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Hope for the Northern Triangle's Lost Generation

Battling Detention of Unaccompanied Children at the Southern Border of Mexico

EMA, The European Master's Programme
in Human Rights and Democratisation



EIUC

European Inter-University
Centre for Human Rights
and Democratisation

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

FOREWORD

The European Master's Degree in Human Rights and Democratisation (EMA) is a one-year intensive programme launched in 1997 as a joint initiative of universities in all EU Member States with support from the European Commission. Based on an action- and policy-oriented approach to learning, it combines legal, political, historical, anthropological, and philosophical perspectives on the study of human rights and democracy with targeted skill-building activities. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA has served as a model of inspiration for the establishment of six other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. These programmes cooperate closely in the framework of the Global Campus of Human Rights, which is coordinated and managed by the European Inter-University Centre for Human Rights and Democratisation (EIUC), based in Venice, Italy.

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- Nomdedeu, Andrea, *Hope for the Northern Triangle's Lost Generation: Battling Detention of Unaccompanied Children at the Southern Border of México*, Supervisor: Prof. Maria Daniella Marouda, Panteion University, Athens
- Parodi, Caterina, *Blood or Soil, Which One Is Thicker? The Obligations of EU Member-States for the International Protection of Stateless Children*, Supervisor: Dr. Daria Davitti, University of Nottingham
- Soltani, Sara, *The Power within Music. Human Rights in the Context of Music*, Supervisor: Dr. Eva Maria Lassen, University of Southern Denmark/Danish Institute for Human Rights

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Prof. Manfred NOWAK
EIUC Secretary General

Prof. Ria WOLLESWINKEL
EMA Chairperson

Prof. George ULRICH
EMA Programme Director

This publication includes the thesis *Hope for the Northern Triangle's Lost Generation: Battling Detention of Unaccompanied Children at the Southern Border of Mexico* by Andrea Nomdedeu Díaz-Valero and supervised by Maria Daniella Marouda, Panteion University, Athens.

BIOGRAPHY

Andrea Nomdedeu Díaz-Valero completed her law degree in Spain right before doing an internship as a legal adviser at the Southern border of México with the NGO Asylum Access. In September 2017, she graduated from the EMA programme and since October 2017, Andrea is doing an internship at the OHCHR in México

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 an increase in detentions and deportations of migrants and asylum seekers entering the country. In this regard, steps have been taken by Mexico to presumably protect unaccompanied children, thus, new legislation protecting children, has been adopted and new protection figures, based on the principle of best interests of the child, have been set down in law. Nevertheless, violations to the rights of the children have been continuously reported by civil society and international organisations. The use of tricky legal terms, a lack of harmonisation of the law and a so-called alternative to detention programmes have been the tools used 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 communities 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 used to answer the question regarding the accountability of Mexico concerning the breaches of international and national legislation when detaining unaccompanied children.

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TABLE OF ABBREVIATIONS

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
HRC	Human Rights Committee
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
IOM	International Organisation for Migration
NGOs	Non-Governmental Organisations
PEMEX	Mexican Petroleum
PTSD	Post-traumatic stress disorder
OAS	Organization of the American States
OPIs	Officers for Child Protection
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
WOLA	Washington Office for Latin America

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GENERAL INTRODUCTION

On 2nd of July 2014, former President Barack Obama publicly declared the apprehension of up to 50,000 children at the Mexico–United States border, 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, criticised 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, is supposed to have two main goals: **(i) to protect the migrants entering Mexico** and **(ii) to manage the ports of entry promoting security and prosperity**.¹

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.”²

¹ Christopher Wilson and Pedro Valenzuela, ‘Mexico’s Southern Border Strategy: Programa Frontera Sur’ [2014]3, Wilson Center Mexico Institute.

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

This initiative rested on four pillars, the third pillar was to create a 21st Century Border recognising a shared accountability on managing the common border,³ 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’.⁴

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 National Migratory Institute (INM), increased up to 71% during the first year of implementation of the program. There is still no formal evidence of the connection between the adoption of the South Border Program and the increase in 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 violations of the rights of the children apprehended by the authorities are outrageous.

The southern border of Mexico extends 1,122km 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 for up to 60% of the detentions registered in the whole country. This increase in the

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

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

detentions of migrants crossing the southern border of Mexico 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 International Covenant on Civil and Political Rights (ICCPR), the Geneva Convention of 1951 and its Additional Protocol of 1967 and the Cartagena Declaration of 1984. Summed up, the Mexican Constitution enshrines in 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, the General Law for Refugee, Complementary Protection and Political Asylum and its bylaw, establishes that an irregular migrant shall be placed in migratory stations to follow up their asylum process, going against the international principle of prohibition of detention.

In regard to unaccompanied children, at the national level the new Mexican legislation about the rights of the children recognises 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 Girls, Boys and Adolescents, establishes that under no circumstances should accompanied or unaccompanied children 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 Integral Development of the Family (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. It can be noted that Mexico is in a rush to adopt legislation regarding the protection of children, particularly about the issue of unaccompanied children, and can be proud of its written law addressing the protection of the rights of children, albeit different evidences indicate that the actual situation is far 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 stated that during 2016 40,542 children and adolescents had been detained in migratory stations, instead of the adequate spaces for them located, throughout Mexico.

While an increasing number of reports refer to the normalisation of the action of detaining unaccompanied children in Mexico in migratory centres - 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 described above, this research will be organised into 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 on their future when it comes to 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 severe 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 have been integrated into society as well as when they have been 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 answer.

The second part of the study will also be divided into two parts. The first part will focus on the demonstrated benefits of the application of possible alternatives to detention when it comes to the health of the applicants, costs to the states and risk of absconding, voluntary departure and integration into society, while paying attention to different models

established around the world and the reported consequences they have had. The second part of this chapter will focus on the alternatives to detention applied in Mexico and their potential benefits, analysing 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 as alternatives to detention and how this could start being applied in respect of the human rights of the children.

In short, bearing in mind the topics that will be studied in 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 on the wellbeing of unaccompanied children fleeing the Northern Triangle of Central America.

Historically, Mexico 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 in detentions and deportations, have started to change the patterns. Mexico is currently starting to be considered as a country of destination by migrants, historically wishing to reach the United States, as demonstrated by the 154,6% increase of asylum petitions during 2016 compared to the previous year according to the data provided by the Mexican Commission for Refugee Aid (COMAR). 86,6% of those petitions were coming from 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 is clearly influencing the changes in these patterns. Nowadays, due to the tough control of irregular migration carried out by the 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, thus 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, according to different articles published by InsightCrime.⁵

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’ policy⁶ at the beginning of this year or campaigns supported by the current president, Donald Trump, labelling migrants 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 19 September 2016, announced that Mexico would strengthen its refugee recognition procedures and ‘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 showed a real 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 analysing the international concept of administrative detention and will pay special attention to the detention of unaccompanied children in Chiapas, outlining the legal basis, procedures 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

⁵ Mike Lasusa, ‘¿Aumentan secuestros de migrantes en México?’ [2016] Insight Crime - Investigation and Analysis of Organized Crime.

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

reintegrate 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 these countries and because of the special vulnerability of unaccompanied children fleeing these countries and crossing the southern border of Mexico. This fact exposes them to appalling crimes such as smuggling and human trafficking. Finally, the chapter will examine the role of different international Non-Governmental Organisations (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.

1.

MAIN CONCERNS ABOUT THE 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,⁷ many interpretations led to some divergence on the terms that were finally defined by 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’ in 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 alleged violations. The resolutions depriving someone of liberty ought to consider the limits enshrined in 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 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,

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

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 those of asylum seekers, are becoming a worrying practice worldwide.

Currently there is a trend among states to criminalise 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 criminalisation of immigrants not just by the states but also by 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 criminalising migration and targeting it as a threat to the culture and values of a society, and to its peaceful existence, are being broadcast 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 about banning Muslims from entering the United States.

Arbitrary detentions, because of irregular stays or irregularly crossing a border, are becoming a norm.⁸ 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 ensure 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 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."⁹

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

⁹ 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.

The analysis of Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR) shows that there is no exhaustive list upon which detention will be accepted, but it 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 of *HL v the United Kingdom*, and it requires that all laws 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 the society about the foreseeability, predictability and the legal consequences of particular actions to consider the detention lawful.

Moreover, the second limb of Article 9, which refers to reasons for arrest, considers the factors that are to be taken into account in making an assessment for 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 in 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.”

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 United Nations High Commissioner for Refugees (UNHCR) has clarified that detention has to be a measure of last resort.

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 acceptable 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 have 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 assessed by administrative or judicial bodies to balance the interests pursued by the states and the fundamental right to liberty.¹⁰

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 assessments 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. However, nowadays there is a general principle becoming 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 limitations, having in mind the necessity of a reasonable period of the detention. The Human Rights Committee (HRC) clarified that 'detention should not continue beyond the period for which the State can provide appropriate justification.'¹¹ Additionally, the UN Working Group on Arbitrary Detention in its report to the 13th Session of the Human Rights Council on 18 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

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

¹¹ 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.

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 recognised 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 ICCPR ‘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 HRC 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.

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 HRC 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 HRC 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.’¹²

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

C) The right to trial within a reasonable time or to release

This right is also provided for by Article 9.3 of the ICCPR, 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 a judicial officer who can confirm the validity of the detention or, in some 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 ICCPR, '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

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 ICCPR 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 fulfil 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 with their national law, remembering the fact that domestic legislation that allows detention but is not in conformity with the internationally-established standards would be considered as a violation of Article 9.1. of the ICCPR.

1.2. REGARDING THE DETENTION OF ASYLUM-SEEKING CHILDREN UNDER INTERNATIONAL LAW

In addition to the general international protection recognised for 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 in Guideline 6 of the UNHCR 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 this can trigger significant 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 International Convention for the Rights of the Child (ICRC), as one of the four general principles of the Convention over which basing the interpretation and implementation of all the rights of the child.¹³ The **principle of the best interests of the child** is used to describe the

¹³ 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.

well-being 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 absence 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 interests. As clarified by the UNHCR Guidelines on Determining the Best Interest of 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 a specific group of children, an evaluation of the possible impacts has to be done before the decision is taken. The decision has to be justified and explicitly demonstrate that the best interests of the child were taken into account.¹⁴

Children are generally considered to be 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 in protecting the children, and it must be the primary consideration in all situations concerning the decisions affecting the children.

Article 37 of the ICRC contains important provisions to preserve that detention of children is, first and foremost, lawful; and second, it is done in the best interests of the child, in accordance with their special needs. Limb (b) of the article states the base upon which the detention of children would be considered lawful, and determines that detention of such a vulnerable group can only be a last resort and for the shortest period.

¹⁴ 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.

Indeed, these two guarantees are extremely important to observe due to the serious harm that detention causes children; besides, they must meet the requirement of the best interests of the child when it comes to deciding 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 their 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 well-being, safety and reintegration, unless it is not in their best interests, such as when they are accompanied by their family. 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 the Havana Rules) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as the 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 in detention. However, it is the responsibility of the states to ensure an adequate child protection system under their domestic legislation, in accordance with their international obligations and its duties to educate, protect and care for 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 the rights they are entitled to, education, leisure, information, etc being suppressed while in 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 their parents, or even as holders of so-called 'mini rights', it is in these contexts even more difficult to understand that they are entitled to the same rights as 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.¹⁵ Detention experiences can trigger in children a variety of psychosocial and developmental problems as reported in the report 'Chapter 5. Impacts of detention on children' published by the NGO International Detention Coalition (IDC). The report further stated that this is why states must be careful in their duty to identify in which particular cases detention of an asylum-seeking child could be accepted under their legislation and strive to implement less harmful alternatives that consider the well-being of the children whilst promoting their reintegration.

Currently, 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, United Nations Children's Fund (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 analysing the 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 in the spotlight and solutions with an approach to human rights are being discussed in an international context, states must remember that administrative detention can only be used as a last resort and for the shortest period of time because it remains up to the state to grant the standards accepted through the adoption of the different international conventions.

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

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, labour and sexual exploitation and human trafficking. Therefore, international laws have been adopted to protect them.

Individuals less than 18 years old are considered to be a child and the law grants 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 interests and provide them with the care and protection needed. Their 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 interests 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 with 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 more exposed to traumatic events: they may be refused at the borders, misinformed about their rights and imprisoned. Besides, they are often discriminated against by states which deny their access to shelter, education or health care. The principle of the best interest of the child establishes that the endorsed actions must be in the child’s interests and thus, the examination of the child’s identity is necessary to understand his or her special needs for protection; consequently, the prerequisite for determining the child’s identity is his or her access

to the territory. The registration and identification should be done in a child-sensitive manner and should be carried out by people trained in age-appropriate skills so they can adequately identify the needs and understand the point of view of the child. In this sense, in the course of the 2000 Discussion Day on State Violence, the Committee on the Rights of the Child, called for the establishment of standards for 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 No 6 called to name a guardian as soon as the child identifies himself or herself.¹⁶ This role is key to protecting the rights of the child, as this guardian shall ensure that the child receives care, education, shelter, medical assistance and other rights they are entitled to. Guardians have to accompany the child during all the steps of the procedure, complementing the legal capacity of the child and acting in his or her best interests. Besides, guardians will have the authority to be present at 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 simple 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 ensuring that the best interest of the child justifies the actions undertaken.

The system of 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 following to protect the children separated from their relatives:

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

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

- 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 recognise the independence of the function. The guardian point of view should be considered in all decisions affecting the child.
- To listen to children and ensuring accountability. The child should be consulted on 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.
- 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.
- To provide training and support for guardians. The guardians must act in the best interests of the children and protect the children's well-being; hence, specific training and advice have to be given to them. Besides, they must have access to a network of services, such as free legal aid.
- To invest in adequate human and financial resources for an effective guardianship. States have failed in providing financial resources to the guardianship system despite 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 last resort and for the shortest period of time under international human rights law. Many states accept that unaccompanied children should never be detained,¹⁷ however, facts reflect another reality. In this sense, the European Court of Human Rights clarified in the case of

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

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.¹⁸

Detention can have undesirable effects on already traumatised children,¹⁹ 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 IDC “Children in Immigration Detention Position Paper” highlighted the consequences of long-period detentions 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 centres 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’.

According to different reports,²⁰ detention of children particularly

¹⁸ 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).

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

²⁰ 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.

threatens their well-being, even when the detention is for a short period of time, a specific negative impact can be observed. In most cases, children can experience high levels of stress, depression and anxiety. In return, this can lead to detrimental and life-long effects on their cognitive and emotional development.²¹ Summed up, children who may have been detained in their countries of origin can relive those traumatic experiences and suffer permanent damage. 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 occurs in places and under circumstances that 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 additional important factors on the effect of detention. Researchers suggest that asylum seekers, especially vulnerable groups such as unaccompanied children, present high rates of pre-migration traumas, hence trauma-related mental health issues. Given this vulnerability and 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).

Mares and Jureidini reported on research carried out on a child and adolescent mental health service in Australia from a detention centre that stated the following: (I) children aged less than 5 years old

²¹ International detention coalition, *There are alternatives A handbook for preventing unnecessary immigration detention* (revised edition) (2015).

commonly presented developmental delays whereas half of the children had delays in language and social development. The study also showed that emotional and behavioural dysregulation as well as attachment problems were affecting this targeted population; (II) children aged between 6–17 years reported extensive mental health difficulties. All of these children met clinical criteria for Post-traumatic stress disorder (PTSD). Besides, all ten children had major depression and expressed suicidal thoughts. 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 centre. Seven of the 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.²² These responses to detention are normal responses to abnormal situations, which are understood as manifestations of misery and suffering.

Detention can jeopardise the proper development of the immigration processes, making the children feel like criminals and be even more prone to abandon the procedure. The fear of deportation can also discourage children from trusting 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 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-confidence, have huge problems of adaptation and find it very difficult to develop trusting relationships. Moreover, these problems have a further negative impact on other spheres such as those involving the family, friends, work or studies.

²² 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).

The evidence on the impact of detention on the well-being of children and the possible traumatic effects it can have on their physical and psychological development have been demonstrated. States party to the CRC, and therefore presumably concerned about the protection of unaccompanied children, should act in accordance with the best interest of the child and ward off unaccompanied children from these traumatic experiences. Identifying the necessities of the children at the very first moment and guaranteeing their protection through the appointment of guardians, so they can, since the very beginning, integrate into the community and have their social and economic rights guaranteed, is a need for vulnerable children fleeing their countries. Most of the children have experienced episodes of intrafamily violence, sexual abuse, abandonment, extortion, forced 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 (UNODC) 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 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 improve 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 unreservedly required. In this regard, Article 40 of the ICRC 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 into society. The risk of exposing these children to post-detention traumatic experiences is high, and reinsertion programmes 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,²³ jeopardising their 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-behavioural interventions.

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

A) Unaccompanied children granted refugee status

For unaccompanied children granted with refugee status, family tracing is a priority. The International Committee of the Red Cross commits to undertaking family reunification through particular methods and cross border cooperation. This must always be 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. If the reunification is not in the best interest of the child, or not possible because of any other circumstance, different options such 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 as 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

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

way, be cared for' in the country where he has been recognised as a refugee. Families with the same cultural background as the children should be a priority since they are supposed to be better at guiding the child through the situation they are coping with and recognising 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 analysed some risk factors jeopardising 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 recognised as refugees when they reintegrate into society, the UNHCR has already underlined the following: (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 recognised 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 in 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 organisations, NGOs 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 the 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 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 while 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 assist the child are not available in the country that granted asylum. There are several states that have adopted a resettlement program and to which individuals with special needs can be sent after assessing the convenience of the transfer.

B) Unaccompanied children rejected refugee status

Whether an asylum-seeking unaccompanied child is denied 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 the child requires that some safeguards have been taken into account before 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 International Organisation for Migration (IOM) or UNHCR.

There are many risks that can jeopardise the proper adaptation of unaccompanied children into 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 that detention has on them, we assume that the evidence found in ‘adult’ research studies are applicable to their current case. The IDC stated in their publication *Captured Childhood* about an Australian study 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 in the study ‘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 study on the effect of detention carried out 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 into which they are trying to reintegrate, regardless of whether they return home or are sent to a local community in the host state or are

resettled into a third country.

Consequently, detention can never be in the best interest of the child. Detention not only can traumatise and influence the physical and psychological health of the children, but also put at 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 the rights they are entitled to and work together to achieve the adaptation of the children to their new social environment.

2.

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 ANALYSED 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 analyse the issue from the different perspectives as well as to see the concerns reported by the international community and the impact these concerns have 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 jeopardising 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 ICRC on 21 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, on 10 October 1953 and its Additional Protocol on 10 March 1983. Although there is no specific mention of 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 ICCPR, the International Covenant on Economic, Social and Cultural Rights, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, 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, recognised internationally, of migrant children, the reality regarding the detention of unaccompanied children within Mexican borders raised the concerns of the CRC, which on 10 June 2015 recommended Mexico to stop the detention of migrant children and, instead, to establish a community-based shelter for them as well as a best interest determination process for decisions relating to migrant children.

This recommendation was part of the 'Concluding observations on the combined 4th and 5th 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 Mexico. 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 centres 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 recommendation²⁴ and reaffirmed its promise to respect the rights of the children and reported its will to establish an interinstitutional group gathering civil society, legislative powers and public authorities which would oversee

²⁴ 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', 10th June, 2015.

the application and monitoring of the recommendation. Two years after this statement, the situation of unaccompanied children seems to have improved. However, 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 idiosyncrasies of the migration situation in Central America outlined the need to adapt the Geneva Convention to the particulars of this region of the world. Organised 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 held in the city of Cartagena, Colombia, 19–22 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 necessary particulars in order to be granted with refugee status in the region ‘in addition to containing the elements of the 1951 Convention and the 1967 Protocol, defines as 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 the Cartagena Declaration into its legislation, under Article 13.2 of the 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 for 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 harmonisation among the different legal systems in the country is labelled as being the cause of this failure. To what extent this is true will be further analysed 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, the 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 in Article 7. Here, 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 promptly brought before a judge. The preamble of the American Convention on Human Rights 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 complementary international 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 identified, triggering international responsibility. However, to reach the international level, national measures have to be exhausted first. The way in which the Inter-American Court of Human Rights operates and enforces the convention is through judgments and advisory opinions, clarifying the meaning of the convention or other treaties related to human rights that 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 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 Organization of the American States (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 attracted political and media attention, negatively impacting the external image of the US and leading to the situation currently faced by Mexico regarding migration at 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, while Mexico increased the deportations of unaccompanied children by up to 56% compared to the previous year. Maureen Meyer, an immigration expert working for the Washington Office on Latin America (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 it spreads publicly a policy of protection under which it has militarised its border in front of the eyes of the international community. The main effect this seems to have is an increase in the amount of detentions and deportations, threatening the protection that unaccompanied children as one of the most vulnerable groups deserve and being at the centre of the attention of the OAS when it comes to violations of human rights in the context of migration.

C) *National legal framework*

The year 2014 was the most important regarding the protection of unaccompanied children in Mexico. During this year, the interest of the international community on this issue shifted from total ignorance to extreme concern. This was the time when Mexico 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, on 10 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 *pro-homine* principles and the protection of the family and children became primary. The importance of this decree regarding migration, led to the adoption of Article 11 which recognised 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 enshrined that all treaties, when adopted, will be automatically applied in Mexico. They are situated at an infra-constitutional level but in a supra-legal one, so that 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 established the base for adopting the rest of the upcoming protective legislation regarding the best interest of the child. This article protects the rights of the children to development, education, health and food. 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 4 December 2014 the new **General Law for the Protection of Boys, Girls and Adolescents** was adopted. This law recognises 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 for 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 the *'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 recognises that detention centres are not suitable 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 could be threatened and Article 85 even establishes that under no circumstance should a minor be detained.

On 26 January 2011, Mexico adopted the **General Law on Refugees and Complementary Protection**, becoming the first country in Latin America to recognise the status of the Complementary Protection for those people who cannot be granted refugee status but cannot go back to their country because their life would be at risk.²⁵ In October 2014, this law was modified and changed its name and structure to include political asylum, which is the asylum granted to a person that is being persecuted due to their political ideas. As explained by the General Assembly, the term political asylum can lead to different meanings. For some people, political asylum refers to 'diplomatic asylum', which denotes asylum granted by one state outside its territory, ie in diplomatic missions or on board its ships when they are in territorial waters of another state, on board its

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

aircrafts, and on their military installations when they are placed in a 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 that grants the refugee status.²⁶

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 enter the child into 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 harmonisation of the Mexican legislation, migration authorities were following only their own regulations and not paying attention to the national legislation. This situation was leaving children unprotected. Yet, since the inclusion of this article, on 21 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 April 2017, for the harmonisation of the General Law for the Protection of Girls, Boys and Adolescents, whereby the detention of children is forbidden, and the Migration Law.²⁷ There is still scepticism about the systematic adoption of this dictum. This is mainly due to the fact that it has to follow the established legal process in order to be adopted by the legislative powers of the country. Yet, the continuous attempts of the senate to stop the detention of children is a good indication towards the situation of unaccompanied children; they are providing a solution to the problem of the harmonisation of the law previously mentioned.

²⁶ UN General Assembly, Question of Diplomatic Asylum. Report, Thirtieth Session, Agenda Item 111, 22 September 1975.

²⁷ Vanessa, 'México debe seguir avanzando en garantizar el derecho a la libertad de niños migrantes' [2017] <http://endchilddetention.org>.

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 the best interest of the child approach, banned the detention of children in any situation 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 completely 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 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 LABELLED AS THE MAIN REASON FOR 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 such as to stroll around a neighbourhood that is under the control of the gangs could be a life or death decision.²⁸ In this 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.²⁹

In this scenario, violence against children is reaching alarming figures. Unprotected children, usually coming from poor living conditions,

²⁸ Amnesty international, ¿Hogar Dulce Hogar? El papel de Honduras, Guatemala y El Salvador en la creciente crisis de refugiados (2016).

²⁹ Carmen Rodríguez, Forzados a huir del Triángulo Norte de Centroamérica: Una crisis humanitaria olvidada (Doctors Without Borders 2017).

not having proper access to mental health assistance or education, are becoming traumatized at a worryingly young age. This threatens the proper development of their wellbeing and physiological health and makes them more prone to start drinking alcohol, misusing drugs and smoking.³⁰

El Salvador and Honduras, were reported as having the highest murder rate of an out-war zone.³¹ 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,³² leaving the children utterly unprotected. Therefore, when they decide to run away, they start the dangerous route already traumatised and distressed,³³ 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 from initiating this dangerous journey. Bearing in mind that there is no other obligation other 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 with Anna Aziza Grewe, 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 violence and lack of opportunities, which has been a concealment to

³⁰ SavetheChildren, Sweden, Childhood in the shadow of war: Voices of young syrians (2015).

³¹ "Amnesty international, ¿Hogar Dulce Hogar? El papel de Honduras, Guatemala y El Salvador en la creciente crisis de refugiados (2016).

³² Ibid. 23.

³³ 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).

intercept external funds by the state. This plan is under the control of corrupted governments which continue influence peddling and exploiting the needs of the youth to their advantage.³⁴ Whilst we are still waiting for the implementation of proper strategies targeting the root causes of migration in Central America, civil society organisations and international NGOs play a major role in fulfilling the gaps of States, regarding the protection of children.³⁵

2.3. PRACTICES REGARDING THE PROTECTION OF UNACCOMPANIED CHILDREN ONCE THEY ARRIVE IN 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 organisations have established their offices in order to control and protect migrants' rights. Since migration controls have become routine at the southern border, people are starting to take new routes, which are worryingly connected to drug trafficking, for avoiding migration authorities during their journey.

Consequently, there is no accurate figure 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 those apprehended by migration authorities and those not being apprehended since the consequences are utterly different.

A) Unaccompanied children apprehended by migration authorities

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

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

³⁵ Ibid. 23.

locate migrants, boosted the number of unaccompanied children detained since the implementation of these measures after 2014.³⁶

According to the statistics, the number of children reported to have been apprehended by migration authorities during the period from January to October 2016, went up to 32,426, from which a trifle of 45.4% were unaccompanied.³⁷ In accordance with the law, these children have to be immediately transferred to DIF centres 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,³⁸ and this has been possible due to the active role of civil society and international organisations in order to make the plight of migrant children visible. Regarding unaccompanied children, the law establishes that the only person that can hold the legal representation of the children is the federal procurator, which relies on the DIF centres for the legal custody.³⁹ These centres are considered by law as the alternative to the detention of children and an assistance centre 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 entered into the DIF system, children actually wait for an average of 3–4 days to be canalised to the DIF.⁴⁰ During this time, children are detained in migratory stations designed for adults, properly called detention centres, and designed with cells, bars and police staff where no personal interviews to identify the specific needs of each child are carried out.⁴¹ In these centres, there are protection officials known as Officers for Child Protection (OPIs), which are supposed to be professionals in the treatment of

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

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

³⁸ Interview Lourdes Rosas, UNICEF's Child Protection Consultant.

³⁹ General Law for the Protection of Girls, Boys and Adolescents (art 24), México, 29 May, 2000 [last reform 2 April, 2014].

⁴⁰ Interview Claudette Walls Coordinator of International Organization for Migration, Office Tapachula.

⁴¹ Interview Claudette Walls Coordinator of International Organization for Migration, Office, Tapachula.

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 one can read OPI.

The Fray Matias Center for Human Rights, an NGO working in Tapachula, reported, in 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, another worrying failure in 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 Fray Matias Center for Human Rights, stated during our interview, many children ask for voluntary repatriation due to this discouragement; authorities discourage children from asking 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 at risk by sending them back to the dangerous situation they had faced in their countries and which forced them to flee.

A general state of negligence 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 also be assumed when looking at the practices that are being implemented.

Fact-finding 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 Center of Tapachula, a so-called alternative centre to detention for unaccompanied girls who are waiting for the outcome of their asylum procedure, their

humanitarian visa, family reunification and also those that are going to be deported or are waiting to be transferred to another shelter once they are recognised with the refugee status. If this was the case, boys and girls are canalised to a shelter with open doors in Mexico City, run by an organization from the organisation 'Casa Alianza'. The state does not participate in the integration of children who are recognised as refugees nor facilitates a space where unaccompanied children can go after receiving the status of refugee. As always, civil society is the one fulfilling the gaps of the state and providing facilities to these children. Regarding the situation of boys, they are sent to another centre 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 also a lawyer, there is capacity for 24 girls. Bearing in mind the number of children apprehended by migration authorities and that most of the deportations are undertaken by the state of Chiapas, it is clear that there is not enough 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 centres. 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 Fray Matias Human Rights Center, confirmed during our interview *'the majority of the girls and boys are held in the Migration Station Siglo XXI'*.

Concerning the Municipal DIF Center of Tapachula, girls seemed to have access to legal information and representation as well as mental health assistance six days per week during office hours. The right to education is not guaranteed in this centre, girls are not going to school and no lessons are being organised for them. Girls waiting for the result of their procedures wait for around six months (45 working days for the first outcome plus 10 more working days for the notification; summed up to this, if 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 centre, 45 working days more until the COMAR resolves the procedure plus the 10 working days for the notification). Consequently, an unaccompanied girl can be more than half a year in the centre 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 school while being in the DIF centre, clearly violating the Mexican legislation.

These centres are described, under Mexican legislation, as being the solution for the detention of children, centres 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 good mental health.⁴²

This violation of the right to education is highly connected to the prohibition of freedom of movement that these girls are suffering. As I understood that they are not allowed to leave the center because of the risk of absconding. Fences and walls surround the building, which only has an open-air space that is a 20 square meters concrete yard. 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 provided for the girls, except for the few days that international organizations like the IOM, among others, can organise activities for them.⁴³

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 for a healthy environment to recover from traumatic experiences. The lack of leisure while waiting for the outcome of the procedure can put at risk the already weak mental conditions of the girls. During my interviews, I was told that they have access to a psychologist 6 days 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 organisations, which are striving to improve the professionalism of the staff in charge of the well-being of the children.⁴⁴ The situation of the girls held in the DIF centres clearly violates the principle of the best interest of the child:

⁴² 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).

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

⁴⁴ Lourdes Rosas, UNICEF's Child Protection Consultant, interview May 2017.

detention is never in the best interest of the child. In this regard, Eva Ovando Matías 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 centre.

In short, these centres are, in practice, detention centres where the right to liberty and security of the girls is being violated. The girls held in the DIF centre of Tapachula were deprived of their liberty and had no guarantees for other rights such as education or leisure among others. This 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 responsible are required to act in accordance with the law. In the current situation, Mexico has transposed, automatically, all the international covenants that it 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 institution, 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 is enshrined in the law and to make the state accountable for not acting in accordance with 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 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 the situation of unaccompanied children. This visit allowed me to expand upon the findings I had gathered in 2016 during my time working at the 'La 72' shelter in Tenosique de Pino Suarez, in Tabasco. In this regard, shelters seem to always have a legal advisor and psychological assistance; nevertheless, no specialisation 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 do not have a large budget, and many international organisations are helping them to offer and improve the services⁴⁵ they provide to migrants and asylum seekers, such as health care, food and other entertainment materials. For example, Claudette Wallas, coordinator of IOM Office in Tapachula, explained during our discussion that the IOM has invested in a library for the Municipal DIF centre of Tapachula, since the children were eager to read entertaining stories. Besides this, they have also invested in training workshops for the boys in order to teach them the professional skills they were asking for.⁴⁶

The main concern about 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 centre, unfortunately, these places have been a key spot for drug dealers and also for traffickers looking for victims. Additionally, many adults arrive traumatised because of their experiences, and their personal struggles can have an impact on children who are witnessing these disturbing situations. Likewise, security in these places is not guaranteed. Many children flee their countries because of the threats of gangs, and it is lamentably true that many gangsters arrive in these shelters, mixed with migrants, in order to hunt down the people fleeing from them. There have been reported cases of abuses committed against migrants by gangsters in these shelters.⁴⁷ Therefore, children are highly exposed to risks for their security while being in these places. The right to liberty of unaccompanied children is threatened by the right to security. For example, during our interview Ana, Coordinator of the Albergue "El Buen Pastor", stated that the majority of children leave the shelter before the outcome of their procedure because they meet someone with whom they decide to continue their life with outside of the shelter.

In addition, these shelters have no recognised legal custody or legal representation of the children, so that the correct way to act

⁴⁵ Claudette Walls Coordinator of International Organization for Migration, Office Tapachula, Interview May 2017.

⁴⁶ Ibid.

⁴⁷ Gustavo Castillo García, 'Ser pandillero o prostituirse, caminos para migrantes de CA' [2014] La Jornada.

in accordance with the law is to call the procurator as soon as the child is identified. Shelters are also supposed to inform DIF centres about the arrival of a 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 Centre and the concerns expressed by the Fray Matias Center for Human Rights or the 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 in 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 such as UNICEF, UNHCR and the IOM, which currently share the goal of implementing projects to protect vulnerable groups such as unaccompanied children, are striving to train staff from these centres to be able to provide an adequate response to the psychosocial necessities of these children.⁴⁸

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 for child protection. Mexico is indifferently failing in protecting the most vulnerable people and in acting in accordance with its own law. Undoubtedly, there is a need to take action and implement what it is written in the law if Mexico wants to fulfil its obligations regarding the protection of children.

In addition, if it were not for the work of civil society and international organisations striving to make visible the plights of migrant children and their struggle to guarantee that the government complies with what it is written in 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.

⁴⁸ IOM, UNHCR and UNICEF Interviews May 2017.

2.4. HOW TO ENFORCE THE LAW: MEXICO'S LEGAL RESPONSIBILITY

Mexico can be labelled 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 (CNDH) 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 into the station. The Fray Matias Center for Human Rights is one of the actors that was permitted to enter 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 the migratory stations, they have witnessed the dreary conditions of people detained there, conditions that were published in 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 migrants' childhoods? Mexico has accepted international obligations towards human rights and, particularly, towards unaccompanied children. Due to breaches of the international legislation regarding this vulnerable group, the procedures claiming for accountability to the state before the Inter-American Court of Human Rights should be triggered, although as previously explained, internal measures have to be exhausted before reaching this level.

When going through an internal procedure to ask for accountability from Mexico, actors claiming a 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 factors negatively impacting litigation which are stopping civil society from asking for 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 tried to sue the state before the courts, the applications have on several occasions not been admitted. In this regard, judges do not seem interested in actually knowing 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.⁴⁹
- **Individuals have to spend the whole process in detention:** In addition to the use of different terminology, Diana Martinez, Program Officer in Mexico for the IDC, revealed during the interview carried out for this research that in the cases concerning adults, when appeals were presented to the court, they had to wait for the outcome of the procedure while detained in the Migratory Station. This meant that they had to usually wait, one more year in detention. This situation has discouraged the majority of people from asking for accountability to the state because of the violations committed against their human rights. Although this was in the case of adults, it might also be applied to the cases concerning 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 themselves as the representative of the child, many civil society

⁴⁹ Salva Lacruz, Advocacy Coordinator Fray Matias Center for Human Rights, Interview May 2017.

organisations 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.⁵⁰ This has left many children unprotected. Moreover, the accountability of the state when it comes to violations of the rights of the children seems not to 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 the Fray Matias Center for Human Rights, have never had the chance to exhaust the internal remedies, which is the only way to gain access to the Inter-American Court of Human Rights. These actors keep on striving to reach the supreme level in order to reach the Inter-American Court. However, time is necessary to train judges about the concepts of human rights and the situations faced by unaccompanied children.

In addition 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 in Article 25 of the Inter-American Commission of Human Rights Regulation. It establishes that in serious and urgent cases, which could represent irreparable damage to a person, the commission could, itself or following a request by someone, make a request a state to adopt precautionary measures to guarantee the rights of the person.⁵¹ 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 make a request to the state to apply precautionary measures, they have found that the

⁵⁰ Diana Martínez, Mexico Program Officer of the International Detention Coalition, Interview July 2017.

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

child has already been deported and consequently his or her rights have already been violated. This fact was also confirmed by Diana Martinez, Mexico Program Officer of the IDC.

- 2. Application to the UN High Commissioner 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. However, 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 the case had reached the UN, the rights of the person would already be violated, can individuals apply directly to the UN High Commission for its protection. The 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 least 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 behaviour 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 Mexico, and if so, no doubt the Inter-American Court will ask Mexico to be responsible for the violations committed against the Inter-American Convention on Human Rights.

These are uncertain strategies to make Mexico accountable but there is the hope that this is the way to enforce the protection of unaccompanied children set down in the legislation. Civil society needs to continue its strive in order to make Mexico accountable for the violations of the rights of the unaccompanied children detained within its borders.

CONCLUSION PART I

In short, the finding reported above have shown that detention of unaccompanied children is currently happening in Mexico, 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 in accordance with international law. Mexico is not fulfilling its international obligations and is not acting in the best interest of the child when sending them to DIF centres and neither when being arch to avoid accountability since there is no single reference in its legislation about the actual detention that the DIF system represents for unaccompanied children.

Besides, the lack of information and knowledge of the judges about the migration situation, in addition to the vagueness of terms found in Mexico's legislation, are important factors to take into account. These factors are challenging the end 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 the 'accommodation' of children in the DIF systems to assure that their migratory status is being studied as a breach of the prohibition of arbitrary detention.

However, Mexico has the tools to make its government accountable for the breaches of 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 before cases will be claiming the responsibility of the Mexican government, not only under international law, but also under its national law. To end this situation, civil society has to focus on litigation and continue striving to ask for adequate enforcement of the law.

While civil society strives to litigate, a system of proper alternatives to detention that is in compliance with the protection required by international law and does 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 Mexico could take advantage of the use of alternatives to detention which will imply benefits to the state in many ways while respecting the dignity of unaccompanied children.

PART II

THE IMPLEMENTATION OF ALTERNATIVES TO
DETENTION FOR UNACCOMPANIED CHILDREN

1.

BEST PRACTICES REGARDING THE USE OF ALTERNATIVES
TO DETENTION

According to the definition provided by the IDC, 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 only be detained 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. Even though the vast majority of states have banned the detention of vulnerable groups, such as unaccompanied children, and even provided on paper alternatives to detention,⁵² the truth is that the state’s fear 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 improving national security by promoting inclusion rather than exclusion.⁵³

Regarding alternatives to the detention of unaccompanied children, states must prevent the harm caused by this practice on the well-being and proper development of the children. Besides that, the possibilities provided by the states must respect the principles of minimum intervention and the best interest of the child; also care has to be the priority of any state when implementing these alternatives. Therefore, the identification of the child’s needs should be done at the very first moment, in order to provide the best possible option according to their situation.

⁵² 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).

⁵³ UNICEF, Toolkit on Diversion and Alternatives to Detention Summary of why diversion and alternatives are important (2009).

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 in recent decades. On the grounds of the work done by the UN in order to create common standards to promote the use of alternatives to detention, can be found other 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 14 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 also outlines that possible alternatives, ideally, should be provided by law and take various forms, including registration and/or the depositing of documents, reporting conditions, community release and supervision, as well as designated residence.⁵⁴ In addition, 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 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 11th Session of the Human Rights Council, stated 'public policies and programmes 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.'⁵⁵ The UN Committee on the Rights of the Child in its General Comment No 6: Treatment of Unaccompanied Children and Separated Children Outside their

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

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

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 programmes 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’.⁵⁶ 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 with the best interest of the child hints that from the very first moment his or her special needs will be identified. 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 in civil society, international organisations 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

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

governance addressing case resolution and not targeting national 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 basis 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. ANALYSING THE BENEFITS OF ALTERNATIVES TO DETENTION FOR UNACCOMPANIED CHILDREN

Many studies have already claimed the ineffectiveness of the states' practices to use detention in order to deter migrants from travelling or to decrease the risk of absconding.⁵⁷ This conclusion has helped to swiftly change from the idea of the implementation of detention as routine to the use of detention as a measure of last resort.

The impact of detention on unaccompanied children has 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 probability that once these children reinsert back into society, this feeling of exclusion puts at risk their 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 impact 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 the benefits of alternatives to detention, they have been demonstrated to:⁵⁸

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

⁵⁸ *Ibid.*

A) be effective. Studies have demonstrated that people based in communities and have access to proper legal and social support and enough information in order to take informed decisions, are highly compliant with the situation and less prone to abscond. It has been reported that alternatives to detention centres have up to 95% appearance rates and up to 69% voluntary return rates for refused cases.⁵⁹ Likewise, a recent study of 13 different methods demonstrated that the rates of compliance ranged from 80% to 99.9%.⁶⁰

B) be more cost effective. Different studies have reported that alternatives measures are more humane 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.⁶¹ Besides, alternatives have been demonstrated to be not only more economical in terms of direct costs but also in terms of long-term costs associated with the physical and psychological recovery from detention. More research has to be done in this field to really understand to what extent the harm caused by detention is directly connected to more expenses for the state and host community.

C) respect human rights. Non-custodial measures are the ones that more respect the dignity and human rights of a person. Likewise, the effective implementation of community-based programmes makes them more prone to respect other rights such as civil, political, economic, cultural or social rights. Community-based alternatives help the well-being of the migrants or asylum-seekers and gives them more strength to cope with the result of the application.

D) promote welfare. 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.

⁵⁹ International detention coalition, *There are alternatives A handbook for preventing unnecessary immigration detention* (revised edition) (2015).

⁶⁰ Rapporteur Ms Tinatin Bokuchava, Georgia, EPP/CD, Parliamentary Assembly Council of Europe, *The alternatives to immigration detention of children*, Doc. 13597, 15 September 2015.

⁶¹ International detention coalition, *There are alternatives A handbook for preventing unnecessary immigration detention* (revised edition) (2015).

These practices should not be seen as alternative forms of detention but as alternative forms of release. Evidence shows the positive impact of these alternatives on the well-being on asylum seekers, letting them socialise 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, leaving aside the social and economic costs that can be generated due to having someone deprived of liberty. Likewise, these practices contribute to improving national security – nowadays topic of concern in most of the countries facing throngs of migrants – promoting inclusion of marginalised children instead of exclusion from society.

Noticeably, this research has not found even one theory – but the risk of threats to national security and public order – that highlighted the negative impact of applying alternatives to detention. It seems obvious that if states are willing to manage migration flows while minimising the risks, cutting its associated 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 fulfil their commitments to human rights and to become an example of good practices, should 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 models⁶² developed by some countries that different actors are claiming should be the ones that states adopt in order to stop the detention of children and help their well-being. Nevertheless, it has been demonstrated that most of the wide array of alternatives to detention imply restrictions of movement or other deprivations of liberty so that these practices are also a matter of concern for human rights. These alternatives will only satisfy the human rights standards if they are proportionated and necessary for the objectives pursued, and this is why the less intrusive measure shall be taken into account in each individual case.⁶³

There are different kinds of alternatives to detention models being applied worldwide, while some of them can be sorted as pro-human rights, others have been put into question since they represent a sort of restriction of movement, besides some could be considered inconclusive.⁶⁴

- **No detention.** This shall be the common rule, since it fulfils 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. ie the Philippines releases asylum-seeker without conditions and gives them asylum-seekers certifications.
- **Release on conditions.** There are some countries which release asylum-seekers under some conditions like registering the residence, living at one designated place or withholding the passport or other documents. ie Austria, Canada and Denmark, among others, release 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 can even be applied in an onerous

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

⁶³ 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).

⁶⁴ Ibid.

way, sometimes representing actual restrictions of movement.

- **Release on bail, bond or guarantor.** This alternative option to detention is applied in some countries such as Finland, Canada and 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.
- **Community-based supervised release or case management.** There are three subtypes here classified depending on the supervisor of the program. In the first one, settlement is 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. The third one is only managed and supervised by governmental authorities.
- **Designated residence.** This represents a common practice within the borders of the European Union. It means to give an official protected housing to the asylum-seeker in order to monitor their location.
- **Electronic tagging and reporting or satellite tracking.** This type is 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.
- **Home curfew.** This type could not even fall under the definition of an 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 IDC 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. In addition, successful alternatives need to focus on early engagement, explore all options to continue in the country legally and all avenues for the voluntary repatriation; ensure individuals are well informed so that they believe to have been through a fair and timely process, ensure that basic needs are met and that any conditions imposed are not overly onerous. Eventually, highlights the importance to apply conditions or limited restrictions only when necessary.⁶⁵

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

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'.⁶⁶ Consequently, it is of extreme importance that all people who are going to take part in the protection of children are trained on children issues and authorised by the public institutions to develop these duties. Furthermore, it 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 in 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 defined different points that a model should focus on to ensure that migrant children are protected while they wait for the outcome of their migrant procedure. This model, based on the points that follow, completely fulfils the obligations accepted by each state when adopting the ICRC:

A) Prevention.

This point outlines the necessity of setting down in the domestic law the explicit prohibition of detaining children. This step is the first one to ensure that no children would be detained, and therefore, to establish the grounds for non-custodial measures.

B) Screening, assessment and referral. The best interest of the child implies that within the hours following 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 needs. 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,

⁶⁶ 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].

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 ensure 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 these reasons, states ought to be aware of fulfilling these basic needs, and for this purpose, investing in 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.

In short, though many studies and reports published by civil society, international organisation 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. It 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 dire 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.

2.

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 centres 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 cannot provide the children with all the services required to recover from their traumas, to guarantee their rights and to prepare them for reinsertion into the society. Therefore, they do not concur 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 privatisation of Mexican Petroleum (PEMEX) – the 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, were left aside and that is why a proper development of alternatives to detention programmes 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 'El Gasolinazo' had a strong impact. Seventy-six per cent of its population live below the poverty line and 31% live in extreme poverty.⁶⁷ Also, the Superior Audit of the Federation highlighted Chiapas as presenting more irregularities in its spending and verification system, therefore, it is 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 its citizens, a hopeless future for the application of protective measures for the rights of unaccompanied children can be imagined.

There are no accurate data on how much money it costs the state to have one person in detention; nevertheless, Eva Ovando Matías, Coordinator of the Municipal DIF Centre of Tapachula, hints that one child represents a monthly cost to the state of around 3,000 Mexican pesos per month⁶⁸ equal to, approximately 150 euros. Consequently, in this context of migratory and economic crisis due to the large numbers of unaccompanied children who have been detained⁶⁹ and the lack of resources and will to adopt more bigger budgets to help even its own citizens, so therefore, less to help the unaccompanied children, Chiapas is seen as a state where the government is not foreseeable to change the patterns already established. It doesn't seem that it will act in accordance with the law, providing the unaccompanied children with a place where they could enjoy the protection they are entitled to.

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

⁶⁸ Eva Ovando Matías, Coordinator of the Municipal DIF Centre of Tapachula, Interview May 2017

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

2.2. TARGETING THE DANGER OF NOT HAVING ALTERNATIVES TO DETENTION PROGRAMMES 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 out of every 20 children from this region are living below the threshold of poverty, and, that half of this number, are living in extreme poverty. These circumstances, in addition to the lack of education and job opportunities, social exclusion and high rates of violence,⁷⁰ are leaving the children in a dire situation whereby untreated trauma can have undesirable effects, including juvenile delinquency and criminal behavior.⁷¹ Early and proper interventions have been demonstrated to be successful in decreasing the risks of delinquent behaviour and future criminality,⁷² so that proper care systems for unaccompanied children should be established in Mexico in order to prevent these threatening situations. These care policies should be applied since the very first moment, thus when children are intercepted by the migration authorities, in an alternative place to detention centres for children.

Mexico, as a host state, should bear in mind the risks that increasing the feeling of exclusion of these children and not providing them with the medical assistance they need in order to overcome their traumas represent. Last May was the most violent month in Mexico for the last 20 years. Violence in Mexico is reaching unexpected levels,⁷³ 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 in this cycle of violence is of concern. Additionally, the reinsertion of these traumatised children into this society can lead to self-destructive behaviours which may drive

⁷⁰ Julio Rivera Claveria, *Las maras El fenómeno criminal del S XXI* (2013).

⁷¹ Maria Hawilo, *The consequences of untreated trauma: Syrian refugee children in Lebanon* (2016)

⁷² *Ibid.* 20.

⁷³ Arturo Cerda, ‘Osorio Chong: Violencia en México, agudizada por delitos del fuero común’ [2017] *Noticieros Televisa*.

them to commit crimes.⁷⁴ Interventions failing to address the mental health of children already exposed to multiple episodes of violence may be translated into greater rates of delinquency.⁷⁵

In short, Mexico, in order to cut down the rates of violence and the associated social and economic costs, should also target the mental health needs of these traumatised unaccompanied children and take action on adopting alternatives to detention programmes. The focus should be 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 for the outcome of their procedure. Despite all these attempts to implement protective measures and to stop detaining children, the truth is that reality (maybe because of lack of resources, capacity, training or attitude) is far away from what has been established on paper.

Although for the Mexican government things started to change after 2014, due to the international attention on its borders, civil society has been working to guarantee the rights of the migrants for decades, fulfilling the gaps in protection that were supposed to be the responsibility of the state. They have been the ones fulfilling the needs of the people that historically were crossing the southern border towards

⁷⁴ 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).

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

the United States. Many shelters opened their doors in the 1990s,⁷⁶ 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 specialised in migration, such as the IOM and the 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 organisations and NGOs reported sharing the same objective for the current year, protecting unaccompanied children. For all of them, DIF centres were another way to violate the principle of prohibition of detention of children, and all were concerned about the fact that children were being detained in migratory stations. Currently, there are 34 migratory stations in Mexico,⁷⁷ and civil society is mainly established at the two ports of entry into 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 these 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 organisations were asking for their help to stop a specific situation of abuses.⁷⁸

Fortunately, the efforts undertaken by civil society and international organisations during these years have achieved important goals which will lead to change in the dire situation of unaccompanied children in Mexico and will start considering the international guarantees recognised 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

⁷⁶ 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.

⁷⁷ Salva Lacruz, Advocacy Coordinator Fray Matias Centre for Human Rights, Interview May 2017.

⁷⁸ Ibid.

Access, Fray Matias, WOLA and the Federal Procurator, among others.⁷⁹ The INM, the Citizens Council and other civil society organisations, gathered to implement in 2015 a pilot project based on the IDC's Child Sensitive Community and Assessment Placement Model, an organisation which also took part in the procedure. This model was tested between August 2015 and February 2016. Casa Alianza and Aldeas Infantiles were the organisations, established in Mexico City, that participated in the implementation of the pilot project by receiving the children; the IDC participated as a technical and procedure advisor.⁸⁰ During and after the implementation of this test project, the actors involved were meeting routinely to identify the needs for the institutionalisation 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 from their procedures, due to the relations of trust created by the centres in charge of the accommodation of the children.⁸¹

Civil society and the Citizens Council are still active in 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, on 13 and 14 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 programmes 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 on 4 August 2016 in San José, Costa Rica, and in which Mexico declared its promise to strengthen its capacities. This meeting was the first step taken in order to prepare for the first United Nations Summit for Refugees and Migrants that took place on 19 September 2016.⁸²

Furthermore, in October 2016, thanks to the pressure of the actors

⁷⁹ INM, "Acta de la Segunda Sesión Ordinaria 2016 del Consejo Ciudadano del INM, en adelante "El Consejo Ciudadano", 30th June, 2016.

⁸⁰ 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]

⁸¹ Ibid.

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

working in the field, the first shelter belonging to the DIF system was inaugurated. It is run by public funds, and has a community-based focus. This pilot project based in Villahermosa, Tabasco, was supported by the UNHCR, UNICEF and civil society such as the 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 completely considered.⁸³ The integral protection and assistance that is supposed to be given in this pioneering 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 centre will be the first community-based centre 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 programmes into society and a council to help the children to make their own life plans. Specialised counsellors 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.⁸⁴ As stated by Mark Manly, representative of the UNHCR in Mexico '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 on this pilot project due to the recent implementation of the project, albeit it represents such an advance, and it has been possible thanks to the collaboration of civil society and international organisations. They have created a reception strategy taking into account all the needs of unaccompanied children. This project is divided into 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

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

⁸⁴ Lourdes Rosas, UNICEF's Child Protection Consultant, Interview May 2017.

specific health care institution.

Despite the fact that it is still too 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 demonstrated hope in this project as an actual alternative to detention. However, there was a sort of scepticism, due to the fact that since January 2017, when this centre opened its doors, just three children have been canalised by the migration authorities. There is a fear of the migration authorities that if you canalise 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.⁸⁵ 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 centres are applying a policy of non-acceptance'.

Consequently, it is still too 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 Mexico. Civil society and international organisations will need to wait some years before they can talk about the changes that it may represent. The first challenge they would need to overcome is, why these centres are empty and the children are not being canalised. For that, they need to reach the judicial level and stop trusting in the good will of the migration authorities, a practice that is spread over the country as Lourdes Rosas, UNICEF's Child Protection Consultant, stated. Capacity 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.

⁸⁵ Interview Salva Lacruz, Advocacy Coordinator Fray Matias Centre for Human Rights.

CONCLUSION PART II

As already explained throughout this research, detention is never in 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 the benefit of the combination of capacity building and professional and technical assistance from different stakeholders – civil society, institutions and international organisations – in addition to the different achievements of the Citizens Council, whereby the plights of children were discussed, and the results of the project concerning an alternative to detention were also analysed. It has also been demonstrated that this combination can 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 flow of migration into Mexico, to start adopting an approach to protect the human rights of unaccompanied children cannot be denied.

GENERAL CONCLUSION

In 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 four years. Notwithstanding the principles of prohibition of arbitrary detention and the best interest of the child, both enshrined in international law and which Mexico has automatically transposed into its domestic law, children are still being detained and their rights, despite their demonstrated vulnerability, are still 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 for new institutions in charge of the protection of children, are putting into question the will of Mexico to actually fulfil its obligations concerning children. The continuous inconsistencies herein exposed regarding what is written in the law and what is the reality, are leading the international community to consider Mexico as a simulated country whereby on paper institutions are working efficiently and the well-being of unaccompanied children is such a matter of concern for the state, that specific protective mechanisms have been set down in the law to protect them, whereas in reality violations to the human rights of unaccompanied migrants are happening.

Throughout this study, we have come to the conclusion that when asking for accountability to Mexico there is the need to adopt 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 professionalism of the Mexican authorities, the issues regarding the legal representation of the children and the amount of work of the few organisations working in

this field, seem to be the main causes. This is a relatively new issue, and civil society is striving to test the ways to make Mexico accountable for the violations committed, thus time is needed to find the way to make Mexico accountable. However, I believe that 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 Mexico has started to change the whole scenario of migration. The government is letting them take part in all matters concerning migration. The main challenge is to overcome the lack of professionalism of the institutions, so in this regard, capacity building to make the authorities understand what human rights mean and the issue of migration is taking place all over the territory. The efforts made 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 demand that the state accomplishes 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, are the main objectives nowadays to reverse the failure of the state in protecting the children.

Another concern which this study has also highlighted, though IT 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 society. The reinsertion of these children in Central America is aggravated due to the spread of violence throughout the region. Therefore, the high possibility of these children to take part in this cycle of violence is worrying. Migration in the region will never stop until the root causes are targeted. Since violence is one of the main reasons causing unaccompanied children to flee (this is currently a fact because of the decrease in the number 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 provide a solution to the root causes of migration and to work on the stabilisation of the region which is leading to a serious problem whereby youths from the Northern Triangle foresee a hopeless future, which has led to them being referred to as the lost generation of Central America.

Nothing would have been possible without the efforts of both international organisations and civil society. On the one hand, international organisations, such as UNICEF, the UNHCR and the 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 such as COMAR or different NGOs and providing different sort of services. They have also raised attention to the situation among the international community. On the other hand, civil society continues to work reporting 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 quite sure that in the following 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 will have made possible thanks to the efforts of civil society, institutions and international organisations. 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 Mexico's borders.

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The present thesis - ***Hope for the Northern Triangle's Lost Generation: Battling Detention of Unaccompanied Children at the Southern Border of Mexico*** by Andrea Nomdedeu Díaz-Valero and supervised by Maria Daniella Marouda, Panteion University, Athens - was submitted in partial fulfillment of the requirements for the European Master's Programme in Human Rights and Democratisation (EMA), coordinated by EIUC.

