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2012). Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption. Retrieved from <https://www.childwelfare.gov/pubs/otherpubs/majorfedlegis/>.

injury, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”<sup>47</sup> States may have a more stringent definition, but they cannot, for example, refuse to include serious emotional injury in the definition of child abuse.

CAPTA also requires expedited termination of parental rights in certain situations, for example abandonment of an infant or serious bodily injury of a child.<sup>48</sup> In addition to CAPTA, the Adoption and Safe Families Act of 1997 (AFSA) developed a mechanism for federal accountability of states’ implementation of federal child welfare system goals.<sup>49</sup> Certain designated federal funds are earmarked for state child welfare systems, with the goal of promoting federal child welfare priorities. These funds support state- and county-level programs to keep families together so that children do not need to be removed from their homes, and to ensure safe out-of-home care for children who are removed from their homes.<sup>50</sup>

Because county governments implement the child welfare system, county culture and county finances or wealth impact child welfare practices. As a result, immigrant children in some counties face significant challenges entering the child welfare system, and they and their families confront difficulties once in the child welfare system. The federal government gives states matching funds to reimburse costs for child welfare services provided, but these funds do not apply to child welfare services for children with irregular immigration status.<sup>51</sup> This means that states and counties bear the financial burden of caring for immigrant children. Some counties resist placing immigrant children in the child welfare system as a result, even though immigration status says nothing about whether a child is abused, abandoned, or neglected under state law and in need of state intervention.

Once in the child welfare system, counties sometimes fail to provide migrant children the services they need because of the restrictions on federal benefits discussed above. If the state does not cover these benefits for migrant children, the cost falls to county child welfare systems to pay for these services for migrant children in custody. This deprivation of necessary services for migrant children in foster care can be especially acute in poor counties.<sup>52</sup> Lack of attention to the needs of

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<sup>47</sup> Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption.

<sup>48</sup> 42 U.S.C. § 5106a (b)(2)(B)(xv)(I) (West); Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption at 18, Retrieved from

<https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf#page=18&view=P.L.%20104-235%20Child%20Abuse%20Prevention%20and%20Treatment%20Amendments%20of%201996>.

<sup>49</sup> Adoption and Safe Families Act of 1997 (AFSA), Pub. L. 105-89 (1997); for comprehensive discussion of AFSA’s goals and results of AFSA, see Urban Institute, Center for the Study of Social Policy, Golden, O., Ehrle Macomber, J., et. al. (2009, December 10). Intentions and Results: A Look Back at the Adoption and Safe Families Act. Retrieved from [http://www.urban.org/uploadedPDF/1001351\\_safe\\_families\\_act.pdf](http://www.urban.org/uploadedPDF/1001351_safe_families_act.pdf).

<sup>50</sup> See Title IV-B, Title IV-E of the Social Security Act. 45 C.F.R. §§ 1355, 1356, 1357 (West).

<sup>51</sup> Dettlaff, A. & Finno-Velasquez, M. (2013). Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families. *Children’s Legal Right’s Journal*, 33(Spring 2013), 55-56. Retrieved from [http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/LEGAL\\_Legal\\_Issues/Child%20maltreatment%20and%20immigration%20enforcement.pdf](http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/LEGAL_Legal_Issues/Child%20maltreatment%20and%20immigration%20enforcement.pdf).

<sup>52</sup> These problems extend to the juvenile delinquency system as well, and may be exacerbated in that system because of the stigma that attaches to children in that system. Some law enforcement officials involved in the delinquency system believe that immigrant children who commit acts of delinquency are a burden on the U.S. and should be sent back to their countries. See, e.g., Marta’s story, describing how a juvenile delinquency judge refused to sign predicate order necessary for Special Immigrant Juvenile Status Application on the basis that Marta did not deserve

migrant children in the child welfare system sometimes extends to their immigration status. Although immigrant children in the child welfare system should be eligible for immigration relief, child welfare workers responsible for their care may not identify their need for regularization and may fail to connect them to an immigration attorney or legal services organization.<sup>53</sup>

Existing services for migrant children and families caught up in the child welfare system are often wanting.<sup>54</sup> Counties frequently lack appropriate housing for migrant children with limited English capabilities, or lack appropriate language services for children and families.<sup>55</sup> Lack of cultural competency on the part of child welfare workers or juvenile court judges can lead counties to discriminate against migrant parents and deny them the right to reunify with children.<sup>56</sup> This may happen, for example, because of different beliefs about the number of family members that can appropriately live in a home, or concerns about undocumented family members. Child welfare workers and juvenile court judges also generally do not understand how the immigration enforcement system works, and sometimes fault parents for their inability to comply with reunification requirements that are rendered impossible by detention or deportation—resulting in highly problematic decisions. In extreme cases the above differences or misunderstandings can result in discriminatory termination of parental rights.<sup>57</sup> Chapter 11 on family separation explores these issues in greater detail.

## **VI. U.S. chapters**

The subsequent four chapters on children in the context of migration in the United States address many of the concerns raised in this introduction. Chapter 9, *Children at the Border*, assesses the apprehension, screening, and detention of migrant children and adolescents by U.S. immigration officials. Next, chapter 10, *Immigration Remedies and Procedural Rights of Migrant Children and Adolescents*, examines the substantive and procedural inadequacies of existing avenues for immigration relief for children. Chapter 11, *Family Separation as a Result of Immigration Policies in the United States*, highlights the insufficiency of family reunification opportunities and the devastating impacts of immigration enforcement on families. Finally, chapter 12, *Repatriation and Reintegration of Migrant Children*, analyzes the policies and practices of the U.S. government in returning Central American and Mexican migrant children to their home countries, and identifies best practices gleaned from an NGO partnership for children returned to Guatemala.

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to become a lawful permanent resident in the United States because of her act of delinquency. *A Treacherous Journey*, p. 40.

<sup>53</sup> See *A Treacherous Journey*, pp. 38-39.

<sup>54</sup> See, e.g., *Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families*.

<sup>55</sup> The Annie E. Casey Foundation. (2006). *Undercounted. Underserved: Immigrant and Refugee Families in the Child Welfare System*. Retrieved from <http://www.aecf.org/m/blogdoc/aecf-undercountedunderserved-2006.pdf>.

<sup>56</sup> Applied Research Center. (2011, November). *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*. Retrieved from [http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC\\_Report\\_Shattered\\_Families\\_FULL\\_REPORT\\_Nov2011Release.pdf](http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf).

<sup>57</sup> See generally Hall, C. E. (2011). Where Are My Children...And My Rights? Parental Rights Termination As A Consequence of Deportation. *Duke Law Journal*, 60:1459, 1459-1503.

## **Appendix: key agencies involved**

The Department of Homeland Security, Department of Justice, Department of Health and Human Services, and Department of State are the major U.S. agencies involved in handling migrant children and adolescents. The following is a brief description of the relevant sub-agencies within each of the broader agencies, and their respective work regarding migrant children and adolescents.

### *A. Department of Homeland Security (DHS)*

DHS is the federal agency responsible for preventing terrorism, controlling immigration, and responding to natural disasters and accidents. DHS is similar to Interior Ministries in other countries. The agency oversees a range of sub-agencies, three of which are relevant to migrant children and adolescents.

#### *1. Customs and Border Protection (CBP)*

CBP is charged with securing U.S. borders and the space between borders, in addition to overseeing customs. CBP is stationed at the border and in between ports of entry. CBP agents apprehend individuals attempting to enter the United States in places other than designated ports of entry and inspect individuals seeking admission at ports of entry. CBP agents conduct initial screening of unaccompanied migrant children and adolescents and place them in temporary CBP custody. CBP transfers unaccompanied children from non-contiguous countries to HHS custody. The agency transfers unaccompanied Mexican children it finds to be at risk of trafficking or persecution or too young to make a decision to voluntarily return to Mexico. In the case of immigrant families apprehended at or near the border or at ports of entry, CBP conducts preliminary interviews that are part of the summary removal procedure that often leads to near-immediate deportation of children with their families.

#### *2. Immigration and Customs Enforcement (ICE)*

ICE is the enforcement arm of DHS within the interior of the United States (i.e., excluding borders and ports of entry) for border control, immigration, and customs. ICE conducts investigations, detains certain immigrants in the interior of the United States, and deports immigrants ordered removed. ICE detains those migrant children and adolescents who sought entry to the United States along with their families in several family detention facilities. ICE also detains many parents of U.S. citizen and lawful permanent resident children.

#### *3. United States Citizenship and Immigration Services (USCIS)*

USCIS administers a broad range of immigration benefits, including applications for family-based immigration, naturalization, and many others. Most relevant for unaccompanied children, USCIS decides cases of Special Immigrant Juvenile Status—a form of relief for children only—and decides unaccompanied children's asylum claims in the first instance.

*B. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR)*

ORR, within HHS, is responsible for the care and custody of migrant children and adolescents who have been apprehended by CBP or ICE and referred to HHS as unaccompanied children. ORR houses children in a range of facilities that provide a variety of services, and oversees the family reunification process of releasing children to family in the United States.

*C. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR)*

DOJ is responsible for the administration of justice and the enforcement of federal law. One of the many branches of the DOJ is the Executive Office for Immigration Review (EOIR), the agency that houses the United State's 50+ immigration courts whose immigration judges hear the claims of individuals in removal proceedings. EOIR includes the Board of Immigration Appeals (BIA), the administrative appeals body that adjudicates the appeals of decisions made at the immigration court level. Appeals from the BIA are heard in the federal courts, which are not part of EOIR; rather, they are part of the judiciary branch, which is entirely separate from the executive branch.

*D. Department of State (DOS)*

The Bureau of Population, Refugees, and Migration (PRM) and the Bureau of Western Hemisphere Affairs (BWAHA) are the branches of DOS whose work most overlaps with Central American migrant children and families. PRM will be responsible for overseeing the in-country refugee processing recently announced for Honduran, Salvadoran, and Guatemalan children. BWAHA's work focuses on development, citizen security, and other issues in the region. The programs of the United States Agency for International Development (USAID) have a significant impact on conditions on the ground in the children's sending countries.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 9 Detention and Treatment of Unaccompanied Migrant Children at the U.S.-Mexico Border

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### **I. Introduction**

Detention of migrant children in the United States has a complex history. Although the U.S. government has made significant progress in the conditions and circumstances under which children are held in government custody, there are still significant concerns over the conditions and use of child detention. Although children should never be detained due to immigration status, the government may have a need to maintain custody of children who are unaccompanied or whose safety is at risk. In 2002, the responsibility for the care and custody of unaccompanied migrant children was transferred from an immigration enforcement agency to a government agency with considerably more expertise with child welfare standards. However, many government detention facilities, particularly those run by Customs and Border Protection (CBP) along the U.S.-Mexico border, are not appropriate for children. Among CBP's shortcomings is its failure to use the best interest of the child framework for custody decisions of children.

The recent surge of unaccompanied children detained by the United States has led the government to make changes to its procedures for the release of children. There is growing concern these new procedures are inadequate to protect children in vulnerable circumstances. This chapter provides an overview of current and prior U.S. immigration detention practices with respect to children traveling alone and with families.

### **II. The U.S. government's immigration enforcement framework**

#### *A. Overview of key agencies*

Although the introduction to the U.S. chapters contains an overview of key U.S. immigration agencies, we briefly provide a recap of the main enforcement arms of the Department of Homeland Security (DHS) here. DHS was created in response to the September 11, 2001, terrorist attacks in the United States to coordinate a comprehensive national strategy to safeguard the country against terrorism and respond to any future attacks. Two of its agencies, CBP and Immigration and Customs Enforcement (ICE), are responsible for all immigration enforcement in the United States.<sup>1</sup>

CBP is charged specifically with securing the U.S. borders and facilitating trade, and initially apprehends and detains children who are trying to enter the United States without authorization.

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<sup>1</sup> Prior to the creation of the DHS, the Immigration and Naturalization Service (INS), which was established on June 10, 1933 as part of the Department of Justice, protected and enforced the U.S. Immigration and Naturalization laws. The INS also addressed illegal entrance into the United States, prevented receipt of benefits such as social security or unemployment by those ineligible to receive them, and investigated, detained, and deported those illegally living in the United States.

CBP is tasked with inspections at U.S. ports of entry and with preventing irregular entries between the ports of entry. While its primary mission is preventing terrorists and terrorist weapons from entering the United States, CBP is also responsible for apprehending individuals attempting to enter the United States irregularly, including those with a criminal record and those without authorization to enter, as well as stemming the flow of illegal drugs and other contraband.

The two components of CBP most likely to encounter immigrant children entering the United States are the Office of Field Operations (OFO) and Border Patrol (BP). OFO officers screen all foreign visitors, returning U.S. citizens, and imported cargo entering the U.S. at more than 300 land, air, and sea ports. BP agents work along U.S. borders in the areas between ports of entry. BP is responsible for securing almost 6,000 miles of border between the U.S. and its Canadian and Mexican neighbors, as well as other coastal areas.<sup>2</sup>

ICE is tasked with enforcing immigration laws in the interior of the country. ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration. The agency devotes the majority of its resources to its two principal operating components—Homeland Security Investigations (HSI), responsible for detecting criminal immigrants, and Enforcement and Removal Operations (ERO), dedicated to removing migrants without authorization to remain in the United States.<sup>3</sup>

### *B. Militarization of U.S.-Mexico border*

Militarization of the U.S. border began under President Ronald Reagan, intensified under President Bill Clinton, and dramatically expanded following the terrorist attacks of September 11, 2001 (9/11). In response to the 9/11 attacks, the United States reorganized many federal government agencies, creating DHS, described above. Prior to the creation of DHS, responsibility for establishing immigration policy, administering benefits, and securing the border lay with the Department of Justice (DOJ) and, before DOJ, the Department of Labor (DOL).

Under the DOL, immigration was considered “a worker issue,” and under DOJ it was considered “a legal and civil rights issue;” now, under DHS, “it is an enforcement and terrorism issue.”<sup>4</sup> The budget for border security has also grown significantly. According to the Migration Policy Institute, a well-known think-tank, “border enforcement costs [a total of] \$18 billion a year, more than all other federal criminal-law-enforcement agencies combined.”<sup>5</sup> The number of border patrol

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<sup>2</sup> See U.S. Customs and Border Protection. At Ports of Entry. Retrieved from <http://www.cbp.gov/border-security/ports-entry>; U.S. Customs and Border Protection. Along U.S. Borders. Retrieved from <http://www.cbp.gov/border-security/along-us-borders>.

<sup>3</sup> See U.S. Immigration and Customs Enforcement. Overview. Retrieved from <http://www.ice.gov/overview>; U.S. Immigration and Customs Enforcement. Homeland Security Investigations. Retrieved from <http://www.ice.gov/hsi>; U.S. Immigration and Customs Enforcement. Enforcement and Removal Operations. Retrieved from <http://www.ice.gov/ero>.

<sup>4</sup> Kim, M. J. (2011, September 8). After 9/11, Immigration Became About Homeland Security. *U.S. News & World Report*. Retrieved from <http://www.usnews.com/news/articles/2011/09/08/after-911-immigration-became-about-homeland-security-attacks-shifted-the-conversation-heavily-toward-terrorism-and-enforcement>.

<sup>5</sup> The Economist. (2013, June 22). The US-Mexico Border: Secure Enough. Spending Billions More on Fences and Drones Will Do More Harm than Good. *The Economist*. Retrieved from <http://www.economist.com/news/usa/21579828-spending-billions-more-fences-and-drones-will-do-more-harm-good-secure-enough>.

officials has increased to over 20,000. Moreover, the U.S. National Guard is deployed to monitor the border with military equipment such as drones (unmanned aircrafts) and mobile surveillance devices.<sup>6</sup>

Believing that irregular migration poses a major threat to U.S. security, some members of Congress have argued for greater enforcement and security measures at the border.<sup>7</sup> However, the security-focused bills that have been introduced in Congress emphasize only how to physically stop individuals from crossing the border without detection, and do not address root causes of migration or how to create alternatives to migration.

In response to the publicized increase in unaccompanied migrant children arriving in the United States in mid-year 2014, the Obama Administration requested emergency supplemental funding from Congress to cover the additional costs of caring for the children in federal custody and for other purposes. Included in the Administration's \$3.7 billion funding request was \$39 million to "increase air surveillance capabilities to improve detection and interdiction of illegal activity in the Rio Grande Valley region."<sup>8</sup> The U.S. House of Representatives passed a supplemental appropriations bill on August 1, 2014 that would increase border security even beyond the Administration's request.<sup>9</sup> However, legislators and Administration officials have not provided justification for further security and militarization of the entire U.S. southern border given that most of the unaccompanied children and migrant families (primarily single women with children) arrive in only one section of the southern border and turn themselves over to border patrol. In other words, they are not trying to slip in undetected. Also missing from the debate is how greater border security in the short-term will solve the problems forcing Central Americans to migrate over the long-term.

Armed and uniformed CBP officers, whose role is both to stop terrorists and arrest individuals who cross the border in violation of U.S. law, apprehend and question child migrants. The fact that CBP, the same agency charged with identifying and stopping terrorists, is also charged with preventing asylum seekers and other migrants from entering the United States documents has been argued by some to lead border officials to treat all migrants like dangerous criminals. The dual yet dramatically different functions CBP performs, stopping "terrorists" and apprehending irregular immigrants, require different approaches, training, and priorities—making it very difficult for the same agency to perform both functions. According to international standards, apprehending and

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<sup>6</sup> U.S. Department of Homeland Security. (2014, September 10). Securing and Managing Our Borders: Implementing 9/11 Commission Recommendations, Progress Report 2011. Retrieved from <https://www.dhs.gov/securing-and-managing-our-borders>.

<sup>7</sup> See, e.g., H.R. 5230, 113th Cong. (2013-2014). Retrieved from <https://www.congress.gov/bill/113th-congress/house-bill/5230> (sending National Guard to the border, providing millions in additional funding for border enforcement); H.R. Res. 330, 113th Cong. (2013-2014). Retrieved from <https://www.congress.gov/bill/113th-congress/house-resolution/330> (prohibiting any immigration reform legislation from advancing until the southern border is secured).

<sup>8</sup> See The White House. (2014, July 8). Emergency Supplemental Request. Retrieved from [http://www.whitehouse.gov/sites/default/files/omb/assets/budget\\_amendments/emergency-supplemental-request-to-congress-07082014.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/emergency-supplemental-request-to-congress-07082014.pdf).

<sup>9</sup> This bill did not become law. The U.S. legal system requires that for a bill to become enacted into law both Houses of Congress (the Senate and House of Representatives) must pass the bill and the President must sign it into law. The bill passed by the Senate differed significantly from the House bill. The result was that no supplemental funding bill passed.

screening children requires especially unique training in a child-sensitive approach due to the needs and vulnerabilities children have distinct from adults.<sup>10</sup> The current lack of such approach, and the need for more child-sensitive policies, is discussed in greater detail in section IV, below.

### **III. How migrant children arrive at the U.S. southern border seeking entry**

Most migrant children attempting to enter the United States, traveling alone or with family, cross into the United States through the U.S.-Mexico border. Central American children often travel through Mexico without a guide or smuggler. They risk serious danger by hitchhiking, walking in gang-controlled areas, and even riding on tops of trains. For more on the dangers faced by children during their migration journey, see chapter 6 on Southern Mexico and chapter 10 on U.S. immigration remedies and procedures.

Once at the U.S.-Mexico border, children may present themselves at an official port of entry and ask for asylum or protection, or they may attempt to cross into the country between ports of entry, usually in the desert. Over the years, as CBP has increased enforcement along the U.S.-Mexico border, migrants attempting to enter between ports of entry have been forced to try and enter through areas that are very rural and have incredibly rough terrain. As a result, many migrants attempting the crossing are entering through the extremely dangerous South Texas area. Children presenting themselves at the ports of entry are screened by OFO officers. If they do not have authorization to enter the United States, they are held in their facilities until they can be repatriated or sent to longer-term government custody. Children who are apprehended by BP agents attempting to enter between the ports of entry are taken to CBP short-term hold facilities until ICE transfers them to longer-term government facilities or until they can be repatriated.

With the increasingly dangerous conditions for migrants crossing through the desert to enter into the United States, OFO has reported an increase of migrants, including children, who do not have authorization to enter the country attempting to use false documents at ports of entry rather than risking the dangerous desert crossing. These migrants present themselves at the ports either to immediately ask for asylum, often with documents that are either entirely fraudulent or that are valid but belong to another person.<sup>11</sup> In fiscal year 2013 OFO apprehended 1,892 unaccompanied children at Ports of Entry.<sup>12</sup> In fiscal year 2013, BP apprehended 47,397 children (8,564 accompanied and 38,833 unaccompanied); and in fiscal year 2014, it apprehended 107,613 children (38,982 accompanied and 68,631 unaccompanied).<sup>13</sup> For more information on the numbers of children arriving at the U.S.-Mexico border, see chapter 1.

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<sup>10</sup> See U.N. Committee on the Rights of the Child (CRC), CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, § VIII, CRC/GC/2005/6 (2005, September 1). Retrieved from <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> (calling for specialized training for all officials working with unaccompanied and separated children).

<sup>11</sup> Interview with Jennifer Podkul with official, U.S. Customs and Border Protection, in San Ysidro Port of Entry, Ca. (2013, Dec. 3).

<sup>12</sup> The figures cited are based on statistics shared with the Women's Refugee Commission by OFO. OFO also shared that in FY 14, up through July, OFO apprehended 3,722 UACs.

<sup>13</sup> U.S. Border Patrol. (2014). *U.S. Border Patrol Fiscal Year 2013 Sector Profile*, p. 2. Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>; U.S. Border Patrol. (2015). *U.S. Border Patrol Fiscal Year 2014 Sector Profile*, p. 2. Retrieved from <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>. Chapter 1 contains additional information on children apprehended by OFO.

#### **IV. The process when an unaccompanied child is apprehended trying to enter the United States without permission**

##### *A. Different treatment for children from non-contiguous countries*

As previously stated, CBP officials<sup>14</sup> are the most likely enforcement officials to apprehend children attempting to enter the U.S. through the Mexican border. After apprehension, the children will be taken to a CBP short-term hold facility for processing. Processing begins with intake, where critical information is gathered by an agent. This process occurs for all unaccompanied children, regardless of their country of origin. A child has no right to have an attorney with her during this process of creating official court documents, despite the fact that information gathered at the intake can be used against her in immigration court procedures. Intake procedures include collecting information regarding the child's name; age; legal status; medical history or health; locations of immediate family members; locations and phone numbers of any friends or relatives in the United States; names and phone numbers of the person or persons in the United States with whom the child was in contact; and, if applicable, any smuggling arrangements made. Information gathered at intake is important for providing services for unaccompanied children, as it can later help establish the suitability of reunification with a parent or guardian and help in assessing the child's needs while in custody.

Upon apprehending an individual who claims to be or is suspected of being under 18, CBP must make an age determination—the first formal step in the complex process of identifying an unaccompanied child and a necessary precursor to such child's transfer to an appropriate facility. The child facility is usually administered by the Department for Unaccompanied Child Services (DCS), part of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS).

Unfortunately, DHS does not have expertise in child welfare and often makes determinations using just one technique, usually a dental exam or radiograph: methods that experts have found to be unreliable.<sup>15</sup> In addition to the use of flawed techniques, age determinations can be complicated by a lack of reliable identity documents, lack of specific knowledge of birth date on the part of the apprehended individual, or misinformation provided by the apprehended individual. This is particularly true for children who have no formal education or indigenous children, whose cultures often do not emphasize dates. As a result, some children have been improperly determined to be adults and placed in adult detention facilities, sometimes for years at a time. These facilities are based on a model intended for adults with criminal histories and are entirely inappropriate for children. ICE does not inform ORR of any individuals deemed adults, as ORR has custody only over unaccompanied children.

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<sup>14</sup> There are no guardians or child protection officers in CBP facilities, contrary to what the CRC Committee recommends in its General Comment on unaccompanied children.

<sup>15</sup> Office of the Inspector General, Department of Homeland Security. (2009, November). Age Determination Practices for Unaccompanied Alien Children in ICE Custody, p. 10. Retrieved from [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-12\\_Nov09.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_10-12_Nov09.pdf). See also Ceberio Belaza, M. (2014, July 18). El Supremo prohíbe someter a todos los menores inmigrantes a pruebas de edad. *El Pais Política*. Retrieved from [http://politica.elpais.com/politica/2014/07/18/actualidad/1405709552\\_799676.html](http://politica.elpais.com/politica/2014/07/18/actualidad/1405709552_799676.html).

Once DHS has determined that an individual is under the age of 18, it must then determine whether he or she meets the definition of an unaccompanied child. The Homeland Security Act of 2002 (HSA) defines an unaccompanied alien child (UAC) as a child who “has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States who is available to provide care and physical custody.”<sup>16</sup> If the child meets the definition of UAC and is from a non-contiguous country, the child should be transferred to an appropriate facility within 72 hours of apprehension or discovery.<sup>17</sup> ICE is responsible for these transfers. In the past when ORR has been overwhelmed and has not had capacity to take additional children in to their care, children have been held as long as two weeks in CBP short term hold facilities in conditions that are wholly inappropriate for children.

### *B. Children from contiguous countries*

Different rules apply to children coming to the United States from contiguous countries than to children coming from other parts of the world. While these rules apply to children from both Canada and Mexico, in practice, it is children from Mexico who are most affected and will be discussed in this section.

Prior to 2008, CBP could immediately return a Mexican child arriving from Mexico through a voluntary return process. Due to the growing concern that many of these children were victims of human trafficking or eligible for asylum protection in the United States, Congress passed the Trafficking Victim Protection Reauthorization Act (TVPRA) of 2008.<sup>18</sup> This new law stopped immediate returns of Mexican children. It required CBP officials to determine during initial intake whether an unaccompanied child is a national of a contiguous country; is not a potential victim of trafficking; has no possible claim to asylum; and can and does voluntarily accept return. Unless all of these questions are answered in the affirmative, the child *cannot* be immediately returned to Mexico, but rather must remain to be evaluated for a claim to protection in the United States.<sup>19</sup>

If it appears that the child does not have authorization to enter the United States, and can safely be returned to Mexico, she can be repatriated without ever being placed in immigration proceedings. If any of the answers to the inquiries the U.S. officials must make are negative, or if no determination of all three criteria can be made within 48 hours, the TVPRA mandates that the child shall “immediately” be transferred to ORR custody. Once transferred to ORR, Mexican children are treated like all other unaccompanied children in detention.<sup>20</sup>

The protections that flow from the TVPRA remain as important as ever. Mexican children have become an easy target for human traffickers and other organized crime. Mexico is a source, transit

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<sup>16</sup> Homeland Security Act (hereinafter “HSA”) of 2002, Pub. L. 107-296, § 462(g), 116 Stat. 2135, 2205 (2002).

<sup>17</sup> See discussion in part III, section C “Children Traveling with Family Members” for a discussion on the concerns caused by the definition of unaccompanied alien child as it relates to non-parent family members.

<sup>18</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (hereinafter “TVPRA of 2008”), Pub. L. 110-457, 122 Stat. 5044 (2008),

<sup>19</sup> TVPRA of 2008, § 235(a)(2).

<sup>20</sup> Cavendish, B., & Cortazar, M. (2011). Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors (hereinafter “Children at the Border”), p. 19. Retrieved from <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

and destination for human trafficking.<sup>21</sup> Furthermore, “the high [financial] cost of [migrating to the United States] places juveniles in jeopardy, causing some young migrants to assume unsustainable levels of debt which they will be coerced into repaying.”<sup>22</sup> The growing control over cross-border migration exercised by Mexico’s drug cartels, which regard human trafficking as an important potential source of revenue and children as easy and valuable prey, further increases these risks.<sup>23</sup>

“Children who reside near the border or who seek to cross it may become caught up with organized gangs that smuggle immigrants or contraband. Mexican consular officials refer to such children as the “*menores de circuito*”—children who are forced into the smuggling of drugs, or the smuggling of other children and adults, across the border. Children may be attractive to criminal organizations as mules because if they are caught, they are likely to be sent immediately back across the border to Mexico without being detained or prosecuted, as discussed below. Once back in Mexico, they can again smuggle drugs or people.<sup>24</sup> For more information on treatment of children on the Mexico side of the border, see chapter 7.

The United States has tried to break up these smuggling rings with a new program that refers these children for criminal prosecution and puts them into formal removal proceedings instead of just allowing these children to return to Mexico. There are many concerns that this program does nothing to protect these children, but rather is a punitive measure.

### *1. Concerns with TVPRA screening of Mexican children*

Unfortunately, the current system of having border agents screen Mexican children is inadequate to ensure protection of these Mexican children.<sup>25</sup> Many who are forced or coerced into working for criminal organizations have not been identified by CBP officials as victims of human trafficking.<sup>26</sup> Instead, they are generally repatriated immediately. In May 2014, CBP began a program called the “Juvenile Referral Program” to refer repeat crossers to the Office of Refugee Resettlement. The intent of the program is to break the smuggling ring and stop these children from working as foot guides. It is not clear they are all being identified as victims of human trafficking, and there are no special programs for these children.<sup>27</sup>

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<sup>21</sup> U.S. Department of State. (2014). Trafficking in Persons Report 2014, p. 271. Retrieved from [http://www.state.gov/j/tip/rls/tiprpt/2014/?utm\\_source=NEW+RESOURCE:+Trafficking+in+Persons+R](http://www.state.gov/j/tip/rls/tiprpt/2014/?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+R).

<sup>22</sup> Children at the Border, p. 16.

<sup>23</sup> Children at the Border, p. 16.

<sup>24</sup> Children at the Border, p. 16.

<sup>25</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, pp. 110-112 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

<sup>26</sup> Ferriss, S. (2011, September 2). Child advocates say more should be done to assist immigrant minors crossing the border. *Center for Public Integrity*. Retrieved from <http://www.publicintegrity.org/2011/09/02/6109/child-advocates-say-more-should-be-done-assist-immigrant-minors-crossing-border>.

<sup>27</sup> Vera Institute of Justice. (2012, March). The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers, p. 20. Retrieved from <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

There have been many concerns raised by researchers and child welfare experts about the adequacy of the TVPRA-mandated screening.<sup>28</sup> To determine whether a child meets the criteria to remain in the United States, CBP officers interview the child at the CBP facility often in full view of other detainees, possibly their traffickers. The CBP officer fills out *CBP Form 93*, which contains only cursory questions and suggestions to determine credible fear and human trafficking.<sup>29</sup> Questions include: “Do you have any fear or concern about returning to your home country or being removed from the United States?;” “Would you be harmed if you returned to your home country?;” and “Is the child engaged in any type of labor?.”<sup>30</sup>

Experts have found that this screening is not conducted in a manner or in environments likely to elicit information on whether the child is a potential victim of trafficking or abuse, or whether the child can and does voluntarily agree to return to Mexico. Moreover, many girls experience sexual violence in their home country and en route to the United States; this kind of abuse is very hard to disclose to a male law enforcement agent. The main weakness identified with the current process is that DHS agents are law enforcement agents: experts in enforcing immigration laws rather than child welfare. Many experts have found that CBP officers do not receive sufficient training or tools to equip them to satisfy the law.<sup>31</sup> During the screening, children are not informed of their rights, often have little or no comprehension regarding their options, and may believe that they have no choice other than to return to Mexico. Agreeing to return to Mexico under these circumstances cannot be said to be truly “voluntary.”

For example, one boy reported being returned to Mexico despite reporting to Border Patrol agents that he was scared to return because he was being trafficked. The agents instead told him to return to help gather more information for their criminal investigation.<sup>32</sup> The United Nations High Commissioner for Refugees (UNHCR), in its review of the process of screening Mexican children, determined CBP has operational practices that “continue to reinforce the presumption of an absence of protection needs” rather than a presumption of “international protection need” that can be ruled out as required by U.S. law.<sup>33</sup> For more information on UNHCR’s recommendations and a detailed description and analysis of its interviews of children at the border, see chapter 1.

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<sup>28</sup> Children at the Border, p. 31. *See also* Women’s Refugee Commission. (2009). *Halfway Home*, p. 36. Retrieved from <http://womensrefugeecommission.org/resources/document/196-halfway-home-unaccompanied-children-in-immigration-custody>. In 2013, the United Nations High Commissioner for Refugees undertook a confidential study to evaluate the screening of Mexican children to help advise the United States government in how to improve the process.

<sup>29</sup> *See* Children at the Border, Appendix 25, Exhibit 5. (Providing a copy of CBP Form 93).

<sup>30</sup> *See* Children at the Border, Appendix 25, Exhibit 5. (Providing a copy of CBP Form 93).

<sup>31</sup> Children at the Border, p. 31. *See also* Center for Gender and Refugee Studies & Kids in Need of Defense. (2014). *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, p. 49. Retrieved from [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf).

<sup>32</sup> Ferriss, S. Child advocates say more should be done to assist immigrant minors crossing the border. *Center for Public Integrity*. Retrieved from <http://www.publicintegrity.org/2011/09/02/6109/child-advocates-say-more-should-be-done-assist-immigrant-minors-crossing-border>.

<sup>33</sup> UNHCR. (2014, June). *Findings and Recommendations Relating to the 2012 – 2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border*, p. 5. Retrieved from [http://americanimmigrationcouncil.org/sites/default/files/UNHCR\\_UAC\\_Monitoring\\_Report\\_Final\\_June\\_2014.pdf](http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf) (hereinafter “UNHCR Findings and Recommendations Relating to the 2012 – 2013 Missions”).

DHS Office of Inspector General recommended that in order to improve their ability to screen and protect Mexican children, CBP agents receive better and more frequent training on what human trafficking is<sup>34</sup> and how to effectively interview a child.

**Consular involvement.** Mexican children found by CBP to be without protection concerns, can be immediately repatriated. The mechanisms of their repatriation are governed by an umbrella agreement between DHS and the Secretary for External Relations of Mexico, implemented by local agreements at different border areas.<sup>35</sup> These mechanisms, explored briefly below, are examined in more detail in chapter 13 on regional and bilateral agreements.

In 2009, the U.S. and Mexican government created a bilateral agreement that creates a formalized agreement for the expedited return of Mexican nationals.<sup>36</sup> The agreement allows for a series of local arrangements between the United States and Mexico to set forth specific locations and hours when repatriation will be allowed. These local agreements are periodically reviewed and updated to improve arrangements. The local repatriation agreements only allow children to be returned during daylight hours.<sup>37</sup> However, as explained in greater detail in chapter 1, UNHCR identified inconsistencies in the implementation of policies,<sup>38</sup> which could result in some of the Mexican children who are being repatriated or returned to Mexico are done so in the safe manner provided for in TVPRA.

Under the 1963 Vienna Convention on Consular Relations (Vienna Convention), and other agreements between the United States and Mexico, all Mexican nationals in the United States are guaranteed the right to speak with a consular official. Additionally, the Mexican government will immediately be notified if a citizen is in U.S. government custody, and a Mexican consular official has the right to visit a Mexican national in detention.<sup>39</sup> Most unaccompanied Mexican children are interviewed by someone from the Mexican consulate before they are returned at the border. CBP has given Mexican consular officials office space in many of the OFO and BP stations, so that a local consular official can come to the facility to interview the migrant and help facilitate repatriation. When CBP wants to return a child to Mexico, the consular official will coordinate the

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<sup>34</sup> Office of the Inspector General, Department of Homeland Security. (2010, September). CBP's Handling of Unaccompanied Alien Children (hereinafter "OIG Report"), pp. 21-24. Retrieved from [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_10-117\\_Sep10.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf).

<sup>35</sup> Immigration and Customs Enforcement. Local Arrangement for the Repatriation of Mexican Nationals. Retrieved from <http://www.ice.gov/doclib/foia/repatriation-agreements/local-arrangements-repatriation-of-mexican-nationals-full-list.pdf>.

<sup>36</sup> Department of Homeland Security. (2009, April 3). Secretaries Napolitano and Espinosa Announce Agreement on Mexican Repatriation. Retrieved from <http://www.dhs.gov/news/2009/04/03/agreement-mexican-repatriation-announced>.

<sup>37</sup> Immigration and Customs Enforcement. Local Arrangement for the Repatriation of Mexican Nationals. Retrieved from <http://www.ice.gov/doclib/foia/repatriation-agreements/local-arrangements-repatriation-of-mexican-nationals-full-list.pdf>.

<sup>38</sup> UNHCR Findings and Recommendations Relating to the 2012 – 2013 Missions, pp. 40-41. While investigating for this report, two field offices visited "told UNHCR that they are not technically bound by these local agreements with Mexico because the agreements address the process of 'repatriation', whereas OFO's return process is the withdrawal of a UAC's application for admission. The language of TVPRA [of 2008], §235(a)(2)(C) uses both 'repatriation' and the more generic term 'return' indicating that the processes employed by both USBP and OFO are to be covered by the local repatriation agreements." UNHCR Findings and Recommendations Relating to the 2012 – 2013 Missions, p. 19 n.17.

<sup>39</sup> Vienna Convention on Consular Relations, 1963, April 24, 596 U.N.T.S. 261.

return of that child with the DIF of Mexico to ensure the safe repatriation of that child, as explained in greater detail in chapter 7, on Northern Mexico.<sup>40</sup> There is concern that the presence of the Mexican officials in the CBP facilities not only may decrease the chance a child will reveal a fear of returning to Mexico, but also that CBP will rely on the consular officials to do all screening of the children, including the kind required by the TVPRA.<sup>41</sup> It may be intimidating for a child to explain to a U.S. official why they think their own government cannot protect them, particularly if the child sees an official from their government waiting in the facility to speak with them. Moreover, CBP agents have told monitors that they believe Mexican consular officials are there to help with the screening, such that they do not feel they themselves must always do a thorough job with their own screening.<sup>42</sup>

### *C. Children traveling with family members*

Family groups traveling with children represent a third group of immigrants that raise unique issues for DHS. DHS has long struggled with how to treat family units apprehended at the border. Prior to 2001, the Immigration and Naturalization Service (INS) would release families traveling with children immediately from the border. In 2006, ICE, the successor agency to INS, recognized that smugglers were exploiting this loophole by encouraging families to bring their children.<sup>43</sup> ICE sought to address this problem by detaining both the adults and the children with them.<sup>44</sup> INS, then DHS, used a variety of facilities to house families, including local motels.<sup>45</sup>

Initially, DHS had only one family shelter, the Berks Family Residential Center in Leesport, Pennsylvania, which opened in 2001 to accommodate immigrant families in ICE custody. This facility was retro-fitted for families who were placed in administrative immigration proceedings and subject to mandatory detention. The Center remains open today and attempts to be a humane alternative to maintain family unity as families await the outcome of immigration hearings or return to home countries.

Due to a shortage of detention bed space, the agency began placing children in shelters run by DCS, part of ORR in the Department of Health and Human Services, and holding parents in countless ICE-run immigration detention centers and state and county jails.<sup>46</sup> In some cases this

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<sup>40</sup> For more information, see chapter 7 on Northern Mexico.

<sup>41</sup> UNHCR [Findings and Recommendations Relating to the 2012 – 2013 Missions](#), pp. 42-43.

<sup>42</sup> UNHCR [Findings and Recommendations Relating to the 2012 – 2013 Missions](#), pp. 42-43.

<sup>43</sup> Department of Homeland Security, Immigration and Customs Enforcement. (2006, May 15). DHS Closes Loopholes by Expanding Expedited Removal to Cover Illegal Alien Families. Retrieved from <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C26307%7C19408>.

<sup>44</sup> Department of Homeland Security, Immigration and Customs Enforcement. (2006, May 15). DHS Closes Loopholes by Expanding Expedited Removal to Cover Illegal Alien Families. Retrieved from <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C26307%7C19408>.

<sup>45</sup> *The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Cheryl Little, Executive Director of the Florida Immigrant Advocacy Center) (stating that Haitian asylum-seekers who are women with children were housed at a local motel).

<sup>46</sup> Women's Commission for Refugee Women and Children. (2000, October). Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center, p. 3. Retrieved from <https://womensrefugeecommission.org/resources/document/272-behind-locked-doorsabuse-of-refugee-women-at-the-krome-detention-center>.

action protected children from what might have been dangerous smuggling situations, but in other instances it resulted in the forced separation of parents from their children, which unlawfully rendered the children unaccompanied. It also increased detention time of children, as ORR sometimes kept them in custody while waiting for the parents to be released.<sup>47</sup>

Congress discovered this issue and directed DHS to stop separating migrant families. In 2005, the House report accompanying the Department of Homeland Security appropriations bill, 2006, stated:

The Committee is concerned about reports that children apprehended by DHS, even as young as nursing infants, are being separated from their parents and placed in shelters operated by [ORR] while their parents are in separate adult facilities. Children who are apprehended by DHS while in the company of their parents are not in fact “unaccompanied;” and if their welfare is not at issue, they should not be placed in ORR custody. The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.<sup>48</sup>

In May 2005, DHS opened the Don T. Hutto facility specifically to house immigrant families.<sup>49</sup> Advocates found the facility wholly inappropriate for families with children. Hutto was a jail-like facility that kept families under virtual 24-hour lockdown and denied them privacy, educational opportunities, and adequate health care. In 2009, under increased pressure and scrutiny, including a lawsuit in the United States<sup>50</sup> and pressure from the Inter-American Commission on Human Rights,<sup>51</sup> ICE stopped using the facility for housing families.<sup>52</sup> Until 2014, DHS maintained only the Berks facility for families; a non-restrictive residential center, Berks had been praised as a more appropriate model for detaining families.<sup>53</sup> In 2014 the number of children being apprehended with parents at the border jumped dramatically, to more 68,445 family units from

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<sup>47</sup> Nugent, C. (2006). Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children, *The Boston Public Interest Law Journal*, 15, p. 230. Retrieved from <https://www.bu.edu/law/central/jd/organizations/journals/pilj/vol15no2/documents/15-2NugentArticle.pdf>.

<sup>48</sup> H. R. REP. No. 109-79, at 38 (2005). Retrieved from <https://www.congress.gov/109/crpt/hrpt79/CRPT-109hrpt79.pdf>.

<sup>49</sup> Women’s Commission for Refugee Women and Children, & Lutheran Immigration and Refugee Service. (2007, February). Locking Up Family Values: The Detention of Immigrant Families, p. 1. Retrieved from <http://lirs.org/wp-content/uploads/2012/05/RPTLOCKINGUPFAMILYVALUES2007.pdf>.

<sup>50</sup> American Civil Liberties Union. (2007, March 6). ACLU Challenges Prison-Like Conditions at Hutto Detention Center. Retrieved from <https://www.aclu.org/immigrants-rights-racial-justice-prisoners-rights/aclu-challenges-prison-conditions-hutto-detention>.

<sup>51</sup> Inter-American Commission on Human Rights. (2009, July 28). IACHR Visits U.S. Immigration Detention Facilities. Retrieved from <http://www.cidh.org/Comunicados/English/2009/53-09eng.htm>.

<sup>52</sup> Inter-American Commission on Human Rights. (2009, July 28). IACHR Visits U.S. Immigration Detention Facilities. Retrieved from <http://www.cidh.org/Comunicados/English/2009/53-09eng.htm>. See also Brané, M. (2009, August 7). Good News on Immigration Detention, But Keep the Pressure On. *Huffington Post*. Retrieved from [http://www.huffingtonpost.com/michelle-bran/good-news-on-immigration\\_b\\_254214.html](http://www.huffingtonpost.com/michelle-bran/good-news-on-immigration_b_254214.html).

<sup>53</sup> Irwin, T. (2011, January 6). In rural Pennsylvania, a model of civil immigration detention. *UNHCR, The UN Refugee Agency*. Retrieved from <http://www.unhcr.org/4d25c4fb6.html>.

only 14,855<sup>54</sup> the year before, DHS opened two new family detention facilities in Artesia, New Mexico and Karnes, Texas. Each facility can hold hundreds of people at a time. Shortly after the opening of the Artesia facilities, attorneys filed suit against the government for violating the rights of families there, alleging numerous due process violations in the assessment of asylum claims of individuals and their right to counsel. In addition to these new facilities, the government has announced plans to open more family detention centers, including a massive 2500-bed facility in Dilley Texas. The expansion of family detention in the United States is a significant step backwards in the protection of human rights for child migrants. It retreats from the policy of releasing families in recognition of their unique circumstances, and comprises one part of a broad effort by the federal government to facilitate “expedited removal” of these families, which reduces their access to fair and robust immigration proceedings and their ability to access asylum and related protections. While the United States has for years had the authority to speed removal of families apprehended within 100 miles of the border and in the country for less than two weeks, the procedure has been little used. Instead, families were generally released and told to report to immigration court. Expedited removal has become the modus operandi for treatment of families apprehended within 100 miles of the border as part of an effort to dissuade unauthorized migration. Although unaccompanied children are not subject to expedited removal and are given a full hearing before a judge, a child traveling with their family *are* subject to expedited removal and may not even be screened to determine if they might have their own form of relief from removal. There are alternatives to detention that are far less costly, and far more appropriate, for kids and their parents.

In response to sustained advocacy calling for humane and appropriate standards, DHS analyzed the family detention operations in conjunction with applicable state statutes that specifically affect children, and began formulating standards to address the unique needs of families held in its custody. While developing these standards, ICE solicited guidance from medical, psychological, and educational subject-matter experts while collaborating with various organizations and many non-governmental organizations (NGOs). In late 2007, ICE approved the Family Residential Standards which contain many revisions based on public comments; but again, those standards were approved at a time when many fewer families were held in federal custody. Moreover they are currently under review.

Another issue arising for children traveling with non-parent or legal guardian family members stems from the intersection of the TVPRA and the HSA definition of unaccompanied child. The TVPRA mandates that Border Patrol transfer a UAC within 72 hours of apprehension. Based on the HSA definition of UAC, a child is accompanied only if a parent or legal guardian in the United States is available to take care and custody. When issuing guidance for the treatment of UAC under the TVPRA, the government relies on this definition of UAC from the HSA to determine if a child is accompanied.<sup>55</sup> Thus, non-parent or legal guardian relatives, such as grandparents and adult siblings, traveling with a child would not be sufficient for the child to qualify as accompanied and

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<sup>54</sup>U.S. Border Patrol. (2014). Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) apprehensions FY 14 compared to FY 13. Retrieved from

[http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf)

<sup>55</sup> Aguilar, D.V. (2009, March 20). Implementation of the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, p. 2 (redacted). *Memo from Chief, U.S. Border Patrol*. Retrieved from [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf).

be treated by CBP as part of a family, i.e., moved to a family detention facility or released on an order of supervision. Instead, CBP must deem the child unaccompanied and transfer the child to ORR custody. This has led to many children being separated from their caregivers and becoming unaccompanied only as a result of the interpretation of these laws. Unfortunately, this was a negative consequence of the HSA, which itself was designed to protect children from traffickers or smugglers. Prior to the HSA, this category of children was routinely held in custody with adult siblings or other adult family caregivers. CBP is currently reviewing its policy to determine if after careful screening these children can be held together with extended family caregivers.

While it appears that most detained immigrant children in immigration proceedings today are in the custody of ORR, DHS retains custody of some children. In general, ICE should not have custody of any children other than those in family detention; those who have been ordered removed (and whom ICE is in the process of removing); those whom ICE is transferring within 72 hours of apprehension; and those classified as a national security risk under the Patriot Act. There may be cases where children are wrongly detained due to faulty age determinations.<sup>56</sup>

Statistics released by ICE in May 2013, as part of Freedom of Information Act litigation, raise some questions about whether other children are being held in ICE custody. These statistics indicated that ICE had detained 1,366 immigrant children for at least three days in adult detention facilities between 2008 and 2012.<sup>57</sup> This information showed that DHS detained these children for periods ranging from three days to more than one year, and nearly 1,000 children spent at least one week in adult custody.<sup>58</sup> Although it is unclear how many children, if any, are spending time in adult facilities, it is important to note adult detention is inappropriate for children.

Another issue has arisen when U.S. citizen children are apprehended and detained with a family member who does not have authorization to enter the country. Because CBP does not have authority to detain U.S. citizens, the children must be released. There is no formal and public CBP policy on how they release these U.S. citizen children and whether or not they will release these children to an undocumented parent or caregiver in the United States. One example of the harm from this lack of clear policy is given below.

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<sup>56</sup> Halfway Home, p. 12.

<sup>57</sup> National Immigrant Justice Center. (2013, May). Fact Sheet: Children Detained by The Department of Homeland Security in Adult Detention Facilities. Retrieved from [http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL\\_0.pdf](http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL_0.pdf).

<sup>58</sup> National Immigrant Justice Center. (2013, May). Fact Sheet: Children Detained by The Department of Homeland Security in Adult Detention Facilities. Retrieved from [http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL\\_0.pdf](http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL_0.pdf). (Noting that DHS's data suggests that in that time period four children were detained from 1,000 to 3,600 days.)

*“Deportation” of 4-year-old U.S. citizen child to Guatemala*

*CBP officers at Dulles Airport in Virginia allegedly, unlawfully detained a four year old, U.S. citizen child for more than twenty hours, deprived her of contact with her parents, and then effectively deported her to Guatemala. The girl was returning home from Guatemala when her flight was diverted from New York to Dulles due to inclement weather. After CBP agents stamped the girl’s passport, they directed her grandfather, with whom she was traveling, to secondary inspection due to an issue with his immigration papers, and both he and the girl were detained. CBP detained the girl with her grandfather for the next 20 plus hours, gave her only a cookie and soda during the entire time, and provided her nowhere to nap other than the cold floor.*

*Despite the grandfather’s repeated requests that CBP let him contact the girl’s parents in New York, they refused to do so. Some fourteen hours after CBP had detained the child, a CBP officer finally contacted the girl’s father, initially promising to put her on a plane to New York. But hours later, CBP again contacted the father, and this time claimed that the girl could not be returned to “illegals.” CBP gave the father one hour to choose between sending her to Guatemala or to an “adoption center” in Virginia. Fearing that he would otherwise lose custody of his daughter, the father decided that the only viable option was for her to go back to Guatemala.<sup>59</sup>*

In contrast, the Women’s Refugee Commission was told at the San Ysidro port of entry that CBP will always return a child to the adult they are traveling with, regardless of the adult’s status.<sup>60</sup>

It is important to note that international bodies recommend using alternatives to detention for all child migrants, and that non-extraordinary use of immigration detention for child migrants violates international principles. UNHCR’s detention guidelines state that the detention of asylum seekers is inherently undesirable, and as a general principle asylum seekers should not be detained; moreover, detention should only take place after a full consideration of all possible alternatives.<sup>61</sup> Furthermore, Article 37(b) of the CRC requires that “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>62</sup> Therefore, in order to be compatible with the CRC, all other possible options must have been considered before immigration detention is utilized.<sup>63</sup> Many alternatives to

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<sup>59</sup> *Ruiz ex rel. E.R. v. United States*, No. 13-CV-1241 KAM SMG, 2014 WL 4662241 (E.D.N.Y. Sept. 18, 2014). The American Immigration Council provides a summary available at <http://www.immigrationpolicy.org/litigation-clearinghouse/newsletter/lac-docket-volume-iv-issue-4>.

<sup>60</sup> Interview by Jennifer Podkul with official, U.S. Customs and Border Protection, in San Ysidro Port of Entry, Ca. (2013, Dec. 3).

<sup>61</sup> Office of the United Nations High Commissioner for Refugees. (1999, February). UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, p. 1. Retrieved from <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>.

<sup>62</sup> Convention on the Rights of the Child art 37(b), 1989, November 20, 1577 U.N.T.S. 3. Retrieved from <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>63</sup> Convention on the Rights of the Child art 37(b).

detention that could be made available by states for unaccompanied children and for families; therefore, detention cannot be seen as “a measure of last resort,” as required by art. 37 of the CRC. Use of a detention as a true “last resort” would require exceptional circumstances, such as a situation where a child was with only one parent and that parent was deemed to be a national security risk, and separating the child from the parent was not considered to be in the child’s best interests. The International Detention Coalition asserts that any restrictions on liberty of children for migration-related reasons must be necessary and proportionate and the least restrictive form possible must be used in order to be compatible with international human rights law.<sup>64</sup>

## V. Detention conditions of immigrant children in the United States

### A. Overview

When a child entering the United States without authorization is apprehended, he is subject to detention. There are three different kinds of detention a child may be subject to: CBP short-term hold facility detention; longer-term ICE detention facility detention; or shelters and programs specifically for unaccompanied children run by ORR.

In 1985, a class action lawsuit, *Flores v. Meese*, was filed against the INS challenging the way the agency processed, apprehended, detained, and released children in its custody.<sup>65</sup> In 1997, a California federal court approved the *Flores* settlement agreement on national policy regarding the detention, release, and treatment of children in INS custody (*Flores* agreement). These conditions are still in force today and apply to all children apprehended by DHS.<sup>66</sup> Although there have been other laws that make advancements regarding the detention of children, *Flores* remains a baseline the government must follow when it detains children. Many of the agreement’s terms have been codified at 8 CFR §§ 236.3, 1236.3.

The agreement defines a juvenile as any person under the age of 18 who is not emancipated by a state court, and who is not convicted and incarcerated due to a conviction for a criminal offense as an adult. It requires that juveniles be held in the least restrictive setting appropriate to their age and special needs to ensure their protection and wellbeing. It also requires that juveniles be released from custody without unnecessary delay to a parent; legal guardian; adult relative; individual specifically designated by the parent; licensed program; or, alternatively, an adult who seeks custody whom DHS deems appropriate. The *Flores* agreement and government policy also mandate that “juveniles will not be detained with an unrelated adult for more than 24 hours.”<sup>67</sup> The *Flores* agreement applies to all children in immigration custody, meaning both unaccompanied children and children detained with family.

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<sup>64</sup> International Detention Coalition. (2009). Children in Immigration Detention Position Paper, pp. 6-7. Retrieved from <http://idcoalition.org/wp-content/uploads/2009/05/childrenpositionpape.pdf>.

<sup>65</sup> *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991) *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

<sup>66</sup> See Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1997) (hereinafter “*Flores* Agreement”). Retrieved from [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf).

<sup>67</sup> U.S. Immigration and Naturalization Service. (2003, November). Immigration and Naturalization Service Juvenile Protocol Manual § 2.3.2, p. 7. Retrieved from [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/juvenileprotocolmanual2006.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf).

### *B. Immigration and Customs Enforcement detention*

Prior to 2003 and the creation of ICE, children were held in the custody of INS pending a resolution of their legal case. Despite the 1997 *Flores* agreement, conditions of confinement were wholly inappropriate, and one-third of these children were held in juvenile detention facilities intended for the incarceration of youth offenders. Many children were commingled with the delinquent population, subject to handcuffing and shackling, forced to wear prison uniforms, and locked in prison cells. Many were *de facto* denied access to legal and social services critical to their pursuit of asylum or other forms of relief because they were housed in remote facilities far from available services. Children who needed mental health services could only be seen by psychologists or psychiatrists who worked for the federal government, and whose assessments or recommendations tended to align with the interests of the INS. In addition to the inadequacy of services provided, the fact that the same agency was responsible for both care and enforcement created a significant conflict of interest.

Pursuant to the Homeland Security Act, in March 2003, the INS transferred its detention operations to the newly created Department of Homeland Security.<sup>68</sup> The Act shifted the responsibility for care and custody of unaccompanied immigrant youth to the ORR in March 2003.<sup>69</sup> Under the terms of the HSA, the newly created DHS retained enforcement and prosecutorial authority related to unaccompanied children, while ORR was given responsibility for all placement decisions, as well as for the provision of children's care.<sup>70</sup> The HSA defined an unaccompanied child as a child that has no legal status in the United States, has not attained 18 years of age, and has no legal guardian or parent in the U.S. able to provide care and physical custody.<sup>71</sup>

Today, ICE detains immigrants in over 250 facilities around the United States. Nearly 67 percent of the ICE detained population are housed in local or state facilities.<sup>72</sup>

ICE facilities today operate according to the unenforceable National Detention Standards established in 2000. There is no legal requirement that these standards for adults be followed<sup>73</sup> and no accountability for any harm that may result in a failure to comply with these standards. In 2008, ICE solicited input from NGOs and released an expanded and revised version of its detention standards, which they called the 2008 Performance Based National Detention Standards. The new standards were an improvement, and include provisions for preventing and reporting sexual abuse and assault, detainee searches and staff training. The administration solicited further input and made additional improvements to create what are known as the 2010 Performance Based National Detention Standards. These improved standards are still being implemented.

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<sup>68</sup> HSA, Pub. L. 107-296, § 441, 116 Stat. 2135, 2205 (2002).

<sup>69</sup> HSA, Pub. L. 107-296, § 462(a), 116 Stat. 2135, 2205 (2002).

<sup>70</sup> As part of that transfer, DHS is now required to abide by the *Flores* settlement. See HSA, Pub. L. 107-296, § 1512(a), 116 Stat. 2135, 2205 (2002). See also *Flores* Agreement, p. 22.

<sup>71</sup> 6 U.S.C.A. § 279(g) (West).

<sup>72</sup> Detention Watch Network. About the U.S. Detention and Deportation System. Retrieved from <http://www.detentionwatchnetwork.org/resources>.

<sup>73</sup> *Flores* Agreement, p. 7. (Defining the scope to apply only to the detention of children.)

With the exception of family detention facilities previously discussed, most detained immigrant children in immigration proceedings today are in the custody of ORR. In general, ICE should not have custody of any children other than those in family detention.

### *1. Detention in Border Patrol facilities*

When a child is initially apprehended entering the United States without authorization, they may be encountered by Customs and Border Protection. CBP maintains short-term hold facilities along the border and at all official ports of entry to the United States, including airports and bridges. If CBP encounters a child, traveling alone or with family, and they do not believe that child has permission to enter the United States, they will put that child in a holding cell. If a child is traveling with family, the child will be held with their family members. If they are unaccompanied, they will be held with other juveniles.

CBP facilities are intended to be short-term hold areas for children while BP officers determine the child's authorization to enter the United States, process a credible fear claim, or wait for another agency, e.g., ICE or ORR, to transfer the child to another facility. Children should not be held in those facilities for longer than 72 hours. After 72 hours, if CBP deems it necessary to continue the detention of a child, ICE must transfer that child to a long-term ORR or ICE facility.<sup>74</sup> Often, due to delays in transport or a lack of long-term immigration detention capacity around the country, children have been held for much longer in CBP short-term hold facilities, up to two weeks.<sup>75</sup>

Children brought to CBP facilities for processing are detained in hold rooms. Border Patrol defines hold rooms as detention cells or search or interview rooms where individuals are temporarily detained pending processing or transfer. OFO defines hold rooms as areas at ports of entry where detained individuals may be temporarily held pending secondary processing, which involves verifying documents and conducting interviews.<sup>76</sup> Border Patrol has issued a Hold Room and Short Term Custody policy dated June 2, 2008 but it is neither public nor enforceable. The agency is, however, currently developing a policy that would address how both OFO and BP must treat children in their custody.<sup>77</sup>

Although Border Patrol stations and ports of entry are entirely different structures because ports of entry are usually large permanent structures and Border Patrol stations usually are very small, and often temporary and remote, the hold rooms in each type of facility are very similar. Children are held in separate rooms from unrelated adults. Most hold rooms are built to resemble jail cells. They are generally concrete rooms with no windows to the outside and one door that locks from the outside. The door has a window so CBP officers and agents can watch the children inside the room. Most hold rooms have a toilet that may, or may not, have a privacy wall.

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<sup>74</sup> TVPRA of 2008, § 235(b)(3).

<sup>75</sup> Women's Commission for Refugee Women and Children. (2012, October 15). *Forced From Home: The Lost Boys and Girls of Central America* (hereinafter "Forced From Home"), p. 4. Retrieved from <http://womensrefugeecommission.org/resources/document/844-forced-from-home-the-lost-boys-and-girls-of-central-america>.

<sup>76</sup> OIG Report, p. 4.

<sup>77</sup> Aguilar, D.V. (2008, June 2). *Hold Room and Short Term Custody* (redacted) (hereinafter "Hold Room Policy"). *Memo from Chief, U.S. Border Patrol*. Retrieved from <http://foiarr.cbp.gov/streamingWord.asp?i=378>.

The sizes of the rooms vary considerably. Some are designed to hold only one person and others have the capacity to hold more than fifty. There are reports of extreme overcrowding in the hold rooms and children having to lay down in shifts during the night because there is not enough room for them to sleep.<sup>78</sup> Most rooms have concrete or metal benches for children to sit for the duration of their stay. None have a sink for children to wash their hands or any other facility in which a person can clean herself. The lights are kept on 24 hours a day. No rooms have beds for children kept overnight; however, some facilities provide thin mattresses and blankets. Most hold rooms are kept very cold and many children report suffering greatly from the cold, especially if not provided a blanket.<sup>79</sup>

Although most hold rooms have drinking water available to migrants, either in coolers, or from a fountain connected to the toilet, some children report not knowing they have access to it.<sup>80</sup> The Hold Room and Short Term Custody policy requires that children are provided food every 4-6 hours, and are allowed to request snacks and juice or milk at any other time.<sup>81</sup> Despite the policy, there are still many children who report that this requirement is not followed.<sup>82</sup>

Some children who have suffered greatly during their migration have severe medical needs at the time of their apprehension and detention by CBP. Pregnant girls and children who have suffered sexual assault during their journey are in particular need of immediate medical attention. CBP has limited capability to tend to a child's medical needs, and not all government officials inquire into these needs.<sup>83</sup>

There are also widespread reports of verbal and physical abuse of children by CBP officials. Children report being thrown to the ground, hit on the back, and having their arms twisted by officials. Some have reported being handcuffed, spit at, and yelled at.<sup>84</sup>

To ensure U.S. government officials are able to adequately serve the needs of children detained in these short-term hold facilities before they are returned to Mexico or sent to a longer-term ORR shelter, the agents must be able to speak with the children and screen them. While some officers speak Spanish, indigenous children who do not speak English or Spanish present a particular challenge. In these cases, government officials must rely on a telephonic translation. This option has many shortcomings, particularly for children already reluctant to discuss a fear of return or other traumatic or sensitive issues.

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<sup>78</sup> Forced From Home, p. 21.

<sup>79</sup> Americans for Immigrant Justice. (2013, August). The "Hieleras": A Report On Human & Civil Rights Abuses Committed by U.S. Customs & Border Protection, p.3. Retrieved from <http://aijustice.org/the-hieleras-a-report-on-human-civil-rights-abuses-committed-by-u-s-customs-border-protection-2/>.

<sup>80</sup> OIG Report, pp. 9-11.

<sup>81</sup> Hold Room Policy, p. 8.

<sup>82</sup> Forced From Home, p. 20.

<sup>83</sup> OIG Report, pp. 13-14.

<sup>84</sup> Forced From Home. pp. 11, 22.

*Eduardo's Story*

*Eduardo, 17, was crossing the desert on foot near McAllen, Texas when his group of five was stopped by Border Patrol. He was one of three youth in the group; the others were a pregnant woman and a guide. The Border Patrol agent grabbed his neck and shoved him, then used a taser gun on him and the other migrants, including the pregnant woman and guide. Once inside the ice-cold cells, the Border Patrol agents continued to verbally harass and insult him, using emasculating words and insults against his mother. Whenever he or the others tried to speak up for their rights, the agents slammed the doors aggressively to intimidate them.<sup>85</sup>*

Thus, despite the *Flores* and TVPRA standards for the treatment of children in CBP facilities, in practice, these facilities are not appropriate places to hold children.<sup>86</sup> Some children are held in these facilities for several days or weeks. While most children are transferred to an ORR facility or repatriated to Mexico within 48 hours, for traumatized children even 48 hours is too long to be held in these conditions. Children in these facilities have no access to an attorney or any legal advice or screening. Although CBP agents report using phone interpreters for children they cannot communicate with, particularly children who speak indigenous languages, children report not understanding agents who are trying to screen or care for them.<sup>87</sup>

Exacerbating these problems is the complete lack of a functioning complaint process within CBP. There are no signs in CBP holding areas to inform children and adults of their rights to just treatment and to complain if they suffer abuse. Even if they come to know their rights, individuals have no means to make a complaint while they are in custody. There are few communication channels for individuals being transferred from CBP to ICE or ORR. They have no Internet access and limited or no phone access, and are not provided with paper complaint forms. Those who have tried to navigate the complaint system have found it inefficient and difficult to use. Attorneys and parents who have used the system report no useful, if any, response.<sup>88</sup> Recently, human rights groups filed complaints on behalf of over 100 children who reported being mistreated in these facilities.<sup>89</sup> The agency is currently conducting an internal review but it is proving difficult to

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<sup>85</sup> Forced from Home, p. 22.

<sup>86</sup> See also Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 182 p. 69 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

<sup>87</sup> United Nations High Commissioner for Refugees (UNHCR). (2014, June). Findings and Recommendations Relating to the 2012 – 2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border, p. 35. Retrieved from [http://americanimmigrationcouncil.org/sites/default/files/UNHCR\\_UAC\\_Monitoring\\_Report\\_Final\\_June\\_2014.pdf](http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf).

<sup>88</sup> Women's Refugee Commission. (1999). It's Time for Customs and Border Patrol to Improve its Woefully Inadequate Complaint System, Retrieved from <http://www.womensrefugeecommission.org/component/content/article/55-programs/detention/1999-it-s-time-for-customs-and-border-patrol-to-improve-its-woefully-inadequate-complaint-system>.

<sup>89</sup> ACLU Border Litigation Project, Americans for Immigrant Justice, Esperanza Immigrant Rights Project, Florence Immigrant and Refugee Rights Project, & National Immigrant Justice Center. (2014, June 11). Complaint Regarding the Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection. Retrieved from <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

substantiate the information in the complaints because by the time the children were able to report what happened to them, the information was old.<sup>90</sup>

### *C. Detention in ORR facilities*

Unaccompanied children from non-contiguous countries and unaccompanied Mexican children who cannot be directly returned to Mexico under the criteria in the TVPRA are transferred to an ORR facility. ORR runs shelters designed to be an alternative form of detention more appropriate for children. The ORR shelters are intended to be facilities that appropriately care for children while adult sponsors are available to come get them. Unlike ICE adult or family detention, they are usually not penal-like and not designed to be punitive, but rather serve as a way to protect unaccompanied children until an appropriate adult is available to care for them.

#### *1. Types of facilities*

The Office of Refugee Resettlement has four different kinds of detention facilities to hold unaccompanied immigrant children. These facilities are different than state foster programs that house U.S. citizen children. ORR facilities are only for unaccompanied immigrant children. These facilities operate along a continuum of care from least restrictive settings to more penal like settings. From least to most restrictive, the types of facilities are: short-term and long-term foster care; shelters and group homes; therapeutic foster care and residential treatment centers; and staff-secure and secure facilities. The placement determinations for each child are made based on information regarding the child's best interests and security risk. The *Flores* agreement and the TVPRA of 2008 mandate that children be housed in the least restrictive setting possible, and the DCS continuum of care is reflective of this principle. DCS generally uses less restrictive facilities than the former INS used.<sup>91</sup>

***Foster care.*** The least restrictive custody placement for a child who has not been reunified is foster care with host families in local communities. Temporary (short-term) foster care is reserved primarily for children under the age of twelve, pregnant and parenting teens, and sibling groups. These children receive services through a DCS-funded care provider but live in private homes. Special needs children with disabilities, or medical or mental health concerns, may be placed in therapeutic foster care. Long-term foster care is available as a secondary placement (transfer from another facility) for children who have been or are likely to be in custody for extended periods of time, such as children for whom reunification is not a possibility and whose immigration cases are not likely to be resolved quickly, e.g., asylum seekers.

Foster care—both short-term and long-term—enables children in DCS custody to benefit from the services of a DCS program while residing in a community-based setting with a family. Children in short-term foster care typically receive services at a range of locations, including in the foster home, at the DCS program sites, and at counseling centers. Foster families are licensed according to the licensing regulations of the state in which they are located.

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<sup>90</sup> Office of the Inspector General, Department of Homeland Security. (2014, August 28). Oversight of Unaccompanied Alien Children. Retrieved from [http://www.oig.dhs.gov/assets/pr/2014/Sig\\_Mem\\_Over\\_Unac\\_Alien\\_Child090214.pdf](http://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf).

<sup>91</sup> Halfway Home, p. 17.

***Shelters and group homes.*** Shelters and group homes are the next least restrictive setting on the DCS continuum of care and custody. Children who cannot be released or placed in foster care but who do not need a higher level of supervision or services are placed in shelters or group homes. One common reason a child is placed in a shelter or group home rather than foster care is the lack of beds available in foster care. Shelters can vary widely in size. Group homes typically house fifteen or fewer children and tend to be less restrictive. This is the optimum model when children must be placed in shelter care. However, many shelters house a large number of children, up to 300 children, and have a more institutional feel as a result. In the large shelters, there tend to be more restrictive measures in place in order to maintain control. In 2011 and in 2014, the federal government did not have enough bed space in their shelters to house unaccompanied children in need. As such, they borrowed space from the U.S. Military and put children in repurposed buildings on military bases until the children could either be reunified or sent to a regular ORR facility. Although there were concerns that the children in these facilities did not enjoy all the benefits children in regular facilities did, such as know your rights presentations, the use of these facilities to house migrant children ceased after a few months.<sup>92</sup>

Conditions and practices in shelters and groups home vary by state and by the size and location of the program, and are subject to state regulations as well as national standards. Children generally sleep in dorm-style rooms with several children per room. In some cases, children can move into more private rooms as a reward for good behavior. Shelters generally have a kitchen, dining area and common living room area. Some of the shelters appeared to be overcrowded. Children at some facilities are able to wear their own clothing. At others, they are given uniform-like clothing such as jeans or shorts, and polo or t-shirt.

The level of security in these facilities is far more stringent than in foster care programs. In theory, children in shelters should have freedom of movement within the facility. However, they typically live and receive education and other services on-site, and are not free to leave the facility unaccompanied by staff. Facilities are locked and surrounded by fences. In some facilities, freedom of movement within the shelter is also limited, with children having to stay within sight of staff and not free to go in their bedrooms or outside at will. Many shelters and group homes are monitored by cameras 24 hours a day, and many of the children we spoke with complained of having no privacy, even when they wanted time alone to cry or think.

***Staff-secure facilities.*** Children who are deemed to be high risk are placed in staff-secure facilities. Many staff-secure facilities closely resemble or are not significantly different from juvenile correctional facilities and secure facilities. According to the DCS manual, staff-secure placement is designated for children who require close supervision but who do not need placement in a secure facility. The DCS manual provides a list of criteria to consider in assessing the appropriateness of a staff-secure placement. These criteria include inappropriate sexual behavior, disruptive acts such as destruction of property, and non-specific threats to commit a violent act that do not involve a significant risk to harm another person. In practice, children with an offender history that is not serious, children who are flight risks, and children who have displayed disruptive behavior in a shelter program, are considered for staff-secure placement. The DCS manual states that staff-secure facilities use staff supervision rather than architectural barriers, such as barred

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<sup>92</sup> Forced From Home, p. 16.

windows or locked doors to control the children. However, some staff-secure facilities do utilize architectural barriers such as bars, fences, and locked doors.

***Secure facilities.*** Secure facilities are the highest level of restrictiveness in the DCS placement continuum. The DCS manual considers secure placement to be appropriate for children (i) charged with or convicted of a crime or adjudicated as delinquent; (ii) who have committed or threatened acts of crime or violence while in DCS custody; (iii) who have engaged in unacceptably disruptive acts; (iv) who are a flight risk; or (v) who need extra security for their own protection. Secure facilities are similar to prisons, with children having no opportunity to move freely without a guard's supervision. The TVPRA of 2008 requires monthly reviews to determine whether or not a secure facility is appropriate for a child.

These facilities provide a wholly jail-like environment with little access to individualized or therapeutic services for the children held there. Secure facilities, and some staff-secure facilities, are built around an enforcement model and tend to focus on protection of the staff, rather than on the needs of the children. Secure facilities are usually located within larger juvenile correctional centers or separate facilities laid out like prisons in which children have little personal space, recreation opportunities, or freedom of movement. As in all facilities run by ORR, the child's ability to communicate with family members, either in the United States or in their home countries is extremely limited. Children are generally permitted a short phone call once or twice a week. Children are generally unable to visit with family while they are in these facilities.

## *2. Current concerns with ORR facilities*

As previously stated, the 2003 transfer of custody from INS to ORR's DCS program was a positive move towards better protections for unaccompanied children. However, the speed with which the DCS program was created and the drastic increase in the number of children apprehended made the development of a new program model based entirely on child welfare principles difficult. The former INS was resistant to hand over information and money to ORR and, as a result, the transfer faced many obstacles. Furthermore, ORR was not accustomed to implementing an operational program responsible for the actual care and custody of children; this has led to some obstacles in effective implementation.<sup>93</sup> While the situation has improved, vestiges of these past tensions remain.

Most children are much better off in the DCS program than they were under the INS. The DCS model is softer and has added some child welfare components, including social workers and case workers at the field level. ORR has dramatically increased the use of foster care, added the staff-secure and residential treatment center options, and ended contracts and agreements with most of the secure facilities used by the former INS. Yet the incomplete remodeling of the program perpetuated the old INS model that viewed children as a security or flight risk, confusing the role of prosecutor and caretaker. This has affected the location of facilities and encouraged institutionalization, making facilities more impersonal and prison-like.

***Location of facilities.*** As previously stated, if CBP deems it necessary to continue the detention of a child, it is ICE's responsibility to transfer that child to an ORR or, in rare circumstances, an

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<sup>93</sup> Halfway Home, p. 4.

ICE facility.<sup>94</sup> To enable timely and less expensive transfer of children, DHS has pressured ORR to place DCS facilities in border areas. As a result, many ORR facilities are located in rural areas that lack access to adequate medical, mental health care, and legal services. According to the DCS manual, DCS should consider proximity to point of referral from DHS, as well as the needs of the child when determining placement.<sup>95</sup> Because many rural areas near the border lack services, this creates obvious tensions between convenience and care. Thus, in making placement decisions, DCS has allowed DHS interests to take precedence over the best interests of the child.

***Trend towards institutionalization.*** Following the transfer of care and custody of children to ORR, the government took steps to deinstitutionalize the INS model. The agency discontinued agreements with 31 secure juvenile detention facilities, began placing some children in foster care, increased reunification efforts, and took steps to introduce and implement social work principles by hiring social workers at both headquarters and in the field. However, much of the fundamental structure of the program has remained the same. While most children are released or placed in foster care or shelters, over time there has been a move toward re-institutionalization and in some cases criminalization, despite the fact that small, homelike settings are better equipped to meet the physical and emotional needs of children. Some facilities have become too large to adequately serve children's needs. Both care and safety are compromised by this reliance on large facilities, as it is difficult for staff to provide children the individualized attention necessary to address their high levels of trauma and vulnerability.

This trend toward the use of large facilities may be due in part to the rapid increase in the number of unaccompanied children crossing the border, and to DCS's difficulty in finding enough facilities to house children. Larger facilities necessarily rely on greater institutionalization as a means of maintaining control. They have a higher staff to child ratio and are less able to adapt services to the unique needs of individual children, particularly a child who may speak an indigenous language, or may have been a victim of sexual assault or is pregnant. Even lower security shelters have also started adding more security, including more cameras and bars on doors and windows because it is difficult for staff to monitor the large numbers of children housed in them. Due to a lack of mental health services available in less restrictive facilities, some children are inappropriately placed in secure facilities.

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<sup>94</sup> TVPRA of 2008.

<sup>95</sup> Halfway Home, p. 14.

## VI. Release from detention

### A. Overview

Once a child is determined eligible for placement in an ORR facility, the federal government makes a determination whether or not that child can be reunified with an adult sponsor in the United States for the pendency of his immigration court case. As of 2014, approximately 90% of the children in ORR custody were eventually released to an adult sponsor in the United States.<sup>96</sup> A sponsor for a child may be a parent, legal guardian, family member, or other responsible adult willing to care for the child. Of the children who are eventually reunified, 50% go to live with a parent.<sup>97</sup>

The dramatic increase of children without a corresponding increase of funds to run the program has forced ORR to streamline its reunification procedures. This has led to a reduction in the types and quantity of services it is able to offer children, particularly in the review and follow-up of any placement decision following release from detention.

Due to these dramatically expedited reunification procedures, the amount of time a child will spend in ORR custody has decreased dramatically since 2011. Previously, children spent close to 60 or 90 days in custody.<sup>98</sup> In 2014, the average length of stay for an unaccompanied child who is detained in an ORR facility is less than 30 days before they are repatriated or released to a sponsor.<sup>99</sup> For children released to a parent or guardian, reunification normally happens in less than 7 days. The sections below provide an overview of procedures for children released to sponsors or others in the United States. For more information on procedures for children who are released for repatriation, see chapters 7 and 12.

### B. Concerns with current release procedures

**Screening of sponsors.** Many of these changes have resulted in realistic concerns that the procedures now lack adequate screening and safeguards to ensure that sponsors can appropriately care for these children. In the worst case, the lack of safeguards leave these children more vulnerable to abuse or exploitation. Some changes made during times of heavy migration of unaccompanied children, for example, parents who are able to show proof of their relationship to

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<sup>96</sup> Administration for Children and Families, Office of Refugee Resettlement. (2014, May). Fact Sheet, U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program. Retrieved from [https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied\\_childrens\\_services\\_fact\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_fact_sheet.pdf).

<sup>97</sup> Information presented orally by the Office of Refugee Resettlement at the May 22, 2014 meeting of the Inter-Agency working group on unaccompanied and separated children held at the U.S. Conference of Catholic Bishops.

<sup>98</sup> Bryne, O., & Miller, E. (2012, March). *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers*, p. 16. Retrieved from <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

<sup>99</sup> Administration for Children and Families, Office of Refugee Resettlement. (2014, May). Fact Sheet, U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program. Retrieved from [https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied\\_childrens\\_services\\_fact\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_fact_sheet.pdf).

the child for a short time were no longer required to submit to a fingerprint check that could reveal a criminal history indicating that the adult, may endanger a child. Child welfare experts assert that in no other context would a child be released to an adult without this assurance, even if the adult were a parent. As discussed below, this very limited screening can lead to children being mistreated by their sponsors and in some cases re-detained or placed in county foster care.

***Insufficient access to support services.*** As the amount of time children spend in ORR facilities decreases, so does their limited access to mental health, medical, and legal services. Children in ORR care may have had exposure to multi-layered trauma via experiences in their home country that compelled their migration, as well as violence encountered during their journey to the United States. Some children are pregnant, and others have acute mental illness. They have limited access to services while in government care, and even less assistance once released to the community. Long separations, challenging cultural adjustments, and the children's past experiences place significant stress on the family or sponsor relationship. Families need support to navigate complex systems to ensure long-term stability and integration. Since ORR has implemented these changes to their reunification system, there has been no systematic review of the new procedures to ensure they are adequate to protect this vulnerable population. Moreover, there is no mechanism for ORR to track children once they leave detention to ensure they do not fall through the cracks.

#### *Maria's Story*

*Maria, a 16-year old girl from Guatemala was initially detained in DCS custody. She was later released to her adult sister's custody. No home study of the sister was ever conducted. Her sister forced her to work as a waitress and a stripper in a local bar. Three months after her release from DCS, local police raided the bar, identified her a trafficking victim and returned her to DCS.<sup>100</sup>*

Few children who are referred for post-release follow up services, such as home visits with social workers to ensure the children are adequately cared for and receiving the support they need, receive those services. In 2013, there were 300 children on a wait list for post release services. These were children who were determined eligible for these services, but due to ORR's lack of funded capacity, were released without them and placed on a waitlist. In early 2014, children waited for approximately six weeks or more for these services. This is a long timeframe during which tenuous living situations can break down.

## **VII. Unaccompanied Refugee Minor Program**

Children in ORR custody who are never reunited with a sponsor, and who have received legal status and will remain in the country, are transferred to the Unaccompanied Refugee Minor Program (URM) within ORR. The URM program has the legal responsibility to ensure, under state law, that unaccompanied child refugees and entrants receive the full range of assistance, care, and services available to foster children in their state. It functions akin to a federal foster care system for refugee youth, victims of human trafficking, and other unaccompanied children who have secure legal immigration status.

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<sup>100</sup> Halfway Home, p. 19.

The URM foster care program includes a comprehensive set of services and financial supports designed to assist youth through their transition process in the United States. These services provide for them while they obtain an education, and prepare them for eventual independence. These services are specially geared towards the needs of foreign-born youth, with a focus on blending their cultural identity with their new American environment. Services provided include: indirect financial support through the provision of housing, food, clothing and other necessities; educational supports; medical, mental health, and legal services; intensive case management; cultural and recreation activities; and mentoring and life skills training. Children are eligible to enter the program before age 18 and can remain with a host family until age 20 or 23, depending on the child welfare guidelines of their state.<sup>101</sup>

### **VIII. Conclusion**

The situation of child migrants in the United States has advanced in some areas, specifically in the custody of unaccompanied children; however, it has also deteriorated in other ways, such as through the expanded use of overly-restrictive family detention facilities. The recent increase in the numbers of children traveling alone and with family members has put a strain on the U.S. government, leading to heightened attention to the situation at the U.S.-Mexico border and to modification of existing policies. Even if migration flows decrease, advocates and the public should continue to shine a spotlight on detention practices, and the government must improve transparency in its handling of migrant children. The U.S. government should shift toward employing greater use of alternatives to detention, serving as model for the rest of the region in accordance with the rights of migrant children under domestic and international law.

In late 2014, the Inter-American Court for Human Rights issued an advisory opinion on migrant children and international protection needs.<sup>102</sup> It reviews states' obligations to ensure protections for migrant children when adopting or implementing domestic laws. The opinion is clear that states must take a rights-based approach and consider the best interests and protection of a child over any concerns regarding nationality or migrant status. The United States has taken steps toward this end, but its recent responses to the influx of child migrants could roll back positive advancements. We must remain vigilant this does not occur.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

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<sup>101</sup> USCCB Migration and Refugee Services & Lutheran Immigration and Refugee Service. (2011, March). Foster Care for Unaccompanied Refugee & Immigrant Children, Frequently Asked Questions. Retrieved from <http://lirs.org/wp-content/uploads/2012/05/URM-FAQ-JOINT-LIRS-USCCB-UPDATED-3-2011.pdf>.

<sup>102</sup> See Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (2014, August 19). Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

## Chapter 10      Immigration Remedies and Procedural Rights of Migrant Children and Adolescents

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### **I. Introduction**

The central tenet of the United Nations Convention on the Rights of the Child (CRC) is that the “best interests” of the child must be a primary consideration in all action and decisions affecting children. The best interests of the child is also a key principle in the U.S. child welfare system and in state child welfare laws. However, the United States has not formally extended this standard to children in the immigration system. The lack of a binding best interests of the child principle in U.S. immigration law is harmful to children across all areas of the law. This chapter focuses on two of those areas: (1) the forms of immigration relief available to children and (2) the procedures in place for children in the U.S. immigration system. Both fall short of international standards and moral obligations to treat every child as our own.

The chapter reviews the range of avenues to regular immigration status available to children who migrate to the United States. It outlines the numerous substantive and procedural challenges that Central American and Mexican children in particular face to obtaining such status. To begin with, children can access most of the available immigration remedies only upon arrival to a U.S. border or entry into the United States, which poses a significant obstacle given the barriers children face in obtaining a valid visa and the dangers of the migration route for those who attempt to enter without a visa. Even when children reach the U.S. border and are able to apply for relief, and adjudicators apply legal standards correctly, many children remain unprotected. Nearly all forms of immigration relief—with the exception of Special Immigrant Juvenile Status (SIJS)—do not incorporate, or even consider, the best interests of the child when deciding whether to grant immigration relief, contravening international norms. Moreover, a major pitfall in the immigration system is the lack of appointed legal counsel and guardians for children. Advocates and academics alike have called for new immigration remedies for children and improved procedures that are based on the CRC’s best interests of the child principle.<sup>1</sup> This chapter contributes to that discussion and concludes by recommending how the United States can and should better protect migrant children from Central America and Mexico who seek safety and stability within its borders.

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<sup>1</sup> See Center for Gender & Refugee Studies and Kids in Need of Defense. (2014, February). A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System. Retrieved from <http://cgrs.uchastings.edu/our-work/treacherous-journey> (hereinafter “A Treacherous Journey”); UNHCR. (2014, March). Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection. Retrieved from <http://unhcrwashington.org/children> (hereinafter “Children on the Run”); Appleseed, Cavendish, B., & Cortazar, M. (2011). Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors. Retrieved from <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>; Women's Refugee Commission. (2012, October). Forced From Home: The Lost Boys and Girls of Central America. Retrieved from <http://www.womensrefugeecommission.org/component/content/article/2-uncategorised/2057-forced-from-home-the-lost-boys-and-girls-of-central-america-background-and-report>.

## **II. Limited immigration options for Central American and Mexican children who are outside the United States**

Central American and Mexican children flee their home countries for a number of reasons, including violence in the home—such as child abuse or incest—or violence at the hands of organized criminal syndicates. Children also seek to reunify with parents in the United States, and escape deep structural poverty that plagues their home countries and is accompanied by social exclusion, and a lack of basic opportunities, including education.<sup>2</sup> A growing number of child migrants (and adults) from Central America migrate south to other countries in the region and South America; however, a large number also migrate north to Mexico and the United States.<sup>3</sup>

Children who leave an intolerable situation and seek protection in the United States have few options for gaining entry through regular channels. Most forms of immigration relief require the child to arrive to the U.S. border or enter the United States before seeking protection. Obtaining a visa for travel is highly unlikely, so children are forced to travel through irregular means. Due to the challenges and dangers children experience on the migration route, as well as recent efforts by the Northern Triangle countries and Mexico to stop children and other migrants from leaving Central America or traveling through Mexico, only a fraction of migrant children in need of protection reach the United States and are able to seek relief there.<sup>4</sup>

### *A. Challenges to obtaining temporary or permanent residence visas to the United States*

There are very few options for Central American and Mexican children to travel lawfully to the United States, whether for a temporary period or permanently. Temporary visas such as tourist, student, and employment-based visas are available, but children—particularly those who have been left behind by their parents and are living in unstable situations—are unlikely to qualify for them. To qualify for a tourist visa, for example, an individual must show that he or she is visiting the United States for a limited period of time, for pleasure, and has the financial means to return to his or her home country.<sup>5</sup> Very few, if any, children are able to meet this standard, especially if they do not have the help of their parents or family, or if they come from a poor family even if they have parental support.<sup>6</sup>

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<sup>2</sup> See chapters 2-7 for an in-depth analysis of root causes of migration in Honduras, El Salvador, Guatemala, and Mexico; chapter 11 for a discussion of the importance of family reunification in meeting children's needs; and chapter 1 for a description of the underlying reasons for Central American and Mexican children's decisions to migrate to the United States, as reported to UNHCR, and the numbers of children arriving.

<sup>3</sup> *Children on the Run*, p. 15 (the report talks about the 435% increase in Guatemalans, Salvadorans, and Hondurans seeking asylum in other countries in the region).

<sup>4</sup> No statistics are available on the number of children prevented from leaving their countries by domestic law enforcement. Restricting freedom of movement and the right to migrate from within the sending countries is a relatively new practice. Mexico's rate of deportation of child migrants is available and alarming. In 2011, Mexico deported 70% of the 4160 Central American migrant children it apprehended (2915 children). In 2012 Mexico deported 98% of the 6107 Central American migrant children apprehended (5966 children). In 2013 Mexico deported 84% of the 9893 Central American children apprehended (8350 children), and in 2014 thus far 78% of the 19,000 Central American children apprehended were deported (15,000 children). See Graphic Number 4, chapter 6 on Southern Mexico; and chapter 6 generally for more information about these practices.

<sup>5</sup> See INA §101(a)(15)(B), 8 U.S.C.A. §1101(a)(15)(B) (West).

<sup>6</sup> Likewise, many children are unlikely to qualify for a student visa. To obtain a student visa, a child must apply to and be accepted by a school approved by the U.S. government. The school must be a university or college, high

The most common way for Central American and Mexican children to enter and permanently remain in the United States through regular channels is through the family immigration system, wherein certain family members can petition for them to receive lawful permanent residency. There are various family visa categories that a child may fall into, depending on whether the petitioning family member is a U.S. citizen parent, a lawful permanent resident parent (LPR or “green card” holder), or a U.S. citizen sibling.<sup>7</sup> No matter the category, the family member requesting that the child join him or her in the United States must first file a “visa petition” with the appropriate immigration authorities. Once the visa petition is approved, the child can then apply for permanent residency from a U.S. consulate. Both of these steps occur *before* traveling to the United States.

Children under the age of 21<sup>8</sup> of U.S. citizens can file a visa petition and apply for permanent residency at the same time. They are considered “immediate relatives” and are not subject to any waiting period beyond the normal processing time (usually ranging from three months to a year).<sup>9</sup> The children of LPR parents, however, must first wait for their visa to become “current” or available after the initial visa petition is filed before they can apply for permanent residency because there is a limit on the number of visas that can be given to family members of LPRs each year. After the visa is available, the second step of applying for permanent residency can take several months. The wait times for the visa to become available can vary significantly depending on the type of family relationship and the country of origin of the applicant. By way of example, under current wait times children from Mexico with LPR parents petitioning for them have to wait a minimum of three years for a visa to become available, whereas children from Mexico with U.S. citizen brothers or sisters petitioning for them will have to wait upwards of 17 years. For more examples, see Table 1 on family visa category wait times in chapter 11, exploring family separation caused by U.S. immigration policies. The long wait times impose a significant burden on families and are often unrealistic in light of children’s need for immediate care and support during their youth.

In addition to the long wait times for certain family visa categories, many—if not the majority—of child migrants arriving in the United States do not qualify for a family visa because (1) they do not have parents living in the United States who can petition for them, or (2) their parents in the United States lack the required immigration status to do so. Undocumented parents (i.e., parents

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school, private elementary school, seminary, conservatory, or another academic program. Children under the age of 18 are unlikely to receive offers to study at a private elementary school or high school in the United States in order to qualify for a student visa, and even if they do receive such an offer, the cost of tuition and application fee for the visa can be prohibitive and unattainable for many Central American and Mexican families. The cost for private school education in the United States varies significantly, but usually ranges in the thousands of dollars each year. The current fees associated with an F-1 student visa total at least \$360. See U.S. Department of State. Student Visa. Retrieved from <http://travel.state.gov/content/visas/english/study-exchange/student.html#overview>.

<sup>7</sup> U.S. citizens over the age of 21 can petition for their siblings, although the wait times can be very long. INA § 203(a)(4), 8 U.S.C.A. § 1153(a)(4) (West).

<sup>8</sup> U.S. immigration law defines a child as an unmarried person under the age of 21 who is either a natural child, adopted child, or a stepchild of the individual(s) claiming the parent-child relationship. See INA § 101(b)(1), 8 U.S.C.A. § 1101(b) (West). The purpose of the definition of a child under immigration law is to determine which children can benefit from a parent or stepparent’s immigration status. Interestingly, the definition of an “unaccompanied alien child” requires that the individual be under the age of 18, not 21.

<sup>9</sup> 8 U.S.C.A. § 1151(b)(2)(A)(i) (West).

without any regular status in the United States) have no legal right to bring their children to the United States. Lack of opportunities for family reunification through regular migration channels is a problem that dates back to the Immigration Reform and Control Act of 1986.<sup>10</sup> Such policies keep families apart and encourage migration through irregular means, as explained in greater detail in chapter 11.

Some adults from El Salvador, Honduras, and Nicaragua may have received an immigration benefit called Temporary Protected Status (TPS), a temporary form of relief designated for nationals of certain countries facing extreme instability, explained in greater detail in section III.E.4, *infra*.<sup>11</sup> However, these adults with TPS have no right to petition for visas or status for family members.<sup>12</sup>

Apart from family, employment, and tourism, one of the few remaining avenues of immigrating to the United States is through the refugee protection program. Although individuals from Central America and Mexico can apply for asylum once they are at the border or inside the United States, they cannot currently seek such protection while they still in their home countries. The United States has an overseas refugee determination process through which it designates fixed numbers of slots for individuals in certain regions and countries to seek refugee status before they have left their home country or from a neighboring country, but it has not historically not designated refugee slots to individuals from Central America.<sup>13</sup> In response to the recent, significant increase in the numbers of unaccompanied children arriving in the United States, the U.S. government has decided to put into place an in-country refugee processing system in Honduras, and possibly other Central American countries.<sup>14</sup> In-country processing would benefit children who qualify for the

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<sup>10</sup> The legalization program put into place under the 1986 Immigration Reform and Control Act did not provide an avenue for legalization of immediate family members of individuals who qualified for the program, if the family members did not themselves meet the requirements. This led to mixed status amongst family members, which has become a significant problem in the U.S. When the U.S. finally put a program into place for those immediate family members who did not qualify under the 1986 Act to regularize their status huge backlogs ensued. Both of these problems - lack of avenues for family reunification and major backlogs within those family reunification options that do exist—persist today. See Cooper, B., & O-Neil, K. (2005, August). Lessons from the Immigration Reform and Control Act of 1986, Policy Brief. Retrieved from <http://migrationpolicy.org/research/lessons-immigration-reform-and-control-act-1986>. For more information, see chapter 11, examining in detail how U.S immigration policies lead to family separation.

<sup>11</sup> The Secretary of Homeland Security may designate a foreign country for TPS because of conditions in the country that make return unsafe, such as armed conflict, an epidemic, an earthquake or flood or environmental disaster. INA § 244(b), 8 U.S.C.A. § 1254a(b) (West). A country must be designated for TPS by the Secretary of Homeland Security. An applicant for TPS must demonstrate that she was in the United States on the date her country was designated for TPS and has been residing in the United States since that date, and she must have registered before the deadline. INA § 244(c)(1)(A), 8 U.S.C.A. § 1254a(c)(1)(A) (West). Honduras was designated for TPS in 2001 and El Salvador and Nicaragua were designated in 1999.

<sup>12</sup> See section III.E.4, *supra*, and Chapter 13 on regional and bilateral agreements for more information on TPS and its limitations.

<sup>13</sup> In 2012, the majority of refugees admitted to the United States through the overseas refugee program were from the Near East, South Asia, East Asia, Africa, and to a lesser extent Europe. The only refugees admitted from Latin America and the Caribbean came from Colombia, Cuba, and Venezuela; the overwhelming majority of those admitted were from Cuba. See U.S. Department of State. (2013, February 28). FY12 Refugee Admission Statistics. Retrieved from <http://www.state.gov/j/prm/releases/statistics/206319.htm>.

<sup>14</sup> See Robles, F., & Shear, M. (2014, July 24). U.S. Considering Refugee Status for Hondurans. *New York Times*. Retrieved from [http://www.nytimes.com/2014/07/25/world/americas/administration-weighs-plan-to-move-processing-of-youths-seeking-entry-to-honduras.html?\\_r=0](http://www.nytimes.com/2014/07/25/world/americas/administration-weighs-plan-to-move-processing-of-youths-seeking-entry-to-honduras.html?_r=0).

program by granting them protection and a right to immigrate to the United States. This would provide a regular channel for migration and eliminate their need to take the perilous unauthorized journey north. However, in-country processing also raises concerns. For example, children denied refugee status could be barred from seeking asylum from the United States should they later make it to the U.S. border and apply, and children could be forced to remain in dangerous situations while they wait for their refugee status claims to be heard.<sup>15</sup>

*B. Dangers children and adolescents encounter in transit*

With few options for legal entry to the United States, and due to the structural factors that currently drive migration in the region,<sup>16</sup> Central American and Mexican children seeking to reach the United States are forced to migrate through irregular channels on their own or with a smuggler. Domestic officials, charged with reducing the flow of migration, restrict children from leaving their home countries in the first place.<sup>17</sup> For those who get through, and as also documented in chapter 7 regarding Mexico's Northern Border, the migration journey is fraught with danger and exploitation. Tragically, some children die en route due to injury or violence, and some children are kidnapped and never arrive at their destination. Others suffer physical and sexual abuse, and still others are injured and forced to return to their home countries with a permanent disability. Migration officials also apprehend and deport many children in the countries through which they transit.<sup>18</sup> Regardless of the specific dangers a child encounters on the migration route, one thing is clear: children migrating through irregular means face significant obstacles to reaching the United States. These dangers include:

***La Bestia (The Beast).*** Because of the lack of legal avenues to travel through Mexico and enter the United States, and because Mexican authorities have increased the number of migration checkpoints throughout the country to stop migrants from passing through, many Central American and Mexican migrant children and adults seek to traverse Mexico on top of freight trains. The freight train—called *La Bestia*—harms, maims, and kills migrant riders with regularity. Accidents are frequent, and “significant numbers of migrants [including children] have lost one or both legs to what is sometimes referred to as ‘the death train,’ while many others have been killed.”<sup>19</sup> In August 2014, Mexico announced its intention to increase the speed of *La Bestia* in order to discourage migrants from riding it; however, given the lack of alternatives for many

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<sup>15</sup> See Frelick, B. (2014, August 14). Are Central American Kids the New Boat People? *Politico*. Retrieved from <http://www.hrw.org/news/2014/08/14/are-central-american-kids-new-boat-people> (warning that in-country refugee processing in Haiti and the Orderly Departure Program in Vietnam were highly flawed, for example, because they had long delays and were used to justify U.S. interdiction and summary return of asylum seekers.).

<sup>16</sup> See chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico for more information on these structural causes; and chapter 1 for a description of the underlying reasons for Central American and Mexican children's decisions to migrate to the United States, as reported to UNHCR.

<sup>17</sup> Little public information is available about who is involved in such efforts and how broad the efforts are. However, they appear to involve inclusion of military police in “halting Central American migrants at their origin.” See Stargardter, G. (2014, August 12). Brutality and ‘The Beast’: why child migration to U.S. is slowing down. Reuters. Retrieved from <http://www.reuters.com/article/2014/08/12/us-usa-immigration-decline-insight-idUSKBN0GC09G20140812>.

<sup>18</sup> See chapter 6 for more information on the practices of Mexico, in particular, as a transit country.

<sup>19</sup> Catholic Relief Services. (2010, January). Child Migration: The Detention and Repatriation of Unaccompanied Central American Children from Mexico, p. 32. Retrieved from <http://www.crsprogramquality.org/storage/pubs/peacebuilding/LACRO%20Migration-final.pdf>.

migrants desperate to leave their home countries, it seems likely that this will only increase the number of injuries and deaths rather than reduce the numbers who ride it.<sup>20</sup>

**Violence by coyotes (human smugglers), gangs, organized crime syndicates.** According to a 2010 study conducted by Catholic Relief Services, about 29% of unaccompanied children interviewed reported experiencing some form of abuse while in transit to the United States.<sup>21</sup> Gangs and other organized crime syndicates, as well as some coyotes, exploit the extreme vulnerability of children traveling without adults. These groups have been reported to kidnap, abuse, rape, and mutilate children, and hold them for ransom or subject them to forced labor. Mexican gangs, in particular, “have a history of kidnapping migrants and holding them for ransom, or forcing them to work for drug cartels or on marijuana farms.”<sup>22</sup> A 2009 report by the Mexican Human Rights Commission documented a staggering 9,758 victims of kidnapping between September 2008 and February 2009, “including numerous cases involving minors.”<sup>23</sup>

**Special dangers for girls.** Migrant girls face unique dangers during their migration journey. Girls interviewed by the United Nations High Commissioner for Refugees and the Women’s Refugee Commission reported being under constant threat of sexual assault while on the move. Girls suffer rape by coyotes, gang members or members of other criminal groups, other migrants, and even corrupt migration authorities or police officers. Rape is so common that “[i]t is a widely held view—shared by local and international NGOs and health professionals working with migrant women—that as many as six in 10 migrant women and girls are raped.”<sup>24</sup> Some girls take birth control pills during the migration journey to avoid getting pregnant in case of rape.<sup>25</sup>

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<sup>20</sup> Pérez Silva, C. (2014, August 25). Aumentarán velocidad a ‘La Bestia’ para evitar que migrantes se suban. *La Jornada*. Retrieved from <http://www.jornada.unam.mx/ultimas/2014/08/25/aumentan-velocidad-a-la-bestia-para-evitar-que-migrantes-se-suban-8773.html>.

<sup>21</sup> Catholic Relief Services. (2010, January). The Detention and Repatriation of Unaccompanied Central American Children from Mexico, p. 33. Retrieved from: <http://www.crsprogramquality.org/storage/pubs/peacebuilding/LACRO%20Migration-final.pdf>.

<sup>22</sup> Kids In Need of Defense. (2013, February). The Time is Now: Understanding and Addressing the Protection of Immigrant Children Who Come Alone to the United States, p. 25. Retrieved from [http://www.supportkind.org/joomlatools-files/docman-files/TimeIsNow\\_KIND\\_Feb\\_2013.pdf](http://www.supportkind.org/joomlatools-files/docman-files/TimeIsNow_KIND_Feb_2013.pdf).

<sup>23</sup> Child Migration, The Detention and Repatriation of Unaccompanied Central American Children from Mexico, p. 34.

<sup>24</sup> Amnesty International. (2010, April). Invisible Victims: Migrants on the Move in Mexico, p. 15. Retrieved from <http://www.amnestyusa.org/sites/default/files/amr410142010eng.pdf>.

<sup>25</sup> See Joffe-Block, J., & Fronteras. (2014, March 31). Women crossing the U.S. border face sexual assault with little protection. *PBS News Hour*. Retrieved from <http://www.pbs.org/newshour/updates/facing-risk-rape-migrant-women-prepare-birth-control/>.

Central American migrant girls also fall prey to human traffickers<sup>26</sup> who force them to work in brothels and bars, especially in Chiapas, Mexico and in Guatemala.<sup>27</sup> ECPAT International,<sup>28</sup> a global network dedicated to combating child trafficking and pornography, reports that girls mainly from El Salvador, Honduras, and Nicaragua, and as young as eight years old, are sold in Guatemala for sexual exploitation.<sup>29</sup>

***Other life-threatening conditions.*** Children migrating to the United States through irregular channels also face extreme environmental dangers: scorching heat and sun, lack of water and food, and the treacherous currents of the Rio Grande River. Many migrants die each year attempting to navigate these life-threatening conditions. According to a recent report issued by the Women’s Refugee Commission, some children who survived the journey through Mexico and reached the United States border reported being abandoned by guides without food or water. “Some wandered for days until [U.S.] Border Patrol found them. Others describe making it to the Rio Grande River and watching others drown as they struggled against the current.”<sup>30</sup>

***Corruption among Mexican authorities.*** Child migrants traveling through Mexico also contend with corruption among Mexican authorities, including migration authorities and security forces that have ties to organized crime syndicates. For example, federal police forces have been known to extort migrants with threats of placing them in detention, and sometimes even rob migrants outright.<sup>31</sup> Officials from the National Migration Institute (*Instituto Nacional de Migración* or INM), the main immigration enforcement agency in Mexico, have also turned over detained migrants to criminal networks or gangs who then hold them hostage for a ransom.<sup>32</sup>

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<sup>26</sup> Human smugglers or coyotes and human traffickers are not the same. According to the Department of State, the “vast majority of people who are assisted in illegally entering the United States are smuggled, rather than trafficked.” Unlike human smuggling, “which is often a criminal commercial transaction between two willing parties who go their separate ways once their business is complete, trafficking specifically targets the trafficked person as an object of criminal exploitation. The purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim. It follows that fraud, force, or coercion all plays a major role in trafficking” and the victim is not free to leave after crossing the border. Some situations that start out as human smuggling turn into human trafficking. See U.S. Department of State. (2006, January 1). Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006. Retrieved from <http://www.state.gov/m/ds/hstcenter/90434.htm>.

<sup>27</sup> United Nations Office on Drugs and Crime. Trafficking of Women and Girls within Central America. Retrieved from [http://www.unodc.org/documents/toc/Reports/TOCTASouthAmerica/English/TOCTA\\_CACaribb\\_trafficking\\_wom\\_engirls\\_within\\_CAmerica.pdf](http://www.unodc.org/documents/toc/Reports/TOCTASouthAmerica/English/TOCTA_CACaribb_trafficking_wom_engirls_within_CAmerica.pdf).

<sup>28</sup> ECPAT stands for End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes, but the organization prefers to be referred to as ECPAT.

<sup>29</sup> United Nations Office on Drugs and Crime, Trafficking of Women and Girls within Central America.

<sup>30</sup> Forced From Home: The Lost Boys and Girls of Central America, p. 8.

<sup>31</sup> See Isacson, A., Meyer, M., & Morales, G. (2014, June). Mexico’s Other Border: Security, Migration, and the Humanitarian Crisis at the Line with Central America. Retrieved from <http://www.wola.org/files/mxgt/report/>.

<sup>32</sup> See Fox, E. (2013, January 9). Figures Show Corruption Rife in Mexico’s Migration Agency. Retrieved from <http://www.insightcrime.org/news-briefs/figures-corruption-rife-under-calderon-mexico-migration-agency>; see also chapter 6 on Southern Mexico for more details.

*C. Challenges upon arrival at the U.S. border, including deportation*

Children who succeed in arriving to the U.S. border face harsh treatment upon arrival, and additional obstacles to seeking regular status. In the name of national security, the border is militarized, which creates a law enforcement setting utterly inappropriate for children. Children at the border encounter armed border patrol officials and military equipment such as watchtowers, tanks, and helicopters, and are detained in border patrol stations that lack beds and blankets and are otherwise not equipped to hold children. The growing militarization of the border and the abuses children face from U.S. border patrol officials are discussed in detail in chapter 9, exploring treatment of unaccompanied migrant children at the U.S.-Mexico border.

As explained in chapter 9 on U.S. border and detention policies and practices, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) codified the existing practice of treating Mexican and Central American children apprehended by border patrol differently. Children from non-contiguous countries (e.g., Guatemala, El Salvador, and Honduras), have an opportunity to seek immigration relief in the United States. As a result, thousands of Mexican children, making up the vast majority of those seeking entry to the United States, are returned directly to Mexico from the border each year without the opportunity to pursue relief opportunities.<sup>33</sup> In contrast, by law, only certain narrow categories of children from contiguous countries (e.g., Mexico and Canada), are given an opportunity to seek legal relief. However, opportunities for non-contiguous country children are now at risk due to pressure from anti-immigrant sentiments. For more information on differential screening procedures and new developments, see chapter 9.

**III. Inadequate forms of immigration relief available to children from Central America and Mexico**

The United States offers a range of immigration benefits to adults and children alike as well as certain forms of relief that are only intended for children. While some of these forms of relief provide important protection and benefits to immigrant children, there are numerous challenges accessing these forms of relief for Central American and Mexican children who have come to the United States to seek safe haven, reunite with their families, access better opportunities, or for a combination of reasons. Additionally, a consistent feature of these forms of relief—with the exception of SIJS—is the complete lack of consideration of the best interests of the child. This lack of consideration is inconsistent with international norms, and directly affects whether a child is able to establish that she qualifies for immigration relief. Her best interests should inform her eligibility for legal relief, e.g., by proving hardship or torture would result from return; under current U.S. law, however, they largely do not.

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<sup>33</sup> The U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) reports that out of 24,668 UAC in custody in FY 2013 only 3% (740) were Mexican. Meanwhile, CBP reports that in FY 2013 17,240 Mexican UAC were apprehended by U.S. Border Patrol in 2013. This means that only 4.29% of Mexican children were not repatriated from the border, and that 95.71% were. *See A Treacherous Journey*, p. 49; *see also* chapter 1 by UNHCR, *supra* (citing additional statistics for FY 2014).

A. *Family immigration system for children who are already in the United States*

As noted in section II.A above, one potential means of obtaining regular status in the United States is through the family immigration system. In developing the current system of quotas and preferences for family visas several decades ago, the U.S. Congress had family reunification as its foremost consideration, particularly in keeping the families of U.S. citizens and LPRs united.<sup>34</sup> Although some children with family members who hold specific forms of lawful immigration status may eventually be able to reunite, current wait times can be inordinately long, frustrating the purpose of family unity. For detailed figures on wait times, see section II.A, *supra* and chapter 11 on family separation.

The wait time for children of LPRs from Mexico and Central America to immigrate to the United States is approximately two to three years.<sup>35</sup> The wait time for siblings of U.S. citizens can be as long as 13 to 18 years before a visa becomes available, and it is only then the children (by then almost certainly an adult) can complete the paperwork to obtain permanent residency.<sup>36</sup> If a child is in the United States at the time the petition is filed on his or her behalf, the child may remain in the country while his or her visa is pending; however, having a pending visa does not give the child a legal right to reside in the country and thus he or she remains subject to deportation at any time.

Some forms of immigration relief, such as asylum and certain types of employment-based visas allow a parent to confer status and bring his or her child to the United States.<sup>37</sup> Of course, in order for children to benefit from this, they must have parents who are in the United States and hold one of these forms of lawful immigration status. However, the family members of many Central American and Mexican children in the United States do not have the requisite legal status, making reunification through these means unattainable. Moreover, not all forms of relief allow parents to bring their children to the United States to join them. As noted, nationals of El Salvador, Honduras, and Nicaragua who have received TPS are not eligible to confer status to their children.

Given the difficulties of obtaining lawful immigration status, it is common to have mixed status families in which some family members have lawful status and others do not. This leaves many families at risk of separation if a family member is put in removal proceedings, which may violate human rights norms on a child's best interests and right to family, as discussed in more detail in chapter 11.<sup>38</sup>

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<sup>34</sup> See Harvard Law Review Association. (1983). Developments in the Law – Immigration Policy and the Rights of Aliens. *Harvard Law Review*. 96, 1286, p. 1351 (citing legislative history); see also *Fiallo v. Bell*, 430 U.S. 787, 795, 811 (1977) (stating that U.S. Congress' main concern in enacting the immigration laws has been "keeping families of United States citizens and immigrants united").

<sup>35</sup> See U.S. Department of State. (2014, July). Visa Bulletin for July 2014. Retrieved from <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-july-2014.html>.

<sup>36</sup> U.S. Department of State. Visa Bulletin for July 2014.

<sup>37</sup> See, e.g., 8 U.S.C. § 1158(b)(3) (asylees); 8 C.F.R. § 214.2(3) (treaty investors); 8 C.F.R. § 214.2(f) (students); 8 C.F.R. § 214.2(h) (temporary employees); 8 C.F.R. § 214.2(j) (exchange visitors).

<sup>38</sup> See Convention on the Rights of the Child (CRC) arts. 9, 10, 1989, November 20, 1577 U.N.T.S. 3.

B. *Asylum, withholding of removal, and Convention Against Torture protection—the forms of relief for children fleeing persecution or torture*

The United States has three related but distinct forms of relief for individuals fleeing persecution or torture— asylum, withholding of removal, and protection under the Convention Against Torture (CAT). These forms of relief were established in an effort to conform U.S. law to international treaties and norms, particularly the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention), the 1967 United Nations Protocol Relating to the Status of Refugees (Refugee Protocol), and the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).<sup>39</sup>

Asylum, withholding of removal, and CAT differ in their levels of protection. Asylum offers the greatest benefits because those granted asylum status (referred to as “asylees”<sup>40</sup> under U.S. law) are eligible to apply for permanent residency after one year and can apply to become a U.S. citizen five years thereafter.<sup>41</sup> Adults who are granted asylum are also entitled to bring their spouses or children to the United States to join them.<sup>42</sup> This is an important benefit of asylum protection that contributes to the goal of family reunification. However, the reverse is not true: children granted asylum are not eligible to bring their parents to the United States. The inability under U.S. law for child asylees to petition to bring their parents to the United States runs counter to international norms. A central tenet of the Convention on the Rights of the Child is the right to family reunification.<sup>43</sup> When legal barriers exist to reunifying children with their parents in the child’s country of origin—as is the case when a child is granted asylum—family reunification obligations under the Convention should control the host country’s determinations regarding reuniting families.<sup>44</sup>

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<sup>39</sup> Although the United States has not ratified the Refugee Convention, it has acceded to the Refugee Protocol, which incorporates most of the key provisions of the Refugee Convention, including the principle of *non-refoulement*. The principle of *non-refoulement* reflects the duty to not return refugees to a country where they face persecution, as provided for in Article 33.1 of the Convention and its 1967 Protocol: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention Relating to the Status of Refugees art. 33.1, 1951, July 28, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees. January 31, 1967. 606 U.N.T.S. 267. The United States ratified the Torture Convention in 1994. That treaty prohibits the returning any person to a country where there are substantial grounds for believing that he or she would be subjected to torture with the consent or acquiescence of a public official. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 3, G.A. Res 39/46, U.N. Doc A/RES/39/46 (1984, December 10).

<sup>40</sup> Although the United States refers to these individuals as “asylees,” anyone who is granted asylum in the United States has been found to meet the international definition of a “refugee.”

<sup>41</sup> 8 U.S.C.A. § 1159(b) (West); 8 U.S.C.A. § 1422, 1423, 1427. Individuals who receive citizenship through the immigration laws and not through having been born in the United States are referred to as “naturalized citizens.”

<sup>42</sup> 8 U.S.C. § 1158(b)(3) (West).

<sup>43</sup> States parties to the Convention must ensure that children are not separated from their parents against their will, unless separation is in the best interests of the child, and applications by children or their parents to enter or leave a State in order to reunify must be dealt with by states parties “in a positive, humane, and expeditious manner” and “shall entail no adverse consequences for the applicants and for the members of their family.” Convention on the Rights of the Child (CRC) arts. 9(1), 10(1), 1989, November 20, 1577 U.N.T.S. 3. For a more detailed discussion on the right to family reunification, see chapter 11.

<sup>44</sup> See UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 83, CRC/GC/2005/6 (2005, September 1). Retrieved from <http://www.refworld.org/docid/42dd174b4.html>

Unlike asylum, withholding of removal and CAT protection do not provide a path to permanent residency and can be terminated if conditions in the home country improve and the applicant no longer faces persecution or torture there.<sup>45</sup> Also different from asylum, U.S. law does not permit individuals granted withholding of removal or CAT protection to bring their spouse or children to the United States to join them contrary to international norms. The distinctions between these forms of relief are critical because, as discussed below, there are number of hurdles applicants face when seeking asylum that results in some bona fide refugees only being granted withholding or CAT protection, and thus being denied the benefits that come with asylum and the opportunity of a durable and stable life in the United States.

### *1. Asylum*

There are myriad reasons why children from Central America and Mexico migrate to the United States. Because many of these children leave their home countries in order to avoid violence and other forms of persecution, as explained in detail in other chapters of this book,<sup>46</sup> they have potentially valid claims for asylum and related protections. The most common asylum claims presented by Central American and Mexican children involve escaping physical or sexual abuse by parents and other family members or caregivers, violence at the hands of gangs or organized crime including drug cartels, sexual or labor exploitation or trafficking, particular harms suffered by street children, and intimate partner violence.<sup>47</sup> Girls and indigenous children also face unique forms of harm based on their gender and ethnicity due to discriminatory cultural norms and practices. Although many of these claims would be recognized as a basis for protection under international standards, U.S. asylum law adopts a narrower approach that rejects some of these claims. Moreover, despite the existence of domestic and international guidelines on the adjudication of children's asylum claims, a child-sensitive legal analysis—which accepts a lower evidentiary threshold for children than adults and recognizes that children are developmentally unique from adults—is not employed.

***Eligibility Requirements.*** In order to be granted asylum, children and adults must meet the U.S. refugee definition, which tracks the language of the Refugee Convention and Protocol. Under U.S. law, a “refugee” is:

any person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>48</sup>

Broken down, the key elements required for asylum eligibility under the U.S. statute are proof of the existence of: (1) past persecution or a well-founded fear of future persecution; (2) “on account

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<sup>45</sup> 8 C.F.R. § 1208.24 (West).

<sup>46</sup> See chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico for more information.

<sup>47</sup> A Treacherous Journey.

<sup>48</sup> 8 U.S.C. § 1101(a)(42) (West).

of” one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, and political opinion (also known as the “nexus” requirement); and (3) that the government is unable or unwilling to control. An applicant for asylum must also establish that he or she is not subject to one of the statutory bars to asylum—including bars for criminal activity, resettlement in third countries, and late filing of the application—and that he or she merits asylum in the exercise of discretion.<sup>49</sup> As discussed below, additional requirements have been added under the statute’s implementing regulations and through the development of case law.<sup>50</sup> This has resulted in a highly complex set of legal requirements that is challenging for even a prepared and well-equipped asylum seeker, even with an attorney, to overcome.

***The United States’ narrow interpretation of the asylum requirements.*** Although U.S. asylum law is derived directly from the Refugee Convention and Protocol and purportedly applies the same definition of a “refugee,” U.S. interpretation of that term is much narrower than the international approach—especially with regards to the “particular social group” and “on account of” (or “nexus”) elements. This divergence is exacerbated by the fact that the United States does not require adjudicators to employ a child-sensitive analysis of the elements of the refugee definition that acknowledges the differences between children and adults. While the U.S. government and the United Nations High Commissioner for Refugees (UNHCR) have produced guidelines encouraging adjudicators to adopt a child-sensitive approach when deciding children’s asylum claims,<sup>51</sup> the United States takes the position that these are not binding on adjudicators. Combined with the tendency of adjudicators to interpret the refugee definition in a restrictive manner, many Central American and Mexican children fleeing persecution experience great difficulty in establishing their eligibility for asylum.

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<sup>49</sup> See 8 U.S.C. § 1158(a)(2)(A) (West) (safe third country), § 1158 (a)(2)(B) (one-year filing deadline), § 1158 (a)(2)(C) (previous asylum applications), § 1158 (b)(2)(A)(i) (ordered, incited, assisted, or participated in the persecution of others), § 1158 (b)(2)(A)(ii) (particularly serious crime), § 1158 (b)(2)(A)(iii) (serious nonpolitical crime), § 1158 (b)(2)(A)(iv) (danger to the security of the United States), § 1158 (b)(2)(A)(v) (terrorist activities), § 1158 (b)(2)(A)(vi) (firm resettlement), § 1158 (b)(2)(B)(i) (aggravated felony); see also 8 C.F.R. § 1208.13(b)(1)(i) (West) (discretionary nature of asylum).

<sup>50</sup> For instance, under the regulations, an applicant cannot establish a well-founded fear of persecution if he or she “could avoid persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence.” 8 C.F.R. § 1208.13(b)(2)(ii) (West).

<sup>51</sup> U.S. Department of Justice, Immigration and Naturalization Service, & Weiss, J. (1998, December 10). Memorandum: Guidelines for Children’s Asylum Claims. Retrieved from <http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> (hereinafter “U.S. Department of Justice Guidelines for Children’s Asylum Claims”); U.S. Citizenship and Immigration Services. (2009, September 1). Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims. Retrieved from <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>; U.N. High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶ 5, U.N. Doc. HCR/GIP/09/08 (2009, December 22). Retrieved from <http://www.unhcr.org/50ae46309.html>. U.S. courts have held that the UNHCR guidance is persuasive, but not binding on the United States. See, e.g., Matter of W-G-R-, 26 I&N Dec. 208, 220 (BIA 2014); Matter of M-E-V-G-, 26 I&N Dec. 227, 248 (BIA 2014).

Persecution. The term “persecution” has been interpreted to include physical harms—such as beatings, rape, and prolonged detention—as well as psychological or emotional harm.<sup>52</sup> It may also include economic harm such as the denial of livelihood and food. However, not all forms of harm or deprivation of fundamental rights constitute “persecution” under the U.S. immigration laws. Because there is no set formula for deciding when a harm or series of harms rises to the level of persecution, the inquiry can seem highly subjective to the individual adjudicator. U.S. and UHNCR guidelines as well as U.S. federal case law recognize that harm that may not constitute persecution in the case of an adult, could rise to the level of persecution when inflicted upon a child.<sup>53</sup> However, studies of asylum decisions have shown that adjudicators frequently fail to recognize that children experience harm differently from adults and that an act that might not be persecution when inflicted on an adult could certainly be so when inflicted on a child, especially if it has long-lasting emotional and psychological effects.<sup>54</sup> This lack of sensitivity to the impact that a child’s age and maturity level can have on their experience of harm creates a significant barrier to recognizing the harm they face as rising to the level of persecution.

On account of a protected ground. One of the most complex and challenging areas of asylum law relates to the “on account of” requirement of the refugee definition; also commonly referred to as the “nexus” requirement. Proof of nexus requires establishing a causal link between the persecution and one or more of the five statutorily protected grounds—race, religion, nationality, political opinion, or membership in a particular social group. An applicant must show that his or her persecutor was motivated to harm him or her *because of* one of these five characteristics. Children can seek asylum based on any of the five protected grounds, but the claims of children from Central America and Mexico c, are often viewed as falling within the social group ground, the most contentious basis.

In general, courts recognize two different standards for claiming asylum based on membership in a particular social group. Under the immutable or fundamental characteristics standard—also known as the *Acosta* standard—a social group must be comprised of individuals who share a common characteristic that they are unable to change (such as sex) or should not be required to change because it is fundamental to their conscience or identity (such as religious or other deeply held beliefs).<sup>55</sup> The majority of courts, however, follow a second approach, which is the *Acosta* standard plus the requirements of “social distinction” (formerly called “social visibility,” which requires the group be perceived as a group by society) and “particularity” (which requires that the

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<sup>52</sup> See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000); *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

<sup>53</sup> U.S. Department of Justice Guidelines for Children’s Asylum Claims, p. 19; Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims, pp. 36-40; UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, ¶¶ 8-9.

<sup>54</sup> *A Treacherous Journey*, pp. 20-23.

<sup>55</sup> *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). Every circuit to rule on the issue adopted *Matter of Acosta* (see discussion below regarding the Ninth Circuit’s adoption of the standard), and it remained the standard in the federal courts for over twenty years, until the BIA, erroneously citing UNHCR refugee guidelines, stated that the *Acosta* standard was only a threshold and that social visibility and particularity also needed to be established. *Matter of C-A-*, 23 I&N Dec. 951, 959-960 (BIA 2006).

group by clearly defined and determinable in the applicant's society).<sup>56</sup> The social distinction and particularity requirements have been criticized by advocates, scholars, and the courts alike for causing confusion and restricting the refugee definition. It should be noted that these requirements conflict with UHNCR's approach.<sup>57</sup>

The imposition of these two requirements has made it especially difficult for Central American and Mexican children fleeing a range of harms and violence.<sup>58</sup> Although children or subgroups of children are targeted precisely because of their status in society and vulnerability *as children*, there is a great resistance on the part of adjudicators to find that children in a range of circumstances can constitute a cognizable social group (in other words, can constitute a social group defined by the immutable characteristic of age). To date, no federal court has approved a social group defined solely by childhood, and one federal court has rejected "street children."<sup>59</sup> Courts that follow just the *Acosta* standard have, however, been more likely to approve social groups where the applicant's status as a childhood or age is at least one defining characteristic of the group. One decision accepted a social group formulation involving former child soldiers.<sup>60</sup> On the other hand, courts that apply the *Acosta*-plus approach have consistently rejected social groups defined in part or in whole by childhood for lack of social distinction and/or particularity.<sup>61</sup> For instance, children fleeing gang-related violence, in particular children who have resisted or opposed forced recruitment to the gangs,<sup>62</sup> are routinely denied asylum on the ground that their claimed social group lacks social visibility, or social recognition, as well as adequate particularity. Adjudicators justify this approach by stating that gangs indiscriminately target young people, and there is insufficient evidence that society perceives certain populations of children as being more vulnerable to gang violence.<sup>63</sup> Girls who have been targeted by gangs to become "girlfriends" or

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<sup>56</sup> Social distinction was formally known as "social visibility." See *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

<sup>57</sup> *A Treacherous Journey* (citing critiques by scholars, academics, and courts).

<sup>58</sup> These harms, and in particular intrafamilial and gang violence driving migration, are explored in greater detail in chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico.

<sup>59</sup> *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (rejecting social group of "Honduran street children" based on finding that age is not immutable and that group is too broad and diverse).

<sup>60</sup> See, e.g., *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (approving a particular social group of young, Albanian women who live alone); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (approving a particular social group of former child soldiers); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (approving a particular social group of young girls in the Benadiri clan); Anker, D. (2013). *Law of Asylum in the United States*. Eagan, MN: Thomson West (citing *Matter of B-F-O-*, No. 78-677-043, 24 IMMIG. RPT. B1-41, 43-44 (BIA Nov. 6, 2001) as recognizing "abandoned street children in Nicaragua" as a social group); but see *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (rejecting social group of "Honduran street children" based on finding that age is not immutable and that group is too broad and diverse).

<sup>61</sup> See, e.g., *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010) (rejecting social group of "Guatemalan youth resisting gang recruitment" for lack of social visibility and particularity); *Orellana-Monson v. Holder*, 685 F.3d 511, 521-522 (5th Cir. 2012) (rejecting social group of "Salvadoran males between the ages of 8-15 who have been recruited by Mara 18 but refused to join the gang because of their principal opposition to the gang and what they want" [sic] under social visibility and particularity criteria); *Barrios v. Holder*, 581 F.3d 849, 854 (9th Cir. 2009) (rejecting social group of "young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities"); *Gomez-Guzman v. Holder*, 485 F. App'x 64 (6th Cir. 2012) (rejecting the group of "Guatemalan children under the age of 14" for want of particularity).

<sup>62</sup> For more information on gang violence and forced recruitment, see chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico, as well as chapter 1 on UNHCR interviews of migrant children.

<sup>63</sup> See *Larios*, 608 F.3d at 109; *Orellana-Monson*, 685 F.3d at 521-522; *Barrios*, 581 F.3d at 854-855; *Gomez-Guzman*, 485 F. App'x. at 65, 68. Some courts have approved social groups comprised of government witnesses and

sex slaves of gang members, or to become members of the gang themselves, have been similarly denied asylum—as adjudicators have likewise rejected social groups defined by gender, age, and/or resistance to gangs.<sup>64</sup> Many children’s cases should qualify for asylum under a proper application of the refugee definition,<sup>65</sup> yet restrictive interpretations of the social group ground have impeded protection. It is important to note, however that adjudicators—including in the federal courts that set precedent—have been more open to granting asylum to children targeted because of family membership, as nuclear family is recognized as a fundamental unit in most societies. A child might also be targeted by State or non-State actors because of the activity of other members of the family.

Even if an adjudicator were to find that a boy fleeing forced recruitment or extortion by gangs or a girl being forced into a relationship with a gang member is a member of a valid social group, the nexus requirement still poses significant challenges. An adjudicator could hold that the gang’s reason for targeting a boy is to increase its ranks, power, and capital—not because of the child’s social group membership. Likewise, she could determine a gang member forcing a girl into a relationship is committing a random act of violence, rather than harming her because of her gender. Unfortunately, numerous published decisions in the federal courts have taken such approaches to claims involving resistance to gang violence.<sup>66</sup>

Claims based on other harms which cause children to migrate—such as extreme poverty and lack of access to education (resulting in a violation of the internationally recognized right to develop), or a child’s lack of an adequate caretaker<sup>67</sup>—are unlikely to succeed under the particular social

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former gang members. *See* *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (former gang members); *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (witnesses who testified against gang members); *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496 (3d Cir. 2011) (witnesses who testified against gang members); *Urbana-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (former gang members). Although there are no published decisions, asylum claims based on gang persecution of religious leaders or followers and LGBT persons have also succeeded at the lower levels of adjudication. *See* Frydman, L., & Neha, D. (2012, October). *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs. Immigration Briefings*, No. 12-10, pp. 20-26 (hereinafter “Beacon of Hope or Failure of Protection?”) (discussing the success of religion cases involving gang persecution at the immigration court level); *see also* *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014) (acknowledging that “a factual scenario in which gangs are targeting homosexuals may support a particular social group claim.”).

<sup>64</sup> *See, e.g.,* *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012).

<sup>65</sup> For example, the Third Circuit’s decision in *Escobar*, 417 F.3d at 363 (rejecting social group of “Honduran street children” based on finding that age is not immutable and that group is too broad and diverse) is flawed. First, federal courts and the BIA have recognized age as an immutable characteristic; while age is not static, neither age nor status as a child can be altered at a given moment in time. *See, e.g.,* *Cece*, 733 F.3d at 673 (recognizing as a cognizable group “young Albanian women who live alone,” concluding that “[n]either their age, gender, nationality, or living situation are alterable”); *Matter of S-E-G-*, et al., 24 I&N Dec. 579, 583-84 (BIA 2008) (acknowledging that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable”). Second, concern about the size or breadth of a social group is not a legally sound basis for denial. *See Cece*, 733 F.3d at 673 (rejecting fear of floodgates argument and explaining that even if a protected group of persons is large, the number who can demonstrate nexus is likely small).

<sup>66</sup> *See, e.g.,* *Mayorga-Vidal v. Holder*, 675 F.3d 9, 19 (1st Cir. 2012); *Rivera-Barrientos*, 666 F.3d at 653; *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008); *Dominguez v. Ashcroft*, 336 F.3d 678, 680 (8th Cir. 2003); *Matter of S-E-G-*, 24 I&N Dec. 579 at 587; *Matter of E-A-G-*, 24 I&N Dec. 591, 597 (BIA 2008).

<sup>67</sup> These harms are discussed in detail in chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico.

group ground for asylum.<sup>68</sup> Even though children in these scenarios may suffer serious consequences due to these early deprivations, or in the case of a child whose relatives can no longer care for the child are particularly vulnerable to persecution, the interpretation of nexus in the United States makes it difficult to show the required causal connection between the persecution and one of the five statutory grounds for asylum and withholding of removal. Children in the above scenarios have likely suffered or are at risk because of their status as children, and their economic marginalization and lack of parental protection. Under the current interpretation of social group, and the requirements for proving nexus, it would be exceedingly difficult for children in these circumstances to prevail in claims for protection.

Government inability/unwillingness to protect. When the persecutor is a non-State actor, rather than the State, which is the case in many children’s cases, an applicant must prove that the government is “unable or unwilling” to control the persecution against the applicant.<sup>69</sup> As discussed in the chapters on Honduras, El Salvador, Guatemala, and Mexico,<sup>70</sup> governments in Central America and Mexico fail to protect children from violence due to a variety of factors, including a weak institutional framework, lack of resources, high levels of corruption, and an acceptance of impunity. Nonetheless, adjudicators often hold children to the standard of adults, and will refuse to find the government was unable or unwilling to protect if the child did not report persecution to the authorities. This approach completely disregards the child’s reality, and how his age, development, and dependency on adults impede ability to report harm.<sup>71</sup>

***Improper influence of policy concerns.*** Yet another barrier to children’s asylum claims is the undue influence of migration control policies in asylum decisions. Some adjudicators’ decisions reflect a fear of the proverbial floodgates if they define a particular social group so that it is comprised of children (or women),<sup>72</sup> because these groups make up a potentially large proportion of a country’s population. These fears are not only inappropriate in interpreting the refugee definition, but are also unfounded because approving a particular social group says little about the number of people who might ultimately qualify for asylum based on membership in that group. Numerous stringent requirements of the refugee definition—such as proving a well-founded fear of persecution, establishing the required nexus between the persecution and the social group,

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<sup>68</sup> However, a child could potentially qualify for asylum if he or she was denied access to education on account of his or her race, religion, nationality or political opinion; *see* *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (noting that “we have rejected the notion that a persecuted group may simply represent too large of a population to allow its members to qualify for asylum”); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (approving the social group of “all alien homosexuals”); U.N. High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶18, U.N. Doc. HCR/GIP/02/02 (2002, May 7) (stating that “[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists”).

<sup>69</sup> 8 C.F.R. §§ 1208.13(b)(1)-(b)(2) (West).

<sup>70</sup> *See* chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico.

<sup>71</sup> A Treacherous Journey, p. 13.

<sup>72</sup> The Board of Immigration Appeals recently ruled in a precedential decision that “married Guatemalan women who are unable to leave the marital relationship” is a cognizable social group. The Board left open the question whether a social group defined by gender alone could satisfy the social group test. The decision marks a significant advancement in the law of social group, but without a published decision squarely holding that “women” is a social group, adjudicators at all levels are resistant to recognizing such a broadly defined group. *See* *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388 (BIA 2014).

proving that the government be unable or unwilling to protect the child—limit the number of successful claims.<sup>73</sup> Additionally, the remaining enumerated grounds—race, religion, nationality, political opinion—also include potentially large numbers of individuals; yet this has not interfered with their acceptance as bases for asylum. Moreover, the breadth of these grounds has not led to mass influxes of group members, nor has recognition of broad social groups that are widely accepted, such as homosexuals fleeing sexual orientation-based persecution or women/girls of a particular clan fleeing female genital cutting.<sup>74</sup>

Policy concerns by adjudicators have been notably apparent in the denial of claims of children fleeing gang violence. For example, some decisions by federal courts and by the highest immigration tribunal, the Board of Immigration Appeals (BIA), have expressly stated that former gang members should not be recognized as a particular social group because the U.S. Congress did not intend to provide protection to such persons regardless of any risk to their lives if returned.<sup>75</sup> The BIA has even gone so far as to reject a social group of children *wrongly* presumed to be gang members; it incorrectly reasoned that because U.S. policy does not recognize current or former gang members as a social group, asylum adjudicators should not recognize presumed gang membership as a social group.<sup>76</sup> Many of these decisions are legally unsound because, if fairly interpreted, these groups would meet the particular social group criteria. The group members share immutable characteristics, and country conditions evidence demonstrates that they are widely recognized in society as being vulnerable to distinct forms of gang violence.

The courts should apply the law to the facts, not make policy—yet courts have explicitly done just that. Moreover, many of the concerns about granting asylum to persons—such as former gang members—who do not deserve it are misplaced. Other statutory provisions, such as those that bar individuals with serious criminal histories or who constitute a danger to the country, are more than sufficient to preclude protection to the dangerous or undeserving applicant. Adjudicators also retain discretion to deny asylum to an individual who otherwise qualifies but who is not a desired resident of the United States. This frequently occurs in cases of applicants with a criminal history or a history of committing immigration fraud.<sup>77</sup>

The United States should protect young people of conscience who face death because of their courageous refusal to join the gangs. However, due to several misguided decisions that are binding

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<sup>73</sup> The burden of proof is on the asylum seeker to establish that he or she meets the definition of a refugee. In order to meet this burden, an asylum applicant must also be found credible, 8 U.S.C. § 1158 (b)(1)(B)(ii)-(iii), must not be able to relocate internally to avoid persecution, 8 C.F.R. §§ 208.13(b)(1)(i)(B), (b)(2)(ii)), must not be barred from asylum, 8 U.S.C. §§ 1158(a)(2), (b)(2)(A)), and must be found to merit asylum in the exercise of discretion, 8 U.S.C. § 1158 (b)(1).

<sup>74</sup> Musalo, K. (2007). Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action? *Virginia Journal of Social Policy & the Law*, 14, 119. Retrieved from <http://librarysource.uchastings.edu/repository/Musalo/14VaJ SocPolyL119.pdf>.

<sup>75</sup> See, e.g., *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013); *Arteaga v. Mukasey*, 511 F.3d 940, 945-56 (9th Cir. 2007); *Matter of W-G-R-*, 26 I&N Dec. 208, 215 n.5 (BIA 2014); *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008).

<sup>76</sup> See *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

<sup>77</sup> Asylum is a discretionary form of relief. See INA § 208 (b)(1)(A), 8 U.S.C.A. § 1158 (b)(1)(A) (West): “The Secretary of Homeland Security or the Attorney General may grant asylum” to a migrant who has applied for asylum and meets the statutory definition of a refugee; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that asylum is discretionary).

on lower courts, there has been a tendency for kneejerk denials of many asylum claims by youth fleeing gang-related persecution, without proper consideration of the evidence presented in each individual case.<sup>78</sup>

## 2. *Withholding of removal*

Withholding of removal, like asylum, requires a showing of harm on account of one of the five statutory grounds;<sup>79</sup> thus, an individual seeking withholding of removal faces all the same barriers applicable to asylum. Unlike asylum, however, withholding of removal requires a higher likelihood of harm; an individual must establish that it is “more likely than not,” or a 51 percent chance or greater, that he or she will suffer persecution—as opposed to only a 1 in 10 percent chance for asylum.<sup>80</sup> The higher likelihood required for withholding of removal can make it much more difficult to obtain than asylum. Withholding of removal can benefit some individuals who are otherwise barred for asylum—for example, because they failed to apply for asylum within the one-year filing deadline.<sup>81</sup> Unlike asylum, once the statutory requirements for withholding are met, relief is mandatory, and not subject to the adjudicator’s discretion. Therefore withholding can be critical for applicants who do not qualify for asylum because of the one-year filing deadline or because of negative factors that result in a denial in the exercise of discretion. In reality, though, most children who are ineligible for asylum are denied because of failure to show persecution on account of one of the five grounds, which would preclude them equally from withholding.

## 3. *Convention Against Torture*

The requirements for protection under the CAT differ in key ways from asylum and withholding of removal. First, the level of harm must amount to “torture,” which has a technical definition and is generally considered graver than “persecution.”<sup>82</sup> There is no requirement to show a link between the torture and race, religion, nationality, political opinion, or membership in a particular social group (as needed to establish asylum and withholding of removal eligibility). However, if a non-State actor is the feared perpetrator of the torture, the applicant must establish a higher level of government involvement than is necessary for asylum and withholding of removal. Specifically, the individual must show that the government “consented or acquiesced” to the torture or will do so in the future, which is more difficult to establish than the “unable or unwilling to protect” standard required for asylum and withholding of removal. Evidence that governments offer ineffective protection is not enough to establish acquiescence, rather it must be shown that they were aware torture would take place and failed to intervene. Additionally, there are no guidelines

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<sup>78</sup> See *Beacon of Hope or Failure of Protection?*, pp. 7-8.

<sup>79</sup> 8 C.F.R. § 1208.16(b) (West).

<sup>80</sup> See *Cardoza-Fonseca*, 480 U.S. at 421 (1987) (setting out burden of proof for likelihood of persecution for asylum and withholding of removal).

<sup>81</sup> Under U.S. law, individuals must apply for asylum within one year of arriving in the United States—this is known as the one-year filing deadline. The one-year filing deadline does not apply to unaccompanied children, which are defined as children under the age of 18 who lack legal status to remain in the United States and who are not accompanied by a parent or guardian upon their apprehension. Although the deadline does apply to children who were accompanied when apprehended in the United States, there are some exceptions to the deadline that may apply to children in certain circumstances. These exceptions are reviewed by the adjudicator on a case-by-case basis. See INA §§ 208 (a)(2)(B), (a)(2)(E), 8 U.S.C.A. § 1158 (a)(2)(B), (a)(2)(E) (West); 8 C.F.R. § 208.4 (a)(5)(ii) (West).

<sup>82</sup> 8 C.F.R. §§ 1208.16-1208.18 (West).

on the unique issues that arise in claims made by children under the Torture Convention. The combination of these issues makes winning CAT protection especially difficult for children.

### *C. Special Immigrant Juvenile Status*

In 1990, the United States created SIJS to protect immigrant children without legal status who have been abused, neglected, or abandoned by their parents and for whom it is not in their best interests to return to their home country.<sup>83</sup> The U.S. originally created this form of relief to address a gap in protection for children without legal status being placed into state foster care programs. Although these children were taken out of harmful living situations, they lacked a pathway to obtaining permanent residency in the United States and thus a plan for their permanent well-being. This ran counter to the requirement in many states' dependency laws that each child have a permanency plan.

SIJS is unique compared to other forms of immigration relief because it requires the involvement of specialized state courts that deal with child custody issues before federal immigration authorities can approve an application for the visa. It is also the only form of immigration relief that takes into consideration the best interests of the child; in fact, the state courts are directed to make a determination regarding the best interests of the child in every case. The U.S. Congress created this bifurcated approach—requiring determinations by both state juvenile judges and federal immigration authorities—because juvenile courts have greater child welfare expertise than immigration authorities in making best interests determinations.<sup>84</sup>

In 2008, the U.S. amended the law that created SIJS to permit children for whom reunification with *one or both* parents was not possible—the former are known as “one-parent” SIJS claims—rather than both parents, as the law required before. To qualify for SIJS under current law, a child—defined as an unmarried person under 21 years of age—must clear several hurdles.<sup>85</sup> First, a state juvenile court must make a series of findings, including: (1) declaring the child a dependent of the court—for example, by placing the child in foster care—*or* placing the child under the legal custody of a state agency or other individual appointed by the state, such as a delinquency placement program; (2) declaring the child to be unable to reunify with one or both of her parents due to abuse, neglect, or abandonment; and (3) declaring that it is not in the best interests of the child to be returned to his or her country of citizenship.<sup>86</sup>

To make the second finding, a court will apply the terms “abuse,” “neglect,” and “abandonment” as they are defined under state law; however, it does not require that formal charges of abuse, neglect, or abandonment have been made against the parents. Children who qualify may include those who have been physically and/or emotionally mistreated by their parents, had their basic

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<sup>83</sup> 8 C.F.R. § 204.11 (West).

<sup>84</sup> See Chen, G. Z. T. (2002). *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*. *Hastings Constitutional Law Quarterly*, 27, 597, p. 602. Retrieved from <http://www.hastingsconlawquarterly.org/archives/V27/I4/Chen.pdf>.

<sup>85</sup> 8 C.F.R. § 204.11 (West). In reality, however, many states end dependency at age 18, meaning that children between 18 and 20 years old will frequently fail to obtain the necessary determination by a state juvenile court in order to qualify for SIJS.

<sup>86</sup> 8 U.S.C. § 1101(a)(27)(J) (West); 8 C.F.R. § 204.11 (West).

needs neglected (including housing, food, education), or have been abandoned altogether—either willfully or as a result of the death of a parent.

These three “special findings” can be made by a range of state courts that hear matters related to child custody, including family courts, dependency courts, and delinquency courts, and courts that rule on petitions for guardianship of a child. After the state proceedings are completed, the child must submit evidence of the state court’s findings along with an application for SIJS with the federal immigration authorities. United States Citizenship and Immigration Services (USCIS)—the agency that decides SIJS applications—looks at the state court order to determine whether it has sufficient information regarding the bases of the court’s findings and reviews the application and evidence submitted to determine whether the child meets the age and other requirements for SIJS. Once the immigration authorities grant SIJS, a child is given a visa that leads to immediate permanent residency.

SIJS can be an important form of relief for Central American and Mexican children who meet the eligibility requirements because it provides a path to immediate permanent residency and does not require extensive interviews with the child (which can be re-traumatizing for some), as do asylum and related forms of protection. However, many immigrant children who are placed in the U.S. foster care system due to abuse, neglect, or abandonment are never identified as being eligible for SIJS for a variety of reasons including lack of information about their immigration status and options for pursuing relief. Social workers assigned to their cases may have no more information about the child’s immigration status and often lack information about a child’s legal options for relief. Meanwhile, those who are identified in the child welfare system as potentially SIJS eligible, or those who affirmatively seek a juvenile court special order in state court face several barriers to obtaining relief. For instance, some state court judges are unfamiliar with federal laws on SIJS, and thus do not understand that making the special findings mentioned above does not mean that the judge is granting an immigration benefit, something the judge feels is outside of his or her jurisdiction (as immigration matters are wholly within the purview of the federal government). For this reason, some state court judges are reluctant to issue an order with the required findings despite the fact that they make similar determinations in other custody and dependency related matters (and the statute clearly delegates them the authority).<sup>87</sup>

Evidentiary demands by the federal government agency tasked with adjudicating SIJS petitions—the USCIS—regarding the child’s age and identity has also created barriers to obtaining SIJS. Federal regulations allow USCIS officers to consider a range of official foreign documents to establish an applicant’s age to prove he or she is under 21 and thus eligible, but there is little guidance on what documents will suffice. Many children traveling alone may lack the original or a copy of their birth certificate for various reasons, or the documentation they do have from home may be incorrect.<sup>88</sup> Although evidence of parentage (evidence regarding the identity of one’s parents that would be listed on a birth certificate) is not listed as a requirement in the regulations,

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<sup>87</sup> A Treacherous Journey, p. 40-41; *see also* Jungk, A. (2013, February). Practice Advisory: An Update on One-Parent Special Immigrant Juvenile Status Claims (surveying SIJS practitioners on a nation-wide basis and finding that some local courts have strongly resisted attempts to bring SIJS orders before them in one-parent cases).

<sup>88</sup> For instance, some children’s birth certificates list incorrect parentage information. It is not uncommon in some Central American countries to list the grandparents’ names on the birth certificate of a child when the mother was under age 18 at the time she gave birth, and it is often difficult to rectify this error. This leads to significant confusion when applying for SIJS with USCIS.

it is often considered by USCIS and has at times held up applications for SIJS or been the basis of denials.<sup>89</sup> Additionally, in some cases USCIS asks for the evidence submitted to state juvenile court in order to determine the basis for the court's findings regarding abuse/abandonment/neglect, inability to reunify with one or both parents as a result, and that it is not in the best interests of the child to return to the child's country, even though USCIS is not qualified to or responsible for making these types of findings, which are reserved for experts on child welfare and custody issues. The U.S. Congress intentionally created a bifurcated process in which USCIS is not tasked with reexamining the evidence of abuse, neglect, abandonment, and best interests—as the state juvenile court with the expertise has already evaluated—but instead with focusing on the child's eligibility for SIJS itself and any relevant discretionary factors. Second-guessing special findings made by state juvenile courts on the part of USCIS can cause delay in the adjudication of cases and create additional stress for children. What is more, in some cases the agency may be violating state confidentiality laws that protect children by requesting to see documentation from the child's dependency or delinquency proceedings.

Although positive in many respects, there is one significant disadvantage to SIJS. A child granted SIJS can *never* petition for a parent to immigrate to the United States and obtain lawful immigration status. This was not as much of a concern when Congress initially enacted SIJS, requiring that reunification with *both* parents was not viable due to abuse, neglect, or abandonment. However, when Congress amended the statute in 2008 to provide for situations of abuse, abandonment, or neglect by *one* parent it should have, but did not, amend the section of the statute barring a child conferring immigration status to the non-abusive natural parent in recognition of this change. Therefore, in one-parent cases, the non-abusive parent may be the child's primary caretaker and the person best suited to care for the child, but the parent is unable to obtain permission to travel to the United States to reunite with his or her child, or to remain in the United States without fear of deportation if the parent does not already have lawful immigration status. The inability of children granted SIJS to reunify with or sponsor the remaining responsible parent (whether as derivative beneficiary of the SIJS application or through the family-based visa process) frustrates the U.S. government's goal of family unity. More importantly, it often directly conflicts with the best interests of the child and right to family, resulting in tension with international law, as discussed in section III.A above and explored in more detail in chapter 11 on family separation.

#### *D. Visas for victims of trafficking and other serious crimes*

The U.S. government has created two visa categories to protect victims of trafficking and other serious crimes in order to encourage them to report the crimes to U.S. authorities and not suffer in silence for fear of being deported: "T" nonimmigrant status and "U" nonimmigrant status (known as the "T visa" and "U visa"). For both visas, the recipient is permitted to legally remain in the United States for up to four years and becomes eligible to apply for permanent residency after three years. Both T and U visas also allow the child to confer status on their parents, even if her parents are overseas.<sup>90</sup> Visa holders are eligible for special benefits and services, including food

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<sup>89</sup> See *A Treacherous Journey*, pp. 44-45.

<sup>90</sup> A spouse, children, parents and unmarried siblings under age 18 of a T or U visa holder under the age of 21 are considered derivative beneficiaries. 8 C.F.R. §§ 245.23(b)(2), 245.24(a)(2) (West).

stamps and social security.<sup>91</sup> These benefits and the promotion of family reunification make T and U visas a positive remedy for trafficking victims and victims of other crimes.

To qualify for a T visa, the applicant must meet three primary requirements. First, he must be a victim of a “severe” form of human trafficking as defined in federal law. “Severe forms of trafficking in persons” includes sex trafficking, which is any person “induced by force, fraud, or coercion” to engage in commercial sex, or any child under the age of 18 engaged in commercial sex, is considered a victim of trafficking and may qualify for a T visa.<sup>92</sup> It also includes labor trafficking, which is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through use of forced, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>93</sup> Second, the child must be in the United States on account of being a victim of trafficking, and must show that he or she would suffer extreme hardship involving “unusual and severe harm” if deported from the United States.<sup>94</sup> This benefit only applies to those who are trafficked into the United States, and not to those who may have been victims of trafficking prior to their arrival to the United States; however, some advocates have been able to win cases in which they could show that a child was brought into the United States for the purpose of human trafficking, even if the child was apprehended prior to being placed in the trafficking situation. In addition, adult applicants must cooperate with reasonable requests from a law enforcement agency for assistance in the investigation or prosecution of human trafficking unless they suffer from trauma that prevents them from cooperating. Children under the age of 18 at the time of the victimization are exempt from this requirement.<sup>95</sup>

The U visa, like the T visa, protects victims of crime but it only protects individuals who have suffered substantial physical or mental abuse as a result of having been a victim of certain serious crimes *in the United States*.<sup>96</sup> To qualify for a U visa, the individual must obtain a certification from a United States federal, state, or local law enforcement agency (which includes those who detect, investigate or prosecute criminal activity such as police, judges, and prosecutors) that the individual “has been helpful, is being helpful, or is likely to be helpful” in the investigation or

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<sup>91</sup> Victims of trafficking that have been certified by ORR are eligible for the same services as a person designated a refugee by USCIS. If the victim is under the age of 18, he or she is eligible for certain benefits without the requirement of certification. Such benefits can include food stamps, Temporary Assistance for Needy Families (TANF); Supplemental Security Income (SSI); Refugee Cash and Medical Assistance (RCA & RMA); health care such as Medicaid or the State Children’s Health Insurance Program (SCHIP); and other social services including placement in ORR’s Unaccompanied Refugee Minors program, which is a long-term foster care program administered by states. *See* Department of Health & Human Services. (2012, May). *Services Available to Victims of Human Trafficking: A Resource Guide for Social Service Providers*. Retrieved from [http://www.acf.hhs.gov/sites/default/files/orr/trafficking\\_services\\_0.pdf](http://www.acf.hhs.gov/sites/default/files/orr/trafficking_services_0.pdf).

<sup>92</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103 (8)(A), 114 Stat. 1464 (2000).

<sup>93</sup> 22 U.S.C.A. § 7102(9) (West).

<sup>94</sup> 8 U.S.C.A. § 1101(a)(15)(T)(i) (West).

<sup>95</sup> 8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(aa)-(cc) (West).

<sup>96</sup> The list of crimes include: “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in [18 U.S.C. § 1351]); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C.A. § 1101(a)(U)(iii) (West).

prosecution of the criminal activity.<sup>97</sup> Unlike the T visa, however, children are not exempt from this cooperation requirement, although a parent, guardian, or “next friend” may cooperate and present that information on behalf of children who are 16 or younger.<sup>98</sup>

Although seemingly simple, there are several obstacles that prevent migrant children from obtaining T and U visas:

*First*, many child migrants are not aware of these somewhat obscure visas and therefore do not realize that they may be eligible. Their lack of awareness is exacerbated by the fact that they do not have attorneys to explain their options for immigration relief. Especially with regard to T visas, there is a need for better screening at the border, as well as inside the United States, as many immigrant children who may be victims are not being identified.

*Second*, as noted above, the T visa is only available to those individuals who are in the United States on account of trafficking. This requires a showing that they either are in trafficking situations in the United States, or can prove they were brought to the United States in order to be trafficked. Central American and Mexican children who were victimized during the migration journey prior to reaching the United States may face significant challenges in obtaining a T visa, if apprehended prior to ending up in the trafficking situation. At the same time, children like these who were victims of crimes outside the United States are typically not found eligible for a U visa. In both cases, U.S. law enforcement officials should have an interest in investigating and stopping criminal syndicates that victimize children traveling to the United States, and the children certainly have a need for protection. Thus the purpose of the U and T visas would seem to be furthered by granting protection in these scenarios.

*Third*, with regard to U visa cases, it can be extremely difficult to obtain the necessary law enforcement certification. Many law enforcement agencies mistakenly believe that they are granting an immigration benefit, rather than simply certifying that the individual is a victim and has cooperated with them.<sup>99</sup>

*Fourth*, some children who are eligible for T or U visas may apply for SIJS instead, because the SIJS process is often easier and faster.<sup>100</sup> By not pursuing T and U visas, however, children who choose to pursue SIJS are not availing themselves of the special benefits and services available to victims of trafficking and crimes mentioned above. Moreover, in some cases involving one-parent SIJS, they are foregoing the opportunity to have the non-abusive parent join them in the United States.

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<sup>97</sup> 8 U.S.C.A. § 1101(a)(U)(III) (West).

<sup>98</sup> 8 U.S.C.A. §§ 1101(a)(U)(i)(II), (III) (West).

<sup>99</sup> A Treacherous Journey, p. 51.

<sup>100</sup> A Treacherous Journey, p. 52.

*E. Other forms of immigration relief*

There are several other forms of relief for which children from Central America and Mexico occasionally qualify, including prosecutorial discretion, Deferred Action for Childhood Arrivals (DACA), Violence Against Women Act (VAWA) protection, TPS, and cancellation of removal. However, none of these forms of relief require adjudicators to consider what would be in the best interests of the child. Nor do they ensure regular migration status to all migrant children in need of protection.

*1. Prosecutorial discretion*

While not an immigration “benefit,” some children may avoid deportation if the U.S. Immigration and Customs Enforcement (ICE) voluntarily chooses not to seek removal in what is known as prosecutorial discretion. The term prosecutorial discretion refers both to the exercise of discretion by the U.S. government in a range of immigration enforcement related decisions, and to temporary reprieve from deportation through programs such as DACA and Deferred Action for Parental Accountability (DAPA), discussed below. Prosecutorial discretion is distinct from other forms of relief because it does not confer any lawful status on the recipient. Nor does it guarantee the right to work in the United States (with the exception of those granted DACA, DAPA, or other form of deferred action), or have any path to permanency. ICE may choose to exercise prosecutorial discretion at any stage in the deportation process—before filing the charging document that initiates the deportation process, once removal proceedings have already begun, and after a final order of removal is entered.<sup>101</sup> If a child is already in removal proceedings, ICE can request that the immigration judge “administratively close” or, in the alternative, “terminate” the proceedings. Administrative closure means that the immigrant no longer needs to attend immigration court hearings, but his or her case is still considered pending and ICE can choose to re-start their removal hearings at any time. Termination, on the other hand, means that the removal proceedings are closed permanently, and ICE officials must file a new document initiating removal proceedings if they decide to remove that person at some point in the future.

For children who do not qualify for any other forms of immigration relief, prosecutorial discretion can be an important means of preventing return to their home country where they may face violence, and/or keeping them in the United States with parents or other family members. However, the lack of any path to permanent residency as well as the ability of ICE to reinitiate the deportation process at any time, prevents such children from achieving true stability in the United States. Additionally, because prosecutorial discretion is—as the name indicates—a discretionary act by ICE officials, immigration judges and higher courts have no ability to review their decisions or prevent inconsistent applications of prosecutorial discretion in different jurisdictions. A study by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University shows significant variation in the rates of prosecutorial discretion offered and accepted in different

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<sup>101</sup> Prosecutorial discretion is usually an option of last resort. Some people choose to reject an offer of prosecutorial discretion made by ICE if they are eligible for another form of relief that provides a path to permanent residency, such as cancellation of removal or asylum. For more information on the limited use of prosecutorial discretion, see chapter 11 on family separation.

jurisdictions around the country as well as for different nationalities.<sup>102</sup> This indicates that children in some jurisdictions are more likely to benefit from prosecutorial discretion than others simply due to their place of residence or country of nationality.

On November 20, 2014 President Obama announced a series of executive actions based on the principle of prosecutorial discretion, as well as a new policy regarding U.S. immigration “enforcement and removal priorities.”<sup>103</sup> Children and families (along with all other migrants) who are apprehended while attempting to enter the U.S. without proper documentation, or who entered the U.S. on or after January 1, 2014—or who cannot prove that they entered prior to that date—are included on the list of immigration enforcement and removal priorities. The priority list additionally includes terrorists and immigrants convicted of certain crimes. The Administration allows for exceptions to the general rule that recent border crossers should be prosecuted and removed unless eligible for an immigration remedy. Although the listed exceptions include age, being or having a young child, pregnancy, mental disability, and other factors,<sup>104</sup> in reality children who arrived in the United States alone or with family on or after January 1, 2014 will likely not benefit.

## *2. Deferred Action for childhood arrivals and for parents of U.S. citizen and LPR children*

On June 15, 2012, the Obama Administration issued an executive order announcing that it would not deport certain individuals who entered the United States as children. Instead, such individuals would receive reprieve from risk of deportation through a program known as Deferred Action for Childhood Arrivals (DACA). This executive announcement followed the U.S. Congress’ failure to pass a DREAM Act,<sup>105</sup> which provoked advocacy by thousands of young undocumented immigrants struggling to build a life in the United States—where many have lived the vast majority of their lives—due to lack of immigration status. On November 20, 2014 President Obama expanded the DACA program as part of a series of administrative actions on immigration described above.

DACA is a specific form of prosecutorial discretion that, once granted, prevents an individual from being removed from the United States for two years, during which time the recipient is eligible for work authorization. Under the recently expanded DACA provisions, DACA is available for children and adults who: (1) were under the age of 16 upon arriving in the United States; (2) entered

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<sup>102</sup> The TRAC Immigration Project at Syracuse University has published statistics on the numbers of cases administratively closed or terminated in the immigration courts due to prosecutorial discretion. See TRAC Immigration. (2012, June 28). ICE Prosecutorial Discretion Program, Latest Details as of June 28, 2012. Retrieved from <http://trac.syr.edu/immigration/reports/287/>.

<sup>103</sup> See U.S. Department of Homeland Security, & Johnson, J. C. (2014, November 20). Memorandum: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants. Retrieved from [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>104</sup> See Memorandum: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants.

<sup>105</sup> Several different DREAM bills have been introduced in Congress since 2001, but none have been enacted into law. The DREAM Act or DREAM bills would provide a path to lawful permanent residence for many undocumented youth. While requirements vary by bill, generally the DREAM bills are for individuals who arrived in the U.S. as children, live in the U.S. for a set number of years, graduate from high school, and have good moral character.

the United States prior to or on January 1, 2010; (3) continuously resided in the United States since that date; (4) have been present in the United States on November 20, 2014 and every day since that date; and (5) are in school, have received a high school completion certificate, or have received a General Education Development (GED) certificate; and (6) have not been convicted of certain criminal offenses.<sup>106</sup> Individuals must be at least 15 years old to apply, unless they are in removal proceedings or have a final removal order or voluntary departure order.<sup>107</sup> Although DACA has benefitted thousands of child immigrants, many children do not qualify because of its strict age and entry date restrictions, particularly children who arrived in the United States after January 1, 2010.

The benefits of DACA are limited. Children who receive DACA may remain in the United States for three years, subject to renewal. DACA does not provide a path to permanent residency or the ability for children to sponsor other family members to join them in the United States. Finally, because DACA was created by an executive order of the President of the United States—and not through legislation passed by the U.S. Congress—it can be revoked or restricted depending on the policy preferences of the sitting president. Republicans in the House of Representatives have charged that issuing DACA through an executive order was an illegal use of President Obama's executive authority. Not only have House Republicans threatened to sue the President over DACA, the House passed a series of bills (which have not been enacted into law) in August 2014 and then again in December 2014 to block President Obama from expanding the DACA program. As of that date, DACA had benefitted about 500,000 individuals.<sup>108</sup>

Another form of administrative relief President Obama announced on November 20, 2014 is the Deferred Action for Parental Accountability program for parents of U.S. citizen or lawful permanent resident children. DAPA is available to an individual who: (1) is the parent of a U.S. citizen or lawful permanent resident child; (2) has continuously resided in the United States since January 1, 2010; (3) was present in the U.S. on November 20, 2014; (4) does not have lawful immigration status; and (5) has not been convicted of certain criminal offenses. DAPA will benefit children in the context of migration—both those whose parents received deferred action through the program, and those who are themselves eligible for the program based on length of residency in the U.S. and being a parent of a U.S. citizen or LPR child. It will temporarily remove the risk of the deportation of eligible parents in many mixed status families. However, the program will not help parents of children who have been granted DACA or other temporary status. Similar to DACA, DAPA also does not provide a path to permanency and lasts for only three years, although it can be renewed.

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<sup>106</sup> See U.S. Department of Homeland Security, & Napolitano, J. (2012, June 15). Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. Retrieved from <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>107</sup> See Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children.

<sup>108</sup> See Sakuma, A. (2014, August 2). House Passes \$694 million border bill. *MSNBC*. Retrieved from <http://www.msnbc.com/msnbc/house-republicans-attempt-second-shot-border-bill>; Mass, W. (2014, December 5). House Passes “Executive Amnesty Prevention Act of 2014.” *New American*. Retrieved from <http://www.thenewamerican.com/usnews/immigration/item/19667-house-passes-executive-amnesty-prevention-act-of-2014>.

### 3. *Violence Against Women Act*

VAWA, first passed in 1994, is a federal law aimed at ending violence against women in the United States. It created a new immigration remedy for battered undocumented spouses and children of abusive U.S. citizens and LPRs, among others, so they could safely remove themselves from the relationship without the fear of deportation. The remedy sought to address cases in which the abuser would attempt to use the victim's immigration status as another way to control and manipulate her.<sup>109</sup> The law has been renewed several times, in 2000, 2005, and most recently 2013.

In addition to showing the requisite level of abuse by a U.S. citizen or LPR spouse, parent, or stepparent, an applicant for protection under VAWA must prove that he or she is a person of "good moral character." Applicants must also prove that deportation would result in "extreme hardship" to themselves, or in the case of a parent petitioner, "extreme hardship" to themselves *or* their children—a very high bar.<sup>110</sup> VAWA can be requested from USCIS at any time by persons not in removal proceedings. For those in proceedings, a related form of VAWA protection can be requested as a defense to deportation in immigration court, referred to as special rule cancellation of removal (or VAWA cancellation of removal). To be eligible for VAWA cancellation of removal, applicants must also have maintained continuous physical presence in the United States for three years prior to the adjudication of the application.<sup>111</sup>

Children can obtain VAWA protection in their own right as children of abusive U.S. citizens or LPRs. In addition, unmarried children under the age of 21 can obtain the benefit through parents who have received VAWA protection.<sup>112</sup> Once granted, VAWA protection offers a path to permanent residency and a more stable future in the United States. In reality, however, few children seek and obtain VAWA protection for a variety of reasons. First, the abusive family member may not be a U.S. citizen or LPR. Second, children who are abused by family members other than parents, stepparents, or spouses—such as by their aunts, uncles, or grandparents—are not eligible for this form of relief. Finally, many children who might be eligible for VAWA otherwise qualify for SIJS or a U visa (discussed in subsections C and D of this section), which do not require that the abuser hold any form of lawful immigration status in the United States. Moreover, the U visa does not restrict *who* the abuser is in relationship to the child, i.e., the abuser need not be related. Therefore, VAWA protection has little practical benefit from many children from Central America and Mexico.

### 4. *Temporary protected status*

As discussed in section III.A above, TPS is a temporary form of relief provided to nationals of certain countries that are unable to handle the return of its nationals due to conditions such as armed conflict or environmental disasters.<sup>113</sup> A country must be "designated" for TPS by the U.S. Secretary of State in order for citizens of that country to apply, and the individual must have been present in the United States on the date of the designation. Currently, the only countries in Central

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<sup>109</sup> 8 C.F.R. § 204.2(c), (e).

<sup>110</sup> 8 C.F.R. § 204.2(c)(1)(i).

<sup>111</sup> 8 U.S.C.A. § 1229b(b)(2) (West).

<sup>112</sup> 8 C.F.R. § 204.2(c)(4).

<sup>113</sup> 8 U.S.C.A. § 1254a (West); 8 C.F.R. § 244.2.

and North America that have been designated for TPS are El Salvador, Honduras, and Nicaragua, due to the effects of natural disasters there in the late 1990s and early 2000s.<sup>114</sup> An individual granted TPS is typically allowed to remain in the United States for 6 to 18 months, but he can renew the status for another temporary period if the country is re-designated for TPS. El Salvador, Honduras, and Nicaragua have continued to be designated for TPS year after year.

An important limitation preventing family unity is that TPS does not allow those who have received TPS to bring their family members to the United States or to confer benefits to them if in the country. Therefore, although some children from these Central American countries have parents in the United States with valid TPS status, it is of no benefit to them. Additionally, the vast majority of children do not satisfy the eligibility requirements for TPS in their own right (even if in the United States) due to the requirement that the applicant have been physically present in the United States at the time the country was first designated for TPS.<sup>115</sup> Because the three countries mentioned above were designated over a decade ago, the large numbers of Central American and Mexican children who have been arriving to the United States in recent years—see chapter 12 for more information about the surge in migration of unaccompanied children in particular—and who continue to arrive do not qualify for TPS.<sup>116</sup> As with other forms of relief discussed in this chapter, depriving children of the opportunity to reunify with their parents runs counter to the best interests of the child principle and other international norms. Finally, TPS is by definition only a temporary form of relief and does not provide a path to permanent residency. Therefore, it is not a durable solution for many migrant children seeking safety and stability in the United States.

Some advocates have urged the government to grant TPS to unaccompanied children from the Northern Triangle countries as a result of the current violence and instability in those countries.

### *5. Cancellation of removal*

Both LPRs and non-LPRs who have lived in the United States for a substantial period of time may be eligible for cancellation of removal if they meet residency, physical presence, and other requirements. This form of relief was created in recognition of the fact that, under certain circumstances, a person who has been in the United States for a long period of time should be permitted to stay even if he or she is not otherwise eligible to remain. To qualify for cancellation of removal, a non-LPR must show that: (1) he or she has been physically present in the United States for a continuous period of at least 10 years; (2) he or she has been a person of good moral character during that period; (3) his or her removal would result in “exceptional and extremely unusual hardship” to his or her spouse, parent, or child who is an LPR or U.S. citizen; and (4) he

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<sup>114</sup> Honduras and Nicaragua were designated on January 5, 1999, and El Salvador was designated on March 9, 2001. For the complete list of countries currently designated for TPS: U.S. Citizenship and Immigration Services. (2015, January 7). Temporary Protected Status. Retrieved from [http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Countries\\_Currently\\_Designated\\_for\\_TPS](http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Countries_Currently_Designated_for_TPS).

<sup>115</sup> 8 C.F.R. § 244.2(c), (d), (f).

<sup>116</sup> El Salvador was designated for TPS in 2001 and Honduras and Nicaragua were designated in 1999. Attorneys have argued that children of TPS holders who are in the U.S. when TPS is extended or re-designated should qualify for initial late registration TPS, even if they were not in the U.S. on the date of initial designation. USCIS and the BIA have a different view and have denied initial late registration applications when the child was not in the U.S. on the initial designation date. *See, e.g.,* Cervantes v. Holder, 597 F.3d 229, 235-36 (4th Cir. 2010) (holding that TPS is only available to children in the U.S. on the date of the initial designation).

or she has not been convicted of any disqualifying crimes.<sup>117</sup> Very few Central American and Mexican children qualify for cancellation of removal because of the lengthy physical presence requirement and the hardship requirement to a U.S. citizen or LPR parent or spouse. If granted, however, cancellation of removal leads to immediate permanent residency and the ability to work legally in the United States.

#### *F. Failed comprehensive immigration reform*

Organizations and individuals on all sides of the political spectrum have been calling on the U.S. Congress to reform what has been dubbed a “broken” immigration system. One of the main motivators for the legislation is the fact that there are approximately 11 million undocumented persons in the United States who are contributing to the country and its economy but living in the shadows. Some proponents of comprehensive immigration reform believe that immigration reform is necessary to provide the country’s undocumented population with a path to becoming fully-recognized members of society, while others place emphasis on including immigration enforcement provisions as part of any comprehensive reform bill to stem the tide of further unauthorized immigration.

The last major overhaul of U.S. immigration laws took place in 1996, and since then efforts to pass a comprehensive immigration reform bill have waxed and waned. In June 2013, a bipartisan group of U.S. senators drafted a comprehensive bill that passed the Senate by a two-thirds majority, which renewed hope for reform.<sup>118</sup> The Senate bill included several positive provisions that increased protections for migrant children, such as: providing government-funded legal counsel for unaccompanied children facing deportation; training border patrol and immigration enforcement officials on identifying and interviewing children who have fled persecution or been victims of trafficking or other crimes; and expediting pathway to citizenship for certain children who came to the United States before the age of 16 and who are attending or have completed high school or higher education (commonly referred to as “DREAMers”).<sup>119</sup>

On the other hand, the Senate bill had several shortcomings that, if passed, would have negatively affected children and adults alike. The bill failed to provide much needed guidance on the standards for asylum including the definition of a particular social group and the manner in which nexus should be determined. As explained in section III.B.1 above, the current interpretation and application of these legal requirements impose significant barriers to children’s claims for asylum and related protection. The bill also denied affordable healthcare, food stamps, and other critical benefits to immigrants on the path to legal status. Finally, the bill further militarized the border and diverted millions of dollars needed in other areas of immigration to extreme enforcement measures.<sup>120</sup>

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<sup>117</sup> 8 U.S.C.A. § 1229b(b) (West). Cancellation of removal for LPRs has fewer requirements, *see* 8 U.S.C. § 1229b(a), but it is only available to individuals who already have permanent residency and committed some offense or behavior that renders them removable.

<sup>118</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013-2014).

<sup>119</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013-2014).

<sup>120</sup> Specifically, the bill would provide an additional \$46.3 billion for additional (and often draconian) security measures, such as adding nearly 20,000 more agents along the border, building 700 miles of fencing, and using “watch towers, camera systems, mobile surveillance systems, ground sensors, fiber-optic tank inspection scopes, portable contraband detectors, radiation isotope identification devices, mobile automated targeting systems.” *See*

The bill did not become law because it failed to gain the approval of the U.S. House of Representatives, which preferred a “piecemeal” rather than comprehensive approach to reforming the immigration system. The House wanted first and foremost to implement stricter immigration enforcement laws, including further militarization of the border and increasing the grounds upon which to refuse immigrants’ admission to the United States and to deport immigrants already here.<sup>121</sup> Many commentators believe the House’s intransigence to passing a comprehensive bill was an intentional effort to prevent any legalization process from moving forward for the country’s estimated 11 million undocumented individuals.<sup>122</sup>

In May 2014, the issue of irregular immigration came to a head when the Obama Administration announced that the “surge” of unaccompanied children and families coming from the Northern Triangle countries, which has been steadily increasing over the last several years, has now become an “urgent humanitarian situation” for the country.<sup>123</sup> Republicans blamed President Obama’s DACA program and what they called his “lax” immigration enforcement policies, in addition to attacking numerous provisions of the TVPRA related to unaccompanied children. They claimed that the TVPRA’s provisions regarding releasing unaccompanied children to family and placing them in regular removal proceedings were too easy on children,<sup>124</sup> and that human smugglers spread the word throughout the Northern Triangle countries that child migrants would be quickly released from custody and would be eligible for DACA, described in section III.E.2 above. These factors, according to conservatives, caused the surge. Although reliable evidence shows that violence in Honduras, El Salvador, and Guatemala caused the influx,<sup>125</sup> conservatives continued to use the surge as a rallying cry for emergency enforcement action.

The House of Representatives acted quickly after the surge came to light to introduce two restrictive immigration bills. First, the House introduced a supplemental funding bill in response to the Obama Administration’s request for emergency funds to care for unaccompanied children. The House Bill, which provided wholly insufficient funding to care for the increased number of unaccompanied children, also penalized children and increased enforcement. The bill included

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Immigration Policy Center, American Immigration Council. (2013, July 10). A Guide to S.744: Understanding the 2013 Senate Immigration Bill. Retrieved from <http://immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill>.

<sup>121</sup> For a brief description of how a bill becomes a law in the United States, see U.S. House of Representatives. The Legislative Process. Retrieved from [http://www.house.gov/content/learn/legislative\\_process/](http://www.house.gov/content/learn/legislative_process/).

<sup>122</sup> See, e.g., Parker, C. (2014, August 4). The (Real) Reason Why the House Won’t Pass Comprehensive Immigration Reform. Retrieved from <http://www.brookings.edu/blogs/fixgov/posts/2014/08/04-immigration-tea-party-constituencies-parker>; Riccardi, N. (2014, August 13). Republicans May Need ‘Another White House Beat Down’ Before Acting on Immigration. *Huffington Post*. Retrieved from [http://www.huffingtonpost.com/2014/06/13/republicans-immigration-reform\\_n\\_5490798.html](http://www.huffingtonpost.com/2014/06/13/republicans-immigration-reform_n_5490798.html).

<sup>123</sup> The White House. (2014, June 30). Letter from the President – Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border. Retrieved from <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

<sup>124</sup> See, e.g., *Hearing: Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border Before the H. Comm. on Homeland Security*, 113th Cong. (2014). Retrieved from <http://homeland.house.gov/hearing/dangerous-passage-growing-problem-unaccompanied-children-crossing-border>.

<sup>125</sup> See, e.g., Wong, T. K. (2014, July 8). Statistical Analysis Shows Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border. Retrieved from <http://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>.

provisions to send the National Guard (armed military troops) to the border, increase additional surveillance along the border, eliminate the existing screening system in place for unaccompanied children by amending the TVPRA,<sup>126</sup> and expand grounds upon which to refuse admission to or deport immigrants from the United States.<sup>127</sup> The House also passed a bill to end DACA and prohibit the President from extending DACA to other immigrants—which would make the 500,000 plus young immigrants who have been granted DACA thus far vulnerable to deportation.<sup>128</sup> The Senate (with a Democratic majority) refused to take up the House provisions that would have eliminated critical protections and, as a result, the House's bills did not become law.

The battle over immigration between Republican and Democratic leaders is not a new phenomenon, but has occurred over time. This battle highlights how political and polarized the issue of migration is in the United States. It also shows how elected officials are all too willing to scapegoat irregular migrants and make them pawns in their political game. In response to the U.S. Congress' failure to pass immigration reform, President Obama exercised his executive powers to address the situation of some of the 11 million undocumented persons living in the United States.<sup>129</sup> At the same time that the White House announced its plans to provide temporary reprieve to about five million immigrants in irregular status in the United States,<sup>130</sup> the Obama Administration has taken a harsh and restrictive approach to migrants who arrived in the United States after January 1, 2014, including unaccompanied children and migrant families, addressed in the section below.

#### **IV. Procedural challenges for unaccompanied children seeking relief in the immigration system**

International bodies call on States to ensure that procedures for migrant children respond to their needs and vulnerabilities as children who are separated from parents and lack regular status. These bodies exhort States to develop policies and practices that are based on the best interests of the child principle, provide minimum safeguards—such as appointment of legal counsel and a guardian to all child migrants identified as unaccompanied—and guarantee full due process.<sup>131</sup> Despite these internationally-recognized fundamental protections and their application to children

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<sup>126</sup> In particular, the bill would gut the existing screening system for children from non-contiguous countries and provide all unaccompanied children with only minimal screening—with the result of immediate deportation for those children not identified on the spot as eligible for immigration relief.

<sup>127</sup> See H.R. 5230, 113th Cong. (2013-14). Retrieved from <https://beta.congress.gov/bill/113th-congress/house-bill/5230?q=%7B%22search%22%3A%5B%22supplemental%22%5D%7D>.

<sup>128</sup> See H.R. 5272, 113th Cong. (2013-14). Retrieved from <https://www.congress.gov/bill/113th-congress/house-bill/5272>.

<sup>129</sup> See Shear, M. D. (2014, November 20). Obama, Daring Congress, Acts to Overhaul Immigration. *New York Times*. Retrieved from [http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html?\\_r=0](http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html?_r=0).

<sup>130</sup> See section III.E.2 for more information on the 2014 executive action.

<sup>131</sup> See, e.g., UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 2005, September 1, CRC/GC/2005/6. Retrieved from <http://www.refworld.org/docid/42dd174b4.html>; U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the human rights of Migrants, Jorge Bustamante*, ¶¶ 34, 52-65, 81-82, 100-102, U.N. Doc. A/HRC/11/7 (2009, May 14). Retrieved from <http://www.refworld.org/pdfid/4a3b51702.pdf>.

in the United States involved in the dependency and delinquency systems, procedures in place for children in the U.S. immigration system do not provide adequate safeguards and do not ensure children's due process rights.

As detailed below, children are not provided with government-funded counsel in immigration matters and do not have the right to a child advocate. Furthermore, the procedures are not always consistent with the best interests of the child. Recent procedures put into place by the Obama Administration to respond to the increase in unaccompanied children were initiated based solely on immigration enforcement priorities, with no consideration of the best interests of the child. These procedures force children to proceed at an expedited pace in immigration removal proceedings and compromise due process. Whether driven by a belief that a harsh response to the increase in children and families is necessary in order to gain support for granting broad administrative relief on immigration or other strategic considerations, the Obama Administration's policies implemented in response to the surge in unaccompanied children threaten to return children to dangerous circumstances, contrary to both U.S. and international law.<sup>132</sup>

*A. No right to legal counsel deprives children of due process and leaves children vulnerable to deportation*

Children facing legal proceedings in the juvenile justice systems in the United States have a right to an attorney to represent them and defend their legal interests.<sup>133</sup> Children in U.S. abuse and neglect proceedings also have a right to an attorney, a guardian, or both. In contrast, in the U.S. immigration system, children—like adults—have no right to government-funded counsel, despite their distinct needs, lack of maturity, and vulnerability.<sup>134</sup> A study by TRAC in July 2014 showed that, on average, only 48% of children were represented by counsel in their immigration proceedings between January 2013 and June 2014.<sup>135</sup> Representation makes a critical difference in the outcomes of children's cases; the study concluded that when children were represented by counsel, they had an almost one in two probability of being allowed to remain in the United States; when lacking representation, they had only a one in ten probability of being allowed to remain in the country.<sup>136</sup>

Children—like adults—can have an attorney represent them in immigration proceedings, but only if they can afford to pay for one or find one willing to do so for free. Given the significant difference that legal representation makes in children's cases, and the current numbers of

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<sup>132</sup> Under the withholding of removal statute and the Convention Against Torture regulations the U.S. cannot return individuals to a risk to life or freedom on account of their race, religion, nationality, political opinion, or membership in a particular social group, or to a risk of torture. The withholding of removal obligation stems from the international *non-refoulement* commitment.

<sup>133</sup> The requirement of counsel in delinquency proceedings was first recognized in 1967. *See* *Application of Gault*, 387 U.S. 1 (1967).

<sup>134</sup> Under U.S. law, immigrants may be represented by counsel "at no expense to the government." INA § 240(b)(4)(A), 8 U.S.C.A. § 1229a(b)(4)(A) (West).

<sup>135</sup> TRAC Immigration. (2014, July 15). New Data on Unaccompanied Children in Immigration Court. Retrieved from <http://trac.syr.edu/immigration/reports/359/>. Previous studies conducted with respect to adults' cases found a 4 fold increase in success where an immigrant had legal representation. TRAC's study shows that when it comes to children there is a fivefold increase (verify math) in grant rates where an attorney is involved.

<sup>136</sup> TRAC Immigration. (2014, July 15). New Data on Unaccompanied Children in Immigration Court. Retrieved from <http://trac.syr.edu/immigration/reports/359/>.

unaccompanied children arriving in the United States, ensuring lawyers for these children is more important and more challenging than ever.

*1. Efforts to provide counsel fall short*

Over the past decade the United States has taken steps to encourage representation of unaccompanied children, but the steps that have been taken are insufficient to address the current need for representation. The BIA set out a policy that allows for appointment of legal counsel in cases of detained mentally incompetent children or adults in removal proceedings, recognizing the need for special safeguards in such cases.<sup>137</sup> However, no similar policy provides for appointment of legal counsel to *all* child migrants as a category of individuals deserving of this safeguard, regardless of proof of incompetence. In addition, two federal laws require the U.S. Department of Health and Human Services (HHS) to promote pro bono legal representation for unaccompanied children, who fall under the jurisdiction of the Office of Refugee Resettlement (ORR) within HHS.<sup>138</sup> These laws have led to a public-private partnerships model in which pro bono attorneys from law firms, corporations, and law schools represent unaccompanied children in immigration proceedings.<sup>139</sup> The public-private partnership model increased capacity to provide pro-bono representation for immigrant children, but about half of the unaccompanied children released from custody were still unable to find counsel to represent them. In October 2014 HHS announced a grant of several million dollars to two U.S. non-governmental organizations to provide legal representation to unaccompanied children following release from custody.<sup>140</sup> The program aims to serve 2,600 unaccompanied children in removal proceedings in Los Angeles, California; Houston, Texas; Miami, Florida; Baltimore, Maryland; Arlington, Virginia; Memphis, Tennessee; New Orleans, Louisiana; Dallas, Texas; and Phoenix, Arizona.<sup>141</sup> Under it, HHS will fund legal representation directly for the first time, a noteworthy step in the right direction of providing government funded counsel. Given the limited reach of the program, however, it will not come close to solving the problem of the growing need for attorneys to represent migrant children.

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<sup>137</sup> See *Franco-Gonzales v. Holder*, 828 F.Supp. 2d 1133 (C.D. Cal. 2011) (holding that U.S. government must appoint counsel for detained persons in removal proceedings who lack mental competence to represent themselves); Executive Office for Immigration Review, Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Respondents with Mental Disorders. Retrieved from <https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf>.

<sup>138</sup> Homeland Security Act of 2002, HSA § 462(b)(1)(A) (codified as amended at 6 U.S.C. § 279(b)(1)(A)) directed HHS to create and submit to Congress a plan to ensure that “qualified and independent legal counsel is timely appointed to represent the interests” of unaccompanied children, “consistent with the law regarding appointment of counsel that is in effect on the date of enactment this Act”; TVPRA encourages HHS to ensure “to the greatest extent practicable” that UAC have attorneys to represent them. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457, 122 Stat 5044 § 235(c)(5) (2008).

<sup>139</sup> A Treacherous Journey, pp. iii, 75.

<sup>140</sup> See Wayland, M. (2014, October 16). Announcement of the Award of Two Single-Source Program Expansion Supplement Grants to Support Legal Services to Refugees Under the Unaccompanied Alien Children’s Program, A Notice by the Children and Families Administration. *Federal Register*. Retrieved from <https://www.federalregister.gov/articles/2014/10/16/2014-24555/announcement-of-the-award-of-two-single-source-program-expansion-supplement-grants-to-support-legal>.

<sup>141</sup> Announcement of the Award of Two Single-Source Program Expansion Supplement Grants to Support Legal Services to Refugees Under the Unaccompanied Alien Children’s Program, A Notice by the Children and Families Administration.

Another branch of the federal government recently announced an initiative to promote counsel for unaccompanied children; however its scope is too limited to solve the problem. The Executive Office for Immigration Review (EOIR), in partnership with another federal agency, will sponsor 100 fellows, including lawyers and paralegals to represent and support cases of unaccompanied migrant children in removal proceedings. The program will provide critical legal services to a small number of unaccompanied children, but cannot meet the needs of all, or even half of the number of children who arrived in the United States in 2014. First, the program excludes many unaccompanied children who need attorneys; it is limited to unaccompanied children not in federal custody under the age of 16. Second, although fellows will be placed in a number of U.S. cities, some cities with very high volumes of unaccompanied children, such as Los Angeles, will not receive a fellow. Third, the relatively small number of 100 fellows will be unable to respond to the legal needs of the nearly 60,000 unaccompanied migrant children who entered the United States between October 1, 2013 and October 1, 2014.

Attorneys at law firms, private practices, non-profit organizations, law schools, and bar associations have responded to the incredible rise in unaccompanied children with offers to help, particularly since the Obama Administration's decision to fast-track these cases (discussed below). Local governments at the city and state-levels are making efforts to respond to the need for representation of children and families in removal proceedings. For example, in California, legislation introduced by Governor Jerry Brown and state Attorney General Kamala Harris and enacted by the state legislature will provide \$3 million to legal services agencies across the state to represent unaccompanied immigrant children in federal custody or released to sponsors. New York City approved a plan to provide immigration counsel to every detained individual in removal proceedings in New York, and San Francisco approved funding to ensure legal representation for recent arrivals of unaccompanied children and families placed in removal proceedings. New York and San Francisco provide models of how receptive attorneys would be to a coordinated federal effort to appoint counsel for children. But the continued lack of a right to counsel and lack of a coordinated federal program appointing counsel means that many children will continue to go unrepresented in immigration proceedings, resulting in a higher likelihood of their deportation.

## *2. Without an attorney migrant children risk deportation*

Children without an attorney are forced to represent themselves in a highly complex legal system, facing off against a trained government attorney arguing for their deportation. Without counsel, children are often unaware of their legal options and thus face formidable challenges to seeking immigration relief. The balance of power is further tipped when the children are monolingual Spanish or other native language speakers and unable to understand the proceedings without interpretation. In short, unrepresented children are deprived of a fundamentally fair process, in tension with their rights under international and domestic law.<sup>142</sup> As was mentioned above, nearly one out of two children with counsel win their immigration cases, whereas only one in ten children

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<sup>142</sup> CRC General Comment 6, p. 12; International Covenant on Civil and Political Rights (ICCPR) art. 24.1, 1966, December 16, 999 U.N.T.S. 171 (special protections required for all children according to their situation as children); Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2012). Representation of Children in Abuse and Neglect Proceedings, p. 2. Retrieved from [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/represent.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.pdf) (noting that all states in the U.S. provide for representation of children involved in abuse or neglect proceedings, and explaining the types of representatives that may be appointed).

without counsel succeed with the same. Moreover, not providing children in the immigration system with legal counsel is inconsistent with the wide recognition that unaccompanied migrant children need special protections due to their unique vulnerability.<sup>143</sup> A number of other countries provide counsel to unaccompanied children as a matter of right, including Canada, Denmark, New Zealand, and the United Kingdom.<sup>144</sup>

In July 2014, a group of leading non-profit immigration organizations filed a lawsuit against the U.S. government for failing to provide attorneys for children in removal proceedings.<sup>145</sup> The lawsuit, brought on behalf of four children without attorneys and seeking to proceed as a nationwide class action, argues that placing unrepresented children in removal proceedings violates due process of law. The lawsuit is currently pending in federal court. The lawsuit argues that representation of all unaccompanied children—the only way in which children can have a fair chance at defending themselves in immigration proceedings against trained government counsel—can only be ensured through government appointment of counsel.

3. *Expedited removal proceedings are fundamentally unfair and heighten the risk of returning children to persecution, torture, or death*

In mid-2014, in response to pressure from anti-immigrant voices, including those in Congress, to deport unaccompanied children arriving as part of the surge, President Obama called for expedited removal proceedings for unaccompanied children and adults with children arriving at the U.S. border. EOIR, which houses the nation's immigration courts, responded by making removal proceedings of unaccompanied children a "priority," and scheduling them before the cases of individuals who arrived earlier, even if those individuals' cases have already been pending for months or years and would be further delayed. In practice, this means that unaccompanied children must appear in immigration court within weeks of arriving in the United States. EOIR not only schedules the child's initial appearance in court quickly, but also requires cases to move forward to trial quickly, instructing immigration judges to grant only short continuances of no more than six weeks to two months for children to seek counsel, explore legal options, and recover from

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<sup>143</sup> See, e.g., U.N. High Commissioner for Refugees (UNHCR). (1997, February). Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, ¶ 4.2. Retrieved from <http://www.refworld.org/docid/3ae6b3360.html> ("Upon arrival, a child should be provided with a legal representative."); CRC General Comment 6, ¶ 36 ("In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation."); CRC General Comment 6, ¶ 1 ("The objective of the General Comment is to draw attention to the particularly vulnerable situation of unaccompanied and separated children[.]"). See Complaint, J-E-F-M- v. Holder, No. 14-cv-01026-TSZ (W.D. Wash. 2014), complaint available at [https://www.aclu.org/sites/default/files/assets/filed\\_complaint\\_0.pdf](https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf).

<sup>144</sup> See Aliens (Consolidation) Act of 2009, 785 of 2009 (D.K.). Retrieved from [http://www.nyidanmark.dk/NR/rdonlyres/C2A9678D-73B3-41B0-A076-67C6660E482B/0/alens\\_consolidation\\_act\\_english.pdf](http://www.nyidanmark.dk/NR/rdonlyres/C2A9678D-73B3-41B0-A076-67C6660E482B/0/alens_consolidation_act_english.pdf); Legal Services Act of 2000 (N.Z.). Retrieved from <http://www.legislation.govt.nz/act/public/2000/0042/latest/DLM71928.html>; Processing an asylum application from a child. Retrieved from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257469/processingasylumapplication\\_1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication_1.pdf); Immigration and Refugee Board of Canada. (1996, September 30). Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues. Retrieved from <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuidDir/Pages/GuideDir03.aspx>.

<sup>145</sup> See Complaint, J-E-F-M- v. Holder, No. 14-cv-01026-TSZ (W.D. Wash. 2014), complaint available at [https://www.aclu.org/sites/default/files/assets/filed\\_complaint\\_0.pdf](https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf).

trauma before proceeding with their case. In some cases, judges have granted only two-week continuances and told children that they will be expected to proceed at their next hearing, even if they have been unable to obtain an attorney.<sup>146</sup> To put this process in context, although times varied across judges and courts, generally, individuals in non-expedited cases prior to the surge would often receive two or more continuances of six months to a year or more, in order to find an attorney and develop an application for relief. Under President Obama's accelerated procedures, up to 45 children at a time appear in court for these proceedings, depending on the location, and some immigration courts schedule children's dockets twice per day, sometimes five days per week. Advocates are calling the hearings "rocket dockets" given the unprecedented pace at which they are moving.

Forcing children to proceed on "rocket dockets" has had multiple harmful results. To begin, an approach that requires children's cases to move forward expeditiously and without a lot of scheduling flexibility makes it exceedingly difficult for children to succeed on their applications for relief, even if they have a strong claim. Existing avenues of relief from removal are meaningless when a child is deprived of the time needed to heal from trauma, to feel comfortable to disclose the information necessary to evaluate a claim for relief (such as whether the child suffered harm in her country or parental abandonment), and to adequately prepare for an interview or court hearing with an immigration officer or judge. Legal proceedings focused on speed, rather than a child's best interests, completely undercut previous advances in the United States' treatment of unaccompanied children. For example, EOIR's guidelines call on judges to accommodate children's needs in court and grant them the time they need to find an attorney. Current policy is in tension with these guidelines, prioritizing speed over child welfare and placing children at risk of deportation to serious danger or death. Current policy also violates U.S. domestic and international obligations not to return individuals to persecution, and the United States' moral obligations to protect children from harm.

Additionally, expedited proceedings of children have elevated the need for legal representation to emergency levels. The number and rate of cases being heard weekly in these expedited cases far outstrips the number of trained attorneys available to take cases of unaccompanied children. Legal services organizations around the country are overwhelmed by children searching for lawyers to help them, and frequently have to turn children away due to lack of capacity.<sup>147</sup> This problem, in turn, has made it all the more challenging for children to secure legal counsel. Pro bono attorneys around the country who have little or no experience in immigration law have stepped forward to help, but their efforts are limited by the availability of experts to train and mentor them on the cases.

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<sup>146</sup> See Declaration of Cheryl Pollman in Support of Plaintiff's Reply in Support of Their Motions for Preliminary Injunction and for Class Certification, National Council of Jewish Women, *J-E-F-M- v. Holder*, No. 14-cv-01026-TSZ (W.D. Wash. 2014), Retrieved from

<http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/Pollman%20Signed%20Declaration.pdf>; Hobbs, M. (2014, August 29). Lawyers Say 'Rocket Dockets' Risk Due Process. *Daily Report*. Retrieved from <http://www.dailyreportonline.com/id=1202668537443/Lawyers-Say-Rocket-Dockets-Risk-Due-Process>.

<sup>147</sup> See Semple, K. (2014, August 4). Advocates in New York Scramble as Child Deportation Cases are Accelerated. Retrieved from [http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?\\_r=0](http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?_r=0).

In some counties, non-profit organizations, attorneys at private law firms, and county bar associations have volunteered to attend some of the “rockets docket” and speak on behalf of children. The role of these attorneys is limited. While their efforts to orient children at their initial hearing and ask judges for more time to find an attorney before moving forward with their cases have helped many children who would have otherwise appeared in court alone, these attorneys are not necessarily able to accept a child’s case for full-scope representation. Nor are they in a position given the time constraints to adequately screen a child for possible eligibility for immigration relief. Such screening is necessary even to provide adequate referrals, as many attorneys and organizations only specialize in certain areas of immigration law.

*B. No right to a child advocate*

United States courts frequently appoint a child advocate, also called a guardian, for children in cases involving adoption, child custody, child support, divorce, and abuse and neglect proceedings.<sup>148</sup> In fact, U.S. federal law requires states to appoint a guardian or other individual designated with representing the child’s best interests in all child abuse and neglect cases.<sup>149</sup> International bodies also recognize the importance of appointing an individual to advocate for the child’s best interests when a child is caught up in legal proceedings on his or her own. UN bodies, including UNHCR and the United Nations Children’s Fund (UNICEF), have long advocated that an independent child advocate be assigned to cases of unaccompanied children in order to advocate for their best interests and advise them in the immigration system.<sup>150</sup> Countries such as Canada, Finland, and Sweden, and the United Kingdom provide guardians in all cases of unaccompanied children.<sup>151</sup> The United States, however, does not provide a child advocate to all unaccompanied children, and prior to 2003 did not provide child advocates to any unaccompanied child.

Starting in 2003, HHS began funding the appointment of guardians in some unaccompanied children’s cases. The non-profit Young Center for Immigrant Children’s Rights, funded by the HHS, developed a model project for the provision of an independent child advocate in cases of

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<sup>148</sup> Technically federal law refers to guardians “ad-litem.” A guardian ad-litem is charged with representing the child’s best interests to the court or other bodies, which may differ from the child’s stated or express interests, as discussed below.

<sup>149</sup> See Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010). The individual appointed may be an attorney ad-litem—responsible for representing the child’s best interests, a Court Appointed Special Advocate (CASA)—charged with advocating for the child and his/her best interests, or an attorney focused on representing the child’s legal and stated interests. See Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2012). Representation of Children in Abuse and Neglect Proceedings. Retrieved from [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/represent.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.pdf).

<sup>150</sup> UNHCR 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum. The Committee on the Rights of the Child and UNICEF also recognize the critical need for appointment of a guardian to represent the best interests of an unaccompanied child. See CRC General Comment 6, ¶¶ 33-38 (calling for appointment of guardian or advisor as soon as UAC is identified); see also UNICEF. (2013, December). Observación Escrita de UNICEF sobre Niñez Migrante en América Latina y el Caribe: Solicitud de Opinión consultiva sobre niñez migrante presentada por Argentina, Brasil, Paraguay y Uruguay, ante la Corte Interamericana de Derechos Humanos. Retrieved from [http://www.unicef.org/argentina/spanish/Amicus\\_Curiae\\_COMPLETO.pdf](http://www.unicef.org/argentina/spanish/Amicus_Curiae_COMPLETO.pdf) (calling for a guardian or legal representative for UACs as a matter of due process).

<sup>151</sup> See King, S. M. (2013). Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors. *Harvard Journal on Legislation*, 50, 331, p. 367; Immigration and Refugee Board of Canada. (2014, June 16). Commentaries to the Immigration Division Rules: Rule 19 (Designated Representatives). Retrieved from <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/ActRegLoi/Pages/CommentIdSi.aspx>.

unaccompanied children.<sup>152</sup> The advocate's role differs from that of the child's attorney. A child's immigration attorney is obligated to represent the child's *stated* or *express* wishes or interest, which sometimes are in tension with a child's best interests. Tension between a child's stated interests and best interests may arise, for example, when a child who fled a dangerous situation asks to return to his or her country. This scenario sometimes arises when a child is in federal immigration custody for an extended time and is desperate to be free, no matter the long-term consequences. It also arises when a child feels compelled by pressure from parents or other adults to do something that would result in harm to the child, such as to work long hours in a restaurant rather than go to school. Child advocates, however, advance the child's best interests (or safety and well-being). Child advocates supervised by the Young Center promote the best interests of the child, but do so "with due regard to the child's expressed wishes," consistent with the CRC.<sup>153</sup>

A major legislative advancement for migrant children enacted in 2008 grants HHS the discretionary authority to appoint an independent child advocate to children identified as trafficking victims or as particularly "vulnerable." As positive as this change may be, only a small percentage of unaccompanied children benefit from it because of its discretionary nature, and because the U.S. Congress has not funded the program at sufficient levels to reach all vulnerable unaccompanied children. HHS decides on a case-by-case basis when to appoint a child advocate using a range of criteria, including pregnancy, disability, and other factors to identify vulnerability. This approach deprives the majority of unaccompanied children of the special protections called for by their situation as children with no adult to advise them, while confronting a legal system in which they risk deportation, potentially back to danger. As part of its initiative to fund legal representation for unaccompanied children released from custody, some of the HHS funds designated for the initiative will be used to provide child advocates for children who receive a lawyer through the program. HHS's initiative should be commended; it increases the number of unaccompanied children who will receive a child advocate and includes children released from custody, who have not previously benefitted from child advocates. Given that the funding aims to provide 2,600 unaccompanied children with attorneys, however, at most 2,600 released children will be assigned child advocates, far short of the need. When no advocate is assigned to an unaccompanied child's case, no one is charged with promoting that child's best interests. Without an attorney or advocate, the child has no one to advise him as he struggles through the immigration system, compounding the due process concerns raised earlier.

*C. Procedures for applying for immigration benefits are complex and difficult to navigate*

Children without status apprehended by federal immigration officials or children referred to federal immigration officials by state authorities, for example in the context of a juvenile delinquency case, are generally placed in removal proceedings. Like adults, these children must respond to the charges brought against them by the government that they are "removable" (meaning they can be deported from the United States) because they are not citizens of the United

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<sup>152</sup> The Young Center for Immigrant Children's Rights, based at the University of Chicago Law School, was formerly the Immigrant Child Advocacy Project (ICAP). Since 2003, even before the TVPRA granted HHS the authority to appoint child advocates, the Young Center has been a pioneer in this area, providing child advocates for unaccompanied immigrant children.

<sup>153</sup> See The Young Center for Immigrant Children's Rights. Our Mission. Retrieved from <http://theyoungcenter.org/about/mission/>.

States and because they entered the United States without permission or overstayed the permission they had. If they admit removability, children have the right to seek relief from removal by showing their eligibility for an immigration benefit. However, applying for these various forms of immigration relief is very complex and difficult for anyone to understand, let alone an unaccompanied child who recently arrived in the United States and who is not afforded counsel or a guardian.

A child is unlikely to know the proper procedure, or how to follow it, without legal counsel. For example, some applications for relief—such as U and T visas—can only be adjudicated by USCIS (not by the immigration courts). When applying for one of those forms of relief the child would ask the immigration judge for time to pursue the application with USCIS. If USCIS approved the application, the child would then ask the judge to terminate or close the deportation proceedings. If USCIS denied the application, the child's case would proceed in court where she could then try to seek other benefits. Some applications for relief from removal can only be pursued in immigration court, for example, cancellation of removal. The substantive requirements of these forms of relief are described in section III above.

Asylum, one of the most common forms of relief sought by children, involves a special procedure for unaccompanied children. Prior to 2008, all children placed in removal proceedings seeking asylum were required to submit their asylum application in immigration court, with the immigration judge deciding whether they were eligible for asylum protection. In response to years of advocacy regarding the inappropriateness of the adversarial setting of removal proceedings in cases of child asylum seekers, U.S. Congress changed the law in 2008 to give USCIS initial jurisdiction over all unaccompanied children's asylum claims—whether in removal proceedings or not. Asylum offices of USCIS now hear and decide all unaccompanied children's asylum cases in a non-adversarial context. If USCIS grants the case, then as with the other forms of relief discussed above, removal proceedings should be terminated. When USCIS does not grant the case, it refers the case back to court for the immigration judge to consider and rule on the asylum application anew. While this procedure has been a major advance from the previous approach, it falls short by failing to recognize the fact that *all* child asylum seekers, unaccompanied or not, are vulnerable by nature of their age, development, status as children, the fact that they are in removal proceedings, and the fact that they fear persecution.

There are other types of immigration relief that can be decided by more than one government agency or that require decisions from a combination of agencies. For example, as explained in section III.C, children applying for SIJS must go through a two-step process that involves appearances before a state court, followed by filing an application with USCIS. Once granted, SIJS recipients are then eligible for immediate permanent residency. Depending on whether the child is in removal proceedings, the procedures for this process can vary greatly and can be complicated, because USCIS cannot decide the application for permanent residence if the child has a pending case in removal proceedings. Often times, the decision on where to file a particular application depends on case strategy, which is a decision one should make with their lawyer, and which includes considerations about the particular jurisdiction where the case is proceeding. Yet children arriving in the United States—unaccompanied or not—are expected to quickly navigate this complex system without the benefit of counsel or a guardian to guide them through it.

*D. Best interests of the child are not a primary consideration*

Prior to the recent increase in unaccompanied children arriving in the United States, the United States had made progress in incorporating child-sensitive procedures into its immigration system—although limited by the lack of a binding best-interests standard. The government’s response to the influx, however, has undermined some of the important advances made regarding proceedings for children, and threatens to roll back progress made entirely.

*1. Procedures for children in removal proceedings*

Due to the adversarial and intimidating nature of removal proceedings, and the grave consequences of a wrong decision, the absence of a best interests standard for children proves especially harmful. The lack of a best interests standard in children’s removal cases manifests in the following ways: (1) an inappropriate (overly formal) courtroom setting for children; (2) insensitive and sometimes aggressive questioning of children by judges or by government attorneys during cross examination; (3) absence of protections for child applicants, such as allowing their testimony to be taken in the judge’s chambers or accepting their declarations as testimony instead of requiring them to testify in court; and (4) overly litigious positions of government attorneys who may be unwilling to limit the contested issues in a case.<sup>154</sup>

Immigrant children in removal proceedings must appear in a formal courtroom setting before an immigration judge and against a trained government attorney who works for DHS. The courtroom may be filled with strangers, most of whom are adults, when a judge calls on a child to proceed with his or her case. Because most child migrants speak limited or no English, communication between the child, the judge, and the attorneys in the courtroom is carried out through an interpreter. A courtroom exchange between an immigration judge and a 16-year old girl is representative of what happens during a child’s first appearance in court:

Judge: Calls out the child’s name to come up.

Judge (*through interpreter*): “Is Spanish your best language?”

Child: “Yes.”

Judge: “Please stand and raise your right hand. Do you affirm what you say will be true?”

Child: “Yes.”

Judge: “How old are you please?”

Child: “16.”

Judge: “Ma’am what is your correct name?”

Child: Provides name.

Judge: “What is your address?”

Child: Provides address.

Judge: “Who is here with you today?”

Child: “I am here with my aunt.”

Judge: “Where are you parents? Why aren’t they here?”

Child: “I don’t know.”

Judge: “But you are living with your parents, aren’t you?”

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<sup>154</sup> A Treacherous Journey, p. 62-63.

Child: "Yes."

Judge: "You do not have a lawyer?"

Child: "No."

Judge: "Ma'am the reason you're here today is because the Government is seeking to remove you from the United States because they say you came here illegally, with a passport that didn't belong to you. So you were sent to a court and before me as a Judge for me to decide if they're right, if you should be removed. And even if that's true, whether there's any way you can stay here legally. Do you understand?"

Child: "Yes."

Judge: Grants the child some time to try to obtain an attorney.

Judge: "You must come back to court on [date] and [time] with your attorney. If you do not appear at that time, you could be ordered removed in your absence. And then you'll be ineligible for forms of relief under the Immigration Act for 10 years. Do you understand?"

Child: "Yes."

This type of questioning confuses and intimidates children, especially if they are unrepresented; the younger the child, the more frightening or confusing. Scholars and advocates alike have criticized the highly adversarial nature of removal proceedings and argued that they are inappropriate for children.<sup>155</sup> EOIR has issued guidelines on children's cases for immigration judges in order to make removal proceedings more child-friendly. The guidelines give immigration judges "discretion in taking steps to ensure that a "child-appropriate" hearing environment is established" and set forth certain accommodations that can be made in children's cases, such as judges removing their robes and appearing in normal attire. However, the guidelines are not binding on immigration judges and do not go far enough. For example, the guidelines do not explicitly restrict judges from engaging in insensitive questioning or from allowing such questioning. Meanwhile, no binding standards require a child-sensitive approach on the part of attorneys for the government.<sup>156</sup> These can lead to highly problematic exchanges between the child and government attorney. For example, in one case, the government attorney questioned a thirteen-year-old child recollecting incidents that took place years earlier, as follows:

Q: Okay. And do you know why [your family's attacker] didn't like your grandmother?

A: No.

Q: Do you know why he said Communists?

A: I don't know what that word means.

Q: Okay. And did you hear it yourself or did someone tell you that's what he said?

A: He stated Communists.

Q: And you don't know what he meant by that?

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<sup>155</sup> Young, W., & McKenna, M. (2010). *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*. 45, 247, p. 256; Bhabha, J., & Schmidt, S. (2006, June). *Seeking Asylum Alone, Unaccompanied and Separated Children and Refugee Protection in the U.S.* Retrieved from [http://www.law.yale.edu/documents/pdf/Clinics/Seeking\\_Asylum\\_Alone\\_US\\_Report.pdf](http://www.law.yale.edu/documents/pdf/Clinics/Seeking_Asylum_Alone_US_Report.pdf).

<sup>156</sup> *A Treacherous Journey*, pp. 9-10.

A: No.<sup>157</sup>

Incredibly, the DHS attorney in the case argued that the child failed to establish nexus to an imputed political opinion in large part due to supposed gaps in testimony such as the above— notwithstanding the fact that the relevant incidents took place when the child was between five and ten years of age. The immigration judge agreed with the government attorney and denied asylum.<sup>158</sup>

Moreover, as discussed in section IV.A.3 above, the current practice of expedited hearings is against the child’s best interests and contrary to the policies announced in the EOIR guidelines. The existence of “rocket dockets” calls into question the continuing applicability and use of those guidelines.

Not only are there insufficient procedures in place for children in removal proceedings, there is also inadequate training of immigration judges, members of the BIA and government attorneys who appear in children’s removal proceedings. Consistent with international and domestic standards, adjudicators must have special training and expertise in order to understand and tailor proceedings to children’s unique circumstances and needs. However, immigration judges and BIA members receive little to no training on children’s issues, such as child development, effects of trauma on children, child-sensitive interviewing, and children’s rights.<sup>159</sup> Attorneys for DHS—who litigate cases in removal proceedings—receive no such training.<sup>160</sup> This critical gap can easily be filled by instituting ongoing training on these issues.

The TVPRA of 2008 requires the United States to issue regulations “which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive handling” of their cases.<sup>161</sup> These regulations would be binding on judges and government attorneys and could resolve the problems highlighted here. However, six years have gone by, and no such regulations have been issued.

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<sup>157</sup> *Mejilla-Romero v. Holder*, 600 F.3d 63, fn19 (1st Cir. 2010).

<sup>158</sup> *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010). The immigration judge denied the child’s asylum claim, and both the BIA and initially the First Circuit upheld the denial. However, at the urging of the child petitioner, supported by U.S. advocacy groups and UNHCR as amici, First Circuit later vacated its decision and remanded to the agency for new proceedings that adhered to U.S. and international guidance on the proper handling of child asylum claims. *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010).

<sup>159</sup> *A Treacherous Journey*, p 68; *see also* American Bar Association Commission on Immigration. (2004, August) *Standards for the Custody, Placement, and Care; Legal Representation; And Adjudication of Unaccompanied Alien Children in the United States*. Retrieved from [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant\\_Standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf) (calling for special training for immigration judges deciding children’s cases); CRC General Comment 6 (calling for special training of officials working with UACs including legal issues, interview techniques, “child development and psychology, [and] cultural sensitivity and inter-cultural communication”).

<sup>160</sup> *A Treacherous Journey* p. 68.

<sup>161</sup> TVPRA § 235(d)(8).

## *2. Procedures before United States Citizenship and Immigration Services*

Children seeking asylum before USCIS are interviewed by a USCIS officer with special expertise in asylum law, known as an asylum officer. Children applying for SIJS, U visas, and T visas are interviewed by a general USCIS officer who does not have expertise in a particular area.

In contrast to immigration court proceedings, USCIS interviews take place in an office setting, without a judge, and with no cross-examination. As with cases in the immigration courts, children can be represented by an attorney, but have no right to an attorney appointed at the government's expense. USCIS asylum officers receive training on interviewing children and analyzing children's asylum claims. Guidelines issued by the federal government on children's asylum claims also set out child-sensitive interview techniques. Despite their training and the thoughtful interview approaches in the U.S. guidelines, some asylum officers have been reported by advocates to "demonstrate a lack of sensitivity and engage in invasive questioning."<sup>162</sup> General USCIS officers who interview children on other types of claims, such as SIJS, do not receive any special training on interviewing children or analyzing children's claims for relief, and there are no guidelines for USCIS officers on children's SIJS, U visa, or T visa cases.<sup>163</sup> Consequently, some USCIS officers "employ antagonistic questioning methods in interviewing children on their applications for SIJS or adjustment of status."<sup>164</sup>

USCIS could significantly improve its treatment of children by applying the best interests of the child standard to all of its procedures in children's cases, and by requiring specialized training for all officers hearing children's cases.

### **V. Lack of best interests standard leaves children without durable solutions and results in repatriation to danger**

Throughout this chapter the term "best interests of the child" has been used to critique a range of U.S. procedures and policies that affect immigrant children and adolescents but do not prioritize their interests. Previous sections also analyzed how the best interests of the child principle impacts the legal analysis of applications for immigration remedies. This section refers to the best interests of the child in a different context, focusing on the absence of a legal framework for immigrant children built on the best interests of the child principle, and the need for a new form of immigration relief rooted in this principle. The absence of a binding legal standard requiring that the best interests of the child be a primary consideration in all actions and decisions affecting immigrant children carries grave consequences for children. It also undermines their substantive rights under international law, and, as discussed above, deprives them of procedural rights and protections. Finally, the absence of this standard affects children's eligibility for lawful immigration status and places children at risk of repatriation to dangerous and precarious circumstances.

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<sup>162</sup> A Treacherous Journey, p. 70.

<sup>163</sup> A Treacherous Journey, pp. 69-72.

<sup>164</sup> A Treacherous Journey, p. 71-72.

*A. The best interests of the child must be a primary consideration in repatriation decisions*

As discussed in chapter 9 on the treatment of migrant children at the U.S.-Mexico border and chapter 12 on repatriation and reintegration, U.S. law and existing practices permit repatriation of unaccompanied children without any determination or consideration of their best interests. The consequence is that children may be returned to unsafe circumstances or situations detrimental to their well-being—for instance, return despite family separation or lack of a caregiver. However, ineligibility for immigration relief does not necessarily mean that a child can safely return to his country. In the case of a child asylum seeker, for example, a judge may find that the child has a well-founded fear of persecution upon return to his country, but may deny asylum based on finding that the feared persecution is not linked to a protected ground.<sup>165</sup> A child in this situation would risk return to his persecutors, contrary to his best interests and in violation of his rights under international law.

In cases in which HHS assigns a child advocate (also called a guardian), the advocate provides the immigration judge or USCIS adjudicator with a best interests recommendation. Best interests recommendations made by child advocates include critical information about the child's history and circumstances that may not have come out during the immigration proceedings. The importance and role of child advocates is explored in greater detail in chapter 12, on repatriation and reintegration of migrant children returned by the United States.<sup>166</sup>

*B. Relief based on best interests of the child is needed*

Inadequate forms of immigration relief exist to address children's reasons for migrating from Honduras, El Salvador, Guatemala, and Mexico. As discussed above in this chapter and in chapters 2-7, children from these countries migrate alone to flee many forms of violence or human rights violations pervasive in their communities. However, restrictive interpretation of the refugee definition, coupled with a lack of a child-sensitive approach to immigration relief and procedures, results in their return to dangerous situations in their home countries. Return may even be fatal, as evidenced by stories of children like Edgar Chocóy Guzman, Josue Rafael Orellana Garcia, and the 5-10 deported children recently murdered in Honduras. Edgar fled Guatemala after members of his former gang threatened to kill him for deserting the gang. He had grown up in an abusive home and took to the streets to escape. There he joined a street gang. Edgar testified before an immigration judge that he would be killed if he were sent back to Guatemala. Although the judge believed him, the judge found that he did not deserve asylum because of his former affiliation with a street gang and ordered him deported. Seventeen days after his arrival in Guatemala, the gang members Edgar feared murdered him.<sup>167</sup> Tragically, Josue's story is not much different. Gang members in Honduras targeted Josue due to physical disabilities he suffered as a result of

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<sup>165</sup> See section III.B.1 for more information on gaps in asylum protection.

<sup>166</sup> U.N. High Commissioner for Refugees. (2008, May). UNHCR Guidelines on Determining the Best Interests of the Child, pp. 53-54. Retrieved from <http://www.unhcr.org/4566b16b2.pdf>. UNHCR recommends that a multi-disciplinary, gender-balanced BID panel comprised of independent experts in "child development and child protection" conduct the formal BID. The panel should have strong knowledge and experience in domestic children's rights and welfare, refugee law, child and adolescent development, "specific protection risks, such as trafficking, recruitment, sexual and gender-based violence," and the child's community.

<sup>167</sup> See De Leon, S., Associated Press. (2004, May 9). Guatemalan Youth Slain 17 Days After Being Deported From U.S. *Los Angeles Times*. Retrieved from <http://articles.latimes.com/2004/may/09/news/adfg-deport9>.

Hurricane Mitch. Josue fled Honduras and filed for asylum in the United States, but an immigration judge found he did not qualify and ordered him deported. Shortly thereafter Josue disappeared; his dead body was eventually found.<sup>168</sup>

Some children make a decision not to apply for relief because they have been informed that they do not qualify. Even applying a child-sensitive analysis, some number of children would not qualify for immigration relief. For example, children migrating because their caregivers become too old to care for them, or solely to reunify with a parent in the United States even though their current situation meets their needs, would likely be ineligible for existing forms of immigration relief.

A new form of immigration relief would protect children from return to their countries when a determination has been made that return is not in their best interests. Requiring primary consideration of a child's best interests is a critical step for protecting migrant children's rights and safety. Providing a form of relief based on best interests would go one step further toward ensuring durable solutions for these children. Specifically, migrant children who do not qualify for existing forms of immigration relief and for whom return would be against their best interests should be granted lawful permanent residency. Such grant would be consistent with state child welfare laws in the United States—which require permanency planning for children in the foster care system—and with UNHCR's recommendation that durable solutions be identified to ensure children's stability.<sup>169</sup>

## **VI. Conclusion**

Children from Mexico and Central America navigating the U.S. immigration system face numerous hurdles in regularizing their immigration status. Overly restrictive applications of certain forms of immigration relief—particularly asylum and related forms of protection—and complex procedural barriers deprive many children of legal relief for which they should be eligible. The Obama Administration's new expedited procedures in response to the influx of migrants from the Northern Triangle countries have exacerbated existing problems and deprive children of due process, especially in light of the government's failure to provide appointed counsel to children. Moreover, the lack of a best interests standard driving procedural and substantive decisions applied to child migrants falls short of the United States' international and moral obligations. Absent such standard, the United States will likely continue to return children to countries where they may face danger and life-threatening conditions.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

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<sup>168</sup> See Dzubow, J. (2012, January 23). Dead Honduran Seeks Asylum in the U.S. *The Asylumist*. Retrieved from <http://www.asylumist.com/2012/01/23/dead-honduran-seeks-asylum-in-the-u-s/>.

<sup>169</sup> UNHCR focuses on the need for durable solutions for unaccompanied children, but its logic also applies to migrant children facing removal or voluntary departure on their own. See UNHCR Guidelines on Determining the Best Interests of the Child.

## Chapter 11      Family Separation as a Result of Immigration Policies in the United States

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Women's Refugee Commission

### **I. Introduction**

This chapter broadly examines family separation in the context of the U.S. immigration system. Current U.S. immigration laws are built on enforcement principles rather than children's rights or family unity, an orientation that has had a devastating effect on the integrity of migrant families in the United States. The existing U.S. family-based immigration system also creates significant challenges for family unity, forcing individuals to wait years to reunite with family members. Throughout the enforcement process, federal laws, agency policies, and state and local practices that target immigrant parents harm hundreds of thousands of children each year by failing to appropriately consider their best interests. This is particularly true in the context of mixed-status families in which one or both parents are undocumented but the child is a U.S. citizen. Because parent and child have different legal statuses and therefore vastly different rights under U.S. law, the mixed-status family facing the deportation of a parent may be forced to make the difficult decision of whether it is better for the family to relocate together to the country of origin or to separate in hopes that the child will ultimately have a better life in the United States. In some cases, parents may not have a choice if they are deported without the ability to make decisions regarding their child's care.

This chapter first addresses the laws, enforcement policies, and related practices that are the root causes of family separation in the United States. It then examines the effect of these practices on the children of migrant parents, including psychological, economic, and educational outcomes as well as the potential for interaction with the child welfare system. The chapter also examines the challenges that deported parents face when they attempt to navigate the system from abroad in order to reunite with their children. Finally, this chapter examines the ways in which the enforcement policies described deprive impacted children of their internationally protected rights to family, education, and health.

### **II. Historic trends and post-1996 changes: limited family immigration and increased enforcement measures**

#### *A. An outdated family immigration system*

As explained previously in chapter 10 on immigration remedies and procedures, the current family immigration system in the United States does not include adequate channels to encourage legal migration. In particular U.S. immigration status is often more focused on economic or other benefits to the United States over family unity. Few temporary visas are available to low skilled workers. Labor related visas are focused in large part in technical or high skill industries, often to the detriment of women and other laborers in non-traditional sectors such as domestic work. Lawful permanent resident status is only available to certain relatives after significant wait times for pending applications. Unmarried children (under the age of 18), and siblings, and parents of

adult legal residents can be eligible for legal migration. However, siblings and parents of U.S. citizen children under the age of 21 are not eligible for migration through the U.S. citizen child. This results in a situation where millions of citizen children or legal resident children have grown up in the United States but their parents are undocumented or living abroad.

In addition to the restrictions on the categories of relatives who may be sponsored for lawful permanent residence (“green card” holder), there are also statutory numerical limits on the numbers of green cards available. Each year, there are usually up to 226,000 green cards available to all of the family-based immigration categories. This limit results in long wait times or backlogs in family green card categories. As of September 2014, wait times for certain family visas are up to 23 years for Filipino brothers and sisters, seven years for adult unmarried children of U.S. citizens and residents, and up to 13 years for married adult children of U.S. citizens (see Table 1, below). These long wait times are not realistic for families needing help in caring for elderly parents or raising young children, or where family reunification is otherwise critical for the family. Because families cannot easily access these green cards in a reasonable amount of time some migrate irregularly rather than remain separated.

In addition to the limits on green cards available to certain categories of family members, there is also a statutory limit on the number of green cards available to nationals of each country. The ceiling on the number of people admitted each year is approximately 25,600 per country; this limit is shared between family and employment-based immigrants. For countries like Mexico, the Philippines, China and other nations that have high rates of immigration to the United States, these per-country limits can cause even longer wait times for family-based green card petitions. Below are the approximate wait times for the different family visa categories as of July 2014:<sup>1</sup>

**Table 1. Family Visa Category Wait Times**

<b>Family visa category</b>	<b>Mexico</b>	<b>Philippines</b>	<b>All Other Countries (including Northern Triangle countries)</b>
F1 – unmarried sons and daughters (children over 21) of U.S. citizens	20 Years	11 Years	7 Years
F2A – spouses and children (children under age 18) of LPRs	3 Years	2 Years	2 Years
F2B – Unmarried sons and daughters (children over 21) of LPRs	20 Years	10 Years	7 Years

<sup>1</sup> U.S. Department of State. (2014, July). Visa Bulletin for July 2014. Retrieved from <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-july-2014.html>. Although migration from the Philippines is outside the scope of this book, the wait times for family members from that country are included for sake of comparison. The wait times for all sending countries other than Mexico and the Philippines vary by visa category as described in the last column of Table 1, but do not vary by country; that column thus describes the wait times for the Northern Triangle countries of Honduras, El Salvador, and Guatemala.

F3 – Married sons and daughters (children over 21) of U.S. citizens	20 Years	21 Years	10 Years
F4 – Brothers and sisters of adult U.S. citizens	17 Years	23 Years	12 Years

Women in particular may face additional hurdles in obtaining visas, not because of direct discrimination but because of the United States prioritizes employment visas in male-dominated fields over family visas, and because the employment-based system is quicker than the family system. Seventy percent of immigrant women gain permanent residence in the United States through family-based visas as opposed to employment-based visas. That contrasts with 61 percent of men who gain status through family channels.<sup>2</sup>

While there have been numerous proposals to update the family immigration system, none have succeeded in being enacted into law. The system has not been updated in over 20 years. This has led to a situation where unauthorized migration is the norm and detention and deportation has increased dramatically.

#### *B. A new approach to immigration enforcement*

The number of immigrants detained and deported by U.S. immigration authorities has reached historic highs in recent years, even though overall migration to the United States decreased during this time. In the United States, the number of people being held in immigration detention centers awaiting removal hearings in immigration court grew by 54 percent between 2004 and 2010.<sup>3</sup> The number of individuals who are ultimately deported at the conclusion of immigration proceedings has also skyrocketed in the past decade. Since 2009, nearly 400,000 people have been deported from the United States each year, compared with just 189,000 in 2001.<sup>4</sup> In early 2014, the number of individuals removed from the United States under the Obama Administration reached 2 million.<sup>5</sup>

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<sup>2</sup> National Asian Pacific American Women's Forum. (2009, October). Family Immigration System and Asian & Pacific Islander Women. Retrieved from [http://nciwr.files.wordpress.com/2011/01/napawf\\_familyimmigration\\_factsheet-3.pdf](http://nciwr.files.wordpress.com/2011/01/napawf_familyimmigration_factsheet-3.pdf).

<sup>3</sup> Phillips, S. D. (2013, January) Introduction: Children in Harm's Way. In Phillips, S. D., Cervantes W., Lincroft, Y., Dettlaff, A. J., & Bruce, L. (Eds.), *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare*, p. 5. Retrieved from <http://firstfocus.org/resources/report/children-in-harms-way-criminal-justice-immigration-enforcement-and-child-welfare/>.

<sup>4</sup> Caplan-Bricker, N. (2014, April 17). Who's the Real Deporter-in-Chief, Bush or Obama? *The New Republic*. Retrieved from <http://www.newrepublic.com/article/117412/deportations-under-obama-vs-bush-who-deported-more-immigrants>.

<sup>5</sup> Caplan-Bricker, N. (2014, April 17). Who's the Real Deporter-in-Chief, Bush or Obama? *The New Republic*. Retrieved from <http://www.newrepublic.com/article/117412/deportations-under-obama-vs-bush-who-deported-more-immigrants>. See also U.S. Immigration and Customs Enforcement. (2013, December 19). ICE announces FY 2013 removal numbers. Retrieved from <https://www.ice.gov/news/releases/1312/131219washingtondc.htm>. See also The great expulsion: Barack Obama has presided over one of the largest peacetime outflows of people in America's history. (2014, February 8). *The Economist*. Retrieved from <http://www.economist.com/news/briefing/21595892-barack-obama-has-presided-over-one-largest-peacetime-outflows-people-america>.

While immigration enforcement in the context of the mixed-status family directly targets the undocumented parent for arrest, detention, and deportation, significant numbers of U.S. citizen children are impacted by these enforcement activities. Recent Department of Homeland Security (DHS) data reveals that 72,410 parents of U.S. citizen children were removed in 2013.<sup>6</sup> This data only reflects those parents who reported having U.S. citizen children and therefore fails to account for those individuals who did not voluntarily report parental status out of fear. Using deportation data, researchers estimate that 152,426 U.S. citizen children experience the deportation of a parent each year.<sup>7</sup> Furthermore, there are an estimated 4.5 million U.S. citizen children at risk of losing a parent because they live with at least one undocumented parent.<sup>8</sup> This number does not include the children of lawful permanent resident immigrants. Although permanent resident parents are at decreased risk of deportation due to regularized status, thousands are still deported each year.<sup>9</sup>

In light of staggering detention and removal numbers, advocates for immigration reform have begun to ask critical questions about how children are affected, such as where children go after the parent is arrested, how children respond socially and psychologically in a culture of increased enforcement, and how the child welfare system addresses the best interest of the child when immigration enforcement renders a parent absent. While the U.S. government does not collect data on the long-term outcomes of affected children, it is clear from anecdotal reporting that such children suffer immensely when separated from a parent. As lawmakers have largely ignored the best interest of children when it comes to immigration enforcement, the result is an immigration system that shows little regard for human collateral consequences in both its design and its enforcement.

In the mid-2000's, several highly publicized workplace raids raised the awareness of the American public regarding critical oversights in the immigration enforcement system with respect to the well-being of children.<sup>10</sup> These raids, conducted in the years just after the creation of ICE and DHS, demonstrated disturbing neglect for the care and safety of children.

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<sup>6</sup> Foley, E. (2014, June 25). "Deportation Separated Thousands of U.S.-Born Children from Parents In 2013." *Huffington Post*. Retrieved from [http://www.huffingtonpost.com/2014/06/25/parents-deportation\\_n\\_5531552.html?utm\\_hp\\_ref=tw](http://www.huffingtonpost.com/2014/06/25/parents-deportation_n_5531552.html?utm_hp_ref=tw).

<sup>7</sup> Human Impact Partners. (2013, June). *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*, p. 2. Retrieved from <http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.

<sup>8</sup> Passel, J. S., & Cohn, D. (2011, February 1). *Unauthorized Immigrant Population: National and State trends, 2010*, p. 13. Retrieved from <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/>.

<sup>9</sup> See Baum, J., Jones, R., & Barry, C. University of California, Berkeley, School of Law & University of California, Davis, School of Law. (2010, March). *In the Child's Best Interest? The Lawful Consequences of Losing a Lawful Immigrant Parent to Deportation*, p. 1, 4. Retrieved from [https://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](https://www.law.berkeley.edu/files/Human_Rights_report.pdf). (The report estimates that between April 1997 and August 2007, the lawful permanent resident parents of at least 88,000 U.S. citizen children were deported. Half of these children were under the age of 5 when their parent was deported.)

<sup>10</sup> ICE was created in 2003 to replace the Immigration and Naturalization Service (INS) and is tasked with the enforcement of federal immigration law. Philips, S. D. *Introduction: Children in Harm's Way*, pp. 4-5.

### *New Bedford factory raids*

*In 2007, ICE raided a leather goods factory in New Bedford, Massachusetts. Although federal officials suspected that the owners of the factory had mistreated the workers and were complicit in helping them obtain fraudulent employment documents, the owners were released soon afterwards to await court proceedings. In contrast, the 361 workers apprehended in the raid were immediately taken into ICE custody and out of the area for processing, and most ultimately ended up in a detention facility on the U.S.-Mexico border where they awaited removal. The majority of the 361 workers apprehended in the New Bedford raid were women, and 110 were sole caregivers of minor children. Despite knowing that many of the workers were parents, ICE planned the raid without coordinating with local officials to ensure that appropriate childcare arrangements would be made for the children. The decision resulted in nearly 200 children being left without a caretaker and without a means to contact their parents. Many of these children were simply left to wait at schools or daycare centers that day for parents who would never arrive.<sup>11</sup>*

The agency responded by issuing new guidance that required its enforcement officers to coordinate with local child welfare agencies prior to conducting workplace raids.<sup>12</sup> Despite these added protections for the families of undocumented workers apprehended in larger-scale operations, the vast majority of apprehensions now occur in the context of smaller-scale home raids or fugitive operations—during which officers are not required to plan ahead to ensure appropriate placements for children.<sup>13</sup> In 2007, ICE issued time-of-apprehension guidance for officers who encounter children in the course of small-scale enforcement operations. However, the guidance was generally viewed by immigrants' rights advocates as deficient for prioritizing placement of a child with a local child welfare or law enforcement agency, rather than permitting the parent to determine appropriate placement. The guidelines were also not implemented consistently in the field. Moreover, while DHS has given more attention to humane policies in this area, it is still not clear whether this policy has been retracted or replaced with clear guidance.<sup>14</sup>

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<sup>11</sup> Butera, E. & Cervantes, W. (2013). Family Unity in the Face of Immigration Enforcement: Past, Present, and Future, pp. 11-21. In Phillips, S.D., Cervantes, W., Lincroft, D., Dettlaff, A.J., & Bruce, L. (Eds.). *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare*. Retrieved from <http://firstfocus.org/resources/report/children-in-harms-way-criminal-justice-immigration-enforcement-and-child-welfare/>.

<sup>12</sup> U.S. Immigration and Customs Enforcement. (2007). Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations. Retrieved from <http://www.nilc.org/document.html?id=364>.

<sup>13</sup> Butera, E. (2010, December 7). Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention, p. 7. Retrieved from [http://womensrefugeecommission.org/component/docman/doc\\_download/667-torn-apart-by-immigration-enforcement-parental-rights-and-immigration-detention](http://womensrefugeecommission.org/component/docman/doc_download/667-torn-apart-by-immigration-enforcement-parental-rights-and-immigration-detention).

<sup>14</sup> U.S. Immigration and Customs Enforcement. (2007, August 24). Juveniles Encountered During Fugitive Operations. Retrieved from [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/juvenilesencounteredduringfugitiveoperations.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/juvenilesencounteredduringfugitiveoperations.pdf). See also Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention. (The Women's Refugee Commission met with the ICE Office of Policy in 2010, during which time the Director informed participants that the agency was reviewing the policy, but did not clarify whether the 2007 policy remained in effect during the review period.).

### *Albuquerque home raid*

*In February 2010, during a fugitive operations team home raid in Albuquerque, New Mexico, ICE detained two undocumented Guatemalan parents of a three-year-old U.S. citizen child. ICE turned the child over to CPS, and immediately transferred his parents to a detention center in El Paso, Texas to await their deportation. Prior to taking custody of the child, the CPS caseworker inquired with ICE whether the child could be placed with a relative instead and was told that a new national protocol required ICE to hand over U.S. citizen children to CPS when detaining their parents. CPS agencies in New Mexico had never been informed of this policy, leaving caseworkers scurrying to learn how to navigate the immigration system to find a way for the child to be reunited with his parents. The child spent several days in foster care with a family he did not know and that did not speak his language, despite the fact that his parents had requested that he be placed with an aunt who lived in the area. Only when the Guatemalan Consulate began advocating for the family's reunification did ICE officers arrange for the child to be reunited with his parents at the airport when they were being deported.<sup>15</sup>*

### *C. The enhanced role of local law enforcement in immigration enforcement*

U.S. immigration law is federal law, enforced at the federal level. However, in recent years, state and local law enforcement have become increasingly involved in federal immigration law enforcement. On the one hand, some states such as Arizona and Georgia, among others, have instituted state laws that discriminate based on immigration status. At the same time, federal legislation has come to increasingly rely on state and local law enforcement to support the implementation of immigration law. State and local agencies now play a key role in identifying immigration violators and routing them into the federal system for deportation. Since 2007, two federal-state partnership programs that are classified as ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) have chiefly been responsible for authorizing local involvement in immigration enforcement. The 287(g) jail program gives local law enforcement officials more authority than ever before to check the immigration records of individuals apprehended for violations of state law.<sup>16</sup>

Likewise, state law jurisdictions that participated in the Secure Communities Program gave the Federal Bureau of Investigation (FBI) permission to send all fingerprints ordinarily checked against federal criminal databases to ICE for checks against its immigration database.<sup>17</sup> Under both programs, ICE can request that the person be held in local custody until ICE can take the individual into custody to initiate removal proceedings. The REAL ID Act of 2005 made it nearly impossible

<sup>15</sup> Santa Fe, New Mexico CPS, Interview, February 2010.

<sup>16</sup> Philips, S. D., Introduction: Children in Harm's Way, p. 5. *See also* Dettlaff, A. J. & Lincroft, Y. (2013). Unanswered Questions about Immigration Enforcement and Children's Well-being. In Phillips, S. D., Cervantes, W., Lincroft, D., Dettlaff, A. J., & Bruce, L. (Eds.). *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare*, pp. 66-70. Retrieved from <http://firstfocus.org/resources/report/children-in-harms-way-criminal-justice-immigration-enforcement-and-child-welfare/>.

<sup>17</sup> Dettlaff, A. J., & Lincroft, Y., Unanswered Questions about Immigration Enforcement and Children's Well-Being, p. 66.

for any immigrant without a green card to obtain a state-issued driver's license or "valid government ID" absent a state law authorizing such identification. Without the possibility of acquiring a valid ID and driver's license, undocumented individuals are at increased risk of being arrested by local law enforcement officials for driving without a license, then channeled into immigration custody.<sup>18</sup> The new Priority Enforcement Program (PEP) announced by the Administration as part of its executive action in November 2014 intends to eliminate Secure Communities. PEP instructs ICE to prioritize enforcement of immigrants in local law enforcement custody only when there is already a conviction in certain categories of crimes, or when ICE deems an individual to pose a threat to national security.<sup>19</sup> Many questions remain, however, on the new PEP and how it will be implemented and monitored.

The rationale for increasing the scope of immigration enforcement to include local agencies was to apprehend and deport fugitives, recent entrants, and individuals who have committed serious criminal offenses. However, the data shows that disproportionate numbers of undocumented individuals who have only minor criminal convictions and are neither a threat to national security nor to public safety fall into this net. ICE removal data shows that only about 39 percent of the individuals removed from the United States in 2011 had been convicted of a non-immigration criminal offense, whereas 10 percent had been convicted of a criminalized immigration offense such as unauthorized re-entry. The remaining majority of 52 percent had no criminal conviction whatsoever, but were removed for violation of civil immigration rules, such as visa overstays or unauthorized entry.<sup>20</sup>

Further examination of those removed for non-immigration criminal convictions, the category of individuals that the new policies were intended to target, reveals that only about 20 percent of removed individuals had actually committed what most would consider a serious criminal offense representing a danger to society. In fact, the largest category, representing the number convicted of a dangerous drug offense, was virtually equal to the number convicted of a traffic offense.<sup>21</sup> This shift in immigration enforcement strategy to include working with enhanced cooperation with local enforcement agencies in the interior of the country has resulted in the detention and removal of more immigrants who have lived in the United States for many years, many of whom have established ties to the community and are raising U.S. citizen children. According to a 2011 study conducted by the University of California, Berkeley School of Law, 37 percent of individuals arrested through Secure Communities reported having a U.S. citizen child, and 83 percent of arrested individuals were ultimately placed in immigration detention.<sup>22</sup>

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<sup>18</sup> National Immigration Law Center. (2008, February). Questions and Answers about Driver's Licenses Now That Final REAL ID Regulations Have Been Issued. Retrieved from <http://www.nilc.org/document.html?id-882>.

<sup>19</sup> Department of Homeland Security Memorandum: "Secure Communities." November 20 2014. [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf)

<sup>20</sup> Family Unity in the Face of Immigration Enforcement: Past, Present, and Future, p. 14; Phillips, S. D., Introduction: Children in Harm's Way, p. 7.

<sup>21</sup> Phillips, S. D., Introduction: Children in Harm's Way, pp. 7-8. (For FY 2011, Removals of Non-immigration Criminal Offenders: Dangerous drug offenses, 11%; Criminal traffic offenses, 11%, Other criminal convictions – believed to represent primarily misdemeanor offenses, 7%; Assault, 3%; Larceny, 2%; Fraudulent Activities, 1%; Burglary, 1%, Family Offenses, 1%; Sexual Assault, 1%.)

<sup>22</sup> Kohli, A., Markowitz, P., & Chavez, L. (2011, October). Secure Communities by the Numbers: An analysis of Demographics and Due Process, pp. 5, 7. Retrieved from [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

The interactions of local law enforcement officers with immigrants suspected of having committed an immigration violation are problematic for several reasons. Such partnerships increase the risk for racial profiling and undermine the trust between immigrant communities and local law enforcement agencies to preserve community safety. Furthermore, local law enforcement agencies are not subject to the guidelines that govern how federal enforcement agents must handle cases in which the well-being of children is implicated. Neither do there appear to be any Memoranda of Understanding between ICE and local law enforcement requiring the identification of humanitarian concerns at the time of apprehension. For example, the workplace raid humanitarian guidelines referenced earlier do not apply to local law enforcement actions even when the targeted immigrant is a primary caregiver. Also, when local or state police apprehend an undocumented individual for a suspected immigration violation, local policies often do not mandate a phone call like they do for individuals facing criminal charges, making it extremely difficult for detainees to make childcare arrangements for children. It is only until she is booked into a local jail that an immigration detainee is given a phone call, which may be hours later and may result in children being stranded at school or left in precarious situations. Also, if an individual is transferred to federal immigration custody, she may be relocated hundreds of miles away without the right to a phone call to make child care arrangements beforehand.<sup>23</sup>

#### *Children left stranded in Georgia*

*A public school educator was on her way home and passed eight students who had been dropped off from school. The children were standing in front of their home crying. Their parents were missing and they had no idea where they were. The educator called the principal who said that there was nothing they could do and that the school's responsibility was over once school was over. The teacher remained with the children for another thirty minutes until the children's uncle arrived. He told them that their parents had been taken away and brought the children to stay with relatives.<sup>24</sup>*

In a policy memorandum issued in March 2011, ICE Director John Morton identified federal immigration enforcement priorities as national security, border security, public safety, and the integrity of the immigration system. Director Morton clarified that because ICE has limited resources with which to initiate proceedings, and could not possibly remove all of the millions of undocumented individuals living in the United States, federal enforcement officers must ensure that the individuals who are removed fall into one of these four priority categories.<sup>25</sup> In a follow-up memo issued in June 2011, ICE employees were instructed to use discretion in deciding whether and to what extent to enforce the law against individuals who could be removed from the country, and were encouraged to make key decisions about apprehension, detention, bond, prosecution, and removal as early as possible in the process. The memo outlined a variety of factors to consider in

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<sup>23</sup> Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention, pp. 7-8.

<sup>24</sup> Shore, E. S. (2010, June 22). Sapelo Foundation White Paper: Immigration Enforcement and Its Impact on Latino Children in the State of Georgia, pp. 17-18. Retrieved from <http://sapelofoundation.org/downloads/whitepapers/immigration2.pdf>.

<sup>25</sup> Morton, J. (2011, March 2). Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens. Retrieved from <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

exercising discretion, including the length of time the individual had been in the United States, and ties and contributions to the community. ICE officers were also explicitly instructed to take into consideration whether the individual is a spouse, parent, or child of a U.S. citizen or permanent resident; whether she is a primary caretaker of a minor child; whether the individual or spouse is pregnant or nursing; and any other compelling family relationship factors.<sup>26</sup>

A new November 2014 DHS memorandum on enforcement priorities clarified enforcement priorities agency-wide, and included that “absent extraordinary circumstances” ICE should not detain immigrants who are pregnant, nursing, or primary caretakers of children or an ill person. However, it is unclear how an individual who exhibits one or more of these vulnerabilities will be treated if he also falls into a priority enforcement category.<sup>27</sup> ICE has also developed a Risk Classification Assessment that is conducted on all individuals placed into detention. The assessment examines the need to detain based on a balanced consideration of flight risk, public safety, community ties, and vulnerabilities—including whether an individual is a primary caretaker of dependent children. It is important to note however, that ICE officials implementing these directives and this assessment are not trained in child welfare, or in addressing best interest of the child factors. Therefore, providing them with discretion in this regard presents a structural problem in the proper exercise of discretionary authority, as seen through the continuing deportation of parents in high numbers.

Since the issuance of the Morton memos, the number of parents deported has remained consistently high. Approximately 24,000 of those removed in FY 2013 were individuals removed from the interior of the United States who had no criminal convictions whatsoever, and another approximately 37,000 had been convicted on a misdemeanor offense only.<sup>28</sup> It is this demographic, individuals who pose no risk to public safety but are still being removed in large numbers, that is most troubling to those who advocate for reforms addressing family separation concerns. While the Administration has publicly emphasized individuals with criminal convictions as priorities for removal, stated official priorities also include recent entrants and those with prior orders of removal. Because of these broad priorities and the failure to adequately consider children’s best interest and family unity, primary caregivers or parents and guardians of U.S. citizen children who pose no risk to national security continue to make up a large percentage of removals. Families and children suffer the consequences.

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<sup>26</sup> Morton, J. (2011, June 17). Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens. Retrieved from <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>27</sup> Department of Homeland Security. Memorandum by Secretary Jeh Johnson. “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants.” November 20, 2014. [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

<sup>28</sup> U.S. Immigration and Customs Enforcement. FY 2013 ICE Immigration Removals. Retrieved from <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>.

*D. New immigration consequences for non-immigration-related criminal offenses*

Another factor increasing the number of deportations by the U.S. government is the growing number of non-immigration related crimes that now carry immigration consequences.<sup>29</sup> In 1996, with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the U.S. Congress dramatically expanded the kinds of criminal convictions designated as “aggravated felonies” to include many non-violent and minor offenses, including non-violent theft offenses.

When an individual in removal proceedings has been convicted of an “aggravated felony,” “crime involving moral turpitude,” or a “drug crime,” she faces a variety of immigration consequences such as deportability, mandatory detention during the pendency of proceedings, and ineligibility for humanitarian relief based on the impact of deportation on U.S. citizen children.<sup>30</sup> Since AEDPA and IIRIRA, increasing numbers of parents convicted of minor offenses under state law that do not subject offenders to serious criminal penalties have been removed from the United States. These changes affect not only the undocumented population, but also temporary immigrants who are lawfully in the United States on a non-immigrant visa, and even lawful permanent residents.<sup>31</sup>

*Mandatory detention and a removal order for Sann, a refugee father of five*

*Sann Chey was granted refugee status (lawful permanent resident) in the United States in 1981 as a teenager after fleeing the genocide in Cambodia. Twenty years later, after graduating from high school, serving in the U.S. military, developing a career as an auto mechanic, and providing for a family that included five U.S. citizen children, Chey pleaded guilty to misdemeanor domestic battery following a fight with his wife about her gambling addiction. The State of California handed down a 365-day sentence, which triggered classification of his misdemeanor conviction as an “aggravated felony” under federal immigration law. After his release, a California family court awarded Chey full custody of his five children because his wife was ultimately deemed an unfit parent. Four years later, Chey lost his green card, and he filed for a replacement card. In 2009, ICE officers came to Chey’s house and arrested him. Because of his “aggravated felony” conviction, he was subject to mandatory detention and was ordered removed after spending six months in immigration detention. He was able to return home temporarily only because the U.S. government has been unable to obtain the necessary travel documents from Cambodia. Chey could be deported at any moment, and he and his five children live in a constant state of uncertainty.<sup>32</sup>*

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<sup>29</sup>Phillips, S.D. Introduction: Children in Harm’s Way, pp. 3-11.

<sup>30</sup> Phillips, S.D. Introduction: Children in Harm’s Way, pp. 3-11.

<sup>31</sup> In the Child’s Best Interest?, p. 3.

<sup>32</sup> In the Child’s Best Interest?, p. 2.

*E. Limited opportunities for immigration judges to consider the best interest of children in deportation proceedings*

Under current immigration law, the best interest of the child is often disregarded and children have few individual rights or benefits. Prior to the 1996 IIRIRA law, immigration judges were able to weigh harm to minor children in the same way as adult relatives, without needing to meet different guidelines for hardship. IIRIRA made hardship to children irrelevant in critical decisions in response to concerns that parents would seek relief through their U.S. born children. As a result, since 1996, immigration judges have lacked discretion to consider the potential harm to minor children when making decisions about a parent's admissibility or removal. For example, even in cases when an immigrant visa is available, a previous period of unlawful presence in the United States may prevent an individual from being able to immigrate to join a family member. A waiver can overcome these restrictions when an individual can prove "extreme hardship" to a U.S. citizen or legal permanent resident spouse or parent; however, hardship to children is not considered. Likewise, when an individual is facing removal, he or she may seek relief based on "exceptional and extremely unusual hardship" to his or her legal permanent resident or U.S. citizen spouse or parent. For the impact to a minor child to be considered, a parent must prove that the hardship suffered by the child is "substantially different or beyond" what is typical from family separation. Courts currently consider the hardship suffered by children as a "common" and "expected" result of parent-child separation, and therefore the ability to meet the "exceptional and extremely unusual" standard in such cases becomes incredibly difficult.<sup>33</sup> For example, the effects on the child of being left behind in the United States without a parent and potentially without appropriate care, or of being forced to leave the United States in order to be with the deported parent, are not considered. Thus, the hardship suffered by children due to separation from a parent carries little weight in immigration court, resulting in negative outcomes for child well-being. Fundamentally, the best interest of the child is not considered.

Under international law, a child's best interest is of paramount importance in legal determinations affecting the child. Article 3, paragraph 1 of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public or private sphere. The Committee on the Rights of the Child found that a child's best interest should be treated as a substantive right, a fundamental interpretive legal principle, and a rule of procedure.<sup>34</sup> Under the Committee's recommended analysis, the child should have his or her best interest assessed and taken as a primary consideration when different interests are considered in order to reach a decision on the issue at stake. Decision-making processes must include an evaluation of the possible impact, positive or negative, of the decision on children. The process should include procedural guarantees to ensure that the decision included a consideration of the child's interest.

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<sup>33</sup> Thronson, D. B. (2013). Immigration Enforcement and Family Courts. In Phillips, S. D., Cervantes, W., Lincroft, D., Dettlaff, A.J., & Bruce, L. (Eds.). *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare*, p. 55. Retrieved from <http://firstfocus.org/resources/report/children-in-harms-way-criminal-justice-immigration-enforcement-and-child-welfare/>.

<sup>34</sup> U.N. Committee on the Rights of the Child (CRC), *CRC General Comment No. 14 (2013): on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1.)*, CRC/C/GC/14 (2013, May 29). Retrieved from <http://www.refworld.org/docid/51a84b5e4.html>.

### III. Tearing families apart: the interaction between the immigration enforcement and child welfare systems

#### A. Lack of collaboration and communication across systems impacting children

The state-based child welfare system and the federal immigration system are guided by distinct missions and principles. Historically, the two systems have not communicated or collaborated. Therefore, when the two systems collide, conflicting interests and policies may result in adverse outcomes for children and families. When a parent is detained by immigration authorities, it can be very difficult for the parent to reunite with a child who is involved in the child welfare system. In some cases, an individual's parental rights may be inappropriately terminated and the child placed in state custody. A 2011 report by Race Forward (formerly the Applied Research Center) estimates that 5,100 children with a detained or deported parent are currently living in foster care, and projects that if deportation rates continue at current levels, 3,000 more children will enter the system every year.<sup>35</sup>

#### *Letter from ten-year-old Jadon to President Obama*

*Jadon Shaikh, age 10, wrote this letter to President Obama explaining how his family was separated after his father was apprehended at home, "After my dad was taken away for a while, I thought we weren't a family anymore. I was so sad and mad I couldn't think clearly. The exact reason I was put in foster care is because my mom couldn't take care of me and my aunt, uncle, grandpa, grandma, and my Dad couldn't either. So I will always miss them. My family is very important to me and I will do anything for them because I love them and I will protect them will all my heart."*<sup>36</sup>

Historically, the lack of communication and coordination across both systems has had negative consequences for families. Until recently, ICE lacked a consistent policy to ensure a parent's ability to make decisions regarding his child's care and to prevent transfer outside of the home community. As a result, some children unnecessarily entered foster care or remained in care longer due to the inability to reunite with a parent in detention. The breakdown in communication across systems also often left child welfare case workers and courts unable to locate detained parents, particularly those transferred to a detention center in another state. To date, many child welfare personnel remain unaware of the tools available by ICE to help locate individuals in immigration detention.<sup>37</sup>

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<sup>35</sup> Wessler, S. F. (2011, November). Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System, p. 6. Retrieved from [http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC\\_Report\\_Shattered\\_Families\\_FULL\\_REPORT\\_Nov2011Release.pdf](http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf).

<sup>36</sup> Letter from Jakir Shaikh to President Obama, December 2011, as part of "Wish for the Holidays" Campaign. On file with Women's Refugee Commission.

<sup>37</sup> Cervantes, W. (2012, December). Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System, p. 6. Retrieved from <http://firstfocus.org/resources/fact-sheet/falling-through-the-cracks-the-impact-of-immigration-enforcement-on-children-cau/>.

Women also encounter specific issues in relation to the immigration enforcement system. Studies have found that only 13 percent of immigrant women work as professionals in the United States either because they cannot find employment or they are caretakers of children or dependents.<sup>38</sup> Because migrant women are often the sole caretaker of children, their detention frequently results in children being left in situations without any care of an adult, in the care of relatives, or placed in foster care with the eventual possibility of termination of parental rights. The detention of a parent can also result in extreme financial hardship for children. Children of women who are stay-at-home mothers may suffer financially when the father or male companion is detained. As mentioned above, ICE often does not take these factors into account when detaining caretaker parents or heads of households.

ICE also previously lacked policies with regards to a parents' ability to meet child welfare case plan requirements or participate in family court proceedings. When a child welfare case is opened, a plan is created that often includes requirements that a parent must meet to reunify with a child. These requirements may include parenting classes, regular visitation with the child, or substance abuse treatment, all of which are difficult requirements to meet when an individual is in detention. Detained parents have also historically been unable to participate in dependency or family court proceedings which can lead to a court making critical decisions, such as terminating parental rights, without a parent having the opportunity to provide input. Detained parents also previously lacked the opportunity or assistance necessary to make arrangements for their children at the time of removal, whether it was their decision was to take their children with them or leave them behind in the care of designated guardian.<sup>39</sup>

*Marta loses her parental rights after detention and deportation by ICE*

*When Marta (not her real name) was apprehended in her home in front of her four children, ICE did not give her an opportunity to arrange for child care arrangements for her children. Instead, they were placed in the custody of the state, and Marta was taken in an immigration detention center, where she was held for two years while her case was being adjudicated. During that time, Marta desperately struggled to participate in the child welfare proceedings that were simultaneously happening in state court and would determine her ability to reunite with her children at the conclusion of her immigration proceedings. However, Marta was not able to arrange for her children to visit her in detention, and could not meet in person with her own attorney or the child welfare worker assigned to her children's case, and was never able to attend a single custody hearing. The most she could do was arrange for a handful of phone calls. While the custody case was still pending, Marta was deported to Mexico without her children. From Mexico, she tried to participate meaningfully in the case but was unable to*

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<sup>38</sup> New American Media. (2009, February). Women Immigrants: Stewards of the 21<sup>st</sup> Century Family, p. 17. Retrieved from <http://media.namx.org/images/communications/immwomenexecsummary.pdf>.

<sup>39</sup> Falling Through the Cracks, p. 7.

*communicate effectively with the court from abroad. Ultimately, the family court terminated her parental rights for all four of her children.<sup>40</sup>*

In addition to problematic ICE policies, there also exist barriers within the child welfare system that put families impacted by immigration enforcement at risk of long-term or permanent separation. For example, the Adoption and Safe Families Act (ASFA) of 1997 creates strict timelines that require courts to file for termination of parental rights in cases when a child has been in care for 15 of the previous 22 months. These timelines may not provide sufficient time for parents who are undergoing lengthy, uncertain immigration proceedings. They also limit the ability of child welfare agencies to conduct diligent searches for detained or deported parents or other potential relative caregivers living abroad.<sup>41</sup> While current law allows for state agencies to delay filing for termination of parental rights in cases where there is a “compelling reason” to do so, the detention or deportation of a parent is not necessarily considered a compelling reason in all states and localities.

Research also shows that systemic bias exists among child welfare staff and family and dependency court judges against undocumented parents or caregivers, compromising the ability of a child to reunify with a parent or be placed with a relative.<sup>42</sup> For example, front line staff or judges may conclude that it is not in a child’s best interest to be reunited with a parent or relative who is undocumented because of assumptions regarding the individual’s moral character or the assumption of imminent deportation.

#### *Jakir faces termination of parental rights*

*Jakir’s four children were placed in four different foster homes after he was detained and his wife found herself unable to support or care for them. Social Services initiated the termination of his parental rights and he was not included in any of the initial hearings, despite his desperate attempts to communicate with them and maintain custody. When he was released and when to social services to inquire about his children, he was told, “Oh, we thought that you were never getting out but getting deported so that’s why we didn’t include you in the process.”<sup>43</sup>*

There may also be concerns regarding an undocumented parent’s limited access to public benefits or services, sufficient employment, or the ability to obtain a drivers license. Similarly, case workers and judges are sometimes reluctant to relocate a U.S. citizen child to another country to be placed with a parent or relative based on assumptions that it is in the child’s best interest to remain in the United States.<sup>44</sup>

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<sup>40</sup> Butera, E. (2013, August 26). ICE’s Parental Interests Directive: Helping Families Caught Between the Immigration and Child Welfare Systems. Retrieved from <http://womensrefugeecommission.org/blog/1713-new-ice-directive-helps-families-caught-between-the-immigration-and-child-welfare-systems>.

<sup>41</sup>ICE’s Parental Interests Directive: Helping Families Caught Between the Immigration and Child Welfare Systems.

<sup>42</sup> Shattered Families, p. 17.

<sup>43</sup> Jakir, Interview with Kathryn Finley for Women’s Refugee Commission, Slinger, Wisconsin, March 20, 2014.

<sup>44</sup> Falling Through the Cracks, p. 7.

*B. Interim measures to reduce family separation and proposed legislation*

As a result of ongoing efforts by immigrant and children's advocacy organizations, the Department of Homeland Security has introduced some important policies to address family unity concerns. In addition to the prosecutorial discretion memos mentioned above, the following are important advances in recent years:

- In 2010, ICE developed an Online Detainee Locator System, which allows family members, child welfare providers and other interested parties to locate immigrants in detention using either a name and birthplace, or immigration identification number. This seemingly insignificant service is critical in cases where a parent has been taken into custody and communication with children or relatives has been lost, allowing social workers to locate parents and work on case management plans.
- In 2010, in response to a Congressional directive, ICE began keeping records of whether immigrants being deported claimed to have U.S. citizen children being left behind in the United States. While not necessarily an accurate number due to reporting inconsistencies, this has been a useful statistic for policy and planning purposes.
- The 2011 Performance Based Detention Standards include provisions allowing for contact visitation with minor children, and the possibility of attending family court hearings in person if practicable.
- In 2012, ICE initiated a Risk Classification Assessment that includes primary caretakers as a vulnerable population to be considered for release or alternatives to detention.
- In August 2013, ICE released a directive entitled "Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities," which is designed to uphold the rights and responsibilities of detained parents by establishing protocols to address the placement, monitoring, accommodation, and removal of certain parents who are placed in immigration detention and removal proceedings.<sup>45</sup> The directive applies specifically to individuals who are: (1) primary caretakers of minor children without regard to the dependent's citizenship; (2) parents and legal guardians who have a direct interest in family court proceedings involving a child or child welfare proceedings in the United States; and (3) parents or legal guardians whose minor children are physically present in the United States and are U.S. citizens or Lawful Permanent Residents (LPRs). The directive reminds ICE employees to determine whether an individual is eligible for prosecutorial discretion under existing policy. It also creates guidelines to help prevent a parent from being transferred out of the area of family court or child welfare proceedings; facilitate a parent's ability to abide by child welfare requirements and court-ordered parent-child visitation; enable participation in family court proceedings; and make arrangements for children at the time of removal. In cases of removed parents, the directive allows ICE to consider allowing a parent back into the United States on a temporary basis for the limited purpose

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<sup>45</sup> U.S. Immigration and Customs Enforcement. (2013, August 23).ICE Memoranda: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities. Retrieved from [http://www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf).

of participating in a termination of parental rights hearing.<sup>46</sup> The directive also designates a point of contact in each ICE field office to deal with parental interests issues, and states that ICE will collaborate with the U.S. Department of Health and Human Services' Administration for Children and Families to develop methods for improving cooperation and communication between the two systems.

While immigrants' rights advocates consider these actions to be important steps toward maintaining family integrity when immigration enforcement impacts the child welfare process, these steps do not create any new rights for immigrant parents and caregivers. Moreover, their effectiveness in preventing family separation remains to be seen. The policies and standards outlined above are self-determined by ICE and are not binding or enforceable as law. This means that they can be changed without need for Congressional action, and no legal consequences flow from ICE's failure to follow the procedures.

In March 2014, President Obama announced in meeting with Hispanic legislators that he ordered a review of deportation policy with the intention of crafting enforcement practices that are more humane and minimize family separation.<sup>47</sup> On June 30, 2014, when it was clear that the House of Representatives was not going to advance an immigration reform bill, the President announced his plans to consider broad administrative reforms to the immigration system by the end of the summer.<sup>48</sup> In November 2014, as described in greater detail in the Preface to this chapter, President Obama announced several components of an executive action that will provide temporary relief to undocumented immigrants who arrived in the United States before the age of 16, as well as to immigrants who are parents of a U.S. citizen or legal permanent resident child. However, the precise contours of this program and the course of its implementation remain unknown as of time of this writing.

In addition to policy changes related to immigration enforcement at the federal level, both state and federal legislation have been introduced that would address systemic challenges facing detained and deported parents with children in foster care. The first bill to be implemented into law is the California Reuniting Immigrant Families Act (SB1064). The bill, signed into law in September 2012, authorizes California child welfare courts to provide an extension in the family reunification period in cases of detained or deported parents. The bill also ensures that immigration status alone does not disqualify parents or relatives from being a potential placement, and allows foreign documents, such as passports, to be used for background checks. SB1064 also requires the California Department of Social Services to provide guidance to agencies on how to screen children and parents for immigration relief options and how to establish memoranda of

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<sup>46</sup> ICE Memoranda: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities.

<sup>47</sup> Shear, M. D. (2014, March 13). Obama, Citing a Concern for Families, Orders a Review of Deportations. *New York Times*. Retrieved from [http://www.nytimes.com/2014/03/14/us/obama-orders-review-of-deportations.html?\\_r=1](http://www.nytimes.com/2014/03/14/us/obama-orders-review-of-deportations.html?_r=1).

<sup>48</sup> Hirshfield Davis, J., & Preston, J. (2014, June 30). Obama Says He'll Order Action to Aid Immigrants. *New York Times*. Retrieved from <http://www.nytimes.com/2014/07/01/us/obama-to-use-executive-action-to-bolster-border-enforcement.html>.

understanding (MOUs) with foreign consulates to facilitate parent-child reunification in cases where parents are detained, deported, or living abroad.<sup>49</sup>

#### **IV. Institutional challenges to transnational family reunification**

Traditionally, one of the biggest obstacles to family reunification after the deportation of a parent was that it was virtually impossible for a parent to re-enter the United States, even on a temporary basis,<sup>50</sup> to participate in ongoing child welfare proceedings.<sup>51</sup> In addition, reunification plans regularly include requirements that are impossible to satisfy from abroad. With no parent present at custody proceedings and no way for a parent to satisfy reunification plans or demonstrate their willingness to provide for their children abroad, family courts routinely terminate parental rights.

##### *Irma loses her infant son in a closed adoption after being deported*

*Irma was separated from her two month old baby when she was arrested in the US and deported to Mexico in 2011. Because she was unable to participate in family court proceedings from Mexico, her parental rights were terminated and her son was given up for adoption. During the closed adoption, her son's name was changed. Irma has placed her name on the state adoption registry, but her only chance of ever contacting her son again is if he independently chooses to inquire with the state about the identity of his biological parents at age 18.<sup>52</sup>*

Parents face a variety of challenges when trying to communicate with the U.S. child welfare system from abroad, such as: difficulty contacting the social worker assigned the case; inability to establish living arrangements and employment in the country of origin within a short period of time and to the satisfaction of the family court judge; lack of legal representation; and the family court's lack of understanding of the reasonableness of the reunification plan in the context of a given country of origin. One of the most prohibitive factors is the difficulty many deported parents face in complying with the reunification plan established by the family courts from abroad. This is a major barrier even in the case of fit parents who are willing and able to adequately provide for

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<sup>49</sup> Lincroft, Y. (2013, May). 'The Reuniting Immigrant Families Act': A Case Study on California's Senate Bill 1064, p. 2. Retrieved from <http://childwelfaresparc.files.wordpress.com/2013/05/reuniting-immigrant-families-act-brief.pdf>.

<sup>50</sup> Individuals could and still can apply for humanitarian parole to enter the United States for a specific reason even if otherwise barred, but very few deported parents qualify or are even aware that this is the case, are often unable to access the consulate to submit an application, and we most often denied this benefit when requesting to attend custody hearings.

<sup>51</sup> Kline, V., & Instituto para las Mujeres en la Migración, AC. (2013, October). Where Do We Go From Here? Challenges facing transnational migrant families between the US and Mexico, pp. 17, 33. Retrieved from [http://uf.imumi.org/recursos/where\\_challenges.pdf](http://uf.imumi.org/recursos/where_challenges.pdf) (hereinafter "Where Do We Go From Here?"). (Under current U.S. immigration law, an undocumented parent of a US citizen child is ineligible to gain legal status from that child until he or she is 21 years old. A parent might also be eligible to gain legal status through marriage to a U.S. citizen, but is likely barred from re-entry to the country for a period of 3 or 10 years depending on how long the undocumented individual had been living illegally in the United States. In this case, a "Stateside Waiver" may sometimes be available that allows an eligible individual to be paroled back into the country for humanitarian reasons. While hardship to a U.S. citizen parent or spouse is a weighted factor in the waiver process, the law prohibits hardship to a U.S. citizen child from being considered.).

<sup>52</sup> Where Do We Go From Here?, p. 9.

their children in the country of origin. Generally speaking, reunification plans are created under the assumption that a child is in state custody due to abandonment, abuse, or neglect; however, in separation resulting from immigration enforcement there often is no history of mistreatment of the child. Standards policies and procedures for reunification do not generally consider unintentional separation not involving abuse or neglect. Because of this, a standard reunification plan requires a home study, psychological evaluation and/or therapy, parenting classes, drug and/or alcohol testing, and evidence of an established living environment and stable employment before the child is allowed to reunite with the parent. The courts also require that the level of service utilized by the parent abroad—psychological counseling, for example—be similar in quality and scope to services available in the United States, even when similar services simply do not exist in the country.<sup>53</sup> If the court finds that the parent has failed to satisfactorily complete the reunification plan within the given time frame, the judge will deem the parent unfit and terminate parental rights.

According to IMUMI, an NGO that advocates for migrant rights in Mexico, the availability of psychological counseling, parenting classes, anger management classes, and drug and alcohol testing in Mexico varies widely depending on the municipality, and may require the parent to travel 8-10 hours by bus to reach the nearest service center. If the municipality does not provide the required service, the parent may hire a private therapist but usually at great cost. Similarly, the scope of the home study required by CPS offices often exceeds that of the home study that the Agency for Integral Development of the Family (*Sistema de Desarrollo Integral de la Familia* or DIF), Mexico's child welfare and family services agency, is able to provide. For example, a CPS home study generally requires an evaluation of the parenting style, social environment, and the prior family history of involvement in the child's life; whereas a DIF home study often focuses on the parent's financial status and the family's overall economic situation. In rural areas such as Oaxaca, Guerrero, and Chiapas, an on-site home study can prove difficult logistically because DIF workers must travel several hours by bus or foot to reach these remote regions.<sup>54</sup> Finally, some home studies simply fail to meet U.S. standards due to basic cultural differences such as the number of extended family members living in the same home or the age at which a family deems it appropriate to leave children unsupervised in the home.<sup>55</sup>

As previously mentioned, some caseworkers and judges have been reluctant to relocate a U.S. citizen child to another country, even to reunify with a parent or relative.<sup>56</sup> In such cases, courts often find that it is in the best interest of the child to remain in the United States because of a higher standard of living, and fail to properly consider the effect of living without parents.<sup>57</sup>

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<sup>53</sup> *Where Do We Go From Here?*, pp. 43-45. For a discussion of challenges that families may face as a result of poverty, violence, or instability in their home country—the same factors that in many cases drive migration in the first place—see chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico. Family reunification decisions must, of course, be made case-by-case, based on the best interests of the child.

<sup>54</sup> *Where Do We Go From Here?*, pp. 43-45. In these same regions, families may face widespread poverty, violence, or instability—the same factors that in many cases drive migration in the first place; however, decisions regarding family reunification must be made case-by-case. For more detail on causes of migration, see chapter 6 on Southern Mexico.

<sup>55</sup> *Where Do We Go From Here?*, p. 44.

<sup>56</sup> *Falling Through the Cracks*, p. 7.

<sup>57</sup> *Where Do We Go From Here?*, p. 32.

As noted above and emphasized throughout this book, international legal standards suggest that the best interest of the child should be considered in judicial proceedings regarding care and custody of the child. The Convention on the Rights of the Child also recognizes the family as the “natural environment for the growth and well-being of a child” and states the importance of keeping children with their parents and reunifying children with family when it is in the child’s best interest.”<sup>58</sup> The U.S. child welfare system is also guided by similar principles that promote family integrity, including reunification of children with parents and/or placing children in kinship care whenever possible.<sup>59</sup> Yet, as was mentioned previously, limited knowledge among child welfare personnel regarding the immigration enforcement system and assumptions about what it means to undocumented often impede family reunification, preventing placement with parents or caregivers who are undocumented or in removal proceedings, or who are located abroad.

With so few legal avenues for reunification, many deported parents attempt to return to the United States without authorization in order to see their children. According to a study conducted by the Kino Border Initiative, 27 percent of the women interviewed after attempting to cross the border reported reunification with their minor children as the main factor motivating return to the United States.<sup>60</sup> A similar study conducted by No More Deaths revealed 46.6 percent of individuals interviewed in CBP custody reported that all of their children in the United States were U.S. citizens. The detainees who named family reunification as their primary reason for crossing the border were also more likely to report that they were trying to reach children under the age of 5 and that their family was dependent on their income.<sup>61</sup> The majority of these parents admitted that they saw illegal entry as the only way to see their family again and no amount of personal risk or inhumane treatment effectively deter them.<sup>62</sup>

Following the release of the Parental Interest Directive, ICE now seeks to improve reunification outcomes by allowing parents to petition for temporary lawful entry into the country for the limited circumstance of participating in a termination of parental rights hearing. While this is certainly a move in the right direction, the Parental Interest Directive does not permit parents to re-enter the United States for the purpose of participating in any other sort of custody hearing, or in order to

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<sup>58</sup> Convention on the Rights of the Child (CRC) Preamble, art. 9, art 10, 1989, November 20, 1577 U.N.T.S. 3. Retrieved from <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>59</sup> Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2013, July). Placement of Children with Relatives, p.70. Retrieved from [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/placement.cfm](https://www.childwelfare.gov/systemwide/laws_policies/statutes/placement.cfm); Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2011, June). Family Reunification: What the Research Shows, pp. 1-2. Retrieved from [https://www.childwelfare.gov/pubs/issue\\_briefs/family\\_reunification/family\\_reunification.pdf](https://www.childwelfare.gov/pubs/issue_briefs/family_reunification/family_reunification.pdf).

<sup>60</sup> Where Do We Go From Here?, pp. 17, 57.

<sup>61</sup> No More Deaths / No Mas Muertes. (2011). A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody, p. 6. Retrieved from <http://forms.nomoredeaths.org/abuse-documentation/a-culture-of-cruelty/>.

<sup>62</sup> Declaration on the Right to Development, A/RES/41/128 (1986, December 4). Retrieved from <http://www.refworld.org/docid/3b00f22544.html>. Under the Declaration on the Right to Development (1986), the right to pursue development suggests that the well-being of migrants should be taken into account under U.S. law. The Declaration on the Right to Development, Article 1, ¶ 1 proclaims that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The rights of migrants to pursue family unity or to contribute to their family’s economic well-being is not recognized in U.S. immigration law outside of the limited family immigration system as described above.

meet the conditions of an existing reunification plan that might involve contact visits. Humanitarian parole is also unavailable to certain parents with criminal history, even if they are at risk of losing parental rights. As of the writing of this chapter, several months after the issuance of the Directive, ICE has received only ten requests for temporary humanitarian parole for the purpose of attending a child welfare proceeding, raising concerns that parents are not being adequately informed about the opportunity.<sup>63</sup>

Even in the absence of the risk of legal separation due to the involvement of a family court, many deported parents find it difficult to arrange for their U.S. citizen children to join them in the country of origin due to a lack of travel documents or due to restrictive regulations in the home country regarding non-citizen children's access to school, health care, and other services. In many cases U.S. citizen children may be entitled to the citizenship of their parents, but may have difficulty in obtaining the proper paperwork due to obstacles in accessing birth records or other documentation bearing proper seals or "apostilles." The de-centralized U.S. child welfare, birth records, and school documentation systems make it very difficult to obtain the "standard" forms acceptable to foreign governments. The process is further complicated because foreign consulates in the United States representing the deported parent are often unable to gain access to a U.S. citizen child in state custody or foster care, because they do not have jurisdiction unless the child is a citizen of their country.<sup>64</sup>

It is important to note that several state and local child welfare agencies already have policies in place that help in the reunification of children with parents who have been deported or who otherwise live abroad. For example, local child welfare agencies such as those in California, Washington, New Mexico, and others, already have established MOUs with their Mexican consulates. These MOUs typically specify the roles and responsibilities of the county or state child welfare agency and the consulate when foreign children are placed in out-of-home care, and the ways in which the respective entities agree to collaborate to ensure the best interests of children. MOUs may also specify the role of the foreign child welfare agency (e.g., DIF in Mexico) in collaborating with the consulate and child welfare agency. MOUs often address consular notification required by the Vienna Convention on Consular Relations, and other procedures for communicating and collaborating with the consulate. Additional family reunification provisions that may be addressed in MOUs include attendance at court hearings, appointment of counsel, exchange of information, and location of and placement with relatives in the foreign country.<sup>65</sup>

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<sup>63</sup> WRC Correspondence with ICE Office of Enforcement and Removal Operations, March 27, 2014.

<sup>64</sup> The Vienna Convention notification requirements apply only to nationals of the requesting country and do not extend to their children. *See* Vienna Convention on Consular Relations art. 5(h), 1963, April 24, 596 U.N.T.S. 261.

<sup>65</sup> U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Human Services Policy. (2013, December). U.S. Department of Health and Human Services Issue Brief: Emerging Child Welfare Practice Regarding Immigrant Children in Foster Care: Collaborations with Foreign Consulates, p. 1-2. Retrieved from [http://aspe.hhs.gov/hsp/14/MOUsWithConsulates/ib\\_MOUsWithConsulates.pdf](http://aspe.hhs.gov/hsp/14/MOUsWithConsulates/ib_MOUsWithConsulates.pdf).

## V. The consequences of family separation: the impact on the left-behind child

Research has consistently documented the negative effect of a parent's detention or deportation on the well-being of children.<sup>66</sup> Separation leads to the disruption of bonds between children and parents, the separation of other family members and siblings, alienation of the child from peers, and economic instability within the home. Most troubling are the reports of the emotional toll that separation takes on children, which reveal how some children become fearful, anxious, withdrawn, socially isolated, and disruptive as a direct result of separation. All of these factors can have a significant impact on a child's overall health and ability to do well in school. In cases when a parent is deported, very difficult decisions must be made regarding whether to take children out of the United States or leave them behind in the care of family members or friends. In both cases, a child must face significant challenges of either adjusting to a new country or adjusting to life without a parent.

### A. Economic security

In families for which immigration enforcement results in job loss because a working parent was detained, deported, or released on the condition that they would not work illegally, economic hardship is an inevitable result. In a study of the consequences of immigration enforcement on family stability and child well-being conducted by the Urban Institute, researchers found that across their entire sample of immigrant parents who had experienced temporary to long-term family separation, average household incomes after apprehension fell by at least half.<sup>67</sup> A recent study by Human Impact Partners (HIP) reveals that the average annual income for a mixed-status household in the United States is approximately \$36,000, which means that the loss of a parental income due to detention or deportation likely results in a drop in household income to an estimated \$15,400, putting the family below the poverty line.<sup>68</sup> Another study by the Center for American Progress also reveals that the high number of fathers being deported has resulted in an increase in single-mother households, many of which may not have access to secure jobs, child care assistance, or public benefits due to the mother's immigration status.<sup>69</sup>

*"No child or family should suffer like we did"*

*Charlie, age 11, wrote this letter to Congress as part of We Belong Together's Wish for the Holidays campaign: "I'm writing to tell you my worst nightmare became real. Last year our dad was taken away from us to and was sent to Mexico. We fought really hard to get him out of jail. I went to church and prayed. We did protests, vigils, wrote letters, petitions, and I behaved well in school. But*

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<sup>66</sup> Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families, p. ii.

<sup>67</sup> Chaudry, A., Capps, R., Pedroza, J. M., Castañeda, R. M., Santos, R., & Scott, M. M. (2010, February) Facing Our Future: Children in the Aftermath of Immigration Enforcement, pp. 27-36. Retrieved from <http://www.urban.org/publications/412020.html>.

<sup>68</sup> Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families, p. 31.

<sup>69</sup> Dreby, J. (2012, August). How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground, pp. 12-15. Retrieved from <http://cdn.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

*immigration did not listen. They don't care about us. I even thought about harming myself because it is sad when bad things happen to good people, and because I love my dad very much... It's been really hard on me and my brother and my mom. I love my mom too, and she keeps us safe, but it's really hard for her, too. Every time I hear her crying, I feel sad. She cries because she misses him.... It is a horrible feeling. It is like when someone you care about dies. It is sad because you will never see them again. I don't know how long I'm going to have to wait to see my dad back. No [child] or family should suffer like we did.*"<sup>70</sup>

Beyond the loss of income, many families find themselves in even more precarious situations due to the legal expenses required to fight deportation in immigration court or the Courts of Appeals. Declines in income also lead to housing instability, with many families in the Urban Institute study reporting that crowded housing conditions worsened because they were forced to move in with relatives to save money. Many children ended up moving frequently and suddenly during the course of the immigration proceedings, which can have a debilitating effect on a wide variety of development metrics. Half of the respondents who had previously owned homes lost the property as a result of income loss. Declines in income also lead to drastic levels of food hardship, reported at levels significantly higher than the national average. The majority of parents reported difficulty in paying for food following interaction with the immigration enforcement system and admitted resorting to offering their children smaller meals with less variety due to financial strain.<sup>71</sup>

#### *B. Psychological well-being and physical health*

In both the short- and long-term period following an immigration enforcement action, children suffer significant psychological trauma. In the short-term (six months or less following initial apprehension), two-thirds of children studied by the Urban Institute experienced behavioral changes, such as frequent crying, increased anxiety, and changes in eating and sleeping habits. Adverse behavioral effects were most pronounced for children who had actually witnessed a parent being taken away and children who experienced long-term separation as a result of immigration enforcement. Although some children began to recover emotionally in the longer-term, the overall incidence of behavioral changes remained at 40 percent even six months after initial apprehension and beyond.<sup>72</sup>

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<sup>70</sup> We Belong Together. December 9 Wish for the Holidays Letter Delivery, Retrieved from <http://www.webelongtogether.org/events/december-9-wish-holidays-letter-delivery>. To see a video of Charlie reading his letter, see National Domestic Workers Alliance [domesticworkers]. (2013, December 11). Charlie H., Homestead, FL – no family should have to suffer like this! [Video file]. Retrieved from <https://www.youtube.com/watch?v=9qtRePD57Ws&feature=youtu.be>.

<sup>71</sup> Facing Our Future, Children in the Aftermath of Immigration Enforcement, pp. 27-36.

<sup>72</sup> Facing Our Future, Children in the Aftermath of Immigration Enforcement, pp. 41-53.

*Eleven-year-old Jamie suffers from depression as his mother's apprehension*

*Even though Jamie's mother was allowed to stay at home during the pendency of her removal proceeding, the 11-year-old U.S. citizen says, "I got depressed." Every time her mother left the apartment, even for a short time, Jamie "felt cold, nervous, and would start crying" because she could not help but imagine what life would be like if her mother never came back.<sup>73</sup>*

Even if children living in mixed status families have not yet experienced the trauma of separation, they are often acutely aware of the reality that their parents might be taken away at any moment. In a focus group of undocumented parents, the HIP study documents that nearly 30 percent of parents reported that their children were afraid either all or most of the time, and nearly 75 percent of parents reported that a child had demonstrated symptoms of post-traumatic stress disorder.<sup>74</sup> In another study, one 12-year old daughter of an undocumented Mexican immigrant responded that she was afraid that "maybe one day, they take her [Mom] . . . Just leave us all by [ourselves]." Another could not even conceive of a scenario in which his family would remain together if the undocumented members of his family were deported. When asked about the probable fate of his 8-year-old brother, the only U.S. citizen in his family, the boy replied, "He'll just have to take care of himself. Maybe they'll adopt him."<sup>75</sup>

*C. Educational outcomes*

In the short run, many children studied by the Urban Institute suffered an initial disruption in schooling immediately after apprehension or even considered dropping out.<sup>76</sup> Following the arrest of a parent, one out of five children reported that their grades dropped.

*Daniel, a former honor student, suffers lower grades at school*

*When Daniel had to change schools after his LPR mother was arrested and held in long term detention, his grades dropped. He had previously been an honor student in the Gifted and Talented Program (GATE) in a school in California, but at his new school he says "I didn't concentrate as much because I was in a place I didn't recognize." Usually an outgoing student, Daniel also became withdrawn at his new school and rarely socialized with his peers.<sup>77</sup>*

The decline in school performance is not only psychological in nature or exacerbated in some cases by the need to change schools unexpectedly, but also can be the direct result of the sudden absence of the parent or caregiver, i.e., the person who helped a child with homework, read to the child at

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<sup>73</sup> In the Child's Best Interest?, p.8.

<sup>74</sup> Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families, pp. 6-8.

<sup>75</sup> How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground, pp. 10, 12.

<sup>76</sup> Facing Our Future, Children in the Aftermath of Immigration Enforcement, pp. 49-52; In the Child's Best Interest?, p. 9.

<sup>77</sup> In the Child's Best Interest?, p. 9.

night, took the child to school, and was generally invested in her academic success.<sup>78</sup> The HIP study also documents that other factors related to a parent's detention or deportation, such as housing instability, food insecurity, and psychological stress, are all closely tied to a student's overall academic performance and can lead to a child ultimately completing fewer years of school. However, the Urban Institute did find that when the school was able to provide traumatized children a measure of stability and normalcy, overall psychological and academic outcomes markedly improved.<sup>79</sup>

## **VI. Family separation due to immigration enforcement can amount to a violation of the rights of a child under international law**

While a basis for legally challenging family separation due to the implementation of immigration law has yet to be identified under domestic law, enforcement practices that result in family separation may amount to a violation of family and/or children's rights under international law.<sup>80</sup> Unlike U.S. law, international human rights law recognizes due process rights of all children and parents in order to protect family unity and prohibits arbitrary family separation regardless of immigration status. Particularly in recent decades, these protections have been explicitly articulated in a variety of international human rights treaties, declarations, and jurisprudence.<sup>81</sup> Many of the human rights treaties to which the United States is a signatory explicitly recognize the obligation of States to afford special protection to the most vulnerable populations, including children.<sup>82</sup> Even in cases where the United States has not ratified the instrument, it has an obligation to refrain from taking actions that defeat the object and purpose of the treaty.<sup>83</sup> These rights, and the necessity of a comprehensive regional framework on migration to address them, are also discussed in detail in Chapter 13.

The Universal Declaration of Human Rights (UDHR) recognizes a right to family as a fundamental human right. Article 16 of the UDHR states that “[t]he family is the natural and fundamental group

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<sup>78</sup> In the Child's Best Interest?, p. 9.

<sup>79</sup> Facing Our Future, Children in the Aftermath of Immigration Enforcement, pp.49-53.

<sup>80</sup> In the Child's Best Interest?, p.6.

<sup>81</sup> Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention, pp. 24-26.

<sup>82</sup> In the Child's Best Interest?, p. 6 (Referencing the International Covenant on Civil and Political Rights art. 24, 1966, December 16, 999 U.N.T.S. 171. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. (Every child has “the right to such measures of protection as are required by his status as a minor.”); UN Human Rights Committee, CCPR General Comment No. 17: Article 21, ¶ 1 (Rights of the Child), 1989, April 7. Retrieved from <http://www.refworld.org/docid/45139b464.html>. (States must adopt “special measures to protect children” to ensure that they enjoy all of the rights provided in the Covenant.); Convention on the Rights of the Child (CRC), 1989, November 20, 1577 U.N.T.S. 3. Retrieved from <http://www.refworld.org/docid/3ae6b38f0.html>.); See also Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention, Appendix C, p. 24 (also referencing the Riyadh Guidelines, Principle 12, A/Res/45/112 of 14 December 1990. Retrieved from <http://www.un.org/documents/ga/res/45/a45r112.htm>; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 44, U.N. Doc A/45/158. 1990, December 18. Retrieved from <http://www.un.org/documents/ga/res/45/a45r158.htm>; American Convention on Human Rights art. 17, “Pact of Jan Jose, Costa Rica,” November 22, 1969. Retrieved from [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm); and the American Declaration of the Rights and Duties of Man arts. V, VII, VII. Retrieved from <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>).

<sup>83</sup> Vienna Convention on the Law of Treaties Part II, § 1, art. 18, 1969, May 23, 1155 U.N.T.S. 331. Retrieved from <http://www.refworld.org/docid/3ae6b3a10.html>.

unit of society and is entitled to protection by society and the State.”<sup>84</sup> The Convention of the Rights of the Child (CRC), the principal international human rights treaty that outlines the protections to which children are entitled, demands that States “respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community.”<sup>85</sup> The International Covenant on Civil and Political Rights (ICCPR) states that the family is “entitled to protection by society and the State.” The U.N. Human Rights Committee has commented that this protection includes the obligation of States to take appropriate measure “to ensure the unity or reunification of families” and more specifically, requires that States refrain from deportation of a parent if such a separation would “arbitrarily interfere” with the right to family.<sup>86</sup> While the Committee has held that the presence of a citizen child does not per se classify the deportation as an “arbitrary interference,” in cases where substantial factors exist that increase the potential that removal will result in hardship, the State must present additional factors to justify deportation and avoid a classification as arbitrary.<sup>87</sup> Experts predict that the prohibition against arbitrary family separation will soon become a fundamental norm (*jus cogens*) in international law from which the United States will not be permitted to derogate under any circumstance.<sup>88</sup>

As emphasized and articulated throughout this book, the Convention of the Rights of the Child clearly articulates that with respect to all court proceedings, “the best interest of the child shall be a primary consideration” and that “[a] child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child.”<sup>89</sup> The best interest of the child doctrine includes a presumption of family unity and the right of children to know and preserve their familial identity absent compelling evidence to the contrary.<sup>90</sup> In some cases, the United States courts recognize and apply this principle, notably in the context of child custody determinations where the immigration status of the parents is not a factor. Although unification of mixed-status families was originally identified as a priority when the INA was originally enacted in 1952, and the 1981 Select Commission on Immigration and Immigration Refugee Policy has described a humane reunification policy as having the potential to serve the national interest through the promotion of public order and the health and welfare of the United States, the current immigration and child welfare systems do not appropriately consider the best interest of the child.<sup>91</sup> In a recent case before the Inter-American Court of Human Rights,

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<sup>84</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, Art. 16, 10 December 1948, 217 A (III), Retrieved from <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>85</sup> Convention on the Rights of the Child (CRC) art. 5, 1989, November 20, 1577 U.N.T.S. 3. Retrieved from <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>86</sup> *In the Child's Best Interest?*, p. 6.

<sup>87</sup> *Winata v. Australia* (Communication No. 930/2000), 2001, August 16, U.N. Doc. No. CCPR/C/72/D/930/2000 (2001).

<sup>88</sup> Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention, p. 24. (Citing Starr, S. & Brilmayer, L. (2003) Family Separation as a Violation of International Law. *Berkeley Journal of International Law*, 21 (2), 213, 230. (“[S]uch a norm is beginning to evolve in fragmentary ways. Sufficient consensus exists against particular types of family separation...to constitute customary international law.”)).

<sup>89</sup> Convention on the Rights of the Child (CRC) art. 3, art. 9, 1989, November 20, 1577 U.N.T.S. 3. Retrieved from <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>90</sup> Family Separation as a Violation of International Law, pp. 213, 222.

<sup>91</sup> *In the Child's Best Interest?* (referencing US Dept. of Health and Human Services, Administration for Children and Families. (2008, April). Determining the Best Interests of the Child: Summary of State Laws, p.6, 11-12.).

the failure of the United States to even consider the best interest of the child at all in some removal proceedings was determined to violate fundamental principles of international law.<sup>92</sup>

In addition to the international protections designed to minimize the occurrence of family separation, children who have been separated from their families by the State are also entitled to certain procedural rights. Article 9(4) of the CRC requires that information on the whereabouts of missing family members be provided to all affected parties unless such information would not be in the best interest of the child. Article 9(2) of the CRC requires that all parties have the opportunity to meaningfully participate in child welfare proceedings. Article 10 of the CRC requires that parents and children be allowed entrance into the territory of the State for the purpose of reunification and that reunification be effectuated in a humane and expeditious manner.

When the detention or removal of a parent has a negative impact on the physical and mental health of a child, such a State action also implicates a child's internationally recognized right to health. Likewise, when the detention or removal of a parent has a negative impact on the educational outcome a child, such a policy implicates a child's right to education. Beyond a 1982 Supreme Court ruling (*Plyler v. Doe*) that determined that all children in the United States have the right to a public K-12 education regardless of immigration status, the United States has taken very limited steps to promote health and education in immigrant children.<sup>93</sup> In fact, research shows that confusion regarding immigrant eligibility for federal- and state-funded health insurance and fear of immigration authorities often deter parents from applying for important health and nutrition programs to which their children are entitled.<sup>94</sup> Recent efforts by state legislators to require schools to document the immigration status of students and their parents have even threatened to deter parents from sending their children to school, as was seen following implementation of the controversial Alabama state law HB56.<sup>95</sup> Thus, both federal and state policymakers should

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<sup>92</sup> *Wayne Smith, Hugo Armendariz et al v. United States*, Report No 81/10 - Case 12.562, Inter-American Commission on Human Rights (IACHR), July 12, 2010. Retrieved from <http://www.refworld.org/docid/502ccca62.html>; See also Inter-American Commission on Human Rights (IACHR). (2000). Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, ¶¶ 159-160, 163. Retrieved from <http://www.refworld.org/type,COUNTRYREP,IACHR,CAN,50ceedc72,0.html>. (“[T]he absence of any procedural opportunity for the best interest of the child to be considered in proceedings involving the removal of a parent or parents raises serious concerns.”); Inter-American Court of Human Rights. (2014, August 19). IACHR Advisory Opinion OC-21/14, ¶¶ 263- 282, Opinion 13. Retrieved from [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf). (“Any administrative or judicial body that is to make a decision on the separation of family members, due to expulsion based on the immigration status of one or both parents, must employ a weighting analysis that considers the particular circumstances of the case and guarantees an individualized decision, prioritizing in each case the best interest of the child. In situations in which the child has a right to the nationality of the country from which one or both of her or his parents may be expelled, or the child complies with the legal conditions to reside there on a permanent basis, States may not expel one or both parents for administrative immigration offenses, as the child's right to family life is sacrificed in an unreasonable or excessive manner, in the terms of paragraphs 263 to 282.”).

<sup>93</sup> *Plyler v. Doe*, 457 U.S. 202 (1982); In the Child's Best Interest?, pp. 7-9. (The No Child Left Behind Act mandates that public schools track the academic performance of limited-English speaking children and other immigrant groups.).

<sup>94</sup> Yoshikawa, H. & Kholoptseva, J. (2013, March). Unauthorized Immigrant Parents and Their Children's Development: A Summary of the Evidence, pp. 6-7. Retrieved from <http://www.migrationpolicy.org/research/unauthorized-immigrant-parents-and-their-childrens-development>.

<sup>95</sup> How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground, p. 22.

implement a more holistic approach to ensure that all children in immigrant families have the maximum opportunity to thrive.

## **VII. Conclusion**

Although the principle of the best interest of the child is an internationally recognized and fundamental principle of child protection, the best interest standard does not underlie U.S. immigration laws that directly impact families. Families are forced to remain separated even when seeking to migrate through lawful family-based immigration channels, which drastically fail to meet demand. Furthermore, the well-being and safety of children are not adequately reflected in the enforcement policies that govern apprehension, detention, and deportation of immigrant parents. Likewise, although the best interest of the child is recognized as central to all domestic juvenile court determinations, when the parent in question detained or deported, systemic barriers and institutional biases threaten family unity and needlessly tear apart loving families. In recent years, deportation numbers have soared to historic highs in the name of national security and public safety, with little regard for the hundreds of thousands of children left to suffer the consequences.

The United States must find a better way to balance valid public safety concerns with the best interest of children and the importance of family unity. Federal law, administrative policy, and judicial process must all aim to address the wide range of challenges U.S. children in mixed-status face in the wake of enforcement action. If steps are not taken to protect the children impacted by immigration enforcement, this significant and growing segment of the population will only continue to suffer. Comprehensive legislative and administrative reforms that completely overhaul the currently dysfunctional immigration system is necessary; these must include consideration of children's best interest and a pathway to citizenship for undocumented individuals whose deportation is not necessary to protect the public interest. At the same time, child protection and family services across the country must become more culturally aware, developing systems that take into account the reality of transnational families. Several key recommendations at the end of this book address the changes necessary at these levels to truly protect the best interest of all children.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 12      Repatriation and Reintegration of Migrant Children

Wendy Ramirez, Megan McKenna, and Aryah Somers  
Kids in Need of Defense

### I. Introduction

During 2014, at least five and up to ten Honduran children deported by the United States government were killed after arriving back to Honduras.<sup>1</sup> Ten years ago, in a well-publicized case, Edgar Chocóy Guzman was killed by gangs in 2004 just 17 days after his return to Guatemala. He had raised this exact fear in his unsuccessful attempt to gain U.S. protection during the course of his removal proceedings.<sup>2</sup> The details of these cases are known to us only because of media attention or the continued advocacy of attorneys representing these children. What we do not know, however, is how many other children deported by the United States in the past decade have been killed or victimized by trafficking, exploitation, abuse, or violence upon their return.

In an effort to address this alarming possibility, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) called for the safe and sustainable repatriation and reintegration of unaccompanied children. The TVPRA was the first federal legislation to (1) include language on the safe and sustainable repatriation and reintegration of unaccompanied children and (2) mandate that the United States government report on measures taken to ensure safe removal of children.<sup>3</sup> Despite this legislation, the United States still lacks clear policies and procedures to govern the process of repatriation and reintegration of children. In addition, it has produced the mandated reporting on safe repatriation measures only twice during the past six years, in violation of reporting requirements set out in the TVPRA. As demonstrated by known cases, described above, these failures lead to children being returned to danger and possibly death in their home countries.<sup>4</sup>

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<sup>1</sup> Planas, R. (2014, August 20). Children Deported to Honduras Are Getting Killed: Report. *Huffington Post*. Retrieved from [http://www.huffingtonpost.com/2014/08/20/minors-honduras-killed\\_n\\_5694986.html](http://www.huffingtonpost.com/2014/08/20/minors-honduras-killed_n_5694986.html).

<sup>2</sup> De Leon, S., Associated Press. (2004, May 9). Guatemalan Youth Slain 17 Days After Being Deported From U.S. *LA Times*. Retrieved from <http://articles.latimes.com/2004/may/09/news/adfg-deport9>.

<sup>3</sup> The TVPRA requires that “the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security... submit a report... on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include— (i) the number of unaccompanied alien children ordered removed and the number of such children actually removed from the United States; (ii) a statement of the nationalities, ages, and gender of such children; (iii) a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot program created pursuant to subparagraph (A); (iv) a description of the type of immigration relief sought and denied to such children; (v) any information gathered in assessments of country and local conditions pursuant to paragraph (2); and; (vi) statistical information and other data on unaccompanied alien children as provided for in section 462(b)(1)(J) of the Homeland Security Act of 2002 (6 U.S.C.11 § 279(b)(1)(J)).” William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457. 122 Stat. 5076 (2008) (hereinafter “TVPRA of 2008”).

<sup>4</sup> UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 85, CRC/GC/2005/6 (2005, September 1), prohibits the return of children without family in the home country without a specific care plan: “In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial

This chapter provides a brief overview of TVPRA's requirements on repatriation and reintegration; international and regional standards; and the process of repatriation and reintegration. We examine problems with current U.S. policies, and identify best practices for better protection and reintegration of children being returned to their countries of origin. This overview is based on the first-hand experiences of Kids in Need of Defense (KIND). Specifically, we draw upon our expertise in protecting unaccompanied children through our pro bono legal services program, our advocacy efforts in the United States, and our Guatemalan Child Return and Reintegration Project.<sup>5</sup>

## **II. Background: repatriation and reintegration**

While the terms repatriation and reintegration are not defined under U.S. federal law, it is important to have a general understanding of both the difference between these two concepts and how they are interrelated. Generally, repatriation is understood as the process through which an unaccompanied child is returned by a government authority in one country to the government authority of her country of origin. Repatriation can be imposed by the government—as a result of a deportation order, for example—or can result from a child's request to return to her country, through a process called voluntary departure. Although it departs from international standards and best practices, repatriation in the United States generally proceeds in relation to the immigration removal proceeding. For this reason, repatriation is sometimes also referred to as removal, return, or deportation.

Generally, when a child is apprehended by U.S. immigration authorities, those authorities initiate a removal proceeding before an immigration court. The court in those proceedings then makes a decision on the child's removability based upon his eligibility for certain forms of humanitarian relief. If the unaccompanied child does not fall within an existing category of humanitarian relief, the child is ordered deported to his home country even if return is not in his best interests. Repatriation thus results from a removal order, rather than on a reasoned decision on the best interests of the child or a determination of his safety upon return. Also within this system, many children, particularly Mexican unaccompanied children, lack meaningful access to protection or access to counsel, and may be repatriated against their will directly from the border. This, too, occurs without consideration of their safety or best interests. The TVPRA requires that the Secretary of Homeland Security consult the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied child to a particular country, but it is unclear the extent to which this actually occurs. It is also unclear whether reports showing high levels of abuses of children's rights or of trafficking of children, if consulted, have any effect on a decision to repatriate a child found ineligible for relief.<sup>6</sup>

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responsibilities upon return to the country of origin"; Center for Public Policy Priorities. (2008, September). *A Child Alone and Without Papers: A report on the return and repatriation of unaccompanied undocumented children by the United States*. Retrieved from [http://forabettertexas.org/images/A\\_Child\\_Alone\\_and\\_Without\\_Papers.pdf](http://forabettertexas.org/images/A_Child_Alone_and_Without_Papers.pdf).

<sup>5</sup> As of July 31, 2014, KIND had been referred more than 6,400 unaccompanied children ranging from 18 months old to 18 years old since the start of its operations in January 2009, and trained 7,800 pro bono attorneys. The large majority of the children are from Honduras, El Salvador, and Guatemala, but KIND has been referred children from 66 countries. KIND's Guatemalan Child Return and Reintegration Project (GCRRP) has been referred 160 children since it began in September 2010; on average children receive reintegration support for about one year.

<sup>6</sup> TVPRA of 2008, § 235(a)(5)(B).

Nevertheless, the safe and sustainable repatriation and reintegration legislation is viewed as part of a larger framework ensuring that vulnerable unaccompanied children are protected from the moment of apprehension; through their care and custody; throughout removal procedures; and if a decision is made to remove the child, until their safe repatriation and successful reintegration. This broader framework requires that unaccompanied children have meaningful access to all processes in the United States to seek protection from exploitation, trafficking, abuse, and violence before any repatriation and reintegration process can be initiated. However, as noted, many gaps and challenges in the process and system persist.

Reintegration follows repatriation and is the process of ensuring that a child can be safely and sustainably reintegrated into her family, community, and country. Reintegration is particularly complex because it requires an understanding of the internal context of the country and the underlying root causes that drove the migration of the child. If those same factors are still present, this can be an extremely difficult process, particularly if the child did not return voluntarily. Components of a reintegration process can include re-evaluation of presence of violence or threat to the child; evaluation of family ties and relationships; community structure and opportunities; education, employment, skills training; psychosocial or psychological treatment; access to health care; access the shelter; cultural and linguistic support; and faith or religious networks of support. Reintegration requires greater resources, investment, and knowledge, and should impact the critical policy question of whether repatriation should even take place, e.g., if the child cannot be reintegrated safely and sustainably. In general, governments throughout the Central America-Mexico-United States corridor, have not implemented adequate reintegration programs in the region.

### **III. U.S. law on safe repatriation and reintegration: unsatisfied mandates**

Thousands of unaccompanied children<sup>7</sup> are returned from the United States to their country of origin every year. Most return after being ordered removed from the country or granted voluntary departure at the conclusion of an immigration hearing or removed directly from the custody of U.S. Customs and Border Protection at or near the border.<sup>8</sup> As noted, TVPRA sought to shed light on what actually happens to unaccompanied children who are removed, but there has been limited to no action in relation to these provisions. The increase in unaccompanied children arriving to the U.S. seeking protection and the resulting acceleration of immigration hearings without access to counsel makes the implementation of the safe repatriation and reintegration provisions even more critical.

The TVPRA requires the Secretary of State to create “a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security,

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<sup>7</sup> The U.S. Homeland Security Act of 2002 defines an unaccompanied child as a person who “(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom - (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” Homeland Security Act of 2002, Pub. L. 107-296 Section 462(g), 116 Stat. 2135, 2205 (2002).

<sup>8</sup> Voluntary departure is a form of immigration relief given to a foreign national in removal proceedings whereby he/she agrees to leave the United States voluntarily by a specific date rather than being removed by the U.S. government.

nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.”<sup>9</sup> This provision, as noted, comes into play once children have had the opportunity to present their claims for humanitarian relief.

For children from Mexico and Canada, the U.S. Secretary of State must negotiate bilateral agreements with both countries for the safe repatriation of children. Such agreements must protect children from severe forms of trafficking in persons. At a minimum, they must provide for return to appropriate employees or officials, including child welfare officials where available, of the accepting country’s government during reasonable business hours.<sup>10</sup> Notably, for children from Mexico and Canada, this process should not be initiated until a determination has been made that the child is not a victim of trafficking, does not have an asylum claim, and is able to make an independent decision to withdraw her application for admission.<sup>11</sup>

Mexican unaccompanied children are generally removed from border patrol stations, in a process called voluntary removal. While called voluntary, reports by UNHCR, Appleseed, and the Women’s Refugee Commission have documented the lack of adequate screening procedures for Mexican unaccompanied children to ensure that repatriation is limited to those children who are not at risk and who are capable of voluntarily deciding to return.<sup>1</sup> These problems are discussed in greater detail in chapter 9, on unaccompanied children at the U.S.-Mexico border.

In July 2011, the Department of State submitted a report to Congress that included the number of deportations from the U.S. to various countries. According to this report, 1,632 unaccompanied children were removed from the United States between December 2008 and June 2011.<sup>12</sup> This number includes 623 Mexican children. However, this report does not appear to include the over 40,000 unaccompanied Mexican children returned at the border between those same years.<sup>13</sup>

Since the 2011 report, the U.S. Department of Homeland Security has not widely shared their repatriation numbers, so this data is not readily available in the United States. The ministries of migration in El Salvador, Guatemala, and Honduras, however, have begun to track and share information about the number of children repatriated from the United States. Their data accounts for all children (under age 18) and does not differentiate between children who were unaccompanied in the U.S. or those who returned with a caregiver.<sup>14</sup> According to the ministries of migration in the respective countries, 164 children were returned to El Salvador from the U.S.

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<sup>9</sup> TVPRA of 2008, § 235(a)(5)(A).

<sup>10</sup> TVPRA of 2008, § 235(a)(2)(C).

<sup>11</sup> TVPRA of 2008, § 235(a)(2)(A).

<sup>12</sup> U.S. Department of State. (2011, July 21). Report to Congress on the Provision of P.L. 110-457 Regarding Repatriation of Unaccompanied Alien Children and U.S. Government Efforts to Protect Them from Human Trafficking (hereinafter “2011 Department of State Report to Congress”). Document with author.

<sup>13</sup> U.S. Customs and Border Protection. Southwest Border Unaccompanied Alien Children. Retrieved from <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

<sup>14</sup> The numbers shared by these countries are of children generally and not only unaccompanied children, however. In addition, children who are returned from the U.S. as adults and then found to children upon return are also included in these numbers.

in 2014 (based on data available until the 22<sup>nd</sup> of May),<sup>15</sup> 194 children were returned to Guatemala (from the U.S.) in 2014,<sup>16</sup> and 300 children returned from the United States to Honduras in 2012.<sup>17</sup> While U.S. authorities have not made data available on returns of Mexican children,<sup>18</sup> according to the National Institute of Migration (INM) in Mexico, 16,971 unaccompanied Mexican children were returned from the U.S. in 2013 and 13,324 in 2014.<sup>19</sup>

As noted, the urgency to find ways to protect these children and ensure they are not returning to harm has never been greater, as the number of unaccompanied children coming to the United States has risen dramatically in recent years. In fiscal years leading up to 2011, the average number of children who came alone to the United States was between 6,000 and 8,000. This number increased at an unprecedented rate to 24,481 unaccompanied children apprehended by U.S. Border Patrol in fiscal year 2012, 38,833 in fiscal year 2013, and 68,631 in fiscal year 2014.<sup>20</sup> Numerous reports, including most recently a report by the UN Refugee Agency,<sup>21</sup> have found that children are fleeing alone in unprecedented numbers often to escape increasing violence in Honduras, Guatemala, and El Salvador.<sup>22</sup> Many of the children may be forced to return to an environment of community violence, violence in the home, or poverty—which reflect the root causes for their flight and are structurally inter-related.<sup>23</sup> In addition, children are now facing challenges to accessing protection

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<sup>15</sup> Dirección General de Migración y Extranjería (DGME) El Salvador. (2014). Document with author.

<sup>16</sup> Dirección General de Migración de Guatemala. (2014). Deportados Via Aerea. Retrieved from <http://www.migracion.gob.gt/index.php/root1/estadisticas.html>.

<sup>17</sup> Dirección General de Migración y Extranjería, Honduras. (2012). Estadísticas Migratorias, Año 2012. Retrieved from [http://www.migracion.gob.hn/index.php?option=com\\_content&view=article&id=78&Itemid=274](http://www.migracion.gob.hn/index.php?option=com_content&view=article&id=78&Itemid=274) (data for 2013 and 2014 was not available on the DGME site but the numbers may be trending higher for 2013).

<sup>18</sup> Appleseed. (2011). Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors. Retrieved from <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>, p. 9.

<sup>19</sup> See chapter 7 on Northern Mexico, table 3 (citing INM statistics); INM. (2013). Eventos de repatriación de mexicanos desde Estados Unidos (Adultos y NNA) de 2000 al 2013. Retrieved from [http://www.gobernacion.gob.mx/es\\_mx/SEGOB/Series\\_Historicas](http://www.gobernacion.gob.mx/es_mx/SEGOB/Series_Historicas) and [http://www.gobernacion.gob.mx/es\\_mx/SEGOB/V\\_Repatriacion\\_de\\_mexicanos\\_de\\_EUA](http://www.gobernacion.gob.mx/es_mx/SEGOB/V_Repatriacion_de_mexicanos_de_EUA).

<sup>20</sup> USBP. (2015). USBP Sector Profile – Fiscal Year 2014 (Oct. 1st through Sept. 30th) (reflecting apprehensions by U.S. Border Patrol). Retrieved from <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>; USBP. (2013). USBP Sector Profile – Fiscal Year 2013 (Oct. 1st through Sept. 30th) (reflecting apprehensions by U.S. Border Patrol). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>; USBP. (2012). USBP Sector Profile – Fiscal Year 2012 (Oct. 1st through Sep. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202012%20Sector%20Profile.pdf>. See chapter 1 for additional statistics on apprehensions by the Office of Field Operations.

<sup>21</sup> UNHCR. (2014, March). Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection. Retrieved from <http://unhcrwashington.org/children>; USBP. (2015). United States Border Patrol Southwest Border Sectors. Retrieved from [http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Aps%20FY13%20-%20FY14\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Aps%20FY13%20-%20FY14_0.pdf).

<sup>22</sup> For more information, see Chapter 1, on UNHCR's findings with respect to Mexican and Central American children's international protection needs.

<sup>23</sup> See Chapters 2-4 for an in-depth analysis of root causes of migration, including increases in violence, in Honduras, El Salvador, and Guatemala.

in the United States due to inadequate notice of accelerated hearing dates in immigration courts and inadequate access to counsel.<sup>24</sup>

Once back in their home countries, children must rely largely on themselves and, if available, family, to ensure their own safe return and reintegration. In addition to the violence in their home countries, of which they are often a target, children are also returning to the same conditions of extreme poverty, with limited educational and other opportunities—often now exacerbated by a significant debt to pay to their smugglers.<sup>25</sup> Most children will not have a support system connecting them to vital services, such as help with school enrollment, scholarships, skills training, psychosocial support, and family reunification. This leaves them vulnerable to trafficking, exploitation, abuse, and violence—the very harms that the TVPRA provisions were enacted to prevent.

### *Cecilia's Story*

*Cecilia<sup>26</sup> was 17 years old when she decided to migrate to the United States alone hoping to bring her family out of extreme poverty. Cecilia recounted that at age 12 she felt obligated to quit school and find a job to support her family after her mother became ill and was unable to walk. As her mother's illness progressed, Cecilia's father abandoned the family. Cecilia traveled to a city outside of Guatemala City and worked 17 hours a day, but still was unable to earn enough to support her family. Cecilia was detained by U.S. Border Patrol shortly after she crossed the border into the United States and was subsequently placed in a government shelter where she remained for three months because she did not have family in the U.S. with whom to reunify. Cecilia was placed in removal proceedings but had no attorney to represent her. She did not know her legal options and was advised that she was not eligible for immigration relief and should request voluntary departure. Cecilia requested and was granted voluntary departure by an immigration judge, without any consideration of the circumstances she was returning to in Guatemala, or whether return would be in her best interests. Cecilia returned to Guatemala. While she was excited to see her family, Cecilia quickly grew desperate as her family's economic situation had worsened while she was away. In addition, now she was also faced with a \$5,800 debt as a result of her trip.*

Cecilia should have been eligible for Special Immigrant Juvenile Status based on abandonment by her father, but she was nevertheless returned to Guatemala. This brings into question whether her due process rights were protected throughout her deportation proceeding, including access to

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<sup>24</sup> Semple, K. (2014, August 4). Advocates in New York Scramble as Child Deportation Cases Are Accelerated. *New York Times*. Retrieved from [http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?\\_r=0](http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?_r=0); Stewart, N. (2014, September). Program to Give Legal Help to Young Migrants. *New York Times*. Retrieved from <http://www.nytimes.com/2014/09/23/nyregion/groups-to-provide-lawyers-for-children-who-face-deportation.html>.

<sup>25</sup> Center for Gender & Refugee Studies, and Kids In Need of Defense. (2014, February). A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System, pp. 79-83. Retrieved from <http://cgrs.uchastings.edu/our-work/treacherous-journey> (hereinafter “A Treacherous Journey”).

<sup>26</sup> All names provided are pseudonyms used to protect the identity of these children.

counsel. Her deportation also highlights how safe repatriation and the best interests of the child were not adequately considered during the proceeding.

Cecilia's story is only one example of many children who return, with new smuggling debt, to unchanged conditions of systemic poverty, lack of access to education, and weak child protection systems. Children who do not receive reintegration support are at greater risk of re-attempting the dangerous trip in an effort to pay off their debt. These same children are also vulnerable to trafficking. Without community-based support services to help them find local options to pay off their debt, receive psychosocial support, and finding other alternatives to remigration, children remain vulnerable at home. To successfully deliver such services, collaboration between all stakeholders is needed—including the U.S. government, the child welfare agencies in the countries of origin, civil society, and consular officials in countries of transit and destination.

#### **IV. Regional protocols and international conventions: unfulfilled standards**

At this time, there is no single legally binding and enforceable regional or international agreement governing repatriation and reintegration procedures for unaccompanied children between all countries in the Central America-Mexico-United States corridor. While regional and international protocols can provide guidance and a principled framework, the United States should create protocols that reflect the best interests of children and meet the TVPRA mandate of safe and sustainable repatriation and reintegration.

The Regional Conference on Migration has worked to develop regional guidelines and promote national protocols in the region. The 2007 Regional Guidelines for Special Protection in Cases of the Repatriation of Child Victims of Trafficking and the 2009 Regional Guidelines for the Assistance to Unaccompanied Children in Cases of Repatriation guarantee the physical and moral integrity of children during the process of repatriation. They require all governments to respect children's human rights and ensuring the best interest of the child. These protocols recognize that countries must ensure the protection of the rights of children while in their custody, including providing access to food, water, medical attention, psychological assistance, education, and opportunities for recreation. Governments must also guarantee that children are informed of their rights. These protocols reference the United Nations Convention on the Rights of the Child (CRC), specifying principles such as the best interest of the child, non-discrimination, family unity and reunification, respect for human rights, and due process. However, these regional guidelines primarily focus on repatriation, and not on reintegration. Additionally as mentioned above, they are not binding.<sup>27</sup>

Individual countries in the region have developed their own national or bi-national guidelines and protocols. In 2006, the Honduras Protocol on the Repatriation of Children and Adolescent Victims or Vulnerable to Trafficking in Persons was developed; and in 2012, Mexico and Guatemala agreed to a Bi-National Protocol Project for Assistance to Children and Adolescent Unaccompanied Migrants. Both Protocols are discussed in greater detail in chapter 13, on regional and bilateral agreements.

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<sup>27</sup> For more information on these and other instruments, see chapter 13 on regional and bilateral agreements.

Moreover, as noted, under TVPRA, the United States is required to develop agreements with Mexico and Canada for the repatriation of unaccompanied children. In 2009, the Department of Homeland Security (DHS) signed 30 bilateral agreements with the Mexican National Migration Institute (*Instituto Nacional de Migración*) and the Mexican consulates on the repatriation of vulnerable migrants, including unaccompanied children.<sup>28</sup> Through a request under the Freedom of Information Act (FOIA), these documents became available to the general public. Although purportedly intended to address the safe repatriation of Mexican nationals, these bilateral agreements are merely logistical in nature and do not address the protection and best interests of unaccompanied children. At their core, these agreements facilitate enforcement of removal orders rather than provide guidance to agents on special considerations for children or practices that are child friendly. Additionally, as is the case with the regional protocols, reintegration is not addressed.<sup>29</sup>

In addition to these regional and bi-national efforts, the primary international instrument providing a principled framework for the repatriation and reintegration process is the CRC. As already noted, regional guidelines created through the Regional Conference on Migration have used the CRC as a reference and framework. The CRC does not envision a repatriation decision occurring within the context of an immigration removal decision; rather, States should conduct a best interests determination to protect children irrespective of their immigration status.<sup>30</sup>

Another international convention relevant to repatriation decisions is the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to prevent the *refoulement* of asylum seekers.<sup>31</sup> The U.S. incorporated these principles into domestic law through the 1980 Refugee Act, which prohibits the U.S. government from repatriating of individuals facing persecution. The prohibition on return applies irrespective of whether U.S. immigration authorities apprehend the individual at the border or within the interior of the country. In practice, however, access to asylum by individuals presenting themselves at the border and ports of entry has deteriorated. The faulty screening of Mexican children by U.S. border officials poses a particular risk of *refoulement* in violation of international protection obligations. This problem is addressed in greater detail in chapter 9, on unaccompanied children at the U.S.-Mexico border.

The Vienna Convention on Consular Relations sets out certain rights for consular access to persons in detention to converse and correspond and arrange for his or her legal representation.<sup>32</sup> The U.S. ratified this convention, but, at the time, took the position that it was self-executing and did not require implementing legislation.<sup>33</sup> In the immigration context, “every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of

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<sup>28</sup> U.S. Department of Homeland Security. (2009, April 3). Secretaries Napolitano and Espinosa Announce Agreement on Mexican Repatriation. Retrieved from <http://www.dhs.gov/news/2009/04/03/agreement-mexican-repatriation-announced>.

<sup>29</sup> For additional details on United States-Mexico agreements, see chapter 13 on regional and bilateral agreements.

<sup>30</sup> Convention on the Rights of the Child (CRC) art. 3, 1989, November 20, 1577 U.N.T.S. 3.

<sup>31</sup> Convention Relating to the Status of Refugees. 1951, July 28, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees. January 31, 1967. 606 U.N.T.S. 267.

<sup>32</sup> Vienna Convention on Consular Relations art. 36(1), 1963, April 24, 596 U.N.T.S. 261.

<sup>33</sup> Garcia, M. J., Congressional Research Service (2004, May 17). CRS Report for Congress: Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements. Retrieved from <http://fas.org/sgp/crs/row/RL32390.pdf>.

his or her nationality in the United States.”<sup>34</sup> Bilateral treaties may require consular notification even if the detained migrant does not request such notification; however Mexico, Guatemala, Honduras, and El Salvador do not have such agreements with the United States.<sup>35</sup> Mexico has informed the Department of State that it would like to be notified of the detention of any child, pregnant woman, or person at risk.<sup>36</sup> However, the consular officers do not have the right to access if the person does not request contact with the consulate; this significantly limits consular contact in immigration detention. As explained below, consular officials usually do receive notice once the U.S. government has decided to remove a person to her country of origin.

U.S. policies on returning unaccompanied children contravene a number of other international treaties and conventions to which the U.S. is not a party, such as the International Covenant on Civil and Political Rights (guaranteeing children the right to such measures of protection as are required by their status as a child);<sup>37</sup> the Universal Declaration of Human Rights (children are entitled to special protection and assistance);<sup>38</sup> and much soft law.<sup>39</sup>

## **V. U.S. repatriation process for unaccompanied children**

In general, the U.S. repatriation process for unaccompanied children is not transparent and varies greatly from country to country. While the practices for children apprehended by and transferred from DHS to the custody of the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS) are generally known, it is much less clear what happens to children in the reverse scenario, when they are picked up by DHS from ORR for removal to their country of origin.

The key government actors in the repatriation process are the DHS, ORR, the Department of State (DOS), and the Department of Justice (DOJ). Essentially, the decision on repatriation takes place in the removal proceeding before an immigration judge of the Executive Office for Immigration Review within DOJ. Neither the best interests of the child nor the safety of the child guide this proceeding; rather the child’s eligibility for relief or her defenses to removability from the basis of

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<sup>34</sup> 8 C.F.R. § 236.1(e) (2014).

<sup>35</sup> 8 C.F.R. § 236.1(e) (2014).

<sup>36</sup> U.S. Department of State. (2014, March). Consular Notification and Access, 4<sup>th</sup> Ed. Retrieved from [http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual\\_Feb2014.pdf](http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf).

<sup>37</sup> International Covenant on Civil and Political Rights art. 24, 1966, December 19. 999 U.N.T.S. 171. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

<sup>38</sup> Universal Declaration of Human Rights art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III). (1948, December 10).

<sup>39</sup> CRC General Comment 6 (2005), Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, including ¶ 84. (“Return to the country of origin is not an option if it would lead to a “reasonable risk” that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of non-refoulement applies,”) and ¶ 92, (“The decision to resettle an unaccompanied or separated child must be based on an updated, comprehensive and thorough best-interests assessment, taking into account, in particular, ongoing international and other protection needs.”); UNHCR. (2007, October 5). Conclusion on Children at Risk, No. 107 (LVIII) – 2007. Retrieved at <http://www.unhcr.org/4717625c2.html> (stating that “best interests of the child shall be a primary consideration.”); U.N. Committee on the Rights of the Child. (2012) Report on the 2012 Day of General Discussion – The Rights of All Children in the Context of International Migration. Retrieved from [http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGD-Childrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf).

the determination.<sup>40</sup> Once the immigration judge issues a decision ordering the removal of the child to her country of origin, either through an order of deportation or a voluntary removal order, the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE) initiates the procedure for the actual repatriation process for unaccompanied children.

TVPPRA also requires the U.S. government to assess country conditions before repatriating children by consulting the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied child to a particular country. However, it is unclear the extent to which this actually occurs.<sup>41</sup> The ICE trial attorney will transmit the information on the final immigration court order to another ICE officer who will begin to make travel arrangements for the child on the Justice Prisoner and Alien Transportation System (JPATS) flights. JPATS flights are ICE charter flights to countries to which large numbers of individuals are being removed. These flights mix adults and children, as well as men and women. This process is used for children from Guatemala and Honduras. Mexican children, however, are usually transported to the border by bus; and children repatriated to El Salvador travel on commercial flights rather than JPATS flights.

ICE also contacts the consulate of the child's country of origin to inform officials that the child will be returning home. There is generally no prior contact with the consulate, and DHS does not consistently share information with Central American consulates when an unaccompanied child is detected, apprehended, and detained. The consulates have asked DHS to notify them of a child in CBP or HHS custody; however, there has been no progress on this issue to date.<sup>42</sup>

After ICE contacts the consulate, practices vary across the country depending on the particular consular office, as discussed in greater detail in Chapter 8. The consulate can visit the child at the ORR shelter or remotely prepare and issue travel documents. Beyond this procedure of providing travel documentation, the consular officers have played a limited role in protection. Although the consulate could also interview the child to ensure that the child's rights were respected throughout the process of apprehension, custody, and removal and help to assess the child's situation abroad, this does not occur in practice. While some ORR shelters may encourage the child to maintain communication with their consulate, this is not done consistently.

In the face of the unprecedented influx of migrant children apprehended by CBP and placed in ORR custody in 2013 and 2014,<sup>43</sup> some of the consulates are pushing for greater involvement at all stages of the process in the United States. Challenges remain, however, with U.S. policies and the consulates' capacity to reach all unaccompanied child nationals. Through conversations with the Embassy of El Salvador, the consulates of El Salvador are looking to better understand the types of immigration relief available for unaccompanied children in the United States. The consulates have begun to build a network of collaborative partners to provide legal services for unaccompanied children with upcoming immigration hearings who have been reunified with

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<sup>40</sup> For a discussion of available forms of relief in the United States and barriers faced by children in obtaining them, see Chapter 10 on immigration remedies and procedures in the United States.

<sup>41</sup> TVPPRA of 2008, § 235(a)(5)(B); *A Treacherous Journey*, p. 80.

<sup>42</sup> For additional details on consular agreements and practices, see chapter 13 on regional and bilateral agreements.

<sup>43</sup> See chapter 9 on unaccompanied children at the U.S.-Mexico border for a more in-depth discussion of border practices.

family in the United States. These steps can also help inform the consulates' protection role if unaccompanied children are subsequently ordered removed.<sup>44</sup>

ICE will provide an approximation of when the child will return to their country of origin, but no specific date with reasonable notice. At best, DHS gives ORR shelter workers and consulates two days' notice that the child will be picked up and placed on a DHS flight home. The timing is based on available seating on JPATS flights to the home country. The short notice gives shelter workers, consulates, and others who are trying to coordinate the child's return and family reunification little time to do so effectively.<sup>45</sup> Through KIND's repatriation and reintegration project, KIND has observed that the consulates of Guatemala do not consistently receive information from DHS about a child's return. DHS notifies the consulate for the purposes of a travel document, as the consulate must issue such document before DHS can confirm and coordinate the child's return flight. In KIND's view, consulates should be more involved in requesting timely information from DHS before a child's return to help ensure a safe process.

Usually, children's families are notified of the child's imminent return by a caseworker at the ORR shelter housing the child. The children are able to buy and take with them clothes, shoes, notebooks, and school notes in a duffel bag that is provided by ORR. Even when there is sufficient time to explain to children what will happen next, children are usually not provided information about what will happen during their flight or upon their return to their country of origin.

There is a significant gap in information on the next step of the process between the pick-up of the child from the ORR shelter and the arrival to the country of origin, as the process is not transparent during this period of time. From information gathered from children, an ICE officer picks up the child from the ORR shelter and transports her to an ICE detention facility, where the child is held with others. She is then placed at some point on a flight and returned to her country of origin, usually in the capital city.<sup>46</sup> Generally Central American unaccompanied children are returned with adults on JPATS charter planes, but are seated in a separate section of the airplane. Unaccompanied children should be accompanied by child welfare trained individuals once in ICE custody for the repatriation process, but it appears that they are escorted by enforcement officers.

The JPATS flights usually land at the capital city of the country, but may sometimes instead arrive at an alternative major city, such as San Pedro Sula in Honduras. Families in the home country must figure out how they are going to get to airport to pick up the child. They receive no assistance in transport to the city to receive their children, but must instead find resources on their own. The

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<sup>44</sup> Conversation with KIND, notes on file with author.

<sup>45</sup> This information is based on KIND's experience coordinating with families in Guatemala whose children are returning home and for whom KIND provides reintegration support through the Guatemalan reintegration project. Throughout the four years that KIND's reintegration project has operated, we have seen DHS give short notification to ORR shelter caseworkers and foreign consulates of a child's return date and time.

<sup>46</sup> Children who are released from ORR custody prior to their final hearing and are later deported are expected to leave the country at the expense of the family, which is expected to pay for the child's flight home. Typically, they have several months to comply. It is difficult to determine, however, if and how many children leave as many are likely to remain in the U.S. undetected. KIND has only seen two cases of children who were released to a family member and they were seeking safe return and reintegration support. A ninety-eight percent (98%) of children helped with KIND's safe return and reintegration services were escorted home from an ORR shelter by DHS on ICE charter flights.

returning children can be from remote, impoverished areas, as is often the case with children from Guatemala. The parent or other caregiver may have to take time off from their work to make the journey and pay for transportation with limited resources. The lack of sufficient notification and time for planning diminishes the likelihood of safe return, reunification, and reintegration.

#### A. Guatemalan children

In Guatemala, the key actors in the current reception and reunification process are the Ministry of Foreign Affairs (*Ministerio de Relaciones Exteriores*), General Directorate of Migration (*Dirección General de Migración*), Secretary of Social Welfare (*Secretaría de Bienestar Social*), and the Attorney General's Office for Children and Adolescents (*Procuraduría de la Niñez y la Adolescencia*). These government agencies also rely on DHS to provide information about the child's arrival date and time. Typically, DHS provides this information only when it hands over the child to migration authorities of her country of origin.<sup>47</sup>

Returned unaccompanied Guatemalan children arrive to the military side of the La Aurora airport and are usually allowed to deplane prior to adults. They are greeted by caseworkers from the Secretary of Social Welfare, and possibly representatives of the Attorney General's Office for Children and Adolescents, who have the legal authority to take custody of the child. The children are walked into a reception room and have a separate waiting area from the adults. Some children are mistakenly treated as adults, and returned together with adults during the flight, but then moved to the children's waiting area upon discovery of their age.

Children are usually provided snacks and can make phone calls to family. The child then undergoes an initial interview for health and safety purposes. In some cases, a parent or family member may be waiting at the airport or at the new shelter in Zona 1 of Guatemala City. The child is then reunified with parent or legal guardian with verification of identity documentation and through execution of an administrative act granting custody back to the family. If the child is unable to be reunified, she is transported to the Secretary of Social Welfare shelter in Zona 1 of Guatemala City. If the child cannot be reunified with a family member, the child will be institutionalized in the child welfare system through a judicial proceeding.<sup>48</sup> There are also children who sometimes arrive on the commercial side of the La Aurora airport, but little is known about the process for these children. Beyond this initial reception process, there is virtually no additional follow-up on safe and sustainable reintegration for these children.<sup>49</sup>

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<sup>47</sup> Based on conversation with stakeholders, advocates, and NGOs about the reception processes in the country of origin.

<sup>48</sup> Based on conversation with stakeholders, advocates, and NGOs about the reception processes in the country of origin.

<sup>49</sup> Based on conversation with stakeholders, advocates, and NGOs about the reception processes in the country of origin.

### *B. Honduran and Salvadoran children*

In general, based on conversations with stakeholders, the U.S. side of the repatriation process is virtually identical between Guatemala, El Salvador and Honduras. One key difference is, in contrast to Guatemala, and as mentioned above, child returns to El Salvador are conducted via commercial planes with a DHS officer escort rather than via ICE JPATS charter planes.

### *C. Mexican children*

As discussed in chapter 9 on unaccompanied children at the U.S.-Mexico border, the majority of repatriated Mexican children are returned directly from the border. The repatriation process for Mexican children is cursory compared to the process for Central American children. Mexican children speak to a consular officer regarding biographical information, but generally do not undergo interviews for safe and sustainable repatriation or regarding their best interests. The process for returning children to the custody of the National Migration Institute and transferring to the custody of the National System of Integral Family Development (*Sistema Nacional de Desarrollo Integral de la Familia*) are not consistent across the country, as explained in greater detail in Chapter 7 on Northern Mexico.<sup>50</sup>

As noted in the case of El Salvador, in the last two years, some consulates have begun to push for greater involvement. For example, in August 2014, the Mexican Ministry of Foreign Affairs (SRE) announced that they are distributing a new questionnaire to consular officials along the Mexico-U.S. border.<sup>51</sup> This questionnaire will further the goal of safe and sustainable repatriation, serving as a tool to determine if the child is a possible victim of trafficking or crime or fears returning home because of intrafamilial violence or sexual assault. The questions will also assess whether a return home serves the best interest of the child.<sup>52</sup> The Mexican consulate will interview the child utilizing this new questionnaire once the child has been interrogated by U.S. CBP officers. The SRE has sought technical assistance from two non-governmental organizations to update their screening tool.<sup>53</sup> Challenges remain, however, with U.S. policies and the consulates' capacity to reach all unaccompanied child nationals.

## **VI. U.S. reintegration process for unaccompanied children**

As previously noted, the TVPRA was the first legislation to include language on safe repatriation of unaccompanied children and to mandate the U.S. government reporting on safe repatriation measures. It required the DOS to create a pilot program, in conjunction with HHS, DHS, nongovernmental organizations, and other national and international agencies and experts “to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual

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<sup>50</sup> For more information on treatment of Mexican children returned by U.S. immigration officials, see Chapter 7 on Northern Mexico.

<sup>51</sup> For more information on the differential treatment of Mexican unaccompanied children vis-à-vis Central American unaccompanied children by U.S. border officials, see chapter 9, on unaccompanied children at the U.S.-Mexico border.

<sup>52</sup> Gómez Quintero, N. (2014, August 20). SRE will help Mexican migrant children in the US. *El Universal*. Retrieved from <http://www.eluniversal.com.mx/in-english/2014/sre-migrant-children-93243.html>.

<sup>53</sup> Kids In Need of Defense (KIND) and Institute for Women in Migration (IMUMI).

residence, including placement with their families, legal guardians, or other sponsoring agencies.”<sup>54</sup> Despite the reintegration provision of TVPRA, the United States has in effect viewed its responsibility towards these children as ending once they are turned over to the custody of government officials from the country of origin at the port of entry.

Implementing reintegration is a complex process and should be based on a more comprehensive understanding of the internal context of the country and underlying root causes that drive migration of children. This includes understanding the political context (general political factors, violence and oppression, etc.); the security context (the extension of gang and drug trafficking activities, etc.); the economic/developmental context (general economic factors and how children fit into this context); the environmental context (distribution of land, environmental disasters, and agricultural reform, crop failures, etc.); and the child protection context (child protection system, child labor eradication campaigns, etc.). This kind of effective implementation requires collaboration among U.S. government agencies supporting development and security assistance abroad, as well as non-governmental organizations with expertise in working directly with populations in need of protection and support.

In 2010, the State Department’s Bureau of Population, Refugees, and Migration funded the International Organization for Migration (IOM) to implement an 18-month pilot project. The project supported the return and reintegration of unaccompanied children returning to El Salvador, and assisted the Government of El Salvador in building its capacity to help these children. The project, which was managed jointly by IOM and the El Salvadoran Institute for the Development of Children and Adolescents (*Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia* or ISNA), assisted children with family reunification, and facilitated the child’s reintegration through education, vocational training, and medical and psychological care. It ran from March 2010 through September 2011. After the project’s completion, local and national authorities were to continue its activities.<sup>55</sup>

Although this was a positive initial effort, it is unclear whether the program still operates under local and national authorities. Due to a change in child welfare laws, a mandate gap emerged between ISNA and the National Council for Children and Adolescents (*Consejo Nacional de la Niñez y Adolescencia* or CONNA). This gap may have impacted or even ceased the implementation of this program, as it is unclear which agency has full mandate over the reintegration of returned child migrants. Nonetheless, with the surge of children repatriated from the Mexican border in recent months, ISNA and CONNA are collaborating with the General Directorate of Migration and Aliens (*Dirección General de Migración y Extranjería* or DGME) in at least the initial reception of children; however these efforts fall short, as discussed in Chapter 4 on El Salvador, and reception efforts do not necessarily extend to the reintegration process.<sup>56</sup>

The U.S. State Department’s two reports to Congress on the pilot project did not offer information about the impact of the 18-month program; specific steps taken to ensure the children were safely and humanely repatriated; or any best practices identified to inform future programming.

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<sup>54</sup> TVPRA of 2008, § 235(a)(5).

<sup>55</sup> 2011 Department of State Report to Congress.

<sup>56</sup> Information based on conversation with NGO stakeholders and ISNA representative in El Salvador. Such efforts are discussed in greater detail in Chapter 4 on El Salvador.

According to IOM, the 2010-2011 pilot helped 52 children find scholarship assistance, job training, and other social services.<sup>57</sup> The second report stated that ISNA had established a national reintegration program for returned children—but, as explained about, the continuing viability of this program remains unclear. It additionally reported that IOM had published a Manual of Reintegration that outlines the roles and responsibilities of El Salvadoran government agencies, as well as a directory of organizations that provide reintegration services, and had documented unaccompanied child reintegration practices in the region.<sup>58</sup> However, to date, these materials have not been made available. Moreover, no projects other than the 2010-2011 ISNA pilot have been implemented by the U.S. government to address the safe repatriation and reintegration of unaccompanied children, and the United States has not issued best practices regarding repatriation and reintegration of children. The Department of State does not currently fund programs to specifically support safe reintegration of repatriated unaccompanied children.

TVPRA also required reporting on efforts to improve repatriation programs for unaccompanied children, including data on: the number of unaccompanied alien children ordered removed and actually removed; the nationalities, ages, and gender of the children; a description of the policies and procedures used to effect the child's removal from the United States; the steps taken to ensure that such children were safely and humanely repatriated to their home country; a description of the type of immigration relief sought and denied to the children; and any information gathered in assessments of country and local conditions. The two DOS reports to Congress on the 18-month pilot project in El Salvador lack substance and fail to meet these requirements. They provide only extremely basic statistical information about U.S. agencies' work addressing mandates under the TVPRA<sup>59</sup>.

Reintegration also requires that unaccompanied children be provided safe and sustainable family reunification services once returned to their home country. These must include social services and shelter care if the child has no family with whom to reunite, as well as services to support reintegration into their family and community. Beyond an initial reception process, however, the governments of El Salvador, Guatemala, and Honduras do not have systems in place to follow up with and provide reintegration support to returned children. As explained in greater detail in Chapters 2-4, all three countries have child protection laws in place, but lack national child protection systems that can actually implement those laws. Rather, the relevant agencies are severely under-resourced, lack clear standards, and do not extend in practice across the entire country.<sup>60</sup> While the United States does have development programs through the U.S. Agency on for International Development (USAID) in the region, it has not engaged in efforts to explicitly connect these programs to reintegration support for children the U.S. has deported. Nor do its efforts to adequately help strengthen child protection systems. Overall, there is an absence of reintegration policies and programs across the region.

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<sup>57</sup> IOM PowerPoint presentation document. (2012, May 12). Document with author. *See also* Méndez, M. (2012, March). Project "Return and Reintegration of Unaccompanied Migrant Boys, Girls, and Adolescents", PHASES I & II. Retrieved from [http://www.rcmvs.org/Eventos/Otros/Marzo2012/Presentations/SAL%20-%20CRM\\_mar12%20Eng.ppt](http://www.rcmvs.org/Eventos/Otros/Marzo2012/Presentations/SAL%20-%20CRM_mar12%20Eng.ppt).

<sup>58</sup> 2011 Department of State Report to Congress.

<sup>59</sup> A Treacherous Journey, p. 82.

<sup>60</sup> Oficina de Derechos Humanos del Arzobispado de Guatemala. (2011). Informe de la Situación de la Niñez y Adolescencia en Guatemala 2011. Retrieved from <http://www.odhag.org.gt/pdf/InformeNinez2011.pdf>.

## **VI. Case study: the Guatemalan Child Return and Reintegration Project**

In the absence of sustainable government reintegration initiatives, non-governmental organizations have stepped in to provide services in the region. In 2010, KIND launched the Guatemalan Child Return and Reintegration Project (GCRRP), an innovative a partnership between KIND, the Global Fund for Children (GFC) and four local nongovernmental organizations in Guatemala: Fundación Castillo de Amor para la Niñez; Asociación Pop No'j; Colectivo Una Vida Digna; and El Refugio de la Niñez. The project aims to help children returning alone to Guatemala from the United States without adequate support. The children who have benefited from the GCRRP the most are those who remained in ORR shelter care because they lacked family in the U.S. with whom they could reunify, then were found ineligible for immigration protection. These children leave the U.S. because they have accepted voluntary return,<sup>61</sup> or because they have been ordered deported. Between October 2010 and September 2014, the GCRRP received 160 referrals of children in ORR shelters who expressed an interest in its services.<sup>62</sup> Of note, this project is fully voluntary. A child's case worker or social worker in the ORR shelter presents the child with information about the project, and refers the child to KIND only if she expresses interest in the GCRRP.

The GCRRP social worker conducts an intake interview with the child via videoconferencing (as most children are referred from ORR shelters in Arizona and Texas). The social worker asks various questions to familiarize himself with the child's life back home. For example, with whom did the child live before coming to the U.S., what was their day to day life in Guatemala, did they attend school, at what age did they start working (if applicable), what motivated them to leave, etc. The assessment tool also consists of child friendly questions that will help the GCRRP social worker detect any past history of abuse or other circumstances that would render return as contrary to the best interest of the child. In a couple of cases, the GCRRP social worker has detected past abuse, and reported this to the ORR shelter and the child's legal service provider to secure a re-interview of the child. In this way, the GCRRP acts a final safeguard to protect children from unsafe returns. In most cases, however, the child is referred to KIND for reintegration support once the child has already been deemed ineligible for relief following a final immigration hearing. Based upon this initial process, KIND plays a role in recognizing the need to connect decisions on return with the feasibility of safe and sustainable repatriation and reintegration.

The GCRRP then matches the child with the NGO that can best provide necessary services. The NGO and KIND coordinate contacting the family members to help them arrange travel to the capital city to reunite with the child. The NGO meets with the child and provides comprehensive support, which includes education and vocational skills training opportunities, psychosocial support, and facilitation of health care and other critical services.<sup>63</sup>

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<sup>61</sup> Note, however, that in many cases, voluntary departure or return takes place in an uninformed or coerced manner that fails to be truly "voluntary." See chapter 9 on unaccompanied children at the U.S. border for more information.

<sup>62</sup> The percentage of Guatemalan children in ORR custody who were told about the program and accepted versus those who were told about the program and declined is not known. This data was not taken by the case workers in the facilities.

<sup>63</sup> It should be noted that KIND's GCRRP is comprised of unaccompanied children within the 10 percent of those who remain in ORR custody throughout their immigration proceedings. These are children for whom ORR has not found a sponsor. Because the children do not have family or a non-familial sponsor in the US, it is more likely that

The following is a chart of the GCRRP service model after children are referred to the program by their immigration attorney or social worker, counselor, or case manager at a federally funded ORR shelter:

⇒	Care plan for return and reintegration developed by KIND, local NGO partners and the child. KIND and local NGO partners coordinate for child's return.	⇒	Returning child is met at the airport in Guatemala, by local NGO partners and the child's family	⇒	Child receives services in Guatemala by local NGO partner, or by referral to other local resource as per care plan	⇒	Local NGO partners follow up with youth based on needs and progress, and KIND monitors case progress
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Since the first unaccompanied child was referred to KIND in October 2010, the GCRRP has helped 121 Guatemalan children return home safely. In a very short period of time, this unique pilot program has demonstrated the power of a collaborative effort among multiple stakeholders to address the needs of a vulnerable, and often invisible, population of children. Although the project has helped only around one percent of the children returning to Guatemala each year, it has served as a catalyst to demonstrate that return and reintegration can succeed with relatively modest resources and collaboration<sup>64</sup>.

### *Santiago's Story*

*Santiago migrated from a small village in Quiche. The poverty in his village is severe and Santiago felt discouraged by the lack of job prospects. He attempted to cross the U.S.-Mexico border twice, was apprehended and taken into custody, and ultimately referred to the GCRRP. Upon his return to Guatemala, he expressed worry and guilt that his family, who was already living in extreme poverty, now had a huge debt to pay to cover his trips to the United States. KIND's NGO partner organization in Guatemala (Colectivo Vida Digna) visited Santiago's home and invited him and his parents to attend workshops about Mayan cultural knowledge and skill-building trainings. There, Santiago and his family began to explore valuable strengths and skills they already possessed that could help them enter the competitive market economy. With the help of special agricultural training and a small loan, Santiago and his family harvested two acres of onions and one acre of green beans that were then sold to a buyer for export. Santiago has gained confidence and can see opportunities at home that are real alternatives to migration. Although challenges remain—his family still lives without running water or electricity—Santiago is happy that he can contribute to his family's economy.*

they have family in their home country. In KIND's experience, all the children in our program had close or extended family to whom to return.

<sup>64</sup> In 2014, KIND estimated a cost per child.

*As he looks to the future, he hopes to find a way to return to school to continue his formal education.*

### *Andres' Story*

*Andres had always excelled in school and was well underway to earning his high school degree. His goal was to become an accountant. Unfortunately, Andres was often discouraged by the lack of job prospects in his community, even for youth like him who had the opportunity to reach a higher level of education than most children and youth in Guatemala. Andres felt that the only chance he had to develop professionally and to repay his parents for the sacrifices they made putting him through school was to migrate to the United States. Andres traveled north with his older sister; they were detained by U.S. Border Patrol at the border. Andres was transferred to an ORR shelter, and his sister was quickly deported to Guatemala. After learning that his only form of relief was to request voluntary departure, Andres was referred by his case manager to KIND's GCRRP in October 2012. When interviewed by KIND, Andres expressed being anxious and depressed because his family would be unable to pay the \$9,000 debt they had acquired as a result of his trip. He feared his dreams of becoming an accountant would never come true. Since his return to Guatemala, Andres and his family have received guidance and support from one of the GCRRP's local NGO partners. Through a generous scholarship provided by the NGO partner, Andres re-enrolled in school and will successfully complete his high school diploma this year with a track in Accounting. The local NGO partner also invited Andres and his mother to participate in their micro-lending program to help the family develop a small business that can generate income.*

Through the GCRRP, KIND has also increased the visibility of the realities children face when they return home, and the conditions that pushed them to migrate to the U.S. in the first place. Challenges to any reintegration effort will persist so long as governments fail to address systemic issues such as endemic poverty, inequities in access to education, community violence, and a lack of child protection systems.

Through partnerships with local NGOs, stakeholders, and advocates in Guatemala, the project has also gained visibility with the Guatemalan government. KIND has shared the project as an experience that can help inform Guatemalan ministries' oversight of the reception, family reunification, and reintegration of repatriated children (e.g. by the Secretariat of Social Welfare, Ministry of Foreign Relations, and Attorney General's Office). Ongoing public outreach and advocacy is needed to highlight the importance of services following children's return as well as the larger systemic issues that drive migration, mentioned above and discussed in detail throughout this book.<sup>65</sup>

In contrast to the model implemented by the International Organization on Migration in El Salvador in 2010 and 2011, which did not incorporate civil society, the GCRRP model seeks to strengthen existing civil society actors in developing more sustainable systems, together with

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<sup>65</sup> For more information on the systemic issues affecting Guatemala, see Chapter 3 on Guatemala.

governments in the region. This type of multi-lateral and government/non-government collaboration could be used to create new programs in Honduras and El Salvador in support of the reintegration of unaccompanied children.<sup>66</sup> It is critical that international organizations work not to replace government and civil society capacity in the region or to inadvertently create conflict, but rather to strengthen and build local capacity.

While programs like the GCRRP are a step forward in ensuring that children who are escorted home by DHS can return safely, initiatives such as these need to be taken on a much larger collaborative scale with both governmental and non-governmental support. Comprehensive efforts must address the many needs of children who return home, including those returning to violence and extreme poverty. Current national and international efforts do exist to expand repatriation and reintegration programs; these should engage with NGOs, such as KIND and its partners, with expertise in working with unaccompanied children. Children's best interests and safety must be paramount in any repatriation and reintegration program. In addition, governments must provide greater transparency regarding the reintegration process for unaccompanied children.

## **VII. How the U.S. falls short in ensuring safe repatriation and reintegration**

As noted in the sections on repatriation and reintegration above, the United States has fallen short of implementing safe and sustainable repatriation and reintegration systems for unaccompanied children pursuant to the TVPRA. This section contains summary points on key problems in current U.S. practices. The U.S. and regional and bilateral recommendations at the end of this book include suggestions on improving the repatriation and reintegration of migrant children, and address the problems discussed below.

***Need for transparency in the repatriation process.*** With respect to repatriation, there have been limited advances in transparency and ensuring safety and dignity in the return process for unaccompanied children. As explained in detail above, many aspects of the process remain unclear, to the detriment of children and families. This additionally imposes difficulties upon NGOs and other service providers attempting to assist children.

***Failure to ensure that child welfare professionals escort children repatriated to countries of origin.*** Unaccompanied children should be escorted by child welfare professionals to ensure that their particular rights are respected, such as safety during transport and what to do if child expresses fear or an impact of trauma.

***Lack of coordination amongst key U.S. government agencies on safe and sustainable repatriation and reintegration.*** Although the TVPRA offers a baseline for DHS, HHS, DOS, and other agencies involved in the repatriation process to consider the child's safety, better cooperation, communication, and coordination is needed prior to the child's departure from the United States.

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<sup>66</sup> For more information specifically on the key actors in those countries, see Chapters 2 and 4 on Honduras and El Salvador.

***Failure to consider the best interests of the child in decisions on repatriation.*** Few, if any, returning children receive assistance that would enable them to reintegrate into their communities and find ways to stay in their home countries safely and sustainably. Children returning to situations of violence in the home and their communities, which may have forced them to migrate in the first place, do not receive follow up support or protection from the state upon return. As a result of weak or absent child protection systems, this leaves them vulnerable to danger and makes it unsafe to remain in their countries. In cases like these, reintegration may also require helping the child and his family relocate to a new community if returning to the original community is not a safe option.

As demonstrated by the above, the best interests of the child are not a primary consideration when a decision is made in an unaccompanied child's immigration case in the United States. Best interests are not considered when deciding whether to order a child deported (removed) or how to return a child ordered removed; or when deciding whether and how to return a child who receives a voluntary departure order.<sup>67</sup> The best interest of the child principle is the universal cornerstone of child protection around the world, as well as within the U.S. child welfare system at the state level. It is embodied in the Convention on the Rights of the Child (CRC), which states, among other vital provisions, that the best interests of the child must be a primary consideration in decisions regarding children.<sup>68</sup>

***Limited number of child advocates for best interest determinations.*** Under the TVPRA, in a limited number of cases, the United States makes use of "child advocates" who are appointed to address the best interests of the child throughout the child's immigration case. They are requested by ORR in cases involving particularly vulnerable children. However, adjudicators are not required to adhere to the recommendations of child advocates in the context of the child's removal proceedings.<sup>69</sup> Because only a very small percentage of unaccompanied children receive child advocates, the risk of returning unaccompanied children to harm, particularly if they were unrepresented in their proceedings, remains great.

The Young Center for Immigrant Children's Rights is the leading U.S. organization that facilitates the appointment of child advocates to unaccompanied children. The Young Center seeks to determine whether a child to whom it has been assigned can be safely repatriated, as required by the Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. The Young Center uses UNHCR's Best Interests Determinations (BID) Guidelines as a framework,<sup>70</sup> and submits recommendations to attorneys and federal immigration authorities.<sup>71</sup> ORR has recently provided funding to expand the child advocate program, but the vast majority of unaccompanied children will still not have a child advocate assigned to their cases.

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<sup>67</sup> A Treacherous Journey, pp. 3, 56-60.

<sup>68</sup> Convention on the Rights of the Child, Art. 3.

<sup>69</sup> For more information on when a child advocate is appointed for a child, see A Treacherous Journey, pp. 57-58.

<sup>70</sup> UNHCR. (2008, May). UNHCR Guidelines on Determining the Best Interests of the Child. Retrieved from <http://www.unhcr.org/4566b16b2.pdf>.

<sup>71</sup> In cases where there are significant concerns about a child's safety upon repatriation, the Young Center will contract with a social worker in the child's home country to visit the child's home and conduct a home study to determine whether it would be safe for the child to return. Young Center for Immigrant Children's Rights. Projects – The Young Center. Retrieved from [www.theyoungcenter.org/about/projects](http://www.theyoungcenter.org/about/projects).

***Children are not provided attorneys in their immigration proceedings.*** Unaccompanied children are also not provided legal counsel in their deportation proceedings. They must either pay for a private attorney or find a pro bono attorney to help them raise a defense against deportation in immigration court and before USCIS. The large majority of children do not find attorneys.<sup>72</sup> Without an attorney, it is extremely difficult to navigate the inordinately complex U.S. immigration system. As explained in Chapter 10 on immigration relief and procedures available to migrant children, many barriers to relief persist within this system.

As a result, children who are potentially eligible to stay in the U.S. may not receive status and could be erroneously returned. In addition, a child may not share his story and experiences to adults he does not know, or may be too traumatized, fearful, or ashamed to disclose experiences such as severe abuse, neglect, or sexual assault. This is particularly true of unaccompanied children from Mexico who are screened by CBP officers—who do not have child welfare expertise—soon after the child’s apprehension. For children with attorneys, it often takes several meetings before the child is able to share difficult facts about what happened in their home country. Children without an attorney—the large majority of children in immigration proceedings—are mostly unable to meaningfully share their story before a judge or asylum officers.

***Failure to connect development and rule of law programs in the region to reintegration programs.*** The mandate of TVPRA for safe and sustainable reintegration has not been fully implemented and has not been connected to larger development projects in the region. In order for reintegration to succeed, it must be connected to efforts to ensure safety and access to opportunities in the sending countries. In June 2013, the U.S. Senate passed S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, a wide-ranging bill that included a provision requiring USAID, in conjunction with DHS, HHS, DOJ, international organizations, and nongovernmental organizations in the United States, to create “a multi-year program to develop and implement best practices and sustainable programs in the United States and within the country of return to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.”<sup>73</sup> The language is more directive than that of the TVPRA and creates programming within USAID to help address the needs of children returning alone from the United States. A U.S. House of Representatives companion bill to S.744, which is nearly identical to S. 744, includes the S. 744’s language on repatriation and reintegration.<sup>74</sup> Additional bills have been introduced by members of the House of Representatives following Senate approval of S. 744. Representative Lucille Roybal-Allard (D-CA) introduced a bill in July 2013 that includes similar repatriation and reintegration language as S. 744. The bill, H.R. 2624, the Child Trafficking Victims Protection Act, was cosponsored by Representative

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<sup>72</sup> Transactional Records Access Clearinghouse (TRAC), Syracuse University. (2014). Juveniles – Immigration Court Deportation Proceedings. Retrieved from <http://trac.syr.edu/phptools/immigration/juvenile/>. Using data from 2005 through June 2014, TRAC found that nearly half of unaccompanied children do not have attorneys. KIND estimates that, since the surge in unaccompanied children, the number of unaccompanied children without attorneys is at least 70 percent.

<sup>73</sup> Border Security, Economic Opportunity, and Immigration and Modernization Act of 2013, S. 744, 113<sup>th</sup> Cong., 1st sess. § 3612(j)(1) (2013). Retrieved from <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:S.744>.

<sup>74</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113<sup>th</sup> Congress, 1<sup>st</sup> sess. (2013). Retrieved from <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.15>:. The bill was introduced by Representative Joe Garcia (D-CA) in October 2013.

Ileana Ros-Lehtinen (R-FL). Although these bills have not passed and are not necessarily expected to pass, they do demonstrate a growing awareness and recognition of need for USAID support for reintegration through development programs.

USAID could increase its development programming to include reintegration support for unaccompanied children who return home. On June 20, 2014, after his meeting with Central American officials in Guatemala, Vice President Biden announced U.S. funding of \$9.6 million “to help the Central American governments receive, reintegrate and care for their citizens repatriated from the United States.”<sup>75</sup> From these monies, \$7.5 million has gone to USAID to work with IOM on a “bricks and mortar” project to assess the capacity of El Salvador, Honduras, and Guatemala to receive repatriated adults and children and increase capacity of its existing reception centers.<sup>76</sup> Additional funding to USAID for long term reintegration support has not been announced and will depend on any supplemental monies per President Obama’s request to be approved.

***Failure to ensure that reintegration programs funded by the U.S. government are sustainable.*** Regarding prior efforts on reintegration, such as the IOM project in El Salvador, there is limited information on the sustainability of these types of projects. The lack of access to data and information remains an impediment to better understanding of these programs.

***Overemphasis on military or law enforcement approach to violence in the region.*** The Central America Regional Security Initiative (CARSI), which is led by the Department of State and the USAID, focuses on the impact of the deteriorating security situation in Central America on human security and the ability of citizens to fully participate economically and socially in their communities. Countries that receive or have received CARSI funding include Guatemala, El Salvador, Honduras, Costa Rica, Belize, and Nicaragua.<sup>77</sup> CARSI has received almost \$500 million to date to support these efforts. CARSI has largely emphasized combating narco-trafficking and gang activity in the region. It has stated as its objective the development of a safer and more secure region where criminal organizations no longer wield the power to destabilize governments or threaten national and regional security and public safety, as well as to prevent the entry and spread of illicit drugs, violence, and transnational threats to countries throughout the region. It has strived to meet this goal by addressing border security measures, offering technical assistance to law enforcement and justice sectors, and supporting gang prevention and social programming for at-risk youth. USAID manages the Economic Support Fund (ESF) portion of the CARSI initiative, which funds at-risk-youth programming.

A major concern with CARSI is that it is focused largely on law enforcement and military backing to address the systemic violence in these countries. However, there have been significant concerns

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<sup>75</sup> The White House (2014, June 20). Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala. Retrieved from <http://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>.

<sup>76</sup> See Joffe-Block, F., PBS NewsHour. (2014, 6 October). Can U.S.-style youth programs in Central America keep kids from migrating? Retrieved from <http://www.pbs.org/newshour/rundown/u-s-seeks-curb-central-american-child-exodus-youth-programs/>.

<sup>77</sup> U.S. Government Accountability Office. (2013, January 30). Subject: Status of Funding for the Central America Regional Security Initiative. Retrieved from <http://www.gao.gov/assets/660/651675.pdf>.

regarding human rights abuses committed by military and police, transparency in judicial systems, and accountability for past human rights abuses.<sup>78</sup>

The majority of children migrating from Central America are fleeing violence perpetrated by the factions CARSi aims to combat. This fact should cause the United States to reconfigure its funding to specifically address the root causes of child migration through strategic development initiatives that promote transparency, accountability, and respect for human rights—as these same measures will also help diminish criminal factions’ control over the region. Additionally, U.S. development initiatives should include in their objectives comprehensive reintegration support, in collaboration with civil society, to children returning from the United States.

The U.S. should *not* invest in utilizing only security, military or law-enforcement based methods to promote sustainable reintegration. As noted, efforts should focus on investing in opportunities for safe and healthy and development of children and youth and alternative strategies for violence reduction.<sup>79</sup> This is particularly critical in Guatemala, Honduras, and El Salvador, where powerful organized criminal networks operate with impunity in light of weak governing and protection structures. The U.S. should also refrain from using force to interdict and prevent individuals from seeking protection from violence and abuse. For instance, using military to forcefully stop individuals from fleeing violence or persecution is neither effective nor humanitarian and does not make for successful prevention or reintegration.<sup>80</sup> While not the focus on this chapter, there are increasing numbers of unaccompanied children being returned from Mexico to Central America, raising serious humanitarian and protection concerns. Chapter 13, on regional and bilateral agreements, discusses the need for a coordinated response in greater detail.

### **VIII. Moving toward best practices: lessons learned from GCRRP on safe and sustainable repatriation and reintegration**

The U.S. should create systems of safe and sustainable repatriation that are transparent and centered on respecting the fundamental rights of children based on four key principles: survival and development; non-discrimination; child participation and the right to be heard; and the best interests of the child. Building a framework around these key principles will ensure the creation of a system that promotes the best practices in child protection and meets TVPRA mandates.

Based upon a program evaluation commissioned by The Global Fund for Children, we identify six key components of KIND’s GCRRP reintegration program to support a scaling up of the project or replication in another country. These key components demonstrate how reintegration programs could should be structured to reflect the key principles of survival and development, ensuring that children’s right to development in a broad sense includes physical, psychological, emotional,

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<sup>78</sup> Meyer, P. J. & Ribando Seelke, C., Congressional Research Service. (2014, May 6). Central America Regional Security Initiative: Background and Policy Issues for Congress. Retrieved from <http://fas.org/sgp/crs/row/R41731.pdf>, p. 33.

<sup>79</sup> Garzón Vergara, J.C., Woodrow Wilson Center Latin American Program. (2014). How to Respond to Organized Crime and Leave Behind the “War on Drugs.” Retrieved from <https://readymag.com/u52521463/40223/>.

<sup>80</sup> Jesuit Conference of the United States, and the Washington Office on Latin America. (2014). U.S. Support and Assistance for Interdictions, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to International Protection. Retrieved from [http://www.jesuit.org/Assets/Publications/File/US\\_Border\\_Externalization\\_2014\\_v1.pdf](http://www.jesuit.org/Assets/Publications/File/US_Border_Externalization_2014_v1.pdf).

social, and spiritual development; nondiscrimination based on age and status; and the right to participate meaningfully in decisions that affect their lives. Many of these key components, gleaned from KIND's insights and experiences, also appear as recommendations at the end of this book.

***Connecting with children and ensuring they participate in identifying their own social service needs before their departure from the U.S.*** Connecting with children prior to their departure eases the child's anxiety about return to the home country and family reunification. About 84% percent of KIND's GCRRP participants returned to rural communities in the Western Highlands, more than 100 miles and up to an eight-hour drive from Guatemala City, where children initially arrive after being removed from the U.S.<sup>81</sup> Most of the families have never traveled to Guatemala City before, may have limited resources to travel, and are in need of interpretation services, as Spanish is not their first language. During the interviews that KIND conducts prior to the child's departure from the United States, children most frequently want to know how they are going to be transported back to their country, what will happen to them upon arrival, and how they will reunify with their family. Providing information about the return process and about the GCRRP's initial guidance and support throughout the family reunification helps lessen children's fear. The assistance that GCRRP local NGO partners provide to families in order to travel back to their community has also helped ensure a successful family reunification. Overall, identifying the child's expressed social service needs prior to his/her departure from the United States ensures a continuum of attention and psychosocial support from the point the child leaves the ORR shelter to the point she arrives in her home country.

***Reintegration program components should reflect a child's right to development in its broadest sense.*** The reintegration services that the GCRRP provides are wide ranging and based on each child's individual needs. These include: **Safe Return** (family contact, family reunification, transportation from Guatemala City to home town, overnight emergency shelter for family, emergency meal on the day of arrival); **Follow Up** (home visit, home and community assessment, goal setting); **Health and Psychosocial Services** (referral to medical and dental clinics, psychosocial services, referral to counseling); **Education** (school enrollment, school supplies, scholarship search, financial assistance with bus fare, enrollment fees, uniforms, books);<sup>82</sup> **Skills Training for children and for families when possible** (computer classes, skill building workshops, vocational training); **Food and Clothing Referrals** (referrals for food assistance); and **other supporting services** (e.g., providing loans to families to support them in starting a business).<sup>83</sup>

The child provides information to KIND at the initial intake/assessment interview prior to their departure from the United States. This information forms the basis for subsequent service delivery. Through the GCRRP partnership model with local NGOs, KIND is able to meet most of the expressed needs of the program's participants. A key component of success is identifying local programs that exist in close proximity to the child's home to ensure they provide an opportunity to reintegrate. Some children have expressed their concern for paying off their smuggling debt and

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<sup>81</sup> Based on GCRRP data from October 2010 to August 13, 2014.

<sup>82</sup> GCRRP Services Overview. Notes on file with author.

<sup>83</sup> KIND tracks the number of GCRRP participants served under each category and this data is available with author.

working to support their family, such that going back to school becomes secondary. Others have expressed the desire to go back to school and to find ways to work during the week.

***Partnering with local community based organizations that are linguistically and culturally competent ensures non-discrimination of children based on gender, language, and other bases; and ensures culturally appropriate services.*** Providing comprehensive return and reintegration support to children who return home requires a collaborative effort from various stakeholders, especially community based organizations that are familiar with the local culture, language, and support systems. KIND's model of partnering with local NGOs to help communicate with the child's family back home and connecting with the child before her departure from the United States allows for a seamless referral process and continuous support for the returning child.

Local NGO partners are also better positioned to assess family dynamics prior to the child's return. A vast majority of children returning to Guatemala are indigenous Maya. In the case of children whose families speak a local Mayan dialect and limited Spanish, the NGO partners' bilingual staff has provided invaluable translation services in dialects such as Mam, Chuj, and K'iche. Moreover, working with local NGOs that have indigenous language and cultural competency (within the historical context of marginalization and discrimination) is critical to establishing rapport with the child and identifying resources in the community. This is also critical to efforts to work with the entire family, as described below,

***Underscoring the importance of working with the entire family unit to help the child reintegrate sustainably, reflecting the child's right to family life.*** It is critical to work not just with the child, but also the entire family in the reintegration process. This is important, because, in many cases, family will be the child's sole support system, and the child may face rejection upon return because of the perceived failure of the migration process. In working with families, new uncovered facts may present significant challenges, such as the existence of intrafamilial violence. In other case, the family may want to support the child, but needs psychosocial guidance on how to work with the returned child and collaborate as a family to do so.

***Accounting for and addressing the reintegration needs of returning girls.*** Approximately 21 percent of the GCRRP participants are girls. Successful reintegration efforts must take into consideration gender and the challenges that girls face at home and in their communities. For example, between August 2012 and December 2014, the GCRRP assisted four girls under the age of 18 who were pregnant or had an infant under their care. Their service needs included pre-natal care, medical care for the mother and child during and after birth, and in one case, professional assistance for a newborn with developmental delays. The GCRRP local NGO partners also work closely with girls to address challenges they face at home if they wish to continue their education. In some cases the local NGO partners have stepped in to provide psychosocial support and to talk to the family about the importance of supporting their child's education and have. On a macro level, interfamilial violence is a larger societal issue that impacts individuals of different races, genders, social economic statuses, ages, and cultures (although some, including girls, may be disproportionately affected). When addressing the causes of migration as well as the reintegration needs of girls, upholding protections for survivors of intrafamilial and gender violence is critical.

***Access to school, scholarships, and vocational and skills training opportunities for youth are critical, and reflect a child's right to learn in a healthy and productive environment.*** Most GCRRP participants report that extreme poverty and lack of access to education and employment opportunities are among the reasons they migrated to the United States. GCRRP local NGO partners have successfully worked with community foundations and accredited entities that provide technical trainings to secure financial support for participants interested in continuing their education or obtaining vocational training. To serve the needs of children located in remote rural areas, GCRRP local NGO partners have also worked with radio-phonics programs accredited by the Ministry of Education of Guatemala to ensure children's access to educational programs. Where possible, GCRRP local NGO partners have developed their own scholarship programs, vocational training programs, micro-lending programs, and internship programs to better prepare GCRRP participants for employment opportunities. These are only a few of many components that should be considered when establishing reintegration programming for unaccompanied children who return home. While KIND has drawn upon its experience in Guatemala through a collaborative effort with local NGOs, replicating the project in another country (El Salvador or Honduras, for example) will require conducting a new assessment of the human services and resources available or lacking in those countries. Additionally, varying political and cultural contexts should be taken into account.

## **IX. Conclusion**

The United States must not return children to their countries in the absence of a process to ensure that repatriation is in their best interests. Once such a system is in place, the United States should focus on establishing robust return and reintegration programming and protocols.

Numerous stakeholders in the United States are looking for ways to address concerns raised by unprecedented numbers of children coming to the United States. This attention presents a promising opportunity to incorporate return and reintegration programs into US development assistance, and to address the root causes of migration via our foreign policy.

A focus on both repatriation and reintegration will help address the core issues driving this migration, in which children see flight as an element of survival. Their situations remind us of the greater societal responsibility to ensure the well-being of children regardless of which side of border they may find themselves. As children are exposed to political conflict, violence, poverty, exploitation, and inequities in access to education and economic opportunities, their movement through migration is increasing global. While the historic migration of unaccompanied children to the United States brings new challenges, it also provides unique opportunities to fundamentally change the way we treat these children and to ensure the protection they need and deserve.

*Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.*

## Chapter 13

# Childhood, Migration, and Human Rights in Regional and Bilateral Agreements in Central and North America

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Translation forthcoming

## Recommendations

These recommendations flow from research conducted by civil and academic institutions in 2013 and 2014 on the treatment of children and adolescents from Honduras, El Salvador, Guatemala, Mexico, and the United States in the context of the migration—either of the children and adolescents themselves or of their parents.

Specifically, these recommendations are based on an analysis of the following sources: interviews with children and adolescents in the five countries, with their parents, and with key social and political actors throughout the region; documents produced by governmental organizations, research centers, specialized international agencies, and civil society organizations; recommendations made by international human rights mechanisms; statistics compiled by governmental and non-governmental organizations; and, current local, national, bilateral, regional, and international norms and laws.

This initiative has been coordinated by the Center for Gender and Refugee Studies (CGRS) at the University of California Hastings College of Law and the Centro de Justicia y Derechos Humanos of the Universidad Nacional de Lanús (CDHUNLA), with the participation of the following institutions: Casa Alianza (Honduras), Universidad Centroamericana “Jose Simeon Cañas” (El Salvador), Pastoral de la Movilidad Humana and the Asociación Pop No’j (Guatemala); the Fray Matías de Córdova Human Rights Center and the Programa de Defensa Binacional (México); as well as Kids in Need of Defense (KIND) and the Women’s Refugee Commission (United States). This project was made possible thanks to support received from the John D. and Catherine T. MacArthur Foundation, supplemented by the Ford Foundation.

### **I. Regional and bilateral recommendations**

### **II. Recommendations for countries of origin, transit, and destination**

### **III. Recommendations by country**

*A. Honduras*

*B. El Salvador*

*C. Guatemala*

*D. Mexico*

*E. United States*

## I. Regional and bilateral recommendations

- A. *El Salvador, the United States, Guatemala, Honduras, and Mexico should immediately draft and implement a Comprehensive Regional plan for Children, Migration, Human Rights, and Human Development including, among other things, the following commitments:*
1. A joint approach that addresses the structural causes of the migration of children, adolescents, and their family members through coordinated plans and programs that ensure:
    - a. The right of children and adolescents to adequate and comprehensive development in their communities of origin, as a guarantee of the right not to migrate.
    - b. The right to live with family—safeguarding the right of children and adolescents to have physical, psychic, emotional, and spiritual development provided to them by their parents or guardians, with the cooperation of the State.
    - c. A gradual reduction in the different forms of violence that impact society at large, and children in particular, as well as the impunity and corruption associated with violence.
    - d. The prevention and sanction of gender-based violence against women and girls, guaranteeing adequate protection for victims, including access to justice.
    - e. The elimination of all forms of discrimination—direct and indirect—against indigenous peoples, in conditions of full respect where they can exercise their ethnic-cultural diversity and their economic, social, cultural, civil, and political rights.
    - f. The promotion of a policy that is inclusive of diversity related to the sexual identity and orientation of children and adolescents.
  2. Inclusion of short, medium, and long-term measures, as well as periodic goals, that make it possible to confirm/evaluate levels of compliance with the Regional Plan.
  3. Production of quantitative and qualitative information about children and adolescents and their families, as a mechanism for the design, implementation, and evaluation of the programs and actions contained in the Plan, in such a way as to ensure transparency and access to information by civil society and the population in general.
  4. Guarantees for the participation of civil society and international agencies specializing in human rights, migration, and/or asylum in the design, implementation, and periodic evaluation of the Regional Plan.
  5. The participation of autonomous and independent public human rights organizations.

*B. States should agree on a binding regional agreement (in the framework of this Regional Plan or in the context of the Regional Conference on Migration) on respect for, and protection and guarantee of, the rights of child and adolescent migrants and children of migrants in the context of migration in the region. The agreement should include, among other aspects, the following:*

1. The requirement that each State create a procedure to determine the best interest of the child, that will ensure in each case the adoption of immediate protection measures and a search for lasting solutions from the perspective of the human rights of persons seeking refuge, and the rights afforded to them under humanitarian law and international law.
2. The duty to conduct an exhaustive review of legislation, programs, and practices, in order to adjust them fully to the treaties, principles, and standards pertaining to the human rights of children and adolescents, humanitarian law, and international law pertaining to refugees.
3. The commitment to ensure that the country's legal framework and its practices of implementation guarantee the principle of the primacy of comprehensive protection of the child and his/her best interest over and above matters of migratory control and punishment for irregular migration.
4. The full recognition of the right to be heard and the participation of the child or adolescent in migration and asylum proceedings that impact him or her directly or indirectly, ensuring all of the guarantees of due process, including the right to free legal assistance.
5. Guarantees of due process for unaccompanied children and adolescents, including the right to free legal assistance and the right to a guardian.
6. The duty to promote and facilitate the reunification of the child or adolescent with his/her parents in the country of destination, through broad, transparent, and swift mechanisms that ensure legal security and uphold the principle of non-discrimination.
7. The obligation to facilitate a process that allows unaccompanied children and adolescents and their family members to regularize their migration status in the countries of destination through accessible, transparent, and non-discriminatory procedures and measures for social inclusion, human development, and reduction of the vulnerability of child and adolescent migrants.
8. An independent oversight mechanism for progressive compliance by the States.
9. The participation of civil society in the discussion and implementation of the Agreement.

*C. States should review and reformulate existing bilateral agreements—in particular, those pertaining to the return and repatriation of children and adolescents—in order to adjust the content of their legislation to applicable international obligations and to the rights and guarantees due all children and adolescents. The best interest of the child, the right to development, non-discrimination, and due process guarantees must be the central tenets that guide the content and implementation of these agreements.*

## II. Recommendations for countries of origin, transit, and destination.

Note: the following section is divided into recommendations for countries of origin, transit, and destination, but is important to highlight that Guatemala, Honduras, El Salvador, and Mexico are all countries of origin, transit, *and* destination, though Mexico plays a dominant role as a transit country and the United States is a country of destination.

### A. *Countries of origin*

1. Introduce migration as a crosscutting theme in national human development plans that guarantee a comprehensive human rights and human security perspective, and ensure coordination between institutions and public policies (on children, education, health, employment, citizen security, social protection, gender equity, and interculturality, among others).
2. Strengthen, and create if necessary, institutions for the comprehensive protection of children and adolescents, as bodies responsible for ensuring all of the human rights of children and adolescents in a comprehensive fashion in order to prevent forced migration.
3. Design and implement public policies aimed at preventing and punishing crimes against children and adolescents, ensuring the access of children and adolescents to the justice system as rights holders, and guaranteeing citizen security, including the strengthening of community participation and organization in this area.
4. Strengthen policies to prevent gender violence and to provide comprehensive care for victims, including access to justice and the fight against impunity and corruption.
5. Pass legislation and implement policies to prevent intrafamilial violence against children and adolescents with an absolute prohibition on any type of physical punishment in the home, in schools, and in other places.
6. Guarantee the right to migrate: countries of origin should not stop or attempt to stop individuals from leaving their country in order to migrate to another country in the region, and should not sanction children and adolescents or the families of children and adolescents after repatriation.
7. Promote bilateral and regional actions aimed at facilitating the ability of migrants to obtain regular migration status, particularly migration based on reuniting children and adolescents with family members who reside in a destination country.
8. Create and implement programs aimed at ensuring the appropriate and sustainable return of child and adolescent migrants—if it is in their best interests—using a human rights approach, which includes, among other aspects, programs for social, family, education, and labor reintegration—if age-appropriate—without any discrimination, as well as mechanisms to prevent and protect against all types of violence and to provide psycho-social support when necessary.
9. Design a consular policy for protecting child and adolescent migrants and children of migrants in order to ensure the protection of their human rights in the destination countries, particularly in the context of immigration proceedings that may directly or indirectly impact their rights, with the following instructions:

- a. In the framework of Best interests [of the child] determinations (BIDs) procedures, provide reliable information—through appropriate coordination with child protection organizations in the country of origin—in order to contribute to an appropriate determination of the best interests of the child by competent authorities in the destination country.
- b. Provide legal information to child and adolescent migrants and their families, particularly about their rights in the context of immigration proceedings, about the need to determine and evaluate the best interests of the child, and about free legal services available from government and civil society.
- c. Oversee the return of children and adolescents to their country of origin in order to ensure that return is only used as a protection measure that is based on the best interests of the child, and is not simply used as a response to the irregular migration status of the child or his/her family members.
- d. Help protect the family unity of children and adolescents whose parents are migrants in destination countries, by urging these destination countries to provide a path to regular migration status and to abstain from measures that result in the separation of families contrary to the best interests of the child.

*B. Countries of transit and destination*

1. Guarantee the application of the legal framework for children and the best interests of children and adolescents as a priority over and above the legal framework for migration.
2. Ensure that child protection agencies, rather than institutions responsible for migration control, are charged with responding to migrant children and adolescents and protecting their rights.
3. Implement mechanisms and protocols for inter-institutional coordination between migration authorities and child protection organizations in order to give a comprehensive response to the phenomena of child migration based on applicable human rights principles and standards.
4. Establish appropriate protocols and necessary training for border control organizations in order to ensure that unaccompanied children and adolescents gain admission to the territory and that ensure timely communication so that they are channeled immediately to child protection authorities.
5. Design and implement a procedure to determine the best interests of the child in all institutions for all cases of unaccompanied children and adolescents and to guarantee an evaluation of the best interests of the child in all immigration proceedings where the resolution could impact the rights of the child or adolescent, including cases that may result in the deportation of the parents.
6. Guarantee full respect for the civil, economic, cultural, and social rights of migrant children and adolescents, on equal terms with nationals, without regard for their immigration situation or that of their parents.
7. Ensure, without exception, the full application of the principle of *non-refoulement*, keeping in mind the socio-economic conditions in the country and community of

origin when evaluating—as a possible durable solution—the return of a child or adolescent migrant or asylum seeker to his or her country of origin.

8. Guarantee in legislation and in practice full compliance with the principle of non-detention of children, adolescents, or their family members under any circumstance based on their immigration status or that of their parents (either as punishment, or as a precautionary measure, or because their family members have also been deprived of liberty).
9. Ensure alternative custody measures for unaccompanied children and adolescents, migrant families, and asylum seekers, so that instead of being put in detention centers, they are placed under the charge of government institutions specializing in the protection of children within the framework of proceedings aimed at identifying short and long term protection measures, as appropriate.
10. In the context of any procedure that might impact the rights of migrant children and adolescents or the children of migrants, guarantee the right to an individual evaluation and the right to be heard, through processes that take into consideration and are sensitive to the age, maturity, and development of the child.
11. Adopt measures necessary for ensuring due legal process in any administrative and/or judicial immigration hearings that might impact the rights of a child or adolescent, including the right to an interpreter, the right to free legal assistance, the right to a guardian in the case of unaccompanied children or adolescents), and the right to consular assistance.
12. Design and implement programs to stabilize regular, accessible, and transparent routes for legal migration, based on criteria such as family ties, length of time in the country, social and/or labor ties, or the comprehensive protection of the child, in order to facilitate human development and the social integration of children and adolescents and migrant families.
13. Promote integration policies with an intercultural perspective and a psychosocial approach that includes children and adolescents who, as a result of the application of their best interests, remain temporarily or permanently in the transit or destination country.
14. Destination countries should not take action to prevent the movement and transit of migrants, for example by training security forces in countries of origin in the region to stop migrants from leaving their countries. Stopping individuals from leaving their countries in order to migrate violates both the right to migrate and the right to *non-refoulement*.

### **III. Recommendations by Country**

#### *A. Honduras*

1. Strengthen policies for the comprehensive protection of children and adolescents, using a human rights approach that progressively guarantees the right of all children and adolescents to an adequate standard of living and comprehensive development free from all forms of violence.
2. Draft a migration policy that takes into account the situation of child and adolescent migrants in order to guarantee their civil, economic, social, and cultural

rights in accordance with the Convention on the Rights of the Child and other treaties to which the country is a party.

3. Design and/or reinforce strategies and programs for preventing violence generated by organized criminal groups and the violence created by gang activity and other forms of violence against children and adolescents, including the violent deaths of children and adolescents, forced recruitment, threats, and other types of aggressions against the life and physical integrity of the children, adolescents, and their family members.
4. Create and implement programs to prevent all types of institutional violence against children and adolescents, in particular those who are in situations of greater vulnerability, including mechanisms to protect victims and provide access to justice and comprehensive reparations.
5. Strengthen policies and programs for preventing and punishing gender violence, in particular against girls and adolescents, in order to combat the impunity and corruption associated with these crimes and to guarantee access to justice.
6. The role of the Dirección Nacional de Adolescencia, Niñez, y Familia (DINAF) with regard to child and adolescent migrants should be strengthened so that DINAF's attention is not limited simply to receiving children and adolescents who are deported and then turning them over to their families.
  - a. Honduras should work together with the countries of destination for Honduran children and adolescents in order to conduct family assessments to evaluate the appropriateness of repatriation based on the principle of the best interests of the child, in cases where the only alternative is that of deportation.
  - b. For migrant children and adolescents or families being repatriated: Implement a strategy to guarantee their safe and dignified return to the country with the necessary protection; to ensure they will be received in shelters where they can receive comprehensive care; and to establish effective mechanisms to support and accompany the family and the child or adolescent so they can reintegrate into Honduran society, guaranteeing them the effective exercise of all their rights, in conditions that are free from all types of violence.
7. Guarantee inter-institutional coordination in the child and adolescent protection policy, with special attention to including all aspects related to the migration phenomena and to children affected by migration in different ways (children and adolescents who have been left behind by parents who have migrated; children and adolescents who migrate and then return either voluntarily or forcibly; children and adolescents who may migrate because their rights are not being guaranteed, etc.).
8. Strengthen the work of Honduran consuls in other countries by allocating the necessary human and budgetary resources and by providing training in the area of human rights, including the rights of children and adolescents and their family members, particularly in cases where children, adolescents, or their family members have been apprehended, detained, or returned.

## B. El Salvador

1. In order to address the causes of child and adolescent migration in an appropriate and comprehensive way, and promote greater involvement of the Salvadoran Institution for the Comprehensive Development of Children and Adolescents (*Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia* or ISNA) and the National Council for Children and Adolescents (*Consejo Nacional de Niños, Niñas, y Adolescentes* or CONNA) to guarantee compliance with the Law on the Rights of Children and Adolescents (LEPINA), the following, in particular, must be done:
  - a. Ensure the effective protection of the rights of children and adolescents, especially their social rights.
  - b. Eliminate child labor and all forms of exploitation of children and adolescents.
  - c. Prevent and punish all forms of violence against children and adolescents, including gender and intrafamilial violence, as a basic step for combating the primary causes of migration.
2. Create strategies and programs for preventing gang-related violence against children and adolescents (including forced recruitment), protect victims, and guarantee access to justice.
3. Establish responsibilities within the National System for the Protection of Children and Adolescents (*Sistema Nacional de Protección de la Niñez y la Adolescencia*) created by the LEPINA in order to guarantee comprehensive attention and the promotion of the rights of children and adolescents locally in the context of migration (continue to create local committees on the rights of children and adolescents, and child and adolescent protection boards).
4. Guarantee full enforcement of the Special Law for the Protection and Development of Salvadoran Migrants and their families, and in particular its primary guidelines on the obligation to protect the human rights of Salvadoran persons abroad, independent of their migration status, and to provide special protection to vulnerable groups including children and adolescents and women, within the context of the best interests of the child or adolescent.
5. Strengthen the operation and budget of the National Council for the Protection and Development of Migrants and their Families (*Consejo Nacional para la Protección y Desarrollo de la Persona Migrante y su Familia* or CONMIGRANTES), so that it can fulfill its goal of drafting, proposing, and verifying compliance with the comprehensive protection policy and other policies related to the connections between migration and human development.
6. Create policies and programs that facilitate the appropriate reintegration of repatriated children and adolescents, especially in regards to their social rights, violence prevention, and protection from violence—for those children or adolescents who may have been involved in conflicts and/or threatened by organized crime (gangs etc.) or have been victims of any type of violence.
7. Strengthen the involvement of ISNA and CONNA considering returned children and adolescents as an especially vulnerable group; and establish specific policies for protecting their rights, facilitating their reintegration in society, and —by

guaranteeing their rights—preventing them from having to migrate again in an irregular or forced manner.

8. Relaunch the Reintegration Program for Returned Migrants (*Programa de Reinserción de Migrantes Retornados*) that was under the Vice-ministry for Salvadorans Abroad with the objective of helping returned Salvadoran migrants to establish roots back in their country, incorporating adolescents as a group that requires priority attention, and basing the program on measures to effectively guarantee rights.
9. Conduct research and compile statistics on the presence of children and adolescent migrants from other countries in El Salvador to determine the dimension of the phenomena and establish criteria for child protection authorities to intervene to protect them and guarantee their rights while they are in the territory of El Salvador.
10. Ratify the Optional Protocol of the Convention on the Elimination of all Forms of Discrimination against Women and the Third Optional Protocol of the Convention on the Rights of the Child, allowing both Committees to hear individual reports of the violation of rights enshrined in both conventions, including the violations experienced by child and adolescent migrants.

### *C. Guatemala*

1. Strengthen institutions charged with ensuring the protection of the rights of children and adolescents as the institutional response to guarantee rights and to restore rights that have been violated. To do so, it is important to have specific budgetary allocations, specialized human resources, and adequate infrastructure for the implementation of the Law on Comprehensive Protection of Children and Adolescents (Ley PINA).
2. Create and implement or strengthen policies and programs to prevent and punish all forms of violence against children and adolescents, including gender and intrafamilial violence.
3. Conduct research to make visible the situation of children and adolescents from other countries who are in transit or who reside in Guatemala, in order to provide them with the protection they need.
4. Implement programs to attend to children and adolescents from other countries who are in transit or who reside in Guatemala, refraining from depriving them of their liberty because of their migration status or repatriating them when repatriation is found not to be in the best interests of the child.
5. Expand and strengthen the consular coverage of the Guatemalan Ministry of Foreign Relations (MINEX) in Mexico and the United States to provide for better care and identification of unaccompanied children and adolescents and the children of migrants in those countries.
  - a. In the specific case of Tapachula, Chiapas, it is necessary to create a General Consulate that would permit appropriate consular protection in light of the large number of Guatemalans there and the needs of children and adolescents who are in vulnerable situations, in order to help Mexican authorities ensure their rights through comprehensive protection measures.

- b. Ensure that consular outposts have the specialized personnel necessary to attend to children and adolescents using a rights-based approach, and that they have the resources needed to carry out necessary actions in an effective manner.
6. The Procurator General of the Nation (*Procuraduría General de la Nación* or PGN) should work in coordination with the Secretariat for Social Welfare (*Secretaría de Bienestar Social* or SBS) and other social protection bodies, to create mechanisms for the appropriate family and social reintegration of children and adolescents who have been repatriated from Mexico and the United States, in order to address the causes of a child's migration and provide appropriate and comprehensive follow-up to the cases of unaccompanied children and adolescents.
7. Produce information that is consistent across the different institutions, with reliable and periodic information about the different categories of Guatemalan children and adolescents in the context of migration, including those who have been returned from Mexico and the United States and those whose parents have migrated to another country.
8. Create inter-institutional protocols or agreements (between MINEX, PGN, and SBS, among others) for repatriation and attention to children and adolescents being repatriated, if it is in their best interests, and for family reunification (in Guatemala, Mexico, or the United States, according to the circumstances of each case in accordance with the best interests of the child).
9. Establish a Migration Cabinet composed of the highest authorities of the institutions that make up the Commission for Comprehensive Attention to Child and Adolescent Migrants (*Comisión para la Atención Integral de la Niñez y Adolescencia Migrante*—Governmental Agreement 146-2014).
10. Attend to the cultural diversity of the children and adolescents who migrate, in order to provide culturally appropriate protection and to ensure that children and adolescents who need interpreters have access to them in all procedures, including return and reintegration programs.

#### D. Mexico

1. Design and carry out a comprehensive reform of child protection policies in the country, adjusting them to standards established in the Convention on the Rights of the Child, and including, without exception, measures and decisions regarding the rights of migrant children and adolescents and the children of migrants.
2. Enact a comprehensive reform of migration policy related to children, with the objective of ensuring the primacy of the comprehensive protection policy, over and above immigration control policies, in all the laws, measures, and decisions that impact the rights of child and adolescent migrants and asylum seekers.
3. Ensure that the perspective of the rights of the child prevails over any aspect related to migratory control in legislative, political, and programmatic spheres and in institutional practices.
4. Implement, evaluate, and follow up on the most appropriate mechanisms for inter-institutional articulation and coordination between migratory authorities and agencies charged with the protection of children, in order to provide a

comprehensive response to the phenomena of child migration from a human rights perspective.

5. Establish clearly the institutional responsibilities of child welfare authorities in order to protect and promote the rights of migrant children and adolescents within the framework of policies for protecting all children and adolescents in the country.
6. Create comprehensive policies for preventing and attending to all forms of violence and discrimination against children and adolescents, including intrafamilial violence, gender violence, institutional violence, violence related to ethnic origin, and the violence of organized crime, including effective mechanisms of access to justice and for the comprehensive protection of victims.
7. Design specific mechanisms for the protection of child and adolescent migrants (Mexicans and foreigners) who are in transit in the country. To that end, thoroughly review and revise the policies involving the proliferation of migration control mechanisms that contribute to increasing the vulnerability and risks to child and adolescent migrants.
8. Design specific policies for the production and periodic evaluation of quantitative and qualitative information, such as rights-focused data on children and adolescents in the context of migration, including:
  - a. Child and adolescent migrants in transit or residing in Mexico.
  - b. Mexican children and adolescents whose parents have migrated to the United States.
  - c. Children and adolescents with migrant parents born in Mexico.
  - d. Mexican children and adolescents who have been returned from the United States alone or accompanied by their parents.
9. Create, approve, and implement a legal framework for the comprehensive protection of the rights of children and adolescents, that expressly states that migrant children and adolescents enjoy the same rights as nationals in the territory of Mexico.
10. Revoke and eliminate laws, institutional mechanisms, and institutional practices that permit the detention of children and adolescents and their family members. It should be clearly established that the deprivation of liberty is never in the best interests of the child, and that policies and institutional practices must be adapted to that principle. As long as the practice is to continue depriving migrant and asylum-seeking children and adolescents of their liberty; broad access to civil society organizations, guardians, and lawyers must be guaranteed at migration stations and DIF shelters where children and adolescents may be detained at the hands of the National Migration Agency (INM).
11. Until the principle of non-detention of child and adolescent migrants and migrant families is put into practice, all children and adolescents detained at migration stations should be transferred immediately to the national agency for Comprehensive Family Development (DIF) for relocation to appropriate placements that do not deprive them of liberty; migrant children and adolescents should be placed in the custody of organizations with a mandate to protect children.
12. Develop policies and programs that include alternatives to the current model offered by shelters that deprive children and adolescents of their liberty. Child protection centers where children and adolescents are not deprived of their liberty

must be established as swiftly as possible in order to temporarily house children and adolescents and migrant families, in order to ensure the comprehensive protection of their rights.

13. Define and put in place a procedure for BIDs ensuring that all decisions related to unaccompanied child and adolescent migrants will be made in the framework of legal due process with the objective of guaranteeing the comprehensive protection of their rights through immediate protection measures and measures to seek lasting solutions for their development and life with dignity.
14. Establish mechanisms to ensure that children and adolescents will only be repatriated after applying a procedure to determine the best interests of the child, using as a guiding principle the need to guarantee the comprehensive protection of the rights of the child.
15. Alternatives to repatriation must be explicitly considered and may be prioritized over repatriation depending on what is in the best interests of the child. These measures may be: temporary or permanent regularization of migration status in Mexico; including the possibility of allowing the entry of the child's family for reunification purposes, or facilitating settlement and family reunification in a third country.
16. Implement mechanisms to ensure due process guarantees to migrants and, in particular, to children and adolescents, in any migration proceedings that may result in detention or repatriation or have a negative impact on their rights. Such mechanisms include free legal assistance, guardians in the case of unaccompanied children and adolescents, and interpreters if they do not understand the language.
17. Redefine the roles and responsibilities of the Child Protection Officers (*Oficiales de Protección a la Infancia* or OPI), assigning them to a competent child protection institution [rather than the INM] in order to ensure adequate attention to the needs and rights of the child in any contact with or intervention by the INM or any other security institution or body that could impact migrant children.
18. Reinforce the asylum policy of the Mexican government, providing sufficient resources and specialized training to the Mexican Commission for Aid to Refugees (COMAR), in order to give asylum seekers appropriate access to the process of soliciting recognition as a refugee, as well as due process and an adequate evaluation of their requests in accordance with the Cartagena Declaration, and ensure that asylum decisions are not subordinated to the considerations of migration control.
19. Create, implement, and disseminate accessible regularization policies, making it possible for migrant children and adolescents to have documented residence in the country and, therefore, full access to their rights.
20. For cases when family reunification is deemed to be in the best interest of the child, forge procedural protocols between local U.S. governments, Mexican consulates, delegations of the Secretariat of Foreign Relations (*Secretaría de Relaciones Exteriores*), state offices of the System for the Comprehensive Development of the Family (*Sistema para el Desarrollo Integral de la Familia* or SNDIF), and other corresponding authorities in the Guatemalan, Salvadoran, and Honduran consulates, as well as the child protection authorities of those countries.

21. Guarantee to children and adolescents full respect, protection, and promotion of their economic, social, and cultural rights in order to prevent the structural causes that give rise to their migration—both unaccompanied and with family members.
22. Through the DIF, the consulates, and other involved organizations, ensure that Mexican child and adolescent migrants are returned to their country only as a protection measure based on the information gathered in each case.
23. In all processes where the rights of the migrant and asylum-seeking children and adolescents are negatively affected, ensure the direct and priority participation of the government institution charged with child protection.
24. Take necessary measures to ensure that the United States will not repatriate and expel Mexican children and adolescents to high-risk zones like Tamaulipas and Coahuila.
25. When Mexican children and adolescents are repatriated from the United States, their right to family life, as well as the best interests of the child must be safeguarded at all times.
26. It is essential to do an in-depth review of all of the many state processes for receiving, caring for, and re-connecting repatriated Mexican children and adolescents to the country, in order to standardize the repatriation processes based on the applicable human rights standards.
  - a. In the context of this reform, it is imperative that the border state DIF systems communicate with their counterparts in the states of origin, in order to find out whether children and adolescents are successfully reconnecting to their communities, or if they are returning quickly to the border.
27. A protocol for family reunification procedures must be established between local U.S. governments, Mexican consulates, delegations of the Secretariat of Foreign Relations, the state SNDIF, and other corresponding authorities.
28. A protocol permitting an overview of the profiles of the people who are making decisions about the future of the children and adolescents in the various states is needed, and trainings on the human rights of children and adolescents must be developed for use with operational personnel.
29. “Circuit” children and adolescents (*niños y adolescentes de circuito*)<sup>1</sup>, must be seen as being in a situation of permanent risk because they are being exploited and forced into a clandestine life. They require special comprehensive treatment and must be considered first as victims, not as offenders. The state DIF systems must take responsibility in this area in coordination with the federal system.
  - a. Create public policies focused on protecting this vulnerable sector, prioritizing support to their families, so that the children and adolescents will have an opportunity to study and develop in healthier and more harmonious environments, making it possible for them to distance themselves from criminal organizations or not ever become involved in them.

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<sup>1</sup> Children recruited and exploited by organized crime and other criminal actors to guide people or drugs across the border; they are called “circuit” children because of their repeated border crossings).

## E. United States

### Overarching

1. Adopt the best interests of the child standard: Consistent with international human rights law and U.S. child welfare laws, Congress should enact legislation requiring that the best interests of the child shall be a primary consideration in all procedures, agency and judicial proceedings, actions, and decisions concerning immigrant children.
2. Do not deny children and other migrants fleeing persecution territorial access to the United States: The United States should cease training, funding, and encouraging Central American governments and Mexico to interdict migrants in order to prevent them from making the journey north to seek protection. Encouraging interdiction undermines the United States' international obligations and risks returning migrant children and families to persecution or torture, contrary to the principle of *non-refoulement*. The United States should urge and support the capacity of Mexico and other countries in the region to screen migrants for vulnerabilities and ensure that those identified as fleeing persecution, torture, or trafficking have access to protection and due process. In particular, the United States should provide funding to Mexico to increase the capacity of the Mexican Commission for Refugees, (*Comisión Mexicana de Ayuda Refugiados* or COMAR) to adjudicate asylum claims, including by increasing the number of asylum officers in the country. To the extent that the U.S. continues to fund immigration enforcement in Mexico and Central America, funds should cover robust training of Central American and Mexican officials to screen for and identify vulnerable migrants.
3. Provide annual comprehensive data: The Department of Homeland Security (DHS), the Office of Refugee Resettlement (ORR), and the Department of Justice (DOJ) (where relevant) should collect comprehensive statistical information and other data on children in the context of migration and make the data public every six months. The data should include: (1) the age, gender, race, nationality, native language (including any indigenous language), and number of Mexican unaccompanied children repatriated directly from the border, how many of them were found not to have a fear of persecution, how many were found not to be at risk of trafficking, and how many were found to be old enough to make an independent decision to withdraw their applications for admission; (2) the age, gender, race, nationality, native language including any indigenous language), and number of accompanied children repatriated directly from the border, and how many of these children were screened separately from their parent(s); (3) the age, gender, race, nationality, native language including any indigenous language), and number of accompanied children repatriated from a family detention center after being found not to have a credible fear of persecution, and how many of these children were screened separately from their parent(s); (4) the age, gender, race, nationality, native language including any indigenous language), and number of children repatriated following entry into the United States, whether they were unaccompanied or accompanied, which cities these children lived in prior to coming to the U.S., whether unaccompanied children were reunited with family in

the sending country, and whether they were repatriated through voluntary return, voluntary departure, withdrawal of an application for admission, or an order of deportation; (5) the forms of immigration relief sought by children as principal applicants (whether unaccompanied or accompanied), and the number of children granted and the number of children denied each form of relief, as well as a breakdown of grants and denials of each form of relief by age, gender, and nationality of child principal applicants; and (6) the number of U.S. citizen children, permanent resident children, and children with DACA affected by the detention or deportation of a parent. DOJ should provide data on numbers 4 and 5 regarding orders of removal, voluntary departure, withdrawal of applications for admission, and forms of relief granted to children in removal proceedings.

4. Ratify, without delay, the Convention on the Rights of the Child and the Convention on the Rights of All Migrant Workers and Members of Their Families.

*Root causes of migration: funding efforts to catalyze change in Honduras, El Salvador, and Guatemala*

In June, 2014, the Administration announced plans to increase U.S. aid to Honduras, El Salvador, and Guatemala. U.S. aid is critically needed to expand the reach of national human development plans and initiatives, rather than to support further security measures. The "Plan for Prosperity" these three countries introduced as a roadmap for future development includes provisions to strengthen development opportunities. Any U.S. financial or technical assistance should focus on strengthening the rule of law and protections for vulnerable peoples, especially children, in these countries. It is important that development plans:

5. Ensure civil society plays a central role in developing international aid initiatives and make funding transparent and accountable: integrally involve civil society, especially NGOs with a proven track record in citizen security, social inclusion, youth employment, and poverty reduction, in designing, implementing, and evaluating international aid strategies and programs. U.S. funding must include regular reporting requirements.
6. Build the capacity of under-resourced national child welfare systems in Honduras, El Salvador, and Guatemala: the United States should invest in national child welfare systems in the sending countries so that they can build shelters for children throughout each country and not just in the capital cities, increase staff and provide greater training and support for staff, and develop accountability mechanisms to effectively protect children at risk of abuse and neglect. U.S. funding should require national child welfare agencies to work with in-country NGOs focused on child welfare and children's rights and well-positioned to identify systemic deficiencies and make recommendations for improvement. Funding should include assistance for children repatriated to their communities.
7. Increase U.S. funding for employment and educational opportunities: The United States should fund teacher training, effective job training programs for youth, and programs focused on the development of small businesses. The Brazilian scholarship program Bolsa Familia gives families a stipend to keep children in

school and can serve as a model. The United States should require that all aid be accounted for and should put into place clear metrics to measure progress.

8. Fund community-based programs to reduce youth crime and violence: the United States should increase funding for evidence-based, community violence prevention programs that offer training, jobs, and other alternatives to violence, and support children and youth who leave gangs and return to their families and communities. In partnership with local and international organizations, there should be funding for shelter for crime victims and expansion of in-country capacity to respond to violence by enhancing police capacity to prevent violence and investigate crimes.
9. Ensure CARSI funds strategic development initiatives that address the root causes of migration, not just military and law enforcement initiatives: the Central America Regional Security Initiative (CARSI) has largely emphasized combating narco-trafficking and gang activity in the region through law enforcement and military backing. CARSI's approach raises significant concerns because of the well-documented human rights abuses committed by military and police, lack of transparency in judicial systems, and lack of accountability for past human rights abuses. Because many children migrating from Central America are fleeing violence perpetrated by factions similar to those CARSI aims to combat, it should reconfigure its funding to specifically address the root causes of child migration through strategic development initiatives that promote transparency and accountability and respect human rights, including funding for reforming the police and ensuring that militaries comply with basic human rights standards. It should also include assistance to help increase judicial independence, transparency, and accountability, including oversight by civil society. Additionally, CARSI should include in its objectives comprehensive reintegration support, in collaboration with civil society, to children returning from the United States.

#### *Screening and detention*

10. Presume a fear of persecution: DHS should refer all adult individuals and families arriving from Mexico and the Northern Triangle countries for a credible fear interview, under the presumption that they fear persecution based on current levels of violence in their countries.
11. Do not expedite screening of children: Children should never be subject to expedited screening and/or repatriation, which places them at grave risk of return to persecution, torture, trafficking, or other violence by failing to provide the appropriate setting, sufficient time, or adequate safeguards needed to protect children from return to such dangers.
12. Initial screening of unaccompanied children and children traveling with family by child welfare: Child welfare professionals, rather than Customs and Border Protection (CBP) agents and officers, should conduct initial screenings of unaccompanied children traveling with family.
13. Meet children's needs consistently and without exception: In every stage of federal custody—including during initial apprehension by CBP—children should have

access to nutritious food, drinking water, restrooms, blanket and mattress for sleeping, and basic medical and psychological care as needed. The U.S. must uphold federal standards regarding conditions for children and the treatment of children in immigration custody (see *Flores v. Reno* settlement), regardless of where children are detained or which agency has custody. Children in ORR facilities should receive a broad array of social services, including intake screening, legal orientation and screening, medical and dental care, case management, educational programming, access to telephones and help contacting family, and counseling and mental health care. These services should never be compromised.

14. Issue public, enforceable standards for conditions and treatment of migrants: For its 700+ facilities, CBP must issue and enforce standards that specifically address how to handle unaccompanied children and families. CBP agents should receive additional training on how to interact with children and meet their needs.
15. Design and implement alternatives to detention: DHS should not detain migrant children or families. Alternatives to detention have proven effective and are more humane than practices that involve the deprivation of liberty.<sup>2</sup> In addition, DHS should not detain parents caring for children. Detaining parents causes needless, painful separation and denies them the ability to make responsible decisions about arrangements for their children. This is especially urgent given the Administration's expansion of family detention centers to detain recently arrived mothers with young children from Central America. It is also critical given that the November 20, 2014 enforcement memos emphasize that recent border crossers—many of whom were unaccompanied children with relatives in the United States or families traveling together—are a high priority for enforcement and removal. These mothers and children should be released and/or placed in alternatives to detention, especially when the mother and/or children may have an asylum claim.
16. Institute zero tolerance for human rights abuses: DHS should institutionalize a zero tolerance policy toward agents who violate the human rights of migrant children and adolescents.
17. Develop an oversight system to monitor ICE and CBP detention conditions and ORR facilities: ORR, ICE,<sup>3</sup> and CBP should develop clear, independent oversight systems to monitor conditions and treatment of children in their custody and allow civil society organizations to monitor detention or shelter facilities. All three agencies should have comparable oversight and monitoring standards.
18. Expand post-release services: ORR should expand post-release services to all children released from custody and reunified with family or friends of family throughout the course of their immigration court proceedings, including ensuring that the placement continues to be safe and that the child is receiving all necessary services such as education, legal representation, mental health services, case management services, and medical care.

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<sup>2</sup> *Alternatives to Detention Programs, an International Perspective* (May 15, 2009) Lutheran Immigration and Refugee Service.

<sup>3</sup> While DHS detention standards include independent monitoring, greater clarity on the standards is needed.

*Procedural rights and protections*

19. Mandate the right to counsel: Congress should mandate the appointment of counsel for all children in removal proceedings who are principal applicants<sup>4</sup> on a claim for relief and who lack an attorney.
20. Appoint child advocates: Congress should mandate that an independent child advocate be appointed for all unaccompanied children. Until Congress acts, ORR should appoint a child advocate for all unaccompanied children in its custody. We commend ORR for its initiative to increase the number of child advocates assigned to unaccompanied children's cases; this initiative should be expanded to reach all unaccompanied children in removal proceedings.
21. Do not expedite removal proceedings and asylum interviews: expediting cases places families and unaccompanied children at risk of removal to life-threatening situations or situations contrary to their best interests. The Executive Office for Immigration Review (EOIR) should stop expediting unaccompanied children's initial court hearings. The September 10, 2014 EOIR memoranda<sup>5</sup> permitting judges to grant continuances for good cause does not solve the problem. United States Citizenship and Immigration Services (USCIS) should also stop expediting unaccompanied children's asylum interviews.
22. Ensure that children can seek immigration relief outside the adversarial removal process: immigration judges should determine whether a child is unaccompanied for purposes of USCIS's initial jurisdiction over unaccompanied children's asylum claims. Rather, immigration judges should grant administrative closure or long continuances for all children who plan to seek asylum and who qualify as unaccompanied under USCIS's May 28, 2013 memorandum, "Updated Procedures for Determination of Initial Jurisdiction Over Asylum Applications Filed by Unaccompanied Children," or who have pending claims for other forms of relief, such as Special Immigrant Juvenile Status (SIJS).
23. Issue child-sensitive regulations as required under TVPRA §235(d)(8): DOJ, in coordination with DHS, should adopt mandatory regulations binding on all immigration judges that meet the TVPRA requirement to ensure that the specialized needs of unaccompanied children are taken into account in all procedural aspects of their cases.

*Immigration relief*

24. Ensure children are not returned to harm: Congress should enact a form of discretionary "best interests" relief that halts removal proceedings and grants lawful permanent resident status to migrant children ineligible for other forms of relief when repatriation is against their best interests. Until Congress acts, these children should be granted administrative relief such as deferred action.

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<sup>4</sup> A principal applicant is a child who seeks immigration relief on his or her own, as opposed to as a derivative on his or her parent's application. Principal child applicants can be unaccompanied or accompanied.

<sup>5</sup> See *Docketing Practices Relating to Unaccompanied Children Cases in Light of New Priorities*, Brian O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, September 10, 2014, retrieved from <http://www.justice.gov/eoir/statspub/Docketing-Practices-Related-to-UACs-Sept2014.pdf>.

25. Reform immigration policies and the immigration system: Congress should immediately enact immigration system reform that places immigrants in irregular status on a path to citizenship, including parents of U.S. citizen and lawful permanent resident children, and expands visa availability and categories for family unity and for laborers such as domestic workers, nannies, and construction workers. Immigration reform should also create a path to citizenship for DAPA and DACA recipients and should ensure that deported parents of U.S. citizen children, lawful permanent residents, and DACA beneficiaries are allowed to re-enter the U.S. and apply for immigration relief. This type of comprehensive reform is the only way to provide mixed status families with long-term stability.
26. Meaningful implementation of expanded Deferred Action and/or Prosecutorial Discretion: following the November 20, 2014 announcements to exercise prosecutorial discretion for certain undocumented immigrants, the U.S. government should implement its welcome administrative reforms to provide relief to the millions of individuals currently residing in the U.S. who may qualify for relief under future immigration reform, while ensuring strong oversight to ensure that all those eligible have a chance to apply and that no one with protection concerns is excluded. For the November 20, 2014 directive to end Secure Communities and replace it with the Priority Enforcement Program, the government should institute strong oversight and accountability mechanisms and ensure that the program does not unnecessarily or inappropriately use detention or deportation, such as the detention or deportation of immigrants without a criminal conviction. As DHS makes its deportation policy more humane, it should also strengthen prosecutorial discretion by making non-criminal immigration offenses (such as re-entry) a lower priority for removals. While the Administration's announcement is welcome, it should be expanded to include those who are parents of DACA-eligible children; parents who have resided in the U.S. for less than five years; children whose parents have temporary status that is not conferrable to them (e.g. Temporary Protected Status); children under the age of 15 who are too young to apply for DACA; those who have lived in the U.S. for an extended period of time even if they did not enter prior to the age of 16; and others who have significant family or community ties. Congress should enact legislation that codifies the November 20, 2014 administrative reforms so that they become permanent.
27. Analyze asylum claims in a manner consistent with international standards: The Administration should issue asylum regulations clarifying standards for asylum consistent with international law and guidance. The standard for proving membership in a particular social group, should – consistent with UNHCR guidance and the majority of refugee receiving countries – require that group members share an immutable or fundamental characteristic, with no additional requirement. The regulations should clearly state that evidence that the State, society, or legal or social norms accept or tolerate patterns of violence against individuals similarly situated to the applicant establishes nexus (the link to a protected ground). In the meantime, the United States should grant humanitarian relief to migrants at risk of suffering serious harm upon return to their countries, but who do not meet the definition of a refugee. Other signatories to the 1951

Refugee Convention or its 1967 Protocol provide this type of humanitarian relief (i.e., indefinite leave or humanitarian visa).

28. Clarify that claims based on violence by gangs and other organized criminal syndicates can be a legitimate basis for refugee protection: in 2014, the Administration stated that the majority of Central American children coming to the U.S. were fleeing gang violence and that they would not qualify them for asylum. This incorrect categorical statement may bias Immigration Judges and Asylum Officers analyzing children's asylum claims. As a matter of law, asylum determinations must be made case-by-case, and numerous courts have granted claims based on violence at the hands of criminal gangs.<sup>6</sup> The Administration should immediately and publicly clarify that each child's case must be determined on its own merits and that claims based on violence by criminal gangs may be a basis for asylum.
29. Set standards for children's claims for relief: DOJ and DHS should issue regulations on children's claims for relief that "take into account the specialized needs" of unaccompanied children, as the TVPRA requires, and should require adjudicators to analyze children's claims in a child-centered and child-sensitive manner, considering a child's best interests, age, developmental stage, mental health, and cultural factors, and granting each child the liberal benefit of the doubt.

#### *Family reunification and separation*

In order to ensure that the right to family unity is fully addressed, both federal and local policies must address the challenges that immigrant families face. The following recommendations focus on legislative and administrative reforms at all levels. With regard to the 2014 executive action, many questions remain as to how the new directives will be implemented. In addition, although the action takes a significant step, the imperative remains for more a more comprehensive, permanent, legislative solution.

30. Better align U.S. immigration law and policy with the right to family enshrined in international law, recognizing that the family unit is fundamental and requires State protection without discrimination based on immigration status. Consistent with Article 9 of the Convention on the Rights of the Child, the right to family includes both the right to family unity and the right of children not to be separated from their parents unless separation is determined to be in the best interests of the child. Until this alignment is achieved, the U.S. should consider the best interests of the child as a primary consideration, as well as the right to family unity and family reunification in all immigration decisions. Existing executive actions and policies that facilitate family unity (e.g., DAPA, DACA, and prosecutorial discretion) should be interpreted and applied generously.
31. Expand judicial discretion and consider the best interests of the child in decisions about deporting parents: immigration judges should have increased discretion to

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<sup>6</sup> See *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (clarifying that particular social group determinations are record-based and that the mere fact that an applicant did not establish membership in a social group in one case does not bar an applicant from arguing membership in a similar social group in a different case).

consider the best interests of the child in all removal cases affecting a child, including the impact of deporting a parent when they adjudicate removal cases and waivers to grounds of inadmissibility. Immigration and Customs Enforcement (ICE) should prioritize the best interests of children in decisions that affect their well-being (including the arrest, prosecution, detention, and deportation of parents).

32. Coordinate between federal immigration agencies and local child welfare agencies: federal immigration agencies and local child welfare agencies must coordinate their policies and procedures to ensure that the rights of families and the welfare of children are not compromised. For example, agencies should collaborate in developing protocols to ensure that detained parents have access to relevant court proceedings and can meet case plan requirements and to help facilitate reunification when or after a parent is removed. Both systems should receive training on the other system and relevant tools and resources available to them.
33. Protect against inappropriate termination of parental rights due to immigration enforcement: Congress should amend federal law to require states to consider on a case-by-case basis a parent's detention or deportation as a "compelling reason" to delay filing for termination of parental rights unless reunification with the parent would not be in the child's best interests.
34. Mandate sensitivity training for DHS personnel on reducing trauma to children: all DHS personnel who come into contact with children during immigration enforcement actions against parents should be trained by child welfare professionals on minimizing the children's trauma when such actions are performed in their presence.
35. Policies and procedures for state, county, and local child welfare agencies on handling cases involving detained or deported parents: child welfare agencies should develop guidance and protocols to help promote reunification and maintain family ties for children with detained or deported parents. For example, agencies can facilitate the placement of children with relatives, including undocumented relatives, by ensuring that immigration status alone is not a disqualifying factor and permitting foreign documents to establish background and identity. Child welfare staff should also receive training on how to contact the local ICE contact responsible for the parental interest directive as well as other ICE policies and tools, such as the online detainee locator system.
36. State and local child welfare agencies should establish guidelines for handling cases involving foreign entities: guidelines should address how to work with foreign child welfare entities, conduct searches for parents and other relatives abroad (including those who may have been deported), conduct culturally appropriate home studies, and develop Memoranda of Understanding (MOUs) with foreign consulates for purposes of family reunification when that is in the best interests of the child. MOUs should be developed with Mexico as well as Central American countries.
37. Increased cultural awareness in family and dependency courts: Family and dependency court judges and frontline staff should receive training on the immigration enforcement system as well as cultural competency awareness to

address bias against undocumented caregivers or individuals in immigration proceedings. For example, training should address the feasibility of placing children with undocumented caregivers as well as placing U.S. citizen children or other lawfully present children with parents and caregivers living abroad.

38. Build the capacity of schools, faith-based institutions, and immigrant-serving organizations to serve children and families impacted by immigration enforcement: research has shown that trusted community-based organizations, religious institutions, and schools can valuably assist and support children and families affected by immigration enforcement. These groups can connect families to counseling services, tutoring assistance, and important safety net programs, such as food assistance and health coverage for eligible children.

### *Repatriation and reintegration*

39. Ensure an individualized BID prior to the repatriation of any unaccompanied child or adolescent: the United States should require BIDs prior to repatriating unaccompanied children and should develop a BID procedure that identifies a child's immediate protection needs and the most appropriate durable solutions that meet the child's needs and guarantee the child's rights.
40. Require due process before repatriation: unaccompanied children must be able to seek all forms of immigration relief available to them and have access to an attorney to represent them in all types of immigration proceedings and a child advocate to advocate for their best interests before a repatriation process can be initiated.
41. When repatriation is determined to be in a child's best interests, create an individualized repatriation plan for each child that reflects a child's right to development in the broadest sense and the right to family life: a plan should be put into place in advance for a safe and dignified return for a child, including ensuring that the child's family can meet the child, informing the child of the return process, and identifying the child's social service needs. Plans should include wide ranging services such as:
  - a. *Safe return*: family contact, family reunification, transportation from the city where the child is returned to the child's home town, overnight emergency shelter for family, and an emergency meal on the day of arrival.
  - b. *Follow up*: home visit, home and community assessment, goal setting.
  - c. *Health and psychosocial services*: referral to medical and dental clinics, psychosocial services, and to counseling.
  - d. *Education*: school enrollment, school supplies, scholarship search, financial assistance with bus fare, enrollment fees, uniforms, books.
  - e. *Skills training for children and for families*: computer classes, skill building workshops, vocational training.
  - f. *Food and clothing referrals*: referrals for food assistance.
  - g. *Other support services* such as loans to families to start a business or help for the entire family to reintegrate the child sustainably.

- h. *Gender*: plans must consider the challenges that girls face at home and in their communities in order to ensure successful reintegration. Upholding protections for survivors of domestic and other gender violence is critically important to ensure the safe and sustainable repatriation and reintegration of girls. Service needs for girls include pre-natal care and medical care for mother and child during and after birth, and support for girls who want to go to school.
42. Create best practices and sustainable programs for repatriation and reintegration: the Administrator of the U.S. Agency for International Development (USAID), in conjunction with the Secretary of State, the Secretary of Health and Human Services, the Attorney General, international organizations, and NGOs in the U.S. with expertise in repatriation and reintegration, should create a program to develop and implement best practices and sustainable programs in the U.S. and within the country of return to ensure the safe and sustainable repatriation and reintegration of unaccompanied children when repatriation is found to be in their best interests. Programs should help youth find alternatives to re-migration and address the root causes of migration. Programs should work with local community organizations that are linguistically and culturally competent to ensure non-discrimination based on gender, language, or other basis, and to ensure culturally appropriate services. Providing comprehensive return and reintegration support to children who return home requires a collaborative effort by various stakeholders, especially community organizations familiar with the local culture, language, and support systems. It is critical that this program complement the national and regional human development and human rights plans discussed in recommendations I.A. and II.A.1. that address the structural causes of migration.
43. Expand target population of Public Law 109-95, Assistance for Orphans and Other Vulnerable Children Developing Countries Act of 2005, to include repatriated child migrants: this law mandates that the U.S. government, and its partners, respond to the needs of at-risk children in the developing world in a comprehensive, coordinated, and effective manner. It should include child migrants.
44. The U.S. must connect development and rule of law programs in the region to reintegration programs: TVPRA's requirement of safe and sustainable reintegration has not been fully implemented and has not been connected to larger development projects, a major shortfall. For reintegration to succeed, it must be connected to efforts to ensure safety and access to opportunities in the sending countries. We need robust U.S. government support, in collaboration with these countries, for reintegration services so children can stay home sustainably and be safely reunified with their families.

*Overseas refugee processing*

45. Use in-country processing to supplement, but not replace, the U.S. asylum system: In-country screening and adjudication standards should be consistent with the international definition of a refugee. In-country processing should not justify denying migrants access or entry to the United States to seek asylum or other humanitarian relief. Similarly, a negative overseas refugee determination should not be used against a child or other migrant if he/she later seeks entry to or asylum in the United States.
46. In-country processing should be expanded to any child in-country who meets the definition of a refugee: the Administration's announced in-country processing program excludes children who do not have a parent "lawfully" in the United States. However, these children are no less vulnerable. Given that in-country processing aims to reduce the need for children to make the dangerous journey to the United States through irregular channels, it should be expanded to all children who qualify as refugees.
47. Develop protection mechanisms for children and families waiting for in-country refugee processing: the United States should implement systems to expedite in-country processing so that children are not placed at further risk of harm while waiting for adjudication by ensuring, for example, enough officers on the ground to quickly process claims. The United States should work with UNHCR and with local NGOs to ensure safe shelter or other protection for children with pending in-country refugee claims. The United States should also implement mechanisms such as granting immediate humanitarian parole to individuals who cannot safely wait their turn in-country.





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