

UNIVERSITY OF COIMBRA

European Master's Degree in Human Rights and Democratisation
A.Y. 2014/2015

THE BEST INTERESTS OF THE CHILD IN THE CONTEXT OF FORCED MIGRATION: THEORY OR REALITY?

A Comparative Study of Unaccompanied and Separated Children
at the U.S.-Mexico Border and Lampedusa (Italy)

Author: Alexandra Graziosi

Supervisors:

Carla Marcelino Gomes & Professor Jónatas Machado

ABSTRACT

Forced migration flows around the world increasingly encompass unaccompanied and separated children. Article 3 of the Convention on the Rights of the Child encourages state parties to adopt the principle of the “best interests of the child” in law, policies, and practice. This dissertation will analyse if the theoretical ratification of this international treaty positively influences implementation of the principle in practice. A study of both the U.S.-Mexico border and Lampedusa (Italy) allows a comparison to be drawn of the differences and/or similarities in the treatment of unaccompanied and separated children. After reviewing the international and regional frameworks, of said countries, their national laws will also be examined. In order to assess whether or not legal obligations are strictly theoretical or practiced in reality, procedures such as screening, accommodation, representation, deportation, and integration will be reviewed.

ACKNOWLEDGEMENTS

First of all, I would like to thank my parents, Patricia and Angelo, for their unconditional love – thank you for believing in me and for supporting me in all my decisions. To my Zia, Giuseppina, my role model – thank you for compelling me to follow my dreams regardless of my fears. To my brother, Adam, for always being there for me. A very big thanks to all of you for feeling my anxieties and stress along the way and for taking the time to read my texts.

I would like to thank my family and friends, without all of you I would not have had the strength to undertake this journey. To my friends, you know who you are, for not being able to physically support me, but still managed to be there for me spiritually, your words of inspiration helped me reach my goal.

I would like to express my special appreciation and thanks to my supervisor Carla whose guidance kept me on track and whose insights improved the quality of my work. I would like to thank you for your encouragement, which has been extremely helpful. I would also like to express my gratitude to Professor Jónatas Machado, Professor Vital Martins Moreira, Ana Filipa Neves, and Bárbara Alves.

This last year I can honestly say has been the best experience of my life. With many hurdles throughout the journey, the growth experienced made them all worthwhile. Both Venice and Coimbra will forever hold a dear place in my heart. To my E.MA colleagues, you were part of an incredible experience and will remain with me forever. To my Rua Eça de Queiroz family, never did I imagine meeting such amazing people and being able to experience all we did – thank you for all the memories, words cannot describe what you mean to me. A special thanks to my sunshine, Johanna – thank you

for being there and brightening my days with your optimism. You always reminded me to smile. I am so grateful to have met you.

Last but not least, to my Anke, I am so glad to have met someone that I cannot just call my best friend but family. You have touched my heart in a way that no other has before. Thank you for being by my side through the good and bad times, I would not have chosen a better person to go through this wonderful experience with – I am truly blessed.

ABBREVIATIONS

ACHR	American Convention on Human Rights
BIA	Best Interests Assessment
BIC	Best Interests of the Child
BID	Best Interests Determination
CBP	U.S. Customs and Border Protection
CEAS	Common European Asylum System
CRC	Convention on the Rights of the Child
DACA	Deferred Action for Childhood Arrivals
DHS	Department of Homeland Security
DOJ	Department of Justice
DOS	Department of State
EOIR	Executive Office for Immigration Review
EU	European Union
FSA	Flores Settlement Agreement
HSA	Homeland Security Act
HHS	Department of Health and Human Services
ICE	Immigration and Customs Enforcement
IOM	International Organization for Migration
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service

OAU	Organization of African Unity
OMN	Operation Mare Nostrum
ORR	Office of Refugee Removal
PRM	Bureau of Population, Refugees, and Migration
SAR	Search-and-rescue
SIJS	Special Immigrant Juvenile Status
TPS	Temporary Protected Status
TVPRA	Trafficking Victims Protection Reauthorization Act
UAC	Unaccompanied Alien Child
UACPA	Unaccompanied Alien Child Protection Act
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
U.S.	United States of America
USCIS	United States Citizenship and Immigration Services

TABLE OF CONTENTS

ABSTRACT

ACKNOWLEDGEMENTS

ABBREVIATIONS

TABLE OF CONTENTS

INTRODUCTION.....	p.1
1. CONCEPTUAL FRAMEWORK – MAKING THE CONNECTIONS.....	p.7
1.1 Rights of the Child.....	p.7
1.2 Unaccompanied and Separated Children.....	p.9
1.3 Forced Migration and Refugees.....	p.11
Conclusion.....	p.15
2. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD IN APPLICATION OF U.S.-MEXICO AND LAMPEDUSA (ITALY).....	p.17
2.1 Defining the Concept.....	p.17
2.2 Legal and Operational Frameworks.....	p.19
2.2.1 International Framework.....	p.20
2.2.1.1 CRC.....	p.20
2.2.1.2 UNHCR.....	p.21
2.2.2 Regional Frameworks.....	p.23
2.2.2.1 North America.....	p.24
2.2.2.2 European Union.....	p.24
2.2.3 National Frameworks.....	p.26
2.2.3.1 U.S.	p.27
2.2.3.2 Italy.....	p.29
2.3 Applying the BIC Principle to Migration.....	p.29
Conclusion.....	p.30

3. U.S.-MEXICO AND LAMPEDUSA (ITALY): BACKGROUND ON THE ARRIVALS OF UNACCOMPANIED AND SEPARATED CHILDREN.....	p.31
3.1 General Figures: The Americas and Europe.....	p.32
3.2 Crossing the Border: Unaccompanied and Separated Children at the Southwest Border – Texas, Rio Grande Valley.....	p.32
3.2.1 Brief Chronicle of Migration to the U.S. of Unaccompanied and Separated Children.....	p.33
3.2.2 The Situation.....	p.34
3.2.3 The Journey.....	p.35
3.2.4 Who are they and reasons for travel.....	p.36
3.2.5 What action has the U.S. taken.....	p.42
3.3 Lost at Sea: Unaccompanied and Separated Children arriving at Lampedusa.....	p.42
3.3.1 Brief Chronicle of Migration to Italy.....	p.43
3.3.2 The Situation.....	p.44
3.3.3 The Journey.....	p.44
3.3.4 Who are they and reasons for travel.....	p.45
3.3.5 What action has the Italian government taken.....	p.48
Conclusion.....	p.49
4. ANALYSIS OF U.S. LAW, POLICIES, AND PRACTICE.....	p.51
4.1 Law and Policies.....	p.51
4.1.1 International Law and its Applicability to the U.S.....	p.51
4.1.2 Domestic Law: U.S. Immigration System.....	p.52
4.1.2.1 Advancements in the U.S. Immigration System for Children.....	p.54
4.1.2.2 Immigration Relief for Children.....	p.56
4.1.3 Key Actors Involved with Unaccompanied and Separated Children.....	p.59
4.1.4 Policies and Programmes to Address the Influx of Children.....	p.60
4.2 Practice: Gaps for Children in the U.S. System.....	p.63
4.2.1 Screening.....	p.63

4.2.2 Accommodation.....	p.64
4.2.3 Legal Representation.....	p.65
4.2.4 Appointment of a Child Advocate.....	p.65
4.2.5 Deportation, Repatriation, and Reintegration.....	p.66
4.3 Remarks.....	p.67
Conclusion.....	p.69
5. ANALYSIS OF ITALIAN LAW, POLICIES, AND PRACTICE.....	p.71
5.1 Law and Policies.....	p.71
5.1.1 Domestic Law: Italian Constitution.....	p.72
5.1.1.1 Italy’s Legal Agenda as it Applies to Children.....	p.72
5.1.2 Key Actors Involved with Unaccompanied and Separated Children.....	p.75
5.1.3 Outline of Policies for Children.....	p.78
5.2 Practice: Key Issues for Unaccompanied Children.....	p.79
5.2.1 Age Assessments.....	p.79
5.2.2 Accommodation.....	p.80
5.2.3 Legal Representation.....	p.83
5.2.4 Guardianship.....	p.83
5.2.5 Family Tracing.....	p.84
5.2.6 Return and Integration.....	p.85
5.2.7 Disappearances.....	p.86
5.3 Remarks.....	p.86
Conclusion.....	p.87
CONCLUSION.....	p.89

BIBLIOGRAPHY

INTRODUCTION

Millions of children are on the move, both within and across countries, with and without their parents. The conditions, in which these movements occur, are often treacherous, placing migrant children at an increased risk of danger – abuse, neglect, and violence. Unaccompanied and separated children have become a large part of global and mixed migration flows throughout the world. Policy responses to protect and support these migrant children are fragmented and inconsistent. While there is an increased awareness of these children on the move, children remain largely invisible in debates regarding both protection and migration.

Adopted by the United Nations General Assembly in 1989, the Convention on the Rights of the Child (CRC) is the first international treaty dedicated to ensuring the rights and well-being of children. One of the aims of this Convention is to protect children from a wide range of human rights abuses. Yet, despite the increasing attention to the principle of the “best interests of the child” (*hereinafter* “BIC”) by courts and law-makers, children continue to constitute a particularly vulnerable group, especially unaccompanied and separated children who are forced migrants and refugees. The main purpose of this dissertation is to evaluate legal standards of international law and compare regional and national law for the purpose of exposing a gap between existing legal standards and the protection afforded to unaccompanied and separated children in reality.

This thesis sets out to answer the following research questions: Is international law strictly theoretical in nature or is it also put into practice? If it is put into practice, is it in ways aligned with international guidelines and does it respect the inherent rights of these children? What are the similarities and/or differences in treatment of unaccompanied and separated children through international law by North America (the U.S.), and the European Union (EU), in particular Italy? Is the “best interests of the child” principle taken into consideration in all aspects of migration? Are international law regulations being breached? Does ratification of the CRC influence countries actions towards unaccompanied and separated children? In addition, a hypothesis this

dissertation begins with is that ratification of core human rights instruments are used solely for the purpose of positioning oneself in a positive light rather than anything else (i.e. carrying out the associated actions).

Regardless of the CRC being the largest ratified convention in the world, voids in legislation, policies, and their implementation still persist. The current categorisation approach continues to leave many children unprotected rather than being protected simply because they are children. The result of this approach is the hierarchisation among categories providing different degrees of protection amongst children. Only the mere symptoms of forced migration seem to be treated, as there is a noticeable gap between the international communities rhetoric and its action. Hence, the opinion of the author is that rather than being concerned for the safety and protection of the children, states are more concerned with state security and address the problems with short-term “fixes” instead of tackling the macro issues with long-term solutions.

In the first chapter, the main concepts that are the foundational blocks of the thesis will be defined and main debates surrounding the concepts explored. While at the same time, portraying the interrelatedness of the concepts. The rights of the child is the first concept to be discussed in terms of defining the term child and the context in which it will be used throughout this dissertation. The CRC is briefly touched upon considering that it is the basis for the rights of the child in the international realm. The next concepts reviewed are unaccompanied and separated children. The main idea being that regardless of their slight variation in definition, this dissertation will utilise them interchangeably, specifically for the reason that they lack the presence of parents. Finally, the last concepts are forced migration and refugees. It is important to establish that forced migration, although often ignored, is the broader, overarching category in which refugees, amongst others, fall under. Moreover, this thesis argues that the refugee definition must be broadened, especially in cases of children, to recognise persecution from a child’s perspective.

The discussion of the BIC, in the second chapter, begins with an attempt to define the concept. From defining the concept the chapter commences a journey to establish the role it plays in both the United States of America (U.S.) and Italy. This is accomplished

by reviewing the legal and operational frameworks that contain BIC beginning with international law, applicable regional frameworks, and finally the national frameworks. This chapter closes with portraying ways in which the BIC principle can be applied to migration.

Chapter 3 will provide the background of the case studies at hand. This chapter opens with a general overview of figures in both the Americas and Europe. This is followed by two subsections that mirror each other in structure however, one focuses on the situation in the U.S. and the other Italy. A brief chronicle of past migration trends to each of the countries, the current situation of unaccompanied and separated children arriving, including statistics (general and specific), the journey these children embark on, and the reasons for the travel will be outlined. Lastly, the actions taken by the respective governments in response to the large quantities of unaccompanied and separated children arriving on their territory are summarised.

In the last section of this dissertation, Chapter 4 and Chapter 5, we will see a comparison between the law, policies, and practices of each of the countries in question, while at the same time, evaluating if state practice is in congruence with the law. Chapter 4 will solely focus on the U.S. while Chapter 5 will do the same for Italy. Conclusively, within each of these chapters, remarks will be made based on best practices and recommendations for the two receiving countries being evaluated.

Importantly, it is necessary to acknowledge that it is the intention of this dissertation to interlink theory and practice throughout the entire thesis rather than strictly focusing on theory and in the end expose the practice. This decision, at least in part, stems from the methodology adopted – to be discussed below.

The methodology embraced by this dissertation is a comparative study, which utilises a mixture of descriptive and normative research. Some areas of concern in relation to the migration experience of unaccompanied and separated children will be taken into consideration, in a comparative study between the U.S.-Mexico border situation and those arriving to Lampedusa, Italy by sea. These two countries were chosen as case studies due to their current relevance and international public attention.

Of course, there are many differences between the two receiving countries in regards to their legislation, policies, and geopolitical stances. Reference to the situation in the U.S. is relevant not just because of the recent media hysteria concerning the arrival of unaccompanied children at the U.S.-Mexico border, but also it will allow tentative conclusions to be drawn about how it compares to the EU in the treatment of unaccompanied and separated children and their best interests despite the U.S. failure to ratify the CRC. Notably, “naming and shaming” is not the intention of this thesis in regards to pointing out that the U.S. has not ratified the CRC. Rather, this point will be used to compare and contrast the differences in treatment based on the U.S. who has not ratified and Italy who has. Notably, there remains discrepancies between state obligations and state practice in which this thesis aims to shed light on by analysing current international legal standards and actual practice in dealing with children who arrive in the two countries being examined.

The research is descriptive since it will depict the laws in place and what they require from States. While at the same time, it will be normative as suggestions for change towards successful implementation and/or stricter enforcement of existing law will be stipulated. This thesis can be conceived as qualitative empirical research, as mentioned it will entail a comparative case study. In the course of research, a critical analysis of legal discourse has been done with a focus on unaccompanied and separated children, forced migrants, and refugees. The overarching laws that will be investigated throughout this thesis are international human rights law and international refugee law, as well as the national laws of specified countries. International human rights law constitutes the broad framework within which refugee law provisions should be seen. Refugees are entitled to two partially overlapping sets of rights: those rights accorded to them as individuals and guaranteed under international human rights standards, and specific rights related to their status as refugees. The international human rights treaty that has a particularly significant role in international refugee law and is the focus of this thesis is the CRC. Further, this thesis is founded on desk research of various UN publications, reports from civil society organisations, news articles, journals, and governmental sites.

One of the greatest challenges to this dissertation is language barrier. In the case of Italy, many relevant documents and governmental sites are strictly written in Italian. This led to several, perhaps key, documents not being utilised and in some instances misunderstandings. Also, as will be noticed, in certain sections of the thesis there is less information provided for the case of Italy for the abovementioned reasons. Moreover, this dissertation also experiences some limitations, specifically when discussing statistics. In the case of Italy, it was extremely difficult to find statistics exclusively on unaccompanied and separated children. As a whole, it must be acknowledged that in actuality the figures discussed are higher than recorded, as many children do not register with the authorities out of fear and/or they are unable to do so.

1. CONCEPTUAL FRAMEWORK – MAKING THE CONNECTIONS

Prior to engaging in the discussion at hand, it is of importance to define the foundational blocks of this dissertation: the rights of the child, unaccompanied and separated children, and forced migration and refugees. Due to the complexity of the concepts involved, the author decided to dedicate an autonomous chapter to the conceptual framework. Children as an entity constitute a vulnerable group, however, the double vulnerability endured by specifically unaccompanied and separated children who are forced migrants and refugees will be revealed. Children's rights are enshrined in international law, however, the implementation of their rights remains a conundrum and this thesis will attempt to unravel the challenges. This section will begin with discussing the rights of the child, which is the central theme of this thesis. It will be followed by an evaluation of a specific group of children – unaccompanied and separated. The discussion will end with a narrower focus of those children who are forced migrants and refugees.

1.1 The Rights of the Child

Within this section, the rights of the child will be explored. The discussion will begin with defining “child” and contextualise the definition within the framework of this dissertation. Next, the only international treaty that discusses the rights of children will be explained, along with the specific articles that are relevant.

In 1989, the acknowledgment of the status of children as persons whom are entitled to rights appeared with the adoption of the CRC by the General Assembly. First and foremost, it is of crucial importance to define the terms. What is a child? There is no unified definition. Hence, for the purpose of this paper, the legal definition taken from Article 1 of the CRC will be used which states, “...a child means every human being below the age of eighteen years...”¹ Although there is much controversy in regards to

¹ UN General Assembly, 1989, Article 1.

who a “child” actually is and what being a child means, the international community generally accepts this definition. The CRC is the quickest and most ratified international convention in world history with 195 parties to the convention.² As a result, it “...reflects a near global consensus on what childhood should be, and a near global commitment to make laws, policies, and practices consistent with the provisions of the convention...”³ The above refers to near global consensus because there remains two countries that have not ratified the convention – Somalia⁴ and the U.S. The latter is of importance for the purpose of this paper. The U.S. signed the convention in 1995; although President Barack Obama has placed ratification on his agenda there has been no publically known movement towards this.⁵ This is interesting considering that the U.S. government along with many American scholars have played a leading role in drafting the CRC.⁶ Besides political complexities, U.S. opposition to ratification is said to fall under two main categories: it has been argued that this is due to public concern that children’s rights would override parental rights; and, that the convention would override American sovereignty.⁷ As will be recommended in Chapter 4, the U.S. should ratify the CRC, especially because it is “consistent with America’s history, founding principles, and tradition.”⁸ On a positive note, the U.S. is obliged not to adopt policies that are in contradiction; after all, they did sign the convention.⁹ On the contrary, Italy ratified the CRC on the 5 September 1991.¹⁰

² United Nations Treaty Collection, Convention on the Rights of the Child, available at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (consulted on 4 March 2015).

³ Covell, 2012, p. 38.

⁴ Somalia is in the final stages of its ratification of the CRC.

⁵ President Obama stated, “It is embarrassing to find ourselves in the company of Somalia, a lawless land. If elected, I will review this treaty and other treaties to ensure that the United States resumes its international leadership in human rights.” See Walden University. Transcript: The Walden University Presidential Youth Debate, available at <http://youthdebate2008.org/debate-transcript> (consulted on 19 May 2015).

⁶ Gautam, 2010, p. 222.

⁷ Gardinier, 2010, p. 7.

⁸ *Idem*, p. 8.

⁹ United Nations, 1969, Article 18(a).

¹⁰ United Nations Treaty Collection, Convention on the Rights of the Child, available at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (consulted on 4 March 2015).

By ratifying the CRC States acknowledge that children are “worthy citizens” rather than “noble causes”.¹¹ Thus, acknowledging that states are duty bearers whom have responsibilities in providing for those rights. As will be argued in this thesis, there remains a large gap between ratification and implementation. The CRC has a monitoring body, the UN Committee on the Rights of the Child (*hereinafter* “the Committee”), who is composed of independent experts that monitor the implementation of the CRC by its State parties.

The most relevant document for the discussion at hand, then, will be the CRC. The provisions that are of relevance for the purpose of this paper will be: Article 2 – non-discrimination; Article 3 – best interests of the child; Article 6 – inherent right to life; Article 20 – states’ responsibility to the child when deprived of family environment; Article 22 – refugee children; and, Article 37 – degrading treatment and deprivation of liberty.¹² Aside from Article 3, the abovementioned are not the explicit focus of this thesis; however, in one way or another the principles should be kept in mind, as they will implicitly be touched upon.

Specifically, there will be a focus on unaccompanied and separated children, which will be discussed in the following subsection. These children are entitled to international protection that is exhibited through many international and regional instruments, for instance, the African Charter on the Rights and Welfare of the Child (1990).¹³ This example was chosen because it is the only regional instrument that is wholesomely dedicated to children.

1.2 Unaccompanied and Separated Children

In order to narrow the focus, this section will direct its attention to a specific category of children. It will define unaccompanied and separated children and outline

¹¹ Covell, 2012, p. 38.

¹² UN General Assembly, 1989.

¹³ Other examples that mention children, asylum and/or refugee include: Charter of Fundamental Rights of the European Union (Article 18 and Article 24); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; American Convention on Human Rights (Article 19); Additional Protocol to the American Convention on Human Rights (Article 16).

that despite their slight variation in definition, this dissertation will use the terms interchangeably. This section, along with the dissertation as a whole, has decided to focus on this group due to the current influx of children who are on the move alone. One may wonder why it is necessary to further categorise children, an already vulnerable group on their own, into unaccompanied and separated children. There is no simple answer to this question, however, it could be argued that the vulnerability of these children are further exacerbated as they are deprived of their family environment and the physical environment they are used to. Also, by traveling alone, they are subject to various violations that perhaps would not occur if they were accompanied by parents or a legal guardian.

Similar to the issue of unclearness with the definition of child, the definitions of unaccompanied child and separated child have numerous meanings. As defined by the UN, unaccompanied and separated children have slightly different definitions. Both refer to any child under the age of eighteen who is separated from their parents and/or legal guardian and outside their country of origin. In the context of unaccompanied children, there are no adults caring for them. On the other hand, separated children are separated from their parents or legal guardians, but may not necessarily be separated from other relatives.¹⁴ All such children are entitled to international protection under an extensive collection of international and regional instruments. This dissertation will use both terms interchangeably however, the emphasis will be placed on the fact that they lack the care and protection of their parent or primary caregiver.

There is usually much confusion, amongst academics and practitioners, as to how to describe the children in regards to terms such as refugee, migrant and asylum seeker. Separated Children in Europe Programme (SCEP)¹⁵, propose three main categories of children who can be described as separated: seeking protection (including asylum), those who have been trafficked, and those who are migrants including those seeking family reunification and/or, economic or education opportunities.¹⁶ Regardless of international, and domestic policy and procedures, the needs and rights of these children

¹⁴ CRC/GC/2005/6, 2005, p. 6.

¹⁵ SCEP was established by the UNHCR and International Save the Children Alliance in 1998. See <http://www.separated-children-europe-programme.org>.

¹⁶ Separated Children in Europe Programme (SCEP), 2009, pp. 14-15.

are being overridden by their status of being subject to immigration controls. SCEP makes it clear through the explanation of the principle of non-discrimination for separated children that,

[a]ll separated children are entitled to the same treatment and rights as national children. They must be treated as children first and foremost whether or not they hold relevant travel, entry, or residence documents, or whether they are perceived to be in transit. All considerations relating to their immigration status must be secondary and anchored in principle of child welfare.¹⁷

When, in this dissertation, discussing unaccompanied and separated children we are talking about a very specific scenario – migration. This will be discussed in the following subsection.

1.3 Forced Migration and Refugees

This subchapter will be tackling both concepts, offering definitions. The object of this subsection is to outline the restricted nature of the refugee definition and to portray how and why it should be broadened to encompass the wider category of forced migrants. Forced migrants, although highly ignored in political discussion and media coverage, is the overarching category in which refugees, amongst others, fall within.

Generally speaking, migration is the movement of people and occurs for many reasons such as: escaping war, starvation, persecution, to find a better life, and so on. Overall, it follows when states are unable or unwilling to provide international protection. Consequently, individuals may suffer violations of their rights and are forced to leave their homes and families to seek safety in another country.¹⁸ However, individuals usually find themselves in worse or similar situations to those they are attempting to escape from. As defined by the International Organization for Migration (IOM), forced migration refers to any person who migrates to “escape persecution, conflict, repression, natural and human-made disasters, ecological degradation, or other situations that endanger their lives, freedom or livelihood.”¹⁹ Much attention has been granted to the question of whether some forced migrants should have a special right to

¹⁷ Idem, p. 7.

¹⁸ UNHCR, 2001, p. 8.

¹⁹ IOM, 2000, p. 8.

cross borders in search of international protection or asylum. Forced migration is a term that usually involves moral judgment in regards to the legitimacy of the movement.²⁰

Integral to the discussion at hand is the differentiation between migrants and refugees, the two may be conceptualised as being different from one another, but they tend to travel alongside each other. Most of the time when using the term migrant, we refer to those making their journeys for economic reasons while refugees fear for their lives. As a refugee, individuals are entitled to international protection while, if an individual were considered an economic migrant, they would most likely be sent back to their home country. The question then arises what stops countries from classifying individuals incorrectly? As a result of the flow of mixed migration, border controls are making it more difficult for forced migrants and refugees to find safety. Unfortunately, there remains a grey area regarding the reasons people are migrating. Often people fleeing a country from fear of persecution also have bad economic situations. Therefore, it is difficult to differentiate between those leaving for refugee reasons or economic ones. While at the same time, both these issues can be interrelated.²¹ This is especially prevalent and will be exemplified in Chapter 3 (and throughout this thesis) with the U.S.-Mexico border and Lampedusa situations.

The main document for international protection of refugees is the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. In order for protection to be granted, the definition of refugee must be met. Under Article 1A(2), the term refugee shall apply to any person who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²²

Interestingly, “persecution”, although central to the refugee definition, is not defined in the Convention. However, both Article 31 and Article 33 refer to threats of life and/or

²⁰ Fiddian-Qasmiyeh *et al*, 2014, pp. 48 - 49.

²¹ UNHCR, 2007 (b), p. 2.

²² UN General Assembly, 1951, Article 1A(2).

freedom, hence the threat of death, torture, or cruel and inhumane/degrading treatment must be included.²³

Moreover, two other definitions must not be ignored, that of the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa²⁴ and the Cartagena Declaration.²⁵ Both these definitions add a more objectively based consideration to the 1951 Convention definition of refugee. The OAU Convention includes within its definition, any person compelled to leave his/her country because of “...external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality...”²⁶ Likewise, the Cartagena Declaration includes 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.”²⁷

Many scholars see the 1951 Convention definition of refugee as being too narrow in order to provide a plausible normative account of who is owed asylum. For instance, Andrew Shacknove offers a more appropriate definition in which refugees would be classified as “...persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs...”²⁸ Forced migration is typically conceived as an “evil”, as something that must be morally avoided; however, the problem lies with the narrow definitions and the unwillingness of granting asylum. It is impossible to separate forced migration and refugees within this dissertation. If we ignore the flow of mixed migration it will be to the detriment of refugee protection. Migration involves people coming for a whole range of reasons, as a result it tends to be treated as an illegal migration issue rather than

²³ Fiddian-Qasmiyeh *et al*, 2014, p. 38.

²⁴ This Convention is the only legally binding regional refugee treaty.

²⁵ In 1984, a colloquium of government representatives and distinguished Latin American jurists convened in Cartagena, Colombia to discuss the international protection of refugees in the region. The Cartagena Declaration was adopted at this meeting.

²⁶ OAU, 1969, Article 1(2).

²⁷ Regional Refugee Instruments & Related, 1984, Section 3(3).

²⁸ Shacknove, 1985, p. 277.

as an issue that also entails protection concerns and involves people with protection needs.²⁹

The principle of utmost importance is that of non-refoulement which is the prohibition of returning any refugee to a place where she or he would face danger.³⁰ This thesis will be assessing international protection at the point of entry of unaccompanied and separated children. At this point, these children are or should be perceived as asylum-seekers. In a global context, an asylum-seeker refers to a person seeking protection as a refugee, however, is awaiting assessment of his or her claim.³¹ “Asylum means, at the very least, basic protection – i.e. no forcible return (refoulement) to the frontiers of territories where the refugee’s life or freedom would be threatened – for a temporary period, with the possibility of staying in the host country until a solution outside that country can be found.”³² However, no international instrument defines “asylum”. Nevertheless, Article 14(1) of the Universal Declaration of Human Rights (UDHR) states, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”³³ The Office of the United Nations High Commissioner for Refugees (UNHCR) established by the GA is the principal UN agency concerned with refugees in order to provide protection, ensure human rights are respected and to uphold the principle of non-refoulement. In addition, the UNHCR holds as a main priority the protection of children – specifically unaccompanied and separated children.

Interestingly, there are no current General Comments or Security Council Resolutions on the aforementioned topic. This is problematic given the “surge” of unaccompanied and separated children attempting to enter the U.S. via the US-Mexico border and Lampedusa via the Mediterranean. These are not the only two situations, but the most-commonly spoken of and happen to be the particular areas of focus in a comparative manner for this paper.

²⁹ UNHCR, Why UNHCR cares about migration flows, at <http://www.unhcr.org/4762830a4.html> (consulted on 25 May 2015).

³⁰ UN General Assembly, 1951, Article 33.

³¹ UNHCR, Asylum-Seekers, at <http://www.unhcr.org/pages/49c3646c137.html> (consulted on 25 April 2015).

³² UNHCR, 2001, p. 15.

³³ UN General Assembly, 1948, Article 14(1).

Conclusion

Overall, this chapter portrayed the interconnectedness of the three pillars. The definitions of each pillar outlined how they would be utilised throughout this dissertation. It has been found that there seems to be a legal void, especially when dealing with unaccompanied and separated children. Also, when dealing with forced migration and refugees, there must be a broadened definition in order for states to be able to follow their international law obligations. Due to the restricted scope of the definition of refugee, many people who should be viewed as refugees are not; as a result, they are provided with less protection and there is an intrinsic link made to criminality. As if this would not be sufficient, forced migrants are then further regarded as criminals. Consequently, their need for protection and their inherent right to seek asylum is placed aside.

2. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD IN APPLICATION OF U.S.-MEXICO AND LAMPEDUSA (ITALY)

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

- CRC, Article 3(1)

In international, regional, and national law, the common legal standard for situations that involve children is the “best interests of the child” standard. Notably, the BIC approach is essential in order to protect children. This is one of the reasons for which an entire chapter has been dedicated to the topic. The main objective of this chapter is to render whether the principle is being used or not, since it is a heavily discussed concept. After providing a broad overview of the concept the focus of this chapter will remain on unaccompanied and separated children whom are forced migrants and refugees. Legal and operational frameworks, which deal with the BIC principle, will be outlined with attention accorded on the countries that this thesis is comparing – the U.S. and Italy. Finally, the application of the BIC will be discussed generally. The intention of this chapter is not to evaluate state practice, but rather to outline the existing protocols for the BIC.

2.1 Defining the Concept

In international law, the best-known assertion of the “best interests of the child” standard is found in the CRC. One of the most significant accomplishments of the CRC is the development of a principle that applies to all actions concerning children, both individually and as a group.³⁴ However, the principle of the BIC first emerged in 1959 with the Declaration of the Rights of the Child, which uses it in Principle 2:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a

³⁴ UNICEF, 2007, p. 23.

healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.³⁵

Nevertheless, it was the CRC that entered into force in 1990, which formalised and made the concept legally binding.³⁶ Today, the principle of the best interests of the child is internationally recognised with Article 3(1) of the CRC, which states, “...the best interests of the child shall be a primary consideration.”³⁷ As can be seen, these two documents vary in terms – paramount versus primary. The use of the term primary in the Convention suggests that there are other considerations that can play a role in processes involving children. But, the best interests should be the primary concern and not be considered on the same level as all the other considerations.³⁸

Generally, as purported by UNICEF, the best interests of the child principle must be interpreted as being of primary concern when making decisions that affect children. All adults, not only when making decisions but also in their actions, should take into consideration the ways in which certain decisions may impact children.³⁹ The principle is to be viewed as a “holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development”.⁴⁰ In order to secure a holistic application, a rights-based approach must be developed and applied.⁴¹ A rights-based approach, for instance, can be applied by providing equal opportunity for children to develop their potential individually.⁴²

The Committee has identified Article 3(1) as one of the four general principles of the Convention.⁴³ Within the Convention itself, the concept is referred to in other Articles, providing obligations to consider the best interests of individual children in particular situations; for instance, Article 20 that discusses the deprivation of family environment, children who are temporarily or permanently deprived of their family environment “or

³⁵ UN General Assembly, 1959, Principle 2.

³⁶ The principle was also enshrined, prior to the CRC, in the CEDAW Article 5(b) and Article 16(1d).

³⁷ UN General Assembly, 1989, Article 3(1).

³⁸ CRC/C/GC/14, 2013, p. 10.

³⁹ UNICEF, Fact Sheet: A summary of the rights under the Convention on the Rights of the Child, at http://www.unicef.org/crc/files/Rights_overview.pdf (consulted on 22 June 2015).

⁴⁰ CRC/GC/2003/5, 2003, p. 4.

⁴¹ CRC/C/GC/14, 2013, p. 4.

⁴² Canadian Coalition for the Rights of Children, 2009, p. 12.

⁴³ CRC/GC/2003/5, 2003, p. 4.

in whose own best interests cannot be allowed to remain in that environment,”⁴⁴ are entitled to special protection and assistance. This is the case with unaccompanied and separated children.

Additionally, the Committee defines the principle as a threefold concept: a substantive right, an interpretive legal principle, and a rule of procedure. The principle is considered substantive because every child has the right to have his or her best interest assessed, protected, and implemented. At the same time, it is a fundamental, interpretive legal principle given that if and when there is more than one possible interpretation, the option that better protects the child’s best interest should be selected. Finally, the impact a decision may have on a child must always be evaluated prior to a decision being made, thus the principle reflects a rule of procedure.⁴⁵

Although great emphasis is placed on the concept, it is open to interpretation as little is known about what it actually means, the criteria that constitutes a child’s best interest, and how the criteria should be applied. The BIC is not defined in the Convention, however, there seems to be a consensus that the concept provides for the interests of children, rather than the interests of parents, adults, and the State, to be at the centre of decision-making. Further, it is a broad concept that can be universally applied. As an umbrella provision of the Convention, it is capable of providing the missing link between a globally recognised theory and the actual practice(s) of states.

2.2 Legal and Operational Frameworks

The responsibility to implement the BIC principle is first and foremost that of states, stemming from their international legal obligations. The concept of *parens patriae* (“parent of the nation”) is a public policy which recognises the power of the state to act as the parent of any child in need of protection. This subchapter will assess various legal and operational frameworks that deal with the BIC. The three branches that will be

⁴⁴ UN General Assembly, 1989, Article 20.

⁴⁵ CRC/C/GC/14, 2013, p. 4.

looked at are international (specifically the CRC and the UNHCR), regional (frameworks of America and Europe), and national with respects to the U.S. and Italy.

2.2.1 International Framework

When deciding whether to apply the best interests principle for unaccompanied children, international law plays an instructive role. Aside from its presence in the CRC, the principle is mentioned in the CEDAW – Article 5 and Article 16;⁴⁶ CRPD – Article 7 and Article 23;⁴⁷ UNHCR Guidelines;⁴⁸ African Charter;⁴⁹ Hague Convention on the Civil Aspects of International Child Abduction – Preamble;⁵⁰ and, the Human Rights Committee (HRC) refers to the BIC in its General Comments No. 17.⁵¹ However, although the BIC principle is widely accepted internationally, its implementation remains an issue. This subsection will focus on two aspects of international frameworks for the BIC principle: the CRC and the UNHCR.

2.2.1.1 The CRC

Both during and following irregular migration processes, children’s rights, which are internationally offered and recognised, are often affected. The CRC prescribes minimum standards that States must adhere to in regards to the treatment of children on their territory. As mentioned earlier, the CRC is the main legal instrument on the protection of children and has four, general principles: the best interests of the child (Article 3), non-discrimination (Article 2), the right to life, survival and development (Article 6), and the right to be heard (Article 12).⁵²

The Committee issues General Comments which aim to guide States in interpreting and implementing the CRC. The most relevant for the discussion at hand are General

⁴⁶ UN General Assembly, 1979, Article 5 & Article 16.

⁴⁷ UN General Assembly, 2007, Article 7 & Article 23.

⁴⁸ UNHCR, 2008.

⁴⁹ OAU, 1990, Article 4.

⁵⁰ Hague Conference on Private International Law, 1980, Preamble.

⁵¹ UN Human Rights Committee (HRC), 1989.

⁵² UN General Assembly, 1989.

Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin,⁵³ General Comment No. 12 on the Right of the Child to be Heard,⁵⁴ General Comment No. 14 on the Best Interests of the Child,⁵⁵ and General Comment No. 5 on General Measures of Implementation.⁵⁶

2.2.1.2 UNHCR

UNHCR's Executive Committee defines children considered at "heightened risk" as those who are affected by risk factors resulting from the wider protection environment and risks resulting from individual circumstances, taking into consideration the cumulative effects of being exposed to multiple risk factors.⁵⁷ As mentioned earlier, the UNHCR is committed to protection and promotion, within its capacity, to the rights of all children under its mandate. In order to do so, the UNHCR supports the strengthening and/or establishment of comprehensive child protection systems. Said systems should include mechanisms to identify the best interests of the child.⁵⁸ "The best interests principle applies to all children without discrimination, including to unaccompanied and separated children at risk outside their country of origin. It applies whether children are nationals, foreign nationals, EU nationals, third-country nationals or are stateless".⁵⁹ Moreover, the "best interests of the child" is an internationally recognised guiding principle for refugee children.⁶⁰

In 1997, the UNHCR released "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum", based on the CRC's principles on children's rights, in which it stipulated that "[t]he basic guiding principle in any child care and protection action is the principle of the 'best interests of the child'".⁶¹ Additionally, the Guidelines offered an explanation of human rights abuses that could

⁵³ CRC/GC/2005/6, 2005.

⁵⁴ CRC/C/GC/12, 2009.

⁵⁵ CRC/C/GC/14, 2013.

⁵⁶ CRC/GC/2003/5, 2003.

⁵⁷ UNHCR, 2007 (a), Section c.

⁵⁸ UNHCR, 2008, p. 9.

⁵⁹ UNHCR, 2014 (b), p. 19.

⁶⁰ CRC/C/GC/14, 2013, p. 16.

⁶¹ UNHCR, 1997, p. 1.

constitute persecution in the case of children. Like the CRC, the Guidelines do not postulate that the child's best interest be the only determining factor, however, reinforce that decision makers should consider the child's perspective by placing the child's best interest at the forefront.

In actions affecting individual children, the UNHCR has implemented two measures to identify the BIC: the Best Interests Assessment (BIA),⁶² used for most actions, and the Best Interests Determination (BID), which will be discussed in more detail below. These two concepts can be understood as the same process, which in principle begins immediately, when unaccompanied and separated children are discovered and ends when a durable solution is reached.⁶³ Importantly, the Committee has noted that BIA's should "...consider that the capacities of the child will evolve" and "...consider measures that can be revised or adjusted accordingly, instead of making definitive or irreversible decisions."⁶⁴ The UNHCR follows the BID when dealing with refugee children, which

describes the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting 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.⁶⁵

A BID is required in three instances: "identification of durable solutions"; temporary care arrangements" during exceptional situations; and, when a child is separated from his/her parents against their will.⁶⁶

When referring to unaccompanied and separated children, a "durable solution" is a sustainable solution that ensures that the child is able to develop into adulthood, in an environment, which will meet his/her needs and fulfil his/her rights as defined by the

⁶² The BIA is an on-going procedure for making decisions about the immediate actions that are in an individual child's best interests (i.e. protection and care interventions). BIA's can take place at various points, either when an action is planned or when it is taken and may affect the child. They involve processes such as: interviews or consultations with the child; information gathering as needed, by professionals with the required expertise, knowledge and skills in child protection; and, the weighing of elements of the child's circumstances. The key characteristics of these are that they are holistic and conducted by staff with relevant professional expertise.

⁶³ UNHCR, 2014 (b), pp. 19 - 20.

⁶⁴ CRC/C/GC/14, 2013, paragraph 84.

⁶⁵ UNHCR, 2008, pp. 8 & 23.

⁶⁶ *Idem*, p. 23.

CRC. What's more, a durable solution ensures that the child is not placed at risk of persecution or serious harm and allows the child to acquire (or re-acquire) the full protection of a state.⁶⁷ As suggested by the Committee, efforts made to attain durable solutions for unaccompanied or separated children outside their country of origin "...should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated".⁶⁸ Thus, BID should occur as soon as possible. Although it is possible to discuss the BID in greater detail, the limited space of this dissertation does not allow for it. Also, the purpose was not to have an in depth evaluation, but rather outline a few of the various approaches that exist at the international level.

The BIC has been subject of extensive evaluation in academic, operational, and other spheres. The implementation and application of this principle in practice is often what remains challenging. In the next sections, 2.2.2 and 2.2.3, we will look at the practices of North America with specific focus on the U.S., and the EU, specifically Italy.

2.2.2 Regional Frameworks

This subsection will briefly outline the regional frameworks of North America and the EU with regards to if and how the BIC principle is addressed at these levels. As following sections demonstrate, the regional framework of North America lacks reference, let alone binding obligations, to the BIC. On the other hand, the EU has incorporated the principle in various ways. Though this section will focus on theoretical measures, further chapters will analyse the practice of states. The purpose is to evaluate whether the implementation of the frameworks has a positive outcome on the treatment of unaccompanied and separated children who are forced migrants and refugees.

⁶⁷ UNHCR, 2014 (b), p. 22.

⁶⁸ CRC/GC/2005/6, 2005, paragraph 79.

2.2.2.1 North America

The American Convention on Human Rights (ACHR) does not formally recognise the best interest of the child, however, Article 19 directly deals with the rights of children: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”⁶⁹ Importantly, the Inter-American Commission on Human Rights has stated that the judicial framework for the protection of children’s human rights is not confined to Article 19 of the ACHR, but it also includes the CRC, among other international texts.⁷⁰

In August 2014, the Inter-American Court issued an Advisory Opinion, “Rights and guarantees of children in the context of migration and/or in need of international protection” in which it summarises:

...child migrants and, in particular, those in an irregular migratory situation, who are in more vulnerable circumstances, require host States to take actions specifically designed to provide priority protection for their rights, which must be defined in accordance with the particular circumstances of each specific case...and based on their best interests.⁷¹

2.2.2.2 European Union

In recent years, efforts have been made towards embedding the BIC principle in policy and legislation. This process has been motivated by the incorporation of the CRC at two levels: national and regional. The latter level is what will be discussed in this subsection. The EU has incorporated the rights of the child in the Treaty on European Union,⁷² and the Charter of Fundamental Rights of the European Union, including Article 24.⁷³ Article 24 explicitly deals with the rights of the child stating that “[c]hildren shall have the right to such protection and care as is necessary for their well-being...”⁷⁴ and that their best interests must be a primary consideration in all actions relating to them, whether taken by public authorities or private institutions.⁷⁵ In contrast,

⁶⁹ Organization of American States (OAS), 1969, Article 19.

⁷⁰ Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas*, at <https://www.cidh.oas.org/countryrep/JusticiaJuvenileng/jjii.eng.htm> (consulted on 2 July 2015).

⁷¹ Inter-American Court of Human Rights, *Advisory Opinion OC-21/14*, 2014, paragraph 170.

⁷² European Union, 2007, Article 3(3).

⁷³ European Union, 2000, Article 24.

⁷⁴ *Idem*, Article 24(1).

⁷⁵ *Idem*, Article 24(2).

the European Convention on Human Rights has no mention of the BIC, however, this does not mean that the European Court of Human Rights (ECtHR) has not recognised the principle. Given the fact that all European states have ratified the CRC, it can be assumed that there is a collective objective of the member states to promote and protect children's rights.

The European Commission has recognised the need for a collective EU approach to protecting unaccompanied and separated children. Hence, it introduced the "European Commission's Action Plan (2010-2014) on Unaccompanied Minors" (*hereinafter* "the Plan").⁷⁶ This plan was a response to the Stockholm Programme,⁷⁷ which sets out the EU's priorities in the field of justice, freedom and security, including border patrol and provision of international protection for vulnerable individuals. In the Plan, the Commission recognises the standards established by the CRC as being "...at the heart of any action concerning unaccompanied minors."⁷⁸

The EU has introduced several EU directives and regulations relating to third-country nationals, including persons in need of international protection, which explicitly refer to the rights of children and the best interest principle in particular. Chronologically, these are as follows: the Family Reunification Directive,⁷⁹ the Directive on residence permits for victims of human trafficking,⁸⁰ the Returns Directive,⁸¹ the Anti-Trafficking Directive,⁸² the EU Long Term Residence Directive,⁸³ and

⁷⁶ European Union: European Commission, *Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors (2010 – 2014)*, 6 May 2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:en:PDF> (consulted on 22 June 2015).

⁷⁷ European Union: Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 4 May 2010, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN) (consulted 22 June 2015).

⁷⁸ European Union: European Commission, *Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors (2010 – 2014)*, 6 May 2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:en:PDF> (consulted on 22 June 2015), p. 2.

⁷⁹ *Council Directive 2003/86/EC*, 2003.

⁸⁰ *Council Directive 2004/81/EC*, 2004.

⁸¹ *Directive 2008/115/EC of the European Parliament and of the Council*, 2008.

⁸² *Directive 2011/36/EC of the European Parliament and of the Council*, 2011.

⁸³ *Directive 2011/51/EU of the European Parliament and of the Council*, 2011.

the Schengen Border Code.⁸⁴ In addition, the EU has adopted five second-phase instruments completing the Common European Asylum System (CEAS), which include: the recast Qualification Directive,⁸⁵ the recast Dublin and EURODAC Regulations,⁸⁶ the recast Asylum Procedures Directive,⁸⁷ the recast Reception Conditions Directive.⁸⁸ The abovementioned instruments have engrained the BIC principle and also deliver essential safeguards.⁸⁹ Mentioning of the best interests of the child can be seen, for instance, in the Returns Directive stating that when implementing this Directive, member states must take into account the BIC (Article 5) and prior to deciding to issue a return in regards to an unaccompanied child, assistance from appropriate bodies must be sought (Article 10.1).⁹⁰ Also, the Procedures Directive states that when member states are implementing special measures to be applied where an unaccompanied child makes an application for refugee status, the best interests of the child shall be the primary consideration.⁹¹

2.2.3 National Frameworks

As we have seen above, the rights of children are generally enshrined in both international and regional law. The next section will briefly portray in what way children's rights, through the lens of the BIC are further (or should be) operationalised through policies and guidelines in national contexts. The national frameworks that will be examined are the U.S. and Italy, which will open the discussion for later chapters.

⁸⁴ *Regulation (EU) No 610/2013 of the European Parliament and of the Council*, 2013.

⁸⁵ *Directive 2011/95/EU of the European Parliament and of the Council*, 2011.

⁸⁶ *Regulation (EU) No 604/2013 of the European Parliament and of the Council*, 2013; *Regulation (EU) No 603/2013 of the European Parliament and of the Council*, 2013.

⁸⁷ *Directive 2013/32/EU of the European Parliament and of the Council*, 2013.

⁸⁸ *Directive 2013/33/EU of the European Parliament and of the Council*, 2013..

⁸⁹ UNHCR, 2014 (b), p. 14 – 15.

⁹⁰ *Directive 2008/115/EC of the European Parliament and of the Council*, 2008.

⁹¹ *Directive 2013/32/EU of the European Parliament and of the Council*, 2013.

2.2.3.1 U.S.

In the U.S., the BIC, is a cornerstone principle of child protection in child welfare and juvenile justice systems. It is usually engaged when dealing with family law courts specifically in divorce, adoption proceedings, and parental termination hearings where children have been abused and/or neglected.⁹² The state's authority in regards to divorce and adoption hearings is controversial; however, there is little to no debate when discussing removing a child from a dangerous setting (i.e. where a parent severely abuses the child).⁹³ It is very clear that unaccompanied and separated children arriving to the U.S.-Mexico border are at risk of serious injury and even death if returned to their home country. Thus, this situation should be treated equally to the U.S. national child facing abusive parents. Although U.S. immigration law does not explicitly refer to the BIC and it is not binding in immigration proceedings, it is argued that decision makers have historically been sensitive to the plight of children who flee their home countries.

Interestingly, two legal works that guide immigration for unaccompanied and separated children, the Trafficking Victims Protection Reauthorization Act (TVPRA) and the Immigration and Nationality Act (INA) – to be discussed in greater detail in Chapter 4 – both fail to recognise the BIC as well as require adjudicators to take it into primary consideration when dealing with children.

Positively, the U.S. has accepted a somewhat normative framework by using the BIC in two sets of official immigration manuals: the asylum officers' "Guidelines for Children's Asylum Claims"⁹⁴ (*hereinafter* "INS Guidelines") and the Homeland Security Act (HSA) of 2002, which stipulates that "the interests of the child are considered in decisions and actions relating to the care and custody of unaccompanied alien child."⁹⁵ INS Guidelines bring the U.S. closer to the international principle of BIC by providing greater procedural protections. However, the INS Guidelines state that "...the internationally recognized 'best interests of the child' principle is a useful measure for determining appropriate interview procedures for child asylum seekers,

⁹² Dalrymple, 2006, p. 143.

⁹³ *Idem*, p. 145.

⁹⁴ U.S. Department of Justice Immigration and Naturalization Service, 1998.

⁹⁵ United States of America, 2002, Section 462 (b)(1)(B).

although it does not play a role in determining substantive eligibility under the U.S. refugee definition”.⁹⁶ The Guidelines emphasise the importance of creating a “child-friendly asylum interview environment”, recognise that children “may not present their cases in the same way as adults”, and suggest interview techniques that “seek to ensure that the applicant feels comfortable and free to discuss the claim”.⁹⁷ Aside from the fact that the burden of establishing an asylum claim remains on the child, INS Guidelines follow the UNHCR’s recommendation that children’s testimonies should be given a liberal “benefit of the doubt” with respect to evaluating a child’s alleged fear of persecution.

Further, the Unaccompanied Alien Child Protection Act (UACPA) is another domestic instrument that can be seen as working toward the advancement of the best interests of the child in procedural matters. The UACPA builds upon the INS Guidelines and is seen as having the ability to further the BIC.

In 2007, Operating Policies and Procedures Memorandum (OPPM) replaced OPPM - 4-07 from 2004.⁹⁸ where it suggests that judges use the best interests concept at their discretion to create a child-friendly atmosphere in the courtroom. It reads as follows:

The concept of “best interests of the child” does not negate the statute or the regulatory delegation of the Attorney General’s authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a “child-appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.⁹⁹

Overall, though the U.S. has taken minor steps to acknowledge the interests of unaccompanied and separated children, it has limited its considerations to practical matters in which the BIC may or may not be followed. Thus, unaccompanied and separated children continue to be disregarded in the actual legal determination.

⁹⁶ U.S. Department of Justice Immigration and Naturalization Service, 1998, p. 2.

⁹⁷ *Idem*, p. 5.

⁹⁸ Office of the Chief Immigration Judge, Executive Office for Immigration Review, U.S. Department of Justice. “Interim Operating Policies and Procedures Memorandum 04 –07 : Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children.” USDOJ (16 September 2004): 3 . Available at <http://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf> (consulted on 3 July 2015).

⁹⁹ U.S. Department of Justice, 2007, Section III(B).

2.2.3.2 Italy

In Italy, the CRC forms part of domestic law and prevails over conflicting legislation.¹⁰⁰ While all European countries have signed and ratified the CRC, they have not all incorporated it into national law. The provisions of the CRC are in force in Italy by Law n. 176/1991.¹⁰¹ Further, Decree n. 286/1999, Article 28.3 states that “in all administration or legislative measures concerning the implementation of the family-unit right and concerning minors, the best interests of the child must be a primary consideration.”¹⁰² National courts are bound to make the BIC a primary consideration in all cases concerning children. It is expected that national courts be influenced by case-law of regional courts (i.e. ECtHR and Court of Justice of the European Union). Italy’s Supreme Court and its Constitutional Court have applied it on several occasions. Article 26 of the Italian Immigration Act of 1998, requires that the BIC be given priority in all decisions regarding family reunification.¹⁰³ Moreover, the Constitutional Court of Italy has held that the BIC principle is implicit in provisions of the Constitution concerning human rights and the protection of children.¹⁰⁴

2.3 Applying the BIC Principle to Migration

The implementation of safeguards for the BIC is necessary, specifically when dealing with unaccompanied and separated children. There are various procedural safeguards that ensure that the BIC principle is being fulfilled when dealing with unaccompanied and separated children. Of utmost importance is the prompt appointment of a guardian, to both assist the child and to represent him/her before any administrative and judicial authorities.¹⁰⁵ In addition to a guardian, children seeking asylum, administrative or judicial proceedings should be provided with a legal representative. At all times children, should be informed and kept up to date about

¹⁰⁰ UNICEF, 2007, p. 7.

¹⁰¹ Law n. 176/1991 *apud* Coccia, 2005, p. 3.

¹⁰² Decree n. 286/1999, Article 28.3 *apud* Coccia, 2005, p. 3.

¹⁰³ Italy, 1998, Article 26(3).

¹⁰⁴ UNICEF, 2007, p. 25.

¹⁰⁵ CRC/GC/2005/6, 2005, paragraph 21.

arrangements for guardianship and legal representation and the opportunity to be heard in which their opinions should be taken into consideration.

Even though the refugee definition applies to all individuals regardless of age, the Committee has proclaimed that the definition must be interpreted in an age-sensitive and gender-sensitive manner. Meaning, for instance, that the harms involved must be considered from the child's perspective. Various factors, such as age, gender, sexual orientation, social factor, etc., can have an impact on the type of persecution a child may be subject to which all exacerbate children's fear and as a result increase their risk of harm. Hence, it is necessary to take appropriate measures and analyse current information on the circumstance in the country of origin of the unaccompanied and separated children and apply the knowledge when assessing the child's specific application for international protection.¹⁰⁶

Further safeguards which need to take place in order to ensure the BIC are: age assessments, decisions about durable, long-term solutions for children, and access to basic social services and enjoyment of related rights (i.e. health and education).

Conclusion

This chapter attempted to define the best interests of the child concept though there is no standardised definition. Following this, the chapter looked at the legal and operational frameworks of the BIC. Internationally, the CRC and UNHCR were highlighted choices. In the CRC subsection the main Articles that refer to BIC were outlined, along with important General Comments drafted by the Committee. The UNHCR on the other hand, was discussed based on their operative framework, specifically the BID. Additionally, the regional frameworks of both North America and the European Union were summarised, which led to the investigation of national frameworks of U.S. and Italy. Finally, the application of the BIC principle in asylum and immigration procedures is mentioned.

¹⁰⁶ UNHCR, 2014 (b), p. 41.

3. U.S.-MEXICO AND LAMPEDUSA (ITALY): BACKGROUND ON THE ARRIVALS OF UNACCOMPANIED AND SEPARATED CHILDREN

Forced migrants often perceive the U.S. and Italy as offering favourable opportunities. Aside from the fact that they are conveniently located (i.e. Mexico and Africa), refugees often have the perception of safety, however the reality is they still endure hardships. After discussing general statistics of asylum¹⁰⁷ in both America and Europe, this chapter will provide an overview of the unaccompanied and separated children arriving in Texas via Mexico and the same will be done for the children arriving to Lampedusa by sea. Subsection one is relevant because the depiction of asylum statistics aims to portray the reasons for the two countries being chosen as case studies for this dissertation by showing the gravity of the situations at hand. Keeping in mind that these numbers are also not accurate, as many forced migrants and refugees do not apply for asylum or register with the authorities. Subsection two and three will provide statistics of the children fleeing, who they are and what the situations are in their home countries. This chapter will conclude and remark on the relevance of taking into consideration the situations where these children are coming from and the importance of addressing root causes rather than just observing the surface. Although not the direct focus of this dissertation, it is noteworthy to mention that the countries of origin and the international community as a whole need to work towards preventing and resolving conflict within the countries of origin.

There are various reasons this dissertation chose to focus on a comparative analysis between the U.S. and Italy. The main reason being that both these situations are extremely current and on-going to date. Further, both situations have the ability to offer proper guidance in the way unaccompanied and separated children should be treated in situations of forced migration. Hence, this study can contribute to the improvement of current practices states engage in by outlining the errors and offering solutions.

¹⁰⁷ It is not the intention of the author to ignore the category of forced migrants as a whole, however, there has been no found documentation of the phenomenon. Thus, only statistics on asylum will be referred to.

However, the purpose of this chapter is to purely depict the situation at hand in each of the said countries – i.e. provide the facts, statistics, and country overviews.

3.1 General Figures: The Americas and Europe

“A combination of armed conflict, deterioration of security or humanitarian situation and human rights concerns in a number of countries...have been among the main reasons for the sharp increase in the number of asylum-seekers...”¹⁰⁸ It is estimated that in 2014, 866,000 asylum applications were logged in industrialised countries,¹⁰⁹ this is a 45% increase from the previous year and the fourth consecutive increase within the industrialised countries.¹¹⁰ In North America, there was an increase of 42% (134,600 claims), in comparison to 2013, of new asylum applications submitted. The U.S. recorded approximately 121,200 claims, a 44% increase from 2013.¹¹¹ Likewise, Europe saw an increase of 47% (714,300 claims) from the previous year. In Southern Europe (which includes Italy), the number of newly registered asylum seekers increased sharply with 95% – the highest increase on record. Italy (along with Turkey), received the most asylum applications in the region. Respectively, Italy received 63,700 claims.¹¹² Overall, among the industrialised countries, the U.S. was the second largest recipient country, and Italy fifth in the number of new asylum seekers.¹¹³

3.2 Crossing the Border: Unaccompanied and Separated Children at the Southwest Border – Texas, Rio Grande Valley

This subchapter will be broken down into various segments from looking at the current situation in the U.S. to a detailed analysis of where these children are coming from and what the situations are in their home countries that force them to leave. The

¹⁰⁸ UNHCR, 2015 (a), p. 7.

¹⁰⁹ All figures mentioned in this section come from a UNHCR report based on information available as of March 2015. The industrialised countries include: 28 Member States of the EU, Albania, Bosnia and Herzegovina, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Kosovo, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Australia, Canada, Japan, New Zealand, the Republic of Korea, and the United States of America.

¹¹⁰ UNHCR, 2015 (a), p. 2.

¹¹¹ Idem, p. 3.

¹¹² Idem, p. 2.

¹¹³ Idem, p. 3.

testimonies (coming from children who entered the U.S.), figures, and findings that this subchapter utilises come from a recent study by UNHCR, “Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection.”¹¹⁴

3.2.1 Brief Chronicle of Migration to the U.S. of Unaccompanied and Separated Children

Since 1990, at least eleven million immigrants have arrived irregularly to the U.S. Since 2000, an additional one million, on average, immigrants are said to arrive annually, either they have arrived irregularly or have become legal residents. Thus, the U.S. has experienced one of the largest waves of immigration throughout its history.¹¹⁵ It is estimated that one million children live illegally in the U.S. Statistics portray that 25% of children in the U.S.’ elementary schools is an immigrant or has a parent who is an immigrant.¹¹⁶

The U.S. prides themselves on their history of admitting refugees of special humanitarian concern into the country. In the wake of WWII, the U.S. admitted over 250,000 displaced Europeans. During this period, the “Displaced Persons Act of 1948”, the first refugee legislation, was enacted by the U.S. Congress. Later laws provided for admission of persons fleeing Communist regimes. Further, in 1975 through an *ad hoc* Refugee Task Force, the U.S. was able to resettle hundreds of thousands of Indochinese refugees. As a result, Congress passed the “Refugee Act of 1980”, which incorporated the UN definition of refugee.¹¹⁷

¹¹⁴ UNHCR conducted in-depth, individual interviews with 404 unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico. All the children interviewed were apart of the surge that began in 2011. Some characteristics of the children interviewed are as follows: ages 12 – 17, entered the U.S. during or after October 2011, and held by the U.S. federal custody at some point. The numbers of children interviewed from each country of origin are: El Salvador – 104; Guatemala – 100; Honduras – 98; and, Mexico – 102.

¹¹⁵ Nazario, 2006, p. 5.

¹¹⁶ *Idem*, p. 221.

¹¹⁷ Refugee Council USA, History of the U.S. Refugee Resettlement Program, at <http://www.rcusa.org/history> (consulted on 27 June 2015).

The arrival of unaccompanied and separated children in the U.S. has also been occurring over a long period of time. Since WWII, the U.S. admitted thousands of children from crisis areas and refugee camps.¹¹⁸ Unlike Mexican migration to the U.S.—which dates back to the 1880’s—Central American movements began a full century later. This was the result of civil wars and unrest, and international trade policies, which in turn led to drug and gang violence, combined with high instances of poverty and domestic abuse. For instance, between 1981 and 1990, an estimated one million Salvadorans and Guatemalans made their way to the U.S.¹¹⁹ Before 2012, the number of arriving unaccompanied and separated children was on average between 6,000 and 7,000 per year. As will be shown in upcoming subsections, these numbers have drastically increased.

3.2.2 The Situation

Over the years, the U.S. has been witnessing an increasing amount of children fleeing violence and insecurity from Central America and Mexico, seeking refuge at the U.S.-Mexico border. President Obama has referred to the issue at the Southwest border as a “humanitarian crisis”. Beginning in 2011, the U.S. government recorded a “surge” in the number of unaccompanied and separated children arriving whom come from Mexico, El Salvador, Guatemala, and Honduras. A study conducted by the UNHCR Regional Office for U.S. and the Caribbean, revealed that no less than 58% (of 404) children interviewed were forced to migrate because they suffered harm that indicated actual need for international protection.¹²⁰ There will be an in depth description of each of the above-mentioned countries and the causes of these children fleeing in subsection 3.2.4.

According to U.S. Customs and Border Protection (CBP), there were 68,541 unaccompanied children apprehended at the Southwest border (the Rio Grande sector

¹¹⁸ Bhabha & Schmidt, 2006, p. 14.

¹¹⁹ Gzesh, Central Americans and Asylum Policy in the Reagan Era, 2006, at <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> (consulted on 2 July 2015).

¹²⁰ UNHCR, 2014 (a), p. 6.

being the largest) between October 2013 and September 2014, a 77% increase from 2013.¹²¹ In June 2014, the numbers were at its peak and since have been reported to be on the decline. The most recent statistics for FY 2015,¹²² 1 October 2014 to 30 June 2015, suggest a 54% decrease in apprehensions for the overall Southwest border. For the Rio Grande Valley sector, 15,613 unaccompanied alien children have been apprehended thus far, a 63% decrease from FY 2014.¹²³

3.2.3 The Journey

“We have seen a surge of unaccompanied children arrive at the border, the journey is unbelievably dangerous for these kids”

- President Obama Speech

The journey that these children undertake is one that no individual should ever have to endure. The children make the journey riding on top of Mexico’s freight trains, known as *La Bestia* (“the beast”) or *El Tren de la Muerte* (“the Train of Death”). The journey on the train can take anywhere from a week to several months. The children must ride atop the trains in which they risk physical dangers that range from amputations to death if they fall or are pushed. For instance, members of the Mara Salvatrucha gang violently control the southern migration route in Mexico.¹²⁴ Gang members have been known to push people off moving trains if unable to pay. The journey (especially for the Central Americans) involves several steps. Prior to getting on the train, the children must travel through Central America to the Mexican border. Once they arrive in Mexico, they must travel to the nearest train terminal. Once at the train, they must pay bribes/protection fees in order to climb atop the train. The children often

¹²¹ U.S. Customs and Border Protection, Southwest Border Unaccompanied Alien Children (FY2014), at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children-2014> (consulted on 7 June 2015).

¹²² U.S. Fiscal Year (FY) begins October 1 and ends September 30.

¹²³ U.S. Customs and Border Protection, BP Southwest Border Family Units and UAC Apprehensions (FY2014-FY2015 Through June 30, 2015), at <http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20Jun.pdf> (consulted on 12 July 2015).

¹²⁴ UNODC, 2012, p. 49.

need to change train lines and along the way and where available, they stop at shelters. Then, once near the border they must pay a smuggler to enter into the U.S.

Furthermore, these children travel alone and due to this they are more vulnerable to dangers. Besides experiencing coldness, hunger, helplessness, and having little or no money, they can be kidnapped, robbed, raped, assaulted, trafficked, and even murdered. According to Sonia Nazario,¹²⁵ children are chased and hunted like animals. “Gangsters control the train tops, bandits rule the tracks, and the Mexican police who patrol the train stations rape and rob.”¹²⁶ Finally, the children arrive at Rio Grande Valley, the river separating the U.S. and Mexico, which happens to be the “hottest” spot for the crossing into the U.S. via Texas.

3.2.4 Who are they and reasons for travel

As mentioned above in subsection 3.2.2, the unaccompanied and separated children are arriving from Mexico and three Central American countries – El Salvador, Guatemala, and Honduras – known as the “Northern Triangle”. The largest number of apprehended children, come from Honduras at 27%, followed by Guatemala (25%), El Salvador (24%), and Mexico (23%).¹²⁷ Research has shown that an increase of violence in the Northern Triangle is the primary recent motivation for the journey. While, in contrast to common assumptions that the children from Mexico are solely chasing the “American Dream”, the study portrayed the contrary – these children require protection, especially from recruitment into and exploitation by the criminal industry of human smuggling. Other factors all children reported were: suffering and/or fear of both violence in society and abuse in the home, and family reunification/opportunity.¹²⁸ Below, we will look at in depth country explanations and on-going situations. It is

¹²⁵ Sonia Nazario is the author of *Enrique’s Journey: The True Story of a Boy’s Dangerous Odyssey to Reunite with his Mother*, about a 17 year old boy from Honduras who makes the journey to U.S. Nazario spent five years reporting and writing. She spent time shadowing his journey and also hearing about his trip.

¹²⁶ Nazario, 2006, pp. 7 – 8.

¹²⁷ Gonzalez-Barrera & Krogstad, With help from Mexico, number of child migrants crossing U.S. border falls, at <http://www.pewresearch.org/fact-tank/2015/04/28/child-migrants-border/> (consulted on 13 June 2015).

¹²⁸ UNHCR, 2014 (a), pp. 6 - 7.

important to keep in mind that it is difficult to assess the current situation in isolation from the past in order to understand the causes of travel. Regional and bilateral economic accords can be seen as direct contributing factors with regards to the root causes of Mexican and Central American children fleeing. For instance, North American Free Trade Agreement and Central American Free Trade Agreement are beneficial to multinational companies and the U.S. economy. This benefit is usually at the expense of the economies and communities of Central America and Mexico.¹²⁹ As a result, unemployment, extreme poverty, and the decay of socio-economic structures occur which in turn reinforces and exacerbates violence. Thus, a vicious circle is created. Many have argued that the U.S. played a role in the spread of gang violence in the region. During the 1990s, U.S. sent a wave of gang members back to Central America. After serving their criminal sentences in the U.S., deported gang members returned to their home countries, becoming a dominant force in an environment where gang culture thrived.¹³⁰ The aim of this is not to accord blame but rather to portray the vicious circle that was created by improper decisions in addressing the issues faced with. The abovementioned factors are inseparable from each other and play a huge role when considering and designing adequate and effective responses (locally, nationally, regionally, and even internationally). Below, Mexico will be discussed on its own, while the Northern Triangle will be discussed together as they have similar issues that distinguish them from Mexico.

Mexico

*I like playing football [soccer] outside, but I can't really play anymore. My friends from my neighborhood all moved because their brothers were killed. The cartel killed them, and the entire family left. So now I don't have anyone to play soccer with.*¹³¹

– Juan, Mexico, Age 13

Although unaccompanied and separated children have been arriving in the U.S. from Mexico over a longer period of time at a steady pace, the number of children from Mexico has still dramatically surpassed the number of children from the other three

¹²⁹ Center for Gender & Refugee Studies, 2015, p. 21.

¹³⁰ Grim, Here's how the U.S. Sparked a Refugee Crisis on the Border, in 8 Simple Steps, at http://www.huffingtonpost.com/2014/07/18/refugee-crisis-border_n_5596125.html (consulted on 27 June 2015).

¹³¹ UNHCR, 2014 (a), p. 39.

countries.¹³² However, most of these children are promptly returned to Mexico, which makes it difficult to understand who these children are and what causes them to flee to the U.S. It is important to note that Mexico plays a dual role as both a transit country and sending country.

Mexico's laws and policies focus on border enforcement rather than human rights and protection needs of children. With the help of the U.S, in training and support, Mexico has significantly increased its enforcement efforts along its border with Guatemala. Mexico detains children and while detained, they are denied edible food, privacy, access to medical and psychological services, and are kept with adults.¹³³

For the children from Mexico, recruitment into exploitation by the criminal industry of human smuggling is a main reason for them fleeing their country.¹³⁴ Some other issues that are on-going in Mexico and could have an impact on children fleeing are as follows: enforced disappearances, extrajudicial executions and torture (in the context of violent crime and lack of accountability in the police and military).¹³⁵

Although official claims suggest that occurrences of organised crime-related violence have fallen, the situation remained severe in 2014. For instance, in the first nine months of the year, the overall number of homicides was 24,746 (in comparison to 26,001 in 2013). Further, an official national survey estimated that the number of abductions in 2013 had reached 131,946, compared to 105,682 in 2012. Also, it has been acknowledged by the Mexican government that there are approximately 22,611 missing persons.¹³⁶ Hence, extreme violence continues to occur widely in the country.

Northern Triangle – El Salvador, Guatemala, and Honduras

Based on 2012 data, UNODC confirms the extreme violence occurring in the Northern Triangle – identifying Honduras as having the highest homicide rate of any

¹³² Idem, pp. 4 - 5.

¹³³ Center for Gender & Refugee Studies, 2015, p. 16.

¹³⁴ UNHCR, 2014 (a), pp. 6 – 7.

¹³⁵ Amnesty International, 2015, p. 247.

¹³⁶ Idem, pp. 248 - 249.

country in the world (90.4 homicides per 100,000 people). On the other hand, El Salvador and Guatemala had homicide rates of 41.2 and 39.9, respectively.¹³⁷ There is a positive link between higher rates of homicide and greater numbers of children fleeing, which has been upheld by Tom Wong in his report. Further, Wong finds another positive relationship between higher danger in security conditions and larger number of unaccompanied children.¹³⁸ According to data, both Honduras and Guatemala have a danger level of 5 (the highest possible) and El Salvador has a danger level of 4.¹³⁹

As noted earlier, there are numerous and interlinked reasons for children leaving their country, however, children from the Northern Triangle consistently cite gang or cartel violence as prime motivators.

The problem was that where I studied there were lots of M-18 gang members, and where I lived was under control of the other gang, the MS-13. The M-18 gang thought I belonged to the MS-13. They had killed the two police officers who protected our school. They waited for me outside the school. It was a Friday, the week before Easter, and I was headed home. The gang told me that if I returned to school, I wouldn't make it home alive. The gang had killed two kids I went to school with, and I thought I might be the next one. After that, I couldn't even leave my neighborhood. The gang prohibited me. I know someone whom the gangs threatened this way. He didn't take the threats seriously. They killed him in the park. He was wearing his school uniform. If I hadn't had these problems, I wouldn't have come here.¹⁴⁰

– Alfonso, El Salvador, Age 17

Based on UNHCR report, 72% of the Salvadoran children interviewed reported some form of violence in society, either at the hands of organised armed criminal actors or others in the community, or due to a lack of State protection from these harms. The main category of harm suffered by the children from El Salvador was by criminal armed

¹³⁷ UNODC, 2014, p. 126.

¹³⁸ Wong, Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border, at <https://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/> (consulted on 13 June 2015).

¹³⁹ FTI Consulting, Public Insecurity in Latin America, at <http://www.fticonsulting.com/global2/media/collateral/united-states/2014-latin-america-security-index.pdf> (consulted on 13 June 2015).

¹⁴⁰ UNHCR, 2014 (a), p. 9.

actors. The children explained their daily routines of escaping extortion, witnessing murders, and dealing with threats to them and their family members.¹⁴¹ Also, intrafamilial violence is a factor that pushes children to flee, with every 7 out of 10 Salvadoran children suffering physical violence in the home. Additionally, El Salvador has the world's highest rate of femicide – more than 25% of these killings are of girls under the age of 19.¹⁴²

These testimonials can be confirmed with an Amnesty International report, which purports that violent crime rose sharply in 2014. It has been documented, by official sources, that 1,857 homicides occurred in the first six months of 2014; whereas, the figure for the same period in 2013 was 1,048. This rise is assumed to be owed to a collapse of a truce between rival criminal gangs.¹⁴³

In response to the increase number of unaccompanied children arriving in the U.S., the National Council for Childhood in 2014 began threatening pecuniary sanctions ranging from \$6,000 to \$12,000 (U.S. dollars) against parents whose children make a subsequent attempt to migrate after being deported. This action can be interpreted as showing “goodwill” to the U.S. rather than the best interests of the child.¹⁴⁴

I had problems with my grandmother. She always beat me from the time I was little. That's why I went to live with my boyfriend – and because I was lonely and sad. But after we had been living together for about a month, my boyfriend also beat me. He beat me almost every day. I stayed with him for four months. I left because he tried to kill me by strangling me. I left that same day.¹⁴⁵

- Lucia, Guatemala, Age 16

According to children interviewed by UNHCR, the predominant themes, at times overlapping, that emerged were as follows: deprivation, abuse in the home, and violence in society. Between 2003 and 2012, intrafamilial violence grew by more than 500%.

¹⁴¹ Idem, p. 31.

¹⁴² Center for Gender & Refugee Studies, 2015, p. 11.

¹⁴³ Amnesty International, 2015, p. 142.

¹⁴⁴ Center for Gender & Refugee Studies, 2015, p. 13.

¹⁴⁵ UNHCR, 2014 (a), p. 35.

Sexual abuse by family is common but often remains hidden.¹⁴⁶ Similar to the above, Guatemalan children suffered or had been threatened with serious harm within society, for example, gang or organised crime related violence, other violence in society, and/or the failure of the State to protect them from this societal violence.¹⁴⁷ Street gangs and drug trafficking cartels are mentioned as the contributors to a dangerous public security situation. It is reported by the authorities that throughout 2014, over 5,000 homicides were committed.¹⁴⁸

In the village where I lived there were a ton of gang members. All they did was bad things, kidnapping people. My mother and grandmother were afraid that something would happen to me. That's why my mother sent me here. They rape girls and get them pregnant. The gang got five girls pregnant, and there were other girls who disappeared and their families never heard from them again.¹⁴⁹

- Honduras, Age 12

The Honduran children interviewed by UNHCR proclaim the same issues as the above two countries, specifically violence within society, either they had experienced or feared violence of organised actors.¹⁵⁰ In Honduras, the current situations of high levels of crime and weakness of, lack of credibility and widespread corruption of the National Police Force contributes to children fleeing their country of origin. For a large percentage of society, their human rights are not realised, as poverty is extremely predominant within the entire population – 60% of the population is living in poverty and more that 40% in extreme poverty.¹⁵¹

Progressive laws have been enacted by the Honduran government regarding children's rights and protection from harm, however, in practice the state fails to enforce these laws and to protect its children from violence. With training and support of the U.S., the Honduran government has begun to stop children attempting to leave,

¹⁴⁶ Center for Gender & Refugee Studies, 2015, p. 14.

¹⁴⁷ UNHCR, 2014 (a), pp. 34 – 35.

¹⁴⁸ Amnesty International, 2015, p. 166.

¹⁴⁹ UNHCR, 2014 (a), p. 36.

¹⁵⁰ Idem.

¹⁵¹ Amnesty International, 2015, p. 174.

regardless of their situation.¹⁵² These actions have negative consequences for children by trapping them in the dangerous and harmful situations as those mentioned above.

3.2.5 What action has the US has taken

In July 2014, President Obama asked Congress for \$3.7 billion to address the crisis by splitting the sum amongst various government agencies in order to apprehend, care for and remove unaccompanied and separated children. Approximately \$300 million was to be used to assist Honduras, Guatemala, and El Salvador repatriate deportees.¹⁵³ As part of their strategy to address the current migration dilemma, President Obama established in-country refugee programs for minors in Honduras, El Salvador, and Guatemala, to be discussed in detail in the following chapter.

The Obama administration has taken some action with regards to the flows of these children by doing the following: directing greater law enforcement resources to the border, expanding detention centres, establishing dedicated child immigration court dockets, and working with Mexico and Central American countries to discourage or prevent illegal migration. Although these measures have proven somewhat successful, they specifically focused on the immediate need rather than a longer-term solution while failing to protect vulnerable groups.¹⁵⁴ The policies chosen to deal with the surge of unaccompanied children will further be discussed in Chapter 4.

3.3 Lost at Sea: Unaccompanied and Separated Children arriving at Lampedusa

With the absence of safe and legal routes into the EU, for forced migrants and asylum seekers, and the EU's preoccupation with sealing its land borders, many individuals have been forced to take the treacherous route – by sea. As a result, there have been record numbers of people who have drowned. Despite efforts to “assist”, 3,400 refugees and migrants were believed to have drowned, although the real number

¹⁵² Center for Gender & Refugee Studies, 2015, p. 10.

¹⁵³ Huffington Post, Obama Requests \$3.7 Billion to Deal With Border Crisis, at http://www.huffingtonpost.com/2014/07/08/obama-border-crisis_n_5567258.html (consulted on 13 June 2015).

¹⁵⁴ Rosenblum, 2015, p. 2.

will never be known, as many bodies are lost at sea, attempting to cross the Mediterranean. Hence, it is the “most dangerous sea route for migrants in the world”.¹⁵⁵ This subsection will focus on several factors: the history of migration to Italy, the current situation, the sea crossing, the most represented nationalities and why they flee their countries, and finally what the Italian government has done to address the current issue at hand. The majority of the recent statistics on arrivals to Italy come from a UNHCR report, “The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees”, published on 1 July 2015.

3.3.1 Brief Chronicle of Migration to Italy¹⁵⁶

Italy is traditionally recognised as a country of emigration. It was not until the late 1980s that the country began to experience the mass-immigration of people who were neither returning Italian emigrants nor their descendants.¹⁵⁷ By the early 1990s, the prevalence of immigration was present with a large number of migrants arriving from Africa – specifically, Tunisia and Morocco and many more travelling upwards from sub-Saharan.¹⁵⁸

The island of Lampedusa is closer to Tunisia than to Sicily – around 70 nautical miles from Tunisia, between Libya and the mainland of Italy.¹⁵⁹ Due to its close proximity to North Africa and its location on the Southern border of the EU free movement area (i.e. Schengen), the island has become an enticing gateway into Europe for those fleeing poverty, war, and repression in Africa, Asia and the Middle East.

¹⁵⁵ Amnesty International, 2015, p. 35.

¹⁵⁶ The author would like to note that the title is not the exact mirror of Section 3.2.1 due to the inability to find information on the history of children migrating to Italy. This could be in part because of the already mentioned language barrier.

¹⁵⁷ The Migrationist, Reaching Terraferma: Boat Migration to Southern Italy, at <http://themigrationist.net/2013/10/10/reaching-terraferma-boat-migration-to-southern-italy/> (consulted on 22 May 2015).

¹⁵⁸ Idem.

¹⁵⁹ Fortune, Lampedusa: L’Isola Bella’s shadow of death, 5 May 2015, at <https://www.amnesty.org/en/latest/news/2015/05/lampedusa-shadow-of-death/> (consulted on 10 June 2015).

3.3.2 The Situation

In 2011, due to civil unrest in Tunisia and Libya, there was a spike in the number of forced migrants and refugees arriving in Italy via the Mediterranean crossing. The main nationalities of the arrivals include: Eritreans (25%), Somalis (10%), Nigeria (10%), and Syrians (7%).¹⁶⁰ According to Amnesty International report, over 170,000 refugees and migrants arrived in Italy by sea in 2014, including more than 10,000 unaccompanied children, the vast majority departing from Libya.¹⁶¹ A recent study reported that within the first six months of this year (January to June 2015), 137,000 refugees and migrants crossed the Mediterranean Sea, 67,500 of this number arriving in Italy.¹⁶²

Out of all the regions in Italy, Sicily represents the highest reception percentage of unaccompanied and separated children, which arrive (30.1%). Not only is it the highest percentage but also the difference between the others is substantial. For instance, the second highest is Lazio at 10.1%.¹⁶³ From January to June 2015, 8% of all refugees and forced migrants arriving in Italy were unaccompanied and separated children.¹⁶⁴

Although the statistics of unaccompanied and separated children arriving at Lampedusa are general and do not specify the percentages from each country,¹⁶⁵ as seen for the children arriving to the U.S., the main countries of origins will be discussed in detail in section 3.3.4

3.3.3 The Journey

The main departure country for Europe is Libya. The crossing is described as a terrifying experience. Hardships and extreme risks to life and safety are typical features

¹⁶⁰ UNHCR, 2015 (b), p. 11.

¹⁶¹ Amnesty International, 2015, p. 202.

¹⁶² UNHCR, 2015 (b), p. 2 - 3.

¹⁶³ Ministero del Lavoro e delle Politiche Sociali, 2015, p. 4.

¹⁶⁴ UNHCR, 2015 (b), p. 12.

¹⁶⁵ The author had a difficult time finding exact numbers of unaccompanied and separated children arriving at Lampedusa. This is not to say that they do not exist however, one downfall is that they may exist in Italian but even so, the author has not come across any in research. Further, the figures that are represented are only a fraction of the true numbers, as many children often do not register with the authorities because they are afraid or unable to do so.

of the journey. April of this year saw the largest refugee shipwreck on record, with 800 people dying.¹⁶⁶ The average time it takes from Libya to European shores is one to three days – depending on several factors such as: the speed of the boat, sea conditions, and so forth.¹⁶⁷

The risks to life in such journeys are obvious: in addition to the hardships of the crossing, in these unusually overcrowded, unseaworthy boats and with inexperienced captains, forced migrants and refugees often endure extreme violence from smugglers, including beatings. Other mishaps include: getting lost (smugglers often abandon the migrants on the boat and they are left to navigate alone), fuel shortage, experience mechanical issues (such as engine breakdowns and/or start taking in water), dehydration since there is no available drinking water, intoxication and suffocation from engine fumes (resulting from overcrowding and lack of air in the engine rooms in the hull of the boats). Further, life jackets and/or other safety gear is never available and many people cannot swim. This danger is exacerbated for children, even if they can swim, they do not have the strength. Thus, deadly incidents are far from rare, even when a boat does not sink.¹⁶⁸

3.3.4 Who are they and reasons for travel

The countries of origin of those attempting to reach Lampedusa by sea are characterised by weak and/or absent state structures, repressive regimes or internal conflicts, with neighbouring countries in similar situations. Due to the situation in Libya and the instability in the country, it may be more difficult to partner with institutions. This can be seen as an added challenge in finding solutions because one cannot be sure which institutional counterparts should be involved. Notably, the majority of forced migrants and refugees arriving to Southern Europe do so with the intention of travelling onwards. Below we will take a closer look at each country of origin and their state of affairs that is causing children to flee. As mentioned earlier, the largest representation of arrivals come from Eritrea, Somalia, Nigeria, and Syria.

¹⁶⁶ UNHCR, 2015 (b), p. 2.

¹⁶⁷ Amnesty International, 2014 p. 17

¹⁶⁸ Idem, p. 20.

Eritrea

“The military does not have an end, it is for life.”¹⁶⁹

- Age 14

Generally, there are patterns of human rights violations in Eritrea. Some common violations are as follows: mandatory military conscription, which is regularly extended indefinitely, arbitrary arrests and detention, extrajudicial killings, torture and other cruel, inhuman or degrading treatment (specifically in prison conditions), etc. Importantly, there are violations of children’s rights, which have been purported by the Special Rapporteur on the situation of human rights in Eritrea.¹⁷⁰ Hence, Eritreans continue to flee the country in large numbers.

Somalia

“There is no security, no hope, no health, no water. No peace since I was born.”¹⁷¹

- Ismael, Age 15

Somalia, along with many other African countries, faced serious security challenges throughout 2014. This resulted from increased violence by radical armed groups, such as al-Shabaab and Boko Haram. Armed conflict continued between pro-government forces, the African Union Mission in Somalia and the Islamist armed group of al-Shabaab in southern and central Somalia.¹⁷²

Over 100,000 individuals have been murdered, injured or displaced and many have been abducted.¹⁷³ All parties involved in the conflict have violated international human rights and humanitarian law. Armed groups forcibly recruited people, in which children are extremely vulnerable to and usually are targets for recruitment.

Hence, due to the on-going conflict, Somalia’s humanitarian situation worsened. Drought and reduced humanitarian access continued to haunt Somalia, with conditions

¹⁶⁹ Human Rights Watch, World Report 2015: Eritrea, at <https://www.hrw.org/world-report/2015/country-chapters/eritrea> (consulted on 10 July 2015).

¹⁷⁰ UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Eritrea, 13 May 2014, A/HRC/26/45, 2015, p. 5.

¹⁷¹ Human Rights Watch, 2015, p. 16.

¹⁷² Amnesty International, 2015, p. 328.

¹⁷³ Idem, pp. 6 – 8.

equivalent or worse than before the 2011 famine. As of September 2014, about 42% of the population were in crisis or needed assistance. Also, Somalia faced political crisis.¹⁷⁴

Nigeria

In Nigeria, both the Nigerian military and the armed group of Boko Haram, committed crimes under international law and serious human rights violations were the outcome. The conflict in the North between government forces and Boko Haram is predominant. Children are being targeted, which could be exemplified through the situation of 276 schoolgirls being abducted by Boko Haram in the town of Chibok. Further, Boko Haram is forcing girls' into marriage. In addition, many school children were murdered when Boko Haram attacked a school on Buni Yadi, Yobe State.¹⁷⁵

This list of attacks can go on, however, this is sufficient to portray that the children arriving to Italy are in need of international protection. Many acts carried out amount to war crimes and crimes against humanity. The authorities are failing to protect its civilians overall, causing people to flee to seek asylum elsewhere.

Syria

*"Maybe we'll live, and maybe we'll die."*¹⁷⁶

- Omar, Age 14

Throughout 2014, Syria's internal armed conflict continued in which both government forces and non-state armed group's committed extensive war crimes and grave human rights violations. Civilians were deliberate targets – from residential and medical areas being bombarded, to government forces depriving individuals of food and

¹⁷⁴ Idem, p. 329.

¹⁷⁵ Idem, p. 274.

¹⁷⁶ Human Rights Watch, "Maybe We Live and Maybe We Die:" Recruitment and Use of Children by Armed Groups in Syria, at <https://www.hrw.org/report/2014/06/22/maybe-we-live-and-maybe-we-die/recruitment-and-use-children-armed-groups-syria> (consulted on 8 July 2015).

other necessities.¹⁷⁷ According to UN figures, the conflict caused a total of approximately 200,000 deaths, 7.6 million people were internally displaced, and millions became refugees in other countries.¹⁷⁸

3.3.5 What action has the Italian government taken

In an attempt to address the humanitarian tragedy faced with, Italy launched a rescue-at-sea operation, called Mare Nostrum (OMN). OMN constituted the first and at the time, only concrete step taken by a European state to assist migrants who face the perilous sea crossing to seek safety. Without the OMN, it is certain that the death toll at sea in 2014 would have been much higher.¹⁷⁹

The Italian navy describes OMN as a military and humanitarian operation. The aim of this operation was two-fold: to safeguard life at sea and to combat human trafficking. The area that was patrolled by OMN, measured about 43,000km², and extended south of Lampedusa into the eastern part, thus overlapping with the Maltese search-and-rescue (SAR) zone south of Malta, as well as with the Libyan SAR zone.¹⁸⁰ OMN relied on staff and assets from the Italian Navy, air forces, customs police, coastguard, and state police. Italy was spending over 9 million euros per month on the operation. This operation ended in December 2014, due to the opinion of some that this was a “pull factor”, but overall it contributed to 164,000 persons being rescued.¹⁸¹ A smaller operation, led by Frontex, with its mandate focusing on border control, and having a limited scope to rescue people at sea, was initiated. However, the number of refugees and forced migrants crossing the Mediterranean did not lessen. Based on emergency meetings held by European leaders, it was agreed upon to triple funding for the Frontex operation in order to significantly increase their scope and coverage. European

¹⁷⁷ Amnesty International, 2015, pp. 353 – 354.

¹⁷⁸ *Idem*, p. 354.

¹⁷⁹ Amnesty International, 2014, p. 23.

¹⁸⁰ *Idem*.

¹⁸¹ UNHCR, 2015 (a), p. 27.

Operation SAR began in May 2015 and the results have been positive, with the deaths at sea being on a downward trend.¹⁸²

Conclusion

The aim of this chapter was to reinforce that the children arriving to the U.S.-Mexico border and Lampedusa indeed have international protection needs. This was achieved by outlining the situations occurring, the nationalities of the children arriving, the circumstances in their home countries which propel them to leave, and finally the responses of the governments in the receiving countries. The pictures painted portray that the situations these children are faced with amount to persecution and are proof of why the refugee definition, especially in cases dealing with children, should be broadened. It can be argued that with the right policies and effective operational responses, positive measures can result for these children. The legal, policy, and practice of the U.S. and Italy with regards to reception and treatment of the unaccompanied and separated children arriving at their borders will be examined in the remaining chapters.

¹⁸² UNHCR, 2015 (b), pp. 8 – 9.

4. ANALYSIS OF U.S. LAW, POLICIES, AND PRACTICE

This chapter will analyse the law, policies, and practice of the U.S. First, a brief international framework will be outlined, as it applies to the U.S. Next, the national legal framework, specifically the immigration system, will be assessed. Special attention will be provided to advancements in the immigration system as well as available immigration relief for children. Key actors and agencies that unaccompanied and separated children come into contact with will be discussed, outlining their main functions. Following this, specific policies and programmes of relevance to the topic will be mentioned. Finally, by utilising official studies, civil society and media reports, state practice will be revealed and evaluated in comparison to their legal doctrinal obligations and policies in place. As portrayed in Chapter 3, many of the children arriving to the U.S. have protection needs. However, many gaps in protection persist within the legal, policy, and practice in the U.S. To address these gaps, this chapter concludes with several key recommendations for the U.S.

4.1 Law and Policies

This subchapter will begin with an overview of the applicable international treaties within the U.S. Furthermore, within the domestic system of the U.S., the U.S. Code will be referred to as it includes the INA, which guides immigration law within the country. The legal framework with regards to its applicability to foreign children arriving to the U.S. will be discussed, including a discussion of key agencies/actors that come into contact with the children, and policies and programmes as they apply to unaccompanied and separated children will be overviewed.

4.1.1 International Law and its Applicability to the U.S.

To reiterate, although commonly known, the U.S. is one of two countries who has yet ratified the CRC. As a result, the U.S. is under no international legal obligation to

follow the BIC principle outlined in Article 3 of the CRC. However, we should keep in mind the discussion of Chapter 2. Aside from this, the International Covenant of Civil and Political Rights, an important human rights treaty, declares: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State.”¹⁸³ Further, the U.S. is not a state party to the 1951 Convention Relating to the Status of Refugees but, is party to the 1967 Protocol.¹⁸⁴ As we will see, the U.S. has implemented the refugee definition into their law, however, their interpretation of it strays away from that of the international context. However, under treaty obligation, the U.S. may not return an individual to their home country where they may face persecution. The U.S. is also a state party to another convention that prohibits the return of people to a country where they may be tortured, the Convention Against Torture.¹⁸⁵

From the above-mentioned, it is evident that there are guiding as well as binding laws in place that the U.S. should follow. Contrarily, U.S. immigration policies and decisions rest on their domestic immigration law, and not international obligations or norms.

4.1.2 Domestic Law: U.S. Immigration System

In the U.S. context, domestic law takes precedence over all other law. Children seeking refuge in the U.S. are protected by both, the immigration and asylum systems, governed by the Immigration Court. The regime that is assigned to handle a child’s asylum claim depends on the circumstances in which the child comes into contact with U.S. authorities. For the children this dissertation is concerned with, those who arrive at the U.S.-Mexico border, claims must be made defensively in Immigration Court, when the child is already the subject of removal proceedings.

¹⁸³ UN General Assembly, 1966, Article 24(1). Ratified by the U.S. in 1992.

¹⁸⁴ U.S. acceded in 1968.

¹⁸⁵ The Convention Against Torture was ratified by the U.S. on 21 October 1994.

The *Immigration and Nationality Act (INA)*, a stand-alone body of text also contained in a section of the U.S. Code, guides national immigration law in the U.S.¹⁸⁶ Prior to the INA, which was created in 1952, other statutes governed immigration law, but they were not centralised in one location.

The INA only defines the term “child” as an unmarried person under the age of twenty-one.¹⁸⁷ The current INA discusses refugees in Sections 207-209 and 411-414. Section 207 (Annual Admission of Refugees and Admission of Emergency Situation Refugees) points out that the U.S. President, after consulting with Congress and so forth, makes a plan for the upcoming year with regards to the designated nationalities and determines processing priorities for refugee resettlement. This plan includes creating categories based on the world’s regions and setting “annual ceilings” for the total amount of refugees who may enter from each.¹⁸⁸ However, section (b) states,

(b) If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.¹⁸⁹

Further, Section 208 (Asylum) discusses who can apply for asylum. Under section (b) it explicitly states that the burden of proof is on the applicant to portray that he/she meets the requirements of the refugee definition.¹⁹⁰ Sections 411-414 deal with the following topics: Office of Refugee Resettlement, Authorization for Programs for Domestic Resettlement of and Assistance to Refugees, Congressional Reports, and Authorization of Appropriations.¹⁹¹

¹⁸⁶ United States, 1952.

¹⁸⁷ *Idem*, Section 101(b)(1).

¹⁸⁸ Refugee Council USA, History of the U.S. Refugee Resettlement Program, available at <http://www.rcusa.org/history> (consulted on 25 June 2015).

¹⁸⁹ United States, 1952, Section 207(b).

¹⁹⁰ *Idem*, Section 208(b).

¹⁹¹ *Idem*, Sections 411 – 414.

Interestingly, the only mention of children in this document is in relation to parents. There is no acknowledgement of unaccompanied and separated children. This can be seen as “...an illustration of the systemic neglect of children as individual actors and rights-holders in U.S. asylum law.”¹⁹² Due to the failure of the INA and other regulations to provide a singular and comprehensive definition which could be applied to unaccompanied and separated children, the 2002 HSA, to be discussed later, introduced the term “unaccompanied alien child” (UAC). UAC is defined in the U.S. Code as a child who:

(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.¹⁹³

In 1990, Congress enacted the Temporary Protected Status (TPS) to provide safety to specific countries designated by the President. As the name suggests, this is a temporary immigration benefit that allows only qualified individuals from specific countries to stay in the U.S. for a limited period. The Secretary of Homeland Security can designate a country for TPS based on country conditions, which prevent individuals from being able to return to their home countries and be free from harm.¹⁹⁴ The legal requirements for TPS can be found in the INA.¹⁹⁵ Currently, El Salvador and Honduras are designated for TPS.¹⁹⁶

4.1.2.1 Advancements in the U.S. Immigration System for Children

Many critics suggest that the current surge at the U.S. border is due to certain policies that have been introduced. Most commonly cited is the Deferred Action for Childhood Arrivals (DACA) and the passage of S.744, an immigration reform bill, by

¹⁹² Bhabha & Schmidt, 2006, p. 30.

¹⁹³ 6 U.S. Code § 279(g)(2).

¹⁹⁴ U.S. Citizenship and Immigration Services, Temporary Protected Status & Deferred Enforced Departure, at <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure> (consulted on 29 June 2015).

¹⁹⁵ United States, 1952, Section 244.

¹⁹⁶ U.S. Citizenship and Immigration Services, Temporary Protected Status, <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (consulted on 10 July 2015).

Senate.¹⁹⁷ DACA, announced on 15 June 2012 by DHS, allowed certain individuals without lawful immigration status to be considered for relief from removal. This policy grants children brought to the U.S. (and meet other criteria) some protection from removal for at least two years. However, DACA has some restrictions such as age and date of entry.¹⁹⁸ Unfortunately, these restrictions lead to many children not qualifying. The S.744, “Border Security, Economic Opportunity, and Immigration Modernization Act”, was passed by Senate in 2013, which allows certain unlawfully present aliens in the U.S. to change to a lawful status.

There exist three legal documents, the Homeland Security Act (HSA) of 2002, the TVPRA of 2008, and the Flores Settlement Agreement (FSA) of 1997, which affect U.S. policy in regards to treatment and administrative processing of unaccompanied and separated children. Today, unaccompanied and separated children are the task of two agencies: the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) Office of Refugee Removal (ORR).¹⁹⁹ This division of responsibilities was created with the HSA, when the former INS was abolished.²⁰⁰ This bill was enacted in response of the terrorist attacks of September 11. The HSA is significant for unaccompanied and separated children because it transferred their care and custody away from an immigration enforcement agency into a child welfare agency, the HHS. This can be seen as one of the first major recognition’s, on behalf of the U.S., that children need to be treated differently than adults.²⁰¹

Due to on-going assertions, which suggested that apprehended children were not being adequately screened in order to establish whether or not they should be returned to their home country, Congress passed the 2008 TVPRA.²⁰² The TVPRA contains provisions addressing issues that affect children such as: requiring their BIC in decisions about placement, access to counsel, the appointment of advocates, and safe

¹⁹⁷ American Immigration Council, 2015, p. 3.

¹⁹⁸ Center for Gender & Refugee Studies, 2015, p. 291.

¹⁹⁹ This splitting of tasks between the two groups was created with the passage of the Homeland Security Act 2002.

²⁰⁰ U.S. Citizenship and Immigration Services, Our History, at <http://www.uscis.gov/about-us/our-history> (consulted on 28 June 2015).

²⁰¹ Center for Gender & Refugee Studies, 2015, p. 231.

²⁰² United States of America, 2008.

repatriation. But, the legislation is also lacking in particular areas. First, it does not adopt the BIC as a central standard applicable to all policies and decisions affecting immigrant children.²⁰³ Second, protection procedures vary for children from contiguous countries (i.e. Mexico and Canada) and non-contiguous countries (i.e. all others). Children from non-contiguous countries are transferred to the HHS to be screened and then placed into formal immigration court removal proceedings. On the other hand, CBP is responsible for the children from contiguous countries. These children are to be screened for trafficking and fear of persecution. If no signs of either exists, the children are returned based on negotiated repatriation agreements.²⁰⁴ On a positive note, the TVPRA, since 2008, ensured that unaccompanied children be exempt from particular limitations on asylum (i.e. one-year filing deadline). In addition, the TVPRA requires that HHS to ensure counsel to unaccompanied children in its custody.²⁰⁵

Lastly, the FSA stemmed from the Supreme Court case of *Reno v. Flores*,²⁰⁶ which has “established a nationwide policy for the detention, treatment, and release”²⁰⁷ of unaccompanied and separated children. The FSA set out requirements for immigration officials when detaining children. Accordingly, children must be provided with “food and drinking water; medical assistance in emergencies; toilets and sinks; adequate temperature control and ventilation; adequate supervision to protect minors from others; and separation from unrelated adults whenever possible.”²⁰⁸

4.1.2.2 Immigration Relief for Children

In the context of the U.S., unaccompanied and separated children may be eligible for certain types of relief: Special Immigrant Juvenile Status (SIJS), T-Visas and U-Visas, and asylum.

²⁰³ Center for Gender & Refugee Studies, 2015, p. 231.

²⁰⁴ American Immigration Council, 2015, p. 5.

²⁰⁵ *Idem*.

²⁰⁶ The Court ruled in favour of the INS’s UAC policy, however, a settlement agreement was drafted between the parties.

²⁰⁷ CRS, 2014, p. 3.

²⁰⁸ *Idem*.

SIJS is a form of humanitarian protection, which has existed since 1990. It provides visa status and protects immigrant children without legal status who have been abandoned, abused, or neglected. Currently, for a child to be eligible for SIJS, a U.S. state juvenile court must do the following: “make the child dependent on the court[...], declare that the child cannot be reunited with one or both[...].due to abuse, abandonment, or neglect, and declare that it is not in the best interests of the child to be returned[...].”²⁰⁹ to his/her home country. Theoretically speaking, this type of legal relief provides immigration benefits because it permits individuals to remain in the U.S. and apply for work authorisation and permanent residence, and eventually U.S. citizenship. However, the reality is that “few children successfully apply for[...]SIJ status, particularly without the assistance of an attorney.”²¹⁰

In addition, certain immigrants may also apply for relief from deportation if they have been victims of severe forms of human trafficking (T-Visas) or victims of crime (U-Visas). In order to be eligible for a T-Visa, one must demonstrate that they would suffer hardship (i.e. severe harm), if removed from the U.S. On the other hand, an individual must have suffered substantial physical or mental abuse, while co-operating with law enforcement during the investigation/prosecution of the crime.²¹¹

Asylum is a form of protection, which is granted to refugees present in the U.S. In order to qualify for asylum, an individual must demonstrate a well-founded fear of persecution based on the refugee definition. This form of relief will be looked at a little more in depth below.

The U.S. passed the *Refugee Act* of 1980 in order to bring the country’s laws into compliance with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. In order to be granted asylum in the U.S., individuals must meet the U.S. refugee definition, which utilises the language of the Convention. Under U.S. law, a refugee is:

²⁰⁹ U.S. Citizenship and Immigration Services, History of SIJ Status, at <http://www.uscis.gov/green-card/special-immigrant-juveniles/history-sij-status> (consulted 29 June 2015).

²¹⁰ Rosenblum, 2015, p. 7.

²¹¹ American Immigration Council, 2015, p. 4.

any person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...²¹²

Although U.S. asylum law is derived directly from the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, and applies the same definition, the U.S. interpretation of the term is much narrower in comparison to the international approach. The U.S. government in conjunction with the UNCHR produced guidelines encouraging adjudicators to adopt a child-sensitive approach when deciding children's asylum claims, regardless of this the U.S. claims that the guidelines are not binding on adjudicators.

In order for children to be granted asylum they must satisfy the same conditions outlined in the refugee definition as adults. Regardless of the definition being the same, it should be applied in a child-sensitive manner. The U.S. has issued guidelines on children's asylum claims that advance a child-sensitive analytical framework and procedures.²¹³ As set out in these guidelines, a child-sensitive approach to asylum claims take into account a child's age, maturity, and development; recognise children as active subjects of rights and their particular vulnerability in specific situations of harm; applies relaxed requirements with regards to the elements of the refugee definition; and, provide children the liberal benefit of the doubt when assessing whether the evidence establishes the elements of the refugee definition.²¹⁴ Unfortunately, due to the non-binding nature (except for Asylum Officers) of the guidelines they are often not applied consistently, if at all. Moreover, asylum is a form of discretionary relief, left in the hands of the adjudicator. Thus, even if the child can satisfy the refugee definition, his/her case may be denied, as listed in INA Section 208(b)(1)(A).²¹⁵

²¹² United States, 1952, Section 101(a)(42)(A).

²¹³ U.S. Department of Justice Immigration and Naturalization Service, "Guidelines for Children's Asylum Claims", 10 December 1998, Available at <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> (consulted on 3 July 2015).

²¹⁴ *Idem*.

²¹⁵ United States 1952, Section 208(b)(1)(A).

In regards to asylum, the only current measure to deal with the increasing humanitarian issue is by USCIS who has increased staffing and re-prioritised applications for interview scheduling. As of December 2014, the USCIS Asylum Division began utilising the following hierarchy for applications: applications that were scheduled for an interview (but the applicant requested a new interview date); applications filed by children; and, all other pending affirmative asylum applications will be scheduled in the order received.²¹⁶

4.1.3 Key Actors Involved with Unaccompanied and Separated Children

The DHS, HHS, the Department of Justice (DOJ), and the Department of State (DOS) are the major U.S. agencies involved with unaccompanied and separated children. There will be a brief discussion of the relevant agencies and their sub-agencies with regards to their functions in dealing with children.

DHS is a massive organisation comprised of many sub-organisations to prevent terrorism, stop irregular migration, administer immigration benefits, and other functions. It is the primary organisation responsible for enforcing the nation's immigration laws. Several DHS agencies are involved in apprehending, processing, and repatriating unaccompanied and separated children: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). CBP, officials stationed at airports and points of entry of the U.S., are responsible for apprehension, processing, and detaining. CBP agents conduct the initial screening of unaccompanied and separated children and place them into temporary CBP custody. Further, ICE is the agency responsible for enforcement. ICE conducts investigations, detains certain immigrants in the interior of the U.S., and departs immigrants who are ordered removed. At the same time, USCIS administers a broad range of immigration benefits. Of relevance to unaccompanied children, USCIS decides cases of SIJS and decides unaccompanied children's asylum claims in the first instance.

²¹⁶ U.S. Citizenship and Immigration Services, USCIS Processing of Asylum Cases, available at <http://www.uscis.gov/node/48323> (consulted on 29 June 2015).

ORR, within HHS, has responsibility for the care and custody of migrant children who have been apprehended by CBP or ICE and are referred to HHS as unaccompanied children. ORR shelters children in various facilities and oversees the process of family reunification in order to release children to family in the U.S. ORR, Division of Children's Services, has an Unaccompanied Alien Children's Program which provides unaccompanied and separated children with a safe and appropriate environment, a high quality of care which is client-focused to maximise the child's opportunities for success both when in care and upon discharge.²¹⁷

DOJ is responsible for the administration of justice and the enforcement of federal law. Its main branch, EOIR, conducts immigration proceedings that determine whether the child is allowed to remain in the U.S. or is deported. EOIR includes the Board of Immigration Appeals, which is the body that adjudicates the appeals of decisions made at the immigration court level.

There are two branches of DOS whose work most overlaps with Central American children: the Bureau of Population, Refugees, and Migration and the Bureau of Western Hemisphere Affairs. The first is tasked with overseeing the in-country refugee/parole processing recently announced for the children of the Northern Triangle; while, the latter focuses on development, citizen security, and other issues in the region.²¹⁸

4.1.4 Policies and Programmes to Address the Influx of Children

Generally, there is an absence of policies to specifically address unaccompanied and separated children. However, there exist a few, which will be discussed below.

As of June 2013, a new USCIS policy emerged. Under the new USCIS policy, if a decision has been made by CBP or ICE officials that a child is an UAC, USCIS will accept the determination as is. The children that will be most affected by this new policy will be those apprehended by CBP or ICE who are determined to be UACs and

²¹⁷ U.S. Department of Health & Human Services, Unaccompanied Children's Services, available at <http://www.acf.hhs.gov/programs/orr/programs/ucs> (consulted on 29 June 2015).

²¹⁸ Center for Gender & Refugee Studies, 2015, p. 240.

placed in the custody of ORR.²¹⁹ However, consistent with TVPRA's intent, the new policy ensures that a greater number of children will benefit from the more appropriate setting of the Asylum Office than the immigration courts, without having to undergo multiple UAC determinations. Also, this policy improves the quality of asylum interviews because it keeps them focused on the claim itself rather than on determining the status of UAC.²²⁰ On the contrary, there are a few downfalls to this new policy. First, it does not back date to children who previously did not meet the definition of UAC. Second, it does not change how the agency will conduct determinations for children in removal proceedings who have not received a prior UAC determination by any federal agency.²²¹

Additionally, to recap from Chapter 3, Section 3.2.5, the U.S. government has addressed the issue with short-term policies. For instance, the strengthening of collaboration amongst agencies, allocation of additional enforcement resources to the border, expanded detention space, created a new child immigration court docket, and negotiated cooperative deterrence and enforcement programs with Mexico and Central American countries.²²²

Enforcement policies, for example, have many negative effects and do not take the BIC into account nor the children's situations. In October 2014, about \$1.3 billion U.S. dollars went to Mexico. With this initiative, it has been reported that there is an

increased presence of immigration officials in pickup trucks patrolling the roads and bus stations en route to the train line. Raids on hotels and restaurants where migrants shelter in traditional cities have occurred. And immigration agents, in raids supported by federal police and the military, are targeting the trains, removing migrants from the train cars and detaining them.²²³

Further, the companies that run *La Bestia*, are working together with the Mexican government to increase train speed in order to prevent migrants from riding atop.²²⁴ Thus, these policies definitely do not have the BIC in mind, but rather quite the

²¹⁹ KIND, 2014, p. 29

²²⁰ Idem.

²²¹ Idem, pp. 29 – 30.

²²² Rosenblum, 2015, p. 1.

²²³ Villegas, Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses, at <http://www.migrationpolicy.org/article/central-american-migrants-and-la-bestia-route-dangers-and-government-responses> (consulted on 29 June 2015).

²²⁴ Idem.

opposite, as they are putting children at increased risk of danger. Also, these policies require Mexico to deport children at their border. Over the course of 2014, deportations from Mexico to the Northern Triangle significantly increased. Research conducted found that during the first five months of FY 2015, there was a 56% increase of deportations from Mexico in comparison to FY 2014.²²⁵

Moreover, in November 2014, the DOS announced the launch of its in-country processing programme in the Northern Triangle countries. The Central American Minors (CAM) Refugee/Parole Program provides qualified children from the Northern Triangle, a “safe, legal, and orderly alternative to the dangerous journey”²²⁶ that many children have been attempting in order to arrive at the U.S. Unfortunately, this program only accepts applications from qualifying parents who are in the U.S. Sadly, “...not one Central American child has been admitted through this channel.”²²⁷ In order to be eligible for this refugee admissions program, the child must first have a parent lawfully in the U.S. That parent must submit a detailed relationship petition and DNA testing must be completed, which is associated with high costs. If all these conditions are met, the child is subjected to four interviews, including a refugee status determination interview where the child must establish a well-founded fear of persecution in the country of origin. After all this, if the child is approved, the U.S. does not immediately take the child to safety, rather, additional medical exams and cultural orientation, and the child must wait for a resettlement agency to visit the parental home in the U.S.²²⁸

²²⁵ Gonzalez-Barrera & Krogstad, With help from Mexico, number of child migrants crossing U.S. border falls, 2015, at <http://www.pewresearch.org/fact-tank/2015/04/28/child-migrants-border/>.

²²⁶ U.S. Citizenship and Immigration Services, In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), at <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam> (consulted on 29 June 2015).

²²⁷ Frelick, New US policy of little help to Central American families who live in fear, at <http://www.hrw.org/news/2015/07/06/new-us-policy-little-help-central-american-families-who-live-fear> (consulted on 4 July 2015).

²²⁸ Idem.

4.2 Practice: Gaps for Children in the U.S. System

There is a legal void that exists in the U.S. in regards to unaccompanied and separated children. The consequence of this void for children is that their human rights are violated and their best interests disregarded. Despite minor advancements made for children within the U.S. immigration system, many gaps still persist – beginning with the flawed screening of children through to the repatriation of children who have protection needs. All these gaps originate from the fact that the U.S. fails to take a rights-based approach and ignores the principle of BIC. Some practices will be reviewed in greater detail: screening, detention, legal representation, the appointment of a child advocate/guardian, age assessments, and deportation, repatriation, and reintegration.

4.2.1 Screening

CBP fails to fulfil its duty to identify Mexican unaccompanied children with protection needs. Under federal law, unaccompanied Mexican children must be placed in federal custody in the U.S. if they are at risk of trafficking or persecution, or if they are unable to make an independent and voluntary decision to return to Mexico. In actuality, CBP repatriates nearly all Mexican children it apprehends, presuming they are not at risk.²²⁹ There exists no specific or sufficient CBP protocol for working with children. Moreover, CBP lacks training, sensitivity, and a child welfare framework for interviewing children.²³⁰

²²⁹ Center for Gender & Refugee Studies, 2015, p. 18.

²³⁰ Idem.

4.2.2 Accommodation

Regardless of international law prescribing that children “should in principle not be detained at all”,²³¹ in the U.S. unaccompanied children can be detained, however, detention is governed by special laws.

CBP temporarily detains children apprehended at the border, including unaccompanied and separated children. Both the officers and the actual conditions of the holding cells violate children’s rights under U.S. national law and international human rights law. For instance, it has been recounted that CBP agents verbally, physically or sexually abused children. Children have reported being thrown to the ground, hit on the back, and having their arms twisted by officials. Others have reported being handcuffed, spit at, and yelled at.²³²

The holding facilities deprive children of adequate nutrition, bedding, recreation and fresh air, and they lack medical care and psychological services. The holding rooms, essentially jail cells, are often kept at extremely cold temperatures, have no windows to the outside, one door that locks from the outside, and most rooms have a toilet that may or may not have a privacy wall.²³³ Furthermore, there are accounts of extreme overcrowding in hold rooms and children needing to lay down in shifts due to lack of space for sleeping.²³⁴ Although the Hold Room and Short Term Custody policy requires children to be fed every four to six hours, with the ability to request snacks, juice, and milk at any time, there are many children who report this is not the case.²³⁵

Additionally, CBP eventually transfers unaccompanied children (except Mexicans) to the ORR for longer-term custody. ORR aspires to protect, not punish, but they fall short of protection in various ways. Many ORR facilities are located far from legal, medical, and mental health service, thus, impeding on detained children’s access to services. Worryingly, ORR releases children to adults not adequately screened, which leaves them vulnerable to abuse and exploitation. Also, ORR only provides follow-up

²³¹ UNHCR, 2012, p. 34.

²³² Women’s Refugee Commission, 2012, pp. 11 & 22.

²³³ Center for Gender & Refugee Studies, 2015, p. 257.

²³⁴ Women’s Refugee Commission, 2012 p. 21.

²³⁵ *Idem*, p. 20.

services (i.e. adjustment to new life in U.S., address prior traumas, etc.) to a small percentage of children.²³⁶ Overall, rather than detaining children, the U.S. government should protect them.

4.2.3 Legal Representation

Generally, the U.S. government does not appoint counsel for unaccompanied and separated children in immigration proceedings. Hence, the lack of counsel renders many children's rights under U.S. immigration law meaningless. Although the TVPRA of 2008 has directed the Secretary of HHS to ensure the provision of counsel to unaccompanied children "to the greatest extent practicable", Congress also explained that the Secretary "shall make every effort to utilize the services of *pro bono* counsel who agree to provide representation to such children without charge".²³⁷ Hence, aside from the fact that many *pro bono* legal service providers have responded, they are unable to meet the need. Ironically, children are forced to appear before an immigration judge and be able to navigate themselves through while DHS, who acts as the prosecutor and argues for the child's deportation, is represented in every case by a lawyer trained in immigration law.²³⁸

As can be seen, there remains a large gap for children in regards to legal counsel. However, there is hope with the Senate comprehensive immigration reform bill S.744 and the House of Representatives' companion bill H.R. 15, which seek to include provisions mandating appointment of counsel for unaccompanied children.²³⁹

4.2.4 Appointment of a Child Advocate

Unlike in domestic child welfare proceedings, the U.S. also does not provide all unaccompanied and separated children in immigration proceedings with an independent

²³⁶ Center for Gender & Refugee Studies, 2015, p. 18.

²³⁷ 8 U.S.Code § 1232(c)(5).

²³⁸ American Immigration Council, 2015, p.8; KIND 2014 p. iii.

²³⁹ Center for Gender & Refugee Studies & Kids in Need of Defense, 2014, p. iii-iv.

child advocate to advise and support them through the process.²⁴⁰ The TVPRA granted HHS the authority to appoint an independent child advocate in cases of “child trafficking victims and other vulnerable unaccompanied alien children” to “advocate for the best interests of the child.” As this paper argues, unaccompanied and separated children whom are forced migrants and asylum seekers are vulnerable and as such should also have a child advocate appointed to them.

4.2.5 Deportation, Repatriation, and Reintegration

Aside from U.S. law attempts to ensure safe repatriation and sustainable reintegration of unaccompanied children, the U.S. continues to repatriate children without utilising the principle of BIC. The U.S. has returned children back to persecution and even death, the very same circumstances that have compelled them to flee in the first place. For instance, Hector Hernandez, who runs a morgue in Honduras, reports that at least five and as many as 10, of forty-two children murdered and at his morgue from February to August 2014 had been deported from the U.S. “There are many youngsters who only three days after they’ve been deported are killed, shot by a firearm.”²⁴¹

In 2004, in a well-publicised case, Edgar Chocóy Guzman was killed by gangs just seventeen days after his return to Guatemala. He had raised this exact fear in his unsuccessful attempt to gain U.S. protection during the course of his removal proceedings.²⁴²

On top of it, U.S. offers no support for reintegration after repatriation occurs (i.e. no medical, mental health, educational or job training support, basic safety, etc.).²⁴³ As mentioned earlier (in Chapter 3), the U.S. has contributed to the formation and strengthening of security forces in Mexico (i.e. to secure borders) in order to deter

²⁴⁰ Center for Gender & Refugee Studies, 2015, p. 19.

²⁴¹ Carcamo, In Honduras, U.S. deportees seek to journey north again, available at <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deported-youths-20140816-story.html> (consulted on 4 July 2015).

²⁴² De Leon, Guatemalan Youth Slain 17 Days After Being Deported From U.S., at <http://articles.latimes.com/2004/may/09/news/adfg-deport9> (consulted on 12 July 2015).

²⁴³ Center for Gender & Refugee Studies, 2015, p. 20.

migration prior to crossing the border. However, this type of response, which is a “band-aid” solution does not address the root causes of the problem or ensure child safety and protection.

4.3 Remarks

This subchapter will propose recommendations for the U.S. as follows: need for a regional approach, ratification of the CRC, broaden refugee definition, implement practical safeguards, and focus on long-term solutions. These recommendations are not explicitly those of the author however, from analysis the author would agree.

Need for Regional Approach

Existing bilateral and regional agreements regarding migration in Central and North America fall short of an adequate response. Rather than focusing on protection needs, the focus remains on the logistics of repatriation. State parties should create a binding rights-based approach mechanism to ensure compliance and implement sanctions for non-compliance. Interestingly, this need for a regional initiative was given attention at the International Conference on Migration, Childhood and Family where a declaration “An Invitation to Action” was created; however, it is based on generalisations and lacks commitments to address the crisis.²⁴⁴

Ratification of United Nations Convention on the Rights of the Child

First and foremost, the U.S. should ratify the CRC. Specifically, the principle of the best interests of the child should be incorporated into existing and future immigration legislation, policy, and practice. As recommended in a report by the Center for Gender & Refugee Studies and Kids in Need of Defense, a new form of immigration relief

²⁴⁴ Organization of American States, OAS Secretary General Calls for a Regional Plan of Action to Address “the Humanitarian Drama of the Child Migrants”, available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-302/14 (consulted on 10 July 2015).

should be developed to prevent children from being sent back to their home countries when it is not in their best interests to do so.²⁴⁵

Broaden Refugee Definition

Decision-makers, especially in cases involving children, should broaden the notion of persecution.

Implement Practical Safeguards

Appoint a guardian-like advisor for children in asylum proceedings. Legislation should be mandated to ensure the appointment for all unaccompanied and separated children as soon as they are identified. Without the appointment of a guardian *ad litem*, the child's perspective may not be heard which is a central element in ensuring the BIC.

Provide legal representation, as is the case for domestic juvenile delinquency court proceedings. Congress should enact legislation making it mandatory for unaccompanied and separated children to receive legal counsel in deportation proceedings.²⁴⁶

In addition, INS Guidelines do not require legal counsel or provide court-appointed counsel, and they do not provide interpreters for unaccompanied minors. Thus, for children, gaining asylum without representation is next to impossible for many reasons such as the inability to understand the proceedings.

Children should never be detained. Child welfare agencies should take custody of unaccompanied and separated children.

²⁴⁵ Center for Gender & Refugee Studies and Kids in Need of Defense, 2014, p. vii.

²⁴⁶ *Idem*.

Focus on Long-term Solutions

There should be a focus on long-term solutions rather than short-term (“band-aid” solutions). For instance, tackle violence prevention in origin countries. This can be achieved by working with civil society organisations to design and develop policies to prevent and sanction child abuse, violence against children by gangs and other criminal actors. Policies should address factors that resulted in weak and ineffective justice systems and strategies to reduce corruption.²⁴⁷

Conclusion

The goal of this chapter was to draw a portrait of the current legal and policy frameworks in the U.S. and to interpret this in light of state practice. It is evident that the U.S. system represents a “paradoxical blend of excess and deficiency”. There are numerous agencies and actors involved with processing, prosecuting, and caring for unaccompanied and separated children. Recognition of the multiple bureaucratic structures and actors involved in the process was necessary to understand the treatment of the children when arriving in the U.S. It is safe to say that law and policies within the U.S. overlook unaccompanied and separated children and do not treat them with their best interests in mind. This could be seen through state practice in various ways: rejection at borders, repatriation, detention, formal and practical limitations to family reunification, lack of mechanisms to protect life and physical integrity in both countries of origin and transit, and last but not least, the denial of basic human rights in the countries of origin. Further, it is evident that the forms of relief available to children are not adequate in protecting them. All these factors reveal that both action (or shall we say inaction) and the omission of state policies and bad practice are not informed by the BIC. This chapter included a subsection of practical recommendations for improving the situation of unaccompanied and separated children in the U.S., with hopes that those involved with children’s rights will consider, debate, and implement. The protection and

²⁴⁷ Center for Gender & Refugee Studies, 2015, p. 20.

best interests of the children who are forced migrants and seeking asylum depends on this.

5. ANALYSIS OF ITALIAN LAW, POLICIES, AND PRACTICE

“Even in Italy, you have to be more widely aware of the persistence, of the possible ulterior extensions of the flow of refugees, the global dimension of the phenomenon and the responsibility that no civilised country can escape. The problem that arises is rather to fill the gaps that are still present in our national law and in our system of reception, protection, and integration.”²⁴⁸

- G. Napolitano

This chapter will be structurally parallel to that of Chapter 4, with few exceptions, but will explore Italy’s law, policy, and practice with regards to unaccompanied and separated children arriving to Lampedusa. Unlike the U.S., Italian national legislation offers a wide range of guarantees to unaccompanied and separated children, however, similar to the U.S., shortcomings in Italy’s implementation still exist. The first section of this chapter will surround Italy’s domestic system, in particular the Italian Constitution. Within this, a subsection will look at the application of the legal agenda to children. A section will also explore the key actors involved, their roles and responsibilities, and how they co-operate with other actors in order to ensure that the rights of unaccompanied and separated children are maintained. Further, state practice will be analysed in comparison to Italian laws and policies. Finally, this chapter will conclude with key remarks that offer a few recommendations to Italy and also outlines certain practice as best practices.

5.1 Law and Policies

This subchapter will begin by outlining the Italian Constitution in general, while making reference to it throughout. In Italy, the main standards for the protection, security, and reception of unaccompanied children can be found within immigration and

²⁴⁸ Free translation from Italian to English by the author.

child law. The legal framework as it applies to children will be discussed, including an assessment of key actors involved, and finally, certain policies will be outlined.

5.1.1 Domestic Law: Italian Constitution

Article 10 of the Italian Constitution sets out very important guidelines. First and foremost, it recognises that the Italian legal system conforms to the rules set forth by international law. Specifically, recognising that the legal status of foreigners shall be regulated correspondingly with international treaties. Further, Article 10 stipulates,

[a] foreigner who is denied, in his or her own country, the effective exercise of the democratic liberties guaranteed by the Italian Constitution shall have the right of asylum in the territory of the Italian Republic, in accordance with the conditions established by law. Extradition of a foreigner for political offences is not admitted.²⁴⁹

There is no specific reference to unaccompanied and separated children; however, Article 30 and Article 31 make reference to children in general. Article 30 purports, “[i]n case of incapacity of the parents [to support, raise and educate their children], the law shall provide for the fulfilment of their duties.”²⁵⁰ While, Article 31 states that the Republic shall protect “...children and the young by adopting the necessary measures.”²⁵¹

5.1.1.1 Italy’s Legal Agenda as it Applies to Children

In Europe, the legal system concerning the reception and protection of unaccompanied and separated children is mainly from the 1951 Convention Relating to the Status of Refugees and the CRC, plus provisions outlined in other agreements. A child who enters the EU must not only be accepted based on the BIC principle, but must also have procedural safeguards implemented to ensure long-term solutions.

Italy has no established law in the area of protection for unaccompanied children. Being a child falls within the scope of various legal frameworks and policies – juvenile

²⁴⁹ Constitution of the Italian Republic, 1947, Article 10.

²⁵⁰ *Idem*, Article 30.

²⁵¹ *Idem*, Article 31.

law, citizenship, immigration, and family law. Italian law allows all unaccompanied and separated children the right to stay in the country, providing numerous services until age of majority is acquired. Hence, Italian law recognises these children as migrants but first and foremost as children.²⁵² Italian legislation (Decree n. 535/99) defines “unaccompanied foreign minor”²⁵³ as: “[...]children without Italian (or any other EU country’s citizenship, who – not having applied for asylum – find themselves in Italy without care and representation by parents or other legal guardians (either officially recognized guardians, or within third-degree relatives) in accordance with Italian laws.”²⁵⁴

Notably, the right to education and health is granted to all foreign children. Even without a residence permit, children are entitled to education, including the obligation to complete mandatory schooling. Further, unaccompanied and separated children are able to enrol in the National Health Service free of charge. There is a good practice that occurs in Lampedusa, which is appropriate to outline here. At the time of rescue (i.e. on Coast Guard vessels), unaccompanied children meet a doctor. This is carried out based on an agreement protocol between the Coast Guard and the Prefecture of Lampedusa, ensuring the on-board presence of the Knights of Malta (CISOM) doctors.²⁵⁵

The only EU document dedicated to unaccompanied and separated children is the *1997 EU Resolution on unaccompanied minors who are nationals of third countries*.²⁵⁶ However, it is evident that this resolution is influential. Italian legislation, for instance, includes the adoption of the definition of unaccompanied foreign minor, a provision of an “assisted” repatriation rather than the child’s expulsion from the territory, repatriation as a priority motivated by family reunification, and the temporary reception of children.

²⁵² Consoli, 2015, p. 21.

²⁵³ The definition of “unaccompanied foreign minor” adopted by Italian legislation is equivalent to the definition provided in the 1997 EU Resolution on Unaccompanied Minors Who are Nationals of Third Countries.

²⁵⁴ Decree n. 535/99 *apud* European Migration Network, 2009, p. 4.

²⁵⁵ Gerace *et al*, 2014, p. 24.

²⁵⁶ European Union: Council of the European Union, *Council Resolution of 26 June 1997 on Unaccompanied Minors Who are Nationals of Third Countries, 18 March 1998, 97/C221/03*, available at <http://www.refworld.org/docid/3ae6b3a4c.html> (consulted on 28 June 2015).

In 1998, the Italian Parliament adopted the first orderly act regulating immigration – act n. 40/1998 (later in Decree n. 286/1998), that included principles such as: administrative impossible expulsion of unaccompanied foreign migrant minors, primary consideration of the BIC in all proceedings affecting children, and the decision to order out children was reserved to the Juvenile Court.

In regards to child law, Article 330 and Article 403 of the Civil Code are relevant, relating to the protection of children who find themselves in a dangerous situation or state of abandonment. In addition, provisions for the protection of children temporarily deprived of a sufficient environment can be found in the Law “Regulation on Child Adoption and Custody” (Law 184/1983 amended by Law 149/2001).²⁵⁷ On the other hand, within immigration law, the main reference text is Legislative Decree no. 286/1998, specifically, Article 19 and Article 32. Article 19 stipulates that unaccompanied children cannot be expelled from Italian territory.²⁵⁸ Anyone who is aware of, or in contact with, a child who is endangered or deprived of a family environment should immediately report this to the Public Prosecutor for Juveniles and the Juvenile Court.²⁵⁹

In contrast to the U.S., the EU has a regional policy for migration. In order to understand the Italian immigration system we must review the EU immigration policy, which influences and binds Italy in legislative choices. Italy is an active participant in EU efforts to harmonise asylum policies for the establishment of a Common European Asylum System. In June 2013, Italy signed a Special Support Plan, which provides backing from the European Asylum Support Office to address a number of aspects of its asylum system that require strengthening.²⁶⁰ The rules governing asylum are regulated at EU level by the Dublin III Regulation,²⁶¹ for which the foreigner may apply for international protection in the country of first entry. The residence permit for asylum is good for five years and is renewable upon expiration.

²⁵⁷ Civil Code Articles 330 and 403; Law 184/1983 amended by Law 149/2001 *apud* Gerace *et al*, 2014, p. 16.

²⁵⁸ Legislative Decree no. 286/1998 Article 19 *apud* Gerace *et al*, 2014, p. 16.

²⁵⁹ Gerace *et al*, 2014, p. 16.

²⁶⁰ *Idem*.

²⁶¹ The Dublin III regulation provides a legal basis in which criteria and mechanisms are set out to determine the member state responsible for examining an asylum application lodged in member states.

Regarding the asylum procedure, it should be noted that Italy has implemented EU directives into national legislation.²⁶² The EU directives together with Consolidation Law on Immigration, the Directive on Unaccompanied Children (December 2006) issued by the Ministry of the Interior, and the Decree of the President of the Republic 303/2004, provide specific protective measures for unaccompanied and separated children.

Official data suggests that although a significant number of unaccompanied and separated children that arrive in Italy originate from traditional refugee-producing countries, many do not apply for international protection in Italy. Many children do not register with the authorities based on the assumption that they will be returned to Italy under the Dublin regulation. Although Italian law guarantees protection to all unaccompanied children, regardless if they apply for asylum or not, there remain gaps within their realisation of children's rights.²⁶³ As mentioned, there exists no national framework for working with these children and no specific actor tasked with the national co-ordinating role responsible for the overall reception and protection of unaccompanied children. Rather, the competencies required for the protection of unaccompanied children are dispersed among various actors.²⁶⁴

5.1.2 Key Actors Involved with Unaccompanied and Separated Children

A central agency involved, not specifically with unaccompanied and separated children, but with immigration in general within the EU is The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (*hereinafter* "Frontex"). Frontex is a EU institution established in 2004 in order to strengthen and improve co-operation between national borders. Frontex has several operating areas, which are defined by the founding regulation. Among the main tasks of Frontex are the following: co-ordination and co-operation between Member States in the management of external borders; assist Member States

²⁶² Council Directive 2005/85/EC; Council Directive 2004/83/EC; Council Directive 2003/9/EC.

²⁶³ Gerace *et al*, 2014, p. 7.

²⁶⁴ *Idem*.

on training of national border guards; carry out risk analyses; follow the development of research relevant for the control and surveillance of external borders; provide Member States with the necessary support for the organisation of joint return operations; and, so forth.²⁶⁵

The Italian authorities, the Coast Guard, Tax and Customs Police (Guardia di Finanza), and the Italian Navy, have been active participants in undertaking rescue at sea, including bringing those rescued to Italy.

In addition, with regards to protection of unaccompanied and separated children in Italy, the main actor is the Ministry of Labour and Social Affairs' Directorate General of Immigration and Integration Affairs (*hereinafter* "the Directorate General"). The Directorate General's responsibility lies within the registration of unaccompanied children and carrying out family tracing.²⁶⁶

The main actors who initially engage with unaccompanied children and carry out identification and placement procedures are law enforcement agencies such as the police. By law, the regions have the task of establishing minimum requirements necessary for the provision of services and the management of residential care facilities for children, but must comply with the minimum requirements set at national level.²⁶⁷ The regions are required to take all necessary measures to facilitate the process of "de-institutionalisation" of the child, organising services and residential facilities for child reception.²⁶⁸ The municipality searches for available places for the children within the community and provides, through social services together with the guardian, the individual educational plan for each child's needs and specific situation. While, local social services have the duty to report on the situation of unaccompanied children living in children's care facilities to the Juvenile Court.²⁶⁹

²⁶⁵ Ministero dell'interno, Frontex, available at <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/frontex> (consulted on 1 July 2015); Frontex, Mission and Tasks, available at <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (consulted on 1 July 2015).

²⁶⁶ Gerace *et al*, 2014, p. 8.

²⁶⁷ Idem.

²⁶⁸ Idem.

²⁶⁹ Idem.

Other actors involved include the following: the Prefecture, the Police Office of Immigration, the Juvenile Court, and Ombudsman for Children – regional and national. The Prefecture is a body that represents the national government at provincial level and acts as a territorial Office of the Government regarding co-ordination of activities, relating to the procedures for first entry and assistance to unaccompanied and separated children, between the Immigration Offices, regional, and local authorities.²⁷⁰ The Police Office of Immigration is the body responsible for issuing documentation that certifies the legitimacy of the child's presence as an immigrant in the country and the Police Office of Immigration receives the request for asylum.²⁷¹ The Juvenile Court assumes the task of assessing the situation of each unaccompanied child and makes decisions for long-term solutions with BIC in mind. Juvenile Court judges are qualified in the subject of communication with children in judicial matters and child law.²⁷² Most Italian regions have a law establishing the Ombudsperson for Children and Young People, but not all have appointed a person to fulfil this role. One of their main activities is the training of volunteer guardians for unaccompanied children and to check on reception conditions. The National Ombudsman for children does not have a specific mandate in the protection and guardianship of unaccompanied children (Law 112/2011).²⁷³

Also, social services, lawyers, guardians, social workers, and staff from children's care facilities, plays a role in different aspects such as identification, hosting, and monitoring unaccompanied and separated children.²⁷⁴ Specifically, the cultural/linguistic mediator, a professional tasked with facilitating the integration of immigrants into the social context of the host country, acting as an intermediary between the needs of migrants and the responses offered by public services.²⁷⁵ In Italy, the role of intercultural mediators has progressively evolved into an established tool for immigrants' social integration. A specific law (Legislative Decree no. 286/98, Article 38) requires the State, regions, and local authorities to encourage specific agreements

²⁷⁰ *Idem*.

²⁷¹ *Idem*.

²⁷² *Idem*, p. 9.

²⁷³ *Idem*, p. 24.

²⁷⁴ Consoli, 2015, pp. 7 – 8.

²⁷⁵ Gerace *et al*, p. 8.

with legally registered associations for them to employ immigrants as intercultural mediators within their organisations. Although Italian law explicitly provides for the engagement of intercultural mediators, national legislation does not include specific rules or guidelines, defining and providing for their role.²⁷⁶

Overall, it is important to review the actors involved with unaccompanied and separated children, at various levels, to see the discrepancies in their qualifications, skills, and training. For example, the Judges of the Juvenile Court, on the one hand, are qualified in communicating with children in judicial issues and child law; on the other hand, they have no specific training on legislation for the protection and safeguarding of unaccompanied children. Further examples are the law enforcement agencies (i.e. Guard Coast, Finance Guards, etc.) that attend courses on immigration law, but not on children's rights. Hence, there is no training on best practices when questioning children, in their approach and/or identification of victims of trafficking, etc.²⁷⁷

5.1.3 Outline of Policies for Children

Below the major policy documents, with regards to children, will be outlined. First, in April 2009 the Parliamentary Commission for Childhood and Adolescence adopted the Resolution (Chamber of Deputies, Doc XVII-bis no.6). This resolution was adopted after a six month fact-finding study took place on unaccompanied children. The children's grave social situations were observed and highlighted while at the same time, there was a call for an urgent need to identify measures, as soon as possible, to ensure the effective protection of unaccompanied children, safeguarding them from an uncertain fate and the abuse of their most basic rights as vulnerable people.²⁷⁸ Second, there exists the National Plan of Action and Interventions for the Protection of Rights and Development of Subjects in the Developmental Stage (National Plan for Childhood – NPC). This document contains key strategic and practical commitments that the government intends to pursue in order to develop an appropriate policy for childhood

²⁷⁶ Idem.

²⁷⁷ Idem, p. 45.

²⁷⁸ Idem, p. 18.

and adolescence. The only provision regarding unaccompanied children, in the most recently approved NPC (2010-2011), was the need to strengthen the integrated network of services.²⁷⁹ Third, in 2012 a National Fund for the reception of unaccompanied children was established. This fund allocated €25 million in 2013, with its aim at supporting care facilities for children. In 2013, the pilot Children's Online Information System (SIM) was launched.²⁸⁰ Lastly, the Guidelines on Unaccompanied Children (19/12/2013) of the Ministry of Labour and Social Affairs' Directorate General of Immigration and Integration Affairs were established based on the need to outline the procedures carried out by the Directorate General relating to unaccompanied children. Specifically, the guidelines define procedures to provide the Directorate General with information concerning children to comply with its duty to collect data, and include simple, specific forms to activate family tracing and apply for assisted voluntary return. It also explains the process where the Directorate General provides the opinion for the conversion of the residence permit to citizenship at age 18. The guidelines' objectives are to simplify all procedures and ensure greater Government accountability.²⁸¹

5.2 Practice: Key Issues for Unaccompanied Children

Below key issues, such as age assessment, accommodation, legal representation, guardianship, family tracing, return and integration, and disappearances, will be outlined and examined based on how they are set out in law *versus* how they are carried out in practice.

5.2.1 Age Assessment

Medical examinations for age assessments with respects to children are supposedly only carried out as a last resort. Age assessment procedures must only be carried out in the event of reasonable doubt as to age and when it is not possible to determine the age of the person in another manner. In order to ensure a proper age assessment, questions

²⁷⁹ Idem.

²⁸⁰ Idem.

²⁸¹ Idem.

to the child about their age should be explicit – day, month, and year. However, the information is often requested more generally (i.e. how old are you?). Further, officers do not always request children to show their identity documents, even in instances where there are doubts about the declared age.²⁸²

Although there is an absence of specific legislation to define age assessment procedures in Italy, Italian officials have worked to create national guidelines for a multidisciplinary (medical, psychological, pediatric) verification of age – the so-called Ascone Protocol. However, this document has yet to be transposed into law. There have been proclamations of discrepancies at the local level about the misuse of x-ray examinations of the wrist.²⁸³

Further, by law, Legislative Decree 25/2008, Article 19, paragraph 2, a child must provide their informed consent prior to undergoing a medical examination for a non-invasive age assessment. In practice, this provision is ignored.²⁸⁴

5.2.2 Accommodation

Italy has obligations with regards to detention based on various laws: international refugee law, international human right law, and the Italian Constitution. Although there is no explicit provision in the 1951 Convention Relating to the Status of Refugees that prohibits arbitrary detention, Article 31(1) provides that States,

...shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.²⁸⁵

As a state party to the Convention and Protocol, Italy is bound by this international treaty.²⁸⁶ Further, the International Covenant on Civil and Political Rights, which Italy is

²⁸² *Idem*, p. 41.

²⁸³ *Idem*, p. 17.

²⁸⁴ *Idem*, p. 41.

²⁸⁵ UN General Assembly, 1951, Article 31(1).

²⁸⁶ Italy ratified the Convention relating to the Status of Refugees on 15 November 1954; and, acceded the Protocol on 26 January 1972.

also bound by,²⁸⁷ contains a key provision in international law guaranteeing the right not to be arbitrarily detained. Article 9(1) states,

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.²⁸⁸

Moreover, Article 13 of the Italian Constitution stipulates that “[p]ersonal liberty is inviolable.”²⁸⁹ Thus, holding of foreigners in identification centers would be considered a restriction on this constitutional guarantee to personal freedom.²⁹⁰

Unaccompanied and separated children seeking asylum in Italy are not detained, rather they are to be accommodated in reception centers suitable for their age, or assigned a foster family. This practice can be seen as applying the CRC, specifically, the BIC principle. Article 37(b) explicitly states, “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”²⁹¹

Further, Italian legislation states that a child cannot be housed in centers with adult immigrants.²⁹² National law purports that children in difficulty or a state of abandonment should be entrusted to a family or, alternatively, to a children’s home.²⁹³ In actuality, foster care for unaccompanied children is not widespread and placement in children’s care facilities continues to be the first option. The law further explained that in order to ensure “a family atmosphere” and better care, facilities should be small, hosting a maximum of ten people, with two additional children under special circumstances.²⁹⁴

Nonetheless, there is considerable scope for improving the application of these provisions in practice. For example, in certain cases, unaccompanied and separated

²⁸⁷ Italy ratified on 15 September 1978.

²⁸⁸ UN General Assembly, 1966, Article 9(1).

²⁸⁹ Italian Constitution, 1947, Article 13.

²⁹⁰ UNHCR, 2006, p. 130.

²⁹¹ UN General Assembly, 1989, Article 37(b).

²⁹² Law Decree 25/2008, Article 26.6; Directive 7/12/2006, Article 2 *apud* Gerace *et al*, 2014, p. 17.

²⁹³ Civil Code, Article 330 and 403; Law 184/1983, *apud* Gerace *et al*, 2014, p. 17.

²⁹⁴ Law 328/2000, Article 3; Law 184/1983, Article 5 paragraph 4. *apud* Gerace *et al*, 2014, p. 17.

children remain in precarious conditions for prolonged periods of time before being transferred to adequate facilities. A visit to Lampedusa by the Guarantor for Childhood and Adolescence organisation, raised alarm about the precarious conditions that the reception center has for children, reporting that children sleep on mattresses placed on the ground with very unhygienic conditions.²⁹⁵

Reception Centers are structures designed to guarantee initial assistance to foreigners who arrive in Italy without permission, and their reception at these centres is limited to the period of time necessary for the adoption of a measure, which authorises their stay in Italy or orders their departure.²⁹⁶ Individuals arriving by boat to Italy are held in “first reception centres” for the purpose of identification and clarification of their status. They receive assistance, are identified and detained in view of deportation, or in cases of international protection needs for the assessment procedures of the relevant requirements. These first reception centers are closed centers, without judicial control.

The structures in place are divided into: first aid and reception centers (CPSA), shelters (CDA), reception centers for asylum seekers (CARA), and centers for identification and expulsion (CIE).²⁹⁷ The CPSA hosts foreigners at the time of arrival. In these centers they are provided with the initial medical treatment necessary, fingerprints and photos are taken, and have the opportunity to apply for international protection. Finally, depending on their condition, they are transferred to other types of centers. The CDA provide first assistance to foreigners tracked throughout the country for the time necessary for identification and assessment on the regularity of their stay in Italy. On the other hand, individuals who require international protection are sent to CARA in order to be identified and to initiate procedures relevant for international protection. The CIE is responsible for detaining foreigners who arrive irregularly to Italy and do not apply for international protection or do not meet the requirements.

²⁹⁵ Save the Children Italia, Lampedusa: continua a mancare un piano di intervento strutturato e non emergenziale per l'accoglienza dei minori in arrivo via mare, available at http://www.savethechildren.it/informati/comunicati/lampedusa_continua_a_mancare_un_piano?year=2013 (consulted on 1 July 2015).

²⁹⁶ Save the Children Italia, 2009, p. 4.

²⁹⁷ Ministero dell'interno, Centri per l'immigrazione, at <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-immigrazione> (consulted on 1 July 2015). Free translation by author.

According to decree no.89/2011 converted into Law n.129/2011, eighteen months is the maximum time for detention, which is due to identification procedures and followed by expulsion or repatriation.²⁹⁸ Also, Legislative Decree 25/2008 provides for a maximum period of twenty to thirty-five days of stay in CARAs before being transferred to a SPRAR, but this has never been implemented in practice due to lack of places within the SPRAR.²⁹⁹

The reception centers for minors must ensure the following: socio-psychological assistance, health care, legal guidance, support of linguistic-cultural mediators, collaboration with the City Council to report to the Directorate General, commences procedures for issuing a residence permit with local police headquarters, Italian language courses, school integration and professional activation of services in support of minors.³⁰⁰

5.2.3 Legal Representation

Article 12 of the CRC recognises the child's right to be heard and to express their opinion on procedures that affect them. In order to ensure Italy abides by this, children must be supported by lawyers (specialised in child law). Law 149/2001 ensures that children are provided free legal assistance. According to Save the Children's experience monitoring reports on children's care facilities, not all facilities have lawyers on staff and this lack was among the leading causes of child disappearances (to be discussed further on).³⁰¹

5.2.4 Guardianship

The law states that if a child does not have a responsible adult he/she should be appointed a guardian "as soon as possible" by the Jurisdictional Authority, especially

²⁹⁸ Idem.

²⁹⁹ UNHCR, 2013, p. 11.

³⁰⁰ Ministero dell'interio, 2014, p. 35.

³⁰¹ Gerace *et al*, 2014, p. 23.

within 48 hours of their stated intention to apply for asylum. In practice, the length of time for appointment of a guardian varies and can last months due to delays in judicial proceedings. There are no consistent practices in choosing guardians, but the law generally provides that the guardian must be an adult who is suitable for the role to ensure the child's protection and care for and legally represent the child.³⁰² Judicial authorities follow certain criteria in choosing the most appropriate guardian considering suitability for the role, as it is important, they have the knowledge and skills to take on responsibility for the child's education and learning, considering the child's skills, natural inclinations, and ambitions.³⁰³ In practice, this task is often assigned to the Mayor of the municipality where the child is located, who often delegates to social services.³⁰⁴

Thus, the appointment of a guardian can be seen as a mere formality, with duties being delegated to social workers whom cannot keep up in regards to providing individualised assistance because of high numbers of unaccompanied children assigned to them. Also, it has been reported by Save the Children, that in Sicily there are lengthy wait times from two to eleven months, with some cases exceeding a year for the appointment of guardians, which do not meet the criteria in place for these children.³⁰⁵

5.2.5 Family Tracing

The Ministry of the Interior (through the Dublin Unit) conducts family tracing to promote the identification of family members of unaccompanied asylum-seeking children. The law established that such activity should be based on agreements specified for this purpose between the Ministries and national or international organisations. However, this does not currently apply to the Ministry of Interior.

³⁰² Civil Code, Article 403; Law 184/83, Article 19 *apud* Gerace *et al*, 2014, 25.

³⁰³ Civil Code, Article 147 *apud* Gerace *et al*, 2014, 25.

³⁰⁴ Gerace *et al*, 2014, p. 17.

³⁰⁵ Save the Children Italia, La Situazione dei Minori Stranieri non accompagnati in Italia – Dati e Storie, http://risorse.savethechildren.it/files/comunicazione/Ufficio%20Stampa/DDL%20MNA_DATI%20E%20STORIE_25lug2013.pdf (consulted on 8 July 2015).

For one year, until December 2014, there was an operation carried out by IOM, Save the Children, Praxis, and CivicoZero, in various countries, Italy being one. The project called, PRUMA – To promote family reunification and the transfer of unaccompanied children seeking asylum within the European Union under the Dublin Regulation, had as its objective to create a solid and sustainable co-ordination operation for the development and implementation of standard operating procedures for family reunification under the Dublin Regulation, ensuring that the needs and rights of unaccompanied children were respected.³⁰⁶

5.2.6 Return and Integration

Non-asylum seeking unaccompanied and separated children can be returned to their home countries. However, the assisted/voluntary return must safeguard the right to life of the child and the right to family reunification, while necessary protection measures need to be adopted. Agreements between the Italian government and NGOs set out special procedures, which also must be followed.

Similar to legal representation, the will and opinions of children are fundamental principles in the procedures for voluntary return to their home country. In Italy, children's opinions are gathered through extensive interviews conducted by social services, who then communicate the information to the jurisdictional authority responsible for children.³⁰⁷

Intercultural mediators fall within the scope of integration policy. In Italy, intercultural mediators were first introduced within the school environment. The role of these mediators gained momentum into a stable tool for foreigners' social integration, now seen in Article 40, Law no. 40/1998, with the enactment of further Directives and regulatory documents.³⁰⁸

³⁰⁶ Gerace *et al*, 2014, p. 39.

³⁰⁷ *Idem*, p. 20.

³⁰⁸ *Idem*, p. 8.

5.2.7 Disappearances

A problem that occurs, and can be seen in the media recently, is that unaccompanied and separated children often disappear. All actors agree that the Police are the primary actors to turn to; they have the role, mandate and responsibility to search for persons who are missing. Where the unaccompanied child voluntarily disappears, becoming untraceable, the responsible of the care facility must report the disappearance to the guardian, local social services and to the Judicial Authorities.. Law 400/1988 established the position of Special Commissioner of the Government for Missing Persons, to ensure the proper management of investigations and timeliness of actions aimed at finding missing people. However, it is only recently that legislation was enacted to establish a procedure for the search of missing persons, although it is often not applied in cases where unaccompanied children go missing.³⁰⁹

According to Save the Children's experience, some reasons for unaccompanied children to move on from the border include: inadequate reception conditions, as well as limited opportunities for work. In these situations, unaccompanied children are more prone to trafficking and exploitation.³¹⁰

5.3 Remarks

As recommended by the UNHCR, the Italian government should identify a single national body specifically to oversee unaccompanied and separated children. Further, all actors/agencies involved should receive equal/similar training in all necessary areas – i.e. immigration law, children's rights, best practices, etc. Generally, Italy has practices that have been noted as best practices. Below, the Praesidium Project and the Online Information System will be outlined and should be taken as a model for other countries.

³⁰⁹ Idem.

³¹⁰ Idem, p. 37.

Praesidium Project

Since 2008, Save the Children, International Organisation for Migration (IOM), UNHCR, and the Red Cross have been partners in the Praesidium Project, co-ordinated by the Ministry of the Interior – Department of Civil Liberties and Immigration. This project aims at strengthening the capacity of the Italian authorities in managing migration flows in Southern Europe. The staff involved in the project are immediately involved upon arrival and they work in teams to monitor procedures of reception conditions and to provide legal information.³¹¹

Online Information System (SIM)

Importantly, inter-agency co-operation is developed through formal protocols at local levels. A specific model for co-operation is an online information system (SIM) to strengthen data collection and facilitate communication and interaction among all institutions and improve the effective documentation of the reception of unaccompanied children upon their arrival in Italy. It is currently under development and being tested in seven pilot locations. This system will allow all involved parties (police, regions, municipalities, communities, Tribunals, etc.) to access a shared database where, according to one's mandate and ensuring data protection, each actor may enter, read and update the information on children. The implementation of this system will strengthen co-operation among actors in their work to appropriately provide reception and integration pathways for children.³¹²

Conclusion

The aim of this chapter was to compare and contrast the current legal framework and policies in place in Italy for unaccompanied and separated children, with actual state practice. Similar to the U.S., various actors interact with unaccompanied and separated children once they enter Italy. Again, it is essential to understand the roles and duties

³¹¹ Idem, p. 24.

³¹² Idem.

that the various institutions are tasked with in order to visualise the impacts they have on children. In comparison to the U.S., Italy formally recognises the BIC principle in law and practice. Italy's best practices, listed above, work to advance the BIC. However, there still remains space for improvement, specifically with certain practices such as: appointment of guardian, accommodation, and disappearances. This chapter ended with minimal recommendations. Also, unlike Chapter 4, this chapter also included some best practices that Italy has which can serve as tools for other countries to follow and implement within their countries.

CONCLUSION

The presence of large amounts of unaccompanied and separated children, both in the U.S. and Italy, raises challenges between immigration enforcement and child protection. The principle of the best interests of the child is an international guiding principle in securing the rights of children. As portrayed through the evaluation of the U.S. national framework, the BIC is highly ignored in reality when dealing with unaccompanied and separated forced migrants and refugee children. However, as pointed out, the U.S. implements the principle in cases involving their national children. On the other hand, the BIC principle forms part of Italy's domestic law and tends to be implemented in practice. To reiterate, in order to ensure the implementation of the BIC principle in cases dealing with unaccompanied and separated children, certain safeguards must be applied. To name a few, reviewed throughout this dissertation, a prompt appointment of a guardian, legal representation to ensure children are being heard and the ability to express his/her views, family reunification, durable and long-term solutions, and access to health and education, are all necessary to safeguard children's rights.

Given the statistics of the children arriving in the two countries and the situations causing children to flee their home countries, the children's need for international protection becomes quite prevalent. Although the background stories of the children arriving to the U.S. and Italy are different, the overall situations occurring, the influx of unaccompanied and separated children arriving at borders in need of protection, are the same. Importantly, the phenomenon of children arriving at the borders cannot be separated from the circumstances of their countries of origin. Receiving states have an obligation to protect children arriving on their territory while at the same time, tackling the issue of migration flows with long-term strategies, including engaging in regional co-operation to help address root causes. In order to deal with the issue adequately, a regional approach is required. However, in order to develop a regional approach, to unaccompanied and separated children, the U.S. in particular, must recognise migration as an international human rights issue that requires a solution based in international principles and standards.

Throughout this dissertation it became clear that there exists legal voids and contradictions in law, policy, and practice with regards to unaccompanied and separated children, and the differential treatment afforded in the U.S. and Italy. In the U.S. context, there is an overall inadequacy of protection afforded to unaccompanied and separated children, both legally and practically. State practices, including rejection at the borders, detention of children, limitations to family reunification, and so on, all need to be addressed keeping in mind the BIC. As for Italy, it seems as if their laws, policies, and practice are more advanced, especially in comparison to the U.S. For both countries, children who arrive unaccompanied and separated come into contact with numerous state actors. As a result, practices that violate and/or fail to take the BIC into consideration are bound to occur at some point. It is necessary, then, for all actors to operate with uniform categories and procedures.

Also, there seems to be a need for a broadened refugee definition, in regards to both countries in question, to include persecution from a child's perspective. Although, the U.S. adopted the refugee definition, an even narrower interpretation than that of the international community, tends to be practiced.

This dissertation has used, as its basis, international human rights law. To answer one of the research questions, whether international law is strictly theoretical or is it also put into practice, there is no easy response. We can see from state practice that there are fluctuations in the way certain obligations are implemented and interpreted, but it is difficult to establish if these fluctuations breach international law. However, to address this question from the viewpoint of the CRC, in particular the BIC principle, generalisations can be drawn.

Overall, the author noticed differences between the U.S. and Italian systems, which made it apparent that the Italian system is more effective and affords greater protection to children. Hence, a conclusion can be drawn between a more effective and protective system and the ratification of the CRC. However, it would not be fair to make such an overt causal link, as there may be other factors to consider. Nevertheless, the best interests of the child should be the primary consideration in all actions relating to children. Therefore, this dissertation calls on the U.S. to ratify the CRC and implement

the provisions, especially the BIC into its domestic law, creating a legal obligation and the ability for individuals to be held accountable for violations that occur.

BIBLIOGRAPHY

- American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, June 2015, available at http://immigrationpolicy.org/sites/default/files/docs/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf (consulted on 11 July 2015).
- Amnesty International, *Amnesty International Report 2014/15: The State of the World's Human Rights*, 2015, available at <https://www.amnesty.org/download/.../POL1000012015ENGLISH.PDF> (consulted on 7 June 2015).
- Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 2014, available at <http://www.amnesty.ch/de/themen/asyl-migration/europa/dok/2014/verantwortung-fuer-fluechtlinge-in-seenot/bericht-lives-adrift-refugees-and-migrants-in-peril-in-the-central-mediterranean-.september-2014.-88-seiten> (consulted on 7 June 2015).
- Bhabha, Jacqueline and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, 2006, available at http://www.law.yale.edu/documents/pdf/Clinics/Seeking_Asylum_Alone_US_Report.pdf (consulted 12 June 2015).
- Canadian Coalition for the Rights of Children, *Best Interests of the Child: Meaning and Application in Canada*, 2009, available at <http://rightsofchildren.ca/wp-content/uploads/bic-report-eng-web.pdf> (consulted 22 June 2015).
- Carcamo, Cindy, *In Honduras, U.S. deportees seek to journey north again*, available at <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deported-youths-20140816-story.html> (consulted on 4 July 2015).
- Center for Gender & Refugee Studies and Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, February 2014, available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf (consulted on 5 July 2015).
- Center for Gender & Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges*, February 2015, available at <http://www.refworld.org/docid/54e5c3574.html> (consulted on 3 July 2015).
- Consoli, Teresa (ed.), *Migration towards Southern Europe: The Case of Sicily and the Separated Children*. Milano: FrancoAngeli, 2015.

- Constitution of the Italian Republic, The, 22 December 1947, available at http://en.camera.it/4?scheda_informazioni=23 (consulted on 4 July 2015).
- Covell, Katherine, “The Case for the Convention on the Rights of the Child from the Perspective of Child Psychology”, pp. 37-54, in Clark Butler, (ed.), *Child Rights: The Movement, International Law, and Opposition*, Purdue University, 2012.
- CRS, Unaccompanied Alien Children: An Overview, 8 September 2014, available at <http://fas.org/sgp/crs/homesec/R43599.pdf> (consulted on 27 June 2015).
- Dalrymple, Joyce Koo, “Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors”, pp. 131 – 168, in *Boston College Third World Law Journal*, vol. 26, 2006.
- De Leon, Sergio, Guatemalan Youth Slain 17 Days After Being Deported From U.S., at <http://articles.latimes.com/2004/may/09/news/adfg-deport9> (consulted on 12 July 2015).
- European Migration Network, Unaccompanied Minors: Quantitative Aspects and Reception, Return and Integration Policies. Analysis of the Italian Case for a Comparative Study at the EU Level, 2009, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/unaccompanied-minors/14a._italy_national_report_on_unaccompanied_minors_updated_version_4aug10_en.pdf (consulted on 29 June 2015).
- European Union, *Charter of Fundamental Rights of the European Union*, 18 October 2000.
- European Union, *Consolidated Version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at <http://www.refworld.org/docid/4b179f222.html> (consulted on 22 June 2015).
- European Union: Council of the European Union, *Council Directive 2003/86/EC of September 2003 on the Right to Family Reunification*, 3 October 2003, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=EN> (consulted on 22 June 2015).
- European Union: Council of the European Union, *Council Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals Who are Victims of Trafficking in Human Beings or Who Have Been Subject of an Action to Facilitate Illegal Immigration, Who Cooperate With the Competent Authorities*, 6 August 2004, available at <http://eur-lex.europa.eu/legal->

content/EN/TXT/PDF/?uri=CELEX:32004L0081&from=EN (consulted on 22 June 2015).

European Union: Council of the European Union, *Council Resolution of 26 June 1997 on Unaccompanied Minors Who are Nationals of Third Countries*, 18 March 1998, 97/C221/03, available at <http://www.refworld.org/docid/3ae6b3a4c.html> (consulted on 28 June 2015).

European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF> (consulted on 22 June 2015).

European Union: Council of the European Union, *Directive 2011/36/EC of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF> (consulted on 22 June 2015).

European Union: Council of the European Union, *Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, 19 May 2011, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0051&from=EN> (consulted on 22 June 2015).

European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF> (consulted on 22 June 2015).

European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=EN> (consulted 22 June 2015).

European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 26 June 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN> (consulted on 22 June 2015).

European Union: Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, 29 June 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0001:0030:EN:PDF> (consulted on 22 June 2015).

European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN> (consulted on 22 June 2015).

European Union: Council of the European Union, *Regulation (EU) No 610/2013 of the European Parliament and of the Council amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council*, 29 June 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0001:0018:EN:PDF> (consulted on 22 June 2015).

European Union: Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 4 May 2010, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN) (consulted 22 June 2015).

European Union: European Commission, *Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors (2010 – 2014)*, 6 May 2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:en:PDF> (consulted on 22 June 2015).

Fiddian-Qasmiyeh, Elena, Gil Loescher, Katy Long and Nando Sigona (eds.), *The Oxford Handbook of Refugee & Forced Migration Studies*. Oxford: Oxford University Press, 2014.

Fortune, Conor, Lampedusa: L'Isola Bella's shadow of death, 5 May 2015, at <https://www.amnesty.org/en/latest/news/2015/05/lampedusa-shadow-of-death/> (consulted on 10 June 2015).

Frelick, Bill, New US policy of little help to Central American families who live in fear, 8 July 2015, available at <http://www.hrw.org/news/2015/07/06/new-us-policy-little-help-central-american-families-who-live-fear> (consulted on 4 July 2015).

Frontex, Mission and Tasks, available at <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (consulted on 1 July 2015).

FTI Consulting, Public Insecurity in Latin America, at <http://www.fticonsulting.com/global2/media/collateral/united-states/2014-latin-america-security-index.pdf> (consulted on 13 June 2015).

Gardinier, Meg, "Why should the United States ratify the Convention on the Rights of the Child?", pp. 7 – 13, in *Child Welfare: Journal of Policy, Practice, and Program*, vol. 89, 2010.

Gautam, Kul Chandra, "Time for USA to ratify the Child Rights Convention", pp. 221 – 224, in *Child Welfare: Journal of Policy, Practice, and Program*, vol. 89, 2010.

Gerace, Valeria, Barbara Santagata, and Viviana Valastro, *The Rules of the Game: A Mapping of the Reception and Protection of Unaccompanied Children in Italy*. Save the Children Italia, 2014.

Gonzalez-Barrera, Ana & Jens Manuel Krogstad, With help from Mexico, number of child migrants crossing U.S. border falls, at <http://www.pewresearch.org/fact-tank/2015/04/28/child-migrants-border/> (consulted on 13 June 2015).

Grim, Here's how the U.S. Sparked a Refugee Crisis on the Border, in 8 Simple Steps, available at http://www.huffingtonpost.com/2014/07/18/refugee-crisis-border_n_5596125.html (consulted on 27 June 2015).

Gzesh, Central Americans and Asylum Policy in the Reagan Era, 2006, available at <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> (consulted on 2 July 2015).

Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980.

Huffington Post, Obama Requests \$3.7 Billion to Deal With Border Crisis, at http://www.huffingtonpost.com/2014/07/08/obama-border-crisis_n_5567258.html (consulted on 13 June 2015).

Human Rights Watch, “Maybe We Live and Maybe We Die:” Recruitment and Use of Children by Armed Groups in Syria, at <https://www.hrw.org/report/2014/06/22/maybe-we-live-and-maybe-we-die/recruitment-and-use-children-armed-groups-syria> (consulted on 8 July 2015).

Human Rights Watch, The Mediterranean Migration Crisis: Why People Flee, What the EU Should Do, 2015, available at http://uscdn.creamermedia.co.za/assets/articles/attachments/55312_hrw_eu0615_web.pdf (consulted on 5 July 2015).

Human Rights Watch, World Report 2015: Eritrea, at <https://www.hrw.org/world-report/2015/country-chapters/eritrea> (consulted on 10 July 2015).

Inter-American Commission on Human Rights, Juvenile Justice and Human Rights in the Americas, at <https://www.cidh.oas.org/countryrep/JusticiaJuvenileng/jjii.eng.htm> (consulted on 2 July 2015).

Inter-American Court of Human Rights, Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”, 19 August 2014, available at <http://www.refworld.org/docid/54129c854.html> (consulted on 2 July 2015).

IOM, World Migration Report 2000, available at http://iom.or.kr/wp-content/pdf/WMR_2000.pdf (consulted on 25 May 2015).

Italy: Law No. 40 of 1998, Provisions Governing Immigration and Regulations Concerning the Status of Foreigners, 6 March 1998, available at <http://www.refworld.org/docid/3fd9cc5e4.html> (consulted on 3 July 2015), Article 26(3).

Migrationist, The, Reaching Terraferma: Boat Migration to Southern Italy, at <http://themigrationist.net/2013/10/10/reaching-terraferma-boat-migration-to-southern-italy/> (consulted on 22 May 2015).

- Ministero dell'interno, Centri per l'immigrazione, available at <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione> (consulted on 1 July 2015).
- Ministero dell'interno, Cittadini stranieri minori di 18 anni. Tutela e definizioni, available at <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/modalita-dingresso/cittadini-stranieri-minori-18-anni-tutela-e-definizioni> (consulted on 1 July 2015).
- Ministero dell'interno, Frontex, available at <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/frontex> (consulted on 1 July 2015).
- Ministero dell'intero, Garantire I Diritti dei Minorenni: Vademecum per le forze di polizia, 2014, available at <http://www.interno.gov.it/it/sala-stampa/pubblicazioni/garantire-i-diritti-dei-minori-vademecum-forze-polizia> (consulted on 3 July 2015).
- Ministero dell'interno, Le Commissioni territoriali per il riconoscimento della protezione internazionale, available at <http://www.interno.gov.it/it/temi/immigrazione-e-asilo/protezione-internazionale/commissioni-territoriali-riconoscimento-protezione-internazionale> (consulted on 1 July 2015).
- Ministero del Lavoro e delle Politiche Sociali, Report Nazionale Minori Stranieri Non Accompagnati, 30 April 2015, available at http://www.lavoro.gov.it/AreaSociale/Immigrazione/minori_stranieri/Documents/Report%20MSNA%2030-04-2015%20-%20aggiornamento%2014-05-2015.pdf (consulted on 7 June 2015).
- Nazario, Sonia. *Enrique's Journey: The True Story of a Boy Determined to Reunite with his Mother*. New York: Random House, 2006.
- OAU, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.
- OAU, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969.
- Organization of American States (OAS), *American Convention on Human Rights* ('*Pact of San José, Costa Rica*'), 22 November 1969.
- Organization of American States, OAS Secretary General Calls for a Regional Plan of Action to Address "the Humanitarian Drama of the Child Migrants", at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-302/14 (consulted on 10 July 2015).

- Refugee Council USA, History of the U.S. Refugee Resettlement Program, at <http://www.rcusa.org/history> (consulted on 27 June 2015).
- Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.
- Rosenblum, Marc, Unaccompanied Child Migration to the United States: The Tension between Protection and Prevention, April 2015, available at <http://www.migrationpolicy.org/research/unaccompanied-child-migration-united-states-tension-between-protection-and-prevention> (consulted on 7 June 2015).
- Save the Children Italia, Accoglienza e tutela dei diritti dei minori nel Centro di Lampedusa: Dossier di monitoraggio, January 2009, available at http://images.savethechildren.it/IT/f/img_pubblicazioni/img28_b.pdf (consulted 3 June 2015).
- Save the Children Italia, Lampedusa: continua a mancare un piano di intervento strutturato e non emergenziale per l'accoglienza dei minori in arrivo via mare, available at http://www.savethechildren.it/informati/comunicati/lampedusa_continua_a_mancare_un_piano?year=2013 (consulted on 1 July 2015).
- Save the Children Italia, La Situazione dei Minori Stranieri non accompagnati in Italia – Dati e Storie, available at http://risorse.savethechildren.it/files/comunicazione/Ufficio%20Stampa/DDL%20MNA_DATI%20E%20STORIE_25lug2013.pdf (consulted on 8 July 2015).
- Separated Children in Europe Programme (SCEP), Statement of Good Practice 4th Revised Edition, 2009, available at <http://www.separated-children-europe-programme.org/images/18/219.pdf> (consulted on 26 June 2015).
- Shacknove, Andrew, “Who is a refugee?”, pp. 274-284, in *Ethics*, vol. 95, 1985.
- UN CRC, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5.
- UN CRC, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/43805.pdf?OpenElement> (consulted on 24 March 2015).
- UN CRC, *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

UN CRC, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC/C/GC/14.

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979.

UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 24 January 2007.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951.

UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in Eritrea, 13 May 2014, A/HRC/26/45.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.

UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4474140a2&query=alice%20wards> (consulted on 14 April 2015).

UNHCR, *Asylum-Seekers*, at <http://www.unhcr.org/pages/49c3646c137.html> (consulted on 25 April 2015).

UNHCR, *Asylum Trends 2014: Levels and Trends in Industrialized Countries*, 26 March 2015 (a), available at <http://www.unhcr.org/551128679.html> (consulted on 7 June 2015).

UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, 13 March 2014 (a), available at http://www.unhcrwashington.org/sites/default/files/UAC_UNHCR_Children%20on%20the%20Run_Full%20Report.pdf (consulted on 5 April 2015).

UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007 (a), available at: <http://www.refworld.org/docid/471897232.html> (consulted on 22 June 2015).

UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards*

relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, available at <http://www.unhcr.org/refworld/docid/503489533b8.html> (consulted on 20 June 2015).

UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, available at <http://www.refworld.org/docid/3ae6b3360.html> (consulted on 22 June 2015).

UNHCR, “Refugee or Migrant? Why it Matters”, pp. 1 – 31, in *Refugees*, vol.148, no. 4, 2007 (b).

UNHCR, *Refugee Protection: A Guide to International Refugee Law*, 2001, available at <http://www.unhcr.org/3d4aba564.html> (consulted on 25 May 2015).

UNHCR, *Safe & Sound: What States Can do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe*, October 2014 (b), available at https://www.unicef.at/fileadmin/media/Infos_und_Medien/Aktuelle_Studien_und_Berichte/Safe_and_Sound/Safe_Sound.pdf (consulted on 22 June 2015).

UNHCR, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, 1 July 2015 (b), available at <http://www.unhcr.org/5592bd059.html> (consulted on 3 July 2015).

UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at <http://www.unhcr.org/4566b16b2.pdf> (consulted on 22 June 2015).

UNHCR, *UNHCR Recommendations on Important Aspects of Refugee Protection in Italy*, July 2013, available at <http://www.refworld.org/docid/522f0efe4.html> (consulted on 10 July 2015).

UNHCR, *Why UNHCR cares about migration flows*, at <http://www.unhcr.org/4762830a4.html> (consulted on 25 May 2015).

UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989.

UNICEF, *Law Reform and Implementation of the Convention on the Rights of the Child*, December 2007, available at http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf (consulted on 21 June 2015).

UNICEF, *Fact Sheet: A summary of the rights under the Convention on the Rights of the Child*, n.d., at http://www.unicef.org/crc/files/Rights_overview.pdf (consulted on 22 June 2015).

United Nations Treaty Collection, *Convention on the Rights of the Child*, available at

https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en-title=UNTC-publisher= (consulted on 4 March 2015).

United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.

United States: *Immigration and Nationality Act*, 27 June 1952.

United States of America: *Civil Code*, available at <https://www.law.cornell.edu/uscode/text/6/279>

United States of America: Homeland Security Act of 2002, 25 November 2002, available at <http://www.refworld.org/docid/3deba3364.html> (consulted on 3 July 2015).

United States of America: *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Public Law 110457, 23 December 2008, available at <http://www.refworld.org/docid/49805ae72.html> (consulted on 5 July 2015).

UNODC, Global Study on Homicide 2013: Trends, Contexts, Data, March 2014, available at https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf (consulted on 13 June 2015).

UNODC, Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment, September 2012, available at http://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf (consulted on 13 June 2015).

U.S. Citizenship and Immigration Services, History of SIJ Status, at <http://www.uscis.gov/green-card/special-immigrant-juveniles/history-sij-status> (consulted 29 June 2015).

U.S. Citizenship and Immigration Services, In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), at <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam> (consulted on 29 June 2015).

U.S. Citizenship and Immigration Services, Our History, at <http://www.uscis.gov/about-us/our-history> (consulted on 28 June 2015).

U.S. Citizenship and Immigration Services, Temporary Protected Status, at <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (consulted on 10 July 2015).

- U.S. Citizenship and Immigration Services, Temporary Protected Status & Deferred Enforced Departure, at <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure> (consulted on 29 June 2015).
- U.S. Citizenship and Immigration Services, USCIS Processing of Asylum Cases, available at <http://www.uscis.gov/node/48323> (consulted on 29 June 2015).
- U.S. Department of Health & Human Services, Unaccompanied Children's Services, at <http://www.acf.hhs.gov/programs/orr/programs/ucs> (consulted on 29 June 2015).
- U.S. Customs and Border Protection, BP Southwest Border Family Units and UAC Apprehensions (FY2014-FY2015 Through June 30, 2015), at <http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20Jun.pdf> (consulted on 12 July 2015).
- U.S. Customs and Border Protection, Southwest Border Unaccompanied Alien Children (FY2014), at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children-2014> (consulted on 7 June 2015).
- U.S. Department of Justice Immigration and Naturalization Service, "Guidelines for Children's Asylum Claims", 10 December 1998, Available at <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> (consulted on 3 July 2015).
- U.S. Department of Justice, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, 22 May 2007, available at <https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Appendix%20O%20%20Working%20with%20Kids%20and%20EOIR%20Guidelines%20for%20Cases%20Involving%20Kids.pdf> (consulted on 3 July 2015).
- Villegas, Rodrigo, Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses, at <http://www.migrationpolicy.org/article/central-american-migrants-and-la-bestia-route-dangers-and-government-responses> (consulted on 29 June 2015).
- Walden University. Transcript: The Walden University Presidential Youth Debate, available at <http://youthdebate2008.org/debate-transcript> (consulted on 19 May 2015).
- Women's Refugee Commission, Forced from Home: The Lost Boys and Girls of Central America, October 2012, available at <https://womensrefugeecommission.org/component/zdocs/document/844> (consulted on 14 June 2015).

Wong, Tom, Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border, at <https://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>(consulted on 13 June 2015).