

Battling detention of unaccompanied children at the Southern border of México

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HOPE FOR THE NORTHERN TRIANGLE'S LOST GENERATION.  
BATTLING DETENTION OF UNACCOMPANIED CHILDREN AT THE  
SOUTHERN BORDER OF MEXICO

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ABSTRACT

*Since former President Barack Obama declared a humanitarian crisis in 2014, a time when up to 50.000 unaccompanied children crossed into the United States, cooperation between the US and Mexico to control the tide of migrants crossing the Guatemalan-Mexican border led to the adoption of the South Border Program. Despite its proclaimed aim to protect people crossing the South border of Mexico, the main result has been the increase on detentions and deportations of migrants and asylum seekers entering the country. In this regard, steps forward have been taken by Mexico to presumably protect unaccompanied children, thus new legislation, accurately protecting children, has been adopted and new protection figures, based on the principle of best interest of the child, have been set down in the law. Nevertheless, violations to the rights of the children have been continuously reported by civil society and international organizations. The use of tricky legal terms, the lack of harmonization of the law and a so-called alternative to detention program have been the tools to avoid its responsibility. This study aims to explore how Mexico can render accountability for the breaches committed to its own legislation, it will be demonstrated how a proper alternative to detention program can be beneficial for the State, host community and children. For this purpose, an analysis of primary and secondary sources, reports, policies and practice, as well as a trip to the field for fact-findings, will be the tools to answer the question regarding the accountability of Mexico due to the breaches of international and national legislation when detaining unaccompanied children.*

CNDH	Mexican National Commission for Human Rights
COMAR	Mexican Commission for Refugee Aid
CRC	Committee on the Rights of the Child
DIF	Integral Development of the Family
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Convention for the Rights of the Child
IDC	International Detention Coalition
INM	National Migratory Institute
HRC	Human Rights Committee
OAS	Organization of the American States
OPIs	Officers for Child Protection
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODOC	United Nations Office on Drugs and Crime
WOLA	Washington Office for Latin America

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## GENERAL INTRODUCTION

The 2<sup>nd</sup> of July 2014, former President Barack Obama declared publicly the apprehension of up to 50.000 children at the border Mexico-United States, in less than a year: a “humanitarian crisis”. During the United States’ congressional hearings concerning the crisis, Michael McCaul, the House Homeland Security Committee Chairman during that time, criticized Mexico for not doing more in order to stop the tide of children, stating: “If we can close the Southern border of Mexico, that stops 99% of our problem”. Five days later, the South Border Program was launched by the Mexican President Enrique Peña Nieto. This program, which until today has never been published in an official document, has two main goals: **(i) to protect the migrants entering Mexico and (ii) to manage the ports of entry promoting security and prosperity**<sup>1</sup>.

The attempts of the United States to cooperate with Mexico in order to control the Guatemalan and Mexican border, have increased since the adoption in 2008 of the Merida Initiative “*an unprecedented partnership between the United States and Mexico to fight organized crime and associated violence while furthering respect for human rights and the rule of law. Based on principles of common and shared responsibility, mutual trust, and respect for sovereign independence, the two countries’ efforts have built confidence that is transforming the bilateral relationship*”<sup>2</sup>. This initiative rested on four pillars, the third pillar was to create a 21<sup>st</sup> Century Border recognizing a shared accountability on managing the common border<sup>3</sup>, which led to the adoption of the South Border Program. Alan Bersin, who was in 2014 the Assistant Secretary of Homeland Security for International Affairs of the United States, asserted that “*the Guatemalan border with Chiapas is now our Southern border*”<sup>4</sup>.

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<sup>1</sup> Christopher Wilson and Pedro Valenzuela, 'Mexico's Southern Border Strategy: Programa Frontera Sur'[2014]3, Wilson Center Mexico Institute

<sup>2</sup> <https://www.state.gov/j/inl/merida/>

<sup>3</sup> Usmcocorg, 'Documento temático 1 - EEUU - México Cooperación en Seguridad'(Usmcocorg, Agosto 2011)<<http://www.usmcoc.org>>accessed 28 April 2017

<sup>4</sup> Todd Miller, 'The US-Central American Border'(Nacla, 31st January)<<http://nacla.org>>accessed April 2017.

Since the adoption of the Program, one of the main concerns has been its impact on the detentions and deportations of migrants crossing the Southern border of Mexico, which, according to the INM, increased up to a 71% during the first year of the implementation of the program. There is still no formal evidence of the connection between the adoption of the South Border Program and the increase on detentions and deportations of migrants at the Southern border, nor of the collaboration between the United States and Mexico in order to control the tides of migrants crossing its border. Nevertheless, facts have shown a clear interconnection between these three points, which are triggering such undesired effects on unaccompanied children that they should be of international concern. During the initial phase of the Program, Barack Obama stated: “I very much appreciate Mexico’s efforts in addressing the unaccompanied children who we saw spiking during the summer”. Yet reports claiming the violations of the rights of the children apprehended by the authorities are outrageous.

The Southern border of Mexico extends through 1.122 km and it is formed by four States. Chiapas - one of the 31 states forming Mexico - is situated at the border with Guatemala and adjacent to the Pacific Ocean. In terms of migration, this state is one of the main ports of entrance to the country for thousands of migrants fleeing, mainly, the States of the Northern Triangle of Central America, which are Guatemala, El Salvador and Honduras. Thus, Chiapas has recorded the highest number of migrant detentions during the last years. Indeed, as was published by the report *Yearbook of migration and remittances, México 2016*, the states of Veracruz and Chiapas account up to 60% of the detentions registered in the whole country. This increase on the detentions of migrants crossing the Southern border of México has had the consecutive effect on the 45% decrease on the detentions of unaccompanied minors in the United States. The Southern border of Mexico is currently coping with a silenced refugee crisis before the indifference of the international community, focused mainly on the so-called European migration crisis.

Mexico has adopted the main international regulations concerning the protection of refugees, among which we can find the ICRC, Geneva Convention of 1951 and its Additional Protocol of 1967 and the Cartagena Declaration of 1984. Summed up to this, the Mexican Constitution enshrines in its Article 11 that “*Everyone has the right to enter and leave the Republic, to travel through its territory without necessity of a letter of security, passport, safe-conduct (...) as well as the right to seek asylum, though the special legislation on migration General Law for Refugee, Complementary Protection and*

Political Asylum and its bylaw, establishes that an irregular migrant shall be located in migratory stations to follow up their asylum process, going against the international principle of prohibition of detention.

In regard to unaccompanied minors at the national level, the new Mexican legislation about the rights of the children recognizes minors as right holders and creates institutions, such as the Federal Procurator for the Protection of Children, to guarantee their rights. Moreover, Article 111 of the bylaw of the General Law on the Rights of the Girls, Boys and Adolescents, establishes that under no circumstances accompanied or unaccompanied children should be detained. The regulation establishes that, once the INM is aware of the beginning of the process for the recognition of the refugee status of unaccompanied children, it has to advise the Federal Office for the Protection of Children and Adolescents; this Federal Office shall then proceed with all the steps to transfer the children to the DIF system where the children are supposed to have the protection they need and to follow up their procedure with the assistance of professionals who have to advise the children in all the steps foreseen. Can be noted that Mexico is in a rush to adopt legislation regarding the issue of unaccompanied children, and can be fond of its written law addressing the protection of the rights of the children, albeit different evidences conclude that the actual situation is far away from the one established on paper. The Unit for Migration Policy (in Spanish, “Unidad de Política Migratoria”), under the control of the Secretary of Government informed that during 2016 the trifle of 40.542 children and adolescents had been detained in migratory stations, instead of the adequate spaces for them, throughout Mexico.

While an increasing number of reports refer to the normalization of the action of detaining unaccompanied children in Mexico in migratory centers - where they live alongside adults, and in many cases are being exposed to drugs and human traffickers – the breach of the principle of the prohibition of arbitrary detention has been caused by three facts: (i) lack of legislative harmonization, (ii) lack of coordination among the public institutions and (iii) deficiency of spaces designated to the hosting and protection of children during the process to seek asylum.

Taking into account the alarming situation exposed above, this research will be organized in two chapters: The first one, divided in two parts, will contain an analysis of the concept of administrative detention in the international legal framework, examining several medical studies and reports on the consequences of detention for the proper development



of children and the impact it has for their future when it comes to the integration into the society that has, since the first moment, excluded them. The second part will pay attention to the procedure established in Mexico when unaccompanied minors coming from the Northern Triangle of Central America are detained by the authorities, and the specific consequences that this detention can have on such a vulnerable group of people who are, in many cases, fleeing their countries due to episodes of savage violence. Are they receiving proper health care while in detention? Are they informed about their rights? Is there a child-sensitive approach taken into account when workers interact with the children? Have the workers had any special training to deal with children? Additionally, this study will try to trace the children once they integrate into the society as well as when they are deported to their home countries, to figure out in which ways the imprisonment has had an effect on them. These questions, among others, are the ones which this part of the thesis will try to give an answer to.

The second part of the study will also be divided in two parts. The first part will focus on the demonstrated benefits of the application of possible alternatives to detention when it comes to health of the applicants, costs to the States and risk of absconding, voluntary departure and integration into society, when paying attention to different models established around the world and the reported consequences they had. The second part of this chapter will focus on the alternatives to detention applied in Mexico and their potential benefits, analyzing what the normative says about this topic, the importance of civil society to fulfil the gaps when it comes to the protection of children and the lessened costs for the State when using alternatives to detention. This research will aim to determine if it is beneficial for Mexico to adopt friendly policies to alternatives to detention and how could this situation start being applied in respect of the human rights of the children.

In short, bearing in mind the topics that will be studied by both chapters, this study aims to answer the following question: How is it possible to make Mexico accountable if it is demonstrated that unaccompanied children are being detained within its borders?

## PART I

### THE USE OF DETENTION OF UNACCOMPANIED CHILDREN

#### INTRODUCTION. THE PATTERNS OF MIGRATION IN MEXICO

Mexico is a complex scenario which embodies different flows of migration, being at the same time a country of origin, transit and destination. For the current research, the two flows of concern are the ones targeting **Mexico as a country of transit and destination**, since these are the dynamics impacting the wellbeing of unaccompanied children fleeing the Northern Triangle of Central America.

Historically, México has been considered a country of transit more than a country of destination, albeit the different practices implemented after the adoption of the South Border Program that led to the increase on detentions and deportations, have started to change the patterns. Mexico is currently starting to be considered a country of destination by migrants, historically wishing to reach the United States, as demonstrated by the increase of 154,6% of the asylum petitions during 2016 compared to the previous year according to the data provided by the COMAR. The trifle of 86,6% of those petitions were coming from the countries El Salvador and Honduras, two of the most violent countries in the world.

Likewise, the scale of crimes committed at the paths which migrants take towards the United States are clearly influencing the changes of these patterns. Nowadays, due to the tough control of irregular migration carried out by army, migration authorities and police at the States of Chiapas and Tabasco, migrants are starting to skip the common routes and are taking the ones used by drug traffickers for their business, facing a new scenario of violence. Once they cross the Guatemalan-Mexican border, they are targeted by different criminal groups that control the routes. “Los Zetas” and “El Cartel del Golfo”, among others, have created a huge business surrounding migrants and claims of kidnapping,

human trafficking, sexual exploitation, extortions and murders of migrants are increasing, as different articles published by InsightCrime are claiming<sup>5</sup>.

Not only the causes explained above but also the new policies the United States is adopting in order to stop new arrivals of migrants to its border - for example, the Obama's repeal of "wet foot, dry foot" policy<sup>6</sup> at the beginning of this year or campaigns supported by the actual president Donald Trump labelling as "rapists" and "violent criminals" the migrants, are important factors influencing the dynamics of migration in Central America, influencing a change on the ideas of people to reach the United States, and thus creating a new scenario for Mexico to cope with.

These new patterns seemed to have been already targeted by the country, whose President Enrique Peña Nieto at the first United Nations Summit for Refugees and Migrants which took place on the 19<sup>th</sup> of September 2016, announced that Mexico will strengthen its refugee recognition procedures and will "*develop alternatives to immigration detention for asylum seekers, particularly children.*" He also claimed that "*no barriers can stop immigration and called for placing immigrants' rights, dignity and wellbeing in the center of the global dialogue*" and, as he said during the Summit "*This includes addressing not only immigration flows but the root causes of those flows with respect for migrants' human rights, and in accordance with the federal migration law and the observations of national and international human rights organizations.*"

While it seems that through his speech Enrique Peña Nieto shared an actual concern about the situation of migrants within the borders of his country - particularly about the children in detention – with the international community, he also outlined the necessity of international collaboration. This is why Chapter I has the purpose of analyzing the international concept of administrative detention and will pay special attention to the detention of unaccompanied children in Chiapas, outlining the legal basis, procedure and consequences of the detention, as well as the measures that the Mexican Government is adopting to decrease the negative impact of detention and help children to reinsert into

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<sup>5</sup> Mike Lasusa, '¿Aumentan secuestros de migrantes en México?' [2016] Insight Crime - Investigation and Analysis of Organized Crime

<sup>6</sup> The white house office of the press secretary, 'Statement by the President on Cuban Immigration Policy' (<https://obamawhitehouse.archives.gov>, 12 January 2017) <<https://https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/statement-president-cuban-immigration-policy>>

into society. For this purpose, this research will also examine the root causes of displacement from the Northern Triangle of Central America, since the majority of the asylum applications stem from those countries and because the special vulnerability dragged by unaccompanied children fleeing these countries and crossing the southern border of Mexico. This fact exposes them to outrageous crimes as smuggling and human trafficking. At last, the chapter will examine the role of different international NGOs and civil society to protect the children and to guarantee that no arbitrary detentions are being executed within the borders of the State of Chiapas.

## CHAPTER I

### MAIN CONCERNS ABOUT DETENTION OF UNACCOMPANIED CHILDREN

#### **1.1. The prohibition of arbitrary detention under International Law.**

The legal concept of detention has no well-established definition, there is no global instrument attempting to establish such a definition. Since the creation of the Working Group on Arbitrary Detention<sup>7</sup>, many interpretations led to some divergences on the terms that were finally solved by the Commission Resolution No. 1997/50. Whereas various international instruments were using different terminologies to refer to the same concept – “detention”, “apprehension”, “reclusion”, etc. -, Resolution No.1997/50 opted to use the term “deprivation of liberty” trying to solve any problem with the interpretation of different terms and containing the essence of any word used to describe the actions of placing someone in detention.

Detention, whether administrative or judicial, does not imply a violation of human rights. Nevertheless, international instruments have defined the limits beyond which it would become arbitrary and, therefore, lead to the alleged violations. The resolutions depriving someone of liberty ought to consider the limits enshrined at the international legislation, since it threatens the fundamental right to liberty and security guaranteed by Article 9.1 of the International Covenant on Civil and Political Rights, Article 7.1 of the American

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<sup>7</sup> UNCHR Res 42 (1991) UN Doc E/CN.4/RES/1991/42

Convention on Human Rights, Article 6 of the African Charter of Human and Peoples' Rights and Article 5.1 of the European Convention on Human Rights.

Administrative detention, unlike judicial ones, are carried out with the absence of a trial and according to General Comment No. 8 of the Human Rights Committee, Article 9.1 "*is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.*". Nowadays, these detentions, particularly of asylum seekers, are becoming a worrying practice worldwide.

Currently there is a trend among States to criminalize immigration, often with the aim of deterring people from entering their country; however, there is no empirical evidence that detention deters people from seeking asylum. Likewise, the criminalization of immigrants not just by the States but also by the society is currently a topic of concern, Western societies are experiencing a rise of nationalist groups, which are spreading hate speech targeting immigrants and even cataloguing migration as a threat to national security. Hate speech criminalizing migration and targeting it as a threat to the culture and values of a society, and to its peaceful existence, are being broadcasted every day by the media. Marie Le Penn, president of the French National Front, carried out her electoral campaign on the basis of a xenophobic speech against immigrants, claiming that "*They have intimidated and threatened France via a series of anti-French and terrorist attacks. Civil war is no longer a dream, but a real possibility*". Donald Trump won the US elections spreading his hate towards Muslims and Hispanics, and even went further by publishing a statement on his website for banning Muslims to enter into the United States.

Arbitrary detentions, because of irregular stay or irregularly crossing a border, are becoming a norm<sup>8</sup>. This is the case even though the Working Group on Arbitrary Detention has held that "*criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention*" (A/HRC/7/4, para. 53). Additionally, administrative detention is often foreseen as a guarantor for another measure, for example to assure deportation. International standards have already set that under no circumstance, "*detention should continue beyond the period for which the State can provide appropriate justification. For example, the fact*

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<sup>8</sup> UNGA "Report of the Special Rapporteur on the human rights of migrants, François Crépeau" (8<sup>th</sup> May 2015) 29<sup>th</sup> Session UN Doc A/HRC/29/36

*of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention, may be considered arbitrary, even if entry was illegal”.*<sup>9</sup>

The analysis of the Article 9.1 of the ICCPR shows that there is no exhaustive list upon which detention will be resorted to States, but prohibits any unlawful and arbitrary detention. The legal meaning of the standard of lawfulness was discussed by the European Court of Human Rights in the case *H.L. v. United Kingdom* and it requires that all law shall be “*sufficiently precise to allow the citizen to foresee to a degree, that is reasonable in the circumstances, the consequences that a given action may entail*”. In this sense, the law has to inform about the foreseeability, predictability and the legal consequences of particular actions to consider the detention lawful.

Moreover, the second limb of the Article 9, which refers to the reasons for the arrest, considers the factors that are to be taken into account in making an assessment for the detention. Accordingly, the lawfulness of the detention will be ensured by measuring its necessity, proportionality and reasonability. The requirement of paying attention to these three principles when it comes to the analysis of the appropriateness of the decision to put someone on detention, have already been discussed by the Human Rights Committee in the case *Van Alphen v. The Netherlands*, which stated that “*Arbitrariness*” is not to be equated [only] with “*against the law*”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”.

**a) Proportionality, reasonability and necessity of detention.**

Any deprivation of liberty of an asylum seeker or migrant has to be necessary, proportional and reasonable in order to be considered lawful. In addition, the UNHCR has clarified that detention has to be a measure of last resort.

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<sup>9</sup> Communication No. 560/1993, *A. v. Australia* (Views adopted on 3 April 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 143, paras. 9.4.

Detention must be necessary in all circumstances. Hence, to assess its necessity, an individual evaluation of the circumstances has to be undertaken in each case to ensure that the deprivation of liberty is the way to achieve the pursued objective, which has to be explicitly clear and predictable under the domestic legislation.

The Human Rights Committee in the case *A. v. Australia*, clarified that detention can be accepted in cases where there is a likelihood of absconding and lack of cooperation, therefore just the illegal entry into a country does not allow the State to automatically detain an individual.

The necessity and reasonability of the detention has to meet with the requirement of the proportionality of the measure applied. This principle requires that an analysis between the obligation to detain in a democratic society and the right to liberty and security of the person are balanced by the relevant authority. The European Union Agency for Fundamental Rights, in this sense, has stated that the proportionality has to be weighted by administrative or judicial bodies to balance the interests pursued by the States and the fundamental right to liberty<sup>10</sup>.

In order to meet with the requirement of proportionality of the detention in the case of asylum seekers, it has been already claimed by the international community that States should apply alternatives to detention to meet this principle. Nevertheless, the proportionality is accepted when it comes to the order of detention to carry out individual assessment to identify special needs of the detainee and to decide about the necessity of his or her detention.

Proportionality also applies to the length of detention, which has to be specifically foreseeable and set by the domestic legislation. Yet nowadays there is a general principle becoming to be accepted by the international community which states that even when the legislation does not set a maximum period of detention, the period under which the person is detained is nonetheless subject to specific limitation, having in mind the necessity of a reasonable period of the detention. The HRC clarified that “*detention should not continue beyond the period for which the State*

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<sup>10</sup> European union agency for fundamental rights, *Detention of third country nationals in return procedures* (2010) , p. 18.

*can provide appropriate justification*”<sup>11</sup>. Additionally, the UN Working Group on Arbitrary Detention on its report to the 13th Session of the Human Rights Council on the 18th January 2010 declared, ‘*Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released*’. In this regard, it would be disproportionate to continue the deprivation of liberty of someone when the removal is not foreseeable due to statelessness, risk of torture, lack of documents required to proceed with the return or lack of cooperation of the country of origin of the individual. These circumstances would make the detention indefinite and, therefore, arbitrary.

Furthermore, International Human Rights Law provides judicial guarantees in regard to administrative detention, albeit domestic law must provide for the possibility of challenging the lawfulness of such detention before an ordinary court, otherwise it would become arbitrary. Insufficient guarantees set down in the law to protect any person against arbitrary detention will put into question the legal validity of the detention. The guarantees recognized by the international legislation to any administrative detainee are:

**a. The right to be promptly informed of the reasons for arrest, detention and charges.**

According to Article 9.2 of the International Covenant on Civil and Political Rights “*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*”. The Human Rights Committee stated in its Communication No. 248/198 that “*one of the most important reasons for the requirement of ‘prompt’ information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority*”.

Any arrested person shall be informed about the reasons – which have to constitute a criminal offence under the domestic legislation - of its detention in a language that he or she could understand and with sufficient detail.

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<sup>11</sup> Communication No. 560/1993, A. v. Australia (Views adopted on 3 April 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 143, paras. 9.4.



**b. The right to be promptly brought before a judicial officer.**

Article 9.3 of the ICCPR provides that “*anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power*”. In Communication No. 521/1992, *V. Kulomin v. Hungary*, the Human Rights Committee further stated that the first sentence of this article “*is intended to bring the detention of a person charged with a criminal offence under judicial control*”.

Regarding this specific right, the jurisprudence of the Human Rights Committee has established that the term promptly “*has to be determined based on a case-by-case-basis, but it should not exceed a few days*”.<sup>12</sup>

**c. The right to trial within a reasonable time or to release.**

This right is provided as well by Article 9.3 of the International Covenant on Civil and Political Rights, mentioned under point (b). Deprivation of liberty must be an exceptional measure and since everyone has the right to be presumed innocent until proven guilty, this right guarantees being brought before the judicial officer who can confirm the validity of the detention or, in some other cases, order the release of the detainee.

**d. The right to have the lawfulness of the detention decided without delay by a court.**

Enshrined under Article 9.4 of the International Covenant on Civil and Political Rights, “*Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*”

**e. The right of access to and assistance of a lawyer.**

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<sup>12</sup> Stephens v. Jamaica, Communication No. 373/1989, UN Doc. CCPR/C/55/D/373/1989 (1995)

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Principle 11.1 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment states that “*a detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law*”.

**f. The right to compensation in the event of unlawful deprivation of liberty.**

Article 9.5 of the International Covenant on Civil and Political Rights provides that “*anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*”. These compensations depend on the demonstration of the damage caused to the detained.

Ensuring these rights in observance to the guarantees enshrined at the international level is a condition that any democratic State under the rule of law must fulfill to prevent unlawful and arbitrary detentions and respect the rights and freedoms of all human beings. States must take all the necessary steps to ensure that the right to liberty and security of the people under their domestic legislation is being protected. Any deprivation of liberty has to be in accordance to their national law, remembering the fact that domestic legislation that allows detention but is not in conformity with the standards internationally established would be considered as a violation of Article 9.1. of the ICCPR.

**1.2. Regarding the detention of seeking-asylum children under International Law.**

In addition to the general international protection recognized towards both, adults and children, against arbitrary detentions, given the special characteristics of children and their particular vulnerabilities, the decision to place a child in administrative detention must take into account specific safeguards, provisions and guarantees. Notwithstanding the special needs of children, nowadays depriving them of their liberty has become a preoccupying practice undertaken by many States, although the position of the Committee on the Rights of the Child to “*expeditiously and completely cease the detention of children on the basis of their immigration status*” is far known by the international community.

As determined by the general rule contemplated by Guideline 6, UNHCR on the Guidelines on Detention, children who are seeking asylum should not be detained. However, the decision to place a child in detention, despite the fact that can trigger important negative psychological effects on such a vulnerable group, is not unlawful.

Nonetheless, in order to be lawful, the decision must be taken in accordance with the State's domestic law.

Since children are considered to be extremely vulnerable, the Convention on the Rights of the Child has specific provisions to protect their rights, and particularly, to protect the rights of asylum-seeking children. Besides, in all the action taken under the auspices of protecting children, the Convention on the Rights of the Child states under Article 3.1. that *“all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”*.

The Committee on the Rights of the Child has identified Article 3.1 of the CRC, as one of the four general principles of the Convention over which basing the interpretation and implementation of all the rights of the child<sup>13</sup>. The **principle of the best interest of the child** is used to describe the wellbeing of a child, paying attention for the determination of such state to, among other factors, their age, level of maturity, experiences of life and the presence or lack of his or her parents. This principle advocates that in all important decisions concerning the child, special safeguards need to be designed to determine the child's best interest. As clarified by the UNHCR Guidelines on Determining the Best Interest on the Child *“It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option”*. This concept has been interpreted by the Committee as: (i) a substantive right: right of the child to have his or her interests taken as a primary consideration; (ii) a fundamental, interpretative legal concept: whether any circumstance is opened to different interpretations, the one that meets better the best interest of the child should be chosen; (iii) a rule of procedure: whenever a decision is going to have any kind of impact on the child or on a specific group of children, an evaluation about the possible impacts have to be done before the decision is taken. The decision has to be justified and explicitly demonstrate that the best interest of the child was taken into account<sup>14</sup>

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<sup>13</sup> The Committee's general comment No. 5 (2003) on the general measures of implementation of the Convention on the Rights of the Child, para. 12; and No. 12 (2009) on the right of the child to be heard, para. 2.

<sup>14</sup> General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). CRC.

Children are considered generally vulnerable due to their lack of psychological and physical development, albeit particular circumstances can put them in even a more vulnerable situation. The situation of asylum seeking children is one of particular concern since their situation is aggravated due to the fact that most migration laws do not adopt a children's rights perspective nor have special provisions for them. The principle of the best interest of the child plays one of the main roles to protect the children and it must be the primary consideration in all situations concerning the decisions affecting the children.

Article 37 of the CRC contains important provisions to preserve that detention of children is, first and foremost, lawful; and second, it is done in the best interest of the child, obeying to their special needs. Limb (b) of the article states the base over which the detention of children would be considered lawful, and determines that detention of such a vulnerable group can only be a measure of last resort and for the shortest period. Indeed, these two guarantees are of extreme importance to observe due to the serious harm that detention causes on children; besides, they must meet the requirement of the best interest of the child when it comes to decide about the deprivation of liberty of a child.

Additionally, point (c) refers to the treatment that children must have while detained. Children in detention must be treated with humanity and respect for their dignity, bearing in mind the needs according to their level of maturity, age and particular needs. Detained children, because of their vulnerabilities, have to be separated from adults due to the consequences it can have on their wellbeing, safety and reintegration, unless it is not in their best interest, such as when they are accompanied by their families. In this case, the best option for the child would be for him or her to stay with his or her family; hence, an individual analysis of each situation is vital to understand the particular needs of each child.

These provisions aiming to protect children against arbitrary detentions are fundamental guarantees, also protected by other international standards enshrined in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (commonly known as Havana Rules) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as Beijing Rules), Despite the fact that these instruments are not legally binding, they complement and develop the international legislation to ensure that children are properly treated while under detention. However, it is the responsibility of the States to ensure under their

domestic legislation an adequate child protection system, in accordance with their international obligations and its duties to educate, protect and care the children.

Moreover, a high number of reports published by international NGOs have claimed that the conditions of detained migrant children are often deficient and, in addition, they see other of the rights they are entitled with – education, leisure, information... - suppressed while under detention. Social and cultural barriers can undermine the understanding of the children as right-holders *per se*. Whether they are considered as a “property” of the State or of their parents, or even holders of a so-called “mini rights”, it is in those contexts more difficult to understand that they are entitled with the same rights than adults, and deficiencies on the access to, for example, rights regarding a fair trial, can be observed. Likewise, children’s safety is often threatened while being detained alongside adults by receiving a non-child-sensitive treatment<sup>15</sup>. Detention experiences can trigger on children a variety of psychosocial and developmental problems as reported by the report “*Chapter 5. Impacts on detention of children*” published by the NGO International Detention Coalition. The report further stated that this is why States must be careful in their duty to identify in which particular case detention of a seeking-asylum child could be accepted under their legislation and strive on implementing less harmful alternatives that consider the wellbeing of the children whilst participating on their reintegration.

Actually, it is still difficult to estimate how many children are in detention because of the lack of record-keeping and the unwillingness of the States to accept that they are detaining children. Nevertheless, UNICEF, has estimated that more than 1 million children are behind bars around the world. In this regard, the Committee has already expressed its concern about the necessity of analyzing relevant data with the purpose of elaborating policies and standard-setting. Thus in the 2000 General Discussion on State Violence it recommended that “*accurate, up-to-date and disaggregated data should be collected on the numbers and conditions of children living in institutions or in the care of the State...*”. Consequently, ensuring that children are lawfully detained and the provisions regarding their protection are taken into account, is such a complex task to undertake. More steps need to be taken to guarantee that every child is granted dignified treatment while detained and that alternatives to detention which actually consider the wellbeing of the child, are being adopted by States. While this issue is at the spotlight and answers with

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<sup>15</sup> UNICEF 'Administrative Detention of Children: a global report by Child Protection Section'. February 2011

an approach to human rights are being discussed at an international context, States must remember that administrative detention can only be used as a mean of last resort and for the shortest period of time because it remains in the State to grant the standards accepted through the adoption of the different international conventions.

### **Special vulnerabilities of unaccompanied children in detention.**

The term “unaccompanied children” is defined by the UN Committee on the Rights of the Child as “children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”. The absence of parents or lawful guardians to protect the children’s interests, makes them more vulnerable to experience traumatic episodes that may affect their life and proper development. Children are more susceptible to suffer from violence than adults due to their psychological and physical characteristics and it may influence their psychological health. They are more likely to become victims of smuggling, labor and sexual exploitation and human trafficking. Therefore, international protection has been adopted to protect them.

Individuals under 18 years are considered a child and the law awards them special protection. Unaccompanied or separated children lack the protection of their parents, hence special guarantees have to be observed to act according to their best interest and provide them with the care and protection needed. The level of psychological development, maturity and age are main factors to understand their needs, and the importance of protective measures to assure the wellbeing of the child derives from the greater possibilities they have to see their rights violated.

The core principle of the best interest of the child refers to the individual needs of the child and implies that any action adopted towards his or her protection ought to be conducted in a child-sensitive manner. The interpretation of this principle must be done in accordance to the essence of the CRC and the guidance provided by the Committee on the Rights of the Child in its 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin. This particular protection of unaccompanied children seeking asylum has been adopted due to the fact that this group is higher exposed to traumatic events: they may be refused at the borders, misinformed about their rights and imprisoned. Besides, they are often discriminated by

States which deny their access to shelter, education or health care. The principle of the best interest of the child establishes that the actions must be endorsed on the child's interests and thus, the examination of the child's identity is necessary to understand his or her special needs of protection; consequently, the prerequisite for determining the child's identity is his or her access to the territory. The register and identification should be done in a child-sensitive manner and should be carried out by people trained on age-appropriate skills so they can adequately identify their needs and understand their point of view. In this sense, the 2000 Discussion Day on State Violence, the Committee on the Rights of the Child, called for the establishment of a standard-settings over which basing the capacitation of the professionals *“working in institutions caring for children, in alternative systems, in the police and in juvenile penal institutions, including the condition that they don't have a prior record of violence”*.

In order to grant the protection that the child deserves, the Committee on the Rights of the Child in its General Comment n°6 called to name a guardian as soon as the child identifies himself or herself<sup>16</sup>. This role is key to protect the rights of the child, as this guardian shall ensure that the child receives care, education, shelter, medical assistances and other rights they are entitled with. Guardians have to accompany the child during all the steps of the procedure, complementing the legal capacity of the child and acting on his or her best interest. Besides, guardians will have the authority to be present in any moment where decisions involving the child are taking place and to be consulted and informed of all actions regarding the child. Their tasks, as it is discussed, are beyond the simply legal representation; they have to perform all different kind of duties regarding the wellbeing of the child as well as the protection of their rights, always assuring that the best interest of the child justifies the actions undertaken.

The system of the guardianship is vital for the protection of unaccompanied children. This is why UNICEF has made recommendations in its call for effective guardianship for unaccompanied and separated children, aiming to accomplish the requirements to protect the children separated from their relatives:

- a) To appoint a guardian for every child deprived of family care. Guardianship should be a part of the protection system of the children regardless of their nationality or migration status. The guardian should be appointed once the

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<sup>16</sup> UN Committee on the Rights of the Child 'Comment No. 6 (2005)' 39<sup>th</sup> Session

unaccompanied child is identified and represent his or her best interest when acting as the link among the child and service providers.

- b) To guarantee independency and impartiality of the guardianship. National systems should provide the legal basis for the guardianship and define the authority responsible for it. Migration authorities should recognize the independence of the function. The guardian point of view should be considered in all decision affecting the child.
- c) To listen to children and ensuring accountability. The child should be consulted of the appointment of the guardian and an external monitoring body of the guardian should be set. The guardianship authority should be responsible for all the acts regarding the guardians.
- d) To develop guidelines on assessing family links, family reunification and other durable solutions. Separated children sometimes are accompanied by adults who could be or not, relatives. In this case, an adult could be appointed as a guardian if assessed that his or her aim is to protect the child. Procedures and standards should be elaborated to assess the link between them and whether it is in the best interest of the child to appoint the adult as his or her guardian.
- e) To provide training and support for guardians. The guardians must act in the best interest of the child and protect the children's wellbeing; hence, specific training and advice has to be given to them. Besides, they must have access to a network of services, such as free legal aid.
- f) To invest on adequate human and financial resources for an effective guardianship. States have failed in providing financial resources to the guardianship system even though the huge number of unaccompanied children worldwide. Consequently, it is often the case that one guardian is appointed to protect a high number of children, affecting the quality of his or her job.

As explained under point 1.2., detention of unaccompanied children is becoming a normal practice, though it can only be done as a measure of last resort and for the shortest period of time under the international human rights law. Many States accept that unaccompanied



children should never be detained<sup>17</sup>, however facts reflect another reality. In this sense, the European Court of Human Rights clarified in the case of *Mitunga v. Belgium* that “*a closed center is not suitable for the ‘extreme vulnerability’ of an unaccompanied migrant child, not least because the facilities did not cater to his special needs*”. Moreover, a Court in South Africa went further highlighting in the case of *Lawyers for Human Rights v. The Minister for Safety and Security and 17 Others (5824/2009)* the obligations of the States to ensure that ‘all children are provided with the basic necessities of life – particularly unaccompanied children (...)’, including appropriate accommodation, hygiene, supervision, and child-suitable dietary requirements<sup>18</sup>.

Detention can have undesirable effects on the already traumatized children<sup>19</sup>, thus the Working Group on Administrative Detention has clarified that ‘*Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort.*’

### **1.3. The impact of detention on the physical and psychological health of detained children.**

The International Detention Coalition report on “*Children in Immigration Detention Position Paper*” highlighted the consequences of long-period detention on the health status of children. They reported that, particularly in some Western countries, specifically in Australia - where the practice of detaining migrants is mandatory – in the detention centers for migrants there had been “excess rates of suicide, self-harm, suicide attempts by prepubertal children, and high rates of mental disorders and developmental problems, including severe attachment disorder for young children”.

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<sup>17</sup> European union agency for fundamental rights, *Detention of third country nationals in return procedures* (2010).

<sup>18</sup> Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (UNHCR 2011).

<sup>19</sup> UNHCR, EXCOM Conclusion on Children at Risk No. 107 (LVIII) – 2007, 5 October 2007.

According to different reports<sup>20</sup>, detention of children particularly threatens their wellbeing, even when the detention is for a short-period of time, a specific negative impact can be observed. In most cases, children can experience such a high level of stress, depression and anxiety. In return, this can lead to detrimental and lifelong effects on their cognitive and emotional development can be lifelong<sup>21</sup>. Summed up to this, children who may have been detained in their countries of origin can relive those traumatic experiences and suffer from permanent damages. Similarly, Silove et al. (1997) stated: “*Our findings raise the possibility that current procedures for dealing with asylum-seekers may contribute to high levels of stress and psychiatric symptoms in those who have been previously traumatized*”.

Detention undermines dignity and increases fear and anxiety, aggravated by the uncertainty of its duration and outcome; it also takes place in places and under circumstances which barely meet human rights standards. Many reports have already revealed the inhuman and undignified conditions under which detainees are living, as well as the ill-treatment, abuses and the failure on separating the children from the adults, with the collateral effects it can have on the children. Additionally, there are a set of stressors - loss of liberty, uncertainty regarding return to their country of origin, uncertain duration of detention, social isolation, separation from families, abuse from staff, riots, forceful removal, hunger strikes, and self-harm (Fazel & Silove, 2006; Pourgourides, Sashidharan & Bracken, 1996; Keller et al., 2003) – that children are experiencing while detained and which have been demonstrated to deteriorate their mental health status.

Moreover, other reports have highlighted other important factors about the effect of detention. Researchers suggest that asylum seekers, especially vulnerable groups as unaccompanied children, present high rates of pre-migration traumas, hence trauma-related mental health issues. Given this vulnerability, outcomes from past experiences prior to arrival, a number of clinicians have already called for an end of these practices worldwide (Salinsky, 1997; Koopowitz & Abhary, 2004; Fazel & Stein, 2004).

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<sup>20</sup> National Inquiry into Children in Immigration Detention 2014: Discussion Paper by the Australian Human Rights Commission. Steel M and Silove D. The mental health implications of detaining asylum seekers. Medical Journal of Australia 2001. Keller A, Rosenfield B, Trinh-Shevrin C et al. Mental health of detained asylum seekers. The Lancet 2003. Seeking refuge, losing hope: parents and children in immigration detention by Sarah Mares, Louise Newman, Michael Dudley and Fran Gale. Detention of asylum seekers: assault on health, human rights, and social development by Derrick Silove, Zachary Steel, Richard F Mollica.

<sup>21</sup> International detention coalition, There are alternatives A handbook for preventing unnecessary immigration detention (revised edition) (2015)

Mares and Jureidini reported on a research carried out on a child and adolescent mental health service in Australia from a detention center that (I) children aged less than 5 years old commonly presented developmental delays whereas half of the children had delays in language and social development. The study also showed that emotional and behavioral dysregulation as well as attachment problems were affecting this targeted population; (II) children age-framed between 6–17 years reported extensive mental health difficulties. All of these children met clinical criteria for PTSD. Besides, all ten children had major depression and expressed suicidal ideation. Eight children had actually conducted actions of self-harming and the authors expressed their concern about an existing culture of self-harm within the detention center. Seven of ten children had symptoms of anxiety and half of them, had persistent physical health symptoms. Children were also reporting boredom, a sense of injustice, sleep difficulties, anxiety regarding delays in educational progress and a sense of shame<sup>22</sup>. These responses to detention are normal responses to abnormal situations, which are understood as manifestations of misery and suffering.

Detention can jeopardize the proper development of the immigration processes, making the children feel like criminals and be more prone to abandon the procedure. The fear of deportation can also discourage children to trust the authorities. Due to the negative effects that detention can trigger on the children's mental health and wellbeing, States shall adopt, immediately, alternatives to detention. The UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, published on February 1999, already stated that in order to avoid detention of children "*where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities.*" This practice has generated good results when it comes to integration into the society. Many detainees after the trauma of having their liberty taken away, which usually has a direct impact on his/her self-confident, have huge problems of adaptation and find it very difficult to develop trusting relationships. Moreover, these problems have further negative impact on other spheres such as those involving the family, friends, work or studies.

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<sup>22</sup> S Mares and J Jureidini, *Psychiatric Assessment of Children and Families in Immigration Detention: Clinical, Administrative and Ethical Issues* (Australian & New Zealand Journal of Public Health vol28 (6) edn, 2004).

Consequently, due to the evidence on the impact of detention on the well-being of the children and the possible traumatic effects it can have on their physical and psychological development, States as parties to the CRC and therefore, presumably concerned about the protection of unaccompanied children - who lack the support of an adult on which to rely on - within their borders, should act in accordance to the best interest of the child and ward off unaccompanied children from these traumatic experiences. Identifying necessities of the children at the very first moment and guaranteeing their protection through the announcement of guardians, so they can, since the very beginning, integrate in the community and have their social and economic rights guaranteed, is a need for vulnerable children fleeing their countries, in most cases due to the fatal experiences that led to their escape. Most of the children have experienced episodes of intrafamily violence, sexual abuse, abandonment, extortion, force recruitment, among others. The level of understanding and the strength to overcome these experiences cannot be put at the same level as it is for adults, children are more vulnerable and that is why the international community should immediately stop the practice of detaining unaccompanied children.

#### **1.4. Difficulties in social integration of unaccompanied children after detention.**

The United Nations Office on Drugs and Crime refers to social integration as the process of integrating socially and psychologically into one's social environment. Detention, as previously explained, can affect the development of the children, causing distrust and distress and influencing the adaptation to new environments. For the successful integration of unaccompanied children, the participation of different actors is mandatory: NGOs, communities, family members and educational and social institutions have to enhance to provide the children with the proper environment for his or her adaptation. Migrants could face exclusion and discrimination and may need assistance to adapt to their new situation, and particularly, due to the vulnerable situation of unaccompanied children, the coordination among institutions, family members and civil society is utterly required. In this regard, Article 40 of the International Convention on the Rights of the Child highlights *“the desirability of promoting the child's reintegration and the child's assuming a constructive role in society”*.

Unaccompanied children who have experienced detention may be released with high levels of stress affecting their welfare so effective actions and best practices ought to be considered when children are sent back to society. The risk of exposing these children to post-detention traumatic experiences is high, and reinsertion programs need to address these risks. Likewise, many of these children have been exposed to traumatic experiences during their journey and while detained, hence, distrust from this group towards the host society has been reported<sup>23</sup>, jeopardizing the effective social reintegration. As accurately stated by the Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders, published by the UNODC, an effective reinsertion program should focus on motivation, education, the development of skills, accommodation, interpersonal relationships, mental health care and cognitive-behavioral interventions reintegration.

Bearing in mind that, unaccompanied children who were detained while waiting for the outcome of their asylum procedure, could be granted with the refugee status or rejected, the outcome of this decision has to be analyzed since it will have different consequences regarding the reinsertion into the society:

**a) Unaccompanied children granted refugee status.**

For unaccompanied children granted with the refugee status, family tracing is a priority. The International Committee of the Red Cross has the commitment of undertaking the family reunification through particular methods and cross border cooperation. This must be always done in the best interest of the child so in cases of reported abuse by the family, special analysis on the welfare of the child is required. Whether the reunification is not on the best interest of the child or not possible because of any other circumstance, different options as guardianship, foster care or adoption ought to be sought.

While tracing their parents, the children should be taken to a foster family, ideally with the same cultural background of the child and willing to adopt the child in case of failing to find his or her family. In this regard, Article 21.b of the CRC states that inter-country adoption can be considered if the child “cannot, in any suitable way, be cared for” in the country where he has been recognized as a refugee. Families with the same cultural background of the children should be a

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<sup>23</sup> Fernández Valeria, 'On the way to the US, children seeking asylum are often put in Mexico's detention centers' [2017] PRI's The World.

priority since they are supposed to better guide the child through the situation they are coping with and to recognize the risks attached to their vulnerable position. Maintaining the cultural values is related to a better integration; families with the same cultural background, which have already been integrated into society, can decrease the psychological impact that the adaptation to a new situation implies. Nevertheless, it is important for the child to acquire the skills and competences needed in this new society. Protective environments have been demonstrated to help the children in this new phase, albeit various studies - Geltman et al., 2005; Bean et al., 2007b; Hodes et al., 2008 - have analyzed some risk factors jeopardizing the proper adaptation of unaccompanied children such as little social support, the number of traumatic experiences and physical injury.

Regarding the difficulties faced by the children recognized as refugees when they reintegrate into society, the UNHCR has already underlined the following difficulties: (i) lack of knowledge of local languages and differing cultures; (ii) discrimination and unreceptive attitudes towards foreigners; (iii) lack of understanding within host societies of the specific situation of refugees; (iv) psychological impact of protracted inactivity during asylum procedures; (v) limited access to rights for persons with subsidiary protection. In this regard, the three following durable solutions have been recommended by the High Commissioner:

**Voluntary repatriation.** The Universal Declaration of Human Rights establishes that every person recognized as a refugee has the right to return to his or her country. This is the most desirable solution because it allows the refugee to restart a normal life in his or her home country. Regarding unaccompanied children, voluntarily repatriation decisions must be taken in accordance with the best interest of the child, family unit, parental responsibility and the active role of the children on the decision. The child himself must take the decision and it must involve the elements of freedom of choice and informed decision. Children must be provided with accurate information and their fears, insecurities and decisions have to be taken into account when deciding where he or she should be repatriated. It is very important to assess the risks that repatriation could have on children, therefore collaboration among governments, international organizations, non-

governmental organizations and special procedures involving child experts are required.

**Local integration in the country of first asylum.** Integration is a two-way process whereby the community and the person in process of integration are key players. It requires all parties to take action: refugees have to adapt to the new society and its culture and the host-community and public institutions have to welcome the new fellow and to guarantee him or her with the rights which he or she is entitled to. It comprises legal, social and economic inter-related aspects which are important for the success of the integration.

**Third country resettlement.** Under the auspices of the UNHCR, resettlement involves *the selection and transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them with permanent resident status*. Regarding the resettlement of unaccompanied children, this will always be undertaken when it is in the child's best interest and paying attention to his or her individual protection needs, such as physical or legal security of the person or where some specific services which are required to the assistance of the child are not available in the country which granted asylum. There are several States that have adopted a resettlement program and to which individuals with special needs can be sent after studying the convenience of the transfer.

**b) Unaccompanied children rejected refugee status.**

Whether an asylum-seeking unaccompanied child is denied the refugee status or is no longer allowed to remain in the State where he or she asked for asylum, special procedures to determine the possibility of returning to the country of origin should be undertaken. In this regard, the principle of the best interest of child requires that some safeguards have been taken into account before the repatriation to the country. First and foremost, the parents should have been located and informed about the child's return; if parents cannot be located, another relative, child-care institutions or the government has to agree to take care of the child.

Monitoring the protection status of the child once the repatriation has been done relies on the State of origin, though monitoring is sometimes done by International Organizations such as the IOM or UNHCR.

There are many risks which can jeopardize the proper adaptation of unaccompanied children into the society. Regarding the effects of detention, there are no abundant studies focusing on the consequences on unaccompanied children when it comes to their resettlement. Several studies have, however, reported on the consequences suffered by adults. Considering the special vulnerabilities of unaccompanied children and the impact detention have on them, we assume that the evidences found in adults' researches are applicable to their current case. The International Detention Coalition informed on their publication *Captured Childhood* about an Australian research which found that years after being released, former detainees *'were struggling to rebuild their lives and for the majority the difficulties experienced were pervasive.'* People taking part on the studio *'described changes in their view of themselves and their capacity for agency, their values and their ability to relate to others.'* In short, what was demonstrated by this study is that the harm caused by immigration detention *'compromises the capacity to benefit from the opportunities ultimately afforded by permanent protection.'* Additionally, *Captured Childhood* shares another research about the effect of detention done by Physicians for Human Rights, hinting *"that detention had harmful physical and psychological effects (including severe and chronic anxiety and dread; pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well as on the central nervous system; depression and suicide; post-traumatic stress disorder; and enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release), but that 'the literature supports the conclusion that the harms that develop during detention do not resolve once the detainee is freed, and that indefinite detention makes detainees vulnerable to new physical, social and emotional harms after they are released.'* The consequences that detention triggers on children have an impact when they are released, not only on the children but on the communities in which they are trying to reintegrate, no matter if they return home or are sent to a local community at the host State or are resettled into a third country.

Consequently, detention can never be in the best interest of the child. Detention cannot only traumatize and influence the physical and psychological health of the children, but also put in risk the proper adaptation of the children to their new environment. This non-adaptation has its effects also in the society that is hosting the children. This is why detention should be completely banned and special cooperation between community,



government and civil society should be established in order to ensure that children are guaranteed with the rights they are entitled with and work together to achieve the adaptation of the children to their new social environment.

## CHAPTER II

### LAW AND PRACTICES REGARDING THE DETENTION OF UNACCOMPANIED CHILDREN IN THE STATE OF CHIAPAS, MEXICO

#### **2.1. Concerns about the protection of unaccompanied children in Mexico analyzed from different perspectives.**

Mexico is a country in which three different systems -international, regional and national - are relevant regarding the situation of unaccompanied children who enter Mexico. In order to understand the complexity of the detention of unaccompanied children in Mexico and its problems, it is firstly important to analyze the issue from the different perspectives as well as to see the concerns reported by the international community and the impact this concern has had on the latest practices adopted by the country.

##### **a) International framework.**

Throughout the last decades, Mexico has been demonstrating through the ratification of international legislation its commitment to protect the rights of the children. However, practices implemented within its borders are jeopardizing this so-called concern about the wellbeing of unaccompanied children.

This first attempt to protect the rights of children, came with the ratification of the International Covenant on the Rights of the Child the 21<sup>st</sup> September 1990. The Covenant's main purpose was to ensure that States in all decisions regarding children, applied the principle of the best interest of the child. Likewise, and regarding the issue of unaccompanied children, Mexico demonstrated its commitment to the rights of refugees when it ratified the Geneva Convention, the 10<sup>th</sup> October 1953 and its Additional Protocol the 10<sup>th</sup> March 1983. Although there

is no specific mention to this vulnerable group in these two last normative regulations, special risks affecting this group should be targeted by specific protection measures in the context of migration.

Moreover, Mexico has ratified the main human rights instruments, including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment or the International Convention on the Elimination of All Forms of Racial Discrimination and The International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families. All these instruments, contain specific provisions regarding the protection of children.

Despite these attempts to protect the rights recognized internationally to migrant children, the reality regarding the detention of unaccompanied children within the Mexican borders raised the concerns of the Committee on the Rights of the Child, which on the 10<sup>th</sup> June 2015 recommended Mexico to stop the detention of migrant children and, instead, to establish a community-based shelter for them as well to a best interest determination process for decisions relating migrant children.

This recommendation was part of the “Concluding observations on the combined 4<sup>th</sup> and 5<sup>th</sup> reports on Mexico” and expressed the Committee's concern about the situation of unaccompanied children seeking asylum or who had been granted refugee status in México. The Committee highlighted: (I) *lack of adequate measures to identify, assist and protect asylum-seeking and refugee children* (ii) *the prolonged detention of asylum-seeking children* and (iii) *the lack of data on the number of asylum claims made by children and children who had been granted with refugee status during 2014*. Likewise, regarding unaccompanied migrants, the Committee reported that “migrant children were being kept in detention centers for migrants and violence and abuses against these children were reported”. Besides, “children were being deported without any preliminary process to establish whether it was in their best interest”.

The Mexican Government reacted to this recommendation<sup>24</sup> and reaffirmed its compromise to respect the rights of the children and reported its will to establish an interinstitutional group gathering civil society, legislative power and public authorities which would oversee the application and monitoring of the recommendation. Two years after this statement, the situation of unaccompanied children seems to have improved. Yet, there are still many voices claiming that there are constant violations being committed against the rights of unaccompanied children in Mexico.

### **b) Regional framework.**

At the regional level, the idiosyncrasy of the context of migration in Central America outlined the need to adapt the Geneva Convention to the specialties of this region of the world. Organized crime and massive violations of human rights, among others, started to be considered a feasible reason to trigger founded fear to leave a country, hence, at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama done in the city of Cartagena, Colombia, during the days 19th and 22nd of November 1984, the Cartagena Declaration on Refugees was adopted by the States participating in the Colloquium.

This declaration, although it is not legally binding, outlines the peculiarities of the displacements in Central America and establishes the particularities to be granted with refugee status in the region *”in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”*

In this regard, Mexico transposed the new refugee definition contained in Cartagena Declaration into its legislation, accurately under Article 13.2 of the

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<sup>24</sup> Comunicado Conjunto Segob Sre Dif Conago 'El Estado Mexicano reitera su compromiso para cumplir con las observaciones del Comité de los Derechos del Niño de las Naciones Unidas', 10<sup>th</sup> June, 2015

General Law for Refugees, Complementary Protection and Political Asylum, changing its legal status to binding. This action could be seen as a positive step taken by the Mexican authorities driven by an actual concern of the situation of migrants in the region. However, facts show a failure to protect unaccompanied children despite the promising steps taken by the country. Lack of harmonization among the different legal systems in the country are labeled as being the cause of this failure. To what extent this is true will be further analyzed when focusing on examining the reality in practice.

Moreover, 30 years after the adoption of the Cartagena Declaration, the countries met in Brasilia, invited by Brazil, UNHCR and The Norwegian Refugee Council, to agree on the “Plan de Acción Brasil” a declaration to establish a “frame of regional cooperation and solidarity to strengthen the international protection of the refugees, displaced and stateless people in Latin America and the Caribbean, demonstrating that States were committed to keep on protecting this group of people.

Additionally, Mexico, is a member of the Organization of the American States and it adopted the American Convention on Human Rights in 1981, whereby the right to liberty and security is enshrined under Article 7. Hereof, it is established that *“No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto”*. This article is really complete when it comes to the prohibition of arbitrary detention: it does not only prohibit arbitrary detention, but it also establishes core rights that have to be respected when someone is detained, such as the right to be informed or to be promptly brought before a judge. The preamble of the Inter American Convention establishes that its goal is to consolidate the democratic institutions throughout the continent as well as to guarantee the right to liberty of the people and social justice. Since these are fundamental rights of mankind, they need international complementary protection. The Inter American Court of Human Rights, created by Article 62 of the Convention - whereby the States had to specifically accept its jurisdiction - states that the international responsibility of States is triggered when a violation of an international rule has taken place. Any breach to the Convention, by action or omission by a State, will be attributed to it, triggering international

responsibility. However, to reach the International level, national instances have to be exhausted first. The way in which the Inter American Court operates and enforces the Convention is through judgments and advisory opinions, clarifying the meaning of the Convention or other treaties related to human rights which are applicable throughout the continent.

Concerning the rights and guarantees of children in the context of migration and/or in need of international protection, the Inter-American Court of Human Rights published, in August 2014, the Advisory Opinion OC-21/14. Some experts claim that this Opinion tackles specifically the issue of unaccompanied children in México, notwithstanding that there is no open reference to Mexico; however, there is no clear reference to Mexico throughout the document regarding to this issue. Ambassador Garre said that the aim of the Opinion was “*for the Court to determine more precisely what are the obligations that the States have regarding the possible measures to be taken in respect to children associated with their immigration status or that of their parents.*”

One month after the release of the Advisory Opinion, the Special Rapporteur of the OAS for Migration, undertook a visit to the US-Mexico Border to monitor the human rights situation of unaccompanied children in the area and wrote a report entitled: “*Refugees and Migrants in the United States: Families and Unaccompanied Children*”. The situation of unaccompanied children at the US-Mexico border immediately called the political and media attention, negatively impacting the external image of the US and leading to the situation currently faced by Mexico regarding migration in its Southern border.

Following these statements, during the first five months of 2015, the numbers of deported unaccompanied children from the US went down to 8.894 compared to the same period of the previous year, while México increased the deportations of unaccompanied children up to 56% over the previous year. Maureen Meyer, an immigration expert working for WOLA stated that “*It’s clear that this stepped-up effort, after July, was in response to pressure from the US to work with them, and help stem the flow of Central American migrants into the US*”.

Consequently, Mexico having become the guardian of the US border is coping with the throngs of migrants crossing the Guatemala-Mexico border whereas

spreads publicly a policy of protection under which it has militarized its border in front of the eyes of the international community. The main effect this seems to have, is the increase on the amount of detentions and deportation, threatening the protection that unaccompanied children as one of the most vulnerable groups, deserve and being the center of the attention of the OAS when it comes to violations of human rights in the context of migration.

**c) National legal framework.**

2014 was the year of inflexion regarding the protection of unaccompanied children in Mexico. During this year the interest from the international community in this issue shifted from total ignorance to becoming an issue of extreme concern. This was the time when México undertook many legal reforms to give its legislation a human rights approach, attempting to meet international standards and to respond to the concerns raised by the international community.

First and foremost, the 10<sup>th</sup> June 2011 the title of the first chapter of the core Mexican legal instrument, the **Constitution of the Mexican States**, was modified by Decree to “Of Human Rights and its guarantees”. This modification led to the inclusion of a human rights approach in many articles of the Constitution. In this regard, the international principles *pro-homine* and the protection of the family and children became primary. The importance of this Decree regarding migration, was the adoption Article 11 which recognized the right of every person to travel, enter and leave the country without the need of holding a passport or similar documents. Likewise, impacting the rights of unaccompanied children, Article 133 of the Constitution enshrines that all treaties when adopted will be automatically applied in Mexico. They are situated in an infra-constitutional level but in a supra-legal one, so all the treaties and covenants Mexico has adopted regarding children and all the duties it has accepted when adopting them, must be protected by the judicial bodies as internal law.

Article 4 of the Constitution has established the base to adopt the rest of the upcoming protective legislation regarding the best interest of the child. This article protects the rights to development, education, health and food of the children.

Additionally, it enables the State to use all necessary means to protect the dignity of the child and his or her rights.

In accordance with Article 4 of the Constitution, on the 4<sup>th</sup> December 2014 the new **General Law for the Protection of Boys, Girls and Adolescents** was adopted. This law recognizes the minors as holders of rights and dignity under the auspices of the principles of the best interest of the child, universality, interdependence, indivisibility and integrity.

Focusing on the issue of detention of unaccompanied children, this new General Law establishes under Article 26 that *“The DIF national system or systems of entities, should grant special measures of protection girls, children and adolescents who have been separated from its family of origin per judgment. Competent authorities shall ensure that they receive all the care that is required by their situation of family abandonment”*. This article also establishes that *“Competent authority shall take into consideration the best interests of parts to determine the option that is most appropriate”* and that the DIF System will have a subsidiary character, giving priority to a familiar environment, which follows the lines established by the recommendation of the CRC explained above. The adoption of this law represents a great advance in guaranteeing the right to liberty of the children, thus this binding regulation recognizes that detention centers are not places for children.

In addition, this new regulation established a chapter entirely dedicated to the rights regarding migrant children, referring to the protection measures that institutions and authorities should adopt to guarantee the rights of migrant children. Article 96 of this law prohibits the deportation of children when their life, security and/or freedom can be threatened and Article 85 even establishes that under no circumstance a minor should be detained.

On 26<sup>th</sup> January 2011, Mexico adopted the **General Law on Refugees and Complementary Protection**, becoming the first country in Latin America to recognize the figure of the Complementary Protection for the people who cannot be granted the refugee status but cannot go back to their country because their life

would be at risk<sup>25</sup>. In October 2014, this Law was modified and changed its name and structure to include the Political Asylum, which is the asylum granted to a person which is being prosecuted due to their political ideas. As explained by the General Assembly, the term political asylum can lead to some divergences. For some people political asylum refers to “diplomatic asylum”, which denotes asylum granted by one State outside its territory, accurately in diplomatic missions or on board its ships when they are in territorial waters of another State, on board its aircrafts, and on their military installations when they are place in the territory which belongs to another country. This kind of asylum implies the derogation of the sovereignty of the territorial State. For others, the term refers to “territorial asylum” which is mainly the one granted within the border of the territory who grants the refugee status<sup>26</sup>.

Furthermore, and regarding unaccompanied children, the **Law on Migration** modified Article 112 stating that when unaccompanied children are held in the migration authority's custody, his or her rights should be protected. It also establishes that once the child is sent to the migration authorities, they have to immediately send the child to the DIF system. Furthermore, it enshrines the importance to inform the child of his/her rights. The inclusion of this article is of highlighted importance. Due to the lack of harmonization of the Mexican legislation, migration authorities were following only their own regulation and not paying attention to the national legislation. This situation was leaving children unprotected. Yet, since the inclusion of this article, on the 21<sup>st</sup> April 2016, protection of the best interest of the child when they are held by migration authorities has become a priority.

The most recent advance on this issue, was a dictum adopted by the Mexican Senate on 27<sup>th</sup> April 2017, for the harmonization of the General Law for the Protection of Girls, Boys and Adolescents, whereby the prohibition of detention

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<sup>25</sup> General Law on Refugees, Complementary Protection and Political Asylum (art.2.IV) México, 27<sup>th</sup> January 2011 [las reform 30<sup>th</sup> October 2014]

<sup>26</sup> UN General Assembly, Question of Diplomatic Asylum. Report, Thirtieth Session, Agenda Item 111, 22nd September 1975.



of children is forbidden, and the Migration Law<sup>27</sup>. There is still skepticism about the systematic adoption of this dictum. This is mainly due to the fact that it has to continue the legal process established in order to be adopted by the legislative power of the country. Yet, the continuous attempts of the Senate to stop the detention of children are a good indication towards the situation of unaccompanied children; they are providing a solution to the problem of the harmonization of the law previously mentioned.

On paper, domestic Mexican law includes all the measures claimed by the International community in order to properly protect and provide an adequate response to the needs of the children. Mexico has included a best interest of the child approach, has banned the detention of children in any case and established a care system to protect separated, unaccompanied or abandoned children which is supposed to be run by experts on the needs of children. Unfortunately, as it will later be explored, this is only in theory. The proper application of these standards and rules is something that is being currently discussed. After reading the law, one can assume that the rights of the children are utterly protected under Mexican legislation. Yet the outrageous violations of human rights that are happening every day demonstrate another reality. Civil society is the one claiming for the enforcement of the legislation and, therefore, for what unaccompanied children are guaranteed within the Mexican borders. In the case it is demonstrated that in its actions, Mexico has not complied with the law, the Mexican State shall be asked for accountability.

## **2.2. Failure of the States of the Northern Triangle to protect their nationals.**

### **Violence labeled as the main reason of forced migration.**

Mexico has become a country of destination for hundreds of children fleeing the Northern Triangle of Central America, one of the most dangerous regions in the world. This region is guided by the rules of fear and violence and simple decisions as to stroll around a neighborhood under the control of the gangs could be a life or death decision<sup>28</sup>. In this

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<sup>27</sup> Vanessa -, 'México debe seguir avanzando en garantizar el derecho a la libertad de niñ@s migrantes' [2017] [Http://endchilddetention.org](http://endchilddetention.org).

<sup>28</sup> "Amnesty international, ¿Hogar Dulce Hogar? El papel de Honduras, Guatemala y El Salvador en la creciente crisis de refugiados (2016)

regard, Doctors Without Borders reported that 92.2% of the migrants who had been interviewed during 2015 and 2016 in Mexico had suffered some kind of violence in his or her country of origin or during the journey through Mexico<sup>29</sup>.

In this scenario, violence against children is reaching alarming figures. Unprotected children, usually coming from poor living conditions, not having proper access to mental health assistance or education, are becoming traumatized worryingly young ages. This threatens the proper development of their wellbeing and physiological health and makes them more prone to start drinking alcohol, misusing drugs and smoking<sup>30</sup>.

El Salvador and Honduras, were reported as having the highest murder rate of an out-war zone<sup>31</sup>. The failure to protect their citizens is becoming – if it is not already - very obvious. None of the countries of the Northern Triangle has ever admitted the existence of an internal conflict within their borders<sup>32</sup>, leaving the children utterly unprotected. Therefore, when they decide to run away they start the dangerous route already traumatized and distressed<sup>33</sup>, leaving them in even a more vulnerable situation.

The international community has requested the countries of the Northern Triangle to start targeting the root causes of forced migration, aiming to protect their people and to deter them of initiating this dangerous journey. Bearing in mind that there is no other obligation than the commitment of the States of the Northern Triangle to find solutions to overcome the issues referring to migration in Central America, the international community has to be patient. In this regard, the plan drafted by the governments of Guatemala, El Salvador and Honduras entitled “Triángulo Norte: Construyendo confianza, creando oportunidades” focuses on the implementation of strategies to improve the social and economic opportunities of children and targets the impact of violence and poverty as the main facts pushing migration. During the interview conducted to Anna Aziza Grewe,

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<sup>29</sup> Carmen Rodriguez, Forzados a huir del Triángulo Norte de Centroamérica: Una crisis humanitaria olvidada (Doctors Without Borders 2017)

<sup>30</sup> SavetheChildren, Sweden, Childhood in the shadow of war: Voices of young syrians (2015)

<sup>31</sup> “Amnesty international, ¿Hogar Dulce Hogar? El papel de Honduras, Guatemala y El Salvador en la creciente crisis de refugiados (2016)

<sup>32</sup> *Ibidem.* 23

<sup>33</sup> Leora Hudak, Trauma of a generation: The urgent need for spezialized mental health solutions in Central America's Northern Triangle (Heartland Alliance International (HAI) 2016)

Youth and Migration Coordinator at the NGO Colectivo Vida Digna in Guatemala, she shared with me her concern about the mentioned plan and the hopeless feeling she has towards it when it comes to changing the situation of children fleeing their country. Her low hopes are mainly due to the lack of opportunities and violence, which has been a concealed mean to intercept external funds by the State. This plan is under the control of corrupted governments which continue trafficking with influences and exploding the needs of the youth to their advantage.<sup>34</sup> Whilst we are still waiting for the implementation of proper strategies targeting the root causes of migration in Central America, civil society organizations and international NGOs play a major role fulfilling the gaps of States, regarding the protection of children<sup>35</sup>.

### **2.3. Practices regarding the protection of unaccompanied children once they arrive to Mexico.**

Historically, migration through the State of Chiapas has used the city of Tapachula as the main port of entry. It is in this city where the main International NGOs, public institutions and civil society organizations have established their office in order to control and protect migrants' rights. Since migration controls have become a routine at the Southern border, people are starting to take new routes, which are worryingly connected to drug trafficking, for avoiding stumbling on migration authorities during their journey.

Consequently, there is no accuracy on the numbers of unaccompanied children crossing the country, alone or with traffickers, due to the fact that there is no recording of the children that have not been registered by the authorities. According to the information one can rely on, regarding the detention of unaccompanied children one needs to differentiate between the ones apprehended by migration authorities and the ones not being apprehended, since the consequences are utterly different.

#### **a) Unaccompanied children apprehended by migration authorities.**

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<sup>34</sup> Interview Anna Aziza Grewe, Youth and Migration Coordinator of Colectivo Vida Digna NGO, Quetzaltenango, Guatemala

<sup>35</sup> *Ibidem.* 23

Indeed, along their journey, children are highly prone to be intercepted by migration authorities. Controls along the border have increased and migration authorities have implemented their operations with the goal of detaining migrants; raids on hotels, settling of new checkpoints and the use of advanced technology to locate migrants, boosted the number of unaccompanied children detained since the implementation of these measures after 2014<sup>36</sup>.

According to the statistics, the number of children reported to have been apprehended by migration authorities during the period from January to October 2016, goes up to 32.426, from which the trifle of 45.4% were unaccompanied<sup>37</sup>. In accordance with the law, these children have to immediately be transferred to DIF centers under the protection of the Federal Procurator for the Protection of Children. The role of the Procurator was created in 2015, with the particular duty of protecting the children and acting in their best interest. Since its creation, 90% of its cases have been related to migrant children<sup>38</sup> and this has been possible due to the active role of civil society and international organizations in order to make visible the plight of migrant children. Regarding unaccompanied children, the law establishes that the only person who can hold the legal representation of the children is the federal procurator, which relays on the DIF centers for the legal custody<sup>39</sup>. These centers are considered by law as the alternative to detention of children and an assistance center in which the protection of the rights of the children and their psychosocial well-being are a priority.

Despite the fact that the legislation establishes that children have to be immediately sent to the DIF system, children actually wait an average of 3-4 days to be canalized to the DIF<sup>40</sup>. During this term, children are detained in migratory stations designed for adults, properly called a detention center and designed with

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<sup>36</sup> José Knippen and others, *An Uncertain Path Justice for Crimes and Human Rights Violations against Migrants and Refugees in Mexico* (2015)

<sup>37</sup> Migratory Policy Unit, *Niñas, niños y adolescentes migrantes en situación migratoria irregular, desde y en tránsito por México* (México 2016)

<sup>38</sup> Interview Lourdes Rosas, UNICEF's Child Protection Consultant

<sup>39</sup> General Law for the Protection of Girls, Boys and Adolescents (art 24), México, 29<sup>th</sup> May, 2000 [last reform 2<sup>nd</sup> April, 2014]

<sup>40</sup> Interview Claudette Walls Coordinator of International Organization for Migration, Office Tapachula

cells, bars and police staff where no personal interviews to identify the specific needs of each child are carried out<sup>41</sup>. In these centers, there are protection officials known as OPIs, which are supposed to be professionals on the treatment of children, yet it seems that the only difference that can be appreciated between the OPIs and normal officials is the sticker glued to the chest in which once can read OPI.

Fray Matias Center for Human Rights, an NGO working in Tapachula, reported on 2016 the systematic violations of human rights that were taking place inside the migratory stations: verbal, psychological and physical assaults, confinement, punishment cells and insalubrity were reported in *“Derribando Muros. Boletín Observatorio de Migración. Más allá de la Detención”* in August 2016. Likewise, a worrying failure on protection, carried out by the people who are supposed to protect the children, is the continuous discouragement caused by the migration authorities. As Salva Lacruz, Advocacy Coordinator of the Center for Human Rights Fray Matias, told me during our interview, many children ask for voluntary repatriation due to this discouragement; authorities discourage children to not ask for protection by telling them that *“they are going to be all the procedure detained, that it is long and that is going to be rejected”*, leaving the children in a hopeless state. Moreover, migration authorities are not informing the children about their right to ask for asylum, going against Article 69 of the Migration Law - which states that migrants in an irregular situation in the country, have the right to be informed by the authorities, at the moment of their presentation before them, of their rights and guarantees -, and putting them on risk by sending them back to the serious situation they had faced in their countries and which forced them to flee.

A general state of negligence is what can be seen when the children are apprehended by the authorities. The Migratory National Institute depends on the Secretary of Government, which has the main goal of national security, therefore children are seen more as a threat to the country than as a vulnerable group in need of protection. Eventually, this is something that can be assumed when looking at the practices that are being implemented.

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<sup>41</sup> Interview Claudette Walls Coordinator of International Organization for Migration, Office, Tapachula

### **Fact-findings regarding the rights of unaccompanied children in detention in Tapachula.**

During the research carried out in Chiapas for the purpose of this thesis, I had the chance to visit the Municipal DIF of Tapachula, a so-called alternative center to detention for unaccompanied girls who are waiting for the outcome of their asylum procedure, humanitarian visa or family reunification, are going to be deported or are waiting to be transferred to another shelter once they are recognized with the refugee status. If this was the case, boys and girls are canalized to a shelter with open doors in Mexico City, run by an organization from the organization “Casa Alianza”. The State does not participate in the integration of children who are recognized as refugees or facilitates a space where unaccompanied children could go after receiving the status of refugees. As always, civil society is the one fulfilling the gaps of the State and setting facilities to these children. Regarding the situation of boys, they are sent to another center called Viva México, in this case run by the State of Chiapas.

According to Eva Ovando Matías, Coordinator of the Municipal DIF Center of Tapachula and lawyer, there is capacity for 24 girls. Bearing in mind the number of children apprehended by migration authorities and that the most of the deportations are undertaken by the State of Chiapas, it is clear that there is no space for all unaccompanied girls that have been apprehended by the authorities. There is no transparency about what is happening with children that are not sent to these centers. By examining the statistics, it is easy to assume that children are being held in migratory stations for adults. Indeed, this is what Salva Lacruz, Coordinator of the Human Rights Center Fray Matias, confirmed during our interview “*the majority of the girls and boys are held in the Migration Station Siglo XXI*”.

Concerning the Municipal DIF of Tapachula, girls seemed to have access to legal information and representation as well as mental health assistance 6 days per week during office hours. The right to education is not guaranteed in this center, girls are not going to school and no lessons are being organized for them. Girls waiting for the result of their procedures wait for around 6 months (*45 working days for the first outcome plus 10 more working days for the notification; summed up to this, whether the outcome is negative, they have to wait 15 working days for the*

*presentation of the appeal, which in this case is done by the lawyer of the center, 45 working days more until the COMAR resolves plus the 10 working days for the notification*). Consequently, an unaccompanied girl can be more than half a year in the center without attending school. The right to education is protected by international legislation, and under Mexican legislation. Authorities are not acting in the best interest of the child when there is no opportunity for unaccompanied girls to attend to school while being in the DIF center, clearly violating the Mexican legislation.

These centers are described under Mexican legislation as being the solution for the detention of children, centers where the necessities of the children are a priority. The right to education is one of the main rights regarding the development of the child. It is not simply about providing learning opportunities to children but it is also necessary to create a sense of normality while being detained, helping children to maintain a good mental health<sup>42</sup>.

This violation of the right to education is highly connected to the prohibition of freedom of movement that these girls are suffering. As I could understand, they are not allowed to leave the center, because of the risk of absconding. Fences and walls surround the building, which only have a space of 20 square meters cement yard open-air. They have access to one television and some minutes to use the few computers installed to help them to cope with their isolation. No other leisure activities are being given to the girls, except the few days that international organizations like IOM, among others, can organize activities for them<sup>43</sup>.

The right to leisure is also protected by Article 31 of the ICRC. Playing helps the children to cope with their current situation, it can relax and relieve them. Article 39 of the Convention also establishes the need of a healthy environment to recover from traumatic experiences. The lack of leisure can put in peril the already weak mental conditions of the girls while waiting for the outcome of the procedure. During my interviews, I was told that they have access to the psychologist 6 days

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<sup>42</sup> Corlett, D, with Mitchell G, Van Hove, J, Bowring L, Captured childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention (International Detention Coalition 2012)

<sup>43</sup> Claudette Walls, Coordinator of International Organization for Migration, Office Tapachula, Interview May 2017.

a week to help them cope with the detention, albeit the quality of the professionals treating the children have been put into question by international organizations, which are striving to improve the professionalism of the staff in charge of the well-being of the children<sup>44</sup>. The situation of the girls held in the DIF clearly violates the principle of the best interest of the child: detention is never on the best interest of the child. In this regard, Eva Ovando shared with me her concern about the mental health of the girls while being detained, she has seen many cases of depression, self-harm and hunger strikes during the time she has been working at the center.

In short, these centers are, in practice, detention centers where the right to liberty and security of the girls is being violated. The girls held in the DIF of Tapachula were deprived from their liberty and no guarantee for other rights as education or leisure among others were guaranteed. The situation goes against all the promising steps taken by the Mexican government in order to presumably protect the children. Opting for the modification of the legislation will not change the situation faced by children unless those responsables are required to act in accordance with the law. In this current situation, Mexico has transposed, automatically, all the international covenants that it has adopted and has made them legally binding. Additionally, it has even given a greater level of protection for unaccompanied children by drafting its own legislation addressing children's protection. Courts are meant to be an independent branch, whose existence is based on the enforcement of the law. Civil society has been given all the necessary tools to legally claim against the Mexican government, requiring them to follow what it is enshrined under the law and to make the state accountable for not acting in accordance to it.

**b) Unaccompanied children not apprehended by migration authorities.**

Unaccompanied children who are not apprehended by the authorities, usually end up in civil society shelters, usually run by friars. Some of them decide to stay in these places and others decide to continue their journey. These shelters are usually

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<sup>44</sup> Lourdes Rosas, UNICEF's Child Protection Consultant, interview May 2017.



transit shelters where migrants can rest for a couple of days before continuing their trip.

During my trip to Tapachula, I had the opportunity to visit the “Albergue Belén” to further understand which was the situation of unaccompanied children. This visit allowed me to expand the findings I had gathered in 2016 during my time working at the shelter “La 72” in Tenosique de Pino Suarez in Tabasco. In this regard, shelters seem to always have a legal advisor and psychological assistance; nevertheless, no specialization on the treatment of children can be observed. Freedom of movement is guaranteed during the shelter’s opening hours, mainly because of security reasons. They have not much budget and many international organizations are helping them to offer and improve the services<sup>45</sup> they provide to migrants and asylum seekers, like health care, food and other entertainment materials. For example, Claudette Wallas explained during our discussion that the IOM has invested in a library for the Municipal DIF center of Tapachula, since the children were eager to read entertaining stories. Besides, they also invested on training workshops for the boys in order to teach them the professional skills they were asking for it<sup>46</sup>.

The main concern of these places is that, although children are sleeping in separated areas from adults, they are all together during the day. Since it is a transit center, unfortunately these places have been a key spot for traffickers to look for victims, as well as for drug dealers. Additionally, many adults arrive traumatized because of their experiences and their personal struggles can have an impact on children who are witnessing these disturbing situations. Likewise, security at these places is at stake. Many children flee their countries because of threats of gangs and it is lamentably true that many gangsters arrive to these shelters, mixed with migrants, in order to hunt down people fleeing from them. There have been reported cases of abuses committed against migrants by gangsters in these shelters<sup>47</sup>. Therefore, children are highly exposed to risks for their security while

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<sup>45</sup> Claudette Walls Coordinator of International Organization for Migration, Office Tapachula, Interview May 2017

<sup>46</sup> *Ibidem*

<sup>47</sup> Gustavo Castillo García, 'Ser pandillero o prostituirse, caminos para migrantes de CA' [2014] (.) La Jornada

being in these places. The right to liberty of unaccompanied children is threatened by the right to security. Exemplifying, during our interview Ana, Coordinator of the Albergue “El Buen Pastor”, expressed that majority of children leave the shelter before the outcome of their procedure, because they meet someone with whom they decide to continue their life outside the shelter.

In addition, these shelters have no legal custody or legal representation of the children recognized, so that the correct way to act in accordance to the law is to call the Procurator as soon as the child is identified. Shelters are also supposed to inform the DIF centers about the arrival of new child, so that they can decide whether the child will be better in the shelter and, if so, monitor the situation. Bearing in mind my interview with the Coordinator of the DIF Municipal center and the concerns expressed by Fray Matias Center for Human Rights or IOM about the amount of work that the Procurator is dealing with, I barely believe that the Federal Procurator is carrying out his or her duty, acting to identify particular necessities of each child. Protection of children is at stake again since Procurators are facing different challenges such as the lack of budget and staff, which make it even more difficult for them to undertake the duties specified under the law.

Notwithstanding that these practices are not in the best interest of the child, at least children can enjoy their freedom. Since these private shelters are becoming a place for children, nowadays, international NGO's as UNICEF, UNHCR and IOM, which currently share the goal of working on the implementation of projects to protect vulnerable groups, as unaccompanied children, are striving to train staff from these centers in order to provide an adequate response to the psychosocial necessities of these children<sup>48</sup>.

Currently, there are only these two possibilities for unaccompanied children crossing the Southern border of Mexico and both are far away from having an approach of child protection. Mexico is indifferently failing in protecting the most vulnerable people and in acting in accordance to its own law. Undoubtedly, there is a need to take action and implement what it is written under the law if Mexico wants to fulfil its obligations regarding the protection of children.

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<sup>48</sup> IOM, UNHCR and UNICEF Interviews May 2017.

In addition, if it was not because of the work of civil society and international organizations striving to make visible the plights of migrant children and their struggle to guarantee that the government complies with what it is written on the law, no one would be aware of the violations taking place and migrant children would continue to be invisible to the Mexican authorities as victims of outrageous injustices.

#### **2.4. How to enforce the law. Mexico's legal responsibility.**

Mexico can be labeled as a simulated State in which, by just looking at the law, it seems to be a kind of paradise where the rights of every child are being guaranteed and protected. The legislation has been written in order to protect unaccompanied children in all spheres. Additionally, institutions seem to work efficiently. There is the conception that the Migratory Institute is reporting each case of detention, individually, and that the Mexican National Commission for Human Rights is fulfilling its commitment of entering the Migratory Stations to monitor the situation of human rights and report when there is a legal violation.

Actually, the monitoring of human rights in Tapachula, at the Migratory Station Siglo XXI, is better than in the rest of the migratory stations due to the establishment in the city of civil society and international NGOs, which are also allowed to enter to the Station. Fray Matias Center for Human Rights is one of the actors which was permitted to enter to the station and unfortunately, during my interview with Salva Lacruz, he expressed his concern about the inefficient work of the CNDH; it seems that they have never heard about this public institution reporting on any violation of human rights or providing help in any individual case. Because of their permission to enter, they have been witness of the drear conditions of people detained in the migratory stations, conditions that were published at the report "*Derribando Muros. Boletín Observatorio de Migración. Más allá de la Detención*".

Mexico is an example of where outrageous violations of human rights occur and where there is impunity and a lack of political responsibility. In this context, where are the migrants? Moreover, what is happening to the unaccompanied migrant's childhoods? Mexico has accepted international obligations towards human rights and, particularly, towards unaccompanied children. Due to the breaches of the international legislation regarding this vulnerable group, the procedures claiming for accountability to the State

before the Inter-American Court should be triggered, although as previously explained, internal measures have to be exhausted before in order to reach this level.

When going through an internal procedure to ask accountability from Mexico, actors claiming the violation of the Constitution need to do an application for amparo. This procedure is regulated in the new Amparo Law Implementing Articles 103 and 107 of Mexico's Federal Constitution and covers all the violations of human rights that have taken place in the country. Once this procedure has been exhausted by the applicant, then the process to access the Inter-American Court of Human Rights is available to guarantee that the rights enshrined in the American Convention are protected. If it is demonstrated that a violation of human rights has taken place, economic punishments will be adopted.

However, there are some circumstances negatively impacting litigation which are stopping civil society from asking the accountability of the country regarding the breaches of its internal legislation:

- **The use of the legal terms “accommodation” instead of detention.** One of the main problems when it comes to the acceptance of the claim, is that the law never uses the legal term detention to refer to the deprivation of liberty of the children. Therefore, when civil society actors have sued the State before the courts, the applications have several occasions not been admitted. In this regard, judges do not seem interested to actually know what is the situation of migrants, they only base the acceptance or rejection of an application by looking at the law, and since there is no single reference to the term detention, the majority of the applications are rejected<sup>49</sup>.
- **Individuals have to spend the whole process in detention.** Summed up to the use of different terminology, Diana Martinez, Program Officer in Mexico for the International Detention Coalition, exposed during the interview carried out for this research, that in the cases of adults, when appeals were presented to the Court, people had to wait for the outcome of the procedure detained in the Migratory Station. This meant that they had to usually wait, 1 more year under detention. This

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<sup>49</sup> Salva Lacruz, coordinator Fray Matias Center for Human Rights, Interview May 2017.

situation, has discourage the majority of the people from asking accountability to the State because of the violations committed to their human rights. Although this was in the case of adults, it might also be applied to the case of children.

- **The legal representation of the children.** Due to the fact that the legal representation of the children falls under the scope of the Federal Procurator, and this is the only person who has the right to claim in representation of the child, many civil society organizations were not allowed to make claims concerning the violations committed against the rights of a child. However, it seems that there is a lack of understanding of its own role by the Procurator when it comes to the litigation in the name of children<sup>50</sup>. This has left many children unprotected. Moreover, the accountability of the State when it comes to the violations of the right of the children seems to not be a priority for the new institution of the Federal Procurator. This has lessened the number of cases asking for accountability of the State for the violations of the rights of the children.

Besides, civil society actors that are still trying to commence actions against the State, such as Fray Matias, have never got the chance to exhaust the internal remedies, which is the only way to gain access to the Inter American. These actors keep on striving to reach the supreme level in order to reach the Inter American Court. Yet, time is necessary to train judges about the concepts of human rights and the situation faced by unaccompanied children.

Additionally to the internal procedure to ask for accountability to the State, civil society has found two other ways to protect special cases which are noteworthy. Although, unfortunately, these mechanisms are not going to render Mexico accountable, at least they will provide protection in some specific cases:

1. **Precautionary measures.** Precautionary measures are enshrined under Article 25 of the Inter American Commission of Human Rights Regulation. It establishes that in serious and urgent cases, which could represent an irreparable damage to a person, the Commission could, itself or requested by someone, request to a State

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<sup>50</sup>Diana Martínez, Mexico Program Officer of the International Detention Coalition, Interview July 2017

to adopt precautionary measures to guarantee the rights of the person<sup>51</sup>. Fray Matias has tried to ask for these precautionary measures in some cases, nevertheless, the Inter American Commission seems to be saturated so when they have accepted to request to the State to apply precautionary measures, they have found that the child has already been deported and consequently his or her rights have already been violated. This fact that was also confirmed by Diana Martinez, Mexico Program Officer of the IDC.

2. **Application to the UN High Commission for Human Rights.** The other path to ask for the enforcement of the protection established under the international legislation adopted by Mexico in cases of violations of human rights is to go directly to the UN High Commission for Human Rights. Yet, in order to do so, one has to firstly, exhaust all the internal remedies. Albeit, when it can be proven that the internal remedies are not going to be effective, as is the case in Mexico, and that once you had reached the UN, the rights of the person would be already violated, you may apply directly to the UN High Commission for its protection. Fray Matias Center of Human Rights is willing to start using this new measure and continue trying to reach the Supreme Court level, in order to make Mexico accountable for its violations of human rights.

The judicial system in Mexico is believed to be the last corrupted of the institutions and that is why civil society strives for litigation. Besides, Mexico is really sensitive to its international reputation, so, the influence of the international community to change the patterns of behavior by pressuring the State has to be taken into account. Mexico has violated human rights and its internal legislation. Litigating with the tools mentioned above, is the only way to ask for accountability. Exhausting the internal remedies will be such a step forward to change the situation of unaccompanied children in detention in México, and if so, no doubt of the responsibility that the Inter American Court will ask to México for the violations committed to the Inter-American Convention on Human Rights.

These are uncertain strategies to make México accountable but there is the hope that this is the only way to enforce the protection of unaccompanied children set down in the

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<sup>51</sup> Rules of Procedure of the Inter-American Commission on Human Rights (art 25) 137<sup>th</sup> Session, October-November 2000 [last reform, 147<sup>th</sup> Session, March 2013]

legislation. Civil society needs to continue its strive in order to make México accountable for the violations of the rights of the unaccompanied children detained within its borders.

## CONCLUSION PART I

In short, the finding exposed above have shown that detention of unaccompanied children is currently happening in México, despite the claims of the international community and the government's statement to the Committee on the Rights of the Child's recommendation. This chapter has demonstrated the vulnerability of children and the lifelong consequences of detaining such a vulnerable group in its attempt to explain why children should never be detained according to International Law. México is not fulfilling its international obligations and is not acting in the best interest of the child when sending them to DIF centers; either when making use of archness to avoid accountability, since there is no single reference in its legislation about the actual detention that DIF system represents for unaccompanied children.

Besides, the lack of information and knowledge of the judges about the migration situation, summed up to the vagueness of terms found under Mexican's legislation, are important factors to take into account. These factors are challenging the overcome of the practices of detaining children, despite the international and national community's awareness that children are being detained. Whereas legislation keeps on using euphemisms to refer to the deprivation of liberty of the children, the authorities are going to keep on interpreting the detention of children as an accommodation conducted in the best interest of the child, instead of an arbitrary detention. In this regard, the judiciary does not consider as a breach of the prohibition of arbitrary detention the "accommodation" of children in the DIF systems to assure that their migratory status is being studied.

However, México has the tools to make its government accountable for the breaches to international law and for the harm caused by detaining unaccompanied children fleeing the Northern Triangle of Central America. Therefore, it is just a matter of time that cases claiming the responsibility of the Mexican government, not only under international law, but under its domestic law. To end this situation, civil society has to focus on litigation and continue striving to ask the adequate enforcement of the law.

While civil society strives to litigate, a system of proper alternatives to detention to actually be in compliance with the protection claimed by international law and to not cause irreversible harm to the children has to be developed. Therefore, the next part will focus on the topic of alternatives to detention in order to study how México could take advantage of the use of alternatives to detention which will imply benefit in many ways the State while respecting the dignity of unaccompanied children.



## PART II

### THE IMPLEMENTATION OF ALTERNATIVES TO DETENTION FOR UNACCOMPANIED CHILDREN

#### CHAPTER I

##### BEST PRACTICES REGARDING THE USE OF ALTERNATIVES TO DETENTION

According to the definition provided by the International Detention Coalition, an alternative to detention is “*any legislation, policy or practice, formal or informal, that ensures people are not detained for reasons relating to their migration status*”. Under international law, unaccompanied children should never be detained only as a measure of last resort; thus, States must provide non-custodial measures to guarantee that no unaccompanied child is being detained. These alternatives have been demonstrated to be beneficial for unaccompanied children, the host community and the State; and even though the vast majority of States, have banned the detention of vulnerable groups, as unaccompanied children, and even provided on paper alternatives to detention<sup>52</sup>, the truth is that State's awe of threats to national security and public order are challenging the implementation of these non-custodial measures. In this regard, UNICEF has already highlighted that alternatives contribute to improve national security by promoting inclusion rather than exclusion<sup>53</sup>.

In regard to alternatives to detention of unaccompanied children, States must prevent the harm caused by this practice on the well-being and proper development of the children. The possibilities provided by the States, besides, shall respect the principle of minimum intervention and the best interest of the child; care has to be the priority of any State when implementing these alternatives. Therefore, the identification of the child's needs should

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<sup>52</sup> European Commission, The use of detention and alternatives to detention in the context of immigration policies Synthesis Report for the EMN Focussed Study 2014 (2014).

<sup>53</sup> Unicef, Toolkit on Diversion and Alternatives to Detention Summary of why diversion and alternatives are important (2009).

be done at the very first moment, in order to provide the best possible option according to their situation.

### **1.1. International framework regarding alternatives to detention.**

The issue of the detention of children has been a matter of concern for the international community for the last decades. On the grounds of the work done by the United Nations in order to create common standards to promote the use of alternatives to detention, can be found another reasons for the adoption of non-custodial measures for unaccompanied migrant children.

In this regard, the General Assembly of the United Nations adopted Resolution 45/110 on the 14<sup>th</sup> December 1990, commonly known as the Tokyo Rules. These rules are a set of standards which highlights alternatives to imprisonment and sets the minimum safeguards regarding non-custodial measures. Besides, it outlines that possible alternatives, ideally, should be provided by law and shall take various forms, including registration and/or deposit of documents, reporting conditions, community release and supervision, as well as designated residence<sup>54</sup>. Together with this, the international community, concerned about minors deprived of liberty, adopted the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990, A/RES/45/113, which states under article 17 thereof that *“Juveniles who are detained under arrest or awaiting trial (“untried”) are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures”*.

Additionally, according to article 37, limb (b) of the Convention on the Rights of the Child “detention can only be used as a last resort”. Therefore, Jorge Bustamante, former Special Rapporteur on the Human Rights of Migrants, at the 11<sup>th</sup> Session of the Human Rights Council, stated *“public policies and programs should ensure the protection of children from detention (...) In particular, these laws should include such children's rights principles as detention as a last resort; priority and alternative measures to detention”*<sup>55</sup>.

The UN Committee on the Rights of the Child in its General Comment n°6: Treatment of

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<sup>54</sup> Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Geneva, UNHCR and OHCHR, Switzerland, 11-12 May 2011.

<sup>55</sup> Annual Report to the 11<sup>th</sup> Session of the Human Rights Council, UN Doc. A/HRC/11/7, 14 May 2009

Unaccompanied Children and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6 claimed that “*all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation*”.

Notwithstanding that many States have already drafted alternatives to detention programs in their legislations, the actual will of the States to establish a method to protect children is currently put into question. In this regard, the Council of Europe’s Special Rapporteur on Detention claimed that “*Where statutory alternatives are found, they are drafted in vague terms or require a high threshold to be crossed by the individual in question, before they can be applied. Furthermore, a high level of discretion is often associated with their use and there are often few clear and consistent guidelines*”<sup>56</sup>. The establishment of clear standards is a priority in order to protect the children and to not cause harm. Likewise, in many countries, though alternatives are provided, they are not easily accessible in practice.

Acting in accordance to the best interest of the child hints identifying, since the very first moment, his or her special needs. States, once they have identified the needs of the child, shall provide him or her with the best alternative option established in its law, according to the needs found. Despite the duty of the States to protect the children, and even more, unaccompanied ones, unfortunately, many cases such as *Louled Massoud v. Malta*, *Rahimi v. Greece* or *Popov v. France* judged by the European Court of Human Rights, have highlighted the violations of the rights committed against unaccompanied children on European ground, by not beholding a system in which the rule of detention as a measure of last resort has been applied. Democratic States, driven by the rule of law, have the mandate to respect liberty, and this liberty is presumably protected when alternatives to detention are clearly specified in the domestic legislation and accessible in practice.

Eventually, there is a growing interest of civil society, international organizations and governments to find cost-effective and more humane responses to the issue of the detention of migrants, asylum seekers and refugees. Alternatives to detention are a result of good migration governance addressing case resolution and not targeting national

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<sup>56</sup> Ana Caterina, Council of Europe Former Special Rapporteur for the Committee on Migration, Refugees and Population, Report on Detention, para. 38. Doc.12105, 11<sup>th</sup> January 2010

security. In this regard, the Assembly of the Council of Europe *welcomed the promotion by some European countries of alternative solutions to the detention of migrant children. Such alternatives to detention, when implemented properly, are more effective, cheaper, better protect the rights and dignity of children, and promote better health and well-being outcomes for migrant children.* Countries should learn from the practices adopted by other governments and share positive experiences. These positive practices shall be grounded on a human-rights base and pay the same attention to both, the wellbeing of the unaccompanied children and the interests of the countries, to boost their benefits.

### **1.2. Analyzing the benefits of alternatives to detention for unaccompanied children.**

Many studies have already claimed the ineffectiveness of the State's' practices to use detention in order to deter migrants to travel or to decrease the risk of absconding<sup>57</sup>. This conclusion has helped to swift from the idea of the implementation of detention as a routine, to the use of detention as a measure of last resort.

The impact of detention on unaccompanied children have already been reported in the first part of this study. Bearing in mind the undesirable effects that it has on their development and the feeling of exclusion it generates, logically, there is a high rate of possibilities that once these children reinsert into the society, this feeling of exclusion puts at risk the proper reinsertion. This reinsertion problem is usually linked to social and economic costs for the host State, which could have been avoided by applying alternatives to detention. There is an array of non-custodial measures that States can adopt to reduce detention and the impacts it has on the children. As claimed by many studies, detention is barely necessary when it comes to the success of a migration case resolution.

Regarding to the benefits of alternatives to detention, they have been demonstrated to<sup>58</sup>:

- b) **To be effective.** Studies have demonstrated that people based in communities and who have access to proper legal and social support and enough information in order to take informed decisions, are highly compliance with the situation and less

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<sup>57</sup> International detention coalition, *There are alternatives A handbook for preventing unnecessary immigration detention* (revised edition) (2015)

<sup>58</sup> *Ibidem.*

prone to abscond. It has been reported that alternatives have up to 95% appearance rates and up to 69% voluntary return rates for refused cases<sup>59</sup>. Likewise, a recent study of 13 different methods demonstrated that the rates of compliance were from 80% to 99.9%<sup>60</sup>.

- c) **To be more cost effective.** Different studies have reported that alternatives measures are more human and more affordable than detention. Alternatives are up to 80% cheaper than detention, since there is no need to deal with the costs of litigation and compensation claims<sup>61</sup>. Besides, alternatives have been demonstrated to be not only more economical in terms of direct costs but also in terms of long term costs attached to the physical and psychological recovery from detention. More research has to be done in this field to really understand to what extend the harm caused by detention is directly connected to more expenses for the State and host community.
- d) **To respect human rights.** Non-custodial measures are the ones who more respect the dignity and human rights of a person. Likewise, the effective implementation of community-based programs are more prone to respect other rights as civil, political, economic, cultural or social rights. Community based helps to the wellbeing of the migrants or asylum seekers and gives them more strength to cope with the result of the application.
- e) **Welfare conditions.** Detention can only threaten the psychological and physical health of the people waiting for the outcome of their procedure. Opting for non-custodial measures means promoting the health and wellbeing of the migrants.

These practices should not be seen as alternatives forms of detention but as alternatives forms of release. Evidences show the positive impact on the wellbeing on asylum seekers, letting them socialize with the new community and culture, while lessening their anxiety so that it helps them to properly prepare their petition; it also has some economic benefits considering that alternatives to detention are much cheaper than imprisonment practices,

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<sup>59</sup> International detention coalition, There are alternatives A handbook for preventing unnecessary immigration detention (revised edition) (2015)

<sup>60</sup> Rapporteur Ms Tinatin BOKUCHAVA, Georgia, EPP/CD, Parliamentary Assembly Council of Europe, The alternatives to immigration detention of children, Doc. 13597, 15<sup>th</sup> September.

<sup>61</sup> International detention coalition, There are alternatives A handbook for preventing unnecessary immigration detention (revised edition) (2015)

leaving aside the social and economic costs that can be generated due to having someone deprived of liberty. Likewise, these practices contribute to improve national security - nowadays topic of concern in most of the countries when facing throngs of migrants - promoting inclusion of marginalized children instead of exclusion from society.

Noticeably, this research has not found even one theory - but the awe of threats to national security and public order – whereby was highlighted the negative impact of applying alternatives to detention. It seems obvious that whether States are willing to manage migration flows while minimizing the risks, cutting its bonded costs and saving on their resources, the option of applying alternatives to detention is the only way to succeed. To sum things up, since the benefits have been already demonstrated, States, willing to fulfill their commitments to human rights and to become an example of good practices, shall opt for alternatives to detention.

### **1.3. Best practices regarding non-custodial measures of unaccompanied children.**

Although there is no legal definition of “alternatives to detention”, there are models<sup>62</sup> developed by some countries that different actors are claiming to be the ones that States should adopt in order to stop the detention of children and help to their wellbeing. Nevertheless, it has been demonstrated that most of the wide array of alternatives to detention imply restrictions of movement or other deprivation of liberty, so that these practices are also a matter of concern for human rights. These alternatives, will only satisfy the human rights standards whether they are proportionated and necessary to the objectives pursued, and this is why the less intrusive measure shall be taken into account in each individual case<sup>63</sup>.

There are different kinds of alternative to detention models being applied worldwide, while some of them can be sorted out as pro human rights, others had been put into

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<sup>62</sup> Melanie Teff and Azadeh Dastyari, Children in Immigration Detention Position Paper (International Detention Coalition).

<sup>63</sup> “Alice Edwards, Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants (UNHCR 2011).

question since they represent a sort of restriction of movement, besides some could be considered inconclusive<sup>64</sup>:

- g) No detention. This shall be the common rule, since it fulfills the commitments set by the right to liberty and security. Under international law, detention is granted when it is proportionated and necessary, and for this purpose, an individual assessment of each case should be done. i.e. The Philippines releases asylum-seekers without conditions and gives them asylum-seekers certifications.
- h) Release on conditions. There are some countries which release the asylum-seekers under some conditions like register the residence, live at one designated place or capture of the passport or other documents. i.e. Austria, Canada or Denmark, among others, release the asylum-seekers under the condition that they can be asked to report to the police or migration authorities at regular intervals. These practices can be of concern due to the fact that in many cases they are applied automatically, without an individual assessment of the necessities regarding each person or even can be applied in an onerous way, sometimes representing actual restrictions of movement.
- i) Release on bail, bond or guarantor. This option of alternative to detention is applied in some countries as Finland, Canada or The Republic of South Korea. The release is based on a financial deposit or legal agreement, which is prone to constitute discrimination due to financial status.
- j) Community-based supervised release or case management. There are three subtypes hereof classified depending on the supervisor of the program. In the first one, settlement will be supervised and managed by community groups and NGOs. The second subtype refers to a partnership between the government and the NGOs to cooperate on running the program. Eventually, the third one is only managed and supervised by governmental authorities.
- k) Designated residence. It represents a common practice within the borders of the European Union. It means to give an official protection housing to the asylum seeker in order to monitor their location.

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<sup>64</sup> *Ibidem.*

- l) Electronic tagging and reporting or satellite tracking. This type will be an extreme alternative to detention which could barely fall under the scope of the right to liberty and security, due to the restrictions on the liberty it implies.
- m) Home curfew. This type could not even fall under the definition of alternative to detention, since it represents another form of detention. It is a deprivation of liberty, hence, it could only be applied in exceptional cases, where its necessity has been proven and there are no other less intrusive measures to pursue the same goal.

The International Detention Coalition has found as common features of successful alternatives, the screening and assessing of each individual case, providing case management and legal advices and other mechanisms that support the individual to work towards case resolution, focusing on early engagement, exploring all options to continue in the country legally and all avenues for the voluntary repatriation; ensuring individuals are well informed so that they believe to have been through a fair and timely process, ensuring that basic needs are met and that any conditions imposed are not overly onerous; likewise, applying conditions or limited restrictions only when necessary<sup>65</sup>.

Regarding the issue of unaccompanied children, the UNHCR has stated that “*Family-based arrangements are to be considered first, with residential care only considered when family-based care arrangements are not possible or they are not in the child’s best interests, and then only for the shortest time possible*”<sup>66</sup>. Consequently, it is of extreme importance that all people who are going to take part on the protection of children, are trained on children issues and authorized by the public institutions to develop these duties. Furthermore, is vital to establish a monitoring and reviewing system to ensure that the alternative elected continues being the best option for the child at any point of the process.

In this regard, the IDC, concerned about the situation of unaccompanied children, has developed the Child Sensitive Community and Assessment Placement Model, which gathers different points whereby a model should focus on to assure that migrant children

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<sup>65</sup> International detention coalition, *There are alternatives A handbook for preventing unnecessary immigration detention* (revised edition) (2015).

<sup>66</sup> UN High Commissioner for Refugees (UNHCR), *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, available at: <http://www.refworld.org/docid/5523e8d94.html> [accessed 29 June 2017].



are protected while they wait for the outcome of their migrant procedure. This model, based on the points that follow, utterly fulfills the obligations accepted by each State when adopting the International Covenant on the Rights of the Child:

**a. Prevention.** This point outlines the necessity of setting down in the domestic law the explicit prohibition of detention of children. This step is the first one to assure that no children would be detained, and therefore, to establish the ground for non-custodial measures.

**b. Screening, assessment and referral.** The best interest of the child implies that within the next hours from the reception of the child, the authorities should undertake an evaluation of each case to assure that children are put in a community which meets their necessities. Besides, this is the only way to know if the decision to detain meets the principles of necessity and proportionality, and therefore, it is not an arbitrary one. This point outlines the necessity to assign a guardian for unaccompanied children. Besides, these activities could be done at any stage of the procedure and they involve an assessment of legal obligations, identity, health and security checks, vulnerability, individual case factors and community context.

**c. Placement and case management.** This step means to do an evaluation of all the alternatives offered by the State to determine, according to the best interest of the child and the protection he or she needs, to canalize them to the place that better fits their necessities.

**d. Reviewing and safeguarding.** To assure that the best interest of the child is always fulfilled, a periodic review and monitoring of the situation -placement, legal status and conditions- has to be undertaken by the competent authorities.

**e. Case resolution.** Sustainable solution for the child.

Additionally, minimum standards shall be respected by the States in order to boost the benefits of the establishment of alternatives to detention and the functioning of the migration governance systems. It has been demonstrated that when people have full knowledge of their situation, their basic social needs are covered and they have access to understandable information and legal support, the rates of acceptance of a negative answer and the rates of voluntary repatriations are higher, whereas the risk of absconding decreases. For this purpose, States ought to be aware of fulfilling these basic needs, and

for this purpose, investing on education and training of the public institutions which are going to be in charge of the supervision and management of these options, as well as their monitoring, is a priority.

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In short, though many studies and reports published by civil society, international organization and stakeholders have already demonstrated the benefits of opting for alternatives to detention, there is still much work to do in order to persuade the States about the importance of using non-custodial measures in the case of unaccompanied children and the negative impact that detention can trigger on all the actors involved in the process. Seems that while a few States are avoiding unnecessary detention of unaccompanied children, the vast majority of them are still using alternative forms of detention, despite the demonstrated impact it has on the wellbeing of the children. There is much room for action in order to change this drear situation and to convince governments about the necessity of opting for measures that guarantee the rights of unaccompanied children, promote their wellbeing and give them a much more dignified future.

## CHAPTER II

### THE IMPLEMENTATION OF ALTERNATIVES TO DETENTION IN THE SOUTHERN BORDER OF MEXICO

#### **2.1. The framework of alternatives to detention of unaccompanied children in Chiapas.**

Mexican legislation, though it has been drafted to presumably protect the children, makes use of many euphemisms to avoid using the word detention and the country's accountability. Unaccompanied children, as explained in Chapter I, are sent to places, known as DIF centers which are considered by the public institutions as alternative places

to detention. These places, are run with the budget of the State and due to the small amount of budget targeting the welfare of unaccompanied children, they can't not provide the children with all the services required to recover from their traumas, to guarantee their rights and to prepare them to reinsert into the society, therefore, they do not meet with the principle of the best interest of the child.

Detention is demonstrated to be up to 80% more expensive than alternatives to detention. In December 2016, due to the privatization of PEMEX - largest company in Mexico and, as can be read in their website *“the largest tax contributor to the Mexican government, the income we generate helps support all three levels of government: federal, state and municipal. We directly and indirectly participate in the economic and social development of our country”* - the price of the oil was raised to historic levels in a process known as “El Gasolinazo”. In this context of crisis and lack of resources, the problems of migrants, unfortunately, are left aside and that is why a proper development of alternative to detention programs, will help Mexico, currently facing this huge economic crisis, to deal with the current and future costs of migration whilst fulfilling its obligations with the international community and its commitment to human rights.

In Chiapas, one of the three poorest States in Mexico according to the Annual Report on the Situation of Poverty and Social Backwardness 2017 of the Secretariat of Social Development (in Spanish “Informe Anual Sobre la Situación de Pobreza y Rezago Social 2017 de la Secretaría de Desarrollo Social”), the “Gasolinazo” had a strong impact. Additionally, with the 76% of its population living under the poverty line and the 31% living in extreme poverty<sup>67</sup>, besides the Superior Audit of the Federation has highlighted Chiapas as presenting more irregularities in its spending and verification system, therefore, being one of the most corrupted States in Mexico. Bearing this data in mind, allegedly, in a State which is not concerned about the plights of their citizens, a hopeless future for the application of protective measures for the rights of unaccompanied children can be imagined.

There is no accurate data of how much money represents for the State the fact of having one person in detention; nevertheless, Eva Ovando Matías, Coordinator of the Municipal DIF Centre of Tapachula, hints that one children represents a monthly cost to the State of

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<sup>67</sup> Subsecretaría de Planeación, Evaluación y Desarrollo Regional, Informe anual sobre la situación de pobreza y rezago social (México 2017).

around 3.000 Mexican pesos per month<sup>68</sup>, approximately 150 when converted into euros. Consequently, in this context of crisis, both migratory and economic, due to the large numbers of unaccompanied children who had been detained<sup>69</sup> and the lack of resources and will to adopt more expenditures to help even its own citizens, so therefore, less to help the unaccompanied children, Chiapas is seen as a State whereby the government is not foreseeable to change the patterns already established and to act in accordance with the law, providing the unaccompanied children with a place whereby they could enjoy the protection they are entitled with.

## **2.2. Targeting the danger of not having alternative to detention programs to protect the unaccompanied children fleeing the Northern Triangle.**

The Northern Triangle of Central America is one of the poorest areas in the region, the Central American Institute of Fiscal Studies has stated that up to 13 of 20 children from this region are living under the threshold of poverty, and, that half of this number, in extreme poverty. These circumstances, summed up to the lack of education and job opportunities, social exclusion and high rates of violence<sup>70</sup>, are leaving the children in a drear situation whereby untreated trauma can have undesirable effects, including juvenile delinquency and criminal behavior<sup>71</sup>. Early and proper interventions had been demonstrated to be successful in decreasing the risks of delinquent behavior and future criminality<sup>72</sup>, so that proper care systems for unaccompanied children should be established in México in order to prevent those threatening situations. These care policies shall be applied since the very first moment, thus when children are intercepted by the migration authorities, in an alternative place to detention for children.

Mexico, as a host State, should bear in mind the danger that, increasing the feeling of exclusion of these children and not providing them with the medical assistance they need

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<sup>68</sup> Eva Ovando Matias, Coordinator of the Municipal DIF Centre of Tapachula, Interview May 2017.

<sup>69</sup> Migratory Policy Unit, Niñas, niños y adolescentes migrantes en situación migratoria irregular, desde y en tránsito por México (México 2016).

<sup>70</sup> Julio Rivera Claveria, Las maras El fenómeno criminal del S XXI (2013).

<sup>71</sup> Maria Hawilo, The consequences of untreated trauma: Syrian refugee children in Lebanon (2016).

<sup>72</sup> *Ibidem.* 20

in order to overcome their traumas, represents. Last May was the most violent month in Mexico in the last 20 years. Violence in Mexico is reaching unexpected numbers<sup>73</sup>, the Ministry of Government, Miguel Angel Osorio Chong, affirmed that “the historical amount of intentional homicides that showed the statistic of last May of the National System of Public Security, are crimes of the common jurisdiction that happen in the local order”; thus, chances for unaccompanied children to end up taking part on this cycle of violence is of concern. Additionally, the reinsertion of these traumatized children into this society can lead to self-destructive behaviors which may drive them to commit crimes<sup>74</sup>. Interventions failing to address the mental health of children already exposed to multiple episodes of violence may be translated in greater rates of delinquency<sup>75</sup>.

In short, Mexico, in order to cut down the rates of violence and the social and economic costs it has bonded, should also target the mental health needs of this traumatized unaccompanied children and take action on adopting alternatives to detention programs with a focus on the protection of the children as well as on developing a care system to help them to recover from their traumas in order to have a successful integration into the society. If not, the psychological health status of the children will lead to worse outcomes for both, the children and the host society.

### **2.3. The role of civil society and international NGOs when applying alternatives to detention.**

Since the outbreak of the humanitarian crisis in 2014, as explained above, the Mexican government has adopted new legislation in order to protect unaccompanied children. It has also created the role of the Federal Procurator for the Protection of Children when adopting the General Law on the Protection of Girls, Boys and Adolescents, and the DIF systems as an alternative to detention, to “accommodate” the children while they are waiting to be deported or to the outcome of their procedure. Despite all these attempts to implement protective measures and to stop detaining children, the truth is that reality

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<sup>73</sup> Arturo Cerda, 'Osorio Chong: Violencia en México, agudizada por delitos del fuero común' [2017] Noticieros Televisa.

<sup>74</sup> Claudia Baker and Alfonso Cessie , Post-traumatic Stress Disorder and the Casual Link to Crime: A Looming National Tragedy (School of Advanced Military Studies 2008).

<sup>75</sup> Maria Hawilo, The consequences of untreated trauma: Syrian refugee children in Lebanon (2016).

(maybe because of lack of resources, capacity, training or attitude) is far away from what it is established on the paper.

Although for the Mexican government things started to change after 2014 due to the international attention to its borders, civil society has been working to guarantee the rights of the migrants for decades, fulfilling the gaps on protection that were supposed to be responsibility of the State. They have been the ones fulfilling the needs of the people that historically were crossing the Southern border towards the United States. Many shelters opened their doors in the decade of the 90s<sup>76</sup> and since then they have been offering alternatives to detention to, among others, unaccompanied children. Moreover, after 2014, international NGOs started to pay attention to the issues regarding violations of human rights at the Southern border of Mexico, hence, during the last three years, international agencies specialized in migration, as IOM and UNHCR, have been established at the main ports of entry to Mexico, Tapachula in Chiapas and Tenosique de Pino Suárez in Tabasco.

In this regard, during the interviews conducted for the purpose of this research in Chiapas, one thing to highlight was that all the international organizations and NGOs were sharing the same objective for the current year, protecting unaccompanied children. For all of them, DIF Centers were another way to violate the principle of prohibition of detention of children and all were concerned of the fact that children were being detained in Migratory Stations. Currently, there are 34 Migratory Station in México<sup>77</sup> and civil society is mainly established at the two ports of entry to Mexico, besides Mexico City; this means that the rest of the migratory stations are just monitored by the CNDH, an institution created by the government to show that there was a mechanism to monitor that no human rights violations were happening in this places. However, this mechanism has been put into question since they have never actively collaborated in stopping the violations of human rights of any particular person, not even when other organizations were asking for their help to stop a specific situation of abuses<sup>78</sup>.

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<sup>76</sup> La Casa del Migrante <http://www.migrante.com.mx/tapachula.html/> Albergue el Buen Pastor [https://www.changemakers.com/sites/default/files/folleto\\_albergue.pdf](https://www.changemakers.com/sites/default/files/folleto_albergue.pdf)

<sup>77</sup> Salva Lacruz, Advocacy Coordinator Fray Matias Centre for Human Rights, Interview May 2017

<sup>78</sup> *Ibidem*.

Fortunately, the efforts undertaken by civil society and international organizations during these years have achieved important goals which will lead to change the drear situation of unaccompanied children in Mexico and will start considering the international guarantees recognized for them. The first positive outcome from the pressure stemming from civil society was the creation of the “Citizens Council” by the INM, in which different stakeholders collaborated, such as COMAR, Asylum Access, Fray Matias, WOLA and the Federal Procurator, among others<sup>79</sup>. The INM, the Citizens Council and other civil society, gathered to implement in 2015 a pilot project based on the IDC's Child Sensitive Community and Assessment Placement Model, organization which also took part on the procedure. This model was tested between the time frame of August 2015 to February 2016. Casa Alianza and Aldeas Infantiles were the organizations, established in Mexico City, which participated in the implementation of the pilot project by receiving the children; IDC participated as a technical and procedure advisor<sup>80</sup>. During and after the implementation of this test project, the actors involved were meeting routinely to identify the needs for the institutionalization of different mechanisms upon which to develop a system of alternatives to detention. After the conclusion of this project, the results showed that children did not abscond their procedures, due to the relations of trust created by the centers in charge of the accommodation of the children<sup>81</sup>.

Civil society and the Citizens Council are still active on sharing the good results of the project described above and they have taken steps forward in order to call the attention of the public institutions. In this regard, next 13<sup>th</sup> and 14<sup>th</sup> of July 2017, there is going to be a meeting whereby not just the Citizens Council but other public institutions are going to meet to talk about the need to establish alternatives to detention programs in Mexico and the pilot project is going to be used as an example of good practices. This meeting is looking forward to sharing the good results achieved by the project and also, is going to take into account the same issues that were treated by the Action Declaration of San José, a meeting which took place the 4<sup>th</sup> of August 2016 in San José, Costa Rica, and in which

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<sup>79</sup>INM, “Acta de la Segunda Sesión Ordinaria 2016 del Consejo Ciudadano del INM, en adelante “El Consejo Ciudadano”, 30<sup>th</sup> June, 2016.

<sup>80</sup>Citizen's Council INM, Reflexiones y Seguimiento a la Evaluación del Programa Piloto de Cuidado y Acogida Alternativa de Niños, Niñas y Adolescentes Migrantes no Acompañados en México [June 2016].

<sup>81</sup>*Ibidem*.

Mexico declared its compromise to strengthen its capacities. This meeting was the first step taken in order to prepare the first United Nations Summit for Refugees and Migrants that took place on the 19<sup>th</sup> of September 2016<sup>82</sup>.

Furthermore, in October 2016, thanks to the pressure of the actors working on the field, the first shelter belonging to the DIF system was inaugurated. It is run by public funds, with a community based focus. This pilot project based in Villahermosa, Tabasco, was supported by UNHCR, UNICEF and civil society as Fundación Casa Alianza and Asylum Access, which worked together to create an integral model of care in which the needs and rights of the children were utterly beholden<sup>83</sup>. The integral protection and assistance that is supposed to be given in this pioneer project, will take into account all the protection measures enshrined in the General Law for the Protection of Girls, Boys and Adolescents, the Migration Law and the General Law for Refugees, Complementary Protection and Political Asylum.

This center will be the first community-based center run by the State, in which children will be allowed to go to the local school, they will have proper psychological, medical and legal assistance, integration programs into the society and a council to help the children to make their own plans of life. Special counselors have participated in order to establish the perfect care system and to train, specifically, the psychologist, since the children are arriving with more psychological problems than ever<sup>84</sup>. As said by Mark Manly, representative of the UNHCR in México “*This shelter represents a very important step in the care of children and adolescents who have arrived in Mexico without the company of their parents seeking protection as refugees. It is the first shelter of the DIF that has a care model that welcomes children within the local community, including their insertion in school since they are applying for refugee status*”.

There is still no much information due to the novelty of the project, albeit it represents such an advance, and it has been possible thanks to the collaboration of civil society and international organizations. They have created a reception strategy taking into account all

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<sup>82</sup>ACNUR, 'Estados de América del Norte y Central prometen acciones conjuntas para los refugiados', [2016] ACNUR Noticias.

<sup>83</sup> ACNUR, 'Albergue para niñas, niños y adolescentes se inaugura en Tabasco' [2016] ACNUR Noticias.

<sup>84</sup> Lourdes Rosas, UNICEF's Child Protection Consultant, Interview May 2017.



the needs of unaccompanied children. This project is divided in some steps, the first one will identify the particular profile and needs of the child to adjust them to his or her specific needs. This project will also work on identifying reception families or cases of special vulnerabilities when the child cannot be in the shelter due to any reason and needs to be sent to for example a specific health care institution.

Despite the fact that it is still early to have some results about this pilot project, during the research carried out for the purpose of this thesis, all the actors involved in the issues of migration in Mexico were expecting this project to succeed in order to expand it to other parts of Mexico. Everyone manifested hope in this project as an actual alternative to detention. However, there was a sort of skepticism, due to the fact that since January 2017, when this center opened its doors, just 3 children have been canalized by migration authorities. There is a fear of the migration authorities that if you canalize these children to a place where there is some kind of freedom, since the children would be allowed to go to the school in the community and also take part in other activities, they will run away<sup>85</sup>. UNICEF was especially concerned about this situation. There is enough space in an alternative place to detention but the children are still in the Migratory Stations. As Lourdes Rosas, UNICEF's Child Protection Consultant, hinted *“it is not just because of migration authorities that children are not being sent to this alternatives places, it is also because the DIF systems or the INM have no means of transport, maybe because of the Consulates are going to Migratory Stations instead of other places, so for some people would be better in the interest of the children to keep them in the Migratory Station so that they have contact with their Consulates, or maybe the DIF has the “non-canalizing the children” policy or the DIF centers are applying a policy of non-acceptance”*.

Consequently, it is still early to have some results about the effectiveness of this project. However, if this project actually works, it will represent a great advance for the situation of unaccompanied children in México. Civil society and international organizations will need to wait some years before they could talk about the changes that it has represented. The first challenge they would need to overcome is, why these centers are empty and the children are not being canalized. For that, they need to reach the judicial level and stop trusting in the *bona fides* of the migration authorities, practice that is spread over the country as Lourdes Rosas, UNICEF's Child Protection Consultant, stated. Capacity

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<sup>85</sup> Interview Salva Lacruz, Advocacy Coordinator Fray Matias Centre for Human Rights

training and educating migration authorities, should be the first step to provide an answer to the question of why the children are still being kept in migratory stations.

## CONCLUSION PART II

As already explained throughout this research, detention is never on the best interest of the child. In Mexico, day-by-day steps forward are taken in order to stop the detention of unaccompanied children and to establish a protection system for them. Throughout this chapter, it has been highlighted that the combination of capacity building and professional and technical assistance carried out by different stakeholders -civil society, institutions and international organizations –, summed up to the different achievements of the Citizens Council, whereby the plights of children were discussed and the results of the project of alternative to detention were also analyzed, have demonstrated to spread to other actors the will to take part in the struggle to achieve the standards of the protection established by law and to prevent the unnecessary detention of unaccompanied children. Nowadays, it can barely be said that alternatives to detention will not be possible in the context of migration in Mexico. Years will need to pass by until results are visible, though the will of the public institutions managing the flows of migration in Mexico to start adopting an approach to the human rights of unaccompanied children cannot be denied.

## GENERAL CONCLUSION

In the light of this study we have seen the inconsistencies of the reality in respect to all the steps which have been taken towards the protection of children in the last 4 years. Notwithstanding the principles of prohibition of arbitrary detention and the best interest of the child, both enshrined under international law and which México has automatically transposed into its domestic law, children are still being detained and their rights, despite their demonstrated vulnerability, are being violated with impunity. In this regard, not only the use of tricky terminology in order to avoid responsibility but the lack of resources and budget destined to new institutions in charge of the protection of children, are putting into question the will of Mexico to actually fulfill its obligations concerning children. The continuous inconsistencies herein exposed regarding what it is written under law with the reality, are leading to consider Mexico as a simulated country whereby institutions are working efficiently and the wellbeing of unaccompanied children is such a matter of concern for the State, that specific protective mechanisms have been set down on the law to protect them, whereas violations to the human rights of unaccompanied migrants are happening.

Throughout this study, we have got to the conclusion that when asking for accountability to Mexico there is the need of adopting a new strategy in which civil society has to participate directly in battling the arbitrary detention of children with the given legal tools. It has been complicated to understand why civil society has not litigated before since they had already the tools to make Mexico accountable for all the breaches of its own legislation. The lack of professionalization of the Mexican authorities, the issues regarding the legal representation of the children and the amount of work of the few organizations working on the field, seem to be the main causes. This is a relatively new issue and civil society is striving to test the ways to make México accountable for the violations committed, thus time is necessary to find the way how to make Mexico accountable. However, I believe there is hope for the situation of unaccompanied children crossing the southern border of Mexico, especially since many advances have been seen in the last years.

In the last two years, the coordination of civil society and international NGOs in México have started to change the whole scenario of migration. The government is letting them take part in all the matters concerning migration. The main challenge is to overcome the lack of professionalization of institutions, so in this regard, capacity building to make the authorities understand what human rights mean and the issue of migration are taking place all over the territory. The efforts done by civil society and International NGOs are of noteworthy importance, albeit some time will need to pass to see the results. Concerning this, the role played by the judicial system will be key for civil society to claim the State the accomplishment of its obligations towards unaccompanied children. I am sure that stakeholders are in the right way, focusing in the capacitation of the judges in human rights and the issues of migration is the main objective nowadays to reverse the failure of the State on protecting the children.

Another fact of concern which this study has also highlighted, though was not its main focus, are the effects of detention on the psychological wellbeing of children and the impact it has on the reinsertion into the society. The reinsertion of these children in Central America is aggravated due to the spread of violence throughout the region. Therefore, the high possibilities of these children to take part in this cycle of violence are worrying. Migration in the region will never stop until the root causes are targeted. Since violence is one of the main reasons of unaccompanied children to flee (this is currently a fact because of the decrease of people trying to reach the US, what leaves aside the so called American Dream as a reason for migrating and outlines the gross threats that migrants are suffering in their countries), taking appropriate measures to assist the children is the first step to control these flows. Regional coordination among all the States involved in this issue ought to be done in order to actually give a solution to the root causes of migration and to work on the stabilization of the region which is leading to a serious problem whereby youth from the Northern Triangle foresees a hopeless future, which has led to refer to them as the lost generation of Central America.

Nothing would have been possible without the efforts of both, international organizations and civil society. On the one hand, international organizations, such as UNICEF, UNHCR or IOM have the financial resources to invest in the institutions in charge of all issues related to migration not just in training or capacitation but in hiring staff for institutions as COMAR or different NGOs and providing different sort of services. They have also raised attention of the situation among the international community. On the other hand,

civil society continues to work claiming on the violations of human rights that are currently being faced by unaccompanied children and it is foreseeing litigation as the way to ask for accountability to the State.

In short, I am pretty sure that in the upcoming years the need to ask for accountability to the Mexican State will not be necessary since the country will become a good example of alternatives to detention for unaccompanied children, and everything would have been possible thanks to the efforts of civil society, institutions and international organizations. Until Mexico becomes the example to implement worldwide, for the best interest of the child and in order to accelerate the changes, I believe that striving to reach the Inter American Court level, while investing in capacity building of the Mexican institutions, is nowadays the only path foreseen to guarantee that the rights of unaccompanied children are protected within the Mexican borders.

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