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The Need to Open Doors and Hearts: The Detention of Unaccompanied Minors Seeking Asylum in the United States and Mexico

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The Need to Open Doors and Hearts: The Detention of Unaccompanied Minors Seeking Asylum in the United States and Mexico

Erratum

This is a reprint of the article that ran in the original version of Volume 42, Issue 3.

THE NEED TO OPEN DOORS AND HEARTS: THE DETENTION OF UNACCOMPANIED MINORS SEEKING ASYLUM IN THE UNITED STATES AND MEXICO

*Lizbeth M. Chavez
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Eleanor Brown
Camilo Pérez-Bustillo**

*“[T]his good Nation is great when we open our doors and our hearts to
needy children, and diminished when we don’t.”¹*

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¹ Deval Patrick, Massachusetts Governor, Address delivered on July 18, 2014. Sean Sullivan, *Emotional Deval Patrick Explains Plans to Shelter Undocumented Children*, WASH. POST, (July 18, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/18/emotional-deval-patrick-explains-plan-to-shelter-undocumented-children-video/?utm_term=.5915ddaf54ba.

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I. INTRODUCTION

Issues regarding the human rights of migrants and refugees have long been among the most contentious in U.S and international law and policy,² and in related philosophical and theological contexts, including Catholic social teaching.³ Such debates have intensified recently given their centrality in the 2016 presidential campaign, and wide-ranging responses to related measures taken by the Trump administration, including ongoing challenges to three new Executive Orders focused on migration and refugee policy.⁴

² See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM (rev. ed. 2002); see also DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

³ See, e.g., LIVING WITH(OUT) BORDERS: CATHOLIC THEOLOGICAL ETHICS ON THE MIGRATIONS OF PEOPLES (Agnes M. Brazal & Maria Teresa Davila, eds., 2016).

⁴ See generally *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017), and reconsideration en banc denied, 858 F.3d 1168 (9th Cir. 2017); EXECUTIVE ORDER CHALLENGES WORKSHEET, https://docs.google.com/spreadsheets/d/12HKAGTI_cdgbDVP9SM-iCzVMuMjX3fd-36lz4A11fj0/edit#gid=0 (last visited Mar. 20, 2017); *Trump Human Rights Tracker*, COLUM. HUMAN RTS. L. REV. (Feb. 2, 2017), <http://hrtr.law.columbia.edu/trump-human-rights-tracker/> (last visited Feb. 1, 2018).

Increased flows of tens of thousands of unaccompanied minors, women, and migrant families, primarily from Mexico and Central America, between March and September 2014⁵ helped set the stage for these responses, leading to the declaration by the Obama Administration of a “humanitarian crisis” at the U.S’ southern border.⁶ All of this was echoed by massive flows with similar characteristics in the Euro-Mediterranean region, from the Middle East and sub-Saharan Africa, which have received widespread attention over the last two years.⁷ The rights of migrant and refugee children are at the core of this unfolding global crisis.

Unaccompanied minors seeking refuge outside of their native country due to social and economic strife are recognized as a particularly vulnerable population. Under international human rights law, the international community has a stringent obligation to provide appropriate care and security to these children and youth.⁸ Such an obligation is found in Article 14 of the United Nations (U.N.) Declaration of Human Rights, which provides for the right to apply for asylum, and Article 25(2), which refers to the special care and assistance required for children.⁹ These rights are developed in many subsequent human rights instruments such as the International Covenant on Civil and Political Rights;¹⁰ the International Covenant on Social, Economic and Cultural Rights;¹¹ and in the Convention on the Rights of the Child.¹² Further, the United Nations High Commissioner for Refugees (UNHCR) has adopted a number of conclusions concerning refugee children that state, as a general principle, unaccompanied minors should not be detained¹³ and that all action taken on behalf of refugee children must be guided by the principle of

⁵ *Children on the Run: Full Report*, U.N. HIGH COMM’N FOR REFUGEES, <http://www.unhcr.org/about-us/background/56fc266f4/children-on-the-run-full-report.html> (last visited Feb. 1, 2018).

⁶ Press Release, The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border (Aug. 1, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american> (last visited Feb. 1, 2018).

⁷ Press Release, International Organization for Migration, Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079 (Jan. 6, 2017), <http://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079> (last visited Feb. 1, 2018).

⁸ See G.A. Res. A/71/1, New York Declaration for Refugees and Migrants, arts. 29, 33 & 59 (Oct. 3, 2016) [hereinafter New York Declaration]; see also Joseph Carlton Elliott, *Sleeping with One Eye Open: The Result of Non-Transparent Oversight by the Office of Refugee Resettlement on Facilities Sheltering Unaccompanied Alien Children*, 68 ADMIN. L. REV. 153, 163 (2016).

⁹ G.A. Res. 217A (III), Universal Declaration of Human Rights, arts. 14, 25 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

¹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Civil and Political Covenant].

¹¹ International Covenant on Economic, Social, and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter Economic, Social, and Cultural Covenant].

¹² Article 22 requires States take appropriate measures to ensure a child seeking refugee status receives protection and humanitarian assistance. Article 37 protects unaccompanied minors from being subjected to arbitrary arrest, detention or exile.

¹³ UNHCR’s *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, OFF. OF THE U.N. HIGH COMM’R FOR REFUGEES GENEVA Guideline 2 (February 1999), <http://www.unhcr.org/4aa7646d9.pdf> (last visited Feb. 1, 2018).

the “best interests of the child.”¹⁴ Most recently, these rights were affirmed in the 2016 New York Declaration for Refugee and Migrants issued by the U.N. General Assembly at a special session focused on global migration issues.¹⁵

At the time of the writing of this Article, there is a worldwide refugee crisis. The U.N. reports the highest levels of displacement of people on record.¹⁶ In 2015 some 65.3 million people were “forcibly displaced” from their homes.¹⁷ According to the UNHCR, approximately 51% of refugees are children and in 2015 approximately 98,400 asylum applications came from unaccompanied minors.¹⁸ This crisis demands the attention of government and non-governmental organizations. Particular concern must be paid to the most vulnerable of these persons—the unaccompanied minors. This Article examines the plight of displaced children in Central American seeking asylum in Mexico and the United States.

The present Article was inspired by and builds on the work done by Professor Marie-Benedict Dembour¹⁹ and the MinAs project²⁰ during the period of July 2014 to December 2015.²¹ The Minas project, funded by the European Commission and entitled “In Whose Best Interests? Exploring Unaccompanied Minors Rights Through the Lens of Migration and Asylum Processes”, compared the experiences of child asylum-seekers in the UK, Slovenia, Austria, and France.²² The project found that in these European countries, there was no formal process for determining the best interests of these refugee children.²³ The vagueness of the concept of “best interest” was subject to different interpretations and depended on the interpretation and implementation by individual actors involved in dealing with the child asylum-seekers.²⁴ The final report issued by the project proposed a number of recommendations to improve the process of assisting unaccompanied

¹⁴ *Id.* at 7; see Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 47 (XXXVIII) on Refugee Children (1987) cited in Guidelines for Children's Asylum Claims (Dec. 10, 1998), 8 Immigration Law Service 2d PSD Selected DHS Document 880.

¹⁵ See New York Declaration, *supra* note 8, at arts. 32, 33, 58 & 59.

¹⁶ *Global Trends 2015 - Figures at a Glance*, U.N. HIGH COMM'N FOR REFUGEES, <http://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Feb. 1, 2018).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Professor of Law and Anthropology, University of Brighton, Brighton, United Kingdom.

²⁰ Funded by the European Commission, “MinAs” is the acronym for the project’s title: In Whose Best Interest: Exploring Unaccompanied Minors’ Rights Through the Lens of Migration and Asylum Processes” [hereinafter MinAs report]. A complete description of the project, and their work including the Project’s final reports, entitled “Comparative Analysis of the National Reports on the State of the Art” (Sept. 2015) is available at: <http://www.minasproject.eu/> (last visited Feb. 1, 2018).

²¹ *Id.* Further information about Dembour’s work and the MinAs project can also be found in the following Blog maintained by Professor Dembour, which is available at <http://blogs.brighton.ac.uk/humanrights/> (last visited Feb. 1, 2018).

²² See MinAs report, *supra* note 20.

²³ *Id.* at 47.

²⁴ *Id.*

minor refugees such as improving information exchange between individuals and institutions involved in dealing with unaccompanied minors and developing suitable accommodation facilities and support structures to meet the needs of these children.²⁵

In 2015, Professor Dembour also published “When Humans Become Migrants”, which examined and compared the treatment of migrants by the European Court of Human Rights and Inter-American Court of Human Rights.²⁶ The book found the treatment of migrant rights by the European Court in some areas as “haphazard, inconsistent and ultimately weak”²⁷ She found the Inter-American Court, in contrast, more *pro homine*, at least in its rhetoric, by using a more rights-protective approach—particularly through the application of human rights instruments.²⁸

Picking up from Professor Dembour’s work and the MinAs project, this article examines the policies involved in and the practice of detaining minors who are seeking asylum in the United States and Mexico. This Article looks specifically at the detention policies of both countries towards unaccompanied minors who are fleeing conflict and who have a well-founded fear of persecution in their native country. This Article examines the legal obligations of each country as it relates to the detention of unaccompanied minors seeking refugee status; the current practice of each country in this area and whether the practice comports with the particular country’s legal obligations; and finally, what, if anything, should be done to either improve the practices or the legal obligations of these countries toward unaccompanied minors seeking asylum.

Section I of this Article examines the legal obligations the United States and Mexico have under general international conventions and customary law. Section II of this Article examines the legal obligations and practice of the United States in its treatment of unaccompanied minors seeking asylum in the United States. Parts of this section of the Article builds off the work of UNICEF and their 2016 report entitled *Broken Dreams: Central American Children’s Dangerous Journey to the United States*.²⁹ This section also reflects findings made by the U.S. Government Accountability Office report entitled *Unaccompanied Children: HHS Can Improve Monitoring of Their Care*,³⁰ and the Congressional Research Service report

²⁵ *Id.* 47–49.

²⁶ See generally MARIE-BENEDICTE DEMBOUR, *WHEN HUMANS BECOME MIGRANTS* (2015).

²⁷ *Id.* at 162.

²⁸ *Id.* at 7.

²⁹ *Broken Dreams: Central American Children’s Dangerous Journey to the United States*, UNICEF REFUGEE AND MIGRANT CRISIS 6 (Aug. 2016) [hereinafter *Broken Dreams*].

³⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-429T, *UNACCOMPANIED CHILDREN: HHS CAN IMPROVE MONITORING OF THEIR CARE* 4 (Feb. 23, 2016), <http://www.gao.gov/assets/680/675330.pdf> (last visited Feb. 1, 2018) [hereinafter 2016 GAO REPORT].

entitled *Unaccompanied Alien Children: An Overview*.³¹

Section III examines Mexico's legal obligation and practices to aid unaccompanied minors and specifically its detention practices with this population. Parts of this section reflect the detailed report made by Human Rights Watch entitled *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children*³² and the report produced by the Georgetown Law Human Rights Institute Fact-Finding Project entitled *The Cost of Stemming the Tide: How Immigration Enforcement Practices in Southern Mexico Limit Migrant Children's Access to International Protection*.³³

In both countries, the treatment of unaccompanied minors falls short of the commitments found in the 2016 New York Declaration for Refugee and Migrants. The New York Declaration calls for the international community to commit to protect the human rights of refugee and migrant children, particularly those of unaccompanied children, and to use a "best interest of the child" standard in their treatment.³⁴ This same standard is reflected in the language of the Inter-American Commission on Human Rights³⁵ and echoed by human rights advocates and scholars across the globe.³⁶ The Declaration in Article 33 states that "detention for the purposes of determining migration status is seldom, if ever, in the best interests of the child . . . [and is to be used] only as a measure of last resort, for the shortest period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interests of the child" ³⁷

³¹ William A. Kandel, *Unaccompanied Alien Children: An Overview*, CONG. RES. SERV. 1 (May 11, 2016), <http://trac.syr.edu/immigration/library/P11767.pdf> (last visited Feb. 1, 2018) [hereinafter *UAC: An Overview*].

³² HUMAN RIGHTS WATCH, *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children* (2016), <https://www.hrw.org/report/2016/03/31/closed-doors/mexicos-failure-protect-central-american-refugee-and-migrant-children> (last visited Feb. 1, 2018) [hereinafter *Closed Doors*].

³³ See generally Georgetown Law Human Rights Institute Fact-Finding Project, *The Cost of Stemming the Tide: How Immigration Enforcement Practices in Southern Mexico Limit Migrant Children's Access to International Protection*, GEO. LAW HUM. RTS. INST. 1 (2015) [hereinafter Georgetown Law Human Rights Institute Fact-Finding Project].

³⁴ New York Declaration, *supra* note 8, at arts. 32, 33, 58 & 59.

³⁵ INTER-AM. COMM'N ON HUM. RTS., HUMAN RIGHTS SITUATION OF REFUGEE AND MIGRANT FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA 11 (2015), <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf> (last visited Feb. 1, 2018).

³⁶ U.C. HASTINGS CTR. FOR GEND. & REFUGEE STUDIES, CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES 383 (Karen Musalo, Lisa Frydman & Pablo Ceriani Cernadas eds., 2015), http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English.pdf. (last visited Feb. 1, 2018); Jacqueline Bhabha, "Not a Sack of Potatoes": Moving and Removing Children Across Borders, 15 B.U. PUB. INT. L.J. 197 (2006); see Julie Marzouk, *Ethical and Effective Representation of Unaccompanied Immigrant Minors in Domestic Violence-Based Asylum Cases*, 22 CLIN. L. REV. 395, 440 (2016) (citing Bridgette A. Carr, *Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009)).

³⁷ New York Declaration, *supra* note 8, at art. 33.

Like the findings of Professor Dembour and the MinAs project, the treatment of unaccompanied minors varied considerably between both countries examined in the present Article. Also similar to the findings in the MinAS report, often the treatment in each country depended on the individual actors involved in dealing with the child asylum-seekers. Finally, like in these earlier reports, this Article finds that considerable improvements can be made to assist unaccompanied minors seeking asylum. The recommendations made in this Article would help the international community meet the commitments made in the New York Declaration and obligations set out under international human rights law to help this most vulnerable population.

II. GENERAL INTERNATIONAL CONVENTIONS AND CUSTOMARY LAW

The liberty, protection and well-being of unaccompanied minors is paramount in the eyes of international law. Under international law, unaccompanied minors escaping persecution have the right to seek asylum outside their States of origin.³⁸ International law documents, such as the Convention on the Rights of the Child, establish the best interests of children as the highest priority and primary consideration.³⁹ Various international documents and practices reflect the political will of world leaders to protect unaccompanied minors.

Article 38, 1 of the Statute of the International Court of Justice (ICJ) sets out the hierarchy of sources of international law applied by the ICJ when deciding cases within its jurisdiction. The Statute mandates the ICJ to apply the following sources of law in its decisions, giving the first the most weight and the last the least weight. The Statute states the order as follows:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁴⁰

The following documents and practices establish the legal obligations

³⁸ Universal Declaration of Human Rights, *supra* note 9, at art. 14.

³⁹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child].

⁴⁰ U.N. Charter art. 38, 1.

of the U.S. and Mexico under international and customary law.⁴¹

A. *International Law:*

1. Convention Against Torture

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (hereinafter “CAT”) states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴² Under CAT, parties are prohibited to “return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴³ Paragraph 2 of Article 3 mandates that “all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights” should be accounted for in determining whether “substantial” grounds exist.⁴⁴ Compliance with CAT prohibits States to return or extradite unaccompanied minors to a state where they could be subjected to torture, including the native state of unaccompanied minors.

2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights expressly states “every human being has the inherent right to life” and such right shall be protected by law.⁴⁵ Similar to CAT, the Covenant protects all human beings, regardless of nationality, from “torture[] [and] cruel, inhuman or degrading treatment or punishment.”⁴⁶ It also provides that “[e]very 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.”⁴⁷ State parties are bound to adhere to this Covenant in regards to the treatment of unaccompanied minors entering its territory.

3. Convention on the Rights of the Child

The Convention on the Rights of the Child is one of the most widely

⁴¹ This section highlights the pertinent parts of the international human rights documents and domestic law for brevity purposes.

⁴² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. II, 2, Dec. 10, 1984, 1465 U.N.T.S. 114 [hereinafter CAT].

⁴³ *Id.* at art. III, 1.

⁴⁴ *Id.*

⁴⁵ International Covenant on Civil and Political Rights, art. VI, I, Dec. 19, 1966, 999 U.N.T.S. 174.

⁴⁶ *Id.* at 175.

⁴⁷ *Id.* at 179.

accepted human rights treaty in the world.⁴⁸ Article 22 of the Convention mandates States to take appropriate measures to ensure that a child seeking refugee status—whether unaccompanied or accompanied—receives protection and humanitarian assistance.⁴⁹ The Convention prohibits discrimination of any kind and ensures protection for all children under the age of eighteen regardless of their “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁵⁰

In addition, Article 37 provides:

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. [Furthermore,] [e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so

B. Customary Law

In addition to international documents, Mexico and the U.S. are obligated to protect unaccompanied minors under internationally accepted principles and declarations.⁵¹ The following provide additional non-binding, yet customary obligations Mexico and the U.S. have to unaccompanied minors: non-refoulement principle, declarations, and other standard-setting documents such as guidelines.

1. Non-Refoulement Principle

The Inter-American Court of Human Rights and the European Court of Human Rights both recognize the principle of non-refoulement as customary law.

⁴⁸ See Karin Bredfeldt, *The United States’ Failure to Ratify the UN Convention on the Rights of the Child*, PROTOCOL MAG., (Oct. 15, 2016) <http://www.protocolmagazine.org/single-post/2016/10/15/The-United-States’-Failure-to-Ratify-the-UN-Convention-on-the-Rights-of-the-Child> (last visited Feb. 1, 2018); see also HUMAN RIGHTS WATCH, *United States Ratification of International Human Rights Treaties* (July 24, 2009), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (last visited Feb. 1, 2018) (“The US is the only country other than Somalia that has not ratified the Convention on the Rights of the Child, the most widely and rapidly ratified human rights treaty in history.”)

⁴⁹ Convention on the Rights of the Child, *supra* note 39, art. 22.

⁵⁰ *Id.* at art. 1–2.

⁵¹ See *Constitución Política de los Estados Unidos Mexicanos* [Constitution] Feb. 5, 1917, tit. I, ch. I, art. I (Mex.); *La Ley General de los Derechos de Niñas, Niños y Adolescentes* [General Law on the Rights of Girls, Boys and Adolescents] tit. I, art. I, sec. I, DIARIO OFICIAL DE LA FEDERACIÓN, 4 Dec. 2014 (Mex.); *Ley de Migración 2011* [Immigration Law] DIARIO OFICIAL DE LA FEDERACIÓN, 4 Dec. 2014 (Mex.).

a. *Pacheco Tineo Family v. Bolivia*

The Inter-American Court of Human Rights citing to *Pacheco Tineo Family v. Bolivia*, in its Advisory Opinion OC-21/14 of August 19, 2014, recognized “the principle of *non-refoulement* constitutes a norm of customary international law. . . .”⁵² Further, the Court explained that the principle of non-refoulement is “binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.”⁵³ Based on the non-refoulement principle, States are bound not to return or expel a person “to a State where her or his life or liberty may be threatened as a result of persecution for specific reasons or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order. . . .”⁵⁴ Thus, under customary law, States are prohibited from removing unaccompanied minors to a place where their life and wellbeing is at risk.⁵⁵

b. *M.S. v. Belgium*

Similarly, the European Court of Human Rights in *M.S. v. Belgium* held that States may not directly or indirectly remove individuals to countries where they are likely to face persecution or threats to their lives.⁵⁶ Citing to the conditions of the Belgian detention centers, the European Court of Human Rights stated that although refugee seekers were not directly forced to leave, they were constructively removed.⁵⁷ Thus, the Court considered the individuals’ return as forced returns, in violation of the non-refoulement principle.⁵⁸ Under customary law, the conditions of detention centers could be considered as forced returns in violation of the non-refoulement principle recognized by the conventions discussed in Section I.A. and customary law.⁵⁹

2. Declarations and Other Contributions to Standard-Setting

Declarations and committee reports, although non-binding, provide states with recommendations and guidelines to follow in order to ensure compliance with legal obligations. The following documents, ranging from

⁵² 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., 211 (Aug. 19, 2014).

⁵³ *Id.*

⁵⁴ *Id.* at 212.

⁵⁵ See UNITED NATIONS HIGH COMM’R FOR REFUGEES (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (Jan. 31, 1994), <http://www.refworld.org/docid/437b6db64.html> (last visited Feb. 1, 2018).

⁵⁶ ECtHR - *M.S. v. Belgium*, No. 50012/08, EUROPEAN DATABASE OF ASYLUM LAW (Jan. 31, 2012), <http://www.asylumlawdatabase.eu/en/content/ecthr-ms-v-belgium-no-5001208-31-january-2012> (last visited Feb. 1, 2018).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *infra* Section I.A.—B.

declarations to committee reports, recommend states to provide unaccompanied minors with the protections guaranteed by the conventions.

a. United Nation's Universal Declaration of Human Rights

The United Nation's Universal Declaration of Human Rights provides all individuals significant safeguards. Article 3 provides that "[e]veryone has the right to life, liberty and security of person."⁶⁰ Article 5 further provides "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁶¹ Article 9 specifically addresses the issue discussed in this Study—the detention of unaccompanied minors—by stating, "[n]o one shall be subjected to arbitrary arrest, detention" or exile.⁶² In addition, Article 14 provides for the protection sought by unaccompanied minors—the right to seek and to enjoy in other countries asylum from persecution.⁶³ Finally, Article 26 reinforces children's right to education.⁶⁴

b. United Nations High Commissioner for Refugees Detention Guidelines

The UNHCR Detention Guideline 9.2 provides that an independent and qualified guardian as well as a legal adviser should be appointed for unaccompanied or separated children.⁶⁵ During detention, children shall also enjoy the right to education.⁶⁶ The education "should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release."⁶⁷ Guideline 9.2 further provides for the detaining facility to facilitate recreation and play for detained children, "including with other children, which is essential to a child's mental development and will alleviate stress and trauma."⁶⁸

c. Committee on Economic, Social and Cultural Rights, Comment 13

Although Comment 13 of the Committee on Economic, Social and Cultural Rights does not explicitly grant unaccompanied minors the right to education, it does discuss its importance. The Committee expressed that "[e]ducation is both a human right in itself and an indispensable means of

⁶⁰ Universal Declaration of Human Rights, *supra* note 9, at art. 3.

⁶¹ *Id.* at art. 7.

⁶² *Id.* at art. 9.

⁶³ *Id.* at art. 14.

⁶⁴ *Id.* at art. 26.

⁶⁵ UNHCR, *Detention Guideline 9.2*, 56, 2012, <http://www.refworld.org/pdfid/503489533b8.pdf> (last visited Feb. 1, 2018) [hereinafter *Detention Guideline 9.2*].

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

realizing other human rights.”⁶⁹ The Committee further stated that education plays a vital role in promoting human rights and democracy.⁷⁰

d. Committee on the Rights of the Child, Comment 6

The Committee on the Rights of the Child Comment 6 further explains the aid and accommodations States should provide unaccompanied minors. Comment 6 states:

States should ensure that access to education is maintained during all phases of the displacement cycle. Every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered in line with articles 28, 29(1)(c), 30 and 32 of the Convention and the general principles developed by the Committee. Such access should be granted without discrimination and in particular, separated and unaccompanied girls shall have equal access to formal and informal education, including vocational training at all levels. Access to quality education should also be ensured for children with special needs, in particular children with disabilities.⁷¹

Comment 6 further urges States to register the unaccompanied minors “with appropriate school authorities as soon as possible and [provide] assistance in maximizing learning opportunities.”⁷² Thus, when unaccompanied minors are detained at detention centers or shelters, under Comment 6, the minors should have access to education.

e. New York Declaration

The New York Declaration for Refugees and Migrants convened on September 13, 2016, is instructive and aspirational. Recognizing the immense movement of people, 244 million and still growing, the General Assembly sought to consider how the international community should respond to the growing phenomenon. Section II Paragraph 33 relates that detention in the best interest of the child, should only be used “as a measure last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that

⁶⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 13: The Right to Education*, art. 13, 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment No. 13*].

⁷⁰ *Id.*

⁷¹ Comm. on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, art. 6, 41, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter *General Comment No. 6*].

⁷² *Id.* at 42.

takes into account, as a primary consideration, the best interest of the child . . .”⁷³

Paragraph 59 of the New York Declaration further reaffirms the international community’s “commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychological services, ensuring that the best interest of the child is a primary consideration in all relevant policies.”⁷⁴ The New York Declaration further instructs states to ensure “that measures are in place to identify persons in need of international protection as refugees, provide adequate, safe and dignified reception conditions, with a particular emphasis on persons with specific needs, victims of human trafficking, child protection. . . .”⁷⁵

On paper, Mexico and the U.S. provide unaccompanied minors with an abundance of protection, including those instructed in the New York Declaration. However, as will be discussed in the following sections, the United States’ and Mexico’s practices are simply evidence of their broken promises to unaccompanied minors. These failures are exacerbated by the ways in which their approaches to these issues are intertwined as a result of intensified bilateral cooperation in the containment of migration flows, which is reflected in a pronounced shift in the burden of enforcement (interception, detentions, and deportations) from U.S to Mexican authorities. Mexico has in effect become more central to U.S concerns as a country of transit for migration from Central America and beyond than as a country of origin, as it has traditionally been understood.

At the same time, the foreseeable result has been an intensification of human rights violations against migrants in transit through Mexican territory, at the hands of both Mexican authorities and criminal gangs.⁷⁶ Migrants in transit have in effect been swept up into the overall web of Mexico’s deepest human rights crisis in recent history.⁷⁷ The consequences of measures discussed below such as the binational Southern Border Plan (focused on containment of flows at Mexico’s border with Guatemala) are currently being challenged before the Inter-American Human Rights Commission.⁷⁸ Such

⁷³ New York Declaration, *supra* note 8, at 33.

⁷⁴ *Id.* at 59.

⁷⁵ New York Declaration, *supra* note 8, at annex I, ¶5(a).

⁷⁶ See generally Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, Inter-Am. Comm’n H.R. Doc. 48/13, at 2 (2013), <http://www.oas.org/en/iachr/migrants/docs/pdf/report-migrants-mexico-2013.pdf> (last visited Feb. 1, 2018); Camilo Perez Bustillo & Azadeh N. Shahshahani, *Tribunal Finds Mexico and US Jointly Responsible for Human Rights Crisis Linked to Drug War*, HUFF POST (Dec. 16, 2015), http://www.huffingtonpost.com/azadeh-shahshahani/tribunal-finds-mexico-and_b_8824162.html (last visited Feb. 1, 2018).

⁷⁷ Zeid Ra’ad Al Hussein, *Statement on visit to Mexico*, U.N. HUM. RTS. OFFICE OF THE HIGH COMM’R (Oct 7., 2015), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16578> (last visited Feb. 1, 2018).

⁷⁸ Brief for Petitioner, Case No. P-652-16, Inter-Am. Comm’n H.R. (April 14, 2016), http://www.centerforhumanrights.org/PDFs/IACHR_PFS_Petition.pdf (last visited Feb. 1, 2018); U.S.

policies of border “externalization” and their consequences are likely to deepen pursuant to the Trump administration’s proposed measures to further militarize the U.S. southern border, given their unavoidable spill-over effects.

III. U.S. OBLIGATIONS, PRACTICES AND RECOMMENDATIONS

Every day across the world, at an early and tender age, unaccompanied minors fleeing persecution embark on a dangerous journey in hopes of seeking refuge in the United States.⁷⁹ The United States defines unaccompanied minors as children who have no lawful immigration status, are under the age of eighteen, and enter the U.S. without a parent or legal guardian.⁸⁰ Most unaccompanied minors entering the U.S. have originated from three Central American countries—Guatemala, Honduras, and El Salvador—and secondarily from Mexico.⁸¹

Violent crime rates, economic conditions, and the presence of transnational gangs⁸² are often the leading factors forcing unaccompanied minors from Central America to the United States.⁸³ At the age of sixteen, Alexis, an Honduran native, left his home country hoping to escape the “bitter” poverty and gang violence.⁸⁴ His journey to the U.S. ended in Mexico when he fell off a freight train and lost his right leg—a common injury for unaccompanied minors.⁸⁵ After losing his leg, Alexis lost hope of ever

Border Externalization Creates Human Rights Crisis in Mexico, CTR. FOR HUM. RTS. AND CONST. LAW (Apr. 14, 2016), http://www.centerforhumanrights.org/Border_Externalization.html (last visited Feb. 1, 2018).

⁷⁹ Unaccompanied minors entering the U.S. from Central America are between the ages of fifteen to eighteen, but some are as young as infants. See *Facts and Data: General Statistics*, OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED CHILDREN’S SERV., <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (last visited Feb. 1, 2018); see also Teresa Wiltz, *Unaccompanied Children From Central America, Once Year Later*, THE HUFFINGTON POST (Aug. 24, 2016, 5:34 PM), http://www.huffingtonpost.com/entry/unaccompanied-children-from-central-america-one-year-later_us_55db88b4e4b04ae497041d10 (last visited Feb. 1, 2018) (explaining many unaccompanied minors were under the age of twelve).

⁸⁰ 6 U.S.C. § 279(g)(2) (2011).

⁸¹ *UAC: An Overview*, *supra* note 31, at 1.

⁸² In a 2014 report, the American Immigration Council reported that about half of the unaccompanied minors live in congested gang territory and are afraid to walk even two to three blocks from their house due to gang violence. See Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AM. IMMIGR. COUNCIL 1, 2 (July 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/no_childhood_here_why_central_american_children_are_fleeing_their_homes.pdf (last visited Feb. 1, 2018); see also Jorge Rivas, *The Untold History of Unaccompanied Minors*, FUSION (Aug. 4, 2014, 2:15PM), <http://fusion.net/story/6211/the-untold-history-of-unaccompanied-minors/> (last visited Feb. 1, 2018) (quoting Professor Dana Frank) (“In Honduras anyone can kill anybody with total impunity . . .”).

⁸³ Kennedy, *supra* note 82, at 2; see Phillip E. Wolgin, *5 Things You Need to Know About Unaccompanied Children*, CTR. FOR AM. PROGRESS (June 18, 2014, 9:22 AM), <https://www.americanprogress.org/issues/immigration/news/2014/06/18/92056/5-things-you-need-to-know-about-the-unaccompanied-minors-crisis/> (last visited Feb. 1, 2018).

⁸⁴ *Broken Dreams*, *supra* note 29, at 6.

⁸⁵ *Id.*; see Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Migrant Minors*, 25 GEO. IMMIGR. L.J. at 884 (“Many unaccompanied minors ride freight trains to reach the United States, an extremely dangerous method of travel known by migrants as El Tren Devorador (‘The Train that Devours’), where they are forced to choose between the risk of suffocation inside the freight cars, and the risk of falling from the top.”); see also Rodrigo D. Villegas,

reaching the U.S. to seek refugee status.⁸⁶ He returned to Honduras with his mother and younger siblings, who work harvesting chilies, babysitting or helping out in food stalls.⁸⁷ Alexis has joined a local UNICEF-supported outreach group to tell other young people about the dangers of the journey, but he is convinced his younger siblings, along with other children in his community, will head north in the near future.⁸⁸

Despite the dangerous journey, the number of unaccompanied minors in the U.S. has been “climbing steadily” since 2012.⁸⁹ According to the Border Patrol in South Texas, the number of apprehensions of unaccompanied minors increased from 16,067 in 2011 to 24,481 in 2012, and then to 38,833 in 2013.⁹⁰ With numbers increasing in 2014, former President Obama declared the surge in unaccompanied minors from Central America an “urgent humanitarian situation.”⁹¹ President Obama’s declaration brought political debate as to what caused the “influx” of unaccompanied minors.⁹² Most importantly, it expanded discussion on the treatment of unaccompanied minors seeking refugee status in the U.S.⁹³ The placement of unaccompanied minors in detention centers has been the focus of many human rights organizations, both locally and internationally.⁹⁴

This section aims to shed light on the treatment of unaccompanied minors seeking asylum in the U.S. Section II.A. briefly examines the United

Central American Migrants and La Bestia: The Route, Dangers, and Government Responses, MIGRATION POL’Y INST. (Sept. 10, 2014), <http://www.migrationpolicy.org/article/central-american-migrants-and-la-bestia-route-dangers-and-government-responses> (last visited Feb. 1, 2018) (discussing that as many as half a million Central American immigrants annually hop aboard freight trains known as “La Bestia,” or the beast, on their journey to the U.S.; the cargo trains carry products for export and migrants ride atop of the moving trains despite the physical dangers that range from amputation to death if they fall or are pushed).

⁸⁶ *Broken Dreams*, *supra* note 29, at 7.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POL’Y INST. (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> (last visited Feb. 1, 2018).

⁹⁰ *Id.*

⁹¹ *Id.*; see also Dan Restrepo, *The Surge of Unaccompanied Children from Central America*, CTR. FOR AM. PROGRESS (July 24, 2014, 10:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2014/07/24/94396/the-surge-of-unaccompanied-children-from-central-america-root-causes-and-policy-solutions/> (last visited Feb. 1, 2018).

⁹² *Id.* (discussing that some political leaders argue Obama’s administration caused the surge by creating programs like Deferred Action for Childhood Arrivals (DACA), a program that grants a two-year “reprieve from deportation and work permit to eligible undocumented youth”); see generally *Consideration of Deferred Action for Childhood Arrivals (DACA)*, USCIS, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Feb. 1, 2018).

⁹³ See *infra* Section II.B.

⁹⁴ Olga Byrne, *The Flow of Unaccompanied Children Through the Immigration System*, VERA INSTITUTE 1, 6–7 (Mar. 2012), <http://archive.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> (last visited Feb. 1, 2018) [hereinafter *The Flow of UACs*]; see also UNHCR, *UNHCR’s Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, at 11 (Feb. 1999), <http://www.unhcr.org/4aa7646d9.pdf> (last visited Feb. 1, 2018) (explaining “[t]he increasing use of detention as a restriction on the freedom of movement of asylum-seekers on the grounds of their illegal entry is a matter of major concern to UNHCR, NGOs, other agencies as well as Governments.”).

States' legal obligations under international and customary law concerning the treatment of unaccompanied minors fleeing persecution and seeking protection. Section II.A. also examines a judicial agreement and two domestic laws governing the detention, release, and treatment of unaccompanied minors seeking refuge in the U.S.

Section II.B. examines whether the U.S. is comporting with its international, customary and domestic legal obligations by focusing on the current practices, legal treatment of, and conditions faced by unaccompanied minors in U.S. detention facilities.

Finally, Section II.C. provides recommendations of where the law should go to ensure the well-being and dignity of unaccompanied minors entering the U.S.

A. *U.S. Legal Obligation Under International, Customary and Domestic Law*

1. International and Customary Law

Unaccompanied children entering the U.S. have the right to seek asylum under international law.⁹⁵ Compliance with CAT prohibits the U.S. to return or extradite unaccompanied minors to a state where they could be subjected to torture, including the native state of unaccompanied minors. Like CAT, the International Covenant on Civil and Political Rights protects unaccompanied minors from “torture[] [and] cruel, inhuman or degrading treatment or punishment.”⁹⁶ The U.S. ratified both documents, indicating its consent to be bound by its provisions.⁹⁷

Other norms and customs provide protection for unaccompanied minors entering the U.S. For example, the Convention of the Rights of the Child establishes the best interests of children as the highest priority and primary consideration.⁹⁸ While the U.S. played an important role in drafting the Convention, it has failed to ratify this Convention.⁹⁹ However, the provisions of the Convention cannot be ignored under customary law as it is one of the most widely accepted human rights treaty in the world.¹⁰⁰ In 2008

⁹⁵ Universal Declaration of Human Rights, *supra* note 9, at art. 14.

⁹⁶ *Id.*

⁹⁷ The U.S. ratified CAT on October 21, 1994, and International Covenant on Civil and Political Rights on June 8, 1992. See generally CAT, *supra* note 42; see also Civil and Political Covenant, *supra* note 10; CAT: *Convention Against Torture*, US HUM. RIGHTS NETWORK, <http://www.ushrnetwork.org/our-work/project/cat-convention-against-torture> (last visited Feb. 1, 2018).

⁹⁸ *Convention on the Rights of the Child*, *supra* note 39.

⁹⁹ Bredfelt, *supra* note 48.

¹⁰⁰ *Id.*; see also *United States Ratification of International Human Rights Treaties*, HUMAN RIGHTS WATCH (July 24, 2009, 12:24 PM), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (last visited Feb. 1, 2018) (explaining “the US is the only country other than Somalia that has not ratified the Convention on the Rights of the Child, the most widely and rapidly ratified human rights treaty in history.”)

during a debate in the primary election, former President Barack Obama described the failure to ratify the Convention as “embarrassing” and said he would review this treaty; however, no changes have been made.¹⁰¹ In addition, the United Nation’s Universal Declaration of Human Rights and the United Nation High Commissioner for Refugees Detention Guidelines provide protection for the well-being and dignity of unaccompanied minors in detention facilities.

2. Domestic Law

The processing and treatment of unaccompanied minors in the U.S. are primarily governed by a judicial settlement and two laws: (1) the *Flores* Settlement Agreement of 1997; (2) the Homeland Security Act of 2002; and (3) the Trafficking Victims Protection Reauthorization Act of 2008.¹⁰² Each plays an important role in ensuring the safety and well-being of unaccompanied minors in the U.S.¹⁰³

a. The *Flores* Agreement of 1997

“In the 1980s, the number of unaccompanied minors entering the United States increased.”¹⁰⁴ Many of those children fled a civil war in Central America.¹⁰⁵ During that time, the U.S. Immigration and Naturalization Service (“INS”) held unaccompanied minors entering the U.S. in its custody.¹⁰⁶ At the same time, INS acted as the minor’s prosecutor “presenting charges that they had violated immigration laws and arguing for their deportation.”¹⁰⁷ Due to INS’s dual capacity as the caretaker and prosecutor, allegations of the mistreatment of unaccompanied minors in detention became popular and resulted in class action lawsuits against the government.¹⁰⁸ These lawsuits challenged the prolonged detention of unaccompanied minors, the treatment of unaccompanied minors in detention centers, and release policies and procedures of unaccompanied minors to family members and/or non-relatives.¹⁰⁹

A class action concerning the arrest, detention and release of unaccompanied minors is *Reno v. Flores* (hereinafter “*Flores*”).¹¹⁰ In *Flores*,

¹⁰¹ *Transcript: The Walden University Presidential Youth Debate*, WALDEN UNIV., <http://www.youthdebate2008.org/debate-transcript> (last visited Feb. 1, 2018).

¹⁰² Lisa Seghetti, *Unaccompanied Children: An Overview*, CONGR. RES. SERV. 3 (Sept. 8, 2014), <http://trac.syr.edu/immigration/library/P8978.pdf> (last visited Feb. 1, 2018).

¹⁰³ *Id.*

¹⁰⁴ *The Flow of UACs*, *supra* note 94, at 6.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Reno v. Flores*, 507 U.S. 292, 292 (1993). *Reno v. Flores* includes two class actions: *Barr v. Flores* and *Flores v. Meese*. Each case was filed separately but decided under *Reno v. Flores* by the U.S. Supreme Court.

Jenny Lisette Flores, at the age of fifteen, fled the violence in El Salvador in hopes to be reunited with her family living in the U.S.¹¹¹ Before reaching the U.S., INS apprehended and detained Flores at the border on suspicion of entering the country illegally.¹¹² INS agents handcuffed, strip searched and placed Flores in a detention facility where she spent two months waiting for her removal hearing.¹¹³ Flores, and many unaccompanied minors, spent over a month in INS detention facilities due to its new policy which limited unaccompanied minors to be released only to parents, close relatives, or legal guardians.¹¹⁴ This caused unaccompanied minors to remain in detention indefinitely pending their removal hearing despite the willingness of other adults or family members to care for them.¹¹⁵

The INS policy resulted in unaccompanied minors being deprived of their liberty, recreation and right to education.¹¹⁶ In 1985, the American Civil Liberties Union (ACLU) and four unaccompanied minors, including Flores, filed a class action lawsuit against INS, challenging the treatment and detention of unaccompanied minors.¹¹⁷

After nine years of extensive discovery and appeals, the case eventually reached the United States Supreme Court.¹¹⁸ Justice Scalia, writing for the majority, found the INS policy limiting the release of unaccompanied minors did not violate their substantive or procedural due process rights.¹¹⁹ The Court then remanded the case to the district court, where the parties reached a settlement agreement known as the *Flores Settlement Agreement* (hereinafter “the *Flores Agreement*”) in order to avoid complex, lengthy and costly trials, which could last several more years.¹²⁰

The *Flores Agreement* governs the nationwide policy for the detention, treatment, and release of unaccompanied minors in federal custody.¹²¹ Under the *Flores Agreement*, when an unaccompanied minor is detained, immigration officials must provide the following: (1) food and drinking water; (2) medical assistance in emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect minors from others; (6) separation from unrelated adults whenever

¹¹¹ Brief for Respondents at 5, *Barr v. Flores*, 503 U.S. 905 (1992) (No. 91-905).

¹¹² *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988).

¹¹³ See Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 596 (1998).

¹¹⁴ Rebeca M. Lopez, Comment, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648 (2012).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*; Brief for Respondents, *supra* note 111, at 5.

¹¹⁸ See Stipulated Settlement Agreement at 3, *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988) (Case No. CV 85-4544-RJK (Px)), <http://www.aila.org/File/Related/14111359b.pdf> (last visited Feb. 1, 2018).

¹¹⁹ *Reno v. Flores*, 507 U.S. 292, 292 (1993).

¹²⁰ See Stipulated Settlement Agreement, *supra* note 118 at 3.

¹²¹ Seghetti, *supra* note 102, at 3.

possible; and (7) separation from juveniles charged with a crime whenever possible.¹²²

The *Flores* Agreement also requires the prompt release of children from immigration detention to family members or a state licensed program in the following order:

- (a) a parent; (b) a legal guardian; (c) an adult relative (brother, sister, aunt, uncle, or grandparent); (d) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being ...
- (e) a licensed program willing to accept legal custody; or (f) an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.¹²³

The provisions of the *Flores* Agreement ensure unaccompanied minors will be placed in the "least restrictive" setting appropriate for their age and needs whenever possible.¹²⁴ Lengthy detentions are permissible if the unaccompanied minor has been charged with, is chargeable, has been convicted of a crime, or has made credible threats to commit a violent or malicious act.¹²⁵

Several years following the *Flores* Agreement, human rights advocates and the Department of Justice Officer of the Inspector General questioned whether INS had fully implemented the terms of the *Flores* Agreement.¹²⁶ Considering INS acted as both the caretaker and prosecutor of unaccompanied minors, "a broad coalition of human rights organizations, religious groups, and political leaders pushed for improvements in the care and treatment of unaccompanied [minors] and lobbied for the transfer of their care and custody to another agency."¹²⁷ In response to the ongoing concerns, Congress enacted the Homeland Security Act of 2002 and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, both discussed next.¹²⁸

¹²² *Id.* at 3; see also U.S. Department of Justice, Office of the Inspector General, Unaccompanied Juveniles in INS Custody, Executive Summary, Report no. 1-2002-009, September 28, 2001.

¹²³ See Stipulated Settlement Agreement, *supra* note 118, at 4.

¹²⁴ *Id.*

¹²⁵ *Id.* at 8.

¹²⁶ *The Flores Settlement: A Brief History and Next Steps*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps> (last visited Feb. 1, 2018); see *Juveniles in INS Custody*, *supra* note 122.

¹²⁷ *The Flow of UACs*, *supra* note 94, at 6.

¹²⁸ See generally Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2137 § 462, https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf (last visited Feb. 1, 2018) [hereinafter *HSA 2002*]; see also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, <https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf> (last visited Feb. 1, 2018).

b. The Homeland Security Act of 2002

Congress enacted the Homeland Security Act of 2002 (hereinafter “HSA”) on November 25, 2002.¹²⁹ The HSA eliminated the INS and transferred all immigration-related services and enforcement functions to the newly created U.S. Department of Homeland Security (hereinafter “DHS”).¹³⁰ The HSA also transferred the responsibility for the care, placement and release of unaccompanied minors to the Office of Refugee Resettlement (ORR), an agency of the U.S. Department of Health and Human Services.¹³¹ The ORR assumed its role on March 1, 2003, and created a Division of Unaccompanied Children’s Services.¹³²

The HSA requires immigration officials to release unaccompanied minors from detention facilities within seventy-two hours whenever possible and place them in the care and custody of the ORR.¹³³ Upon arriving at an ORR facility, the process of searching for a family member, adult, or agency to sponsor an unaccompanied minor typically begins within twenty-four hours.¹³⁴ After case workers complete an admission assessment and a psychological assessment, the ORR then makes placement determinations for all unaccompanied minors according to the priority set forth in the *Flores* Agreement.¹³⁵ Unaccompanied minors that cannot be released to family members or other individuals for safety concerns or other reasons,¹³⁶ remain in ORR’s custody and are placed in state licensed shelters, group homes, or residential facilities, located in the United States and funded by the ORR, pending their immigration hearing.¹³⁷

A 2016 report by the U.S. Government Accountability Office (“GAO”) found that in the fiscal years 2003 through 2011, the ORR cared for fewer than 10,000 unaccompanied minors per year. In 2012, the number of unaccompanied minors transferred to ORR custody “rose to unprecedented

¹²⁹ *HSA 2002*, *supra* note 128.

¹³⁰ *Id.* at § 462(a).

¹³¹ *Id.*

¹³² *The Flow of UACs*, *supra* note 94, at 6.

¹³³ See *Services Provided*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/about/ucs/services-provided> (last visited Feb. 1, 2018); see also *Administration for Children and Families U.S. Department of Health and Human Services Before the Committee on the Judiciary United States Senate* (2016) (statement of Mark Greenberg), <https://www.judiciary.senate.gov/imo/media/doc/02-23-16%20Greenberg%20Testimony.pdf> (last visited Feb. 1, 2018) (explaining the responsibilities and process of the ORR more in depth).

¹³⁴ *The Flow of UACs*, *supra* note 94, at 17.

¹³⁵ See 6 U.S.C. § 279(b) (2011).

¹³⁶ At times, due to the fear of deportation, undocumented family members living in the United States do not come forward when unaccompanied minor is apprehended. See *The Flow of UACs*, *supra* note 94, at 10.

¹³⁷ *About Unaccompanied Children’s Services*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/programs/ucs/about> (last visited Feb. 1, 2018); see also *Facts and Data*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (last visited Feb. 1, 2018) (explaining the average length of stay of a child in shelter care in FY 2016 was 34 days).

levels and peaked in fiscal year 2014 at nearly 57,500.”¹³⁸ Due to the increase of unaccompanied minors in ORR custody, allegations of mistreatment and inappropriate conditions in ORR shelters increased; however, this paper only focuses on the conditions in detention facilities, before unaccompanied minors are placed in ORR’s custody.¹³⁹

c. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

In December 2008, former President George W. Bush signed into law the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (hereinafter “TVPRA”).¹⁴⁰ The TVPRA recognized the unique vulnerabilities and trafficking risks of unaccompanied minors and implemented greater protection measures.¹⁴¹ Under the TVPRA, legal procedures for unaccompanied minors differ based on their residency or nationality.¹⁴²

For instance, if an unaccompanied minor is a resident or national of a non-contiguous country, countries other than Mexico or Canada, the minor is detained and referred to the ORR within seventy-two hours for screening and placement in the least restrictive setting possible.¹⁴³ The ORR then places the unaccompanied minor with a family member, ORR shelter, or foster home pending his or her immigration hearing.¹⁴⁴ In contrast, if the unaccompanied minor is a resident or national of Mexico or Canada, the minor is screened *by an immigration officer* within forty-eight hours of the detention to determine

(1) [w]hether the child had been trafficked or is susceptible to trafficking upon return to their home country; (2) [w]hether the child has a credible fear of returning to their home country; (3) [w]hether the child is able to make an independent decision to withdraw an application for admission into the United States, also known as voluntary departure.¹⁴⁵

If the immigration officer determines an unaccompanied minor from Mexico or Canada can safely return to his or her home country, the

¹³⁸ 2016 GAO REPORT, *supra* note 30, at 4–5; *At the Crossroads for Unaccompanied Migrant Children: Policy, Practice, & Protection*, LUTHERAN IMMIGR. AND REFUGEE SERV. 1, 13 (July 2015), http://lirs.org/wp-content/uploads/2015/07/LIRS_RoundtableReport_WEB.pdf (last visited Feb. 1, 2018) [hereinafter LIRS REPORT].

¹³⁹ See LIRS REPORT, *supra* note 138, at 13.

¹⁴⁰ *Id.* at 12.

¹⁴¹ *Id.*; see also 8 U.S.C. §1232 (2013).

¹⁴² *Protections for Unaccompanied Minors in the Trafficking Victims Protection Act of 2008*, FIRST FOCUS 1 (July 2014), <https://firstfocus.org/wp-content/uploads/2014/08/Legal-Protections-for-Unaccompanied-Minors-in-the-Trafficking-Victims-Protection-Act-of-2008.pdf> (last visited Feb. 1, 2018).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

unaccompanied minor is returned to such country.¹⁴⁶

Undeniably, the *Flores* Agreement, the HSA and the TVPRA have significantly changed policies concerning the treatment of unaccompanied minors in the United States. However, it is important to note that removal proceedings continue even after unaccompanied minors are released from detention, and are placed with a parent or other relatives or remain in the care of the ORR.¹⁴⁷ In order to prevent deportation, unaccompanied minors may seek asylum if they have suffered past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁴⁸ Other legal remedies, such as Special Immigrant Juveniles Status, are available to unaccompanied minors seeking legal status.¹⁴⁹ Unaccompanied minors are not appointed an attorney to help them in their removal proceedings and must seek an attorney themselves.¹⁵⁰ Often times, they rely on legal services organizations and pro bono attorneys for representation to avoid being sent back to dangerous situations in their home countries. Unfortunately, legal representation is not afforded to all unaccompanied minors due to the need of more volunteer attorneys or the inability to afford an attorney.¹⁵¹

B. *The Practice and Implementation of the Law*

While significant changes have been made since the *Flores* Agreement, issues regarding the detention of unaccompanied minors continue to exist. Before exploring those issues, a brief overview of the apprehension, processing and detention of unaccompanied minors is necessary as an array of federal agencies touch the lives of unaccompanied minors in varying ways.¹⁵²

Generally, the initial government encounter with unaccompanied minors occurs at the point of apprehension—either by DHS’s Customs and Border Protection (“CBP”) near the southern U.S. border, or less often by the

¹⁴⁶ *Id.*; See Marc R. Rosenblum, *Unaccompanied Child Migration to the United States: The Tension Between Protection and Prevention*, TRANSATLANTIC COUNCIL ON MIGRATION 9 (April 2015), <http://www.migrationpolicy.org/sites/default/files/publications/TCM-Protection-UAC.pdf> (last visited Feb. 1, 2018).

¹⁴⁷ Seghetti, *supra* note 102, at 10.

¹⁴⁸ See 8 U.S.C. § 1158 (2012).

¹⁴⁹ If an unaccompanied minor cannot establish he or she should be granted asylum, the unaccompanied minor can apply for Special Immigrant Juveniles (SIJ) Status. Children who establish they have been abused, abandoned, or neglected can obtain a green card through the SIJ program and live and work permanently in the United States. See *Special Immigrant Juvenile (SIJ) Status*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status> (last visited Feb. 1, 2018).

¹⁵⁰ Monique Sherman, *Unaccompanied Child Immigrants: Representation Needs and Efforts*, AM. BAR ASS’N (June 18, 2015), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2015-0615-unaccompanied-child-immigrants-representation.html> (last visited Feb. 1, 2018).

¹⁵¹ *Id.*

¹⁵² Marc R. Rosenblum, *supra* note 146, at 10.

Office of Operations (“OFO”) at official ports of entry.¹⁵³ Upon apprehension, CBP or OFO agents take children to detention centers, often called short-term holding facilities, for screening.¹⁵⁴ The conditions in detention centers range from “enclosed cells with cinderblock benches and open toilets, to portable modular units or outdoor cages.”¹⁵⁵ If agents determine a minor is unaccompanied, he or she is classified as an unaccompanied minor (often abbreviated as UAC) and processed for immigration violations.¹⁵⁶ The unaccompanied minor may then be transferred to the ORR for additional screening and placement arrangements.¹⁵⁷ As previously discussed, unaccompanied minors from Mexico and Canada may be returned to such countries in as little as forty-eight hours without being transferred to the ORR for further screening.¹⁵⁸

An analysis of the treatment of unaccompanied minors in detention facilities reveals that current policies and practices violate basic human rights. The following are on-going issues that must be addressed to ensure the safety, well-being and dignity of unaccompanied minors entering the U.S.: (1) the use of detention facilities to hold unaccompanied minors apprehended by immigration officials; (2) the inadequate conditions in detention facilities; (3) the lack of compliance with recording systems to monitor the care provided to unaccompanied minors while in detention facilities and the length of time unaccompanied minors spend in those facilities; (4) the inconsistency in the completion of training required under the TVPRA; (5) the inadequate screening of unaccompanied minors from Mexico and Canada by immigration officials; and (6) the lack of legal representation for unaccompanied minors facing deportation.

1. The Use of Detention Centers to Hold Unaccompanied Minors Apprehended by Immigration Officials

While the HSA and the TVPRA demand unaccompanied minors to be released from detention facilities within seventy-two hours, the initial placement of unaccompanied minors in detention facilities has been increasingly criticized. For instance, the Committee on the Rights of the Child¹⁵⁹ has stressed the detention of unaccompanied minors cannot be justified solely on the basis of the child being unaccompanied. According to Article 37 of the Convention on the Rights of the Child, “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily” and the “arrest,

¹⁵³ Seghetti, *supra* note 102, at 4.

¹⁵⁴ *Id.*

¹⁵⁵ Marc R. Rosenblum, *supra* note 146, at 13.

¹⁵⁶ Seghetti, *supra* note 102, at 5.

¹⁵⁷ *Id.* at 7.

¹⁵⁸ *Id.* at 5.

¹⁵⁹ The Committee on the Rights of the Child monitors the implementation of the Convention on the Rights of the Child. See *Committee on the Rights of the Child*, UNHCR, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (last visited Feb. 1, 2018).

detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort*.”¹⁶⁰

Similarly, the Human Rights Watch has stressed that “[j]ailing immigrant children is hardly in their best interest. Cost-effective, humane, and reliable alternatives to detention are used around the world and have been found to benefit government and the community, as well as children”¹⁶¹ The U.N. has also described the detention of minors as “not only inhumane but illegal.”¹⁶² Despite the criticism of human right organizations and customary law prohibiting the detention of children, the U.S. continues to place unaccompanied minors in detention facilities.¹⁶³

2. Inadequate Conditions in Detention Facilities

The conditions in detention facilities have been the focus of many human rights organizations.¹⁶⁴ Some reports and studies conducted by federal agencies and human rights organizations suggest the conditions in detention facilities are in compliance with the *Flores* Agreement. However, various reports suggest the conditions in detention facilities are inadequate and in violation of the *Flores* Agreement.

For instance, in 2015 the GAO reported its satisfaction with the conditions and treatment of unaccompanied minors in detention facilities.¹⁶⁵ In its report, the GAO found that CBP developed policies consistent with the *Flores* Agreement after visiting fifteen detention facilities in July, September, and October of 2014.¹⁶⁶ It also noted CBP had several policy documents to provide guidance for how agents and officers should implement the *Flores* Agreement.¹⁶⁷ According to the GAO, in some instances, policy documents included more “rigorous care requirements” than the *Flores* Agreement.¹⁶⁸

Based on its observations and interviews with CBP officials at the detention centers, the GAO concluded CPB was generally implementing the terms of the *Flores* Agreement and its policies.¹⁶⁹ A toilet and a sink were

¹⁶⁰ *Convention on Rights of the Child*, *supra* note 39, at art. 37(b) (emphasis added).

¹⁶¹ *US: Halt Expansion of Immigrant Family Detention; Problems With Detaining Children Evident in New Mexico Center*, HUMAN RIGHTS WATCH (July 29, 2014), <http://www.hrw.org/news/2014/07/29/us-halt-expansion-immigrant-family-detention> (last visited Feb. 1, 2018).

¹⁶² Emily A. Benfer, Comment, *In the Best Interest of the Child? An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 *IND. INT’L & COMP. L. REV.* 729, 734 (2004).

¹⁶³ Seghetti, *supra* note 102, at 5.

¹⁶⁴ *The Flow of UACs*, *supra* note 94.

¹⁶⁵ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-521, UNACCOMPANIED CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY, <http://www.gao.gov/assets/680/671393.pdf> (last visited Feb. 1, 2018) [hereinafter 2015 GAO REPORT].

¹⁶⁶ *Id.* at 38.

¹⁶⁷ *Id.*

¹⁶⁸ For example, the *Flores* Agreement requires adequate supervision of unaccompanied minors, but CBP policy requires direct and constant supervision of unaccompanied minors. *Id.*

¹⁶⁹ *Id.* at 39–40.

readily available in holding cells behind a half wall, unaccompanied minors had access to drinking water, and food was provided to all unaccompanied minors at least every four hours.¹⁷⁰ Unaccompanied minors were also separated from unrelated adults when possible.¹⁷¹ While seven out of the fifteen detention centers did not meet the policy requirements of separating unaccompanied minors from adults due to the height of the increase in the apprehension of unaccompanied minors,¹⁷² the GAO noted those detention centers made appropriate decisions on how to segregate adults and children based on risk level.¹⁷³

However, in June 2014, the National Immigrant Justice Center, the ACLU Border Litigation Project, Americans of Immigrant Justice, Esperanza Immigrant Rights Project, and the Florence Immigrant and Refugee Rights Project filed a formal complaint against CBP on behalf of 116 unaccompanied minors between the ages of five and seventeen.¹⁷⁴ The complaint contained allegations of abuse and mistreatment of these unaccompanied minors while in CBP custody—including physical abuse, sexual assault, beatings, use of stress positions, verbal abuse, denial of food and medical care, unsanitary conditions, and custody beyond the seventy-two hour maximum.¹⁷⁵

Similarly, inspections by the Office of Inspector General¹⁷⁶ conducted in July of 2014, found isolated problems with the quantity of food provided, sanitation, and temperature of detention facilities.¹⁷⁷ Unaccompanied minors often refer to detention centers as “hieleras” (Spanish word for “freezers”) due to their cold temperature.¹⁷⁸ Other organizations reported on the lack of compliance with the *Flores* Agreement, the HSA and TVPRA.¹⁷⁹ For example, when DHS’s Office for Civil Rights and Civil Liberties¹⁸⁰ conducted an investigation at detention facilities located in south Texas, it found issues pertaining to sanitation and holding room conditions—specifically finding unsanitary conditions in restroom areas, and the lack of

¹⁷⁰ *Id.* at 40.

¹⁷¹ *Id.* at 41.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ LIRS REPORT, *supra* note 138, at 14.

¹⁷⁵ *Id.* at 13.

¹⁷⁶ The Office of Inspector General conducts and supervises independent audits, investigations, and inspections to ensure DHS is carrying out its responsibility in the most effective, efficient, and economic manner possible. See *Office of Inspector General: What We Do*, U.S. DEP’T OF HOMELAND SEC., https://www.oig.dhs.gov/index.php?option=com_content&view=article&id=94&Itemid=63 (last visited Feb. 1, 2018).

¹⁷⁷ 2015 GAO REPORT, *supra* note 165, at 42.

¹⁷⁸ LIRS REPORT, *supra* note 138, at 14.

¹⁷⁹ *Id.*

¹⁸⁰ The Office for Civil Rights and Civil Liberties supports DHS’s mission to secure the nation while ensuring individual liberty, fairness, and equality under the law. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/office-civil-rights-and-civil-liberties> (last visited Feb. 1, 2018).

bathroom tissue, drinking cups, and food in holding rooms.¹⁸¹

3. Incomplete and Unreliable Data Make it Impossible to Track Compliance with Domestic Laws

In 2008, CBP implemented a tracking system requiring its agents and officers to document care actions (such as physical checks and meals) to ensure detention centers are complying with the care requirements set forth in the *Flores Agreement*.¹⁸² But the Office Inspector General reported border patrol agents did not document the care provided to unaccompanied minors as required and recommended by CBP policy.¹⁸³ To eliminate reporting inconsistencies, in 2014, CBP fully implemented an automated system that made it easier to document the physical movements of unaccompanied minors. Nevertheless, in its 2015 report the GAO found the information provided by CBP was incomplete and unreliable because its agents did not routinely or accurately record the care provided to unaccompanied minors.¹⁸⁴ Further, the GAO found incomplete and unreliable information concerning the dates and times unaccompanied minors entered and left detention centers, making it impossible to determine whether the length and time of an unaccompanied minor in a detention facility exceeded the seventy-two hour limit.¹⁸⁵

4. Inconsistency in the Completion of Training Required Under the TVPRA

In its 2015 report, the GAO also noted the lack of adequate training of border patrol officials.¹⁸⁶ The TVPRA requires DHS to provide training to all personnel who have substantive contact with unaccompanied minors.¹⁸⁷ When GAO officials asked CBP officials for the reports of agents that completed training, many CBP officials were unable to provide accurate information.¹⁸⁸ CBP officials argued the increase in apprehension of unaccompanied minors in 2013 and 2014 led to “below-optimal training completion percentages.”¹⁸⁹ According to the GAO, however, tracking completion of the required training has been a long-standing issue.¹⁹⁰

¹⁸¹ 2015 GAO REPORT, *supra* note 165, at 42; *see* Motion to Enforce Settlement of Class Action at 42, *Flores v. Reno*, No. 85-4544 (C.D. Cal. Feb. 2, 2015).

¹⁸² 2015 GAO REPORT, *supra* note 165, at 42.

¹⁸³ *Id.*; *see also* DHS, Office of the Inspector General, CBP’s Handling of Unaccompanied Alien Children, OIG-10-117, 22, September 9, 2010, https://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf (last visited Feb. 1, 2018).

¹⁸⁴ 2015 GAO REPORT, *supra* note 165, at 43–44.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 36.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 37.

¹⁹⁰ *Id.* at 36.

5. The Inadequate Screening of Unaccompanied Minors from Contiguous Countries Under the TVPRA

The TVPRA mandates special screening of children to ensure they are not returned to trafficking situations.¹⁹¹ The table below shows the number of Canadian and Mexican unaccompanied minors apprehended by CBP from fiscal years 2012 through 2014 and repatriated or transferred to ORR.¹⁹²

	2012	2013	2014	Total
Canadian unaccompanied minors repatriated	100	100	100	300
Mexican unaccompanied minors repatriated	15,000	18,000	16,000	49,000
Canadian unaccompanied minors transferred to ORR	Less than 100	Less than 100	Less than 100	Less than 100
Mexican unaccompanied minors transferred to ORR	500	500	1,000	2,000

The data collected makes evident CBP officials routinely return unaccompanied children from Mexico at alarming rates. “[I]n essence, law enforcement personnel are ill-equipped to make determinations about which child should be detained or returned.”¹⁹³ Minors from Mexico and Canada are excluded from access to protective measures and due process procedures, and instead face fast track-return procedures.¹⁹⁴ Today, Central American children make up 95% of children in ORR custody, whereas Mexican children

¹⁹¹ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5076, <https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf> (last visited Feb. 1, 2018).

¹⁹² 2015 GAO REPORT, *supra* note 165, at 20.

¹⁹³ See *Five Fast Facts about Unaccompanied Children and the 2014 Border Crisis and Three Ways You Can Make a Difference*, NW. LAW 5 (Dec. 9, 2014), <http://www.law.northwestern.edu/legalclinic/cfjc/documents/CFJC%20Newsletter%20Article%20final.pdf> (last visited Feb. 1, 2018) [hereinafter *Five Fast Facts*]; see also LIRS REPORT, *supra* note 138, at 14.

¹⁹⁴ LIRS REPORT, *supra* note 138, at 14.

make up only 3%, and Canadian children only 2%, “a ratio that is not reflective of the protection need.”¹⁹⁵

6. The Lack of Legal Representation for Unaccompanied Minors Facing Deportation

Unaccompanied minors who arrive in the United States are placed in removal proceedings.¹⁹⁶ While the legal community has developed various approaches to alleviate the intense need for representation of unaccompanied minors, thousands of unaccompanied minors still navigate the complex immigration court system without legal representation.¹⁹⁷ Trauma, age, language barrier and the fear of being in court makes the immigration court system even more complex.¹⁹⁸ According to the Transactional Records Access Clearinghouse (TRAC), a data gathering and research organization, outcomes are better for children who have an attorney to navigate the system, whereas children appearing in immigration court without a lawyer are almost three times as likely to receive a removal order.¹⁹⁹ Similar to TRAC’s data, a 2014 report by the Human Rights Watch found that thousands of unaccompanied minors who were not represented by a lawyer were deported after only one hearing.²⁰⁰

Advocates have pushed for the enactment of bills, such as the Fair Day in Court for Kids Act of 2016, to ensure all minors are guaranteed legal representation stating, “[i]n America, no child should be forced to face a courtroom alone, especially when the outcome may be a matter of life or death.”²⁰¹ As of today, the law continues to deny unaccompanied minors the opportunity to make their case before a judge with legal representation, hurting their chances of receiving asylum.²⁰²

¹⁹⁵ *Id.*; *Facts and Data*, *supra* note 137.

¹⁹⁶ Seghetti, *supra* note 102, at 10.

¹⁹⁷ Casey Tolan, *This Senate Bill Would Provide Legal Help to Immigrant Minors Facing Deportation*, FUSION (Feb. 12, 2016, 12:44 PM), <http://fusion.net/story/268213/attorneys-central-american-unaccompanied-minors/> (last visited Feb. 1, 2018).

¹⁹⁸ *Id.* (explaining “a six-year-old girl from El Salvador whose feet did not touch the floor as she sat before her judge[,] . . . did not speak a word in English and did not understand the complicated legal proceedings that would determine whether she would be deported or not”).

¹⁹⁹ See *Five Fast Facts*, *supra* note 193, at 4; see also Angilee Shah, *Without lawyers, 90% of children crossing into the US alone seeking safety could be sent back*, PRI (Dec. 16, 2014), <https://www.pri.org/stories/2014-10-15/children-crossing-border-alone-look-chance-escape-violence-and-lawyers> (last visited Feb. 1, 2018) (explaining “90 percent of the children that appear in court without representation are ordered deported or granted voluntary departure”).

²⁰⁰ *US: Children Face Deportation Without Lawyers*, HUM. RTS. WATCH (Mar. 14, 2016, 8:00 AM), <https://www.hrw.org/news/2016/03/14/us-children-face-deportation-without-lawyers> (last visited Feb. 1, 2018).

²⁰¹ Gabriel Vasquez, *Fair Day in Court Bill Would Drastically Improve Outcomes for Refugee Children*, FIRST FOCUS (Feb. 11, 2016), <https://campaignforchildren.org/news/press-release/fair-day-in-court-bill-would-dramatically-improve-outcomes-for-refugee-children/> (last visited Feb. 1, 2018).

²⁰² *A Fair Day in Court for Kids*, ACTION NETWORK, <https://actionnetwork.org/letters/a-fair-day-in-court-for-kids> (last visited Feb. 1, 2018).

C. *Recommendations:*

“Refugees and migrants are not to be seen as a burden; they offer great potential . . . [w]e must place the human rights of all refugees and migrants at the heart of our commitments.”²⁰³

Undeniably, the protection and well-being of unaccompanied minors is paramount in the eyes of international law.²⁰⁴ Domestic laws governing the treatment of unaccompanied minors in the U.S. also ensure their well-being and safety. However, changes in domestic laws and its practices are necessary in order to align with international human rights law. This section lays out six recommendations to ensure the rights of unaccompanied minors under international, customary, and U.S. domestic laws are upheld.

1. The U.S. government should ratify the Convention on the Rights of the Child.

The Convention on the Rights of the Child is of utmost importance as it establishes the best interest of minors as the highest priority and primary consideration.²⁰⁵ This Convention is the most widely and rapidly ratified human rights treaty in history.²⁰⁶ The U.S. should ratify the Convention to “uphold the rights of [unaccompanied minors and] live up to its reputation as a leader in human rights and a nation that protects children.”²⁰⁷

2. The *Flores* Agreement should be expanded and apply to all minors, whether unaccompanied or not.

The government believes the *Flores* Agreement applies to unaccompanied minors but not to children traveling with their parents or guardians, often referred to as accompanied minors.²⁰⁸ According to the government, family detention is necessary to deter migration.²⁰⁹ But international standards provide that the detention of children and any asylum seeker should be used as last resort. Mandatory or indefinite detention of

²⁰³ Ban Ki-moon, United Nations Secretary-General, Address to the Summit (Sept. 19, 2016). See *UN Summit Commits to Protect Refugee, Migrant Rights*, UNHCR (Sept. 19, 2016), <http://www.unhcr.org/en-us/news/latest/2016/9/57dfal734/un-summit-commits-protect-refugee-migrant-rights.html> (last visited Feb. 1, 2018).

²⁰⁴ *Migration and International Human Rights Law: A Practitioners Guide*, INTUIDCOMMID OF JURISTS 44 (2014), <http://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf> (last visited Feb. 1, 2018).

²⁰⁵ See generally *Convention on the Rights of the Child*, *supra* note 39.

²⁰⁶ See Bredfelt, *supra* note 48; see also *United States Ratification of International Human Rights Treaties*, *supra* note 100.

²⁰⁷ See *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children*, WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN 3 (2002), <http://www.refworld.org/pdfid/49ae53f32.pdf> (last visited Feb. 1, 2018).

²⁰⁸ *Family Detention & the Flores Settlement Agreement*, LIRS 1 (Aug. 12, 2015), http://lirs.org/wp-content/uploads/2015/08/LIRSWRC_FloresSettlementandFamilyDetention_150812.pdf (last visited Feb. 1, 2018).

²⁰⁹ *Id.*

children should not be used as a tool to deter migration.²¹⁰ Children fleeing persecution—whether unaccompanied or not—should not be punished and placed in detention centers for an indefinite time; instead, all migrant children should be transferred to the ORR for proper screening and released to family members or caring adults whenever possible.

3.. The U.S should take steps to reduce (and eventually eliminate) the detention of unaccompanied minors fleeing persecution.

International documents concerning minors seeking asylum reject the use of detention. Studies by many organizations, such as the U.S. Commission on International Religious Freedom, New York University’s Bellevue Program for Survivors and Torture, and Physicians for Human Rights, have conducted studies which demonstrate “detention poses a serious threat to the psychological health of detained [children] and further aggravates isolation, depression, and mental health problems associated with past trauma.”²¹¹ Even if the detention of unaccompanied minors is “brief,” alternatives to the use of detention should be explored, or the seventy-two hour limit to transfer unaccompanied minors to the ORR should be reduced.

4. Conditions in detention centers need improvement.

While the GAO reported CBP is complying with the *Flores* Agreement, studies by human rights organizations show the contrary.²¹² CBP and OFO should follow the Flores Agreement to ensure the well-being, safety, and dignity of unaccompanied minors.

5. Compliance with recording systems intended to track the care provided in detention facilities and the time unaccompanied minors spend in detention facilities is necessary.

Reports have found CBP failed to collect complete and accurate data documenting the care provided to unaccompanied minors while in detention centers and the length of time unaccompanied minors spent in those detention

²¹⁰ Many children traveling with their parents or guardian spend several months in family detention facilities. For instance, when Beatriz fled to the U.S. from Honduras with her 11-year-old son after gangs threatened to forcibly recruit him, they were locked up together in a U.S. detention center for migrant families for over ten months. Beatriz told Human Rights Watch that her son began to spend all day sleeping. See Michael Garcia Bochenek, *Children Behind Bars*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/children-behind-bars> (last visited Feb. 1, 2018); see also *Family Detention 101*, DETENTION WATCH NETWORK 2 (July 15, 2014), <http://grassrootsleadership.org/sites/default/files/uploads/Family%20Detention%20Backgrounder.pdf> (last visited Feb. 1, 2018) (explaining “children as young as eight months wore prison uniforms and jumpsuits, lived and slept in locked prison cells with open-air toilets, families were subject to highly restricted movement and threatened with family separation if children cried or played too loudly. Medical treatment was totally inadequate, infants lost weight due to poor nutrition, and children received only one hour of education a day”) [hereinafter *Detention 101*].

²¹¹ *Detention 101*, *supra* note 210, at 1.

²¹² See *supra* Section II.C.2.

centers.²¹³ Non-compliance with recording systems set in place should be addressed to ensure all unaccompanied minors receive proper care and are released from detention facilities within seventy-two hours. In addition, DHS should provide quarterly public reports to Congress documenting the number of unaccompanied minors apprehended and the length of time they spend in detention facilities.²¹⁴

6. Unaccompanied minors from contiguous countries should not be screened by immigration officials.

The United States' current practice of screening Mexican and Canadian children at the border does not afford children from those countries adequate protection. For this reason, unaccompanied minors from contiguous countries should be screened by the ORR. The number of Mexican unaccompanied minors repatriated in 2012 through 2014 is alarming.²¹⁵ International law mandates unaccompanied minors seeking refuge in the U.S. should not be turned away based on their nationality or residency. Accordingly, provisions of the TVPRA should be amended.²¹⁶

7. Congress should pass the Fair Day in Court for Kids Act to give unaccompanied children the right to legal counsel.

The failure to appoint legal representation to unaccompanied minors facing deportation violates their basic rights under international law.²¹⁷ The Universal Declaration of Human Rights states that *everyone* has the right to leave their country and request asylum.²¹⁸ Unaccompanied minors cannot meaningfully exercise their right to seek asylum when not afforded legal representation.²¹⁹ Thus, Congress should pass the Fair Day in Court for Kids Act to ensure all unaccompanied minors have legal representation and are not returned to a place of danger and despair.

D. Conclusion

Minors fleeing persecution are a highly vulnerable and sympathetic population deserving of protection. They enter the U.S. after enduring extremely dangerous journeys and escaping dire circumstances, such as

²¹³ See *supra* Section II.C.3–4.

²¹⁴ Reports documenting the number of children apprehended and the length of time they spent in detention facilities are not only limited, but also inaccurate.

²¹⁵ See *supra* Section II.C.5.

²¹⁶ See *Five Fast Facts*, *supra* note 193, at 5 (explaining “[y]ou can help by calling your congressional representatives and senators to let them know that sending children home without due process is not the answer to this humanitarian issue”).

²¹⁷ *US: Children Face Deportation Without Lawyers*, HUM. RTS. WATCH (Mar. 14, 2016 8:00 AM), <https://www.hrw.org/news/2016/03/14/us-children-face-deportation-without-lawyers> (last visited Feb. 1, 2018).

²¹⁸ Universal Declaration of Human Rights, *supra* note 9, at art. 14.

²¹⁹ Shah, *supra* note 199.

relentless violence and poverty. The U.S. should not ignore the unfair and inadequate treatment unaccompanied minors face. After all, what makes the U.S. a great nation is when we open our doors and hearts to children in need.²²⁰

IV. MEXICO'S OBLIGATIONS, PRACTICES AND RECOMMENDATIONS

Unaccompanied minors fleeing dangerous situations in Northern Triangle states—Guatemala, Honduras, and El Salvador face a harsh reality at Mexico's southern border. The possibility of reaching safety in Mexico is close to none—0.005% to be exact.²²¹ Unaccompanied minors who leave their state of origin, a place full of violence and poverty, seeking refuge, seeking a helping hand, are forced to seek refuge from a country that is unwilling to extend a helping hand, Mexico.

Mexico's failed practices did not come into the international community's focus until there was an apparent and drastic decrease of unaccompanied minors detained at the United States-Mexico border.²²² At that time, statistics showed there was growth in the number of unaccompanied minors fleeing Northern Triangle states; yet, the number of unaccompanied minors being detained at the United States-Mexico border was far less. Thus, the question arose—what happened to the unaccompanied minors? It was only then that the international community shifted their focus to Mexico's southern border.²²³ Following this policy change, an examination into Mexico's practices revealed the chilling reality unaccompanied minors face at Mexico's southern border—the lack of aid, immediate refolement, and repugnant practices.²²⁴

This portion of the Article, under Section A, will first examine Mexico's legal obligations to aid unaccompanied minors under international and domestic law. Second, under Section B, this Article will analyze

²²⁰ At a news conference, Massachusetts Governor Deval Patrick remarked, “[w]e have rescued Irish children from famine, Russian and Ukrainian children from religious persecution, Cambodian children from genocide, Haitian children from earthquakes, Sudanese children from civil war, and New Orleans children from Hurricane Katrina. Once, in 1939, we turned our backs on Jewish children fleeing Nazis, and it remains a blight on our national reputation. The point is that this good Nation is great when we open our doors and our hearts to needy children, and diminished when we don't.” See *Patrick Delivers Forceful Speech on Migrant Children*, BOSTON GLOBE, (July 18, 2014, 5:32–6:15), <https://www.bostonglobe.com/metro/2014/07/18/patrick-speak-friday-migrant-housing/KNbWL2DTtAO2nTvXGP9ixL/story.html> (last visited Feb. 1, 2018).

²²¹ See *infra* Section III.B.5; see also Laura Tilman & Cecilia Sanchez, *Human Rights Watch Accuses Mexico of Failing To Care for Young Central American Migrants*, L.A. TIMES (Mar. 31, 2016, 5:44 PM), <http://www.latimes.com/world/mexico-americas/la-fg-mexico-child-migrants-20160331-story.html> (last visited Feb. 1, 2018).

²²² See generally Dan Restrepo & Ann Garcia, *The Surge of Unaccompanied Children from Central America*, CTR. FOR AM. PROG. (Jul. 24, 2014), <https://www.americanprogress.org/issues/immigration/reports/2014/07/24/94396/the-surge-of-unaccompanied-children-from-central-america-root-causes-and-policy-solutions/> (last visited Feb. 1, 2018).

²²³ See *infra* Section III.C.

²²⁴ See *infra* Section III.B.6.

Mexico's current practices, in specific what aid is *actually* being provided to unaccompanied minors. Finally, under Section C, this portion of the Article will discuss the changes Mexico needs to make in order to fulfill their current broken promises to unaccompanied minors.

A. *Mexico's Legal Obligations to Aid Unaccompanied Minors Crossing Its Southern Border*

Mexico's purported support for human rights and upholding international law are evident on paper.²²⁵ Through its legislation and initiatives, Mexico has a mandate to follow international law and cooperate with the international community to ensure the betterment of human life—including the lives of unaccompanied minors.²²⁶

1. International Law – Conventions

Under international law, Mexico is obligated to protect unaccompanied minors and provide them refuge. Mexico's purported commitment to protect unaccompanied minors is evident on paper, through various international documents affording unaccompanied minors the help they so desperately need.

Through the numerous conventions Mexico has ratified and implemented, Mexico has agreed to hold itself accountable before the international community.²²⁷ In addition to the Convention Against Torture, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Mexico has ratified the 1951 Refugee Convention and the American Convention on Human Rights.²²⁸

a. The 1951 Refugee Convention

In April 2000, Mexico ratified the 1951 Refugee Convention ("Refugee Convention").²²⁹ The Refugee Convention sought to offer victims, referred to as "refugees", a degree of international legal protection and assistance to help them begin a new life in the state of "refuge."²³⁰ In addition, the Refugee Convention provides refugees legal protection to remain in the state of refuge through its principle of non-refoulement. The principle of

²²⁵ See *Ley de Cooperación internacional para el Desarrollo (LCID)*, 2011 (on file with author).

²²⁶ *Id.*; *Ley Para La Protección De Los Derechos De Niñas, Niños y Adolescentes*; AGENCIA MEXICANA DE COOPERACIÓN INTERNACIONAL PARA EL DESARROLLO, *¿Qué es la cooperación internacional para el desarrollo?*, GOB.MX (July 15, 2016), <https://www.gob.mx/amexcid/acciones-y-programas/que-es-la-cooperacion-internacional-para-el-desarrollo-29339?idiom=es> (on file with author).

²²⁷ See Section III.A.1–3.

²²⁸ *Id.*

²²⁹ 1951 Refugee Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/Mexico.pdf> (last visited Feb. 1, 2018) [hereinafter *Refugee Convention*].

²³⁰ *Id.*

“non-refoulement” forbids states from removing anyone “to a place where she or he would have a well-founded fear of persecution or would face a risk of torture or other cruel, inhuman or degrading treatment or punishment.”²³¹ Thus, under the Refugee Convention, Mexico has an obligation not only to provide refuge to unaccompanied minors who present a well-founded fear of persecution, but also to not remove the unaccompanied minors to a place where the minors have a well-founded of persecution or where their wellbeing would be at risk.²³²

b. American Convention on Human Rights

The American Convention on Human Rights provides that under no circumstance, “may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”²³³ Mexico ratified the American Convention on March 2, 1981.²³⁴ Similar to the conventions aforementioned, under the American Convention Mexico is prohibited from removing individuals to a country where his life might be in danger.²³⁵ Thus, upon “substantial ground” of danger in a country where the unaccompanied minor can be removed to, Mexico is prohibited from conducting such removal.

2. Customary Law – Cartagena Declaration

Mexico’s support of customary law is evident through its integration of customary law into its domestic laws.²³⁶ Mexico modeled numerous constitutional provisions and laws after internationally accepted principles and declarations.²³⁷ Mexico’s support for customary law and principles are primarily derived from the Cartagena Declaration.

Under the Cartagena Declaration, States must abide by the non-refoulement principle established in the aforementioned conventions and customary law.²³⁸ Mexico was a signatory at the 1984 Cartagena Declaration on Human Rights.²³⁹ Between 1981 and 1983, approximately 200,000

²³¹ *Closed Doors*, *supra* note 32, at 123.

²³² *Id.*

²³³ American Convention on Human Rights, art. 22(8), Nov. 21, 1969, 1144 U.N.T.S. 143.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Derecho Consuetudinario Indigena y Organizacion Social, INSTITUTO DE INVESTIGACIONES ECONOMICAS Y SOCIALES, http://biblio3.url.edu.gt/IDIES/nuevo_enfo/7.pdf (on file with author).

²³⁷ See *supra* note 52 (on file with author).

²³⁸ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, concl. 5, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1984-cartagena-declaration-on-refugees.html> (last visited Feb. 1, 2018) [hereinafter Cartagena Declaration].

²³⁹ *Id.* at 5.

Guatemalans surged to Mexico's southern border in search of protection.²⁴⁰ Mexico was simply not prepared to assist the large flow of individuals arriving at its border. Mexico sought aid from civil society organizations and the international community to help "ensure the adoption of a humanitarian policy of protection and assistance, a position that was confirmed and supported by the Cartagena Declaration of 1984, which Mexico strongly supported."²⁴¹ Civil organizations and the international community both contributed to refugee protection efforts and "emergency assistance — including health services, children care and education, among others — but later promoted development projects that promoted refugee self-sufficiency."²⁴²

The Cartagena Declaration is of great significance for those seeking refuge from bordering states as the Declaration "expands the definition of refugees entitled to protection 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 the public order.'"²⁴³ Thus, the Cartagena Declaration provides protection to those who might not have established a "well-founded fear of persecution."²⁴⁴

3. Enacted Domestic Law

Mexico's domestic law and asylum process modeled after international conventions and declarations provide unaccompanied minors with additional safeguards under Mexican law.²⁴⁵ The following enacted laws and asylum processes represent Mexico's "written" commitment to unaccompanied minors.

In addition to its numerous legal obligations under international law, Mexico has sought to implement its international legal obligations through its Constitution and protective legislation, including Mexico's own 2011 Amendment to its Constitution, Immigration Act of 2011, Law on Refugees, Complementary Protection, and Political Asylum, and the Refugee Law, and the General Law on the Rights of Boys, Girls, and Adolescents.²⁴⁶

²⁴⁰ Manuel A. Castillo, *Mexico: Caught Between the United States and Central America*, MIGRATION POL'Y INST. (2006), <http://www.migrationpolicy.org/article/mexico-caught-between-united-states-and-central-america> (last visited Feb. 1, 2018).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 40; *see generally* Cartagena Declaration, *supra* note 238.

²⁴⁴ *Id.*

²⁴⁵ *See infra* Section III.A.3.a.

²⁴⁶ *Closed Doors*, *supra* note 32, at 18.

a. Mexico Constitution

In 2011, Mexico changed eleven articles of the Mexican Constitution, which are known as the 2011 Human Rights Amendments.²⁴⁷ “The main theme of the modification focused on the enhancement of human rights protection.”²⁴⁸ Specifically, Article 1 now reads, “[i]n [Mexico], all persons shall enjoy the human rights recognized in this Constitution and in international treaties to which [Mexico] is a party, as well as the guarantees for their protection. . . .”²⁴⁹ Mexico’s amendment to Article 1 is a testament of Mexico’s promise not only to uphold its international obligations, but also to provide all persons with protections set forth in its Constitution. In addition, Article 4 of Mexico’s Constitution provides that the child’s best interest shall be reflected in all decisions and actions made by the State and further establishes that “[c]hildren have the right to the satisfaction of their needs for food, health, education and healthy recreation for their integral development.”²⁵⁰

b. Immigration Law of 2011

Mexico’s Immigration Law, as amended in 2011, recognizes migrants’ special needs, in particular children. Article 11 of Mexico’s Immigration Act of 2011, provides that in all proceedings applicable to migrant children, “their age shall be taken into account, and their best interests shall be prioritized.”²⁵¹ Under Article 52, unaccompanied migrant children and asylum applicants whose applications are still pending are eligible for humanitarian visas.²⁵²

c. Law on Refugees, Complementary Protection, and Political Asylum

Article 6 of Mexico’s Law on Refugees, Complementary Protection, and Political Asylum provides that under no circumstance must a person seeking refuge (asylum) be denied entrance at Mexico’s border, nor should they be returned to a country where their life is in danger.²⁵³ Article 6 further

²⁴⁷ Víctor Manuel Colli Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, WASH. COLL. OF LAW 7 (2012), <https://www.wcl.american.edu/hrbrief/20/1ek.pdf> (last visited Feb. 1, 2018).

²⁴⁸ *Id.*

²⁴⁹ See *Constitución Política de los Estados Unidos Mexicanos* [CONSTITUTION] Feb. 5, 1917, tit. I, ch. I, art. I (Mex.);

²⁵⁰ *Id.* at art. 4.

²⁵¹ Immigration Law, *supra* note 51, at art. 11.

²⁵² *Id.* at art. 52.

²⁵³ Ley sobre Refugiados, Protección Complementaria y Asilo Político, [Law on Refugees, Complementary Protection, and Political Asylum], art. 6, DIARIO OFICIAL DE LA FEDERACIÓN (Oct. 30, 2014), http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP_301014.pdf (last visited Feb. 1, 2018); see Nicole Dicker & Joanna Mansfield, *Filling the protection gap: current trends in complementary protection in Canada, Mexico and Australia*, UNHCR (May 2012), <http://www.unhcr.org/4fc872719.pdf> (last visited Feb. 1, 2018).

provides that a person who illegally enters Mexico will not be removed until their refugee status is determined, even if the individual is in removal proceedings.²⁵⁴ In addition, Article 9 provides that in all determinations, the best interest of the child will prevail when deciding whether to grant a child refugee status and for any other decision made.²⁵⁵ Finally, Article 20 reiterates that in all determinations a child's wellbeing and best interest will be superior in all circumstances.²⁵⁶

d. General Law on the Rights of Boys, Girls, and Adolescents

Mexico's General Law on the Rights of Boys, Girls, and Adolescents aspires to provide unaccompanied minors additional safeguards. Article 1 provides that this source of law seeks to "guarantee the full exercise, respect, protection and promotion of the human rights of children and adolescents in accordance with [Mexico's Constitution] and the international treaties to which the Mexican State is a party."²⁵⁷

Article 92 guarantees that in migratory proceedings involving children, the children will be granted the right to: (1) be notified of the existence of a legal remedy or process; (2) be informed about their rights; (3) have migration processes carried out by a specialized official; (4) be heard and to participate in the different procedural stages; (5) be assisted by a free translator and/or interpreter; (6) communicate and receive consular assistance; (7) be assisted by a lawyer and to communicate freely with him; (8) substitute representation if necessary; (9) have the decision adopted assess the best interests of the child; (10) appeal the decision before a judicial authority; and (11) know the duration of the procedure to be carried out.²⁵⁸ Article 97 further establishes that any decision to return a minor or adolescent to their country of origin can only be based on the child's superior interest.²⁵⁹

4. Overview of Mexico's Immigration and Asylum Process

Under international and domestic law, Mexico has an obligation to not only provide refuge to unaccompanied minors who present a well-founded fear of persecution, but also not to remove them to a place where the minors have a well-founded fear of persecution or where their wellbeing would be at risk—the non-refoulement principle.²⁶⁰ Thus, unaccompanied minors have

²⁵⁴ Law on Refugees, Complementary Protection, and Political Asylum, *supra* note 253, at art. 6 (on file with author).

²⁵⁵ *Id.* at art. 9.

²⁵⁶ *Id.* at art. 20.

²⁵⁷ General de los Derechos de Niñas, Niños y Adolescentes [General Law on the Rights of Girls, Boys and Adolescents] tit. I, art. I, sec. I, DIARIO OFICIAL DE LA FEDERACIÓN, 4 Dec. 2014 (Mex.); *see supra* Section III.A.1. for international treaties and conventions to which the Mexican State is a party.

²⁵⁸ General de los Derechos de Niñas, Niños y Adolescentes [General Law on the Rights of Girls, Boys and Adolescents] art. 92, DIARIO OFICIAL DE LA FEDERACIÓN, 4 Dec. 2014 (Mex.).

²⁵⁹ *Id.* at art. 97.

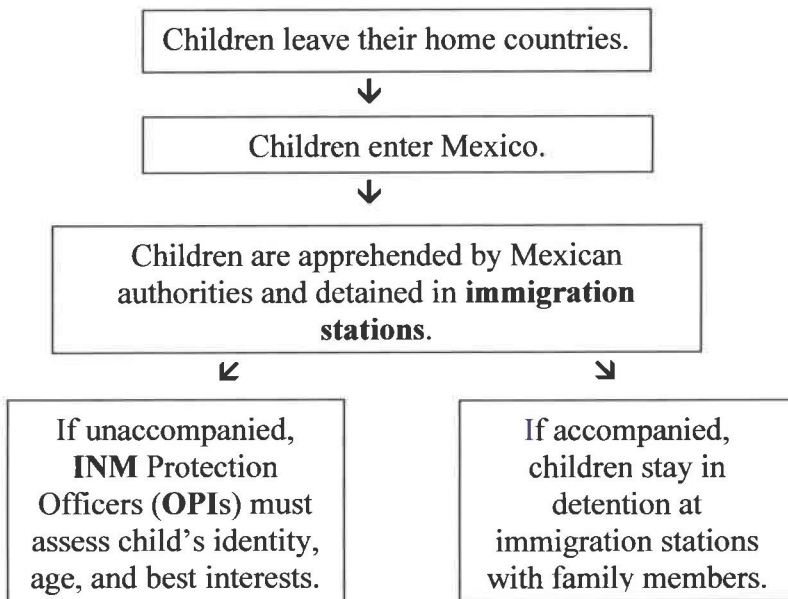
²⁶⁰ *See supra* Section I.B.1.

the right to seek and enjoy asylum in Mexico and must not be removed until their status is resolved, through means discussed below.

Under Mexican law, when unaccompanied children are apprehended by Mexican authorities and subsequently detained in immigration stations, INM Protection Officers (“OPIs”) must assess the children’s best interest.²⁶¹ The OPIs must interview all unaccompanied minors “under its custody, screening for international protection needs.”²⁶² OPIs must inform apprehended unaccompanied minors of their right to apply for asylum.²⁶³ OPIs must then immediately refer unaccompanied minors to Mexico’s National System for the Integral Development of the Family (DIF) shelters. While at the DIF shelters or while detained unaccompanied minors must file an asylum application within thirty days of entering Mexican territory. The application is then referred to the Mexican Commission of Refugee Aid (COMAR), which must determine whether to grant asylum to the unaccompanied minor.

The following table and diagram, modeled after a diagram included in Georgetown Law Human Rights Institute Fact-Finding Project, depict the process unaccompanied minors undertake when seeking asylum and the respective protections provided under Mexican law.²⁶⁴

Diagram 1: The Mexican Immigration and Asylum Process²⁶⁵



²⁶¹ See *infra* Diagram 1.

²⁶² See *infra* Chart 1.

²⁶³ Immigration Law, *supra* note 51, at art. 109

2.

²⁶⁴ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 23.

²⁶⁵ See *id.*

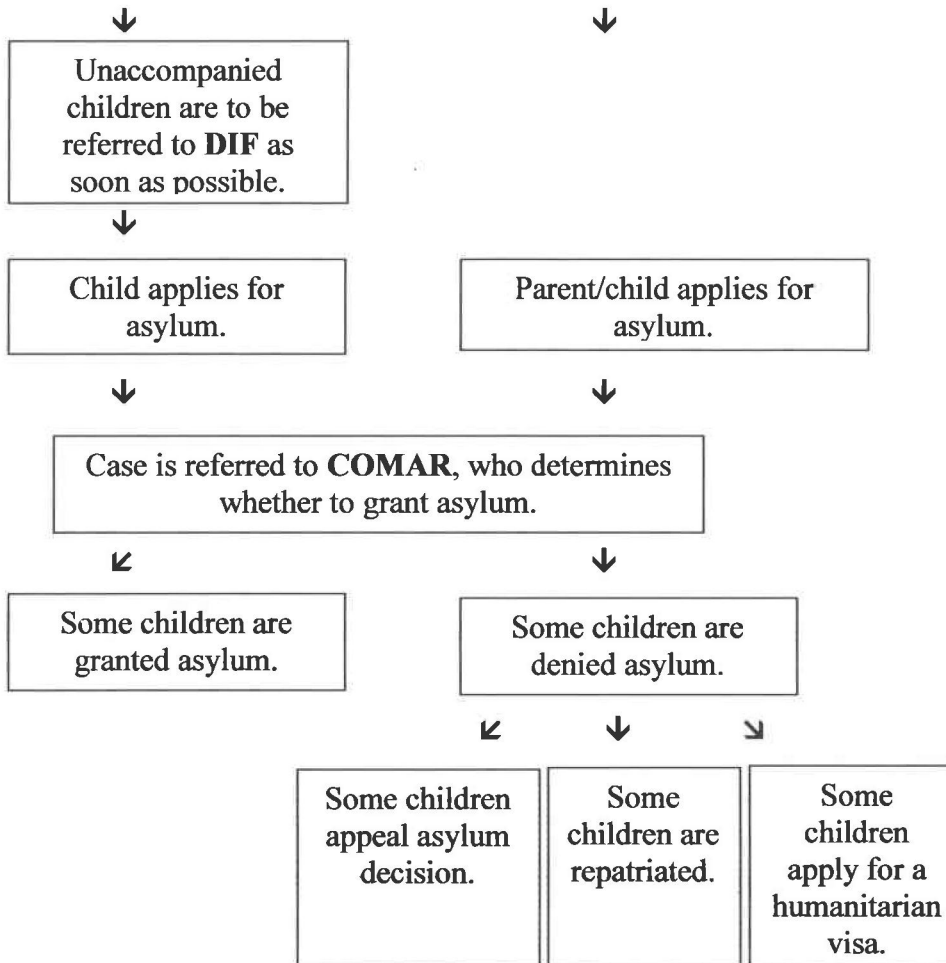


Chart 1: Reference Chart²⁶⁶

²⁶⁶ *Id.*

INM	<p>The National Institute of Migration (INM) is an independent agency under the Ministry of Interior (SEGOB). INM is in charge of controlling and supervising migration in the country. INM administers all immigration proceedings, namely: border and domestic control, admission, and enforcement, apprehension, detention, deportation, and repatriation of migrants.</p>
Immigration Stations	<p>The INM operates several immigration stations throughout Mexico. The stations' purpose is to "temporarily lodge" migrants in immigration stations until their status is determined.</p>
OPI	<p>Child Protection Officers (OPIs) are INM agents tasked with protecting the rights of detained children. According to the Immigration Regulations, INM is charged with conducting a "best interests" interview with all unaccompanied child migrants under its custody, screening for international protection needs, protecting children's rights, and repatriation.</p>
DIF	<p>Mexico's National System for the Integral Development of the Family (DIF) is in charge of safeguarding the well-being of children and families. DIF operates a network of facilities that are used for processing and housing migrants apprehended in Mexico. Under the law, all unaccompanied migrant children who are detained by INM are to be immediately referred to DIF shelters, where they are to be "provided with proper care until such time as their immigration status is determined." However, the Immigration Regulations allow that children be held in immigration stations instead, when DIF accommodations are unavailable.</p>
COMAR	<p>The Mexican Commission of Refugee Aid (COMAR) is an independent agency under the Ministry of Interior (SEGOB) and is in charge of adjudicating asylum and complementary protection proceedings. Once the asylum application has been submitted, COMAR conducts an eligibility interview and must issue a decision within forty-five business days. Asylum applications must be filed within thirty business days of entering Mexican territory. A non-detained asylum seeker may either submit an application to COMAR or INM. A detained asylum seeker may submit an application to an INM agent at an immigration station, who must submit the application to COMAR within seventy-two hours.</p>

**International
Protection
Available to
Children in
Mexico**

Asylum: Under Mexican law refugees are defined as persons “who have a reasonable fear of being persecuted upon return to their country based on race, religion, political opinion, nationality, membership in a particular social group, gender, or generalized violence.”

Complementary Protection: Protection under the Convention Against Torture (CAT).

Humanitarian Visa: Protection available to victims of crimes committed in Mexico, unaccompanied minors, and asylum-seekers.

B. Mexico’s Current Practice: Does Mexico’s Practice Comport with its Legal Obligations?

By agreeing to undertake the obligations of the numerous conventions and laws Mexico has ratified, acceded to or implemented, Mexico has committed itself to protect and ensure unaccompanied minors’ rights and has further agreed to hold itself accountable for this commitment before the international community.²⁶⁷ On paper, Mexico appears to provide unaccompanied minors the protection they desperately need; however, a look into Mexico’s practices reveals Mexico is not comporting with its domestic and international obligations.²⁶⁸

On July 8, 2014, Mexican President Enrique Peña Nieto announced the implementation of the Southern Border Program (Programa Frontera Sur).²⁶⁹ President Peña Nieto’s announcement was seemingly a direct response to the United States’ request for help to decrease the influx of unaccompanied minors arriving at the U.S. border.²⁷⁰ Helping decrease the influx of minors arriving at the U.S. border meant increasing detention measures at Mexico’s southern border, as most of the unaccompanied minors detained at the U.S. border came from Northern Triangle States.²⁷¹

From the perspective of many U.S. and Mexican officials, the Southern Border Program was a great “success” for the Mexican government, as “Mexico detained 73 percent more migrants in the first year” of

²⁶⁷ See *supra* Section I.A.

²⁶⁸ See generally *Closed Doors*, *supra* note 32. See Ximena Suárez, José Knippen, and Maureen Meyer, *A Trail of Impunity: Thousands of Migrants in Transit Face Abuses amid Mexico’s Crackdown*, WOLA 2 (Sep. 2016), <https://www.wola.org/wp-content/uploads/2016/09/A-Trail-of-Impunity-2016.pdf> (last visited Feb. 1, 2018) [hereinafter *A Trail of Impunity*].

²⁶⁹ *Closed Doors*, *supra* note 32, at 43.

²⁷⁰ *Id.*; see Clay Boggs, *Mexico’s Southern Border Plan: More Deportations and Widespread Human Rights Violations*, WOLA (Mar. 19, 2015), <https://www.wola.org/analysis/mexicos-southern-border-plan-more-deportations-and-widespread-human-rights-violations/> (last visited Feb. 1, 2018).

²⁷¹ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33 at 13.

implementation.²⁷² Between July 2014 and June 2015 about 168,000 migrants were detained in Mexico, compared to 97,000 during the previous 12-month period.²⁷³ Further, “INM statistics reveal[ed] that 18,169 children were deported in 2014, more than double the 2013 total of 8,350.”²⁷⁴ The number of children detained in immigration stations also increased by an outstanding 230% in 2014.²⁷⁵ On January 6, 2015, former President Barack Obama commended Mexico on its efforts in reducing the influx of unaccompanied minors. In 2015, the United States apprehended 22% fewer unaccompanied minors than in 2014.²⁷⁶ In correlation, Mexican authorities apprehended 70% more accompanied minors in 2015 than 2014.²⁷⁷

To human rights activists and communities across the world, the Southern Border Program was a “great failure of Mexican society and the Mexican state in its responsibility to [their] Central American brothers” and particularly to children fleeing persecution.²⁷⁸ In 2015, Mexico deported approximately 150,000 individuals, adults and minors, from the Northern Triangle States—a 44% increase from 2014.²⁷⁹ Individuals from the Northern Triangle States represented 97% of Mexico’s 2015 deportations.²⁸⁰ Between October 2014 and February 2015, Mexico deported 3,819 unaccompanied minors from Central America, “a 56% increase over the same period a year earlier.”²⁸¹

The large number of deportations over a short period of time suggested limited humanitarian screening of individuals arriving at Mexico’s southern border.²⁸² Accordingly, the international human rights advocates’ focus shifted to Mexico’s practices; a review of these practices revealed Mexico violated international and domestic law. On its face, the review exposes major flaws in Mexico’s practices for managing unaccompanied minors who enter through the southern border. Specifically, Mexico’s practices have the following six major flaws: (1) failure to inform unaccompanied minors of their right to seek refuge; (2) failure to screen

²⁷² *Migrant detentions in Mexico up 73 percent since 2014*, CBS NEWS (Nov. 18, 2015, 5:30 PM), <http://www.cbsnews.com/news/migrant-detentions-in-mexico-up-73-percent-since-2014-southern-border-program-launched/> (last visited Feb. 1, 2018); see *A Trail of Impunity*, *supra* note 268, at 3.

²⁷³ *Id.*

²⁷⁴ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 18.

²⁷⁵ Nina Lakhani, *Mexico deport record numbers of women and children in US-driven effort*, THE GUARDIAN (Feb. 4, 2015, 7:00 PM), <https://www.theguardian.com/world/2015/feb/04/mexico-deports-record-numbers-women-children-central-america> (last visited Feb. 1, 2018).

²⁷⁶ *Closed Doors*, *supra* note 32, at 45.

²⁷⁷ *Id.*

²⁷⁸ *Migrant Detentions in Mexico up 73 Percent Since 2014*, *supra* note 272.

²⁷⁹ Natalia Gomez Quintero, *Mexico deporta 150 mil inmigrantes en 2015*, EL UNIVERSAL (Dec. 2, 2016, 5:40 PM), <http://www.eluniversal.com.mx/articulo/nacion/seguridad/2016/02/12/mexico-deporta-150-mil-inmigrantes-en-2015> (last visited Feb. 1, 2018).

²⁸⁰ *Id.*

²⁸¹ Ana Gonzalez-Barrera & Jens Manuel Krogstad, *With help from Mexico, number of child migrants crossing U.S. border falls*, PEW RES. CTR. (Apr. 28, 2015), <http://www.pewresearch.org/fact-tank/2015/04/28/child-migrants-border/> (last visited Feb. 1, 2018).

²⁸² Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 10.

unaccompanied minors; (3) absence of legal counsel for unaccompanied minors; (4) the immediate and prolonged detention of unaccompanied minors in immigration stations; (5) lack of asylum process in practice; and (6) mass deportations.²⁸³

1. Failure to Inform of Right to Seek Refuge

The Human Rights Watch's report *Closed Doors* and Georgetown's report both revealed unaccompanied minors entering Mexico's southern border are not informed of their rights to seek refuge or international protection.²⁸⁴ Mexico's General Law on the Rights of Girls, Boys, and Adolescents mandates immigration officials to inform unaccompanied minor of their right to seek international protection.²⁸⁵

Under Mexican law, upon detention, if minors are unaccompanied, INM Protection Officers must assess the child's identity, age, and best interests, and inform minors of their rights to seek refuge.²⁸⁶ However, *Closed Doors* revealed that two-thirds of unaccompanied minors were not advised of their rights. Only one out of four minors who were advised of their rights reported that they had been notified in a way they understood.²⁸⁷ Various studies revealed the same result—only a small percentage of unaccompanied minors were advised of their rights.²⁸⁸ In addition, none of the unaccompanied minors interviewed by the Human Rights Watch and Georgetown Law had actually met with an OPI to determine their best interests, as mandated by Mexican law.

2. No Screening for International Protection and No Best Interests Determination

OPIs are tasked with conducting a best interest assessment and screen of unaccompanied minors for protection needs.²⁸⁹ However, as discussed in the previous section, most minors had in fact never spoken to an OPI, meaning an assessment and screening were never conducted.²⁹⁰ During the time of detention, many minors interviewed by the Georgetown Law stated they had never heard of OPIs.²⁹¹ OPIs are tasked with other primary duties, thus they

²⁸³ See *Closed Doors*, *supra* note 32 at 4–5; Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 25.

²⁸⁴ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 25.

²⁸⁵ See generally *Closed Doors*, *supra* note 32; Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33.

²⁸⁶ See Chart 1, *supra* note 266.

²⁸⁷ *Closed Doors*, *supra* note 32, at 54.

²⁸⁸ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 54.

²⁸⁹ See Chart 1, *supra* note 266.

²⁹⁰ See *infra* Section III.A.1.; see also *Mexico: Asylum Elusive for Migrant Children*, HUMAN RIGHTS WATCH (Mar. 31, 2016), <https://www.hrw.org/news/2016/03/31/mexico-asylum-elusive-migrant-children> (last visited Feb. 1, 2018).

²⁹¹ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 45.

have little to no time to meet with unaccompanied minors, which explains why many children had not in fact heard of OPIs.²⁹² Instead most children interviewed by both the Human Rights Watch and Georgetown Law had neither met with an OPI nor were they informed of their rights and respective protection under international and Mexican law.²⁹³ Proper screening of migrant children would reveal that many have valid claims for refugee recognition; however, due to the lack of screening and the lack of considering the best interests of minors, most unaccompanied minors are left without hope.²⁹⁴

3. Absence of Legal Counsel

Guideline 9.2 of the UNHCR Detention Guidelines, provides that an independent and qualified guardian as well as a legal adviser should be appointed for unaccompanied children.²⁹⁵ Unfortunately, Mexico, similar to the U.S., does not provide unaccompanied minors with legal representation in refugee recognition proceedings.²⁹⁶ Minors must complete their applications and “go through the process without legal or any other assistance, unless they are fortunate enough to be represented by one of the few nongovernmental organizations.”²⁹⁷ Therefore, minors are significantly disadvantaged in their ability to present relevant evidence.

The lack of representation results in minors not presenting relevant evidence. Research in Australia, Canada, United Kingdom, and the United States “shows that represented children are far more likely to be granted asylum than those who do not have representation.”²⁹⁸ Not only does the lack of counsel present legal issues for minors, the uncertainty and confusion about the application process has psychological repercussions. A young girl stated, “not knowing what would happen made me so anxious I thought about killing myself.”²⁹⁹ Having minors attempt to go through a legal process alone only serves as another obstacle to gaining the much-needed help and protection.

4. Duration of Detention in Prison-like Conditions

Under Mexican law, upon interviewing unaccompanied minors and determining their “unaccompanied” status, OPIs must propose alternatives to detention in immigration stations.³⁰⁰ Unaccompanied minors are then to be

²⁹² *Closed Doors*, *supra* note 32, at 51–52.

²⁹³ *Id.*

²⁹⁴ *Id.* at 4.

²⁹⁵ *Detention Guideline 9.2*, *supra* note 65, at 56.

²⁹⁶ *Closed Doors*, *supra* note 32, at 71.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 72.

²⁹⁹ *Id.*

³⁰⁰ *See* Chart 1, *supra* note 266.

immediately transferred to DIF shelters.³⁰¹ Unaccompanied minors must be immediately transferred unless there is no space available in nearby DIF shelters.³⁰² However, statistics released by INM revealed that even though DIF shelters have numerous vacancies unaccompanied minors are not routinely transferred. INM detained 6,723 unaccompanied minors in an immigration station, Siglo XXI, while only 422 unaccompanied minors, 6%, were placed in DIF shelters.³⁰³ Thus, “[t]ransfer to DIF is the exception rather than the rule. . . . If a child does not apply for asylum or is not flagged as potentially needing international protection, she may stay detained in [immigration stations] from apprehension through return to her home country.”³⁰⁴

Even when unaccompanied minors are transferred to DIF shelters, the conditions in the shelters are the equivalent to the conditions in detention centers. Some accompanied minors spend up to ten months in DIF shelters.³⁰⁵ During their stay, unaccompanied minors are not permitted to go outside, interact with others outside, or attend school. As discussed in Part I.B.2.b., unaccompanied minors have the right to enjoy education and recreational activities.³⁰⁶ Having access to the “outside” is essential to a child’s mental development and will alleviate stress and trauma.³⁰⁷ Thus, unaccompanied minors have described being transferred to DIF, as being transferred to a “nicer” prison, with similar restrictions like the immigration stations.

The reality is, most unaccompanied minors remain in immigration stations until they are returned to their country of origin.³⁰⁸ The conditions of the immigration stations are in violation of every convention to which Mexico is a party and every Mexican domestic law pertaining to unaccompanied minors.³⁰⁹ Unaccompanied minors reported immigration stations are hot and cramped.³¹⁰ Further, minors have reported that they were put in the same detention cells as gang members, the same gang affiliations they were fleeing from.³¹¹ Minors also reported that while in detention, they had been beat up by the gang members and verbally and inappropriately disciplined by INM officials.³¹²

³⁰¹ *Id.*

³⁰² Decreto por el que se expide el Reglamento de la Ley de Migración y se reforman, derogan y adicionan diversas disposiciones del Reglamento de la Ley General de Población y del Reglamento de la Ley de Asociaciones Religiosas y Culto Público [Immigration Regulations] art. 173, DIARIO OFICIAL DE LA FEDERACIÓN, 28 Sept. 2012 (Mex.).

³⁰³ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 32.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 30.

³⁰⁶ See *supra* note Section I.B.2.b.

³⁰⁷ *Id.*

³⁰⁸ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 32.

³⁰⁹ See *supra* Sections I–III.

³¹⁰ Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 36.

³¹¹ *Id.*

³¹² *Id.*

The duration and conditions of immigration stations and DIF shelters are not only shameful, but they also serve as a deterrent for unaccompanied minors who might have otherwise applied for asylum.³¹³ Minors reported that INM officials advised them that if they apply for asylum, they would be detained for over three months. Therefore, when considering the conditions of the immigration stations and DIF shelters, unaccompanied minors are inclined to accept deportation instead.³¹⁴

5. Lack of Asylum Process in Practice

The small number of applications COMAR receives annually, can be understood by the major flaws discussed in the previous sections. Not only are children not informed of their protections under international and domestic law, Mexico's practices further serve as an obstacle for even the submission of an application. In 2014, 23,000 unaccompanied minors were apprehended and 29,000 in the first eleven months of 2015.³¹⁵ Out of those large numbers, COMAR only received 78 applications in 2014 and 131 applications in the first 11 months of 2015.³¹⁶ These figures translate to a total of approximately 0.003% of unaccompanied minors who applied for asylum in 2014 and 0.005% in 2015.

On paper Mexico's grants of protection seem promising, granting 56 unaccompanied minors asylum status out of the slightly over 131 applicants—a 43% grant rate in 2015.³¹⁷ However, at the end of 2015, Mexican authorities apprehended 35,000 unaccompanied minors, meaning only 56 out of 35,000 unaccompanied minors received asylum—a rate of 0.005%.³¹⁸ These statistics and the flaws suggest that the issues with Mexico's lack of aid begin and remain at the detention centers. It is incredible that only 56 unaccompanied minors out 35,000 applied for asylum. Unfortunately, however, these statistics are not surprising when considering Mexico's practices of deterrent detention, lack of information, lack of legal counsel and lack of screening.

Interestingly, Mexico's refugee assistance agency, "COMAR, has had no increase in staffing in recent years even though its caseload has nearly doubled since 2013. As of July 2015, COMAR had only 15 officials who

³¹³ *Id.* at 37.

³¹⁴ *Closed Doors*, *supra* note 32, at 72; see Brooke Stewart, *Deportation Instead of Protection: The State of Child Migration in Central America*, FOREIGN AFF. REV. (Apr. 29, 2016, 3:19 PM), <http://foreignaffairsreview.co.uk/2016/04/deportation-instead-of-protection/> (last visited Feb. 1, 2018).

³¹⁵ Rodrigo Dominguez Villegas & Victoria Rietig, *Migrants Deported from the United States and Mexico to the Northern Triangle: A statistical and Socioeconomic Profile*, MIGRATION POL'Y INST. 9 (Sep. 2015), <http://www.migrationpolicy.org/sites/default/files/publications/RMSG-CentAmDeportations.pdf> (last visited Feb. 1, 2018) [hereinafter MIGRATION POL'Y INST.].

³¹⁶ *Closed Doors*, *supra* note 32, at 74.

³¹⁷ Laura Tilman & Cecilia Sanchez, *supra* note 22.

³¹⁸ *Id.*

were qualified to make refugee status determinations.”³¹⁹ Thus, it does not come as a surprise that Mexico seeks to prevent unaccompanied minors from applying, and as of today, has had success doing so.

6. Mass Deportations

The flaws identified in this section result in the direct and constructive deportation of unaccompanied minors. Both the Human Rights Watch and Georgetown Law found that INM agents advise unaccompanied minors that leaving the country is the best decision for the minor, suggesting that their case is not strong enough and that they will be detained for a long time.³²⁰ Due to this advice, unaccompanied minors voluntarily return to their country of origin. The INM agent’s advice and the conditions unaccompanied minors live in at the immigration stations, constructively deport unaccompanied minors in violation of the non-refoulement principle.³²¹

In addition to constructive deportations, Mexico’s actual deportation of unaccompanied minors has increased dramatically in numbers. “INM statistics reveal that 18,169 children were deported in 2014, more than double the 2013 total of 8,350.”³²² Going back to the figures previously discussed, in 2014 approximately 23,000 unaccompanied minors were apprehended; the number of deportations in 2014 suggest that approximately 77% of unaccompanied minors apprehended at Mexico’s southern border were deported. This percentage is even more alarming considering that the United States deported just three unaccompanied minors for every 100 it apprehended in 2014.³²³

Mexico’s practice of mass deportation of unaccompanied minors, without considering the children’s best interest and without considering the threats posed to the children’s lives upon their return, is in clear violation of the non-refoulement principle, international law in general and Mexico’s domestic law.

C. Recommendations: Changes Mexico Needs to Make to Fulfill Their False Promises

Similar to the surge of 200,000 Guatemalans in 1981 through 1983, which led to the Cartagena Declaration, the surge is happening again in 2016. Mexico’s response, however, has not been the same. Mexico has not sought out help from the international community; instead, Mexico has tasked itself with the mass deportation of unaccompanied minors. Unaccompanied minors

³¹⁹ *Closed Doors*, *supra* note 32, at 49; *A Trail of Impunity*, *supra* note 268, at 8.

³²⁰ *Closed Doors*, *supra* note 32, at 58; Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 35.

³²¹ See *supra* Section II.A.2.b.

³²² Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 18.

³²³ MIGRATION POL’Y INST., *supra* note 315, at 1.

are guaranteed protection under the Cartagena Declaration, New York Declaration, and numerous conventions. Mexico's broken promises need to be kept. Mexico can implement its laws in practice and create initiatives that their international commitments and domestic law seek to provide.

Six major flaws were made evident in analyzing Mexico's current practice as discussed in Section III.B. This Article proposes the following ten recommendations,³²⁴ modeled after Mexico's obligations under international, customary and domestic law and in direct response to the six identified flaws:

1. INM Protection Officers (OPI) should assess the child's identity, age and best interests upon apprehension.

2. OPIs should inform unaccompanied minors of the protections provided by international and domestic law, including the right to seek asylum.³²⁵ Further, OPIs must not discourage unaccompanied minors from applying for asylum by making incorrect determinations.³²⁶

3. OPIs should only have one responsibility, the reason for the creation of their position—to protect the rights of detained children.³²⁷ Today, OPIs have numerous responsibilities, which prohibit OPIs from conducting their primary duty of protecting unaccompanied minor. OPIs should focus their efforts on conducting a “best interests” interview with all unaccompanied minors, screening for international protection needs and protecting children's rights.

4. Mexican authorities should immediately refer unaccompanied minors to the DIF and placed in DIF shelters.³²⁸

5. Unaccompanied minors, as practicable as possible, should never be placed in detention centers. Only in extreme circumstances should such placement be acceptable. Even when necessary, unaccompanied should be placed in a separate area from others in the detention centers. Similar to the U.S., Mexico should implement a time limit to release unaccompanied minors from detention centers.³²⁹

6. While in DIF shelters, unaccompanied minors should have access to education and liberty to spend time outdoors.³³⁰

7. The unaccompanied minors' stay at the DIF shelters should be as

³²⁴ These recommendations focus on unaccompanied minors and the current immediate detention and deportation practices. Mexico must also make major changes to its policy and practice to provide further protection for unaccompanied minors who are granted asylum status in Mexico; however, that topic is beyond the scope of this Study.

³²⁵ *Closed Doors*, *supra* note 32, at 130.

³²⁶ *Id.*

³²⁷ *See A Trail of Impunity*, *supra* note 268, at 6.

³²⁸ *Closed Doors*, *supra* note 32, at 130.

³²⁹ *See supra* Section II.A.2.b.

³³⁰ *Closed Doors*, *supra* note 32, at 131.

short as possible, only until necessary to determine their status.

8. Unaccompanied minors should receive assistance in applying for asylum. As of today, Mexico does not provide legal assistance to unaccompanied or to adults. With the assistance of non-profit organizations, unaccompanied minors should receive legal assistance in the application process.

9. COMAR should increase its staff in order to have a quick turnaround in the application process, and thus shorten the time unaccompanied children are “detained” in DIF shelters.³³¹

10. Mexico should not deport unaccompanied minors, directly or constructively, until their status is resolved. Mexico’s 77% deportation rate must decrease dramatically and the only path to accomplish this goal is for Mexico to provide a process by which unaccompanied minors can seek asylum.

D. Conclusion

In sum, Mexico must provide an asylum process for unaccompanied minors, not only on paper, but in practice as well in order to fulfill its broken promises. As it did in 1983, Mexico should seek assistance from the international community, and together provide unaccompanied minors the help and refuge they desperately need. The ten recommendations set out in this Article will aid Mexico in its journey to fulfill its now broken promises and written commitment, to concrete measures and processes that will aid unaccompanied minors in their flight towards refuge.

V. CONCLUSION

“The alien was to be protected, not because he was a member of one’s family, clan, religious community; but because he was a human being. In the alien, therefore, man discovered the idea of humanity.”³³²

The extent to which the rights of migrants and refugees are recognized and respected in effect tests the limits of the reach of the aspirations for universality which are the essence of international human rights law. Theorists such as Hannah Arendt have framed these concerns in terms of the “right to have rights”³³³—the right of a person to be recognized as the subject of rights, regardless of his or her membership in a specific

³³¹ *Id.* at 132; Georgetown Law Human Rights Institute Fact-Finding Project, *supra* note 33, at 55; *A Trail of Impunity*, *supra* note 268, at 12.

³³² David Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 *FORDHAM L. REV.* 2541 (quoting Cole, *supra* note 2).

³³³ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290 (1951), http://www.havenscenter.org/files/Somers_1_arendt.pdf (last visited Feb. 1, 2018).

political community—as the most fundamental human right.

Principles, policies, and practices as to universality, hospitality, solidarity, and related rights to humanitarian assistance, refuge, asylum, and sanctuary, from this perspective, are thus all interrelated. Unaccompanied children and youth in contexts such as those described in detail above, in both the U.S and Mexico, together with other especially vulnerable groups such as women, and others identified by factors related to racial, ethnic, religious, and gender identity, illustrate the dangers of the kinds of exclusionary policies which have become hegemonic throughout the world, precisely when the need for compassion and balance is greatest. This Article suggests that a crucial way of closing the gap under such circumstances is to re-center our attention, scholarship, and advocacy on ensuring full respect for the rights of the children and youth who literally embody our collective futures, on both sides of the wall that threatens to separate us.

