

Acknowledgments

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The Handling of Unaccompanied Minors Entering the United States from Mexico and the
Northern Triangle Region

A Thesis in Political Science

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Abstract

The United States government has been challenged by the unprecedented number of children arriving at the southwestern border raising questions regarding its capacity to deal with this crisis. The majority of children are fleeing from El Salvador, Guatemala, Honduras, and Mexico. Under international law, these children are eligible for international protection due to the circumstances that pushed them to leave. However, due to the lack of child-sensitive policies, the U.S. has failed in providing children with the help they need. This research project argues that the U.S. needs a more child-sensitive immigration system that takes into consideration the vulnerability of the child through a best interest of the child principle lens. Incorporating this principle into immigration laws that affect children will bring the U.S. immigration system in line with welfare laws and international laws in place to protect children. As a result, the United States will have an immigration system that takes into consideration the experience of children in their home countries, during the journey, and in the United States. Also, a best interest of the child policy will ensure that children have a just legal process in which they are able to understand their legal situation. This research analyzes the U.S. actions in repatriating, sheltering, and adjudicating children. As every part of the process after children arrive to the U.S. should be guided by a best interest of the child principle.

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Introduction

In recent years, there has been a significant increase in the number of unaccompanied minors entering the United States. In trying to understand this phenomenon, many believe that children are fleeing because of the high rates of violence and poverty that have plagued their home countries. The sky rocketing number of children fleeing has challenged the capacity of the United States to handle the situation. Apprehensions in the United States by Border Patrol units have increased steadily each year, from 16,067 in fiscal year (FY) 2011 to 24,481 in FY2012, to 38,759 in FY2013 and, finally, to 68,541 in FY2014 (Kandel and Seghetti 1). Traditionally, the majority of children has come from Mexico. However, the percentage of children coming from Central America, specifically, Guatemala, Honduras, and El Salvador, has drastically increased. In FY2009, Mexican children represented 82% of 19,668 Unaccompanied Alien Children (UAC) apprehensions, while children from the Northern Triangle Region (El Salvador, Guatemala and Honduras) represented 17%. By September 2014, those proportions changed: Mexican children comprised 23% of the 68,541 UAC apprehensions, while children from the Northern Triangle Region represented 75% of the apprehensions (Kandel and Seghetti 3).

The phenomenon of the child migrant has not been widely considered by the United States. However, the urgency of the increasing number of children coming into the country has called for an immediate response to the issue, challenging the United States government and its current policies on immigration. The issue has generated on-going debate regarding which children are legitimate, as they have sought asylum due to

life-threatening situations, the desire for better economic opportunities, and reunification with their families. The variations of the reasons for the migration have created major concerns, as solutions need to be sought to deal with the mixed migration of children. Due to the current system in place, the U.S. has not been able to identify these children as either refugees or migrants. In addition, children are charged with breaking U.S. immigration laws after being apprehended. At the same time, the political rhetoric on this issue is that the U.S. is currently facing a refugee crisis, while others believe that national security should be the government's primary concern.

The number of UACs entering the U.S. illegally has created an unprecedented problem for U.S. immigration authorities and for unaccompanied minors. The lack of policies, lack of space, and an unprepared legal system have created a consequent backlog of cases that has affected the situation of UACs in the U.S. One of the main obstacles that UACs have been experiencing upon entering the U.S. is still having to face the U.S. legal system in order to prove that they are, in fact, fleeing conditions that are in violation of their basic human rights. Yet, astonishingly, the ambiguity of the laws and the lack of appropriate immigration policies for children have caused these children to be treated as adults in the courtroom.

UACs do not become vulnerable when they arrive in the U.S. They are vulnerable in their home countries due to the horrible circumstances in which they are living and to which they are exposed. Despite having fled their countries, when they arrive in the U.S., they are still vulnerable because they enter a system that is unknown to them and that does not guarantee them the protection they need (Cernadas 6). Therefore, due to the

inadequate legislation currently in place in the U.S. legal system regarding the handling of unaccompanied minors, children have been subjected to situations that are contrary to the recommendations established by the United Nations and introduced through the Convention on the Rights of the Child that focus on the Best Interest of the Child Principle pertaining to children worldwide. The United States laws do recognize the responsibility for operating in terms of the Best Interest of the Child Principle through its welfare laws for children who are U.S. citizens. However, neither that principle nor those laws apply to children entering the United States as unaccompanied minors. Those children are classified as criminals upon entering the U.S. and are treated in an entirely different manner. Until the United States recognizes the vulnerability and the unique situation of these children and establishes laws that are based on protection rather than criminalization, the country will continue to subject children to have to navigate an unfair, incomplete and ineffective immigration system.

In this research project, the introduction is followed by an overview of the root causes of migration in order to understand the reasons why UACs are fleeing their countries. Section I focuses on the research that has been carried out in relation to the current crisis with UACs entering the U.S. It includes scholarly studies, government reports, international government reports and statistics regarding the role of international protection and children. The best interest of the child principle is also included for a better understanding as to why it is important to adopt a legal framework based on this principle. Finally, how the U.S. has adopted the best interest of the child principle under its welfare laws to protect children who are U.S. citizens is discussed in contrast to the

lack of such immigration laws for unaccompanied minors entering the United States. Section II is devoted to an explanation of what happens to the children once they arrive on U.S. soil. This section includes an overview of the three major policies that have been established in the past twenty years –the Flores Settlement Agreement of 1997, the Homeland Security Act of 2002, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Also included is a discussion of the possible legal relief for which migrant children could be eligible in the U.S. In order to prove how the system is still failing in handling the cases of these children, section III focuses on an analysis of the areas that affect the children such as repatriation, institutional capacity, the current legal system, and their treatment under the law. Finally, section IV focuses on critiquing the flaws of the legal system and its inefficiencies to adjudicate children’s cases.

This contemporary issue is worthy of research study because of the dire situation of children arriving to the U.S. without a legal guardian. Children who engage in the journey of migration are not physically or emotionally prepared to handle the situations they encounter. However, what the U.S. has yet to recognize is that regardless of their immaturity, the decision of a child to migrate should be seen not only as an indication of their desire for survival but also as a verification of the extremely dangerous situations in which they are living in their respective countries and the deep fear surrounding their lives on a daily basis. This issue raises not only many policy debates, but also moral debates. It is also a multidisciplinary issue that can be analyzed and studied through many lenses.

To focus merely on enforcement of migration policies rather than on protecting the best interests of children results only in a greater crisis: children are not allowed to stay in the U.S., but they also cannot go back to their home countries due to security concerns. The violation of the basic rights of these children is a never-ending cycle; because the key root causes prompting the children to migrate remain unchanged in their home countries. If they are sent back, chances are that they will become statistics among the numbers of victims of killings, poverty, child prostitution, and they will never have the opportunity to reach their full potential. For these reasons, the situation demands an effective system that considers all aspects of a child's life when she/he arrives in the U.S. to make sure that child can normalize his/ her life in a country that provides her/him with a safe environment.

Children Crossing International Borders: Why Are They Leaving?

Thousands of children have been fleeing their home countries due to the terrible conditions in which they live. In their home countries these children have become increasingly vulnerable because they lack the protection they need from the violence they are experiencing, they lack educational opportunities, and even are without access to basic needs. Children are fleeing to the United States hoping to find a safe haven in which their rights are respected. To understand the issue of child migration, it is paramount to realize that the vulnerability of children does not start when they engage in their journey to the United States or when they arrive in the U.S. Their vulnerability as minors starts in their home countries; it is there where they are helpless and quickly become victims of situations that are out of their control. In the U.S., however, that vulnerability is exacerbated by the numerous ways in which they are struggling on their own without family members to care for them, lacking the appropriate language skills to make themselves properly understood, and falling into a limbo where the backlog of cases diminishes any hope of their finding the protection they need.

For these reasons, this section will explain the factors that push children towards a journey northward. Having to make the decision to engage in such a journey is a situation that no child should have to face. However, due to the circumstances in which they live, they have no other option. Therefore, explaining the causes of their migration is important not only to understand their vulnerability but also their real need for international protection, as going back to their home countries should not be considered an option.

Mexico, Guatemala, El Salvador, and Honduras are facing very complex issues related to violence, high poverty levels, corruption, and dysfunctional institutions that are unable to provide its citizens –especially children– with what they need. Today, the U.S. has not been responsive to the situation these countries are currently facing. In trying to find long-term solutions that reduce the influx of immigrants arriving in the United States. The U.S. has taken very small steps to help these countries. One critical dilemma of the UAC crisis is that many believe that the issues these countries are facing affect adults primarily, in reality; children are the most vulnerable population (Children on the Run Report 2015). From institutional failure and corruption to the highest rates of violence in the world, the combination of issues affecting these countries are rooted in how connected the factors are to each other, creating a structural crisis wherein the solution for one issue needs to lead to a positive result for the others (Cernadas 12).

In the Northern Triangle region and Mexico, one of the most important factors that motivate children to leave their countries is the high level of poverty. The Council of Foreign Relations has established that “the Northern Triangle Region suffers some of the region’s highest rates of poverty. In Honduras 52% of the population lives on less than \$4 per day. In Guatemala and El Salvador, those figures are 53.5% and 42.7% respectively and 46.2% in Mexico” (CFR 2014). For many families in these countries, economic instability becomes the major factor that prevents them from providing their children with the opportunities for a better life. In the majority of cases, parents leave their children, hoping family members will care for them as they seek employment in the U.S. As a result, children find themselves living in extreme poverty, without parents, making them

extremely vulnerable in many ways. This situation becomes a very strong motivation for the unaccompanied migrants to leave their respective countries. Moreover, many parents who left their children and their home countries years ago are influencing their children to leave home and make the life-threatening journey to be reunited with them. Many children never reach their destination and lose their lives en route (Children on the Run Report 2015). Other children become victims of gangs and criminals who are looking to exploit them and force them into criminal activity, including working as drug runners and prostitutes. For those who manage to arrive at the U.S. border, their vulnerability is not eradicated. It is simply traded for legal problems and a myriad of situations in which they are moved from location to location as they are worked through the system as UACs.

Additionally, it is important to recognize that beyond poverty levels, in the last few years, migration has been exacerbated by the increase in violence. A UN survey has found that more children are leaving because of the gang violence that controls their communities in the Northern Triangle countries. In a recent research study in which the UN interviewed 404 children from Central America and Mexico, one girl stated,

In the village where I lived there was 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 (Children on the Run Report 36, 2015).

Regardless of their economic status, children are scared for their lives. They cannot continue with their life as other normal children because many of them are receiving death threats or are forced to join gangs. Children are placed in a very vulnerable situation because they cannot control or escape the violent behavior in which

the gangs engage and they become the victims of these criminal groups. Other countries in Central America with very high poverty levels but significantly lower violence rates are not experiencing massive numbers of children leaving their respective countries. For example, “in Nicaragua, nearly 70% of the population lives under less than \$4.00 per day, but violence is considerably lower than in neighboring countries... leading many experts to believe that this phenomenon –migration– is more rooted in violence than poverty” (CRF 2015). Poverty is certainly a major issue that affects other areas of a child’s life, but violence presents a force from which children are not able to escape. Their only alternative to escaping the violence is to leave the country. Unable to leave under normal circumstances they begin their journey as child migrants.

According to UN data, one-third of global homicides occur in Latin America and Central American countries suffer from the highest rates of violence in the world. The issue is rooted in an increase of the drug trafficking business in the region, gang violence, institutional corruption, and, not surprisingly, high levels of poverty. The United Nations Office on Drugs and Crime (UNDOC) has stated that as of 2012, Honduras has the highest homicide rate in the world at 90.4 deaths per 100,000 people (UNODC 2013). El Salvador has the fourth highest homicide rate. In El Salvador, in 2014, homicides increased by 70% in the first half of the year, demonstrating that the 2014 surge in the U.S. was a response to the increase of homicides in these countries (Carlson and Gallagher 134). For its part, Guatemala has the fifth highest homicide rate in the world, and the violence by gang members is supported by state corruption (Carlson and Gallagher 135). UNICEF has named Guatemala “the second most dangerous country in the world for

children from zero to 19 years of age and El Salvador placing first” (UNICEF 2014). Mexico’s high rates of violence are directly connected to the drug cartels operating in the region, including the Zetas, the Sinaloa Cartel, and the Knights Templar (Carlson and Gallagher 136). In Mexico, “criminal cartels –which traffic 90% of the cocaine that enters the United States –have killed approximately 60,000 Mexican soldiers, police, politicians, and civilians since 2006” (CFR 2014).

In Central America and Mexico, violence has become part of their lives. The communities in which most UACs live are not only affected by high poverty levels but also by the violence criminal groups perpetuate in these communities. The motivation of children to migrate evolves from the economic survival circumstances of their wanting to leave the country because of the threat that these criminal groups pose. Many children live under the fear that they will become the targets and victims of the atrocious violence that exists in their communities. Under these circumstances, many children decide to make the life-changing decision of risking their lives on a journey to the United States rather than to stay at home and lose their lives to the hands of criminal groups.

When clashing with other factors such as education and institutional failure, the surge in violence in these countries is the clearest indication as to why thousands of Central American and Mexican children flee to the United States and why the dilemma of sending them back becomes more complicated. The violence is also one of the reasons why children decide to stop attending school. In countries such as El Salvador, the presence of gangs in schools makes it impossible for them to keep attending. Alfonso, a 17-year-old from El Salvador, states,

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. They prohibited me. I know someone whom the gangs threatened this way. He didn't take their 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 (Children on the Run Report 2015).

According to a PBS special report, an attorney from the Women's Refugee Commission in Washington stated, "Cartels are recruiting at schools... and going after children who are participating in youth groups and churches. So they are really targeting a particular age group... It's similar to the child-soldier phenomenon in certain countries in Africa. It's often easier to mold younger people" (Tobia 2014). By not having the opportunity to attend school safely, children become more vulnerable, the consequences of not receiving an education creates a vicious circle that will be repeated once they have their own families. The failure of having a society in which children are not attending school results not only in children not being able to prepare themselves for the future, but it also keeps the nations from experiencing progress to better the lives of its citizens, to educate mothers to take better care of their children, and to retain children in school in order for them to make good rather than bad decisions.

Additionally, the educational system in these countries is very inefficient. Children are not provided with the necessary tools to develop to their full potential. In Guatemala, for example, education is funded by the state until the 6th grade. This is problematic because, as has been stated, Guatemalans suffer high poverty rate. Therefore,

children without resources do not have the financial means to continue their education. On the other hand, the number of children enrolled in high school in El Salvador is higher. However, USAID has noted that the country's education system faces challenges, such as poor quality of education, limited access, and inequality for disadvantaged groups –such as indigenous girls and groups that live in extremely rural areas. According to the UN Human Development Report, only 30% of children in Honduras go to high school for the same reason previously mentioned. The situation results in a growing number of young people leaving school without basic skills, making them highly susceptible to gangs, crime, and poverty.

Children also face the consequences of bad governance and bad allocation of resources. When children are experiencing poverty in their households, when they are not able to attend school because of security reasons, and when those who have the opportunity to attend school do not get a good quality education, it is clear that the national governments are not taking responsibility for the development of children. Despite the reasons as to why a child does not attend school, low levels of education are indications of high levels of government corruption. The complexity of this issue goes well beyond what a child can control and, once again, their only option is to flee these desperate circumstances.

Weak government institutions also present a major issue for these children. People in these countries do not trust their state institutions. The police and the judiciary are among the most mistrusted entities. The situation calls for institutions to be strong to be able to protect and ensure the security of these children. However, over recent years,

they have not been able to fulfill the goal of protecting its citizens. Sarah, a 16-year-old girl from Mexico, notes,

I don't understand why there are so many criminals who want to be more powerful than the authorities in our countries. If the authorities are afraid of the criminals, then our country will never get ahead. We have to work hard and reduce the violence and the criminal organizations. Also, the lack of jobs causes problems. Many people can't get a job no matter how hard they try. They need to work to support their families, and the families there are bigger than the families here. Also, many people can't complete their education because of the social instability and school closings. Our countries are allowing themselves to be controlled by the gangs and by people who only think about themselves and not the well-being of their own country. I want the president of this country to help us because all we want is a better future (Children on the Run Report 2015).

In most cases, the police do not hold the gangs accountable for their crimes.

Other branches of government are also very dysfunctional and have perpetuated the mistrust of the region. For example, according to the World Bank, Honduras collects just 14.7 percent of its GDP in taxes, which makes it among the lowest tax paying countries in the world. Additionally, the Honduran Education Secretary notes that 96 % of schools close several days of every week or month because of teacher strikes, since government payments are inconsistent and schools are under-resourced. The fact that these children do not find the necessary protection from the authorities means that they have to find solutions to protect their own lives. The lack of trust towards the national government has caused people to take action such as migrating to the United States. In these countries having weak institutions is directly related to poverty and violence. In terms of violence, children are unable to report their cases and have a successful outcome. UACs and their families are left alone, and if the authorities are unable to protect a child from the violence, many parents decide that the best option is to send them to the U.S. before their

child becomes one more case of impunity (Children on the Run 2015).

The problem with institutions encapsulates all the major factors of migration, and it is an indication that in order to find long-term solutions for these issues, major changes that affect the way in which institutions function has to be implemented. These governments cannot target issues such as violence when their police authorities are often linked to these criminal groups. The role of the institutions is so important that solutions cannot be sought without first addressing who is taking the lead on determining solutions. If this issue is not targeted from the core of the political structure, it will be very hard for these countries to find effective solutions that help reduce the migration of children.

Section I- *Background Information*

1.a. Literature Review

Migration has been understood historically as a phenomenon that affects only adults. However, child migration has been a global issue for a very long time. Yet, the experience of migrant children has not been researched widely until recent years. To understand how this issue has evolved over the years, the literature used for this thesis includes articles from scholars discussing various major issues related to the migration of these minors. Policy papers and articles from the United Nations, World Bank reports, and others written by economists, policy experts and social scientists are also included to better understand the development of the conditions in which the children have lived and what happens to them when they arrive on U.S. soil. From these documents, I have been able to extract the main arguments and concerns that scholars have presented in order to analyze why the number of children coming from this region has increased dramatically in recent years. From my research, the common elements that shed further light on this issue provide a very comprehensive approach that will contribute to a deeper understanding of the plight of unaccompanied alien children in the U.S.

According to Jacqueline Bhabha, a leading expert in child migration, there are three broad approaches to how international, regional, and domestic law deals with migrant children. The first approach is punitive and criminalizing, and “it is based on a dichotomy between criminal traffickers and victim trafficked persons” (Bhabha 1). Thus, this approach focuses on “penalizing and preventing exploitative child migration” (Bhabha 1). The second approach is regulatory, and according to Bhabha, “it established

the parameters for legal migration, including the migration of children. It is based on the notion that children are family dependents who lack autonomous agency” (Bhabha 1).

The third approach is protective; this human rights approach includes international law as a guide to how to protect particular groups, including children. Bhabha states, “over the past fifteen years or so, there has been a growing acknowledgment that child migration is a significant and increasingly important phenomenon that requires the development of a more effective approach” (1). These approaches are important because they recognize that children are in need of a system that addresses their particular needs. Bhabha argues “this body of work has been on migrant children’s distinct vulnerability, their triple burden of alienage, minority, and family separation, and on the need for protective policies to ensure their safety and welfare” (1). Thus, Bhabha recognizes that children are independent agents when it comes to migration and therefore should not be subjected to laws that do not directly affect their situations (1).

Additionally, the geographical proximity of Central America, Mexico, and the U.S. has played a major role in children making the decision to engage in a journey northward. The increasing number of children migrating to the U.S. over the years has led researchers, academics, and policy makers to become interested in studying the experiences of migrant children. In the U.S., this issue has spurred controversy because children have been treated as adults under immigration law. As a result, their experiences have been ignored (Chavez and Mejivar 2010). Over the years the conceptualization of children under domestic law has been that children can exist only in relation to a parent. However, recent trends of migration to the U.S. have shown that “children are active

social agents who take part in adult-like activities and who also make economic and social contributions” (Suarez Navas 2006 in Chavez and Menjivar 2010).

The number of children migrating from Central America and Mexico started to increase during the 1980s. At that time, many children were fleeing Central America where civil wars caused dislocation and other hardships (Byrne and Miller 6). Today, the root causes of migration have changed and the structural issues that lead to the migration are very similar in the countries of El Salvador, Guatemala, Honduras, and Mexico. However, not all the children migrate for the same reasons and there is no consensus among scholars and government officials as to which of the known factors best explains the causes of this phenomenon.

Furthermore, Muzaffar Chishti and Faye Hipsman criticize the U.S. immigration legal system and its capacity to deal with the cases of UACs. Chishti and Hipsman claim that an “under-resourced and overburdened” immigration court system has contributed to the increase in the flow of minors coming into the U.S. (Chishti and Hipsman 99). Marc Rosenblum and Doris Meissner have found that “the US has systematically under-resourced the immigration court system—between 2002 and 2013 funding for frontline immigration enforcement operations increased 300% while funding for adjudications increased just 70%, resulting in growing court backlogs as cases flow into the system faster than they can be accommodated” (Rosenblum and Meissner 2014). While children wait for their immigration hearings, at times for more than years, they are reunited with their family members. The American Bar Association has stated, “the failure of immigration reform is another factor that has led to the increased migration of children”

(ABA 2015). This situation is further complicated by human smugglers who deceive people by telling them that they will be granted a “*permiso*” or “permit” to stay in the US while they wait for their immigration hearings.

The development of public and political opinions also challenges the situation of UACs and has affected the perceptions about illegal immigration, reopening the debate about a more secure border. Rosenblum argues that US policy makers and many Americans are predisposed to view the border as an enforcement issue rather than as a humanitarian issue. He states, “the failure to prevent ‘regular’ immigration undermines domestic political support for generous protection policies, jeopardizing the protection of those who need it the most” (Rosenblum 16). A study conducted by the Pew Research Center shows that 33% are of the opinion that the priority should be on better border security and tougher enforcement laws and 23% favor a reform that leads immigrants, be they children or adults, to become citizens (Pew Research Center 2014). In cases such as the 2014 crisis, the short-term policies implemented by the government were successful. However, with all the flaws of the system, Rosenblum claims that 2014 policies do not advance long-term solutions and important questions such as “can current policies effectively address enforcement and protection concerns, and can the reduction in flows be sustained?” (1) Such issues still remain.

The reasons why children have been fleeing to the U.S. without parents or guardians are very complex. But, for children facing the U.S. immigration system, the situation is even more complicated. Joyce Koo Dalrymple argues, “every year many children under the age of eighteen enter the U.S. without legal guardians and are forced

to navigate a confusing legal system designed primarily for adults” (Dalrymple 133). This situation creates many issues for children who are not only fleeing precarious situations but, in many cases, are traveling alone without a guardian. Chavez and Menjivar have also recognized a pattern in which “the knowledge based on the adult migration experience has been used to conceptualize the children’s experience; however, what we know about adult experiences should not be the only yardstick to assess what is lacking in the youth experiences” (Chavez and Menjivar 75). David B. Thronson argues that “thousands of children arrive in the U.S. unaccompanied by parents every year...and the limited definition of ‘child’ in immigration law cannot alter the complex reality that thousands of children struggle through the maze of immigration law without adult assistance” (Thronson 998). Dalrymple argues that the law does not recognize a child without a parent (137). Thronson’s reaction to this definition is that under immigration law, children are treated as adults not because they are able to make their own decisions, but because under immigration law there is no definition or policy that differentiates them from adults (Thronson 1002).

In the case of unaccompanied minors, the cases are even more tortuous because many other issues are involved. That is, children are more vulnerable to any kind of situation because they have very limited or no knowledge of the English language. They are not able to articulate their reasons for fleeing as well as an adult, and they are not mature enough to understand the situations they face and the importance of the answers with which they respond to questioning (Dalrymple 139; Thronson 1002). Jacqueline Bhabha argues, “children asylum seekers face the same penalties as adults, and if their

claims are denied, including indefinite detention or even deportation to the countries from which they have fled, where they may be persecuted or killed or face the dangers that precipitated the quest for refuge in the first place” (130).

Recognizing all of these challenges for children calls for a recommendation or solution to what might grant them the rights and the protection they need. Children’s rights have always been controversial. Thronson explains that in the U.S., children’s rights have not been recognized separately from those of their parents. Rather, children have been treated as property and saying that children belong to their parents has promoted the idea of ownership (982). This idea is also supported by Darlymple who states, “children lacked any articulated rights and relied on adults to vindicate interest” (142). Thus, for the cases of unaccompanied minors and immigration law, scholars believe that children should be given international protection following the best interest of the child principle, which should be taken into consideration when making decisions about the status and future well-being of these children.

1.b. - The Role of International Protection

Despite having an international framework to protect children, U.S. immigration laws are not in line with major international laws. Thus, failing to provide Central American and Mexican children with the help they need. The root causes of migration have demonstrated that the rights of Central American and Mexican children are being violated in their home countries. Under international law, these children have the right to international protection. International agreements have articulated ways in which the international community must intervene to protect children’s rights. International

protection means “the responsibility of states to protect their citizens. When governments are unwilling or unable to protect their citizens, individuals may suffer such serious violations of their rights that they are forced to leave their homes and often even their families to seek safety in other countries” (UN Children on the Run Report 8). The situation of unaccompanied minors from the Northern Triangle countries and Mexico creates international protection concerns because of the unprecedented number of children fleeing their countries.

By definition, the nations from which these children are fleeing have failed to protect their rights. Therefore, other states must step in to ensure the well-being of these children. Marc Rosenblum, in his article, “Unaccompanied Children Migration to the U.S.: The Tension between Protection and Prevention,” states that a response to this type of mixed flows creates unique policy and political challenges for the U.S. On the one hand, “under international law, the U.S. is required to provide protection to those who have been persecuted in their home countries. On the other hand, like all sovereign states, the U.S. must maintain its border controls and deny entry to those who do not have valid claims to stay in the United States” (Rosenblum 15-16).

Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, an individual must satisfy the refugee definition and, as indicated in Article 1F of the Convention, there must not be any reason to exclude an individual from such protection (UN Children on the Run Report 8). The definition of refugee on the 1951 Convention and its 1967 Protocol indicates that a refugee “is any individual who has a well-founded fear of being persecuted based on race, religion, nationality, membership of

a particular social group or political opinion; is outside the country of origin; and the country is unwilling or unable to provide protection to that individual” (1951 Convention). In the United States, the person has to be outside the U.S. in order to be considered a refugee. In the situation of children, most of them do not have the knowledge, the means, or the time to seek international protection in other countries while they are still in their home countries.

The United Nations Convention on the Rights of the Child (CRC) is the most adopted convention worldwide. When the CRC was passed, it marked an important step for how states should understand children’s rights. The CRC recognizes children as individual rights holders (Todres 208), which introduced a major shift in how children are understood as independent beings throughout the world. The Convention establishes human rights provisions related to children as well as the obligation of states to consider and protect children’s rights. The CRC has also recognized the importance of the connection between a child’s agency and the decisions made regarding his/her favorable protection. In the context of migration, due to the situations in their countries, the plight of Central American and Mexican children fleeing to the United States conflicts with one of the most important principles in the CRC –the right to life, survival, and development, established in Article 6 (CRC 1989). Central American countries and Mexico have been incapable of ensuring these rights for children. At a very young age, many children are becoming the victims of the violence that is currently affecting these countries. Children, also, have very limited opportunities to develop and to have a better future. Therefore, these countries have fallen short in terms of accomplishing the provisions established in

the CRC.

The United States and South Sudan are the only two countries in the world that have not ratified the CRC. The United States, however, does have a legal welfare apparatus that is in line with the provisions in the CRC, and children in the U.S. have a voice when decisions in regards to their welfare are to be made. However, U.S. immigration laws do not mirror CRC principles in how children should be protected. Despite the inhumane reasons of why children are fleeing, these principles are not being taken into consideration when dealing with UACs from Mexico and Central America.

Contrary to the CRC, the United States immigration system lacks provisions to deal with the adjudication of UACs. In the U.S., immigration laws are not created to deal with favoring the protection of an alien child's rights, and thus, fail to provide children with the rights to which they are entitled. Rather, children go through a system based on enforcement laws and not laws that were created from a human rights standpoint.

According to Jacqueline Bhabha,

Like adults, children migrate across borders for different reasons and in varying circumstances; and they face legal consequences as a result of their migration. Two of these consequences are common to all child migrants and have far reaching implications: the child migrants become non-citizens or aliens once they have crossed a border, and they face a new social environment once they leave home (87).

The U.S. has a long record of not being able to develop laws that fulfill the needs of children. As a result, enforcement laws that define detention, deportation, and raids do not provide children with the right to life, survival, and development.

1.c. - Best Interest of the Child Principle

One of the fundamental principles established in the CRC is “the best interest of

the child principle.” Article 3 of the CRC establishes that “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 1989). According to the UNHCR guidelines on determining the best interest of the child, “the ‘best interest’ term broadly describes the well-being of a child” (UNHCR 2008). The CRC does not offer an explicit definition of what the term means but it does emphasize in other articles how the term and the principle should be implemented. For example, the CRC outlines that

The best interest must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9); the best interest of the child must be a primary (but not the sole) consideration for all actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative or legislative bodies (Article 3 UNHCR 2008).

The goal of the best interest of the child is to reaffirm the agency of children when making decisions that affect their lives. The CRC and the best interest of the child are important because they recognize the vulnerabilities of being a child. However, according to Jonathan Todres, “the guiding principle of the CRC has a limitation that adversely affects many independent children: states are required to ensure the best interest of the child are only *a* primary consideration, not *the* primary consideration” (Todres 302). In other words, the states to which children are migrating have the option to decide how important the principle should be and if it can be considered over national security. Even though the U.S. prioritizes the principle for cases related to welfare law, it does not take the principle into consideration for immigration cases involving children. Bridgette Carr states that “the failure of immigration law and procedure to incorporate a ‘best interests

of the child' approach ignores a successful means of protecting children that is common both internationally and domestically" (Carr 123).

1.d. - The Best Interest of the Child Principle in Welfare Law

Under welfare law, the way in which decisions that affect children are made is highly organized around the situation of every minor. Placement and custody decisions are made under the policies established by the "best interest of the child" doctrine that the U.S. has adopted for welfare law. In U.S. domestic laws, the best interest of the child does not have an explicit definition, but "the term refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is the best suited to take care of a child" (Child Welfare Information Gateway 2).

The decisions that affect children are made taking into consideration many factors related to the child and his/her parents' situation. The laws are made to ensure that children are treated as children and it recognizes the vulnerability caused by their age when their cases come to court. The laws in place ensure that children are treated with respect and provided with their basic needs, such as going to school, living in a safe environment, and providing them with the legal tools to find the best solution to their cases without affecting the child's emotional stability. Carr states,

It is impossible to point to one legal standard defining the "best interest of the child" approach in domestic law. It is, however, possible to identify the priorities of the "best interest" approach. Procedurally the "best interest prioritize the child's safety, permanency, and well-being" (Carr in Wolozin 153).

Therefore, under domestic law, issues of maturity and age are considered when making decisions in regards to a child's case. In welfare law, children have a voice in defending themselves in their cases. A judge always considers what the wishes of the child are by attempting to understand the nature of the situation in which the child finds himself/herself.

According to the Children's Bureau guidelines, "the state statutes frequently reference overarching goals, purposes, and objectives that shape the analysis in making best interests determinations" (2015). There are four major statutes that outline some of the factors courts should take into consideration when dealing with children. The statutes are as follows: (1) the importance of family integrity and preference for avoiding removal of the child from his/her home, (2) the health, safety, and/or protection of the child, (3) the importance of timely permanency decisions, (4) the assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult (Child Welfare Information Gateway 2). These provisions are very child-friendly and they prioritize the protection and welfare of children in the United States who are being exposed to legal experiences beyond their expected maturity level.

Section II- *What happens to UACs when they arrive to the US?*

2.a. - Policies Overview

Once Mexican and Central American migrant children step foot on U.S. soil and are apprehended their status is defined automatically as that of a criminal according to U.S. law. At that point, specific processes begin and every child becomes a depersonalized statistic. Each UAC needs to be processed and entered into a system that is governed by specific regulations that can be quite intimidating for children. Over the years, new laws have been put in place to mandate the specific process that UACs have to follow. Despite improvements, the increasing number of children crossing the border has challenged the institutional capacity of the agencies that have been unable to protect children and to provide them with the services they need. This section includes an overview of the laws and policies involved in the handling of UACs in the U.S. that have led to the current system. Today, the system still lacks child-sensitive laws, which has led to the failure of the government to recognize the unique circumstances of children. As a result, the United States has failed to deal with the cases of Central American and certain Mexican children in terms of providing them adequate protection.

In the 1980s, the government experienced countless lawsuits as a consequence of the poor handling of children by the Immigration and Naturalization Service (INS), the agency in charge of the immigration enforcement and granting of immigration benefits. Due to the restrictive and punitive mistreatment of unaccompanied minors, the United States attempted to make improvements in the way in which children were treated after apprehension at the border. The enforcement branch of the INS was in charge of UACs

and had the role of legal custodian of UACs as well as the role of deportation agent (Musalo, Frydman, and Lee 344). Because of the two major roles the INS played in UAC cases, the agency was subjected to harsh criticism due to the conditions in which children found themselves after being apprehended. For example, the INS was supposed to release UACs to parents, siblings, aunts, uncles, and/or grandparents. However, the release took months and, in many circumstances, took more than a year. Also, children's advocates often complained that even though there was a federal provision that established that children needed to be placed in the "least restrictive environment," children were being held in detention centers under poor conditions (Schmitt 2001). The report, "I Running out of Hopely..." Profiles of Children in INS Detention in Florida reported that,

The INS took advantage of children's vulnerability and their separation from their family as a means to obtain information from children about family members in the United States lacking regular immigration status. The agency also used unaccompanied children as bait to enforce immigration laws on their family members (Newhouse and Kleiser in Musalo, Frydman and Lee 345).

Many human rights concerns developed in the public due to the handling of children by the INS, in place at that time, and led the government to take action and introduce new policies that addressed the concerns of advocacy groups that ensured better treatment for the UACs.

I. The Flores Settlement Agreement (1997)

The allegations against the INS resulted in the adoption of *The Flores Agreement* in 1997. *The Flores Agreement* introduced new laws in regards to the detention, release, and treatment of children in INS custody. Major changes implemented by this agreement

included the recognition of the vulnerability of UACs during the detention. It also addressed the major concerns the public had about the INS. The agreement established

That juveniles be held in the least restrictive setting appropriate to their age and special needs to ensure their protection and well-being. It also requires that juveniles be released from custody without unnecessary delay to a parent; legal guardian; adult relative; individual specifically designated by the parent; licensed program; or, alternatively an adult who seeks custody whom DHS deems appropriate (Podkul, Katz, Kelsey 371).

The agreement also required that UACs need to be provided with basic needs such as food, drinking water, medical assistance, adequate supervision of the minors, and protection from unrelated adults whenever possible. *The Flores Agreement* opened up the conversation in the immigration system of the need for children to be treated with dignity. The bill focused on ensuring that the INS changed the way in which children were being treated. Although the INS no exists and its role was taken over by various federal agencies, the provisions established in 1997 are still the ones that dictate the treatment of children in detention. Despite the challenges still faced today by UACs in detention centers, over the years the conditions have improved and there is in place a system that takes into consideration the well-being of children without affecting their relatives and their legal statuses.

II. The Homeland Security Act of 2002

After the terrorist attacks of September 11, 2001, the need to secure the border increased, causing Congress to pass the Homeland Security Act (HSA) of 2002. Consequently, HSA created the Department of Homeland Security (DHS). In addition to its main task of preventing terrorist attacks on U.S. soil, the DHS was given the responsibility of the processing of unaccompanied minors. The HSA divided the

responsibilities for the processing and treatment of UACs between the DHS and the Department of Health and Human Services (HHS). The bill established that DHS is responsible for the apprehension, transfer, and repatriation of these children, while HHS was assigned with the care and placement of UACs, reuniting minors with the families, by providing them with legal services available to them, in addition to many other services (Kandel and Seghetti 2015). Additionally, due to the lack of provisions and terminology to identify a minor as UAC, the bill also introduced a statutory definition for the term “unaccompanied minor.” Section 462 of the Homeland Security Act defines an *unaccompanied alien child* as someone who is under the age of 18, lacks immigration status, and either has no legal parent or legal guardian in the United States or has no parent or legal guardian in the country who is available to provide care and physical custody of the child.

***III. William Wilberforce Trafficking Victims Protection Reauthorization Act
(TVPRA) of 2008***

Major concerns regarding Border Patrol officials not screening children properly, and jeopardizing their security and protection, led Congress to pass another favorable bill impacting unaccompanied minors: The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. The TVPRA provides guidelines for DHS to implement policies and procedures that ensure that UACs are properly repatriated to their country of nationality. Section 235 of the Act established rules for contiguous countries (Mexico and Canada): “children from contiguous countries must be screened by CBP officers to determine if each child is unable to make independent decisions, is a

victim of trafficking, or fears persecution in his home country. If none of these conditions apply, CBP will immediately send the child back to Mexico or Canada” (American Immigration Council 2014). Yet, on the other hand, children from non-contiguous countries start the process of removal proceedings and are sent to a detention center. The U.S. government has claimed to have very strong ties to the governments of Mexico and Canada in regards to repatriation. Due to the geographical proximity, it is more effective for the U.S. to work with the Mexican and Canadian government in returning children than it is to allow them to enter the U.S. and add them to the number of children already stuck in the U.S. legal system.

2.b. - Legal Relief Options for UACs

In many cases, some children are not allowed to stay in the U.S. through immigration law. However, UACs have other forms of relief that can apply to their respective circumstances. In determining the best legal relief for an accompanied minor, the reasons why he/she left become critical due to the specific requirements of each of the legal options. The most common forms of legal relief that the U.S. currently has are special immigrant juvenile status (SIJS), asylum, U visas, and T visas.

I. Special Immigrant Juvenile Status (SIJS)

Depending on their family circumstances, many unaccompanied minors can be eligible for SIJS, a status that grants them with lawful permanent status and creates a path for citizenship. SIJS, however, is limited to children with special circumstances, such as (1) being declared by a state court as a dependent of the court, or have been legally placed by the court with a state or an appointed private entity, (2) being unable to reunite

with one or more parents due to abuse, abandonment, or neglect, and (3) having been determined not to have his/her best interest served by being returned to his/her native country. Under these circumstances, children who have left their countries without their parents knowing or because they have experienced abuse, are eligible to apply for one of the reasons justifying legal relief.

However, children encounter many issues during their application process. SIJS is a very complex process due to the jurisdiction of the state court involved; that is, state court laws vary across the United States. Therefore, many children who are eligible to apply for relief are unable to do so because they may not be able to meet the requirements of state laws. Additionally, state judges usually process the application incorrectly due to a lack of experience with federal immigration law. Many state courts around the U.S. do not take into consideration that the law allows children to apply for SIJS even when only one parent has abused, abandoned, or neglected them.

In the case of Erick M., the court denied his SIJS application because Erick had been removed from his mother as a result of delinquency and not abuse, abandonment, or neglect. The court was not able to confirm the father's abandonment despite the fact that Erick argued that while reunification with his mother was viable, he was unable to reunify with his father, who had abandoned him. However, based only on Erick's argument, the Nebraska court argued that the language "one or both parents" is susceptible to more than one interpretation (American Bar Association 2014). The court's ineffectiveness to understand the laws objectively puts children in a very complex situation in which, on the one hand, the child does not have the support of his/her

parent(s) and, on the other, the court's unwillingness to provide protection puts into question how SIJS procedures are being implemented.

II. Asylum

Another major form of relief for which UACs can apply is asylum. Any illegal immigrant may be eligible for asylum if he/she is unable or unwilling to return to his/her home country due to a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group (INA §208(b)(1)(A), 8 U.S.C. §1158(b)(1)(A)). Asylum law is extremely complex and, as SIJS, varies among jurisdictions. Asylum claims are more straightforward than those pertaining to SIJS; however, the definition of this legal relief makes it hard for unaccompanied minors to establish an asylum case. Asylum claims have a very fact-sensitive nature, and in the case of UACs, due to their levels of development it is very hard for them to establish a credible claim for the judge. Children lack the ability to explain objectively what has happened to them in their home countries and to make the necessary connections that apply in asylum cases. By not being able to explain the persecution they experience in their home countries it is unlikely that an immigration judge grants the children asylum. Due to the fact that many children are fleeing gang violence in their home countries, children and their attorneys –if they have one to establish a credible case in which the immigration judge determines that the child will be in danger in case of return.

Even though asylum claims are a very helpful and effective way to provide children with protection, asylum law makes no distinction between a child and an adult.

In this case, children who are not able to establish a well-grounded case may lose their cases, and chances are very high that they would be returned to the danger from which they were escaping. For this reason, a child-sensitive approach is needed under asylum law. Many UACs have, in fact, fled their countries because of persecution from gang members. Also, in countries such as Guatemala, many mothers and children are persecuted based on their belonging to a specific indigenous group. People who belong to indigenous communities are very particular because in the U.S they would not only not be able to communicate with the judge because of lack of English skills, but it turned also be difficult to communicate in Spanish because many of them speak only indigenous dialects. Therefore, immigration laws need to recognize not only the particular vulnerability of being a minor but also the vulnerability of not being able to effectively present a valid asylum claim that is in line with asylum law. In many circumstances, creating valid claims is difficult for adults; therefore, in cases of children who do not have the tools to properly express themselves and to understand how their situation is evaluated under the law, more attention should be placed it and more policies should be developed to ensure a fair legal process.

III. T Visas and U Visas

The causes prompting immigrant children to leave their countries are very important because they help define the type of relief a child might be given when he/she cannot be considered for immigration status. For example, there are special forms of legal relief such as T visas and U visas for victims of particular crimes. INA establishes that the T visa may be granted to aliens that have been the victims of severe forms of

trafficking. A U visa can be granted to aliens that “(1) have suffered substantial physical or mental abuse on account of being victims of specified criminal activities, (2) possess information regarding the criminal activity, and (3) have been or are likely to be helpful in a law enforcement investigation or prosecution of such activity (Manuel and Garcia 13). These two visas have annual caps and are not common as the other two mechanisms in cases involving UACs.

U visas are offered to any non-citizen who meets the requirements established by the law. One of the most important requirements is that the applicant must prove that he/she, in fact, can be helpful in the investigation of the crime of which they claim to have been a victim. Under this requirement, the exception is that if the person is under 16 years old a parent or legal guardian must perform this role (Immigration Legal Resource Center 3). On the other hand, in the case of T visas, one of the requirements is that “the non-citizen must comply with any reasonable request for assistance in the investigation or prosecution” (Law Enforcement Certification Resource Guide); however, in contrast with U visas, minors under the age of 18 are exempt from this requirement.

These requirements are extremely complicated for children to meet, especially because they need certification from a state, federal or local law enforcement agency to proceed with their applications. This is problematic for many children because these processes usually require the services of an attorney and, as it has been stated, many UACs do not have access to one. Also, this is a major issue because even when –under a U visa- an adult can represent them, the challenge becomes how children and their parent or legal guardians are going to prove the claims they are making.

These visas also have yearly caps; T visas have a cap of 5,000 visas per fiscal year and U visas have a cap of 10,000. Even though the visas are undeniably helpful for UACs, many of them are not aware that they are eligible to apply for them or do not know of their existence. Furthermore, it is difficult for these minors to prove that they have, in fact, been victims of trafficking and crimes. In most circumstances, the crimes committed against these children outside the U.S. are not eligible for adjudication under U.S. laws, leaving children, once again, without the proper pathway to find protection in the U.S.; the experiences of these minors are thus seemingly not a primary concern of the U.S. immigration system.

Section III- *The Lack of a Best Interest of the Child Principle in the Handling of UAC Cases*

Despite the advancements over the years to deal with UAC cases, major concerns still need to be addressed. The policy questions related to this issue have raised questions regarding not only whether they should stay or go back. Rather, the concerns are in areas such as repatriation, institutional capacity, and the treatment of children before the law. This section analyzes the major problems children face in these areas due to the lack of attention to the best interest of the child principle that considers the needs of their situation, as articulated by the CRC.

3.a. - The TVPRA, Repatriation, and the Best Interest of the Child

The TVPRA is a landmark bill that introduced improvements to the treatment of UACs in the U.S. Since its creation, the TVPRA has provided UACs with numerous rights under immigration law, especially regarding issues concerning their care and placement in the U.S. However, the legislation has many flaws that neither favor nor take into consideration the situation of UACs. First, in Section 212 (a)(7) of the INA establishes the ground for inadmissibility into the U.S. prohibits the admission of

Any immigrant [who] at the time of application for admission... is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Secretary of Homeland Security (Manuel and Garcia 7).

Section 235 of the TVPRA, after being amended, potentially allows UACs to enter the U.S. The problem with this provision is that the TVPRA makes a distinction between unaccompanied minors from Central America and unaccompanied minors from

contiguous countries. The legislation requires that UACs from contiguous countries be screened within forty-eight hours of being apprehended at the border to determine whether they should be returned to their country or if they have a valid claim to stay in the U.S., be transfer to HHS and be placed in removal proceedings. This is problematic for two reasons: first, by not having developed a best interest of the child approach, children's screening is not considering major questions such as "will the child be in danger if returned to his/her home country?" nor are they determining if the child has a valid claim for asylum. Second, children are not being given the opportunity to seek immigration relief, and they face deportation almost immediately after arriving to the U.S.

The TVRPA also dictates that "an unaccompanied child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child" (Section 235 (4)(c)(2)). Under immigration law, the best interest of the child is considered exclusively in the placement in detention centers of the UACs once in the U.S. Even though this is a major step forward in dealing with this issue, this approach needs to be considered in matters that affect the legal situation of children and in making decisions regarding their repatriation. According to Musalo, Frydman, and Seay,

The TVPRA of 2008 requires the United States to issue regulations "which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive handling" of their cases. These regulations would be binding on judges and government attorneys and could resolve the problems highlighted here. However, six years have gone by, and no such regulations have been issued (424).

HARM EXPERIENCED OR FEARED BY THE CHILDREN			
Total Number of Children Interviewed by Country of Origin	Number of Children Who Mentioned Violence in Society	Number of Children Who Mentioned Abuse in the Home	Exploitation by Smuggling Industry
El Salvador 104	69	21	0
Guatemala 100	20	23	0
Honduras 98	43	24	0
Mexico 102	60	17	39 (38%)
TOTAL 404	192 (48%)	85 (21%)	39 (10%)

Source: Children on The Run Report, 25

The table above shows the harm experienced by children in the Northern Triangle countries as well as in Mexico. As shown, these UACs have legitimate reasons to leave their countries. In the case of Mexican children, the lack of a child-sensitive approach in decisions regarding repatriation are worsening the situation and causing an increase in the numbers of minors affected by the violence in the region. Also their rights for international protection are being taken away. Mexican children are not only exposed to high levels of violence, but they also have the highest risk of becoming victims of the smuggling industry. Not allowing them to seek the protection they need demonstrates the failure of the United States to ensure their security and well-being. In the cases where repatriation is inevitable, safe repatriation should be ensured. Yet, “even though the TVPRA provided that the U.S. ensures safe repatriation of all UACs, in reality repatriated children do not receive support or assistance to ensure that they return safely to their communities or that their home they are returning to is safe” (Gill and Chen 126). Children’s well-being should be considered at all times regardless of the decision of their

situation. The U.S. has a major role to play in providing support to these countries to be able to develop the best long-term solutions to reduce the flow of minors engaging in migration.

3.b. - Bureaucratic Structure

The laws previously mentioned have been a major advancement in the treatment and care of unaccompanied minors. Due to the changes that have been implemented, today there are various agencies involved in the process of apprehension, screening, and sheltering of UACs. However, issues still remain. The undesirable circumstances in which children find themselves are partly the result of a lack of effective implementation of the laws. Also, the increasing numbers of children arriving in the U.S. have challenged the institutional capacity of these agencies, which are an essential component of how children are handled in the U.S., as they spend many months in the custody of these agencies. To date, what has been lacking is adequate care from the time that they arrive in the U.S., despite the goal of their migration is to seek protection.

Among the agencies involved in the handling of the children are the Department of Homeland Security (DHS) that includes Customs and Border Protection (CBP), the agency in charge of securing and overseeing customs. It is mainly located in ports of entry around the country. CBP is the agency that apprehends and processes the majority of UACs detained at the border. CBP interviews each child to confirm that he/she has entered the country illegally.

Another agency that deals with apprehension is Immigration and Customs Enforcement (ICE). Different from CBP, ICE is the agency that enforces immigration

laws inside the country and is in charge of the transfer of children from CBP to the Department of Health and Human Services. A major role of ICE is to represent the government in removal proceedings when the child attends a hearing before an immigration court. After being apprehended and interviewed by CBP, the children are transferred to the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) that is responsible for the custody and care of the children. Section 235 (d)(c)(2) of the TVPRA establishes that UACs “be promptly placed in the latest restrictive setting that is in the best interest of the child.” Under the Flores Agreement, ORR is also in charge of finding a sponsor or caregiver for the UACs who will take responsibility for the care of the child while he/she remains in the country.

Regarding their legal status in the country, U.S. Citizenship and Immigration Services (USCIS) has jurisdiction over the asylum applications of children apprehended by CBP, which means that even if minors are released to their families, the agency still has control over their applications. In other words, the agency’s jurisdiction has the initial control over the asylum applications filed by UACs with pending claims in immigration court and petitions appealed with the Board of Immigration Appeals. Finally, children’s legal cases also go through the Department of Justice (DOJ) and the Executive Office for Immigration Review (EOIR). This agency is responsible for the adjudication of cases and the enforcement of federal law. For those children who are going to be deported and returned to their country of origin, after those UACs are placed in immigration removal proceedings, the minor has to present a testimony before an immigration judge who can make a decision on whether the foreign national has valid claims to stay in the United

States.

I. Institutional challenges

Even though the United States has a systematic way of handling the cases of UACs, there are flaws that threaten the stability of children once they arrive to the U.S. As mentioned, even though significant changes have been made over the years, the U.S. government has yet to have appropriate methods in practice for handling children. Some of the practices by these agencies do not take into consideration the vulnerability of the children for whom they are responsible. The laws themselves do not take into consideration the well-being of children, and so the ways in which agencies are treating children do not necessarily reflect that they are doing so according to children's best interests. For example, CBP makes a difference between children from contiguous countries (Canada and Mexico) and non-contiguous countries (El Salvador, Guatemala, and Honduras). This situation is problematic because many Mexican children are leaving for very valid reasons but they are unable to explain their claims to a CBP official. This causes many Mexican children to be sent back to their communities in Mexico, returning to the same unsafe environments that led them to leave in the first place. Therefore, the U.S. government is not considering the vulnerability of the child or the conditions to which they will return, putting the children in significant danger due to what could or quite likely will happen to them.

Although the time between apprehension and screening of UACs happens in a timely manner, and that the screening process take place for all children regardless of the country of origin, there has been criticism by immigration advocates and experts that the

conditions in which children are interviewed do not take into consideration the trauma of the journey. Foremost, these children are fleeing precarious situations and CBP personnel are not properly trained to understand the traumatic elements experienced by the children or prompted by the journey. Because the English language skills of the majority of the children are very limited, it makes it very difficult for the children to fully explain their reasons for leaving their home countries. During the screening process, children do not have the right to an attorney when official court documents and charges are being created. Thus, children are not aware of what charges they will be facing in immigration court. Most importantly, most of these children do not have the maturity to understand what is taking place legally, which undermines their ability to be able to explain their claims fully. As Martha Fineman has stated, “vulnerability is a universal, inevitable, enduring aspect of the human condition... vulnerability must be at the heart of our concept of social responsibility” (Fineman in Todres 293- 294). In other words, any person can be vulnerable under these terrible circumstances of migration, but the age disadvantage increases the vulnerability of these UACs who are unable to present their claims fully and clearly to the U.S. government.

Also, the training of CBP officials does not have as a priority the vulnerability of these children. Rather, the focus is on charging them with breaking immigration laws. Therefore, despite the laws in place, the apprehension system itself has not been created or modified to deal with UACs, when in turn undermines their possibilities to attain the protection they are seeking due to the failure of the immigration authorities to recognize that their only crime is to have become victims of crime in their home countries.

Another institutional issue that affects UACs is the limited capacity of ORR to provide shelter for the massive number of children that has entered the U.S. According to the GAO from fiscal year 2003 through 2011, ORR cared for fewer than 10,000 UACs per year. In 2014, the massive number of 57,500 children coming into the U.S. overwhelmed ORR facilities (GAO 4). One of the major issues the agency is facing is the limited numbers of shelters with open beds throughout the country. In 2014, ORR was not prepared to meet the needs of such a high number of children crossing the border. In response, new facilities have had to be established in different states. Across the country the number of shelters has increased from 27 to 59. However, children apprehended by CBP are sent to ORR shelters that have open beds, not to locations that are necessarily in close proximity to where the child's relatives are located.

A research conducted by the Washington Office on Latin America (WOLA) found that “children overwhelmed U.S. agencies’ capacities, producing heartbreaking images of hundreds of parentless children, packed for weeks into border patrol detention facilities designated to hold adults for a day or two” (WOLA 2015). The fact that children are characterized as lawbreakers creates major issues for them, in addition to experiencing a terrifying immigration journey; they are forced to be in conditions that were originally established to deal with adult migrants. Despite the fact that they are unable to be reunited with their parents, UACs should not be sent to detention centers where they feel depersonalized, more vulnerable, and unprotected.

Furthermore, by law ORR has to place children “in the less restrictive setting that is in the best interest of the child” (U.S.C. 1232 (b)(2)). Even though the meaning of the

best interest of the child is not provided by HHS, when making a placement determination the agency needs to consider concerns of trafficking, prior sexual abuse, siblings in ORR custody, criminal behavior or juvenile backgrounds, danger to the community and self, age, gender, length of stay in ORR custody, location of a potential sponsor, and others (ORR 2015). Despite the fact that the best interest principle is very vague in this context, it does take into consideration some of the most important factors that affect a child's life.

However, under immigration law, the best interest of the child is often not considered. As a result, due to the vagueness of the policies, the system fails when it comes to providing UACs with legal solutions that are supposed to address their needs. This is contradictory because by establishing a best interest of the child policy in ORR actions the U.S. recognizes the developmental factors that are taking place at this stage in the life of a child. However, there is still a lack of acceptance for the claim that because of their level of development children should be treated under a best interest of the child policy in court. The concerns for the best interest of the child principle focus on the fact that it should be applied to all the areas that affect a child's life. The real need for a best interest of the child principle implementation is yet to be developed in the immigration court system of the United States. Considering the best interest of the child when in ORR is a major step forward. However, the children's stay is temporary, when on the other hand, having the opportunity to have a legal case considering the best interest would ensure that if given legal relief, the child will be able to normalize his/her life in the U.S.

3.c. - Children vs Adults

Immigration laws are not created to deal with the cases of unaccompanied minors. Consequently, children go through the same legal procedures as adults. In other words, UACs are trapped in a baffling system in the U.S. that does not take into consideration their best interests, the uniqueness of their situations, and their special needs. This is very problematic because children, unlike adults, are not able to understand the legal consequences of their actions and are left with very limited rights.

Since their creation, immigration laws have focused on dealing only with adult migration only. Under immigration law a child exists only in relation to a parent; children are not given independent rights from their parents (Dalrymple 137). David Thronson argues, “emphasizing dependence on parents as a prerequisite to being a ‘child’ strongly reflects notions of the child as property” (992). This definition poses challenges for UACs because they do not fall under the traditional category of having come to the U.S. under the immigration laws that grant children the same legal benefits as their parents. As a result, under the law, the idealistic notion of being a child leads to failure in recognizing the independence of children when, at the same time, it undermines children’s independence and their agency as humans seeking international protection.

In the case of Central American and Mexican children, the lack of recognition of a child’s agency aggravates their situation further because these UACs are coming to the U.S., to seek protection. Their illegal entry places them in a situation in which they become non-citizens of the U.S. causing them to be subjected to criminal charges regarding crossing the border illegally, long periods of detention and, in the case of Mexican children, to experience removal proceedings. In these circumstances, children

become more vulnerable because they cannot return to their home countries, and, at the same time, they become illegal aliens in the U.S. without being able to understand what that actually means. According to professor Bhabha, “this void in immigration and refugee law is remarkable when contrasted with other areas of U.S. law, such as criminal and family law, which do ensure special treatment for minors” (130). Yet, under immigration law, the treatment of children barely recognizes why children are in need of protection. Bhabha continues,

“When a child dies despite the U.S. Child welfare systems’ familiarity with his or her protection needs, the general public typically reacts with horror, lawsuits and calls for measures to ensure such a tragedy never happens again. Individual children’s cases become household names and state national legislation takes on the moniker of the child memorialized. Such as “Amber Alerts” “Megan’s Law” or Jessica’s law.” No such outrage occurred in response to the death of one such child asylum seeker named Edgar Chocoy” (134)

Jonathan Todres states that “exploring the experiences of independent children and having their perspective reveals a very different picture from the one traditionally associated with childhood” (Todres 262). The traditional notion of childhood severely affects the cases of UACs because many of them, since the time when they were still in their home countries, have broken those traditional notions. In other words, many of these minors are very young and, instead of being in school, are working in the fields to help their parents with expenses. Also, many of the children are simply not living in social environments that help their development and contribute to their safety. In Central America and Mexico, children are forced by external factors to have a life that does not reflect the traditional notions of childhood.

The generalized assumptions that all children “prior to eighteen years of age... are

typically expected to reside in a family home, follow their parents' rules, attend school, and otherwise remain largely in the private sphere of society" (Todres 263) have negatively affected the way in which UACs are perceived. Children from Central America and Mexico do not have a stable and fulfilling childhood and their developmental process has been interrupted by the uncommon situations to which they are exposed. UACs do not fit this category of minors. They arrive to the United States unaccompanied. Therefore, immigration laws that directly affect children but that are based on family law are counterproductive for the well-being of these minors.

Andrew Schoenholtz states, "all children share common developmental milestones, such as learning to think abstractly, understanding others' perspectives, and undergoing puberty. Cognitive development includes the capacity to be self-reflective; to think in and use language in more advanced ways, to make decisions, and to develop a sense of identity" (999). However, in the case of unaccompanied minors, the peculiarity of their situations creates traumatic experiences that affect their developmental process when, at the same time, their rights as children are not being respected and dignified. As a result of being treated as adults under immigration law, the particular vulnerabilities of children are undermined. It is important to note that these children continue to be on their own after crossing the border. Many of them experience trauma in relation to their past experiences and the journey itself. When the UACs arrive in the U.S., they find themselves confronting a very complex immigration system and they do not have the maturity and the experience to understand the seriousness of the charges being issued against them for crossing the border illegally. Thus, the criminalization of children should

not be part of the immigration system without first having a full understanding of what external factors, outside of the childhood experience, guided the children to make the decision to leave their homes for the United States in the first place. It is paramount that the immigration system separates migrant children's experiences from those of adults. That is, "by re-thinking our traditional perceptions of childhood and simultaneously accounting for vulnerability and maturity, we can better identify ways to reform law and policy to meet the needs of independent children" (Todres 303).

3.d. -Immigration Law vs Welfare Law

The treatment of children as adults under immigration law demonstrates the lack of a best interest of the child approach within the system. Despite the fact that in the U.S. the best interest of the child is the hallmark for laws related to the custody or other important matters involving children, in immigration law it is not a binding standard. Two of the most important differences are that unlike welfare law, in immigration law, family reunification is not prioritized. This presents major issues for the immigration system as whole, but in the case of UACs not having the opportunity to reunite with their parents after experiencing the terrible conditions in their countries violates the right of being with their families and it is not in line with how welfare cases are handled. Also, in welfare law, children are appointed a *guardian ad litem* that ensures the well-being of the child by providing him/her with the needed guidance for legal resources and social services and also ensures that the court understand the child's needs. In immigration law, although children are provided social services by the Department of Health and Human Services, children do not have access to an attorney who is able to guide them through

their court process. Not having an attorney minimizes the possibilities for children to present claims that help them during the court process, undermining the chances of children obtaining legal status in the U.S.

Not having the best interest of the child approach has had many grave consequences for UACs because the cases of children are not being adjudicated from a perspective that takes into consideration their experiences and what could potentially happen to them if their best interests are not considered. The experiences of children that go through the welfare system are not different from those who enter the immigration system. Consequently, in terms of seeking protection, not giving the same importance to migrant children's cases is the greatest confirmation of the United States failure to protect Central American and Mexican children. The best interest of the child principle is founded on the idea of protecting children from hardship and under this circumstances, both children go through the same struggle, therefore, immigrant children should have the opportunity to be heard and to have the circumstances of their cases evaluated before making a decision that will directly affect their lives.

Repatriation is one of the worst immigration case outcomes for a UAC who has fled violence. When an immigration judge does not consider the best interests, children could potentially be returned to the dangerous situations in their home countries, as was the case of Edgar Chocoy. Edgar fled Guatemala, after members of his former gang threatened to kill him for deserting the gang. He had grown up in an abusive home and took to the streets to escape and decided to join a street gang. Edgar testified before an immigration judge that he would be killed if he were sent back to Guatemala. Although

the judge believed him, the judge found that he did not deserve asylum because of his former affiliation with a street gang, and ordered him deported. Seventeen days after his arrival in Guatemala, the gang members Edgar feared murdered him (Musalo, Frydman, Seay 426).

Chocoy's situation is one of the many cases in which the lack of a best interest of the child approach has not only resulted in the loss of a life, but also undermines the right to international protection under international law. Like Chocoy, many UACs are sent back to terrible situations in which their chances of surviving are very low. The role of the best interest of the child approach is not only important for children to have a just adjudication but also to provide judges with the expertise needed to handle these cases. According to Nagda and Woltjen, "every child has an individual story. The best interest of the child standard... requires that each child's story be known and understood before immigration authorities make decisions that could put the child in harm's way. Such individualized inquiries are the hallmark of fairness and due process" (110).

Acknowledging that UACs from Central America and Mexico are fleeing due to various circumstances and employing a best interest of the child approach would ensure that every need of the child is treated with fairness that a durable outcome that would meet the needs of his/her situation, would occur.

Section IV- *Why is the Legal System Inefficient for Children?*

4.a. -Issues in the Immigration Court System

Inability to handle this situation is reflected in the immigration court system, which is deeply flawed and negatively affects the way in which children are treated. One reason the U.S. is unprepared to deal with the increasing number of children crossing the border is because the immigration court system is highly under-resourced in terms of the massive numbers of children. The United States has invested more funds in immigration enforcement rather than on the immigration court system (American Immigration Council 2015). Therefore, children find themselves navigating not only a complex system, but also one that is not able to meet their legal needs.

Among the major issues UACs face within the immigration court system are the intimidating settings they encounter when they attend immigration hearings. For example, the questions an immigration court might ask may be beyond the child's understanding of the situation. Once again, developmental issues are extremely important when dealing with children but even more so when they go to their hearings. Also, an under resourced court has led to two major issues. First, the 2015 backlog statistics show the burden that the legal system is facing. As of 2015 the number of backlog cases has reached 474,025 with a record of 667 days waiting days to adjudicate a case (Immigration Court Backlog Tool 2015). These long periods of waiting time affect UACs because they have need such as attending school or access to medical service due to the legal limbo in which they find themselves. Many cities across the U.S. are reluctant to provide them with these services. Secondly, another major issue children face during

their adjudication process is the lack of legal representation. Not having access to an attorney represents the major disadvantage for a child who is in removal proceedings. The laws are already highly complex, and without an attorney that represents the immigration court the chances that a child will win a case are very low. In this section, the issues that children face within the immigration court system along with the implications of how each one of them affects UACs will be addressed.

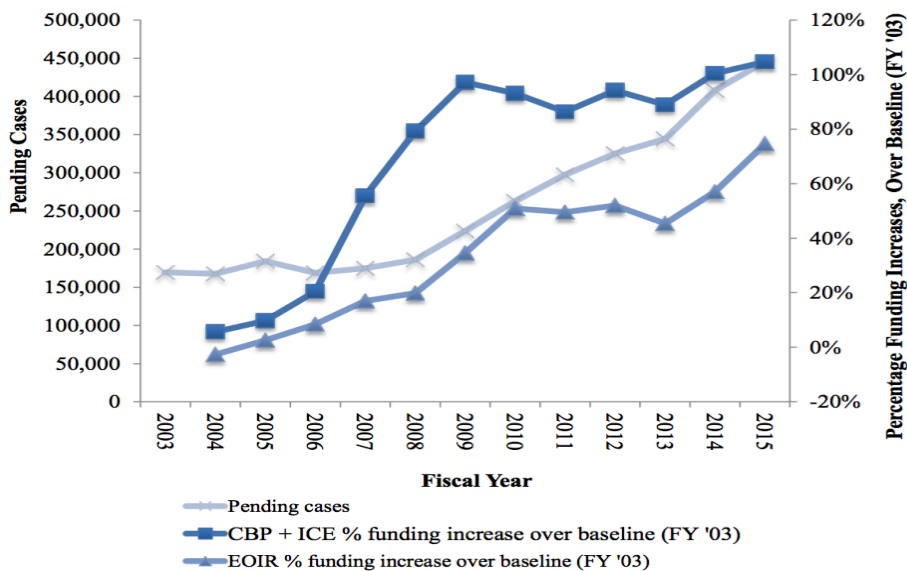
I. Under resourced Immigration Courts

The immigration crisis in the U.S. is not only rooted in the laws that are not child-oriented, but also in the inefficient and underfunded immigration court system. Given the magnitude of the immigration issue as a whole in the United States, the number of courts and judges is not enough to deal with the almost half a million backlog of cases that currently exists. The backlog is problematic, not only for unaccompanied minors that have to wait several months to have their cases resolved, but also for the government. The backlog has created a situation in which the United States is unable to provide children with valid claims the protection they need. At the same time, the backlog is delaying the removal of those without valid claims. This is a major concern because it calls into question the effectiveness of the system and it allows people to have the wrong perception regarding how cases are handled, leading people who live in Central America and Mexico to believe that the waiting time before the resolution of a case is one in which being in the U.S. illegally has no major consequences.

One of the major reasons why the immigration court system is so inefficient is that it does not have the proper resources to be able to handle the amount of cases handle

every fiscal year. Over the last decade, the U.S. focus has not been in addressing the immigration issues that are affecting the country internally; rather, the government has poured massive amounts of money into national security and immigration enforcement. The graph below shows the disparity in how resources have been allocated since 2003.

Figure 1: CBP & ICE Enforcement Funding vs. EOIR Court Funding, Case Backlog



Source: American Immigration Council 2

Resources for immigration enforcement have increased 105% since 2003; the increase went from \$9.1 billion to almost \$18.7 billion in the last decade.

Whereas on the other side, immigration backlogs have increased 163% during the same period and immigration court spending has increased only 74%, from \$199 million to \$347.2 million (American Immigration Council 2015). Therefore, this situation results in an immigration system that has a high caseloads and low staffing.

A major concern is that there are nearly 250 immigration judges nationwide.

Additionally, there are only 57 immigration courts across the country (EOIR 2015). This is a very harmful situation for UACs, and its implications are significant. Many UACs do not live in cities that do have immigration courts, making it very difficult for them and their families to be physically present at every immigration hearing they are scheduled to attend. Also, immigration judges have been reported to experience burnout given the high number of cases they are assigned each year. Since the number of immigration cases is so high, in many circumstances children do not have enough time to create a strong case or to find legal representation.

A reform to the immigration court system is needed, not only because of the enormous number of cases that are currently in backlog status, but also because the U.S. cannot continue to have UACs go through that system. Long delays affect many children whose needs are almost immediate. Also, due to the backlog, immigrant families in the U.S. are forced to be separated, affecting the well-being of the children who are seeking to be reunified with their families. Moreover, to be able to ensure that children have their circumstances deeply evaluated, more resources need to be allocated to the immigration courts. More than just allocating money in national security –which is highly important–, the government should provide the immigration court system with more resources as well. While unaccompanied children are waiting for their cases to be resolved, they are living in the United States within a system that allows a child to normalize his/her life, becoming part of a U.S. community. After being released by ORR to their families, the majority of UACs, start attending local schools, thus becoming part of the communities in which they live. Therefore, it is impossible for a child to be repatriated to his/her home

country without it affecting his/her emotional stability. This situation does not ensure the security of the child. First, it is against the child's best interest to go back to his/her home country and, second, it is counterproductive for the psychological well-being of the child to be sent back to the same place from where he/she left to seek refuge in the first place.

II. Lack of Legal Representation

Besides dealing with an under-resourced immigration system and intimidating settings, many UACs have to deal with the lack of legal representation. The lack of legal representation for UACs is an issue that children, and immigration advocates have highly criticized. Section 292 of the INA provides that “in any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense of the government) by such counsel.... as he shall choose” (8 U.S.C. § 1362). Minors are allowed to have legal counsel. However, many of the children from the Northern Triangle countries and Mexico do not have the financial resources to pay for an attorney. According to the Migration Policy Institute, “having an attorney is the single-most important factor in whether or not unaccompanied children receive a deportation order... More than 90% of unrepresented children are ordered with deportation, either through formal removal orders or informally through voluntary departure” (Pierce 8).

According to TRAC Immigration, the outcome if an attorney is present is that n almost half (47%) of the cases in which the child was represented, the court allowed the child to remain in the United States. The child was ordered “removed” which means that

the child would not be admissible to the U.S. for at least five years and was ineligible to apply for any legal status in the country in slightly more than one in four (28%) of these cases. In the remaining quarter (26%), the judge entered a “voluntary departure” order – the child will not have in his/her record that she/he has been in the U.S. illegally. If possible, the child can apply for a visa or green card without any restrictions. On the other side, when there is no attorney, nine out of ten children were ordered deported – 77% through the entry of a removal order, and thirteen percent with a “voluntary departure” order. One in ten (10%) were allowed to remain in the country (TRAC 2016).

In the United States, a child with no attorney has to represent him/herself in an extremely complicated legal system that also has a trained government attorney advocating for that child’s deportation. Also, in many circumstances, children are unlikely to know about the existence of the forms of legal reliefs that may apply to their situation. Many UACs attend their first master calendar hearing alone, creating an even more stressful situation for them, especially if the judge emphasizes that the child needs to have an attorney if he/she is seeking any kind of legal relief.

Table 5. Specific Outcomes for Juvenile Cases in the Immigration Courts

Case Outcome	Number		Percent	
	No Attorney	With Attorney	No Attorney	With Attorney
Removal Order	22,406	8,607	77%	28%
Voluntary Departure	3,759	7,970	13%	26%
Stay in U.S.				
Case Terminated	1,128	6,572	4%	21%
Relief Granted	168	2,710	1%	9%
Prosecutorial Discretion	315	1,775	1%	6%
Other Closure	1,397	3,402	5%	11%
Total Closed	29,173	31,036	100%	100%

Source: TRAC Immigration 2014

The levels of stress that children and their families go through when they do not

have an attorney can lead to children not wanting to attend their immigration hearings. If a child fails to attend his/her immigration hearings, a judge can automatically issue a deportation notice. If this happens, the chances for a child to stay in the U.S. are very low, especially if he/she is not able to find an attorney who can appeal the deportation notice. Given the circumstances that have led to massive numbers of children leaving their home countries, guaranteeing that children have an attorney should be a priority for the United States government.

The lack of legal representation does not allow children to have a fair process of adjudication, because without representation they are unable to present a strong case that might lead to a positive outcome for them. UACs should have the right to a legal counsel being appointed and afforded by the government. In doing so, the U.S. government not only ensures a fair immigration process, but most importantly the security and protection of the children's rights. By providing children with an attorney, the cases can be handled in a more effective and just way to help children to have their cases defended with more objectivity, while also allowing them to have their appeal heard so that they are able to defend themselves against the charges that have been issued against them.

III. Intimidating Settings, Minimal Emotional Maturity, Lack of English

During removal proceedings, children encounter many adversarial situations that work against their best interests. In the courtroom, this situation can be seen in the following ways: an inappropriate courtroom setting for children, aggressive questioning of children by judges or by government attorneys during the examination of the case, the absence of protection for child applicants, and the reluctant attitude of government

attorneys who may be unwilling to limit the contested issues in the case (Musalo, Frydman, and Seay 422). Children usually find themselves in a courtroom full of adult strangers who make them feel very uncomfortable, especially because of the lack of understanding of the legal offences they are facing.

This situation is exacerbated by the lack of English skills of most minors. In most settings, the judge and the child will be able to communicate through an interpreter who in most circumstances will be sitting very close to the child. Because of their young age and the lack of maturity, children's answers are usually very short and not detailed enough at first, which shows that children are unable to explain their accounts and situations coherently to an immigration judge. For example, the questioning of a judge to a UAC can proceed as follows:

Judge: Calls out the child's name to come up.

Judge (through interpreter): "Is Spanish your best language?"

Child: "Yes."

Judge: "Please stand and raise your right hand. Do you affirm what you say will be true?"

Child: "Yes."

Judge: "How old are you please?"

Child: "16."

Judge: "Ma'am what is your correct name?"

Child: Provides name

Judge: "What is your address?"

Child: Provides address

Judge: "Who is here with you today?"

Child: "I am here with my aunt."

Judge: "Where are you parents? Why aren't they here?"

Child: "I don't know."

Judge: "But you are living with your parents, aren't you?"

Child: "Yes."

Judge: "You do not have a lawyer?"

Child: "No."

Judge: "Ma'am the reason you're here today is because the Government is seeking to remove you from the United States because they say you came here"

illegally, with a passport that didn't belong to you. So you were sent to a court and before me as a Judge for me to decide if they're right, if you should be removed. And even if that's true, whether there's any way you can stay here legally. Do you understand?"

Child: "Yes."

Judge: Grants the child some time to try to obtain an attorney

Judge: "You must come back to court on [date] and [time] with your attorney. If you do not appear at that time, you could be ordered removed in your absence. And then you'll be ineligible for forms of relief under the Immigration Act for 10 years. Do you understand?"

Child: "Yes." (Musalo, Frydman, and Seay 425)

For a child, these questions might be confusing and intimidating. As previously noted, children's answers are usually very short. In cases where the child does not have a lawyer to represent them, the situation becomes even more complicated. When a child has an attorney, the attorney is able to explain afterwards or even before the hearing what to expect. But if the child does not have an attorney, he/she is not able to understand the seriousness of the situation nor are their families able to do anything about it. For children, this is a very intimidating situation because the environment around them augments the pressure of not knowing what can happen to them. Additionally, many children do not have their parents by their side, affecting them emotionally and making them even more fragile in this situation.

Most children are not able to clearly explain themselves or the reasons why they left their countries. The judge has the right to establish that the child was unable to make a strong case or in the case of asylum, a judge can argue that the child could not find the nexus between his/her circumstances and the requirements to apply for this form of legal relief. To address this situation, the EOIR has issued guidelines for judges in order to have a more child-friendly immigration process (Musalo, Frydman, and Seay 423). One

of the guidelines established that

Every immigration judge is expected to employ child sensitive procedures whenever a child is a respondent or witness is present in the courtroom. However, it is equally true that all such cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager (Schoenholtz 1004).

These guidelines clearly establish that, when in court, children should be treated differently and it does address the need for different procedures that recognize the unique situation of a child. However, these guidelines have not been implemented in immigration courts around the country. The guidelines are not binding and, as a result, many children are still being treated with indifference and their agency has not been taken into consideration. Not following a child-sensitive approach in immigration court is extremely disadvantageous for children because they are not given the opportunity to make the claims of their cases in a way that is comfortable for them to speak and this can lead to decisions that will not provide them with the protection they are looking for and the long-term results are very disastrous.

Section V-Conclusion & Recommendations

The increasing number of unaccompanied children that has crossed the southwestern border in the last few years has challenged the United States capacity to deal with this issue and has questioned the effectiveness of the immigration laws and policies currently in place. This issue has created and will continue to create discussion and frustration in the years to come as to what is the right path for the United States to follow in dealing with children entering the country illegally. This project has investigated only one major aspect of a very broad issue. There is no doubt that the United States immigration legal system needs to be reformed in order to deal effectively with the influx of UACs coming illegally from Central America and Mexico. The question confronting numerous U.S. agencies and lawmakers is the direction that the United States should take considering the various aspects of the question. Should a more humanitarian approach be given consideration? Or, does the U.S. need to develop a newly designed enforcement system that responds to the legal limbo in which children currently find themselves? Should a corps of teachers and counselors made up of recent college graduates be formed to work with the large number of children who are waiting for their legal processing? Regardless of the approach, there must be significant attention paid to the complexities of this situation. In the United States there are important policy questions that need to be reviewed and reconsidered, as the present responses to this situation are not working effectively.

First, the current system has proved to be a systematic failure regarding how to protect children. When immigration laws were created, children were simply not

considered in any significant way as it related to migration. However, in today's world, the need to create and implement laws that address the particular situation of dealing with migrant children who are illegal is paramount not only to protect the children but also their rights. An approach that directly addresses the needs of children will prevent the country from having these children in a legal limbo that, in the long run, can provide positive impacts in the communities where these children are going to live rather than negative impacts. A system with the proper laws to deal with children would prevent an internal crisis in the United States in which schools, hospitals, and other public service providers would not have to engage debate on how to provide adequate services to these children. Thus, an environment would be created for the children who are allowed to stay so that they can start the process of adaptation to U.S. communities in the best way possible, while also ensuring treatment that is in their best interests.

Second, one of the most important policy questions the United States needs to consider in order to ensure a better legal system for children is that of a comprehensive immigration reform. In this research, it has been shown that many of these children are coming to the U.S. not only because of the situation they were experiencing in their home countries, but also because they are seeking reunification with their parents, who left their country to ensure they could provide their children with a better future by earning money in the U.S. An additional problem is that many of these children come to the United States to live with families with mixed immigration status. Some have one parent who has legal status in the country, but the other one does not. Other children's parents are illegal immigrants, which negatively affect how a child approaches his/her immigration

case because many parents who do not have legal status in the U.S. have misconceptions regarding how their children could be protected in the United States. Finally, other children come to the United States to live with other relatives who are not their parents and who also do not have legal status, complicating how the case of a minor proceeds in immigration court. A comprehensive immigration reform can also develop policy that would encourage the legal migration of children, instead of children crossing borders illegally. By having such policies in place, their parents or family members could start a proper immigration process under which children could be considered for the benefits to which parents with legal status are entitled. By doing so, the United States would reduce the influx of illegal entrees.

Third, the United States needs to reconsider reinforcing its fundamental ethical standards in immigration law. The issue of unaccompanied minors is a moral issue. A best interest of the child approach is fundamental to deal with unaccompanied children. Changes in the immigration system are needed so that the best interest of the child principle can be introduced while, at the same time, a balance can be found with the enforcement laws currently in place. Minors should not be treated as adults under immigration law; it does not guarantee a fair and just trial or hearing. It also undermines the capability of children to present their claims before an immigration judge in a fair and just way. Furthermore, the decisions made by judges regarding the legal status of UACs do not take into consideration an outcome that best addresses the needs of the child. A 2007 document issued by the Executive Office of Immigration Review regarding immigration court cases involving UACs notes that “issues of law –questions of

admissibility, eligibility, for relief, etc. –are governed by the Immigration and Nationality Act and the regulations. The concept of the best interest 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 the law” (Neal 4). If adopted, the introduction of the best interest of the child would bring to the courtroom a more child-friendly process.

Having a network of pro-bono attorneys who are willing to represent these cases in court would benefit these minors positively and would ensure them a fair trial. Providing children with an attorney would mean that the United States is recognizing the agency that children have and that it has been supported by the CRC and its core principles. It would mean recognition from the United States government of the importance of children’s emotional and cognitive development, as well as the vulnerability they face in this situation. The immigration legal system that deals with UACs should be brought in line with how welfare laws treat children. Despite the fact that UACs are foreign nationals, they too deserve to be treated with dignity, especially due to the circumstances of their cases.

Fourth, the flaws of the immigration court system need to be addressed. It is a reality that the massive numbers of illegal children who have arrived in the past five years have caused more backlogs in the court system. Yet, the backlog has also increased due to the fact that immigration courts across the country are under resourced. With only 250 immigration judges, it is almost next to impossible for the country to appropriately address and solve this crisis. Immigration judges are getting burned out with the high

number of cases they have to deal with and careful determinations about an individual case are extremely hard to make under these circumstances. A reform in the legal system is necessary so that judges can get the proper training they need to deal with children's cases. Guidelines that have been put into place to train judges are not binding; therefore, it is up to their judgment as to how they proceed in UAC immigration hearings.

Additionally, children are in the desperate need of attorneys that guide them through their immigration processes. Without an attorney, children have minimum chances of being informed about the kinds of legal relief for which they can apply. Also, children's need for an attorney goes beyond being informed about their legal options. In the court, an attorney can make the difference between an underrepresented child making a claim, and a represented child whose claim is presented to the judge by an attorney. Just as in welfare law, children need a trained person that helps them support their claims and presents to the judge the needs of the child to attain protection from the U.S. government. If children continue to not be legally represented by an attorney, this issue will only continue increasing the needs of UACs already in U.S., it will continue to violate some of their primary human rights, and the country would experience a more complex dilemma in trying to figure out what needs to be done with the high number of children with no legal status in the country. Also, assigning a *guardian ad litem*, just as in welfare cases, would be extremely beneficial for children who have immediate social needs. If children have a *guardian ad litem* that defends and advocates for the child's case in court, the assessment of the needs of the child would be different because the minor would have someone making his/her claims.

Furthermore, DHS needs a stronger and more developed screening system that is able to recognize when a child is in need of protection. Repatriation should be the last option for a child who is fleeing violence or abuse in her/his home-country. In case of repatriation, the U.S. should ensure that the child is being repatriated to safe conditions and that he/she would not become the target of any non-state actor. Having a best interest of the child approach would allow the U.S. to consider the situation of a child more in depth and would bring the immigration legal system in line with U.S. family law where children's needs are considered a top priority.

Moreover, allocating resources exclusively to immigration enforcement and border control is not going to address the influx of minors coming into the U.S. With the high number of cases pending, the United States has an urgent need to allocate more resources to the immigration court system so that children are able to receive a decision from an immigration judge that is fair and that takes into consideration all the needs of the child. The United States should focus on reforming its court immigration system because; if the issue continues to develop as it has been over the last year, the number of children –and migrants overall– is not going to be reduced. Children that wait for periods of two years for an immigration case to be decided are already starting to become part of communities throughout the country and it will be counterproductive to send a child seeking protection, after two years of waiting, that his/her case cannot be considered by the U.S. legal system.

Finally, a very important factor that has a major role in how to solve this issue is political will and the public opinion regarding immigration. The current political

environment has prevented major pieces of legislation from being passed. Since 2007, Republicans have blocked about 500 legislation proposal supported by President Obama, and adult migrants and UACs that have entered the country in unpredictable numbers have paid the price of not passing any legislation. Also, the unwillingness of the federal government to address this issue has led to some states taking actions against immigrants, enormously affecting this population. In the case of UACs, the Republican-led Congress passed supplemental funding to deal with the crisis, but in return did not allow President Obama to pass legislation that would have affected the 11 million illegal immigrants currently present in the United States. Also, with all the events happening worldwide, the future for legislation on border control that benefits children does not seem so bright. Historically, national security has triumphed over protection of children crossing the border, and they have been portrayed as criminals rather than refugees seeking protection.

Furthermore, public opinion is also very important in how this issue is being handled. In the U.S. when an unexpected event happens and it is related to children, people react in in a very responsive way in which they ask the government to do something. However, in the case of UACs, the perception of the seriousness of their claims is very different. Even though a great majority of people believes that UACs do have humanitarian claims, others believe that children fleeing these countries should not be given protection. In this issue, the general perception people have over immigrants being bad people and taking their jobs plays a major role in how people react to children entering the southern border. This is important not only because a protective reaction from the people could potentially cause politicians to take action in immigration, but also

because it causes a different environment in U.S. communities across the country in which children do not have to experience rejection and discrimination.

My goal with this project is to bring attention to the legal challenges UACs face in the United States and the need for a system that follows the principles established by the best interest of the child in the CRC. The United States cannot continue to violate children's rights and it must ensure the protection of children from Central America and Mexico. To provide Central America and Mexico with more aid for security and development purposes will, undeniably, help to reduce the influx. However, solutions are to be sought in order to ensure that children are treated according to their needs and are given the protection they are so desperately seeking. The United States needs immigration laws to have a more humanitarian approach to deal with unaccompanied minors. Even though the United States national security concerns are very valid, children should not be dehumanized. Criminalizing children in the same way as an adult is not only inhumane, but also highly ineffective when trying to reduce the flow of children migrants entering the United States.

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