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SUBMITTED INPUT

An NGO input to the Special Rapporteur for the Human Rights of Migrants to the Office of the United Nations High Commissioner for Human Rights report on pushback practices and their impact on the human rights of migrants

SUBMITTED BY

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This report is submitted to the UN Special Rapporteur on the Human Rights of Migrants in preparation of the 47th Report to the Office of the United Nations High Commissioner for Human Rights on the use of pushback practices and their impact on the human rights of migrants.

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Input for the Special Rapporteur’s Report on Pushback Practices and their Impact on the Human Rights of Migrants, Submitted by the Center for the Human Rights of Children, Loyola University Chicago School of Law et al., February 1, 2021

I. Introduction

The Center for the Human Rights of Children, in collaboration with Kids in Need of Defense (KIND), the Women’s Refugee Commission, and the Young Center for Immigrant Children’s Rights (“Young Center”), submits this input in response to the call for submissions made by the Special Rapporteur on the Human Rights of Migrants to inform the forthcoming report to the 47th session of the Human Rights Council regarding the use of “pushback” practices and their impact on the human rights of migrants. This input will focus specifically upon the implementation of pushback policies by the United States Government (“USG”) along the border between the United States and Mexico and the impact those policies have had, and continue to have, on the rights of migrant children. The signatories to this input are national and international organizations that provide a range of services related to migrant children, including direct legal services, social services, advocacy, research and scholarship.

Children are uniquely vulnerable, due to their age, development, and dependence on adults for their safety and well-being. The plight of migrant children has been tied to that of all migrants—perpetuating the unfortunate tradition of treating migrant children merely as adults in miniature or merely as an invisible extension of their migrant guardian. Migrant children must be given special attention, and all decisions concerning migrant children must be firmly centered around the best interests of the child. This input calls attention to the ways in which the USG has specifically targeted and exploited the unique vulnerabilities of migrant children to achieve its unlawful policy goals. The result has yielded state-sanctioned violence against migrant children’s physical, mental, emotional, and developmental well-being.

II. The Suppression of Peremptory Norms Relating to All People, Especially Children

This input specifically addresses the ways in which USG pushbacks have violated peremptory norms including—pursuant to each pushback mechanism—the right of migrant children not to be returned to persecution and harm under the *jus cogen* imperative of non-refoulement.¹ We also evaluate the ways in which USG pushbacks violate *jus cogens* principles of international law, such as a child’s inherent right to life, survival and development² and to be free from torture.³ All

¹ *United Nations Protocol Relating to the Status of Refugees* art. I, 31 January 1967, *United Nations Treaty Series*, vol. 19, No. 6223, [hereinafter “Refugee Protocol”]; *Convention Relating to the Status of Refugees* art. 33(1), 28 July 1951, *United Nations Treaty Series*, vol. 189, No. 150, p. 152, [hereinafter “Refugee Convention”]; see also Refugee Act of 1980 § 208, 8 U.S.C. § 1158, (c)(1)(A) (2018) (“In the case of an alien granted asylum... the Attorney General shall not remove or return the alien to the alien’s country of nationality or, in the case of a person having no nationality, the country of the alien’s last habitual residence).

² General Assembly resolution 44/25, *Convention on the Rights of the Child*, 20 November 1989, art. 6 [hereinafter “UN CRC”].

³ Under the Convention Against Torture – which the United States has ratified and incorporated, in part, into domestic law – torture is “any act by which severe pain or suffering, whether physical or mental, is intentionally

pushback mechanisms violate the customary international right of the child to have their best interests considered.⁴ Each mechanism, and the manifest violations of children’s rights that flow from them, has resulted in immense physical, emotional, developmental, and traumatic harm to migrant children.

III. United States Government Pushbacks: A Case Study in the Need for Enhanced Protections for Migrant Children

The following provides a brief synopsis of specific policies and practices taken by the USG which are identified as “pushback” mechanisms directly infringing upon the rights of child migrants. This synopsis is not an exhaustive discussion of the pushbacks implemented by the USG, but merely a selection of some of the most violative and harmful practices that have been used.⁵

A. USG Pushback Mechanism: Family Separation Under “Zero Tolerance”

Beginning in January of 2018, advocates began decrying an informal practice of separating migrant children from their family at the U.S.-Mexico border.⁶ In April of 2018, the government formalized the unthinkable practice of separating every single parent and child detained at or along the U.S. borders or at ports of entry.⁷ The policy publicly called for prosecuting immigration offenses including unauthorized entry.⁸ The collateral consequence of this policy was the adoption of *pro forma* family separation in order to carry out the prosecutions. While family separation was

inflicted on a person for such purposes as ...intimidating or coercing him or a third person.” See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, *United Nations Treaty Series*, vol. 1465, No. 85, p. 113.

⁴ UN CRC, at art. 3, *supra* note 2; See generally, U.N. Children’s Fund [UNICEF], *Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, available at <https://www.unicef.org.uk/publications/child-rights-convention-2012-report/>. (Recognizing that every country in the world, apart from the United States, has ratified the UN CRC, and that pursuant to a UNICEF study of the UN CRC, “[t]he right of the child to have their best interests considered is the single most universally adopted principle of the CRC,” the right of a child to have their best interests considered has become a preemptory norm as recognized by treaty, custom and general principles of law recognized by civilized nations.)

⁵ See National Immigrant Justice Center, *A Timeline of the Trump Administration’s Efforts to End Asylum*, (last accessed Jan. 24, 2021) available at <https://immigrantjustice.org/issues/asylum-seekers-refugees>.

⁶ Sarah J. Diaz, *Parent-Child Border Separations Violate International Law: Why it matters and what can be done to protect children and families*, GEO. HUM. RTS. INST.: PERSP. ON HUM. RTS. 6 (2018) available at <https://georgetown.app.box.com/s/dunc9o3twzy6obc03oh5wandfl9cnwng>.

⁷ See Memorandum for Federal Prosecutors Along the Southwest Border, OFFICE OF THE ATTY GEN., (Apr. 6, 2018) available at <https://www.justice.gov/opa/press-release/file/1049751/download> (“Zero-Tolerance” Policy Memo).

⁸ *Id.* These offenses are laid out at 8 U.S.C. § 1325(a): “Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.”

said to be incidental to the Zero Tolerance Policy, parents and children were separated in all cases including cases in which the parent properly presented themselves for asylum at the border or port of entry—cases in which there were no grounds for prosecution.⁹ This policy inflicted unquantifiable, irreparable harm¹⁰ upon thousands of children and their parents and led to a fraught reunification process once it was finally ended. Hundreds of parents were deported without their children and hundreds of these children remain separated from their parents to this day.¹¹

This policy not only violated the due process rights of both parents and their children,¹² but it was denounced by the U.S. medical community as a form of torture perpetrated against children.¹³ The infliction of pain and suffering to children was not simply an unfortunate side effect of stricter immigration policies—it was the targeted, intentional impact of the USG pushback mechanism.¹⁴ The USG used family separation to both deter migration and coerce children and families to abandon their claims for asylum in exchange for promises of reunification.¹⁵

⁹ Camila Domonoske & Richard Gonzales, *What We Know: Family Separation And 'Zero Tolerance' At The Border*, NAT'L PUBLIC RADIO (June 19, 2018), available at <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>. 36Id.

¹⁰ See Sarah A. MacLean *et al.*, *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOCIAL SCIENCE & MED. at 303-08, (June, 2019) available at <https://www.sciencedirect.com/science/article/abs/pii/S0277953619302138?via%3Dihub>. Trauma resulting from family separation can severely harm a child's development and create harmful consequences that last into adulthood. Research shows that children who experience more adverse experiences during childhood, such as separation from family and detention, are statistically more likely to experience negative behavioral and physical health outcomes as adults.

¹¹ See Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot be Found*, N.Y. TIMES (Oct. 21, 2020) available at <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>.

¹² See *Ms. L. v. U.S. Immigration and Customs Enf't*, 310 F. Supp. 3d 1133, 1144-46 (S.D. Cal. 2018), modified by 330 F.R.D. 284 (S.D. Cal. 2019); Compl. ¶ 62 (citing *Ms. L.*) (“A practice of this sort [family separation] implemented in this way is likely to be ‘so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience,’ interferes with rights ‘implicit in the concept of ordered liberty’ and is so ‘brutal’ and ‘offensive’ that it does not comport with traditional ideas of fair play and decency”).

¹³ Charles Oberg *et al.*, *Treatment of Migrant Children on the US Southern Border Is Consistent With Torture*, 147 PEDIATRICS 1, (Jan., 2021) available at <https://pediatrics.aappublications.org/content/pediatrics/147/1/e2020012930.full.pdf>.

¹⁴ Danielle Diaz, *Kelly: DHS is Considering Separating Undocumented Children from their Parents at the Border*, CNN (Mar. 7, 2017), available at <http://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>. (stating that the government was considering separations “in order to deter more movement... [the children] will be well cared for as we deal with their parents...”); see also David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018) available at <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C>.

¹⁵ See Letter to John V. Kelly, Acting Inspector Gen., Dep't of Homeland Sec., *Re: The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials Against Parents Who Were Forcibly Separated From Their Children*, from the American Immigration Council (Aug. 23, 2018), available at https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/the_use_of_coercion_by_u.s._dept_of_homeland_security_officials_against_parents_who_were_forcibly_separated_from_their_children_public_fin_0.pdf.

Given the extensive press coverage that the family separation crisis received, rather than present examples here, the signatories have compiled examples of this atrocity in an appendix to this input.¹⁶

B. USG Pushback Mechanism: Migrant Protection Protocols (MPP) or “Remain in Mexico”

In January 2019, the USG began to implement a policy known as the “Migrant Protection Protocols” which returns non-Mexican asylum seekers to Mexico for the duration of their immigration proceedings.¹⁷ Under this policy, tens of thousands of asylum seekers have been forced to wait in “MPP camps” composed of crude, makeshift tents and plagued by crime, abuse, and poverty.¹⁸ As of October 2019, at least 16,000 children and nearly 500 infants have been forced to wait in these conditions. There have been at least 1,314 publicly reported cases of murder, rape, torture, kidnapping, and assault against those who have been subjected to MPP.¹⁹ There have been over 300 cases of children who have been kidnapped or nearly kidnapped.²⁰ The introduction of the COVID-19 pandemic has only increased the dangers faced by migrant children under MPP.

MPP has fostered the creation of conditions which pose direct threats to the life, survival and development of migrant children. Families are forced into the position of sending their children to the U.S. alone to pursue their asylum claims in relative safety.²¹ MPP courts lack adequate protections necessary to carry out a legitimate legal proceeding on behalf of an asylee, especially

¹⁶ See also, Policy Report of KIND at Appendix B; see also Policy Report of the Young Center at Appendix B.

¹⁷ See Policy Guidance for Implementation of the Migrant Protection Protocols, U.S. DEP’T OF HOMELAND SEC., (Jan. 25, 2019) available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; see also *Innovation Law Lab v. Nielsen*, 19-cv-00807, Doc. 73, (N.D. Cal. 2019).

¹⁸ See Human Rights First, *Publicly Reported MPP Attacks*, (Dec. 2020) available at <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks12.15.2020FINAL.pdf>; see also Kristina Cooke *et al.*, *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, REUTERS (Oct. 11, 2019) available at <https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1>. (Note here that the USG did not create or fund these camps for migrants. Nor does the USG make any efforts to protect migrants. Instead, migrants created their own encampment which has relied largely on humanitarian assistance for survival. These camps lack food, access to medical care, water and education.)

¹⁹ See Human Rights First, *Publicly Reported MPP Attacks*, (Dec. 2020) available at <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks12.15.2020FINAL.pdf>.

²⁰ See Women’s Refugee Commission, *Chaos, Confusion and Danger: The Remain in Mexico Program in El Paso*, at 3-4 (May 6, 2019) available at <https://www.womensrefugeecommission.org/research-resources/chaos-confusion-and-danger/> [hereinafter “WRC Report on MPP”].

²¹ *Id.*

for a child.²² The superficial proceedings designed under MPP undermine the basic guarantee of due process and the obligation of non-refoulement.²³

This state-sanctioned violence has devastated the lives of children, as evidenced at Appendix A. Consider five-year-old “Juan” from Guatemala who, along with his mother, was forced to live in Matamoros MPP camp:

Juan, a five-year-old Honduran boy who became sick and, along with his mother, was kidnapped in the Matamoros encampment, provides another example of the danger of being forced to wait in Mexico. Juan’s mother was sold to and raped by a human trafficker as a child. She escaped after four years, and gave birth to Juan. He became her joy, and her sole mission was to protect him from the abuse and dehumanization that she experienced as a child. In October 2019, they fled Honduras for the U.S. after a man stalked and threatened to kill Juan’s mother. After being sent to Matamoros under MPP, Juan and his mother stayed in the encampment. The area, however, was controlled by a Mexican cartel. One day near the camp’s entrance, a group of men in a vehicle attempted to kidnap Juan’s mother when she returned from a convenience store with Juan. She quickly grabbed Juan, and they fell to the ground. Juan injured his cheek during the fall, leaving a scar on his face. Following these events, his mother was afraid to leave the camp for any reason. Juan became ill due to the weather conditions in Matamoros, where he endured very hot temperatures during the day and cold temperatures at night. Juan lost his appetite. Although his mother searched for medical assistance, she could not find the medical attention that Juan needed. At one point they were kidnapped for two months. They were released, but Juan’s mother felt trapped in the camp because she was petrified that cartel members would attempt to kidnap her again if she ventured from her tent. With no other option to save her son, she separated from Juan, as he sought protection alone from border officials. But for Juan, the trauma did not end; after their separation, he constantly cried, called for his mother to return, and wet the bed at night.²⁴

Young Center *Amicus* Brief, *Wolf v. Innovation Law Lab*, (Jan. 22, 2021).

²² See KIND Policy Report on MPP at Appendix C; see also Young Center Policy Report on MPP at Appendix C.

²³ See Brief of Local 1924 as *Amicus Curiae*, 19-cv-15716, ECF No. 39, Compl. ¶ 26, *Innovation Law Lab. v. Wolf*, 951 F.3d 1073 (9th Cir. 2019). U.S. asylum officers stated that MPP “adds to the already overwhelming burden on our country’s immigration judges, and further delays hearings for asylum seekers with meritorious claims.”

²⁴ See Brief of Young Center for Immigrant Children’s Rights *et al.* as *Amicus Curiae*, at 20, *Wolf v. Innovation Law Lab*, No. 19-1212, 141 S.Ct. 617 (Jan. 22, 2021).

C. USG Pushback Mechanism: Title 42 Expulsions

Beginning in March 2020, the USG authorized the expulsion of all undocumented noncitizens appearing at the border under the guise of preventing the spread of the COVID-19 pandemic.²⁵ This policy, known as Title 42, has categorically denied migrants access to asylum proceedings as required by U.S. obligations under the Refugee Convention.²⁶ Over 180,000 migrants have been summarily expelled under Title 42, including over 13,000 unaccompanied children.²⁷ The process, by design, fails to screen migrants, including children, for fear of persecution or safety concerns upon expulsion or return to country of origin.

Many of the unaccompanied children who have been expelled were first secreted away to undisclosed and unlicensed commercial hotels.²⁸ These children were placed under guard by security contractors with no training or certification in child welfare.²⁹ The use of secret detention practices placed children in environments ripe for predatory child abuse. Title 42 repudiates US obligations relating to the prohibition against torture by using incommunicado detention—children were detained in locations unknown to them and without access to the outside world for days or weeks at a time.³⁰

The use of rapid expulsion, regardless of a child’s fear of return to home country, again exemplifies the failure of the USG to protect the preemptory norm of non-refoulement or to consider the best interests of the child. Under Title 42, children have been expelled to incredibly dangerous areas along the border.³¹ Children are also often expelled during hours when there are no authorities to

²⁵ See Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 24, 2020); *but see also* Letter from Public Health Leaders to HHS Secretary Azar and CDC Director Redfield (May 19, 2020), available at <https://reliefweb.int/report/united-states-america/public-health-experts-urge-us-officials-withdraw-order-enabling-mass>. Many public health officials, doctors, and infectious disease experts have spoken out against the efficacy of Title 42 and have stated that it would not help control the spread of the virus in any meaningful way.

²⁶ Refugee Convention, *supra*, note 1; Refugee Protocol, *supra*, note 1.

²⁷ See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, U.S. CUSTOMS AND BORDER PROTECTION (last modified Jan. 7, 2021) available at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>; *see also* Zolan Kanno-Youngs, *Judge Halts “Public Health” Expulsions of Children at the Border*, N.Y. TIMES (updated Jan. 20, 2021) available at <https://www.nytimes.com/2020/11/18/us/politics/trump-migrant-children.html>.

²⁸ See “Declaration of Marisol Vargas” at 6, 2:85-cv-04544-DMG, ECF No. 920-2, *Flores v. Barr*, 407 F.Supp.3d 909 (C.D. Cal. 2020) (recalling being rebuffed by “[u]nidentified men, who appeared to be contractors of DHS” who denied court-appointed monitors access to speak with children detained at the Hampton Inn Hotel in McAllen, TX).

²⁹ See Malachy Schrobilgen & Sarah J. Diaz, *COVID-19’s Nefarious Toll on Migrant Children: Executive Overreach and a Framework to Prevent Abuse*, CTR. FOR THE HUM. RTS. OF CHILDREN, (November, 2020) available at <https://www.luc.edu/media/lucedu/chrc/pdfs/Schrobilgen-and-Diaz.pdf>.

³⁰ See Flores Independent Monitor Interim Report on the Use of Temporary Housing for Minors and Families Under Title 42 at 6-8, 2:85-cv-04544-DMG, ECF No. 938, *Flores v. Barr*, 407 F.Supp.3d 909 (C.D. Cal. 2020).

³¹ “Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020) at 4.

receive them and the potential for kidnapping or exploitation is highest.³² Some children expelled to Mexico are not from Mexico and are simply left in foreign country without a plan for their safety or care.³³ Consider the following example:

Ana*, a 14-year-old girl from El Salvador, and her 11-year-old brother Alex* fled to the U.S. border in July 2020 due to threats from gang members against their family because of their stepfather’s job as a police officer. The children’s mother fled to the U.S. in 2018, leaving them in their aunt’s care, but as the gang’s threats grew worse, their aunt’s partner told the children they would have to leave the home. With nowhere else to go, Ana and Alex left El Salvador alone in hopes of reaching their mother. After crossing the border, they were held for six days in CBP custody, with no information about what would happen to them, and allowed to speak to their mother for only five minutes a day. Ana was sexually assaulted by a CBP official while in custody, but was afraid to tell anyone at the facility, and CBP officers monitored her calls with her mother. When the children were taken to the airport they believed that they were finally going to reach their mother, until Ana saw that their flight was destined for San Salvador. The children were able to reunify with their aunt after their expulsion, but the police have threatened the family with criminal charges because the children fled during the national quarantine, and they remain in hiding from the gang.³⁴

Complaint filed with Customs and Border Protection, Office of the Inspector General, (Sept. 15, 2020), on file with KIND.

New reports indicate some expelled children have been subjected to persecution upon return to their country of origin.³⁵

D. USG Pushback Mechanism: Metering and Turn-backs

In spring 2018, the USG announced a “Turnback Policy” which directed border officials to “directly or constructively” turn back migrants without first screening them for asylum.³⁶ Officials

³² *Id.* at 1.

³³ *Id.*

³⁴ Complaint filed with Customs and Border Protection, Office of the Inspector General, (Sept. 15, 2020), on file with KIND.

³⁵ *Id.* at 3.

³⁶ See 9 Office of Inspector General, U.S. DEP’T OF HOMELAND SEC., Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, Sept. 27, 2018, available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> (confirming the implementation of

were directed to do so through pretextual means, such as falsely asserting that a port of entry lacked capacity to process asylum seekers or through the use of verbal and physical abuse to coerce migrants, including children, to recant their stated fear of return.³⁷ The mechanism employed no oversight, no formal process, and in some cases, no record if a child had even appeared at the border. Some children were reportedly denied a place on the waitlist based on their skin color or a CBP officer's subjective belief that they would be more likely to apply for asylum.³⁸

These practices leave unaccompanied children with impossible choices such as remaining in the dangers of Mexico, crossing the border without inspection via predatory enterprises including cartel smugglers, or return to persecution in home country.³⁹ Children, including unaccompanied children, were turned away, exposing them to the dangers of kidnapping, abuse, or death in Mexico.⁴⁰ Consider the following:

In December 2018, three Honduran children in Tijuana who traveled with the caravan and had not presented themselves at a port of entry due to metering, were tortured—and two of them were brutally murdered. At least two of them had already been identified as having a strong case for accessing protection in the US. “It was Mexican criminals who killed them, but it was the US government who sent them to the slaughterhouse.”⁴¹

The unsupervised, ad hoc practice has also led to arbitrary forced family separations. Consider the experience of Oscar, a young boy whose family was separated as part of the USG's metering and turn-back policies:

Oscar, a six-year-old Salvadoran boy, and his father were separated from Oscar's mother and younger brother for nearly eight months based on a CBP agent's unsupervised and arbitrary decision to separate the family. Oscar's father served in the Salvadoran military for three years before retiring to work for a private company. Oscar's mother, a homemaker, cared for Oscar and his little brother.

a “turnback” policy executed by border patrol, but also noting that advocates were reporting the practice since 2016).

³⁷ See *Al Otro Lado, Inc. et al. v. McAleenan et al.*, 3:17-cv-02366, ECF No. 189, ¶¶ 51-3, 327 F.Supp.3d 1284 (S.D. Cal. 2018).

³⁸ *Al Otro Lado, Inc. et al. v. McAleenan et al.*, 3:17-cv-02366, ECF No. 189, ¶¶ 103-04, 327 F.Supp.3d 1284 (S.D. Cal. 2018).

³⁹ Women's Refugee Commission, *Migrant and Refugee Caravans: Failed Responses to Women and Children in Need of International Protection and Humanitarian Aid*, at 10 (May 2019) available at <https://www.womensrefugeecommission.org/research-resources/migrant-and-refugee-caravans/> [hereinafter “WRC Caravan Report”].

⁴⁰ “WRC Report on MPP,” *supra* note 20, at 7.

⁴¹ “WRC Caravan Report,” *supra* note 39 at 10.

But their home was abruptly damaged after a group of men forcibly entered it searching for Oscar's father. The men assaulted and threatened Oscar's father because of his military service, destroying his military credentials. After fleeing El Salvador, the family was separated at the border because a CBP agent improperly told them that only one parent and one child could enter into the U.S. He offered no explanation for his arbitrary decision. Oscar and his father were returned to Matamoros under MPP while his mother and brother entered the U.S., despite the entire family arriving and presenting themselves together. In Mexico, Oscar's father was kidnapped and held for ransom for several days by Mexican cartel members.⁴²

Young Center *Amicus* Brief, *Wolf v. Innovation Law Lab*, (Jan. 22, 2021) at 33.

IV. Conclusion and Recommendations

The USG pursued migration pushbacks with the express purpose of ending asylum and other relief for migrant children.⁴³ The USG did so by taking advantage of children's vulnerabilities and the lack of robust special protections for migrant children. The implementation of these pushbacks exploited gaps in the U.S. system, international system, and in the general principles of law applied to migrant protection. In light of the intentional and egregious nature of the violations of migrant children's rights by the USG, we respectfully submit the following recommendations:

First, the Special Rapporteur should fully investigate the systemic human rights violations by the USG as applied to children. Such investigation will provide transparency and insight into the state actions and institutional failures which enabled such abuses. These insights will protect this vulnerable population from being targeted through future abuses of executive power.

Second, the Special Rapporteur should also fully investigate all USG foreign policy actions that allow for pushbacks and the human rights violations that result from them. This investigation would necessary include the role Mexico played in allowing pushbacks and not offering sufficient protection to those affected. Such investigation would underscore the responsibilities of each country, and provide recommendations to prevent international cooperation that results in human rights violations and putting children at risk

Third, with a new Administration, the Special Rapporteur, via its investigatory findings, should call upon the USG to recommit to its international obligations under the Refugee Convention, the Refugee Protocol, and to urge the US government to ratify the UN CRC. This will strengthen

⁴² See Brief of Young Center for Immigrant Children's Rights *et al.* as *Amicus Curiae*, at 33, *Wolf v. Innovation Law Lab*, No. 19-1212, 141 S.Ct. 617 (Jan. 22, 2021).

⁴³ See Kids In Need of Defense, *What are the TVPRA Procedural Protections for Unaccompanied Children?*, Policy Report (Apr. 1, 2019) available at <https://supportkind.org/wp-content/uploads/2019/04/KIND-TVPRA-talking-points-4.1.19-FINAL.pdf> (detailing how the Trump administration repeatedly mischaracterized statutory protections for unaccompanied migrant youth as "loopholes" in the immigration laws).

international commitments to the rule of law and the responsible use of state power as applied to the rights of migrant children.

Fourth, the Special Rapporteur, in partnership with a USG committed to the CRC, must facilitate the development of a U.S. domestic law framework that treats migrant children as children.

Fifth, the Special Rapporteur, in partnership with a recommitted USG, must facilitate the development of a framework for responsible derogation from certain international human rights obligations in times of national emergency such as the COVID-19 pandemic. This framework must consider the unique vulnerabilities of migrant children.

APPENDIX A

Organizational Partners

The following are additional case examples of rights violations of migrant children at the hands of the USG that our organizational partners have encountered through their work. In Appendix A, we briefly introduce our partners, followed by the list of individual cases they have encountered, subdivided by each major policy addressed in the input. Appendix B compiles policy reports from our partners which address family separation under Zero Tolerance. Appendix C compiles policy reports from our partners which address the Migrant Protection Protocols. Appendix D compiles policy reports from our partners which address Title 42 expulsions. Appendix E compiles policy reports from our partners which address Metering and Turnbacks.

The Young Center for Immigrant Children's Rights

The Young Center was founded in 2004 to develop a program to advocate for and advance the best interest of unaccompanied immigrant children according to the Convention on the Rights of the Child and state and federal law. The Young Center serves as a trusted ally for unaccompanied children when they arrive in the United States and while they are in deportation proceedings, advocating for their best interests and standing for the creation of a dedicated children's immigrant justice system that ensures the safety and well-being of every child. Young Center attorneys and social workers, along with bilingual volunteers, are appointed as Child Advocate (guardian ad litem) in order to advocate for the best interests of these children. This includes decisions related to the custody and release of children to the ultimate decision about whether children will be allowed to remain in the United States. The Young Center's goal is to change both immigration policy and practice so that immigrant children are recognized first as children and their best interests are considered in every decision.

Kids in Need of Defense

Kids in Need of Defense ("KIND") is the pre-eminent U.S. based nongovernmental organization devoted to legal protection of unaccompanied and separated children. KIND envisions a world in which children's rights and well-being are protected as they migrate alone in search of safety. Since its inception in 2008, KIND has received referrals for more than 21,000 cases and now serves over 5,000 children annually in partnership with hundreds of law firm, corporate, law school and bar association partners. KIND has 13 offices in the United States and at the U.S.-Mexico border, that provide unaccompanied children holistic and trauma informed legal and social services. KIND's programming in Central America and Mexico works with partners on the ground to address the root causes of migration, protect children during migration, and connect repatriated children to essential services. Through its new European Initiative, KIND and partners in Belgium, France, Greece, Ireland and the United Kingdom work to ensure access to high quality pro bono legal assistance for unaccompanied children in Europe.

Women's Refugee Commission

The Women's Refugee Commission ("WRC") was created in 1989 to ensure that the rights and needs of women, children, and youth displaced by conflict and crisis are taken into account in humanitarian programs. is a leading research and advocacy organization that works to advance gender equality and resilience across humanitarian response. WRC's groundbreaking work has led to transformative changes in humanitarian programming. As a result, refugee women, children, and youth now have greater access to sexual and reproductive health care from the very onset of

an emergency. They are more likely to find safe, dignified work. Marginalized individuals, including displaced people with disabilities, are included in more programs and in making decisions that affect their lives. Preventing and responding to sexual and gender-based violence is now on the international agenda. And families and children seeking asylum in the United States have a fearless advocate looking out for their best interests.

Case Encounters

Family Separation

Bianca, a young woman from Nicaragua, was separated from her five-year-old daughter, Helen, and her 16-year-old-brother, Eddy, with whom she was traveling to the United States when they turned themselves in to immigration agents at or near El Paso, Texas on/about May 1, 2019. Bianca was kidnapped and raped when she was a young teen, which resulted in her pregnancy with Helen. Because of the violent circumstances of her pregnancy and because she was a minor at the time of the birth, Bianca was not listed as the birth mother on Helen's birth certificate. Rather, Bianca's mother, Ingrid, was listed instead. However, a biological parent-child relationship claim (between Bianca and Helen) was made clear to the CBP officials verbally and by way of hospital records when Bianca and her child were in CBP custody. Despite that claim, and amid ongoing intergovernmental discussions about providing Bianca with a DNA test, Helen was sent to the same ORR shelter where Eddy had already been sent. After approximately six weeks in CBP custody, Bianca was never provided with the DNA test and was placed into RIM. A team of attorneys and advocates searched for Bianca in Ciudad Juárez, and only after getting in touch with Ingrid (Bianca's mother), was she able to be located. Eventually pro bono attorneys familiar with her case, together with the ACLU, negotiated with a DOJ attorney to bring Bianca back to the Port of Entry for a DNA test. When Bianca returned to the US for her first immigration court hearing on July 8, 2019, her counsel was under the impression she was to receive the DNA test while in CBP custody or after having been transferred to ICE custody. Neither happened, and Bianca was returned to Mexico again. Following weeks of further advocacy and follow-up with government officials, Bianca finally received a DNA test on August 1, 2019. On August 7, 2019, the results came back confirming her parental relationship to Helen. In total, Bianca was separated from her daughter (and from her younger brother) for approximately three months. The separation wrought distress on Bianca's family and traumatized Bianca and her daughter. In addition, Bianca herself was placed at higher risk upon being sent to Ciudad Juárez to wait for her immigration hearings, as she did not feel safe in Ciudad Juárez and

had a difficult time finding a place to stay. For example, upon her initial return to Mexico, she was turned away from one shelter that was full and was sleeping in a church.¹

Women’s Refugee Commission, Re: Separation of Families via the Migrant Protection Protocols, Letter to Dep’t of Homeland Sec. (Aug. 16, 2019) at 6.

Marcelo, a father from Guatemala, was separated from his 15-year-old son Byron when they crossed into the US on approximately May 2, 2019 near Calexico, California. According to Marcelo, CBP officials accused him of lying about whether Byron was his son. He said that officers “humiliated him,” and that they threw Byron’s birth certificate into the garbage. He was told that if it was determined that he was lying, he would go to jail. When Marcelo received a Notice to Appear (NTA) while in CBP custody, where he was held for eight days, he asked why they did not give him an NTA for Byron. Marcelo was told not to worry about it. Unbeknownst to Marcelo, Byron was sent to an ORR facility in Florida, and Marcelo – without ever having received any explanation or warning for the separation or his placement into RIM – was returned 7 to Mexicali, Mexico. His first immigration court hearing, held hundreds of miles away in San Diego, California, was on July 8, 2019. Marcelo was returned to Mexico after his hearing.²

Women’s Refugee Commission, Letter to U.S. Department of Homeland Security, (Aug. 6, 2019).

CBP sent Katia and her daughter to Mexico, separating them from Katia’s husband and 7-yearold son when the girl fell ill in CBP custody. After days in makeshift CBP detention facilities under the Paso del Norte Bridge and a desert tent camp with limited food and heavily chlorinated water that burned their lips, Katia’s daughter collapsed. The child was sent to a local hospital with her mother. “When I returned to the camp with my daughter, my husband and son were gone. They’d been released. No one had told me that was happening,” Katia said. CBP returned Katia and her daughter to Mexico where a taxi driver kidnapped them outside of a Mexican migration office in Ciudad Juárez.³

Women’s Refugee Commission, Letter to U.S. Department of Homeland Security, (Aug. 6, 2019).

¹ Women’s Refugee Commission, Re: Separation of Families via the Migrant Protection Protocols, Letter to Dep’t of Homeland Sec. (Aug. 16, 2019) at 6.

² Women’s Refugee Commission, Re: Separation of Families via the Migrant Protection Protocols, Letter to Dep’t of Homeland Sec. (Aug. 16, 2019) at 6-7.

³ *Id.* at 11.

“Maria arrived at the border during the height of Zero Tolerance policy with her four sons, ages six months to twelve years old. They were fleeing persecution in their home country. At the border, Maria’s sons, including the nursing baby, were taken from her and placed in [Office of Refugee Resettlement (ORR)] custody. She was sent to [Immigration and Customs Enforcement (ICE)] detention. Alone with his brothers, the twelve-year-old became a surrogate parent, waiting for weeks to be released to his grandmother who was already living in the United States. With substantial advocacy...Maria was reunited with her children. The trauma inflicted on this family may have lifelong consequences.”⁴

Young Center for Immigrant Children’s Rights, *Family Separation is Not Over: How the Trump Administration Continues to Separate Children From Their Parents to Serve Its Political Ends*, at 9 (Jun. 25, 2020).

Migrant Protection Protocols (MPP)

In late April, two Honduran siblings a girl, age 12 and a boy age 15 were referred to KIND after they were taken into custody by Mexican government officials. In this case, the children presented by themselves on the day that they were scheduled for an MPP hearing. The father was supposed to be with them for the hearing but was not. An adult they met at a shelter took them to their MPP appointment. During this time frame, CBP had been issuing new ‘tearsheets’ with future hearing dates because court hearings were being postponed. CBP brought each minor into their building; separated them and questioned them extensively (DOB/Parents location/ contact etc./provided them documents to sign and took a biometric information. They were not provided copies of the documents and do not know what they signed. The minors were with CBP for approximately 2 hours. They were sent back to cross the bridge into Mexico alone. They were not delivered into the custody of Mexican authorities and were completely alone once back in Mexico. They were only brought to the attention of the Mexican government after they took an UBER to the shelter where they had been staying and the director of the shelter contacted the Mexican authorities. The children reported being told that the border was closed because of the pandemic. They were not given their new hearing dates for MPP even though they had scheduled hearings.⁵

⁴ Young Center for Immigrant Children’s Rights, *Family Separation is Not Over: How the Trump Administration Continues to Separate Children From Their Parents to Serve Its Political Ends*, at 9 (Jun. 25, 2020) available at <https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5f032e87ff32c80f99c7fee5/1594044048699/Young+Center+Family+Separation+Report-Final+PDF.pdf>.

⁵ *Id.*

“Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020).

“Alvaro, an indigenous Guatemalan man who speaks little Spanish, and his son Enzo, were separated by Customs Border Patrol (CBP) officials when they entered the United States on April 6, 2019 near El Paso, Texas. Alvaro presented his son’s birth certificate to prove that Enzo was his son, but officials claimed that the documents were false. Alvaro was called a liar by U.S. Border Patrol officials, who forcibly separated him from his son. Enzo was sent to an ORR shelter in the United States. Alvaro was kept in CBP processing for 12 days, during which time he asked about his son but received no answers. The government never provided Alvaro with any information on how to contact his son or even with the whereabouts of his son. Alvaro was sent to Ciudad Juárez in Mexico, pursuant to Remain In Mexico (or “MPP”) It was only in Juárez that he was able to borrow a phone to contact a family member in the US, who was able to provide information about his son because this family member had been contacted by ORR. Alvaro was not afforded an opportunity to ask any U.S. immigration official about his son or the separation until his first immigration court hearing, over two months after they were initially separated. Alvaro asked the immigration judge about his son and was told that he needed to bring his case to the attention of immigration officials at CBP and that the court could do nothing to facilitate reunification. Alvaro was sent back to Mexico following the hearing and, again, was not given any information on how he could reunify with his son.”⁶

Women’s Refugee Commission, Re: Separation of Families via the Migrant Protection Protocols, Letter to Dep’t of Homeland Sec. (Aug. 16, 2019).

Title 42 Expulsions

“Juan” and “Roberto” are teenage brothers who fled Honduras on their own, seeking safety and hoping to reunite with their father in Texas. At the border, instead of being afforded the normal processes and procedures required under the TVPRA, Juan and Roberto were held in a hotel in an unknown location for several days. While there they had no access to an attorney, or medical care, and they were threatened by the untrained ICE contractors charged with watching over them. Juan and Roberto’s father, frantic to find them, drove hours across Texas, stopping at every detention center and

⁶ Women’s Refugee Commission, Re: Separation of Families via the Migrant Protection Protocols, Letter to Dep’t of Homeland Sec. (Aug. 16, 2019) at 5.

Border Patrol station along the way.¹ Finally, Juan and Roberto's father reached KIND, and a KIND attorney was able to intervene and halt their expulsion to Honduras. The two brothers were moved from the hotel to a licensed shelter for children and soon after released to their father. They are now seeking asylum in the United States.⁷

Kids in Need of Defense (KIND), Title 42 Report (Jan. 26, 2021).

Alejandro" fled gang violence in El Salvador and came to the U.S. seeking protection and to reunite with his family. He survived a dangerous journey and reached the U.S.-Mexico border only to be turned back by U.S. officials and expelled into Mexico under the CDC order. Alone and without any caretaker, Alejandro was taken into the custody of Mexican child welfare officials. On his own in Mexico and desperate to reunite with family, Alejandro later returned the border and KIND helped ensure that he was not expelled again and was instead processed according to the normal procedures afforded to unaccompanied minors. With KIND's assistance, Alejandro was released from U.S. government custody and reunited with his family on his 18th birthday. KIND is helping Alejandro ensure he has legal representation for his immigration proceedings.⁸

Kids in Need of Defense (KIND), Title 42 Report (Jan. 26, 2021).

A 17 year old Guatemalan girl was traveling with her 1 y/o daughter. She was fleeing death threats and violence following a rape. She travelled to Arizona and turned herself into CBP on June 1, 2020. She had travelled with a group of about 10 other persons to the northern border of Mexico. She experienced an attempted assault by one of the guides during their travel and up to a point, she traveled with other migrants. She and another other woman migrating with her became lost in the desert late at night. Border Patrol located them and took them for processing. The officers did not have any face coverings when they first took them into custody, but they were later provided face masks. She was asked if she felt okay or had headache or fever. She replied 'no'. She did not feel ill. She was interviewed and asked her age. The officers said she looked to be 20 years old and accused her of lying to them. While in detention, she talked on the phone with an official who she believes was in Guatemala. The man she spoke with (possibly a consular officer or other authority)

⁷ Kids in Need of Defense (KIND), Title 42 Report (Jan. 26, 2021).

⁸ Kids in Need of Defense (KIND), Title 42 Report (Jan. 26, 2021).

said the process for minors going to the US had been terminated during the last 2 months; She expressed her fear to him and explained what had happened in Guatemala. He told her that in Guatemala he would help her, but she could not go to the US. They were not given a test for Covid-19 that she is aware of while in the U.S. She does not recall Border Patrol directly asking if she was afraid to return to Guatemala but said that the man on the phone from Guatemala asked if she was afraid to return. She had expressed that she 'told CBP her entire situation. ' CBP didn't ask where she would go if returned to Guatemala; They had her parents' phone numbers in the United States and they called her dad. She arrived at CBP Monday in the early am and was with them about three days. Consistent with other children that KIND has interviewed, she and the baby were taken to a hotel under ICE custody. She was not allowed to talk to her parents during her time with CBP or while at the hotel. She was not advised regarding her rights, the consequences of this expulsion to Guatemala or the possibility of return to US in the future. She does not recall if she signed anything and was not given any documents. On 6/5/2020 client and her baby were returned to Guatemala. Before she got on the plane, they took her temperature. There were about 10 migrants on the plane sitting in separate rows. When she got to Guatemala, they put the swab in their noses to check for Covid. She was later told that she and her baby tested positive and had to be moved and quarantined in a different location. An international organization has intervened on her behalf to secure protection in her home country.⁹

“Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020).

On 7/15/2020 KIND was referred the cases of two Mexican male siblings, 14 and 16 y/o. They fled Mexico after they were brutally attacked on March 12, by members of a cartel in their home state. They were hospitalized for over a month due to the severity of their injuries which included head injuries, face lacerations and broken bones. Their uncle took them to the border to seek protection and reunification with their mother in the United States. Despite the fact that the children expressed fear of return to Mexico and multiple visible injuries they were expelled by CBP without any clear questioning or explaining of the process they were under. For example, the younger child was walking with crutches as his leg had been broken in two places (fibula and tibia) and had required insertion of screws via a surgery after the attack. The younger boy

⁹ “Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020).

also showed scarring from second degree burns on his face and neck. He also still had scars on his head and forehead from the beatings to his head. The older child had head injuries and contusions on his ribs and his head from a beating he received from a pistol. The children had presented to CBP on 6/29/2020 and on 6/30/2020 their mother got a call from CBP saying they would be returned in a few hours to Mexico. The children are now at a shelter in Mexico and are terrified for their safety.¹⁰

“Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020).

In August, KIND attorneys intervened in the case 17-year-old child. “Alejandro,” a Salvadoran child fleeing gang violence, came to KIND’s attention only a week before his 18th birthday. Alejandro had attempted to enter the U.S. but was expelled under Title 42 back to Mexico and placed in the custody of Mexican child welfare (DIF) officials in mid-July. KIND worked with a partner in Ciudad Juarez and Mexican authorities to help facilitate a best interest determination favoring the child’s reunification with family members in the U.S. Two days before the child’s 18th birthday, he was accompanied to the Port of Entry and processed as an unaccompanied minor. KIND supported the effort by liaising with U.S. officials, orienting the child, and providing information to the child’s family in the U.S. KIND’s Managing Attorney then advocated with U.S. officials for the child’s direct release to family members rather than transfer to ICE custody. On his 18th birthday, “Alejandro” was released and reunited with his family in El Paso where he can seek permanent legal relief. The case of Alejandro demonstrates the enormous amount of resources and coordination required to secure a child’s basic rights to seek protection under the unlawful public health order.¹¹

Kids In Need of Defense (KIND) (Jan. 26, 2021)

‘Elena’ fled violence in her home country of El Salvador. In August 2020, Elena tried to jump over the border wall near Ciudad Juarez with about 20 people including one other minor. They were all apprehended by Border Patrol; she was taken to a ‘hielera’ and asked her name, date of birth and country of origin. She was fingerprinted and her photo was taken. She expressed fear to the border patrol officers. Instead of being given access to protection she was driven to the Palomas port of entry (4 hours) with the other minor and about

¹⁰ *Id.*

¹¹ Kids In Need of Defense (KIND) (Jan. 26, 2021).

10 other adults. She was told she was being ‘deported’ because of the pandemic. In fact she was being expelled in accordance with the Title 42 policy. She was eventually placed into DIF custody in Ciudad Juarez. With KIND’s assistance she was later allowed to re-present to CBP and processed.¹²

Kids In Need of Defense (KIND) (Jan. 26, 2021)

‘Cesar,’ age 17, tried to enter US near Ciudad Juarez in October 2020. He was apprehended by CBP; He indicated he was from Guatemala and provided them with documents but he was returned to Mexico and turned over to DIF. With KIND’s assistance he was able to present to CBP in El Paso and she was eventually transferred to ORR and reunited with his family.¹³

Kids In Need of Defense (KIND) (Jan. 26, 2021)

15 year old ‘Gina’ attempted to cross near El Paso in August 2020 while traveling with other children who were non-family members. CBP took her into an office for approximately 30 minutes and took her fingerprints and picture. She and the other children were escorted back through the port of entry gate in Juarez and left alone on the other side of the port. As the children were walking, they were apprehended by the Guardia Nacional, which transported her to DIF custody. Only with KIND’s assistance, was she able to present at the port of entry and get processed into ORR and eventually reunited with her family in California.¹⁴

Kids In Need of Defense (KIND) (Jan. 26, 2021)

Metering & Turnbacks

On 6/19/2020 KIND was referred the case of an 18 y/o Guatemalan male born on 6/7/2002, who had presented himself at the Paso del Norte port of entry on June 17 – days before turning 18. He presented himself to officers at the bridge stating that he was a minor traveling alone. He was not allowed a fear screening of any sort and was forced back across the bridge into Mexico alone and was not delivered to the custody of Mexican authorities. 3 They did not ask about his family. They did not take his prints or photo. They did not give him any papers. He reiterated the event took about 10-15

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

minutes. Officials only told him no one was getting in. They were not wearing masks. He was scared that he would be living on a dangerous street if he didn't get help, so he sought out Grupo Beta. They took him to the Hotel Filtro, where he was quarantined for 14 days. During the quarantine, he had access to some Wifi and was able to call his family. Then he was transferred to a different shelter. When asked about contact w/ the consulate, client did not seem to know what that meant, and indicated he had not talked to officials from his government.¹⁵

“Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020)

¹⁵ “Declaration of Florence Chamberlin,” Kids in Need of Defense (KIND), (July 21, 2020).

APPENDIX B

FAMILY SEPARATION IS NOT OVER

HOW THE TRUMP ADMINISTRATION CONTINUES TO SEPARATE CHILDREN
FROM THEIR PARENTS TO SERVE ITS POLITICAL ENDS



EXECUTIVE SUMMARY

The Trump administration continues to separate families, taking children from parents, placing parents in adult immigration detention and children in shelters across the country. During the administration's Zero Tolerance policy, the government separated nearly 4,500 children from their parents. Its stated motive: to deter families from seeking protection in the United States.¹

Since the end of this policy, another 1,100 children have been separated from their parents based on alleged criminal histories, which frequently have no bearing on a parent's ability to care for a child.² The Young Center for Immigrant Children's Rights was appointed to a two-year-old who was separated from a parent after Zero Tolerance ended because immigration officials observed that the child had a diaper rash. In another case, a six-year-old was separated from a parent who had a charge of "breaching the peace" on his record. Teenagers and babies alike were taken from parents with years-old charges for driving under the influence. After spending months in federal custody, all these children were reunited with their parents for the purpose of joint repatriation (deportation).

Today, under the pretense of protecting public health, the border is closed and nearly no children are allowed in. Some families continue to wait in the Remain in Mexico program, which the government ironically calls the Migrant Protection Protocols. The program forces families seeking protection at the U.S. border to wait in Mexico for decisions on their immigration proceedings. Since the policy began in January 2019, nearly 60,000 people have been trapped in appalling conditions at the border.³ Others—including unaccompanied children—have been put on ICE flights and deported, in violation of federal law.

Separation from parents can cause severe, lifelong harm to children. In this report, we seek to galvanize renewed attention to the problem of family separation at the border and offer concrete recommendations to end these practices. We will also share how the Young Center employs its unique model of assigning independent Child Advocates—volunteers, attorneys, social workers, and paralegals—who work to reunify separated children with their families as quickly as possible and ensure that unaccompanied children can live with family in the community as their immigration cases proceed.

KEY RECOMMENDATIONS

1. **Every government agency must make the best interests of the child a primary consideration in every decision about a child.** All federal agencies must be required to consider children's best interests in every decision, regardless of immigration status or opportunity for legal relief.
2. **Congress and agency policy must prohibit family separation in all but the most exceptional cases.** Children must not be separated from their parents unless there is evidence that the parent poses an imminent risk to the child's safety.
3. **Every decision to temporarily separate a child from a parent must be subject to prompt review by a court with expertise in child protection and parental rights—not immigration enforcement officials.** Decisions to separate an immigrant child from a parent should only be made by an independent professional who is culturally sensitive, trained in child welfare, child development, immigration law, and trafficking concerns.
4. **Federal agencies (DHS, DOJ, and HHS) should ensure that every child separated from a parent has an attorney and an independent Child Advocate.** When DHS separates a child and a parent, it should be required to ensure that both parent and child have counsel.
5. **Congress must protect the Flores Settlement Agreement and the Trafficking Victims Protection Reauthorization Act (TVPRA) which provide critical protections for children.** Before Flores and the TVPRA, immigrant children were treated the same as adults; any weakening of these protections will undermine the safety of children.
6. **The Executive Branch must end the Remain in Mexico program/Migrant Protection Protocols and restore access to asylum.**

WHAT HAPPENS TO A CHILD APPREHENDED AT THE BORDER?

In order to understand how the Young Center helps separated and unaccompanied children, it is important to know what happens to a child who is apprehended at the border. There are important differences in the process depending on whether they are designated as “accompanied,” meaning they are traveling with a parent or legal guardian, or “unaccompanied.”

A child will be designated “unaccompanied” if they come into federal custody without a parent or legal guardian physically present to care for them or if they are forcibly separated from these caregivers by U.S. officials.⁴

Following apprehension at the border, accompanied children (those with parents) may be placed into expedited removal proceedings as a family unit. Each accompanied child’s case is linked to that of the parent unless the child affirmatively requests her own case to apply for other forms of relief, such as humanitarian visas for victims of trafficking or severe crimes or Special Immigrant Juvenile Status. In expedited removal, accompanied children may be returned to their home countries in a matter of days. Alternatively, they may be subjected to the administration’s Remain in Mexico policy, and forced to wait for weeks or months in Mexico for their U.S. immigration proceedings in dangerous conditions without access to basic services, much less access to counsel.

Children who are designated as “unaccompanied” must be transferred out of DHS custody to the Office of Refugee Resettlement (ORR) within 72 hours.

STAKEHOLDERS IN A CHILD’S IMMIGRATION PROCESS

Customs and Border Protection of the Department of Homeland Security (CBP): CBP is the law enforcement agency of the Department of Homeland Security. It enforces U.S. regulations, including immigration at the border.

Immigration and Customs Enforcement of the Department of Homeland Security (ICE): ICE is responsible for investigating and removing people from the United States. Adults detained by CBP are transferred to ICE detention. ICE lawyers argue against children in immigration court.

Office of Refugee Resettlement of the Department of Health and Human Services (ORR): Unaccompanied children are transferred from CBP to ORR, which is required to place the child in the least restrictive setting in the child’s best interests. ORR contracts with agencies to care for children until they can be released to sponsors. ORR can appoint a Child Advocate to vulnerable children.

Child Advocates: Child Advocates—attorneys, social workers and volunteers—are appointed to advocate for the best interests of individual children. The volunteers meet with the child they are appointed to each week, spending time and learning their stories. Young Center attorneys and social workers develop best interests recommendations grounded in child welfare and immigration law for every agency making a decision about the child.

Legal Service Providers (LSPs): Legal service providers are federally funded through a grant program, currently administered by the Vera Institute of Justice. LSPs give each unaccompanied child an individual screening to determine eligibility for legal relief, provide children with “Know your Rights” presentations, and in some cases—and often with private funding—represent the child in court.

Once in ORR custody, the government is required to place a child in the “least restrictive setting in the child’s best interests.”⁵ This is the only place in immigration law where a child’s best interests must be considered.

ORR is also required to provide children in its care with education, recreation, access to religious services, and other essential services.⁶ ORR can also appoint a Child Advocate for children who have particular vulnerabilities or unique needs to advocate for their best interests. Under the Trafficking in Victims Protection Reauthorization Act (TVPRA), ORR can appoint a Child Advocate for child trafficking victims and other vulnerable children.

Child Advocates are often appointed to very young children who are unable to tell their story or express their wishes, children with disabilities, children who are pregnant or parenting, and children at risk of aging out of ORR custody and into adult detention. Child Advocates are also frequently appointed to children from indigenous communities or countries from which fewer children come to the United States to seek protection. These children may be isolated from other children by language or culture.

STAKEHOLDERS IN A CHILD’S IMMIGRATION PROCESS (CONTINUED)

U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security: USCIS oversees lawful immigration to the U.S. Unaccompanied children are entitled to an interview with a USCIS asylum officer, before or in place of an adversarial process in immigration court. USCIS also processes U and T non-immigrant visas and petitions for Special Immigrant Juvenile (SIJ) status.

Department of Justice Executive Office of Immigration Review (DOJ EOIR): Under the authority of the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings. Unaccompanied children appear before EOIR immigration judges for their court hearings.

Unaccompanied Refugee Minors Program: URM is administered by ORR. The program provides children who’ve been granted legal protection with long-term care and services. With support from ORR, states administer the program.

Brothers Separated under Zero Tolerance

Brothers Andy (age 7) and Junior (age 21) were separated at the U.S.-Mexico border in October 2018. Andy was transferred to an ORR facility in New York and Junior was placed in ICE detention in Texas. The brothers were devastated; Junior was his little brother's primary caregiver in Honduras. Four months later, Junior was released from ICE detention. But he still had to go to immigration court before the government would release his little brother to him. A Young Center Child Advocate volunteer visited Andy in custody every week to ensure he didn't feel abandoned during the many months of separation from his brother. Andy and Junior were finally reunited six months later, in April 2019.

REMEMBERING ZERO TOLERANCE

Since 2017, the government has separated children from their parents or legal guardians at an unprecedented scale at the U.S. border, rendering those children “unaccompanied.”⁷ Once separated, a child is transferred to the custody of the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS), while the parent is detained elsewhere, deported, or sometimes released within the United States.

In April 2018, the Trump administration officially announced a policy it had been implementing on a pilot basis since October 2017. The policy was known as “Zero Tolerance” indicating the Trump administration would criminally prosecute all adults crossing the U.S. border, even if they were seeking asylum. Seeking asylum at our border is a legal right, protected under both U.S. and international law.⁸ Because children could not be held with their parents in *criminal* custody, thousands of children were separated from their parents and rendered unaccompanied. Separations persisted from weeks to months even though parents were often prosecuted quickly, received a sentence of “time served,” and returned to immigration custody within days.

Once made official, the public reacted forcefully to the Zero Tolerance policy, calling for an immediate end to this cruel, immoral, and unlawful practice. On June 20, 2018, President Trump issued an executive order halting the practice. A federal court order enjoining the practice on June 26, 2018 cemented the policy's end.⁹ Days later, that court ordered the near-immediate reunification of all children still separated from their parents. Due to poor record-keeping, separations persisted for months beyond the court order, even for very young children.¹⁰ The policy caused serious damage to children and families which will take generations to correct. While the number of parent-child separations has gone down, the practice continues, whether due to flimsy allegations of criminality or at the discretion of CBP officers who face little accountability for decision-making that has no basis in child protection.

KEY FINDINGS IN GOVERNMENT REPORTS ABOUT THE ZERO TOLERANCE POLICY

The Office of the Inspector General of the Department of Homeland Security (DHS OIG) has released two damning reports since the end of the Trump administration's Zero Tolerance policy. The first of these concluded that even though Customs and Border Protection (CBP) knew since November 2017 that their methods to record and track family separations led to widespread errors, it made no effort to fix these before the implementation of the policy in May 2018.¹¹ As a result, the DHS OIG could not confirm the total number of families DHS separated during the Zero Tolerance period. The most recent DHS estimates suggest that CBP agents separated 3,014 children from their families while the policy was in place.

In a broader analysis of DHS data between the dates of October 1, 2017 to February 14, 2019, the DHS OIG identified an additional 1,233 children with potential family relationships that CBP failed to accurately record.¹² It then released a second report on May 20, 2020 showing that even more families had been separated than previously reported as a number were separated at points of entry, which were supposed to be excluded from the Zero Tolerance policy.¹³ This second report reiterated a devastating conclusion:

Because of concerns over CBP data reliability, we cannot be certain our analysis of separations occurring between May and June 2018 captures all family separations during that period, and it is even less certain that we have a clear picture of the separations occurring before 2018.

The Office of the Inspector General of the Department of Health and Human Services (HHS OIG) has also released two reports, requested by Congress, analyzing the agency's strengths and shortcomings during the implementation of the Zero Tolerance policy. According to the reports, many problems flowed from the failure of senior leadership to take any action to protect children's interests in response to the concerns raised by ORR staff.¹⁴ The reports concluded that not only did this lead to substantial challenges in reunifying children with their parents, but shelter staff were under-prepared to meet the acute mental health needs of the separated children in their care.¹⁵

The OIG recommended that HHS take steps to ensure that children's interests are prioritized and represented in decisions affecting the unaccompanied immigrant children's program, both internally and when engaging with interagency partners.¹⁶

THE PHASES OF FAMILY SEPARATION

PILOT

The Trump administration ran a pilot program testing the Zero Tolerance program in El Paso, Texas from October 2017 until the official policy was announced in April 2018. During this phase, the Young Center noticed a substantial uptick in referrals for Child Advocates, including for very young children. Data suggests that nearly 1,500 children were separated during this pilot phase.

ZERO TOLERANCE

In April 2018, the Trump administration announced it would criminally prosecute all adults if it believed they were attempting to enter unlawfully, even though most were approaching the border to exercise their lawful right to seek protection. As a result, children were forcibly removed from their parents. While the government claimed there was never a “family separation” policy, the Trump administration had already publicly discussed separating families to deter them from entering the country. In just two months, nearly 3,000 children were taken from their parents before a court ordered an end to the policy just after the President bowed to public pressure.

NEW SEPARATIONS

When the court ended parent-child separation, it allowed the government to exercise discretion to separate if the child would be unsafe based on a parent’s criminal history (not including immigration offenses). The Trump administration blew this exception wide open, separating an additional 1,100 children, including nearly 200 children under the age of five, based on flimsy allegations of criminal history, misdemeanor offenses, and charges that have nothing to do with the ability of the parent to care for the child.

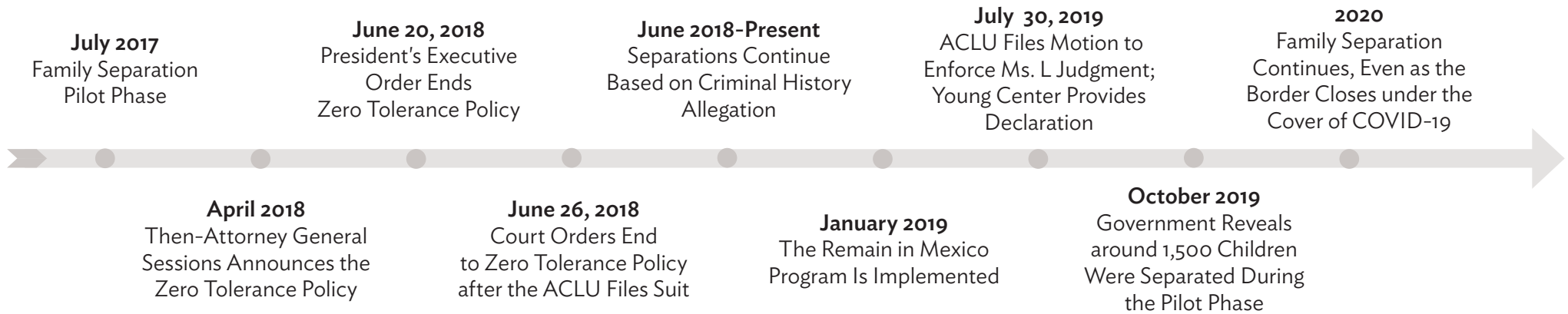
MIGRANT “PROTECTION” PROTOCOLS (REMAIN IN MEXICO)

The government’s so-called Migrant Protection Protocols has caused more children to become separated from their parents. When families seek help at the border, they are sent back to Mexico to wait for their court hearings. Some children return to the border to escape danger in the Mexico encampments and are designated “unaccompanied” while their parents stay in Mexico. It is extremely difficult for children to maintain communication with parents in MPP, and separated children can be completely cut off from contact with family support or information critical to their legal case.

YOUNG CENTER'S WORK

The Young Center applies its unique model to reunite children separated from parents and legal guardians with their families, or when they cannot be reunified, to secure alternative solutions that protect the children’s rights. Created in 2004 as a pilot project of the Office of Refugee Resettlement, the Young Center advocates for the rights and best interests of immigrant children in federal custody applying federal, state, and international law. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the Young Center’s independent Child Advocates are appointed as guardian ad litem to vulnerable children in federal custody. Volunteer advocates meet with the children each week to learn their stories, needs, and wishes so that our staff of attorneys and social workers can advocate with decision-makers throughout the immigration process to advance the child’s best interests in every decision made about them.

A TIMELINE OF FAMILY SEPARATION



YOUNG CENTER'S BEST INTERESTS PARADIGM

Young Center attorneys and social workers supported by trained, bilingual volunteers, identify a child's best interests by considering the child's expressed wishes, safety, and right to family integrity, liberty, development, and identity. These best interests factors are well-established in the child welfare laws of all 50 states, Puerto Rico, and the District of Columbia, and in international law, including in the Convention on the Rights of the Child. Through this paradigm, the Young Center aims to minimize the risks of implicit bias, stereotypes, and other subjective biases that might improperly influence recommendations.



A PARALLEL FAMILY SEPARATION CRISIS

The Convention on the Rights of the Child guarantees that all children have the right to know and be cared for by their parents.¹⁷ The United States Supreme Court has declared that the Due Process Clause of the Fourteenth Amendment “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁸ Indeed, the right to care for one’s child is “perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”¹⁹ But throughout U.S. history, the government has sanctioned the separation of children from their parents. Black children were sold into slavery away from their parents. Indigenous children were forcibly separated from their families and sent to “Indian schools.”²⁰ Newly arrived immigrant children were sent on “orphan trains” to families in the west.²¹ These racist practices persist today. Black people are over-represented in every legal system in the United States, whether immigration, school suspensions, arrest and incarceration, or in child welfare proceedings. While the child welfare system is in theory dedicated to ensuring the safety of children, racial disparities exist at every stage of decision-making, inflicting untold harm on families. As renowned scholar Dorothy Roberts writes:

The child welfare system claims to be a non-adversarial legal system dedicated to ensuring the well-being and safety of children. This claim obscures the oppressive political role it plays in monitoring, regulating, and punishing poor families and Black, brown, and indigenous families. The mass removal of Black children from their families in some ways parallels the U.S. criminal legal system’s mass removal of Black men and women from their communities.²²

While efforts have been made to correct for racial bias in state child welfare systems, children of color, and poor children continue to be disproportionately removed from their parents. Too often these separations become permanent. Federal law says that any parent whose child spends 15 out of 22 months in foster care can lose their parental rights.²³ Enforcement of these laws ignores the reality of mass incarceration in the United States and disproportionate sentencing. In New York, for instance, a woman’s median sentence is 36 months.²⁴ Loss of parental rights can strip parents of any opportunity to stay in touch and play a role in their children’s lives.

New laws may help reverse some of these trends and limit the damage caused by incarceration and the child welfare system. Primary caretaker laws seek to expand the use of community-based alternatives to incarceration for parents, enabling them to care for their families while serving a sentence. The Families First Prevention Services Act offers funding for a range of services to be delivered to parents in their homes, seeking to reduce the use of foster care whenever possible.²⁵

But more needs to be done. Across the country systemic bias and deeply embedded racism ensures that Black and Brown people, including children, are policed, monitored, judged, and prosecuted for a range of issues that do not affect white peers similarly. Just as we raise the alarm about separating children from immigrant parents, the Young Center is committed to working with advocates across social systems to ensure that no child faces the trauma and lifelong consequences of family separation.

THE YOUNG CENTER'S EFFORTS DURING ZERO TOLERANCE

Once the Trump administration's Zero Tolerance policy was officially in effect, referrals for Child Advocates increased exponentially at all eight of the Young Center's program sites. In most cases ORR had little to no information about the parent and other family members from whom each child was separated; the separation was done by another federal agency. Nor was there information about why a child was separated from a parent, where the parent was detained, or how to contact the parent to learn more about the child. With such limited information, Young Center attorneys and social workers faced substantial hurdles to reunify families. Staff repeatedly called CBP and ICE detention centers, looking for parents. When parents were located, Young Center advocates pressured ICE officials to allow them to communicate with their children. In some cases, that communication was denied, but even when it was approved, there were no systems in place to ensure ICE facilitated regular contact between children and parents. Most parents had no idea where their children were or why they had been separated from them. They didn't know when they would see their children again. Young Center staff often fought to get parents released from detention to be reunited with their children—in many cases, successfully.

Nursing Baby Taken from Mom's Arms

Maria arrived at the border during the height of the Zero Tolerance policy with her four sons, ages 6 months to 12 years old. They were fleeing persecution in their home country. At the border, Maria's sons, including the nursing baby, were taken from her and placed in ORR custody. She was sent to ICE detention. Alone with his brothers, the 12-year-old became a surrogate parent, waiting for weeks to be released to his grandmother who was already living in the United States. With substantial advocacy by the Young Center and the help of two other organizations, The Florence Immigrant and Refugee Rights Project and the Together Rising Community, Maria was reunited with her children. The trauma inflicted on this family may have lifelong consequences.*

**Name changed to protect family's privacy.*

Once parents were located, Young Center staff worked with both children and parents to determine the family's wishes. In almost every case, the children simply wanted to reunify with their parents. Parents faced much more complicated decisions. They did not know how long they would be detained, if they would be returned to their home country, or if the government would permit reunification with their children in the United States. In many instances, parents were deported without knowing where their child was. Countless others were forced to relinquish valid asylum claims because they were told that doing so would help their children or allow them to be reunified.

Tragically, in some cases, children believed their parents willingly abandoned them by returning home. In these cases, the Young Center either advocated for the child to be granted voluntary departure to return to their family; or, if a parent believed it was not safe for their child to return to their country, the Young Center worked with the child and child's family to identify safe placements within the United States so the child could be released from government custody. Although the Young Center successfully reunified many children with parents—in the United States or in their home countries—the harm perpetrated against these children and families was extraordinary. Some children regressed. Some were angry at their parents. Family relationships were damaged in untold ways.

Unlawful Separation of a Child

The Young Center considers all separations under Zero Tolerance to be arbitrary and unlawful. In most cases, within 48 hours the Young Center sent a Best Interests Recommendation to every stakeholder (CBP/ICE, Federal Public Defenders, ORR) and to the court indicating that the separation was pursuant to the Zero Tolerance policy and unwarranted. The first recommendation in these cases was to reunite the child with the parent.

The Zero Tolerance policy created logistical chaos in addition to the untold damage done to families. In July, in the wake of the decision in the Ms. L litigation ordering the reunification of separated families, hundreds of parents were summarily released from government custody without notice to Child Advocates, attorneys, or others working with their children. In many cases, Young Center staff received frantic phone calls from parents or other family members, indicating that the parent was at a bus stop, had just been unexpectedly reunified with their child and had no resources or information about why they were released, what the status of their immigration cases were, or what would or should happen next. Together with a range of non-governmental organization (NGO) partners, the Young Center worked to get families access to shelter, legal counsel, and information about their cases whenever possible.

SEPARATIONS CONTINUE OUTSIDE OF PUBLIC VIEW

When a federal court halted the Zero Tolerance program, it included in its judgment three instances in which family separation might still be permissible: danger to the child, communicable disease, and criminal history of the parent. Unfortunately, these factors were left vague and undefined, leaving wide room for interpretation. Shortly after the court's decision, the Young Center saw new cases of family separation, the vast majority of which were based on a parent's alleged criminal history. From the date of the court's decision in June 2018 through November 2019, an additional 1,100 children were separated from their parents. In the rare instance that there was some clear indication that the parent was a danger to their child, such separations may have been warranted, after a review by a qualified judge. CBP officers, however, were separating children from parents for a range of minor criminal offenses which have no impact on a parent's ability to care for the child. Teenagers and babies alike were removed from parents with decades old charges such as "breaching the peace" or marijuana possession. After spending months in federal custody, these children were reunited with their parents for the sole purpose of joint repatriation (deportation), undercutting any claims that the separations were meant to protect children.

In July 2019, the Young Center submitted a declaration as a part of the ACLU's ongoing litigation against the government, which provided numerous examples of children who were taken from parents for everything from traffic violations to a diaper rash. Even more disturbing was the fact that the average age of children taken from parents was very young, around seven years old, and these children were spending a longer time in custody than most separated under the Zero Tolerance program.²⁶ Prolonged custody was often due to difficulties finding and communicating with children's parents and determining whether the stated reason for separation was valid.

Today, when a child is separated from her parents due to a parent's alleged criminal history, Young Center staff begin coordinating with ORR to learn everything possible about the child and her relationship with the parent. After we locate the parent, our staff work with the Federal Public Defenders who represent

the parent in their criminal case. The Young Center provides the parent's counsel with a Best Interests Recommendation about what actions would be in the best interest of their client's children. This is almost always family reunification. Once Federal Defenders have the Young Center's recommendation, they can argue for lower sentences, time served, release into the community or, if it is the only option, to family detention—any steps that would expedite the family's reunification. If the parent is returned to DHS custody following the criminal case, we will often work with the parent's immigration attorney—or directly with the parent for the many who are unrepresented—to ensure the family's joint repatriation whenever that is in the child's best interests.

In addition to fighting for the release of parents, the Young Center will also make a Best Interests Recommendation to ORR regarding the child's reunification with their parent. As with all Best Interests Recommendations, no stakeholders are required to follow a suggested course of action, but most of them rely on the information we provide as part of their decision-making.²⁸

When it is in the best interest of the child to be reunified with their parent so they can return to home country together, Young Center staff will also work with ICE to expedite the parent's case or advocate for the cancellation of the parent's case. Since the separated child has their own legal case, the Young Center must also try and get the child's immigration case canceled, or advocate in support of a grant of voluntary departure (return without penalty) from the immigration court. Our goal is to find the quickest and safest route to reunify the parent and child, barring any concerns about the child's safety. Staff will also coordinate repatriation services for the family, relying on a number of in-country partnerships. The Young Center will follow up with repatriated children according to its safe repatriation protocols.

When can a child be taken from parents under U.S. Law?

Every state and territory in the United States has laws governing the circumstances under which a child can be taken from a parent or legal guardian. To be separated, all child welfare laws specify that the child must be in imminent danger of harm, such that the situation requires immediate action. Unless state child welfare authorities believe that a child is in immediate jeopardy, emergency separation without a court order is not warranted. When the government does remove a child in imminent danger, it must provide evidence to justify that decision to a court within days of the separation.

By contrast, under the Zero Tolerance policy, the federal government attempted to use parent-child separation as a deterrent to reduce migration, prioritizing political interests over children's well-being.²⁷ Even now, children are being separated from parents who have a "criminal history," with no consideration of the impact of that history on a parent's ability to care for a child.

WHAT IS A BEST INTERESTS RECOMMENDATION?

Child Advocate supervisors, who are attorneys or social workers overseeing Child Advocate volunteers, submit Best Interests Recommendations to various agencies and officials based on their knowledge of a child's story, wishes, and protection needs. Best Interests Recommendations are:

- Submitted on all issues relevant to a child's care, custody, release, ability to remain in United States or to safely repatriate;
- Directed at any entity with authority to make decisions that affect the safety and well-being of the child;
- Presented in writing as a best interests brief; or orally, during case hearing or staffing.

BEYOND ZERO TOLERANCE: THE YOUNG CENTER'S UNIQUE ROLE IN HELPING UNACCOMPANIED CHILDREN

Since its founding in 2004, the Young Center has been helping children who arrive at the border alone, whether in times of crisis, such as during Zero Tolerance, or whenever a vulnerable child is in need. The Young Center does not provide direct representation to children in their immigration cases. Instead, Child Advocates are appointed to argue for whatever is in the best interests of the child, on every decision from safe placement and prompt release to family, to access to critical services, from access to counsel and access to foster care for children without families, to the child's request for legal relief, and, where applicable, whether it is against the child's best interests to be repatriated. Child Advocates are independent; they do not play any other role in the system for unaccompanied children, such as offering direct legal representation, residential services, or traditional post-release social services. Child Advocates' sole responsibility is to advocate for the best interests of the child in each decision made about that child. Child Advocates are not decision-makers, but rather make reasoned, fact-based recommendations grounded in best interests law.

The role of a Child Advocate is different from that of legal service providers, which are often non-profit organizations contracted by ORR to assist unaccompanied children. Legal service providers are required to give each child a "Know Your Rights" presentation and an initial screening to determine eligibility for legal relief from deportation. Legal service providers can decide to represent children in their immigration proceedings, but this service is usually not government-funded. When legal service providers, pro bono counsel, or private attorneys take on a child's immigration case, their mandate is to represent a child's expressed wishes to the court. Beyond the case for legal relief, legal service providers do not typically engage in representation related to conditions of custody or release and may or may not be in touch with the child's parents.

Any legal service provider, private attorney, or pro bono attorney who takes up a child's substantive case is obligated to argue for the child's expressed wishes, even if those wishes might put that child in harm's way. For example, a teenager frustrated with conditions of detention who has been denied release to a family member in the United States, may ask to return to home country, despite the likelihood of persecution, trafficking or abuse on return—and before the decision denying release to family has been challenged. This is one way in which a Child Advocate serves a critical role; as the guardian ad litem, the Child Advocate can provide information to the court that could argue against a child's expressed wishes, but only if those wishes would endanger the child. The Child Advocate might also be able to successfully argue for the child's release to sponsor and thus remove the barrier preventing the child from continuing with her case. This balance of expressed wishes and best interests allows for counsel to represent the child's expressed wishes while ensuring the Child Advocate provides the court with information about threats to the child's safety.³⁰

SPECIAL CONCERNS FOR BABIES AND TODDLERS

ORR's protocols for finding sponsors for unaccompanied children in its care were designed primarily for teenagers, who comprise the majority of children in custody. As a result of the Zero Tolerance program and separations that continued after the program was ended, however, ORR had significant numbers of very young children in custody but often lacked the expertise or tools to locate parents. For the youngest children, separation is particularly traumatizing and the longer the exposure to serious stress, the more damage done to a child's health. Separation of young children from their parents, and placement in government custody can impact their attachment, putting their long-term development at risk.²⁹ If there is ever a need to separate a baby or toddler from a parent or loving caregiver, protocols must be put in place for expediting reunification or finding an appropriate sponsor for that child with the goal of minimizing time in custody. Facility staff must also receive specialized training to work with young children who have unique developmental and mental health needs.

A New Horror: Parents Charged with Smuggling for Trying to Protect Their Children

The Young Center was appointed to a toddler who arrived at the border with his father. His father brought documents confirming his legal status as the child's father but was separated after a rapid DNA test indicated he was not the child's biological father. Worse yet, the father was charged with smuggling. The smuggling charge was dropped after a review of the father's documents confirmed his legal status as the child's parent. However, other parents are still at risk of criminal charges, which could preclude their ability to seek protection, especially if they plead guilty in the hope of being reunified more quickly. The result: many parents and families will be excluded from seeking protection, in violation of U.S. law and despite having done nothing wrong.

NEW SEPARATIONS AS A RESULT OF THE REMAIN IN MEXICO PROGRAM (MPP)

Children are also being separated from parents as a result of the Remain in Mexico program, which the government ironically calls the Migrant Protection Protocols (MPP). As a result of the program, which forces families seeking protection at the U.S. border to wait for their immigration proceedings in Mexico, nearly 60,000 people are trapped in appalling conditions on the U.S.-Mexico border. While the numbers of people waiting have decreased since the outbreak of COVID-19 and the lengthy suspension of court hearings, there are still thousands of people living on the border without access to basic services or protection.

In mid-January, a Young Center team visited Matamoros, a city just over the U.S. border in Mexico, where nearly 3,000 people are living in makeshift camps to await immigration hearings in the United States. The situation there is bleak, with little access to sanitation, health care, or food other than what is being generously provided by volunteers. Few lawyers are available in the bordering U.S. towns to take cases. As a result, almost 95 percent of migrants file cases on their own. Even when legal counsel is available, many immigrant families lose their cases as a result of other policies put in place by the Trump administration.

Most significantly, under the government's "transit ban," anyone who has traveled through another country en route to the United States must first apply for asylum in that country; if they have not, they will not be permitted to ask for asylum in the United States (a barrier that was created by agency action, not federal law). The transit ban effectively prohibits the vast majority of migrants from applying for asylum. People may still apply for withholding of removal under the Convention Against Torture, but obtaining this protection is even more difficult than winning asylum and recipients (such as parents) cannot use their status to help family members (like children). In mid-2020, the Trump administration released yet another proposed rule that would bar even more, if not almost all, people from applying for asylum.³¹

For parents in Matamoros and other refugee encampments created by U.S. policy, their primary concern is the safety of their children. They are worried about their children's health in the dangerous conditions in the camps. They are worried about their children's future given that so many doors for protection are closing. They are worried that even if they have a strong claim, they will be unable to fill out the paperwork without the benefit of a lawyer or will be unable to make their case to a judge who appears only by video monitor in a tent "court." They also worry about those children who decide to cross into the U.S. by themselves, either with their parents' knowledge or on their own. While in Mexico, our team met with parents to help them understand what happens to children once they are determined to be "unaccompanied." Since our visit, Young Center staff across the country have provided consultations for families identified by our nonprofit partners in Matamoros and Brownsville.

Across the country, the Young Center is appointed to cases of children separated from parents trapped in Mexico as a result of the Remain in Mexico program. As with other separations, the government has again failed to track family relationships or parents' contact information, making communication and reunification nearly impossible. The Young Center is working with allies in Congress to push for the immediate end of the Remain in Mexico program and to this gross abuse of asylum laws.

DEPORTING UNACCOMPANIED CHILDREN WITH MPP REMOVAL ORDERS

Prior to the shutdown of the southern border on March 20, 2020, hundreds of families were faced with a torturous decision: risk their children's health and safety waiting indefinitely in dangerous tent camps in Mexico—where they were sent under MPP—or send their children across the border alone to seek protection. Many of these families have removal orders from tent court “hearings”—proceedings where they did not have attorneys and where they testified over video without an in-person interpreter. Several hundred children have come into ORR custody having been separated from their parents. Designated as unaccompanied children, they have been placed in protective custody, met with lawyers, been appointed independent Child Advocates, and began the process of seeking protection. Rather than allowing these child-appropriate procedures to take their course, DHS has been rushing to implement the “removal orders” imposed against the children in the tent courts while they were trapped in Mexico.

In one case, a child to whom the Young Center was appointed was taken from an ORR shelter in the middle of the night, put on a flight with unknown adults, and returned to the country where she had received death threats for reporting her father's sexual abuse.

In the middle of a pandemic, ICE deported this child and many others to known danger. The Young Center is calling on Congress to demand an end to these deportations.

USING COVID-19 AS COVER TO DENY CHILDREN SAFETY

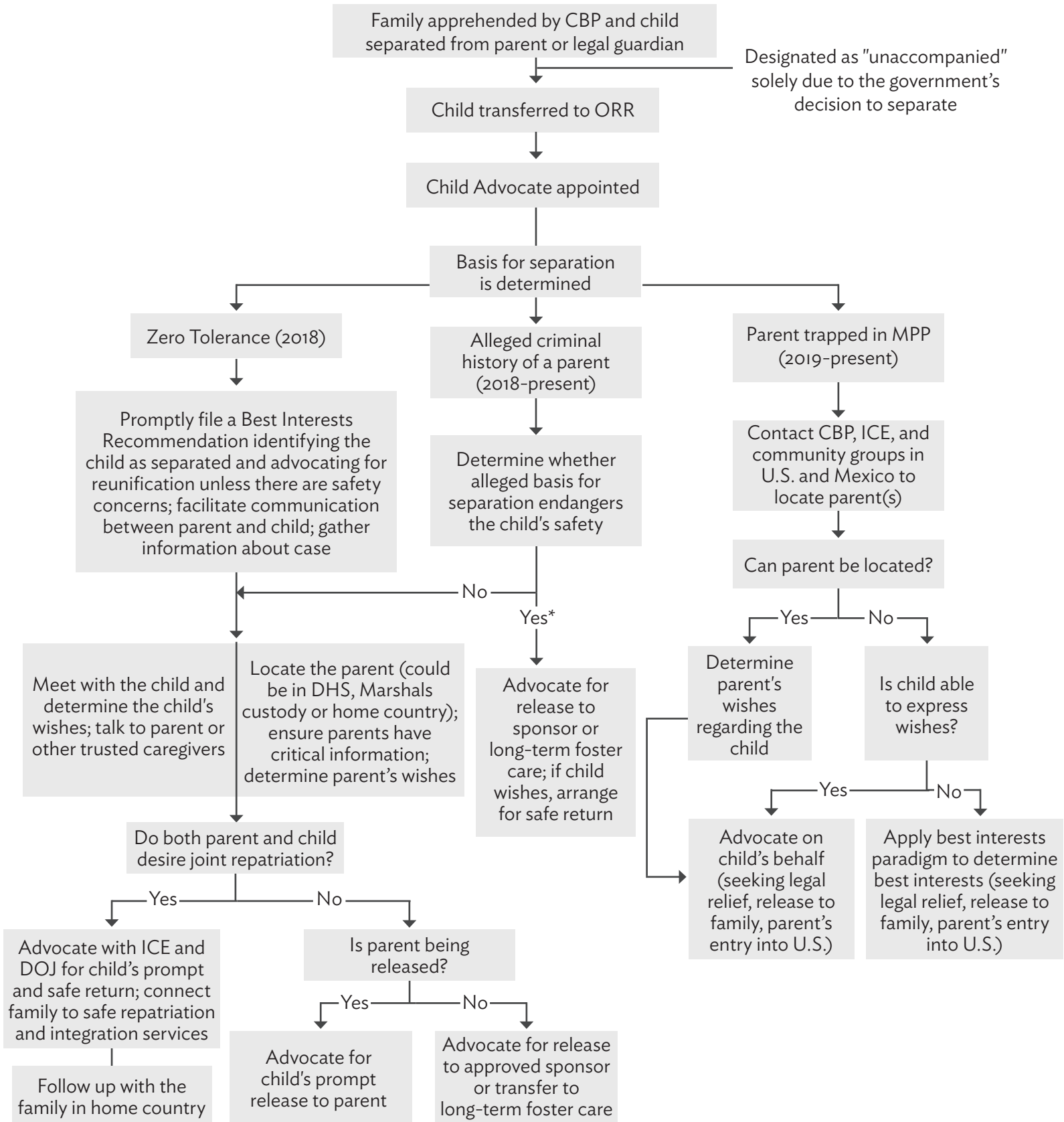
In 2020, under the guise of protecting public health, the Trump administration furthered its goal of shutting down the southern border to those seeking safety. On March 20, 2020 the Centers for Disease Control and Prevention (CDC) released an order suspending the entry of some people into the country during the COVID-19 pandemic.³² The CDC order was immediately followed by an announcement from DHS that it would turn back migrants without travel documents at the border.³³ As a result, CBP is rapidly turning back people, including unaccompanied children.³⁴ More than 2,000 children have already been expelled, either to Mexico or via ICE flights back to the countries they fled.³⁵ These actions are in clear violation of federal law which has long recognized the right to asylum and the vulnerability of unaccompanied children arriving at our border.

Leading health experts agree there is no public health rationale for shutting the border to asylum-seekers and unaccompanied children.³⁶ DHS can screen people for signs of infection and refer them to health facilities as needed. ORR has ample space for social distancing and quarantine.³⁷ Several organizations have filed suit against the government demanding that the border be reopened.³⁸

The Young Center will continue to advocate for the rights of immigrant children and their families, and for laws and policies that prioritize children's best interests in any decisions made about them. Ultimately, the United States must reimagine its immigration policy and create a new system that recognizes the particular needs and capabilities of children.

ANATOMY OF A CHILD ADVOCATE'S ROLE IN FAMILY SEPARATION CASES

In almost every case to which the Young Center was appointed, separation was contrary to the child's best interests and had no relation to the parent's fitness or the child's safety. Our role was to find parents, establish missing parent-child communication, fight for the parent's and child's release, and help ensure their safe reunification.



RECOMMENDATIONS

At the Young Center for Immigrant Children's Rights, we are working towards the creation of an immigration system that is tailored to the needs and vulnerabilities of children. Even before substantial legislative reform, however, there are many steps decision-makers can take to ensure that whenever possible, families remain together, and that children's needs do not come as an afterthought.

Every government agency must make the best interests of the child a primary consideration in every decision about a child. All federal agencies must be required to consider children's best interests in every decision, regardless of immigration status or opportunity for legal relief. The Office of Refugee Resettlement is required by law to place children in the least restrictive setting in their best interests. This statutory obligation to consider the best interests of unaccompanied children aligns with the laws of all 50 states for cases in which children are separated from their families by government action. Every federal agency involved in an immigrant child's case, from the time of the child's apprehension through the final resolution of the child's immigration case, should consider the best interests of the child—the child's expressed wishes, and rights to safety, liberty, family integrity, development and identity—in every decision.

Congress and agency policy must prohibit family separation in all but the most exceptional cases. Children must not be separated from their parents or legal guardians unless there is verifiable evidence that the parent poses an immediate threat to the child's safety or is otherwise unfit to care for the child.

Every decision to temporarily separate a child from a parent must be subject to prompt review by a court with expertise in child protection and parental rights—not immigration enforcement officials. Decisions to separate an immigrant child from a parent should only be made by an independent professional who is culturally sensitive, trained in child welfare, child development, immigration law, and trafficking concerns.

Federal agencies (DHS, DOJ, and HHS) should ensure that every child separated from a parent has an attorney and an independent Child Advocate. If DHS separates a child from a parent, the child should be referred for the appointment of an independent Child Advocate to champion the child's best interests in all relevant decisions, from reunification with parents and other family members to whether the child can safely repatriate. The government should provide an attorney to both the parent and the child if they do not have counsel. Unless the child expresses a contrary desire, the government should ensure consistent, age-appropriate video and phone contact between the parent and child and facilitate regular in-person visits.

Congress must protect the Flores Settlement Agreement and the Trafficking Victims Protection Reauthorization Act (TVPRA) which provide critical protections for children. Congress should reject any effort to dismantle or otherwise narrow the Flores Settlement Agreement or the Trafficking Victims Protection Reauthorization Act (TVPRA), which provide critical protections for children, including the right to placement in the least restrictive settings in their best interests and the appointment of independent Child Advocates to identify and advocate for the best interests of the child.

The Executive Branch must end the Remain in Mexico program/Migrant Protection Protocols and restore access to asylum. The Young Center has been appointed to multiple cases of parent-child separation resulting from Remain in Mexico. The government fails to track family relationships or parents' contact information, making communication and reunification nearly impossible. The Remain in Mexico program must end immediately, and access to asylum for all seeking protection must be restored. At the very least, children who cannot safely remain in Mexico should be admitted in the custody of their parents, not separated from them.

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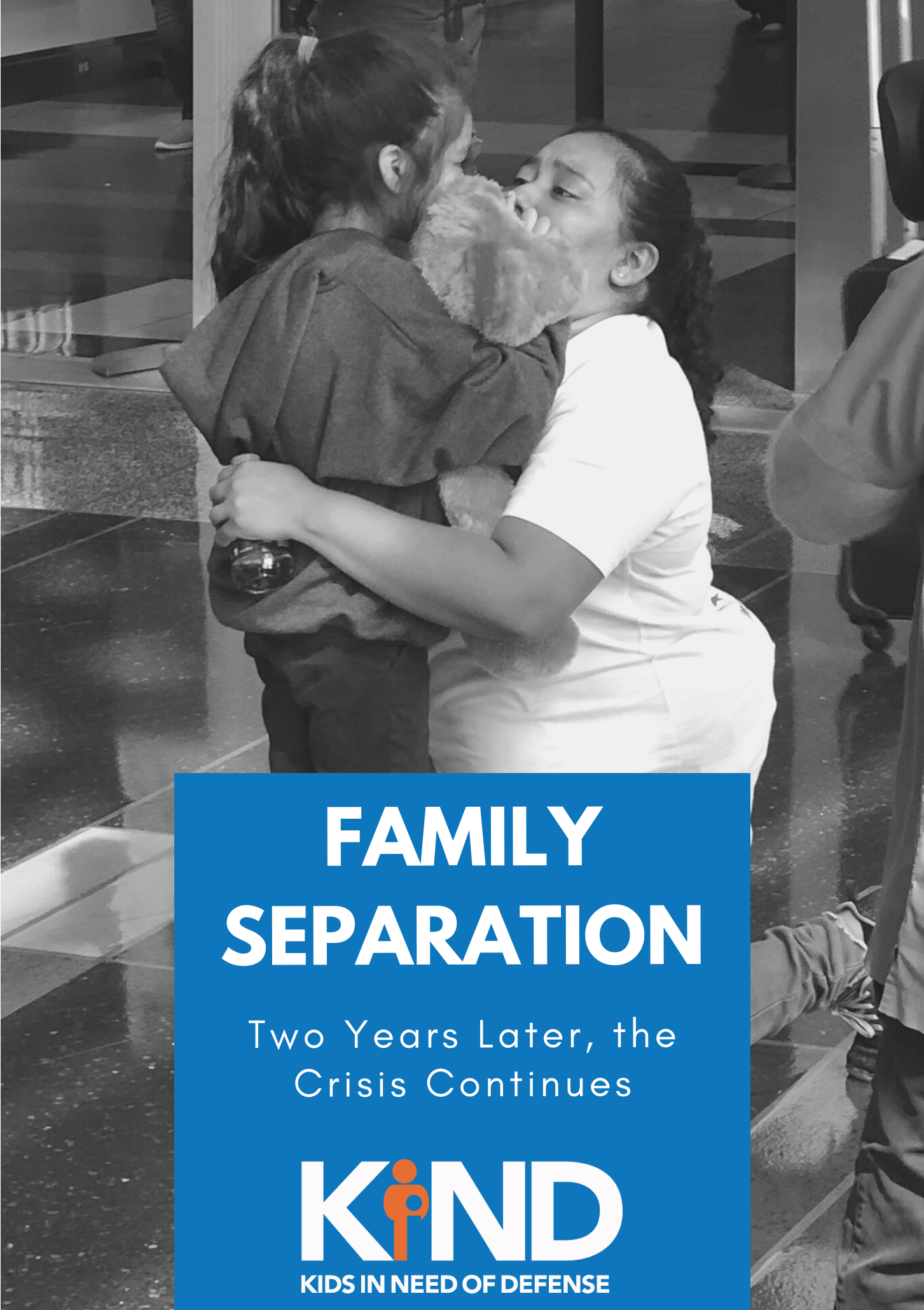
Michael Becker, Tee Scatuorchio, and supporters of the 2018 New York Benefit

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Family Separation Is Not Over: How the Trump Administration Continues to Separate Children from Their Parents to Serve its Political Ends

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FAMILY SEPARATION

Two Years Later, the
Crisis Continues

KIND
KIDS IN NEED OF DEFENSE

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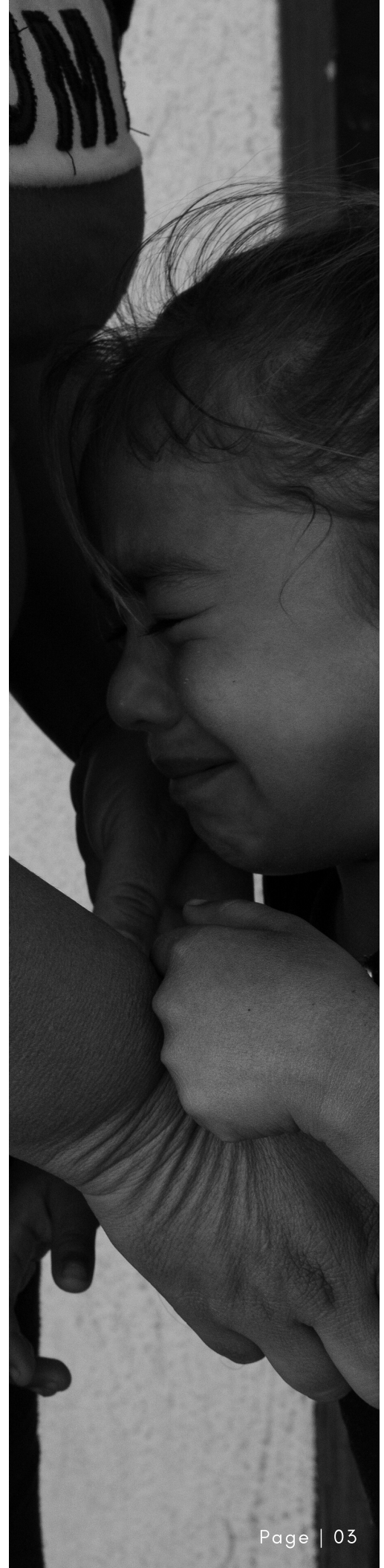
On May 14, 2018, 11-year-old Nancy watched in horror as immigration officials in Texas forcefully took her father from her at the U.S. border. She has not seen him since. Nancy has no one else - her father was her only caretaker. The terror, trauma, fear, and confusion that resulted from the forced separation remains with Nancy to this day. Nancy and her father came to the United States seeking protection from gang violence in her home country. Instead of finding refuge, Nancy experienced the worst event of any child's life - the loss of a parent.

By the time the Trump Administration had abandoned its “zero tolerance” policy that cruelly separated immigrant and refugee parents and children at the U.S. border in June 2018, about **2,800** children—including more than **1,000** children under the age of 10—had been forcibly taken from their parents.^[1] The policy, which began in May 2018 and was the subject of enormous public outcry,^[2] required that any adult crossing the southern border without authorization—even if they were asking for protection—be turned over for prosecution. In the chaotic implementation of the policy, immigration enforcement officials at the border often used coercion, lies, and harassment to tear children away from their parents. Many of the parents were summarily deported while their children remained in the United States.

Shortly after the administration ended its zero tolerance policy, a federal court ruled that many of the separations had been unconstitutional and ordered the government to halt the practice except in limited circumstances. The court also ordered the government to reunify the families it had separated. That would prove impossible due to the administration’s careless and irresponsible implementation of the policy. It later emerged that thousands more separations had taken place even before the zero tolerance policy was implemented.^[3]

Now, years later, many of these families have yet to be reunified. Some may never be.

Thousands of children are still navigating their legal cases for protection made only more difficult by the trauma and separations they experienced, without their parents by their side.



Alarming, family separation has continued since the end of the zero tolerance policy in significant numbers due to a lack of standards to guide when separations should occur or oversight to ensure appropriate child welfare standards are being met, as well as other more recent harsh deterrence policies that are forcing families apart.

KIND has assisted more than **1,100** individuals affected by family separation in the United States, as well as in the countries to which separated parents have been wrongfully deported. KIND has provided legal screenings and representation, facilitated court-ordered reunifications, advocated for the return to the United States of parents deported without their children, connected children and families with trauma-informed social services, and spearheaded the effort to implement safeguards to prevent harmful and unnecessary separations in the future. Together with coalition partners, KIND's efforts helped reunite hundreds of children and families and enabled them to begin the difficult process of healing from trauma and pursuing their immigration cases. For families reunified in Central America, KIND partners have provided psychosocial support and ongoing reintegration assistance. Despite these efforts, however, it is tragically clear that far more remains to be done.

This report details KIND's work on behalf of separated children since the end of the zero tolerance policy and highlights the gaps that remain in preventing wrongful separations in the immigration system. Absent concrete actions to limit family separations and ensure accountability, these gaps will tragically persist and children will continue to be ripped from their parents without assurance of reunification. This report also provides recommendations to help ensure that life-altering decisions about when separations should occur are made by professionals with expertise in child welfare, rather than law enforcement, and that the best interests of children are central to all decisions made at the border. This will help ensure that no family is separated in the name of deterrence and that the fair and appropriate treatment of all children at the border is not an aspiration, but a reality.

More than 5,400 Children Have Been Separated from Their Parents



Ending the Zero Tolerance Policy

In June 2018, President Trump issued an executive order formally abandoning the zero tolerance policy and purporting to maintain family unity through increased use of family detention.^[4] However, the executive order did not provide any guidance about how to reunify families who were forcibly separated under the policy. Similarly, it lacked guidance about the circumstances in which family separations might occur in the future, apart from stating that parents and children would not be detained together if there were concerns that a parent posed a risk to the child's welfare. On June 26, 2018, a federal court—in the case of *Ms. L v. ICE*—ordered the government to halt separations of migrant parents and their minor children absent a determination that a parent is unfit or presents a danger to his or her child, has a criminal history, or has a communicable disease.^[5] The court also ordered the government to immediately reunify separated families.

As became painfully clear during the reunification process, the federal government had failed to systematically track children and their parents and lacked effective mechanisms to quickly reunify them. Nongovernmental organizations, including KIND, stepped in to fill the gap and devoted critical resources to scanning through client databases and spreadsheets to try to ensure no parents or children were overlooked in the process. The Department of Homeland Security (DHS) possessed data on the parents, and the Office of Refugee Resettlement (ORR), within the Department of Health and Human Services (HHS), maintained information on the children in its custody. Yet the two agencies lacked a central database to connect this vital data to the families the government had torn apart.^[6] DHS, shockingly, had not tracked which parents had been separated from a child. And, when they referred separated children to ORR, DHS did not inform ORR which children had been separated. After separation, agency employees had to manually comb through thousands of records to assess whether a child in ORR custody had been separated from a parent. The process^[7] was rife with mistakes and confusion. In one case, KIND assisted a mother who had been separated from her children, including a 6-month-old. ORR employees initially handed over the wrong baby to her before correcting their mistake.

Ongoing litigation and government oversight investigations have documented shocking failures by the government to carry out even basic planning for the implementation of the zero tolerance policy, which further compounded the cruelty of the design. Those failures included the absence of any reliable systems for identifying, tracking, and reunifying children and parents who were torn from each other.^[8]

KIND met Brianna in the chaos of June 2018 at the Port Isabel Detention facility in South Texas. Brianna was desperate—she had been separated from her 5-year-old son and did not know when she would see him again.

Brianna fled her home country seeking safety after her partner physically abused and threatened to kill her if she did not participate in violent political protests. KIND placed Brianna's case with a pro bono attorney after she was released and reunified with her son later that summer. Following months of preparation and planning, including hours of testimony in court, an immigration judge granted Brianna and her son asylum. They can now move forward with their lives and begin to heal from the past traumas they have endured, including the trauma inflicted upon them at the hands of U.S. government officials.

KIND sent emergency teams of lawyers and paralegals to assist separated parents held at the Port Isabel Processing Center (PIDC) in Texas in the summer of 2018. Parents were desperate and devastated.

Here is what they told KIND:

“

They told me my child would be there when I returned from court. When I got back my child was gone and they wouldn't tell me for weeks where they'd taken her.

Mother of 8-year-old child, from El Salvador

“

They told us they were only taking the children while we went to court. My daughter is 6 years old, so when they came for her in the middle of the night, she didn't want to go. I promised her it was only for a little while and that we would be together again soon. That was the last time I saw her. When I was finally able to speak with my daughter, three weeks later, she didn't want to speak to me. She is resentful towards me. She thinks I lied to her. I can't hold her and explain to her that I didn't know this was going to happen.

Mother from Honduras

“

I don't know how he's doing; I haven't spoken to him, I don't know where he is. We're here because we watched our family get murdered. He has bad separation anxiety - it was bad even before we left because, imagine, he watched his family get murdered. He never wants to leave me and gets really bad if we're apart. Then we got here and they took him. I can't imagine what he's like, I just want to take his suffering for him. He can't be apart from me, he's suffering, I know it.

Mother of a 6-year-old boy

“

The officer tore my 6-year-old daughter from my arms in the middle of the night.

Father from Guatemala

The Fight for Children Whose Parents Were Deported Without Them

Although hundreds of parents and children were reunified through the court order, the process came too late for **471** parents who had already been deported from the United States without their children.^[9] In response, the Ms. L court ordered the formation of a Steering Committee, of which KIND is a part, to locate and assist these parents who were deported to their countries of origin without their children. In some cases, parents who feared for their lives withdrew their asylum claims and agreed to deportation after being told that this was the only way to get their children back.



A family assisted by KIND reunited in the Los Angeles International Airport after the court in Ms. L ordered the father's return.

In September 2019, after advocates, including KIND, brought these cases to the Ms. L court's attention, the court eventually ordered the return of **11** of the 471 separated parents who were wrongfully removed. The court found significant defects in the process those parents had gone through prior to their deportation, including cases in which parents were compelled to give up their asylum cases after being told it was the only way they would see their children again. In January 2020, **nine** of the 11 parents returned to the U.S. and were reunited with their children.^[10]

Even today, hundreds of children remain separated from their parents, who were removed to their countries of origin.

KIND met with a single mother who fled to the United States from Guatemala in May 2018 with her surviving family members after her adult son and a grandchild were murdered and one of her daughters and another grandchild were shot and injured. The mother presented at the El Paso port of entry to seek asylum and was separated from her 17-year-old daughter and an adult daughter and her children. The mother was confused and disoriented after the separation, and KIND identified serious due process violations during her detention. She returned to the United States twice after her original deportation, fearing for her life and desperate to reach her daughters and was deported for a third time in October 2019 and forced into hiding. In April 2020, KIND was able to secure counsel for both the mother in Guatemala and her daughters and grandchildren in the U.S.

They dream of one day reunifying safely in the United States.

Separations Prior to the Zero Tolerance Policy

While advocates worked to reunify families separated under the zero tolerance policy, increasing reports by advocates,^[11] the media,^[12] and federal oversight and accountability agencies began to reveal that the government's use of family separation was more widespread than it had previously acknowledged. In October 2018, the Government Accountability Office (GAO) reported that the administration began a secret pilot program to separate children and their parents arriving at the border in July 2017.^[13] In January 2019, the Department of Health and Human Services Office of Inspector General issued a separate report finding that thousands of separations may have occurred before the announcement of the zero tolerance policy.^[14] Informed by these reports, and upon advocacy by the American Civil Liberties Union (ACLU) as counsel for the plaintiffs and evidence provided by its partners, including KIND, the court in *Ms. L* ordered a full accounting of these previously unknown separations in March 2019. The court broadened the scope of the case to include families separated from the beginning of the pilot program in July 2017 through the date of the court's June 2018 order. Seven months later—in October 2019—the administration provided a total count of the families that it had not previously revealed, stretching back to July 2017; the number of additional children that had been separated from their parents totaled **1,556**.

Given that the government only began to produce data about its pilot separations more than two years after many of these incidents occurred, it has been extremely difficult to locate and contact the separated families, many of whom include parents deported without their children and without the information needed to reunify. The Steering Committee appointed by the court, comprising the Paul, Weiss law firm, KIND, the Women's Refugee Commission, and Justice in Motion has located over **400** of the families as of May 2020, while nearly **600** could not be reached with the contact information the government provided.^[15] Approximately 70 percent of these unreachable parents are believed to have been deported without their children. Covid-19 travel restrictions have halted searches to find these parents in their communities.^[16]

KIND continues to identify and evaluate cases of asylum-seeking parents who were separated as far back as July 2017. Many parents were coerced by U.S. government officials into accepting deportation or misled about the asylum process, separation, or reunification, among other factors. Since June 2019, KIND has worked with over **160** deported parents separated from their children prior to the zero tolerance policy, the majority of whom are still seeking reunification with their children, now after nearly three years of separation in some cases. KIND continues to work to facilitate family reunification, to assist deported parents seeking return to the United States, to support children and families post-reunification, and to identify and advocate for local, regional, and international protection solutions for families in need.



"Laura" and her two boys, victims of the pilot phase of family separation, were separated for nearly two years. With KIND's assistance, they were reunited.

KIND worked with a mother from El Salvador who was separated from her 12-year-old daughter upon arrival in the U.S. in September 2017, fleeing from a gang member who wanted her daughter to become a gang girlfriend, threatening to kill them both when the mother tried to protect her child. The mother begged the immigration judge to grant her bond so that she could reunify with her daughter, but the judge told her that the only way to reunify would be for the mother to accept deportation. Devastated, the mother agreed to be deported in order to get her daughter back. Despite assurances that they would be returned together, ICE deported her several weeks later—without her child. The child’s ORR caseworker then pressured the mother to find her daughter a sponsor in the United States. Fearing for her child’s life, the mother eventually found a family friend to take the child, who spent eight months in custody, and is still struggling to find a stable sponsor due to her mother’s removal.

KIND secured legal counsel for the mother to pursue her reunification claim to be with her daughter in the United States.

Post Zero-Tolerance: KIND's Ongoing Work with Separated Children

While public outrage about family separation diminished at the close of 2018—after hundreds of families were reunited—the underlying structures within the U.S. immigration system and the limitations of the court order allowed a new crisis to more quietly unfold in 2019. **In the spring of 2019, KIND attorneys saw an alarming increase in children separated from their parents at the border and placed in ORR custody. This time, the children were even younger than the children seen during the zero tolerance policy—in many cases toddlers and pre-verbal children.** Advocates working with these children had to navigate a labyrinth of government officials and contacts to find even basic information about the child’s background, the reason that the child had been separated from the parent, and the location of the parent in government custody. Frequently, the parents were hundreds or thousands of miles away, many of them in remote Immigration and Customs Enforcement (ICE) facilities in the southern U.S. that were not adequately served by legal service providers.

Through KIND’s work with these children, it became clear that U.S. Customs and Border Protection (CBP) officials had adopted a disturbing interpretation of some of the more ambiguous terms of the *Ms. L* court’s order that said parents could be separated from their children in various circumstances, including: whenever the parent had any indicia of prior criminal history or communicable disease; when officials doubted the relationship between the parent and child; when CBP alleged that the parent and child’s identity documents were false; or when CBP officials, who have little to no child welfare training, perceived a parent to be unfit to care for their child. These broad bases for discretion have no grounding in domestic child welfare standards. In one reported case, a child was apparently separated from a parent because the baby had a full diaper!^[17] In a KIND case, three girls fleeing violence were separated from their father because he was HIV-positive.^[18] In another case, a father’s decade-old forgery conviction led to his forcible separation from his 11-year-old daughter, without any indication that this charge posed a threat to the child’s safety. After she was separated from her father, the child was placed in a CBP holding cell with unknown adults and forced to sleep on the floor for over ten days.

KIND has also served children who have been separated from their parents because CBP did not consider legally recognized documents granting custody to be valid, or because of language issues. These situations have also arisen in cases involving legal guardians responsible for the custody and care of the child in their country of origin or who are the child's legal parent under the color of law despite the fact that immigration law considers legal guardians to have the same rights as parents in this regard.^[19]

In total, more than 1,150 children have been forcibly separated from their parents since the formal end of the zero tolerance policy, despite the court's injunction in June 2018. More than 200 were under the age of five.^[20] CBP officials with little to no training in evaluating the best interests of children are making these life-altering decisions that are not subject to review or challenge. These rapid determinations result in forceful separations and the quick shuttling of children to ORR facilities frequently hundreds of miles away, while parents are sent to ICE detention facilities.

In 2019, KIND worked with more than 40 children in detention who had been separated from their parent after the June 26, 2018 injunction. The average age of these clients was five years old. Only four children were over the age of ten; sixteen children were under the age of five. The youngest child was only four months old when he was separated from his mother and six months old when a KIND attorney represented him in immigration court. These cases are complex and require close collaboration between KIND's legal services and international programs. KIND assisted several children who sought to reunify and jointly repatriate with their parent.

Throughout 2019, KIND supported the ACLU's efforts to halt these ongoing separations. KIND submitted a declaration to the court and advised the ACLU in coordination with other partner organizations. However, in January 2020, the court signaled its reluctance to manage the government's determinations at the border,^[21] finding that agencies may continue to separate parents from their children based on any criminal history—including minor and nonviolent crimes, previous unlawful reentry, or often uncorroborated gang allegations.^[22] The court found that while the government had acknowledged some errors, it was largely in compliance with the court's earlier order. As a result, more than **1,000** separations that occurred subsequent to the court's original order were deemed permissible, thereby excluding hundreds of parents and their children from the court's 2018 ruling that protected the right to family unity.

In one case, a 6-year-old boy was separated from his father for several months because CBP doubted their relationship. Unable to speak Spanish and understand when asked to verify his relationship to his son, the father was accused of fraud; his child taken away. Father and son were sent to facilities thousands of miles from each other. For months the government did not acknowledge the separation. Only after extensive advocacy and a DNA test that proved the relationship were the father and child finally reunited.

KIND represented a 3-year-old who was sexually assaulted while in ORR custody after she and her father were separated because his name was not on her birth certificate. The child was severely traumatized by the separation and the abuse. Working with the father's attorneys, KIND fought government delays to obtain a DNA test and coordinate joint repatriation to their home country. However, the government swiftly deported the father, causing the toddler to travel by herself. KIND's partners continue to provide the child with reintegration services and psychosocial support.

“

I was not told where I was going, where my dad was. I didn't know if I could talk to my mom. I'm really scared of the police and what they will do to me again.

6-year-old child separated from his father

“

I will die if I go back, but at least I will die with my son.

Father separated from his 5-year-old son

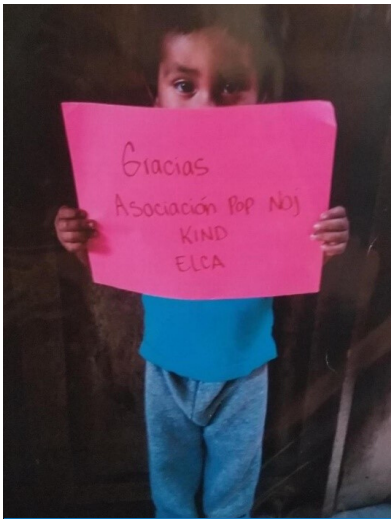


Photo credit:
Asociación Pop No'j

KIND routinely encounters cases in which neither the parent nor child were told why they were being separated or given any opportunity to challenge the separation. In some cases, parents continue to not know where their children are for days or weeks after being torn from them. Communication problems persist, with children frequently having great difficulty reaching their parents by phone in detention facilities.

The structural problems and deficiencies made clear during the zero tolerance policy largely endure and continue to harm children and families. The government's ongoing failure to adequately track family relationships in one system; to properly share information between agencies and with legal service providers, parents, and children; and to provide an effective mechanism for parents or children to challenge separations make reunification of families that have been separated ever more difficult to achieve.^[23]

These problems are amplified by the absence of any meaningful standards to guide the decisions of border officials making these life-altering decisions. Once a decision to separate is made, it is extremely difficult to undo, and in KIND's experience, requires intensive advocacy by both an attorney for the child and an attorney for the parent, even when both parent and child only want to repatriate to their home country together. With so many separated parents detained in remote facilities with little to no access to free legal service providers, it is only the exceptional case where such advocacy can be achieved on both ends.

“

They lied to me. They told me that all I had to do was sign this form and I would get my child back...I can't sleep at night, I have constant nightmares about what is happening to my little girl.

Father separated from his 2-year-old daughter

Family Separation, the Migrant Protection Protocols, and Public Health Expulsions

At the end of 2019, KIND staff began to notice a downward trend in the number of newly separated children entering ORR shelters. Instead of separating children and parents and sending them to different facilities on U.S. soil, a new attack on the ability of families to access protections in the U.S. was resulting from the Migrant Protection Protocols (MPP), also known as the “Remain in Mexico” policy. Under MPP, the U.S. sends certain asylum seekers to Mexico to wait for proceedings in their U.S. immigration cases. This policy, which has returned more than **65,000** asylum seekers to Mexico to date, has forced a new form of family separations. ^[24]

Families in MPP are returned to dangerous border towns in Mexico, where they must wait for weeks or months for court hearings in tent courts along the U.S. border, often without access to shelter or a means of supporting themselves. These families are uniquely vulnerable to exploitation and violence in border towns where criminal organizations operate with impunity. Since the policy began, there have been more than **1,114** reported violent assaults, kidnappings, and even murders of asylum seekers returned to Mexico through MPP.^[25]

Due to these conditions, hundreds of children placed in the MPP program have been forced to make the decision to separate from their parents and guardians and come to the U.S. to seek protection alone. HHS has reported that from October 1, 2019 to January 13, 2020, it received referrals of more than **350** unaccompanied children in the U.S. whose families remained in Mexico. KIND has served more than **90** children impacted by MPP, including children who came to the U.S. alone after a parent’s disappearance or kidnapping. In some cases, these children have been ordered removed to their countries of origin in Central America despite the fact that their parents remain in Mexico. These family separations—the consequence of the government’s cruel efforts to deter parents and children from seeking asylum—not only cause serious trauma to children but also severely undermine their ability to access lifesaving protections.

Daniel's Story

Daniel, 16, from Honduras, and his mother presented themselves at the U.S.-Mexico border in August 2019 to seek protection in the U.S. and were sent to Mexico to wait for their asylum cases under MPP. They had nowhere to go and were forced to remain in the dangerous border area, where they were terrified of the rampant violence. They found a church in the area that gave them a place to stay. One day during a service at the church, armed, masked men came in and forced everyone into waiting vehicles, including Daniel’s mother. Daniel managed to hide from the kidnappers. He did not come out until the next day. His mother had disappeared. Not knowing what else to do, he returned to the border and turned himself in to CBP. He was transferred to an ORR children’s shelter. Early one morning he was told to get ready because he had an appointment with immigration in Miami. Daniel asked if he was going to be deported to Honduras and was told no. It was only when officials asked him to get on the plane did they tell him that he was being deported to Honduras. His family in Honduras did not know he was coming until he was able to call his sister from the Honduran reception center after his removal. Daniel’s mother calls the family every now and then from different numbers. The calls are very short and she never says where she is; she only asks how Daniel and the rest of the family are. Daniels fears for himself and his mother.

The Trump Administration's March 2020 closure of the U.S.-Mexico border to asylum seekers and unaccompanied children in response to the Covid-19 pandemic is the most recent attempt to curtail access to children seeking safe haven in the U.S. and has led to the expulsion of more than **2,000** children. These expulsions violate the law^[26] and force migrating children into perilous conditions along the border or back to their countries of origin, to which many are returned without any screening for protection needs, counter to special protections in the Trafficking Victims Protection Reauthorization Act enacted to facilitate due process and prevent the return of unaccompanied children to harm, including human trafficking.

In addition, children are being sent back into Mexico by the U.S. government with adults they do not know who have not been screened by U.S. officials to determine if they are a potential risk to the child for abuse, trafficking, or exploitation. This complete disregard of these children's safety flies in the face of the purported reasons the administration separates children from their parents – supposed safety concerns for the child. Expelling children not only exposes them to grave danger, but in some cases keeps them from safety, including from reuniting with parents in the United States.

The pandemic has also accelerated ICE's use of "binary choice," a cruel method of requiring parents to choose between keeping their family intact in U.S. immigration detention or allowing a child to be released into ORR custody to be placed with a sponsor. Recent reports suggest that ICE began circulating forms to parents housed in its family detention facilities in May 2020 demanding they waive their children's legal rights against indefinite detention or else have the family separated and the children treated as though they were unaccompanied.^[27] As evidence of widespread outbreaks of Covid-19 in ICE facilities continues to grow, many parents are facing a Sophie's choice: keep their children with them or send them away to avoid the risk of illness or death in custody. ICE reportedly plans to use the signed forms as proof that parents are waiving their children's right to be released from unlicensed detention facilities for prolonged periods of time.

Conclusion


Two years after the zero tolerance policy, and despite various lawsuits, the court order in *Ms. L v. ICE*, oversight reports, and congressional hearings, there continues to be very little oversight over the agencies executing family separations, which carry pervasive and devastating consequences for the families they tear apart. In working with hundreds of victims of family separation over the last three years, KIND has seen firsthand the disastrous impact of these separations on children and families. The psychological and medical trauma to children and their parents cannot be overstated. It is critically important that the U.S. government take steps to stop future separations from occurring and meaningfully address the needs of families still suffering from this harmful practice.





Recommendations


Family separation imposes catastrophic and long-lasting consequences on the health and well-being of children. It also greatly impacts their ability to fully and fairly make their cases for legal protection. The government continues to separate families, however, with few safeguards to guarantee that it is done only sparingly and when truly necessary to prevent a clear danger to a child. The zero tolerance policy and the thousands of separations that occurred before, during, and after its implementation underscore the need for critical reforms to ensure the best interests and appropriate treatment of all children arriving at the border. Tragically, this is not happening, and children continue to be forcibly taken from their parents at the U.S. border.


KIND calls for the immediate implementation of the following recommendations:


 DHS should consider and prioritize the best interests of the child in all processing, custody, removal, and repatriation decisions.


 DHS should hire licensed child welfare professionals to oversee the care and screening of all children in CBP custody and facilities. Child welfare professionals should be charged with deciding whether a separation is necessary for child safety. A recent federal funding law directed the agency to hire child welfare professionals at all points along the southwest border. DHS must swiftly comply with this directive, and Congress should conduct oversight to ensure it is achieved.


 DHS should immediately halt all parent-child and guardian-child separations. In the exceptional case where separation may be warranted due to human trafficking or other child welfare concerns, a child welfare professional should conduct an assessment before the separation occurs and recommend separation only when warranted by specific criteria and approved by supervisory review. The assessment should be provided in writing to the parent and a copy maintained in their detention file. A copy of the assessment should also be uploaded to the unaccompanied child portal and made accessible to legal service providers assisting the child.


 In the exceptional case where a separation must occur due to concerns about the child's well-being, DHS should provide children and parents or guardians with clear information about the basis for separation, in writing, information about how to reach each other, as well as an accessible, immediate, and independent process by which they can challenge the separation, and access to government records including adverse records regarding the parent or legal guardian. When a determination is made that the parent provides no safety threat to the child, the parent should be prioritized for release from detention.


 In cases of separation based on concerns about the validity of the relationship between the adult and child, DHS should offer, but not require, rapid DNA testing to any adult and child claiming a biological relationship. In cases of claimed non-biological relationship, child welfare professionals must assess the validity of the relationship while keeping the best interests of the child at the forefront of the investigation.


 DHS and ORR should upgrade database systems and create robust mechanisms to track and share information about any and all separations of children from parents, legal guardians, and other family members, including the reasons for any such separations.

 DHS and ORR should facilitate routine (at a minimum, weekly) video communication between separated parents and children, as well as access to legal counsel for each affected parent and child. DHS and ORR should facilitate in-person visitation for each parent and child when the separation lasts for more than 30 days, which should occur in only the most extreme circumstances. DHS and ORR should share information with legal counsel necessary to effectuate the representation of each child and parent.

 DHS should work with ORR to swiftly reunify an adult and child after the reason for an initial separation—such as an illness or condition that rendered the parent temporarily unfit or unavailable—is resolved. The child should be provided an opportunity to consult with his or her attorney before the reunification occurs.

 DHS and ORR should develop streamlined and expedited processes to reunify children and their parents or guardians when the reasons for the separation have been successfully challenged or overcome. The best interest of the child should remain central to all steps in the reunification, with safe and appropriate travel provided to the child and adequate opportunities for them to speak to their parent and legal service provider about any concerns. When a parent and child decide to jointly repatriate to their country of origin, DHS and ORR must ensure that the parent and child are able to reunite in the United States and make the trip back together. Adequate notice of travel or movement of the child should be provided to legal service providers assisting the child and parent, so that arrangements can be made for the safe reception of the family in the country of origin.

 DHS should immediately end the practice of requiring parents to choose between keeping their family together or allowing the child to be released separately into ORR custody. If a family is detained together, they should be detained for a maximum of 20 days; otherwise, DHS must place the family in an alternative to detention program.

 DHS should immediately stop placing children in the Migrant Protection Protocols and expelling unaccompanied children under Title 42. Expulsions violate protections for unaccompanied children under the Trafficking Victims Protection Reauthorization Act, and expose children to grave harm, including human trafficking.

Endnotes

- [1] OFFICE OF THE INSPECTOR GENERAL U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OEI-BL-18-00510, Communication and Management Challenges Impeded HHS's Response to the Zero-Tolerance Policy 8 (Mar. 2020) (hereinafter HHS OIG REPORT MARCH 2020) <https://oig.hhs.gov/oei/reports/oei-BL-18-00510.pdf>; see also ACLU, *Family Separation: By the Numbers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation>.
- [2] See Joint Status Report, at 9, *Ms. L. v. U.S. Immigration & Customs Enf't*, No. 18-cv-00428-DMS-MDD (S.D. Cal. Dec. 12, 2018); see also OFFICE OF THE INSPECTOR GENERAL U.S. DEP'T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 11 (Jan. 17, 2019) (hereinafter HHS OIG REPORT JANUARY 2019) <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>; OFFICE OF THE INSPECTOR GENERAL U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OEI-BL-18-00510, Communication and Management Challenges Impeded HHS's Response to the Zero-Tolerance Policy 11 (Mar. 2020) (hereinafter HHS OIG REPORT MARCH 2020) <https://oig.hhs.gov/oei/reports/oei-BL-18-00510.pdf>.
- [3] HHS OIG REPORT JANUARY 2019 at 1.
- [4] See Exec. Order No. 13841 (June 20, 2018), 83 Fed. Reg. 29,435 (June 25, 2018); see also U.S. Gov't Accountability Off., GAO-19-163, Unaccompanied Children: Agency Efforts To Reunify Children Separated From Parents At The Border 2 (Oct. 9, 2018) <https://www.gao.gov/assets/700/694918.pdf>.
- [5] *Ms. L. v. U.S. Immigration and Customs Enforcement ("ICE")*, 310 F. Supp. 3d 1133 (2018).
- [6] See OFFICE OF THE INSPECTOR GENERAL U.S. DEP'T OF HOMELAND SECURITY, OIG-20-06, DHS Lacked Technology Needed to Successfully Account for Separated Migrant 8 (Nov. 06, 2019) (hereinafter DHS OIG REPORT NOVEMBER 2019) <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf>; see also HHS OIG REPORT MARCH 2020 at 22.
- [7] DHS OIG REPORT NOVEMBER 2019 at 13.
- [8] See OFFICE OF THE INSPECTOR GENERAL U.S. DEP'T OF HOMELAND SECURITY, OIG-20-06, DHS Lacked Technology Needed to Successfully Account for Separated Migrant 21-27 (Nov. 06, 2019) (hereafter DHS OIG REPORT NOVEMBER 2019) <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf>; see also HHS OIG REPORT JANUARY 2019 at 13; HHS OIG REPORT 2020 at 22.
- [9] See Priscilla Alvarez, *471 parents were deported from US without their children during family separations*, CNN (Mar. 7, 2019), <https://www.cnn.com/2019/03/06/politics/family-separation-update-immigration-border/index.html>.
- [10] See Camilo Montoya-Galvez, *More parents deported without their kids may be able to return to the U.S. - if advocates can find them*, CBS News (Feb. 18, 2020), <https://www.cbsnews.com/news/deported-parents-separated-children-return-us-advocates/>.
- [11] KIND was the first to sound the alarm on family separations. See KIDS IN NEED OF DEFENSE, LUTHERAN IMMIGRATION & REFUGEE SERVICE & WOMEN'S REFUGEE COMM'N, BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES (2017) https://supportkind.org/wp-content/uploads/2017/03/BetrayingFamilyValues_Feb2017.pdf.
- [12] Lomi Kriel, *Trump moves to end 'catch and release,' prosecuting parents and removing children who cross the border*, Houston Chron.(Nov. 25, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>.
- [13] See U.S. Gov't Accountability Off., GAO-19-163, Unaccompanied Children: Agency Efforts To Reunify Children Separated From Parents At The Border at 14 (Oct. 9, 2018) www.gao.gov/assets/700/694918.pdf.
- [14] See HHS OIG REPORT JANUARY 2019 at 11.
- [15] See Joint Status Report, *Ms. L. v. U.S. Immigration & Customs Enf't ("ICE")*, No. 18-cv-00428-DMS-MDD (S.D. Cal. May 27, 2020) (of the remaining 500 children, the government provided incomplete information for over 100, and disputes class inclusion of the other 400).

[16] The Steering Committee is still trying to contact families believed to be in the U.S. and in Central America, in order to confirm that they are in touch with (or reunited with) their children, and to screen for legal or protection needs. Families and advocates may call the following numbers to reach the Steering Committee: United States: 1-888-582-2853; Honduras: 800 2791 9210; Guatemala: 2375 0592; El Salvador: 2136 8300; Mexico: 800 269 1316; Other: +1 646-478-1535. See also Kids in Needs of Defense, Steering Committee in National Lawsuit Representing Separated Migrant Families Seeks Help in Locating Additional Separated Parents and Children, KIND (Mar. 3, 2020), <https://supportkind.org/press-releases/steering-committee-in-national-lawsuit-representing-separated-migrant-families-seeks-help-in-locating-additional-separated-parents-and-children/>.

[17] See Maria Sacchetti, ACLU: U.S. has taken nearly 1,000 child migrants from their parents since judge ordered stop to border separations, Washington Post (July 30, 2019), https://www.washingtonpost.com/immigration/aclu-us-has-taken-nearly-1000-child-migrants-from-their-parents-since-judge-ordered-stop-to-border-separations/2019/07/30/bde452d8-b2d5-11e9-8949-5f36ff92706e_story.html.

[18] See Beth Fertig, *Three Young Girls Were Separated at the Border from a Father with HIV*, WNYC, New York Public Radio (Sept. 3, 2019), <https://www.wnyc.org/story/three-young-girls-were-separated-border-father-hiv/>.

[19] See 6 U.S.C. § 279(g) (2020); 8 U.S.C. § 1232 (2020).

[20] Mot. to Enforce Prelim. Injun., *Ms. L. v. U.S. Immigration & Customs Enf't ("ICE")*, No. 18-cv-0428-DMS-MDD, (S.D. Cal. July 30, 2019).

[21] Order, *Ms. L. v. United States Immigration & Customs Enf't ("ICE")*, 415 F. Supp. 3d 980, 998 (S.D. Cal. 2020).

[22] *Id.*

[23] See HHS OIG REPORT MARCH 2020 at 27-28; see also DHS OIG REPORT NOVEMBER 2019 at 20.

[24] See Transactional Records Access Clearinghouse, Details on MPP (Remain in Mexico) Deportation Proceedings (Mar. 2020), <https://trac.syr.edu/phptools/immigration/mpp/>.

[25] See Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants To Danger* (May 2020), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

[26] The closure of the border in response to the Covid-19 pandemic leading to the deportation of children before they can even gain access to an attorney, and without placing them in the custody of the Office of Refugee and Resettlement (ORR) is in violation of rights under the Trafficking Victim Protection Reauthorization Act (TVPRA). See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; see also TRO Br. for Pet'r, *J.B.B.C v. Wolf*, No. 1:20-cv-01509-CJN (D.C. Cir. June 9, 2020); Kids in Need of Defense, *Court Ruling Signals Problems for Trump's Summary Expulsions of Children*, KIND (June 24, 2020), <https://supportkind.org/press-releases/court-ruling-signals-problems-for-trumps-summary-expulsions-of-children/>; Washington Office on Latin America, *U.S. Deportations During Global Pandemic Risk Spreading COVID-19*, WOLA (Apr. 9, 2020), <https://www.wola.org/2020/04/deportations-during-global-pandemic-risk-spreading-covid-19/>.

[27] See Associated Press, *Judge Demands ICE Better Explain why it Won't Release Kids*, VOA News (May 22, 2020), <https://www.voanews.com/usa/judge-demands-ice-better-explain-why-it-wont-release-kids>.

APPENDIX C

IN THE
Supreme Court of the United States

CHAD F. WOLF, ACTING SECRETARY OF
HOMELAND SECURITY, *et al.*,

Petitioners,

v.

INNOVATION LAW LAB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF YOUNG CENTER FOR IMMIGRANT
CHILDREN'S RIGHTS, KIDS IN NEED OF
DEFENSE, CENTER FOR THE HUMAN RIGHTS OF
CHILDREN, ANGRY TIAS AND ABUELAS OF THE
RIO GRANDE VALLEY, CHILDREN'S DEFENSE
FUND, FIRST FOCUS ON CHILDREN, SAVE THE
CHILDREN ACTION NETWORK, AND SAVE THE
CHILDREN FEDERATION, INC. AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici serve immigrant children and their families who are and have been subjected to the so-called Migrant Protection Protocols (“MPP”). *Amici*, who provide legal and social services to these children and their families experiencing trauma while living in dangerous conditions in Mexico under MPP, are well-suited to assist the Court in understanding the policy’s impact on asylum-seeking² children through their personal stories. *Amici* have directly interacted with the children whose stories are highlighted in this brief. The children’s stories will illustrate that MPP fails to meet the United States’ legal obligations to afford asylum-seeking children with critical, child-specific protections and procedures.

Young Center for Immigrant Children’s Rights is a federally appointed independent Child Advocate for unaccompanied and separated immigrant children in eight locations in the U.S., and advocates with federal agencies to consider children’s best interests in every decision.

Kids in Need of Defense is a national nonprofit organization dedicated to providing free legal

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have provided written consent for the filing of this brief.

2. *Amici* use “asylum-seekers” and “asylum-seeking children” to refer to immigrant children seeking safety through various forms of humanitarian relief, including but not limited to asylum, under U.S. law.

representation and protection to immigrant and refugee children in the U.S. who are unaccompanied by or separated from a parent or legal guardian, and face removal proceedings in immigration court.

Center for the Human Rights of Children at Loyola University Chicago School of Law advances and protects the rights of children with the belief that children's rights are human rights, and engages in interdisciplinary scholarship and applied research to address critical issues affecting the lives of children.

Angry Tias and Abuelas of the Rio Grande Valley is a network of concerned women located at the Texas-Mexico border that provides basic necessities for health and safety and support for human dignity and justice to individuals and families seeking asylum at our borders.

Children's Defense Fund is a national nonprofit child advocacy organization that has worked relentlessly for more than 40 years to ensure a level playing field for all children and champions policies that lift children out of poverty, protect them from abuse and neglect, and ensure their access to health care, quality education, and a moral and spiritual foundation.

First Focus on Children is a national bipartisan children's advocacy organization dedicated to making children and families the priority in federal policy and budget decisions, and advocates for immigration policies that promote the health, safety, and well-being of children and families.

Save the Children Federation, Inc., in the U.S. and around the world, gives children a healthy start in life, the opportunity to learn and protection from harm.

Save the Children Action Network, founded in 2014 as the political advocacy arm of Save the Children, is building bipartisan support to make sure every child has a strong start in life.

SUMMARY OF ARGUMENT

The Migrant Protection Protocols (“MPP”), the unlawful policy forcing asylum-seekers to remain in Mexico while awaiting hearings on their claims for immigration relief, specifically harm children whom Congress has directed the Executive Branch to protect. This brief illustrates these specific harms through the stories of actual children subjected to MPP.

MPP forces nearly all asylum-seekers to remain in Mexico to await their immigration hearings in violation of federal law and international treaties that prohibit the return of asylum-seekers to countries where they face danger, persecution, threats, or harm. MPP uniquely affects children by failing to consider children’s best interests or provide the necessary procedural safeguards to ensure their safety and due process during the pendency of their immigration proceedings. The consequences are devastating.

Until MPP, the United States had for decades implemented basic procedural safeguards to avoid returning asylum-seekers to danger before or while their protection claims were decided. Children and their

families who were apprehended seeking protection in the U.S. were generally processed for expedited removal and given credible-fear interviews with asylum officers. After receiving a positive credible-fear determination, they were placed in full removal proceedings and either placed in family detention or permitted to reside in the interior of the U.S. while resolving their immigration cases. In many cases, *pro bono* legal service providers and lawyers offered children and families in family detention basic information about the immigration process. These trained *pro bono* service providers and lawyers often recognized when a child had an independent claim for immigration relief, including a distinct asylum claim.

MPP turns the system on its head: it effectively prevents immigration officers from hearing the credible fears of asylum-seeking children and their families before sending these asylum-seekers—who already fled danger in their home countries—to dangerous conditions in Mexico to await their immigration proceedings without meaningful access to counsel. Under MPP, asylum-seekers must affirmatively assert their fears of persecution in Mexico. But asylum-seeking children and their families often do not know they can (and should) volunteer such concerns. Those who affirmatively tell a border agent that they fear persecution in Mexico may be referred for a *non-refoulement* assessment by an asylum officer. However, the few asylum-seekers who receive such assessments are not provided with language-appropriate information, access to counsel, or a chance to appeal a negative *refoulement* assessment determination before they are hurried back across the border.

Worse yet, back in Mexico, many children and their families live in dangerous, unsanitary, and inhumane encampments along the border. They have frequently lacked access to running water, electricity, food, and basic medical care. Children and their families witness, fear, and often fall victim to brutal violence, kidnapping, and cartel warfare.

When children ultimately attend their MPP hearings, the vast majority lack counsel—and the “tent courts” along the border are not safe or confidential spaces to disclose harm. No one informs children about their statutory right to file an asylum application separately from their parent or guardian based on their unique claims. The hearing procedures also fail to account for the unique needs and vulnerabilities that children, especially traumatized ones, face navigating complex legal proceedings. During MPP hearings, immigration judges do not consider children’s distinct asylum claims, and rarely ask children to testify. MPP’s lack of procedural safeguards for children contravenes the basic standards of due process that Congress adopted by incorporating the principle of *non-refoulement* into federal law.

MPP is traumatic for children and further compounds the physical and psychological trauma that many already experienced in their countries-of-origin. This trauma has long-term consequences on their brain development, health, educational outcomes, and psychological well-being.

This brief provides these and other vivid illustrations of MPP’s harmful impact on children:

- Ana fled her sexually abusive father and threats to her life after she reported him to the police in Honduras.³ Because of MPP, 16-year-old Ana was expected to volunteer her story in a tent court, where she had no privacy and no attorney to advise her about what information would be relevant.
- Six-year-old Oscar and his father were forced to separate from his mother and younger brother at the border, because U.S. Customs and Border Patrol (“CBP”) arbitrarily decided to permit his mother and brother to enter, but to return Oscar and his father to Mexico. While in Mexico, Oscar’s father was kidnapped and held ransom by a cartel.
- Five-year-old Juan fled violence in Honduras with his mother, a human-trafficking survivor. While subjected to MPP, Juan became severely ill and narrowly escaped an attempted kidnapping that left a scar on his face.
- Erick, a teenager, fled Honduras after years of abuse and sexual-orientation discrimination. He attended multiple MPP hearings, but he was afraid to discuss his sexuality in open tent hearings and in front of his mother.
- Sisters Alejandra and Rosa, ages 9 and 11, were unable to present their own distinct asylum claims during MPP proceedings with their abusive father. In three hearings, the girls were only allowed to say their names and ages, at which point the judge

3. *Amici* use pseudonyms for the minor children in this brief.

told them that their father would speak for them, denying the girls a fair opportunity to present their personal claims.

- Seventeen-year-old Mateo fled El Salvador with his family after gang members killed his older brothers and attacked him. While living in an encampment under MPP, Mateo learned that gangs were threatening to steal children. His family struggled to find food, water, and clothes; Mateo became ill after bathing in the river.

It is unreasonable to expect children to seek asylum, much less meet the evidentiary burdens needed to win asylum, while subjected to these conditions. To end the inhumane treatment of migrant children and prevent further violations of international and U.S. law, the Court should affirm the decision of the Ninth Circuit.

ARGUMENT

I. ASYLUM-SEEKING CHILDREN CANNOT BE HEARD WITHOUT PROCEDURAL SAFEGUARDS AND CHILD-SENSITIVE CONSIDERATIONS

The United States has long been committed to protecting asylum-seeking children. It codified this commitment in its prohibition against sending asylum-seekers to a country where they would likely face persecution based on protected grounds, torture, or other specified harms—the principle of *non-refoulement*.⁴ As a

4. See 8 U.S.C. § 1231(b)(3). In addition, the *non-refoulement* obligation is set forth in treaties ratified by the U.S. See, e.g., Protocol

signatory to the United Nations Convention on the Rights of the Child, the U.S. agreed to be part of a global effort to advance the “best interests” of children, and to afford children appropriate protections from child-specific forms of persecution and other harms.⁵ To meet these obligations, asylum laws, policies, and procedures must take into account each child’s safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity.⁶ Where a child faces serious risks elsewhere, asylum is often the best guarantee of the child’s safety and well-being.⁷

Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention against Torture art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987; ratified by United States Oct. 21, 1994); International Covenant on Civil and Political Rights (ICCPR) art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; ratified by United States June 8, 1992); UNGA, Exec. Comm. of the High Comm’r’s Programme, *Note on International Protection*, U.N. Doc. A/AC.96/951, ¶ 16 (Sept. 13, 2001).

5. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; see also U.N. Comm. on the Rts. of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 74, CRC/GC/2005/6 (Sept. 1, 2005).

6. See Subcomm. on Best Interests, Interagency Working Grp. on Unaccompanied and Separated Children, *Framework for Considering the Best Interests of Unaccompanied Children* 4-5 (2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf>.

7. See U.N. High Comm’r for Refugees, *UNHCR Guidelines on Determining the Best Interest of the Child* 102 (Nov. 2018), <https://www.refworld.org/docid/5c18d7254.html>.

Congress has recognized that children’s unique needs and vulnerabilities warrant heightened procedural protections to ensure that they have a fair opportunity to be heard on their protection claims.⁸ Children are developmentally distinct from adults because children’s brains continue to develop well into their twenties.⁹ According to the Department of Justice (“DOJ”), a child’s perception, memory, recall, and other capacities develop with age, yet even older children vary in cognitive abilities.¹⁰ Cultural and linguistic differences may further hinder communication and comprehension as a child is interviewed.¹¹

Moreover, a child’s ability to establish eligibility for asylum and other relief often depends on individual and institutional actors beyond children’s control. Because children are neither financially nor emotionally self-sufficient, they depend on adults to facilitate their participation in a legal system designed for adults.¹²

8. See Trafficking Victims Protection Reauthorization Act (“TVPRA”), 8 U.S.C. § 1232 (2008).

9. Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, in 45 *Journal of Adolescent Health* 216 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/>.

10. Chris Newlin et al., *Child Forensic Interviewing: Best Practices*, *Juvenile Justice Bulletin* (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice, Washington, D.C.), Sept. 2015, at 3-4, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf> (“*Child Forensic Interviewing*”).

11. *Id.* at 4.

12. See *E.A.C.A. v. Rosen*, No. 20-3216, 2021 WL 97447, at *9-10 (6th Cir. Jan. 12, 2021).

Children must depend on parental support and scarce resources for legal, medical, and educational services.

Furthermore, trauma history may exacerbate the gap that a child must bridge to participate in immigration proceedings. Many children seeking immigration relief have suffered trafficking, abuse, or other violence. In particular, child migration from Central America has been conclusively connected to gang violence, the erosion of human rights, violence in the home, and other grave danger and serious harm in their countries-of-origin.¹³ DOJ guidance notes that a trauma history may “interfere with a child’s ability or willingness to report information about violent incidents.”¹⁴ Children who have experienced trauma may have piecemeal or nonlinear memories of the harm they suffered, making it time-consuming to develop and corroborate their claims.¹⁵ Because many asylum-seeking children have suffered immense trauma, it may be difficult for them to discuss private and painful experiences in a formal adversarial proceeding without privacy or any child-sensitive interviewing procedures, as is the case in MPP.¹⁶ For many children, the asylum

13. U.N. High Comm’r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 9-11 (Mar. 13, 2014), <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>.

14. *Child Forensic Interviewing* at 5.

15. *Id.*

16. See Jodi A. Quas & Thomas D. Lyon, *Questioning Unaccompanied Immigrant Children*, Society for Research in Child Development (Oct. 2019), <https://www.srcd.org/research/questioning-unaccompanied-immigrant-children-lessons-developmental-science-forensic> (“*Questioning Unaccompanied Immigrant Children*”).

process is the first time they discuss their experiences, and it requires procedures and an environment that account for their age, development, and trauma history.

Courts have long recognized the unique needs of children and the need to account for them to allow children's meaningful participation in immigration proceedings.¹⁷ And U.S. Citizenship and Immigration Services ("USCIS") trains asylum officers that "children's needs are different from adults due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm" and provides *child-specific interviewing procedures*.¹⁸

MPP, however, is a dangerous departure from this long-standing legal recognition of asylum-seeking children's vulnerabilities and needs. As discussed below, MPP's procedural shortcuts and indifference to children's unique needs deny them the opportunity to meaningfully seek asylum.

II. MPP VIOLATES *NON-REFOULEMENT* PRINCIPLES BY DENYING CHILDREN DUE PROCESS

MPP deprives asylum-seeking children of basic procedural safeguards and due process in contravention of

17. See, e.g., *Mejilla-Romero v. Holder*, 614 F.3d 572, 573 (1st Cir. 2010); *A-D-*, AXXX XXX 526 (BIA May 22, 2017) (unpublished).

18. U.S. Citizenship & Immigr. Serv., U.S. Dep't of Homeland Sec., *RAIO Combined Training Program: Children's Claims* § 2.4.2 (2019), https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.

the Nation's obligation to protect asylum-seekers against *refoulement*.¹⁹ First, MPP prevents children from being heard on their fear of harm in Mexico, resulting in them being sent to danger and persecution there. Next, removal proceedings under MPP fail to provide child-sensitive considerations and procedures to ensure that children have a fair opportunity to tell their stories and seek immigration relief. Many children are forced to participate in tent hearings without counsel, and under intimidating and often adversarial conditions that are not conducive to volunteering intensely personal information. Immigration judges rarely ask children questions regarding their claims, and children are not informed about their right to pursue independent claims for asylum and other relief. The procedural failures put asylum-seeking children at a severe disadvantage and prevent them from sharing their own unique experiences.

A. MPP Denies Children Their Right To Be Heard on Their Fears of Returning To Danger in Mexico

At MPP's initial "screening" stage, CBP fast-tracks asylum-seekers into MPP unless they affirmatively volunteer their fears of returning to Mexico.²⁰ If an asylum-seeker affirmatively expresses such fear, the

19. *Cf.* 8 U.S.C. § 1231; Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), Pub. L. No. 105-277, Div. G., Title XXI, 112 Stat. 2681 (codified as note to 8 U.S.C. § 1231).

20. *See* U.S. Customs & Border Prot., MPP Guiding Principles (2019) at 1, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

Department of Homeland Security (“DHS”) policy requires that CBP refer the asylum-seeker for a *non-refoulement* assessment to determine whether it is more likely than not that they will face persecution or torture in Mexico.²¹ If the asylum-seeker receives a negative determination, they are placed in MPP.²² CBP does not consider the fear of return to an asylum-seeker’s country-of-origin that serves as the underlying basis for an asylum claim. These procedures are inadequate to ensure that asylum-seeking children have an opportunity to be heard on their fears of returning to Mexico.

i. Children in MPP Face Dangerous and Inhumane Conditions in Mexico

More than 16,000 children, including nearly 500 infants, have been sent back to dangerous, inhumane, and unsanitary conditions in Mexico under MPP.²³ Many children in MPP live in makeshift tent encampments, where the air smells of feces and is thick with smoke from near-constant fires.²⁴ Children and families have been crowded in these camps with no or limited access

21. *Id.* at 1-2.

22. *Id.* at 2.

23. See Kristina Cooke et al., *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, Reuters, Oct. 11, 2019, <https://www.reuters.com/article/us-usa-immigration-babies-exclusive-idUSKBN1WQ1H1>.

24. See Nomaan Merchant, *Tents, Stench, Smoke: Health Risks Are Gripping Migrant Camp*, Associated Press, Nov. 14, 2019, <https://apnews.com/article/337b139ed4fa4d208b93d491364e04da>.

to running water, electricity, food, medical care, or other necessities. Humanitarian organizations on the ground have provided food, medical care, and other services in the camps; nonetheless, some children go to bed hungry.²⁵ The “crowded, unsanitary and often dangerous conditions in tent encampments in Mexico are hazardous to child health and family wellbeing.”²⁶

While in Mexico, many children in MPP witness and fall victim to crime, violence, abuse, and family separation. Criminal groups often target asylum-seekers along the border because asylum-seekers, who have no protective community ties in Mexico, may have networks of families and friends in the U.S. who can pay their ransoms.²⁷ In

25. See, e.g., Human Rights Watch, “Like I’m Drowning”: Children and Families Sent to Harm by the US “Remain in Mexico” Program 70 (2021), https://www.hrw.org/sites/default/files/media_2021/01/mexico0121_web.pdf (“*Like I’m Drowning*”); Lucy Bassett, et al., *Living in a Tent Camp on the US/Mexico Border* 5-6, 13 (Univ. of Va. Batten Global Pol’y Ctr., Apr. 27, 2020), <https://gpc.batten.virginia.edu/our-work/publications/living-tent-camp-usmexico-border-experience-women-and-children-matamoros> (“*Living in a Tent Camp*”).

26. Kelly L. Edyburn & Shantel Meek, *Seeking Safety and Humanity in the Harshes Immigration Climate in a Generation: A Review of the Literature on the Effects of Separation and Detention on Migrant and Asylum-Seeking Children and Families in the United States During the Trump Administration*, Social Policy Report, at 43 (forthcoming 2021).

27. See Stephanie Leutert, et al., *Migrant Protection Protocols: Implementation and Consequences for Asylum Seekers in Mexico* 32 (U. Tex. Austin Strauss Ctr. for Int’l Sec. & Law, No. 218, 2020), <https://repositories.lib.utexas.edu/handle/2152/81991> (“*Migrant Protection Protocols*”).

other instances, criminal groups and other opportunistic actors target asylum-seekers because of anti-immigrant sentiment.²⁸ Because they are often fleeing gangs in the Northern Triangle of Guatemala, El Salvador, and Honduras, some children and their families are targeted by those same gangs, which have a strong presence in Mexico.²⁹

These dangers impact the daily lives of children while they await adjudication of their asylum claims. Out of fear, migrant parents often do not send their children to schools in the border cities.³⁰ That fear pervades even the most routine tasks, such as charging their cellular phones at a charge location within the encampment. Parents do not even feel comfortable taking their children to restrooms due to reports of sexual assault within the encampments and fear of going to places in the border cities due to gang and other criminal activity.³¹

ii. The MPP Process Returns Children To Danger and Harm in Mexico

Under MPP, asylum-seekers must affirmatively assert their fears of persecution in Mexico: It is DHS policy to not even ask.³² Yet, children and their families often arrive

28. See, e.g., *id.* at 33; *Like I'm Drowning* at 26.

29. See U.S. Dep't of State, Mexico 2018 Human Rights Report at 19 (2018); see also *Like I'm Drowning* at 26.

30. See *Living in a Tent Camp* at 23.

31. See *id.* at 19-20, 25.

32. Pet. App. 28a.

at the border scared and unfamiliar with MPP and the complicated asylum system and do not know that they can (and should) volunteer such concerns while they are being processed by border patrol officers. It is unreasonable to place the burden on asylum-seekers, particularly children, to volunteer painful information regarding their fears of violence and persecution in Mexico. Moreover, some asylum-seekers do not receive *non-refoulement* assessments even when requested.³³

Even if asylum-seekers are able to receive a *non-refoulement* assessment, they are not given adequate time to prepare for their interviews, and may not know that they should express their fears of returning to Mexico, even though they are required to meet a heavy burden.³⁴ Many times, they lack language-appropriate information that explains the purpose of the interview.³⁵ Asylum-seekers are expected to participate in this process after they have been traveling, sometimes for months, to arrive at a point of entry.³⁶ Reports from the field show that

33. *Like I'm Drowning* at 47.

34. Cf. Policy Memorandum, USCIS, PM-602-0169, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, at 3 (Jan. 28, 2019), <https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>.

35. *Examining the Human Rights & Legal Implications of DHS's "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec.*, 116th Cong. 100 (2020) (statement of Columban Center for Advocacy & Outreach).

36. See Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico* 11

some *non-refoulement* interviews were conducted over the telephone, and at times in the middle of the night or early in the morning.³⁷ Contrary to government policy, some asylum-seekers have been denied the opportunity to have their *non-refoulement* assessments conducted by asylum officers trained on conducting asylum interviews.³⁸ Moreover, asylum-seekers have no way to appeal negative *refoulement* assessment determinations.³⁹

As a result of these inadequacies at the *non-refoulement* assessment stage, and as the following stories show, MPP returns many children to extreme danger and violence in Mexico.

(2019), https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf; cf. *Examining the Human Rights & Legal Implications of DHS's "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec.*, 116th Cong. 126 (2020) (statement of the International Refugee Assistance Project).

37. *Like I'm Drowning* at 48.

38. See Debbie Nathan, *An Asylum Officer Speaks Out Against the Trump Administration's "Supervillain" Attacks on Immigrants*, *The Intercept*, Sept. 13, 2019, <https://theintercept.com/2019/09/13/asylum-interview-immigration-trump/>.

39. *Examining the Human Rights & Legal Implications of DHS's "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec.*, 116th Cong. 149 (2020) (statement of Douglas Stephens, Esq., Government Accountability Project).

a. Jorge—Child Fleeing Violent Gangs Subjected to MPP With His Mother Even Though They Were Kidnapped in Mexico on Their Way to the Border

For instance, Jorge, a four-year-old boy, lived with his mother and grandparents in El Salvador, where violent gangs often sought to control Salvadoran police officers by attacking their families. Because Jorge's close relatives are members of the Salvadoran police force, gang members forcibly entered the family's home and killed Jorge's grandmother. His grandfather fled the country, and gang members threatened Jorge's uncle and mother. In August 2019, Jorge and his mother fled to the U.S.

Along their journey to the border, Jorge and his mother were kidnapped by gang members in Mexico. The gang hid them in a stash house with other hostages, threatening to kill them if their family refused to pay their ransom. Jorge's father, who has lived in the U.S. since Jorge's birth, paid the ransom. As Jorge and his mother were being released from the stash house, a different gang arrived and started firing gunshots. Jorge's mother covered him with her body, she prayed for the bullets to pass over them, and they eventually fled the scene. Following these events, Jorge and his mother sought protection in the U.S.

Upon arrival, border officials briefly processed them, gave them a court date, and sent them back to Matamoros under MPP. The border officials ignored Jorge's mother when she told them about the kidnapping in Mexico and the gang violence in El Salvador. Forced to return to Mexico, Jorge and his mother lived in a temporary tent at times, and sometimes they slept on bedding in the street. One night

when they went to the bathroom, a group of men kidnapped them. The men took them away in a vehicle. Jorge witnessed the men rape his mother before the men left them in Reynosa, more than fifty miles away. Jorge's mother managed to find local police, and she was sent to a hospital. Eventually, Jorge and his mother made it to a shelter.

In November 2019, Jorge and his mother attended an immigration hearing, where their attorney advocated for their protection in the U.S. based on their experiences in Mexico and El Salvador. They underwent a *non-refoulement* assessment, but received a negative determination and were again sent back to Mexico. Jorge showed signs of trauma, such as fighting and other unusual behavior. His mother suffered from depression, nightmares, and suicidal thoughts. She sought help from a therapist. After gang members entered their shelter in December 2019, Jorge stopped eating, and his mother stayed in bed. Jorge and his mother eventually relocated to a small apartment. Later, Jorge became ill with an infection that caused his fingernails to fall out, and then a tooth infection. Jorge and his mother remain in Mexico because of MPP.

b. Juan—Child Fleeing Violence Who Became Ill from the Conditions in the Camp and Was Kidnapped for Months

Juan, a five-year-old Honduran boy who became sick and, along with his mother, was kidnapped in the Matamoros encampment, provides another example of the danger of being forced to wait in Mexico. Juan's mother was sold to and raped by a human trafficker as a child. She escaped after four years, and gave birth to Juan. He became her joy, and her sole mission was to protect him from the abuse and dehumanization that she experienced as a child.

In October 2019, they fled Honduras for the U.S. after a man stalked and threatened to kill Juan's mother. After being sent to Matamoros under MPP, Juan and his mother stayed in the encampment. The area, however, was controlled by a Mexican cartel. One day near the camp's entrance, a group of men in a vehicle attempted to kidnap Juan's mother when she returned from a convenience store with Juan. She quickly grabbed Juan, and they fell to the ground. Juan injured his cheek during the fall, leaving a scar on his face. Following these events, his mother was afraid to leave the camp for any reason.

Juan became ill due to the weather conditions in Matamoros, where he endured very hot temperatures during the day and cold temperatures at night. Juan lost his appetite. Although his mother searched for medical assistance, she could not find the medical attention that Juan needed. At one point they were kidnapped for two months. They were released, but Juan's mother felt trapped in the camp because she was petrified that cartel members would attempt to kidnap her again if she ventured from her tent. With no other option to save her son, she separated from Juan, as he sought protection alone from border officials. But for Juan, the trauma did not end; after their separation, he constantly cried, called for his mother to return, and wet the bed at night.

B. MPP Denies Children Their Right To Be Heard on Their Fears of Returning to Their Countries-of-Origin

Once in MPP, asylum-seekers are forced to wait in Mexico for months to attend removal proceedings held in

tents just across the U.S. border.⁴⁰ While asylum-seekers are asked to provide a written account of the basis for their claim in their asylum application, a tent-court hearing is the first opportunity for many asylum-seekers to meaningfully articulate their fears of returning to their countries-of-origin.⁴¹ Ignoring the realities of the unique needs and vulnerabilities of children, these tent hearings place children in circumstances that make it nearly impossible to tell their stories.

For starters, the morning hearings in the U.S. typically begin at 9 a.m.; however, asylum-seeking children and their families are often required to arrive at the international bridge between 3 and 4 a.m.⁴² This means that these children must leave their tents in the dark to walk and wait on the Mexican side of the border—the same places where asylum-seekers become victims of robbery, sexual assault, kidnapping, extortion, and other crimes.⁴³ Because of these dangers, many asylum-seekers never make it to their hearings.⁴⁴ Children and their families who fail to attend their hearings face termination of their cases and orders of removal in absentia.⁴⁵

40. *See Migrant Protection Protocols* at 18-21.

41. *See id.* at 20-21.

42. *See id.* at 20; *see also Like I'm Drowning* at 26.

43. *See Migrant Protection Protocols* at 33-35.

44. *See Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, Transactional Records Access Clearinghouse at Syracuse Univ. (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/>.

45. *Migrant Protection Protocols* at 21.

i. The Video-Based, Adversarial, and Non-Private Conditions of MPP Hearings Prevent Children from Understanding the Proceedings and Presenting Their Protection Claims

The tent hearings are conducted via video teleconferencing (“VTC”), making it very difficult for children to understand what is occurring during their hearings.⁴⁶ The immigration judge, government lawyer, and interpreter are located in a courtroom sometimes hundreds of miles away from the tent where the asylum-seekers are.⁴⁷ The immigration judge appears on a video screen.⁴⁸ The interpreter sits next to the judge.⁴⁹ Asylum-seekers can hear the government lawyer’s voice, but they cannot see the lawyer’s face.⁵⁰ Children must listen to the interpreter and try to understand what is being said and who is speaking. At the same time, it is difficult to hear and understand interpreters.⁵¹ The tent hearings are rife with

46. Oliver Laughland, *Inside Trump’s Tent Immigration Courts That Turn Away Thousands of Asylum Seekers*, *The Guardian*, Jan. 16, 2020, <https://www.theguardian.com/us-news/2020/jan/16/us-immigration-tent-court-trump-mexico>.

47. Alicia A. Caldwell, *Tent Court on the Border: Migrants Face a Judge on a Screen and a Lawyer They Can’t See*, *Wall. St. J.*, Jan. 9, 2020, <https://www.wsj.com/articles/tent-court-on-the-border-migrants-face-a-judge-on-a-screen-and-a-lawyer-they-cant-see-11578565802>.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Examining the Human Rights & Legal Implications of DHS’s “Remain in Mexico” Policy: Hearing Before the Subcomm.*

technical glitches and connectivity issues.⁵² Given their age and lack of understanding of the legal process, children are reluctant to speak up about these challenges.⁵³

Immigration judges rarely ask children any questions during these hearings and, even if they do, the tent courtrooms are inappropriate places for children to tell their private stories. The hearings are adversarial; the government lawyer argues for asylum-seekers to be sent back to their countries-of-origin.⁵⁴ Furthermore, the tent hearings lack privacy. As an asylum-seeker explains the reasons why she fears returning to her country-of-origin, roughly twenty-five other asylum-seekers are in the same room.⁵⁵ The hearings include parents, who may be unaware of a child's sexual orientation or other basis for persecution, and the hearings can include individuals who would share a child's traumatic testimony with people in the

on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec., 116th Cong. 18, 23 (2020) (statement of Laura Peña, American Bar Association).

52. *Id.* at 23.

53. Young Center, *Immigration Hearings by Video: A Threat to Children's Right to Fair Proceedings* (Jan. 2020).

54. *Cf.* American Immigration Council, *A Guide to Children Arriving at the Border* 8 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf.

55. *See Examining the Human Rights & Legal Implications of DHS's "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec., 116th Cong. 140 (2020) (statement of the National Immigrant Justice Center).*

child’s country-of-origin. This environment falls far short of the welcoming, supportive, and empathetic environment that increases immigrant children’s responsiveness to questions about their traumatic experiences.⁵⁶

Compounding the difficulties of safely arriving at hearings and navigating a complex legal system with no procedural protections, asylum-seekers in MPP rarely have critical access to counsel largely because it is very difficult to retain U.S. immigration counsel or *pro bono* counsel in Mexico.⁵⁷ Children, due to their developmental needs, dependence, and vulnerabilities, are severely impacted by lack of access to counsel.⁵⁸

56. See, e.g., *Questioning Unaccompanied Immigrant Children*; Lisa Aronson Fontes, *Interviewing Immigrant Children for Suspected Child Maltreatment*, *J. of Psychiatry & L.* 294 (2010); cf. Kids in Need of Defense, *Forced Apart: How the “Remain in Mexico” Policy Places Children in Danger and Separates Families* at 2-3 (Feb. 24, 2020).

57. As of November 2020, only 5,148 out of 69,333 asylum-seekers in MPP had counsel. *Details on MPP (Remain in Mexico) Deportation Proceedings*, Transactional Records Access Clearinghouse at Syracuse Univ. (Nov. 2020), <https://trac.syr.edu/phptools/immigration/mpp/>. Data show that legal representation is the single most important factor influencing the outcome of a migrant’s case. See *New Data on Unaccompanied Children in Immigration Court*, Transactional Records Access Clearinghouse at Syracuse Univ. (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/359/>.

58. See *In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand

ii. MPP Fails To Ensure That Children Are Able To Pursue Independent Asylum Claims

MPP hearings also deny children the opportunity to pursue and be heard on independent asylum claims. By law, children may assert independent asylum claims, separate and distinct from the claims of their parents and guardians.⁵⁹ In MPP, however, border officials and immigration judges generally fail to consider that possibility, treating children solely as “derivative” riders on a parent’s claim. As the stories below illustrate, judges particularly fail to appreciate that children may have separate claims for relief that involve sensitive information that a child may be unable to disclose in the presence of their parents or guardians. Consequently, judges fail to: (i) inform children of their right to pursue independent asylum claims; (ii) elicit testimony from children; (iii) consider a child’s claim for asylum separately from their parent’s or guardian’s claim; and (iv) recognize when a child might have a basis for protection based on abuse or neglect by a parent. Without access to counsel, children and their families often do not know that they can pursue independent asylum claims, much less articulate those claims in their written asylum applications. As a result, children who face persecution on separate protected grounds are denied a fair opportunity to be heard.

of counsel at every step in the proceedings against him”) (citation and internal quotation marks omitted), *abrogated on other grounds by Allen v. Illinois*, 478 U.S. 364 (1986).

59. See 8 C.F.R. §§ 1208.3, 1208.13 (2020).

a. Erick—Teenager Fleeing Physical and Verbal Abuse Based on His Sexual Orientation With No Privacy To Describe Persecution in the Open Tent Hearing

For example, at age sixteen, Erick fled to the U.S. with his mother because he experienced abuse in Honduras based on his sexual orientation. Erick realized from a young age that he was different from the people around him. He was effeminate and had a “different sexual preference,” but feared coming out to his family and peers because Honduran society does not tolerate homosexuality. Erick was consistently abused, both verbally and physically, because of his sexual orientation. Eventually, Erick came to fear that, like others in his small town, he would be killed for being gay. Erick’s fear and depression became so severe that he attempted suicide. Erick never told his mother that the reason for the abuse was because he is gay. Erick and his mother sought protection in the U.S. after the killing of her brother and experiencing fear related to a fifteen-year-old family feud in Honduras.

After arriving at the border, Erick and his mother were denied safe entry into the U.S. and were thrown into MPP. Over the course of several months, they attended multiple hearings in a tent court. Erick did not understand the asylum process, and he did not give any testimony at the hearings, fearing speaking candidly about his sexual orientation in front of his mother. The testimony provided by Erick’s mother at the hearing was confusing because she was nervous. Because Erick had not revealed his sexuality to his mother, her testimony excluded his

persecution based on his sexual orientation. Although the immigration judge found that her testimony was credible, Erick and his mother were ultimately ordered removed. They walked back across the bridge to Mexico. Erick's mother did not continue with the asylum process, but Erick returned and presented himself at the border alone because he knew there could be no safe return to Honduras. Erick was placed in government custody. He then filed a separate asylum application based on the sexual orientation persecution, but immigration officials removed him to Honduras based solely on the order entered against him while he was in MPP. He continues to pursue his asylum claim to escape the sexual orientation-based violence he experiences in Honduras.

b. Ana—Child Fleeing Sexual Assault Who Felt Unsafe Telling Her Story at Her MPP Hearing

Ana, a sixteen-year-old girl, fled Honduras with her mother after Ana was raped by her father. Ana received death threats from both her father and her uncle for reporting the rape to law enforcement authorities. Ana and her mother appeared at their MPP hearing without counsel, and Ana's mother presented both her own case and her daughter's case to the immigration judge. Although the immigration judge gave Ana the opportunity to speak, Ana was afraid to do so because the hearing took place in a tent via VTC with no privacy for her to share the details of her private, painful story in a child-appropriate setting. Ana and her mother were ordered removed, without Ana's testimony. After they were sent back across the border, Ana witnessed a group of men attempting to kidnap her friend. Following these events,

Ana suffered from depression, anxiety, night terrors, and poor sleep. She has been diagnosed with PTSD.

c. Alejandra and Rosa—Sisters Fleeing Gang Threats Forced To Appear at Hearings With Their Abusive Father, and Prevented from Telling Their Stories of Abuse

Alejandra, a nine-year-old girl, and Rosa, an eleven-year-old girl, are sisters who were born in El Salvador. When the girls were younger, their paternal grandfather sexually abused them. They also experienced verbal and physical abuse by their father. Because their father had a successful taxicab business, MS-13 gang members targeted the family for extortion and violence, including death threats at gun point and the torching of one of the family's taxicabs. After the gang members alerted the family that they knew every detail of the girls' whereabouts, the family was afraid to let the girls go to school unless they were guarded by their father. In fear for their lives, their parents made the difficult decision to flee El Salvador. The girls and their father arrived at the border in September 2019; they were forced to return to Matamoros after being placed in MPP.

In Matamoros, the girls' father found a small room to rent, but the girls were unable to attend school. The girls were rarely allowed to leave the little room they were living in out of fear that they would be harmed or kidnapped. After waiting for four months, the girls and their father attended three tent hearings. During the first hearing, the girls only addressed the court to state their names and ages, after which the immigration judge told

them that their father would speak for them. The girls sat in the back of the courtroom and did not sit at the respondents' table. During the second hearing, the judge did not speak directly to the sisters, not even to ask their names. Their father managed to retain counsel, who filed identical applications for protection for each member of the family based on the gang threats. Without separate counsel, the girls could not assert their separate bases for protection arising from the domestic abuse.

Alejandra and Rosa were ultimately ordered removed with their father, and they returned to Matamoros. One day, their father left their apartment and never returned. A family friend brought the two girls to the border alone, where they crossed and were placed in government custody. Eventually, their father resurfaced—he had been assaulted, robbed, and left without a phone for a time. While in government custody, the girls rarely spoke about their father, and indicated that they were afraid of seeing him again because he had been abusive.

III. MPP HAS DEVASTATING LONG-TERM EFFECTS ON CHILDREN

The totality of the conditions under MPP—the dangerous and inhumane conditions in Mexico, the hearing process with inadequate procedural safeguards, and the constant fear of being forced to return to danger in their countries-of-origin—is traumatic for children, causing long-term harm to their mental health. Many migrant children have already suffered traumatic experiences in their countries-of-origin, during their journeys to the U.S., and from their interactions with authority figures.⁶⁰

60. *See Questioning Unaccompanied Immigrant Children.*

MPP compounds this trauma, and fails to consider the specific needs of traumatized children. Many migrant “children have high levels of anxiety, depression, and PTSD.”⁶¹ Research shows that exposure to trauma and violence negatively impacts children’s brain development, health, educational outcomes, and psychological well-being.⁶²

MPP also subjects asylum-seeking children to the trauma of separation or the possibility of separation from their families, including when parents are kidnapped.⁶³ In some instances, parents with fears of returning to Mexico and their countries-of-origin are separated from their children based on arbitrary decisions by immigration officials. Such separation causes children deep sadness and stress, and often irreparable harm. A reliable, supportive relationship with a parent or caregiver serves the vital role of mitigating the dangers and harms of highly stressful and traumatic experiences.⁶⁴ Traumatized children may

61. Julie M. Linton, et al., *Providing Care for Children in Immigrant Families*, *Pediatrics: Official Journal of the American Academy of Pediatrics* (Sept. 2019) at 6, <https://doi.org/10.1542/peds.2019-2077> (“*Providing Care for Children*”).

62. See, e.g., *id.*; Vidanka Vasilevski & Alan Tucker, *Wide-Ranging Cognitive Deficits in Adolescents Following Early Life Maltreatment*, 30 *Neuropsychology* 239, 240 (2016).

63. See *Providing Care for Children* at 21, 23; see also Young Center, *The “Migrant Protection Protocols” Are Harming Children and Must End* 1 (Nov. 2019), <https://www.theyoungcenter.org/stories/2019/12/12/the-migrant-protection-protocols-are-harming-children-and-must-end>.

64. *Oversight of the Customs and Border Protection’s Response to the Smuggling of Persons at the Southern Border:*

be at serious risk of “toxic stress or prolonged serious stress in the absence of buffering relationships.”⁶⁵ This risk is alarming because “toxic stress in young children can lead to . . . permanent changes in brain structure and function” and other adverse health effects.⁶⁶

A. Mateo—Child Fleeing Gangs that Killed His Brothers and Attacked Him Sent to Mexico Where Gangs Threatened To Steal Children in the Camp

Mateo, a budding teenage artist and avid soccer player, is an animal lover who once nursed a bird back to health. When he was ten years old, Mateo’s mother withdrew him from school in El Salvador because gangs extorted and recruited schoolchildren. Instead, he had to work five days a week loading cement blocks onto construction trucks from the early morning to the evening. As part of a “campaign of terror,” gang members threatened one of Mateo’s older brothers for publicly evangelizing Christianity; the family regularly attended a Christian church in their hometown. Gang members abducted and killed Mateo’s two brothers in 2016 and 2019. Several

Hearing Before the Senate Comm. on the Judiciary, 116th Cong. (2019) (testimony of Julie Linton, American Academy of Pediatrics).

65. *Providing Care for Children* at 6.

66. Jack P. Shonkoff, et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 *Pediatrics* e232, e236 (2012); cf. American Academy of Pediatrics, *Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health*, 129 *Pediatrics* e224, e225 (2012).

months before the gang members killed Mateo's second brother, a group of men came to their family's house looking for Mateo's brother. When they did not find him, they attacked and beat Mateo. Local authorities ignored the family's police report.

In July 2019, Mateo and his family fled the threats to their lives from the gangs. After arriving at the border, they were initially detained, and then sent to Matamoros under MPP. While there, a gang threatened to steal children in the encampment. Mateo's family struggled to find food, water, and clothes. Mateo and his younger brother fell ill after bathing in a river, sending his brother to the hospital and leaving Mateo with stomach problems.

Despite their situation, Mateo and his family attended their immigration hearing in the U.S., appearing before an immigration judge via VTC without counsel. Mateo's mother did not understand the interpreter, and the immigration judge never asked Mateo a single question. Mateo said that he felt nervous and afraid to discuss his experiences in such an open setting. The judge denied Mateo's and his family's asylum petitions in January 2020, and they were sent back to Mexico.

Concerned for her children's safety, Mateo's mother decided to separate from her children. Mateo and his brother crossed the border without her, and they were placed in government custody while their mother remained in Mexico. They continue to seek asylum in the U.S.

Mateo cries whenever he discusses these traumatic events, and he has persistent fears of returning to danger in both Mexico and El Salvador. He has nightmares about

being abducted like his older brothers. According to a licensed clinical social worker, Mateo has been “profoundly impacted by the series of traumatic events where he had no control,” and he suffers from PTSD.

B. Oscar—Child Fleeing Death Threats Separated from His Family at the Border Based on CBP’s Arbitrary Processing Decision

Oscar, a six-year-old Salvadoran boy, and his father were separated from Oscar’s mother and younger brother for nearly eight months based on a CBP agent’s unsupervised and arbitrary decision to separate the family. Oscar’s father served in the Salvadoran military for three years before retiring to work for a private company. Oscar’s mother, a homemaker, cared for Oscar and his little brother. But their home was abruptly damaged after a group of men forcibly entered it searching for Oscar’s father. The men assaulted and threatened Oscar’s father because of his military service, destroying his military credentials. After fleeing El Salvador, the family was separated at the border because a CBP agent improperly told them that only one parent and one child could enter into the U.S. He offered no explanation for his arbitrary decision. Oscar and his father were returned to Matamoros under MPP while his mother and brother entered the U.S., despite the entire family arriving and presenting themselves together. In Mexico, Oscar’s father was kidnapped and held for ransom for several days by Mexican cartel members.

CONCLUSION

The violence and significant trauma that asylum-seeking children and their families faced in these stories are not unique. Standing alone, each story belies the very principles of human decency that the U.S. has long committed to upholding. Taken together, these stories clearly illustrate that MPP violates the U.S.'s commitment to protecting asylum-seeking children. Sending children into real danger in Mexico and subjecting them to serious risk of *refoulement* to their countries-of-origin is clearly not in their best interests. It is the opposite. The Court should affirm the decision of the Ninth Circuit.

Respectfully submitted.

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Forced Apart: How the “Remain in Mexico” Policy Places Children in Danger and Separates Families February 24, 2020

The “Remain in Mexico” policy, or so-called “Migrant Protection Protocols (MPP),” has not only mandated the return of more than 60,000 asylum seekers,¹ including at least 16,000 children,² to dangerous conditions in Mexico, it also represents yet another devastating form of family separation under the Trump administration.

Already, MPP has forced hundreds of children apart from their parents and other family members. The Department of Health and Human Services (HHS) reported that, from October 1, 2019 to January 13, 2020, it received referrals of over 350 unaccompanied children now in the U.S. whose families remained in Mexico.³ In a number of such cases, children’s parents disappeared amid widespread kidnappings and other harm perpetrated by criminal groups against MPP asylum seekers, leaving the affected children alone in Mexico and facing heightened peril. Though the Department of Homeland Security (DHS) maintains that unaccompanied children are not subject to MPP, it is clear that numerous children have *become* unaccompanied due precisely to this policy.

KIND is now serving approximately 60 children impacted by MPP. Informed by KIND’s direct observations, this report: (1) examines how MPP forces families apart and the harmful consequences of these separations for affected children; (2) describes inefficiencies in the immigration court system created by MPP family separations; and (3) recommends actions that the administration and Congress should take to mitigate these consequences and prevent future such separations.

Family Separations Under MPP and Consequences for Impacted Children

Children are typically rendered unaccompanied by MPP—and separated from their families—in one of two ways.

The first category of family separations under MPP involves children who arrive at the U.S. border with their parents or legal guardians to request humanitarian protection. DHS places these families together in MPP, transporting them to border cities in Mexico. There the families must attempt to survive some of the world’s most dangerous places for weeks and even months while waiting for their court hearing. Many families are forced to live in makeshift tents, temporary shelters, or on the streets—unprotected

¹ Julian Aguilar, “Migrants, advocates mark the anniversary of ‘remain in Mexico’ with fear, anger and trepidation” The Texas Tribune (Jan. 30, 2020); <https://www.texastribune.org/2020/01/30/migrants-advocates-mark-anniversary-remain-mexico/>.

² Kristina Cooke, Mica Rosenberg, Reade Levinson, “Exclusive: U.S. migrant policy sends thousands of children, including babies, back to Mexico” Reuters (Oct. 11, 2019); <https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1>.

³ Priscilla Alvarez, “At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US” CNN (Jan. 24, 2020); <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

from the elements and without access to basic necessities, medical care, or means of safety. These families are uniquely vulnerable to violence and exploitation and may be targeted on account of their nationality and status as asylum seekers. Indeed, human rights monitors have reported more than 800 violent assaults, kidnappings, and even murders of asylum seekers returned to Mexico under MPP.⁴

Sadly, as a result of the danger and unique vulnerabilities these families face, many parents have been victims of crimes, leaving children all alone without any support or protection in dangerous border towns. As such, children have been forced to go back alone to U.S. officials and ask for protection again—this time as an unaccompanied child. In some instances, parents never returned after going to work. In another case, a child’s mother disappeared after she set out to make a report about men who had previously kidnapped her. Left alone in Mexico, without anyone to care for them and fearing for their safety, these children crossed alone into the U.S. in search of protection and were transferred to the care of the U.S. Office of Refugee Resettlement (ORR) as unaccompanied children.⁵ Many of these children are ages 10 or younger and are severely traumatized, having fled grave threats to their lives in their home countries only to witness horrific violence and conditions while waiting in Mexico for their U.S. asylum proceedings. Children like Marco, Sara, Vanesa, and Rosa.*

Marco, a 16-year-old boy, fled to the U.S. with his mother, Lucia,* to escape gang threats in Honduras. After entering, they were held in separate facilities for four days before being given an immigration court date in three months and told to return to Mexico to wait. They came back to the United States to attend their hearing, but their case was continued for another two months, and they were again told to return to Mexico. While in Mexico, both mom and child were working at a restaurant. Based on threats received by a local drug cartel against the child that he must work for them or face death, Marco decided that he must separate from his mother and present himself at a port of entry. His mother remains in Mexico.*

Sara, Vanesa,* and Rosa,* ages 15, 12, and 9, fled to the U.S. with their mother after facing violent threats from gangs in their home country of Honduras. At the U.S. border, CBP placed the family in MPP and sent them back to Mexico to wait for their U.S. asylum cases. One day, their mother, Moraya,* went out to look for work to support the family, but never returned. Following their mother’s disappearance and alone in Mexico with no one to care for them, the children presented themselves at the U.S. border. They are now in ORR custody in New York. With the help of attorneys, they were able to find their mother, who remains separated from them in Mexico waiting for her asylum hearing.*

For children such as Marco, Sara, Vanesa, and Rosa,* these family separations cause profound psychological damage while erecting further barriers to potentially life-saving humanitarian protection in the United States. Many children have already experienced significant harm both in their countries of origin and while waiting with their families in Mexico. The potential disappearance of a parent in Mexico—and uncertainty about a parent’s safety and well-being—adds immeasurably to a child’s psychological and emotional strain and makes it even more difficult for that child to discuss—whether with her attorney, an asylum officer, or an immigration judge—traumatic experiences at the core of her claim for legal protection. Additionally, children may be unaware of the circumstances that led their family to flee their countries of origin or may have been protected from learning about the threats facing them. Without the support and assistance of a parent or family member, children may be unable

⁴ Human Rights First, “Marking One Year of the Horrific “Remain in Mexico” Policy – Over 800 Violent Attacks on Asylum-Seekers” (Jan. 22, 2020); <https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers>.

⁵ Homeland Security Act of 2002, 6 U.S.C. § 279 (defining “unaccompanied alien child”).

to provide detailed information or documentation that is necessary to prove their eligibility for asylum. MPP, then, not only results in these children's devastating separation from their parents, it also undermines their ability to effectively present protection claims.

MPP Family Separations Involving Other Family Members

The second category of family separations under MPP involves affected children who request protection at the U.S. border with a family member other than a parent or legal guardian, such as a grandparent, aunt, uncle, or sibling. Under U.S. law, children who do not have lawful immigration status and who are not with a parent or legal guardian when they are apprehended are deemed unaccompanied and transferred to the care and custody of ORR. While DHS may separate children from family members outside of MPP, separations under MPP present additional concerns and trauma for children.

Specifically, once such family members are placed in MPP and sent to Mexico, they are no longer available to serve as a sponsor for a child following the child's release from ORR custody. As a result, children may face prolonged stays in ORR custody if they do not have another family member or contact in the U.S. who can serve as a sponsor. Returned family members may also have documents and information that are critical to a child's case for protection. Attorneys frequently face difficulty in communicating with family members detained in U.S. immigration custody due to restricted telephone access and limited visitation policies in Immigration and Customs Enforcement (ICE) facilities. Placement of family members in MPP transforms this already difficult task into a nearly impossible one, necessitating that attorneys and children establish contact with family members living in another country who may be without access to safe shelter, a telephone, or a fixed address. Moreover, this substantial distance from loved ones exacerbates the trauma of vulnerable children who have already endured acute harm and rely on the now-separated family members for emotional support.

Inefficiencies in the Immigration Court System Arising from MPP Family Separations

Immigration court inefficiencies resulting from MPP family separations contribute to the immigration court backlog, which has increased dramatically from just over 600,000 cases in Fiscal Year 2017 to more than 1.1 million at present.⁶ Currently, DHS is creating a new case—and issuing a new Notice to Appear (NTA) for immigration proceedings—to each child who seeks humanitarian protection by entering the U.S. alone after having been sent to dangerous conditions in Mexico with his or her family under MPP. As a result of this government practice, many children now effectively have two pending court cases and initial hearings—twice as many for the immigration court system to administer. Yet the government is not affirmatively eliminating duplicate proceedings. As a consequence, the immigration court backlog needlessly rises.

In addition to further straining the court system, the government's practice compounds the obstacles impeding unaccompanied children's pursuit of legal relief while squandering vital attorney resources that are often provided on a pro bono basis. For example, information about the location and timing of the initial hearing in the child's MPP case is frequently unavailable or unclear. Attorneys must work to track down this information and request a change in the location of court proceedings, as the child is often no longer near the border but in ORR custody elsewhere in the United States. If such information

⁶ TRAC Immigration, "Immigration Court Backlog Tool" (accessed Feb. 22, 2020); https://trac.syr.edu/phptools/immigration/court_backlog/.

is not provided and a child misses a court hearing, the child could potentially be ordered removed from the country in absentia, even while in the custody of ORR. And if an affected child lacks counsel—as do the majority of unaccompanied children⁷—it may prove all but impossible for her to obtain details about her MPP hearing, rectify duplicate proceedings, and avoid a nonsensical *in absentia* deportation order. Finally, the administrative complications stemming from concurrent hearings prolong the time children must spend in ORR custody, as they cannot obtain release until resolution of the status of their court cases.

Conclusion and Recommendations

MPP has caused a humanitarian crisis for asylum seekers returned to Mexico, where they face widespread kidnappings, sexual assault, and other often-existential threats. But the suffering created by this policy extends well above our southern border. Hundreds of children located throughout the U.S. have been forced apart from their families and rendered unaccompanied directly on account of MPP. These vulnerable children in our midst—boys and girls like Marco, Sara, Vanesa, and Rosa*—urgently need solutions. Their well-being, and ultimately their lives, could hang in the balance. The administration and Congress must therefore take swift action to mitigate the consequences of family separations that have already occurred under this policy and to prevent such separations in the future. Below are three key recommendations to those ends.

1. Rescind MPP to prevent the traumatic separation of families, to ensure the safety of all asylum seekers—not least vulnerable children—and to advance the full and fair consideration of their protection claims.
2. Require that the Department of Homeland Security and the Office of Refugee Resettlement document and track any separations of a child from a parent, legal guardian, or other family member, and that the agencies facilitate routine communication between children and their family members.
3. Direct the Department of Homeland Security and the Executive Office for Immigration Review to fairly and promptly eliminate any duplicate court proceedings for unaccompanied children who were previously in MPP with their families.

⁷ See KIND, KIND Fact Sheet (accessed Feb. 22, 2020); <https://supportkind.org/resources/kind-fact-sheet/>.

Deporting Children to Danger: ICE is Relying on Sham Proceedings to Send Unaccompanied Children Back to Abusers, Traffickers and Persecutors

In the last week of April, the Department of Homeland Security (DHS) rounded up at least four unaccompanied children who were in the custody of the Office of Refugee Resettlement (ORR) and put them on “ICE flights” to Honduras. This week, DHS announced plans to do the same for children from Guatemala. Each child was previously ordered “removed” in tent court hearings along the border—hearings where they did not have attorneys, and where their parents testified over video without an in-person interpreter. Those hearings were a product of the White House’s prolonged assault on the asylum system. When the tent courts predictably failed their families, the children returned to the U.S. border alone to escape kidnapping, assault, and hunger in the refugee encampments in Mexico. Designated as unaccompanied children, they were placed in protective custody, met with lawyers, were appointed Child Advocates, and began the process of seeking protection. Rather than allowing these child-appropriate procedures to take their course, DHS rushed to implement the “removal orders” imposed in the tent courts. In the first such case, a teenage girl was taken from an ORR shelter in the middle of the night, put on a flight with unknown adults, and returned to the country where she was threatened with death for reporting her father’s sexual abuse.

DHS knowingly returns children to danger by relying on spurious tent court proceedings where children’s right to seek legal protections are subverted. We respectfully urge Congress to demand answers to this practice. Below are further details on the extra-legal policies that lead to this practice, and specific recommendations for action.

Migration Protection Protocols – Following the advice of anti-immigrant senior advisor, Stephen Miller, the Trump administration has put in place a range of extra-legal policies, many of which are being challenged in federal court. Those include the Migration Protection Protocols (MPP), in which the Trump Administration is forcibly returning asylum seekers to Mexico, creating a humanitarian crisis. There have been widespread reports of violence against asylum seekers who are living in makeshift camps or overcrowded shelters with little access to clean water and medical care and where they face an ongoing threat of being kidnapped for ransom.ⁱ Now these people seeking our protection are at great risk of getting ill as they wait for hearings which have been suspended due to COVID-19. Children at greatest risk often flee the camp and return to the U.S. border alone, once again asking for protection.

Tent “courts” – Asylum seekers under MPP are forced to wait for months – but not for a proper day in court. Instead, they must travel back to a U.S. port of entry to a freezing cold tent “court” where they see a video feed of a judge and hear the voice of an interpreter, both of whom are sitting in a comfortable courtroom in another city, even another state. Given the dangerous and remote locations of these tent courts, and the requirement that families arrive in the dark hours of the morning - sometimes as early as 4am - it is nearly impossible for asylum seekers to find counsel. As few as four percent of asylum seekers have been represented in these hearings.ⁱⁱ Many members of Congress have called MPP illegalⁱⁱⁱ and tent courts devoid of due process.^{iv}

The transit ban – The administration’s third-country transit ban bars people from applying for asylum if they transited through another country en route to the United States after July 16, 2019 even if they have well founded fears of persecution.^v It is nearly impossible to seek asylum in Guatemala, Honduras and El Salvador, and Mexico’s system, to the extent it had some capacity to process asylum seekers, has

been completely overwhelmed. Many people coming from the Northern Triangle are seeking asylum in the U.S. because they have family here who can provide a place to live and basic resources to sustain themselves as their cases proceed in court. Congress cannot ignore the historic role the U.S. has played in Central America, including those policies and actions that have separated families and given rise to many of the conditions people seek to escape.^{vi}

Asylum is not children's only option for protection – Even if children are denied asylum in sham tent courts, once they are designated unaccompanied and enter ORR custody, they are eligible for other forms of relief such as T visas, U visas, and Special Immigrant Juvenile Status, among others. Instead of releasing children to sponsors so that they can find a lawyer and present their case, ICE is removing them as quickly as possible, in clear defiance of the language and the spirit of the TVPRA, which was developed to provide more child-appropriate proceedings for children.

Children have the right to appeal immigration decisions – As with adults, any adverse decision of an immigration judge may be appealed administratively to the Board of Immigration Appeals, and then to the circuit court of appeals. Children may also seek reconsideration of the decision made in the tent court hearings, in which their families were ordered removed. In each of the cases of children recently returned to Honduras, attorneys had filed or were preparing to file appeals of the underlying tent court decision. DHS's rush to deport these children, made with knowledge of these appeals, undermines any claim that the children had a "fair day in court."

What Congress can do: The Trump administration has made a mockery of asylum procedures and other legal protections for unaccompanied children. Legal processes which may have been sound in the past, can no longer be considered legitimate. Thus, Congress should:

- Call for an end to ICE removals of unaccompanied children based on removal orders from MPP.
- Reiterate calls to end MPP and restore the right to asylum for people seeking safety.
- Hold DHS and DOJ accountable to their legal obligation to provide unaccompanied children all of the protections granted under the TVPRA and to ensure each child has a fair day in court.
- Ensure that ORR releases children to approved sponsors so they can pursue claims for protection.
- Call for the investigation of those unaccompanied children removed by ICE on the basis of removal orders issued while the children were in MPP.

ⁱ *Lawyer Defending Trump Policy Makes Stunning Admission*, CNN (Mar. 11, 2020), <https://www.cnn.com/videos/politics/2020/03/11/valencia-migrant-kidnapped-awaiting-asylum-hearing-pkg-lead-vpx.cnn/video/playlists/this-week-in-politics/>.

ⁱⁱ *Q&A: Trump Administration's "Remain in Mexico" Program*, HUM. RTS. WATCH (Jan. 29, 2020), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>.

ⁱⁱⁱ Press Release, *Correa & House Judiciary Democrats Announce Investigation into Trump Administration's "Remain in Mexico" Policy* (Jan. 14, 2020), <https://correa.house.gov/news/press-releases/correa-and-house-judiciary-democrats-announce-investigation-into-trump-administrations-remain-in-mexico-policy>.

^{iv} Letter from Senators Elizabeth Warren, Jeffrey Merkley, and Kamala Harris to Attorney General Barr and Acting Secretary Chad Wolf (March 2, 2020), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senators-raise-concerns-that-dhs-operated-tent>.

^v *Trump Administration's Third Country Transit Bar is an Asylum Ban that Will Return Refugees to Danger*, HUM. RTS. FIRST (Sept. 2020), <https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf>

^{vi} Peter J. Meyer & Maureen Taft-Morales, *Central American Migration: Root Causes and U.S. Policy*, CONGR. RES. SERV. (June 13, 2019), <https://fas.org/sgp/crs/row/IF11151.pdf>.

APPENDIX D

DECLARATION OF FLORENCE CHAMBERLIN

I, Florence Chamberlin, declare the following information under penalty of perjury:

1. I am an attorney licensed by the State of Florida since 1997. I am currently employed by KIND Kids in Need of Defense as the Managing Attorney for KIND in Mexico and am currently based in El Paso, Texas. My responsibilities involve the management of the organization's legal services and programming for the U.S. Mexico border region.
2. Since March 21, 2020, our office has been made aware of the ongoing expulsion of adults, families and children from the United States into Mexico and to Central America on the basis of the U.S. Customs and Border Patrol's implementation of the Title 42 CDC health policy. We have been referred cases where the U.S. Customs and Border has refused to process vulnerable children who have attempted to seek protection at various ports of entry including but not limited to, El Paso International Bridge/Ciudad Juarez; Columbus, Puerto Palomas; McAllen, Reynosa. The returns have impacted children who clearly would have been otherwise deemed unaccompanied under the TVPRA and provided an opportunity for protection under U.S. and international law. The basis of the expulsions has consistently been based on the CDC's health policy under Title 42. It is unclear if any of the children we have spoken to were screened for trafficking or interviewed for fear of torture or persecution. CBP did not screen the children to make sure they have a safe family member available to receive them, and some children were not questioned at all beyond name, age, and contact information of parents.
3. The following case examples describe specific instances referred to KIND involving unaccompanied children who were expelled under the Title 42 policy:
 - a. In late April, two Honduran siblings a girl, age 12 and a boy age 15 were referred to KIND after they were taken into custody by Mexican government officials. In this case, the children presented by themselves on the day that they were scheduled for an MPP hearing. The father was supposed to be with them for the hearing but was not. An adult they met at a shelter took them to their MPP appointment. During this time frame, CBP had been issuing new 'tearsheets' with future hearing dates because court hearings were being postponed. CBP brought each minor into their building; separated them and questioned them extensively (DOB/Parents location/ contact etc./provided them documents to sign and took a biometric information. They were not provided copies of the documents and do not know what they signed. The minors were with CBP for approximately 2 hours. They were sent back to cross the bridge into Mexico alone. They were not delivered into the custody of Mexican authorities and were completely alone once back in Mexico. They were only brought to the attention of the Mexican government after they took an UBER to the shelter where they had been staying and the director of the shelter contacted the Mexican authorities. The children reported being told that the border was closed because of the pandemic. They were not given their new hearing dates for MPP even though they had scheduled hearings for July 21, 2020. The father had been in a different city during this

time. The father had to travel from Nogales to Juarez to get the minors from DIF custody. The older child reported the when CBP questioned him they said to him that 'we know your dad is in Juarez' which was not the case.

- b. A 17 year old Guatemalan girl was traveling with her 1 y/o daughter. She was fleeing death threats and violence following a rape. She travelled to Arizona and turned herself into CBP on June 1, 2020. She had travelled with a group of about 10 other persons to the northern border of Mexico. She experienced an attempted assault by one of the guides during their travel and up to a point, she traveled with other migrants. She and another other woman migrating with her became lost in the desert late at night. Border Patrol located them and took them for processing. The officers did not have any face coverings when they first took them into custody, but they were later provided face masks. She was asked if she felt okay or had headache or fever. She replied 'no'. She did not feel ill. She was interviewed and asked her age. The officers said she looked to be 20 years old and accused her of lying to them.

While in detention, she talked on the phone with an official who she believes was in Guatemala. The man she spoke with (possibly a consular officer or other authority) said the process for minors going to the US had been terminated during the last 2 months; She expressed her fear to him and explained what had happened in Guatemala. He told her that in Guatemala he would help her, but she could not go to the US. They were not given a test for Covid-19 that she is aware of while in the U.S. She does not recall Border Patrol directly asking if she was afraid to return to Guatemala but said that the man on the phone from Guatemala asked if she was afraid to return. She had expressed that she 'told CBP her entire situation. ' CBP didn't ask where she would go if returned to Guatemala; They had her parents' phone numbers in the United States and they called her dad. She arrived at CBP Monday in the early am and was with them about three days. Consistent with other children that KIND has interviewed, she and the baby were taken to a hotel under ICE custody. She was not allowed to talk to her parents during her time with CBP or while at the hotel. She was not advised regarding her rights, the consequences of this expulsion to Guatemala or the possibility of return to US in the future. She does not recall if she signed anything and was not given any documents. On 6/5/2020 client and her baby were returned to Guatemala. Before she got on the plane, they took her temperature. There were about 10 migrants on the plane sitting in separate rows. When she got to Guatemala, they put the swab in their noses to check for Covid. She was later told that she and her baby tested positive and had to be moved and quarantined in a different location. An international organization has intervened on her behalf to secure protection in her home country.

- c. On 6/19/2020 KIND was referred the case of an 18 y/o Guatemalan male born on 6/7/2002, who had presented himself at the Paso del Norte port of entry on June 17 – days before turning 18. He presented himself to officers at the bridge stating that he was a minor traveling alone. He was not allowed a fear screening of any sort and was forced back across the bridge into Mexico alone and was not delivered to the custody of Mexican authorities.

They did not ask about his family. They did not take his prints or photo. They did not give him any papers. He reiterated the event took about 10-15 minutes. Officials only told him no one was getting in. They were not wearing masks. He was scared that he would be living on a dangerous street if he didn't get help, so he sought out Grupo Beta. They took him to the Hotel Filtro, where he was quarantined for 14 days. During the quarantine, he had access to some Wifi and was able to call his family. Then he was transferred to a different shelter. When asked about contact w/ the consulate, client did not seem to know what that meant, and indicated he had not talked to officials from his government.

- d. On 07/15/2020 KIND was referred the case of a 16-year-old Guatemalan/Garifuna client born on 05/16/04 who was believed to have crossed on or about 7/5/20. He is the child of a U.S. citizen. He called his mother on 7/8/20 from the immigration office and said that he had been in custody for 2-3 days at that point. He was detained somewhere in McAllen, but neither the mom nor the Guatemalan consulate knew his location. Child was attacked in Mexico while he and his cousin were on a train, by armed men who boarded the train and tried to chase them. The child had a gun held to his head during the attack, which he reported to his mother when he called her in custody on July 8. He lost his cousin when they were fleeing. He called his mom once while he was in Mexico after the attack but was unable to tell her where he was or what was going on, and he was only able to speak to her very briefly. She believes that this was about two weeks before she got the call from him on July 8 when he was in DHS custody. The mother was told he would be expelled from the U.S. Due to the intervention of KIND and the ACLU, on 7/16/2020 DOJ agreed to process him into the U.S. under Title 8 and transferred to ORR custody.
- e. On 7/15/2020 KIND was referred the cases of two Mexican male siblings, 14 and 16 y/o. They fled Mexico after they were brutally attacked on March 12, by members of a cartel in their home state. They were hospitalized for over a month due to the severity of their injuries which included head injuries, face lacerations and broken bones. Their uncle took them to the border to seek protection and reunification with their mother in the United States. Despite the fact that the children expressed fear of return to Mexico and multiple visible injuries they were expelled by CBP without any clear questioning or explaining of the process they were under. For example, the younger child was walking with crutches as his leg had been broken in two places (fibula and tibia) and had required insertion of screws via a surgery after the attack. The younger boy also showed scarring from second degree burns on his face and neck. He also still had scars on his head and forehead from the beatings to his head. The older child had head injuries and contusions on his ribs and his head from a beating he received from a pistol. The children had presented to CBP on 6/29/2020 and on 6/30/2020 their mother got a call from CBP saying they would be returned in a few hours to Mexico. The children are now at a shelter in Mexico and are terrified for their safety.
- f. On 07/15/2020 KIND learned of a case involving a Honduran minor who entered on 7/13 in Arizona. The minor had expressed a fear of return. His father who lives in the US was

contacted by CBP and also expressed concern for son's return. The minor had been held in a hotel for several days and it was extremely difficult to locate the child. KIND was able to submit a G-28 and requested contact with our client but within hours, learned that the child had already been returned to his home country.

- g. On 07/20/2020, KIND was informed about the case of a 17-year-old minor from Guatemala. She was fleeing domestic abuse in country of origin. Her mom got call at 12:30 am saying that her daughter was in CBP custody. The mother was only permitted to provide her name and contact info of someone in Guatemala. Mom gave the child's paternal great-grandmother's information, who she'd been living with. The mother was informed that her daughter would be returned to Guatemala and to wait to hear back from them. Mom wasn't allowed to ask any questions or given any more information. Due to the intervention of KIND and the ACLU, the DOJ agreed to process him into the U.S. under Title 8 and transferred to ORR custody.
- h. It has been brought to KIND's attention that the U.S. authorities are returning children at dangerous areas along the norther Mexican border during early morning and unsafe hours. The returns take place when there are no authorities available to receive the adults or more concerning the child migrants who are vulnerable to kidnappings and extortion. They are not being screened for signs of illness when they return. Minors have been returned to areas where there are no suitable youth shelters or available authorities who can screen them for protection concerns such as signs trafficking or abuse.

DATED: July 21, 2020

Florence Chamberlin, Esq.

Florence Chamberlin, Esq.

APPENDIX E



The Protection Gauntlet: How the United States is Blocking Access to Asylum Seekers and Endangering the Lives of Children at the U.S. Border

December 21, 2018

Background

Kids in Need of Defense (KIND) visited Tijuana, Mexico to learn about the experiences of unaccompanied children living in the refugee camp that has been set up along the border. We spoke with children living in the formal camp set up by the Mexican government, children living on the streets in the informal camps along the border wall, and children living in private and state-run shelters. KIND staff met with both U.S. and Mexican immigration officials, staff from the Mexican children protection agency (DIF) as well as representatives from international organizations serving the children trapped in Tijuana. Finally, KIND was also able to interview volunteers from U.S and Mexican nongovernmental organizations who are providing safe shelter and legal information to these children.

Acknowledgments

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Introduction

Kids in Need of Defense (KIND) visited the formal and informal refugee camps and shelters in Tijuana, Mexico during the week of December 12, 2018 to look at the conditions that unaccompanied children are facing and their ability to access U.S. protection. We found children living in squalid conditions, in grave danger, fearful, and suffering greatly while waiting to be allowed to present at the port of entry. We learned that unaccompanied children are systematically being prevented from applying for protection in the United States, a significant violation of U.S. and international law.

KIND saw what has now become a classic refugee situation – but lacking significant protections that are a minimum in most refugee camps around the world. Children are languishing in dangerous and unsanitary makeshift camps. There is no running water and in some cases, irregular access to food. We saw children who had become sick from living outside in cold and wet conditions for weeks and needing medical care – including a toddler who suffered a seizure. We saw a child scraping the remains of a can of formula for more, hungry, and crying when her mother said there was no more food.

We learned of a girl who was selling her body every night in order to provide food for her 13-year-old sister. We learned of people exploiting children by offering false promises of safe shelter and subjecting children to abuse and exploitation after they were able to convince the children to go with them. We found many children were too scared to accept assistance from anyone since they did not know who to trust.

All this suffering, abuse, and exploitation is happening in camps that are only steps away from, and in the shadow of, the U.S. border wall.

Beyond the physical conditions, we found that the U.S. government was not allowing the very few unaccompanied children who were able to reach the U.S. border to apply for asylum and turning them back to Mexico, a violation of U.S. and international law. The Mexican government for its part was blocking unaccompanied children from reaching the border, sending the children back to the streets or turning them over to Mexican child welfare officials, who detained them and offered them only two options – apply for asylum in Mexico or be sent back to their home country. Mexican officials were not offering the children their third legal option – seeking U.S. protection, a grave violation of these children’s rights.

No Official Protection Process

The only way adults and children with families at the U.S. border can apply for U.S protection is through an unlawful practice known as “metering,” in which they are being told by Mexican government and other officials to put themselves on an unofficial list and wait until they are called to ask for asylum. The list is not officially being kept or regulated by government or other officials; we found that the migrants are managing it themselves.

U.S. and Mexican immigration officials claim no responsibility for the list. However, Mexican immigration officials liaise with U.S. officials each day to learn how many asylum seekers the U.S. will process that day and convey that information to the migrant managers of the list. KIND observed Mexican immigration officials tell an adult Honduran asylum seeker who presented at the San Ysidro port of entry that the United States was “full” and that he had to put his name on a waitlist.

U.S. officials are validating the unlawful metering system by communicating daily with Mexican immigration officials about how many people from the list can present themselves each day.

Unaccompanied Children Blocked from U.S. Border

KIND learned that unaccompanied children are not even able to put themselves on the list – both U.S. and Mexican officials are telling them that they are not eligible to be on it. The children are being told – erroneously – by Mexican officials and others that they are not allowed to ask for protection in the United States and that their only option is to ask for asylum in Mexico or to return to their home country. They are not telling children of their third legal option - to apply for protection in the United States. Both Mexican immigration officials and Mexican child welfare officials confirmed that they are telling children this.

Unaccompanied children are being prevented by Mexican officials from even reaching the U.S. border, another egregious legal violation. While attempting to comply with the Trump Administration’s demand that asylum seekers present themselves at ports of entry,

unaccompanied children are being physically blocked by both Mexican officials and U.S. Customs and Border Protection (CBP) officials from presenting themselves at the U.S. border.

Directly in front of the gate that CBP has designated as the port in which asylum claims will be processed, Mexican private security guards and Mexican immigration officials stop any child they believe is unaccompanied. They inform these children that they are not allowed to pass to present themselves to U.S. officials. Children may be turned back to the streets of Tijuana or held until Mexican officials can bring them to the custody of Mexican child welfare agency, DIF.¹ Some children with whom we met said that they were forced to wait for hours until the DIF representative could come to get them, and others reported being told incorrectly by Mexican immigration officials that the United States no longer accepts asylum seekers from Central America.

Mexican immigration officials confirmed this policy. They told KIND that when they detect an unaccompanied child seeking to enter the port of entry they stop them from entering and refer them to Mexican child welfare officials. They said that according to Mexican protocol, these children would be prevented from accessing their legal right to ask the United States for protection. This is a violation of their basic rights as migrants and their rights as potential refugees.

Although it is unclear if U.S. officials are specifically telling Mexican child welfare officials to not allow children to ask for protection in the United States., U.S. officials have been put on notice that this is occurring and they have done nothing to correct this misinformation.

KIND met many children who believed they had to hide from the Mexican child welfare authorities to avoid detention and deportation. DIF's actions are having the perverse effect of causing children to hide from them – the officials who are supposedly there to protect them. KIND met an 11-year-old boy who had attached himself to unrelated adults so he would not be detected as unaccompanied and then deported to his country. This spontaneous creation of “families” can cause children to be vulnerable to further abuse and exploitation.

United States is Violating Domestic U.S. and International Laws

Despite the blockades, several unaccompanied children with whom KIND spoke managed to reach U.S. territory to request protection. They were told by U.S. officials that they were not allowed to ask for protection in the United States. This response by U.S. border officials is false and violates the Trafficking Victims Protection Reauthorization Act (TVPRA) that Congress enacted a decade ago to specifically protect this vulnerable population and ensure their access to U.S. territory. U.S. officials are violating the TVPRA each time they stop a child from entering the country and call Mexican officials to take the child back into Mexican custody.

Children have a right to tell their story to an immigration judge to ensure they are not sent back to harm. This response by U.S. officials also violates U.S. asylum law and the 1951 Convention Relating to the Status of Refugees to which the United States is a party. The U.S. is also violating its own laws by expecting Mexican officials to support the metering system.

In one case, two Mexican children reported that they told U.S. officials that they were too scared to return to Mexico. Instead of transferring these children to the custody of the Office of Refugee

¹DIF - [Desarrollo Integral de la Familia](#)

Resettlement (ORR) for screening as the TVPRA requires, the officials ordered the children to sign a form indicating that they had no fear of return. The children felt they had no choice but to sign the forms, and they were sent back to Mexico. Unsafe in Mexico and turned away from the U.S., the children are now living in a shelter on the border trying to figure out what to do next since it is not safe for them to return to their home countries.

KIND also met children who told us that they had tried to present themselves to border agents between official ports of entry, only to be shot at with rubber bullets or turned around by U.S. agents from whom they sought protection.

Excluded from the waiting list used by adults to access the port of entry, and unable to access the port themselves, many children who do not feel safe remaining in Mexico or returning to their country of origin are left considering whether or not they should try to turn themselves in to Border Patrol agents between a formal port of entry. The children who KIND interviewed fully understood the risks of trying to enter this way, but many felt they were left with no choice and that this was their only option to access safety.

Protection Gauntlet – Lack of True Information

For unaccompanied children living in the camps or shelters, access to information about their rights and options depends largely on those with whom they happen to come into contact. There is no centralized system for ensuring children receive information about all their rights, including the right to ask for protection in the United States. They are gathering information on an ad hoc basis from other people living in the camps, from NGOs providing know your rights presentations, from the International Organization for Migration (IOM), which is offering assistance to those who want to return to their country of origin, from DIF, or the Mexican asylum agency (COMAR).²

The information provided to children and the accuracy of that information varies widely. A significant amount of misinformation about the U.S. and Mexican protection frameworks and the rights available under those laws is being shared.

We learned that none of the agencies involved in dealing with the children – DIF, COMAR, or IOM – ensure that children receive information about seeking protection in the United States.

Unaccompanied Children in Mexican Custody

The Mexican asylum system is still in a nascent stage. Mexico is currently unable to process all of the asylum claims it has received this year,³ and it is still developing appropriate protocols for assessing unaccompanied children's cases.

In addition, many child migrants do not feel safe in Mexico. Only a very small number of unaccompanied children of the many thousands who cross into Mexico each year seek asylum there because they fear staying in Mexico and/or they have family in the United States to care

² Comisión Mexicana de Ayuda a Refugiados

³ https://www.gob.mx/cms/uploads/attachment/file/413017/COMAR_2018.pdf

for them. In 2017, 259 unaccompanied children applied for asylum in Mexico;⁴ from January – August 2018, 217 children applied.⁵

Mexican law dictates that DIF conduct a “Best Interest Determination” (BID) for any migrant child before deciding on a course of action in their case to figure out the best and safest option for these children. DIF is conducting limited and flawed BIDs, however, notably not factoring in reunification with close family members who may be best suited to care for the children to ensure their safety and well-being. As mentioned above, many of these children fear staying in Mexico or returning to their home country, but a determination that the U.S. may be safest for them and the best place for them to apply for protection is not part of the BID process. This is a glaring omission. Mexico has ratified the Convention on the Rights of the Child (CRC) yet is violating its provisions on BIDs.⁶

DIF routinely contacts IOM to facilitate the return of children to their countries of origin. IOM also does not provide information to children about the right to seek protection in the United States, but instead facilitates their rapid repatriation.

KIND has learned of children who were at risk of being returned to their countries of origin even before a BID had been performed. KIND met with four Honduran children who were seeking “voluntary assisted return” with assistance from IOM. One child stated that although his mother is in the United States and he planned to seek protection in the U.S., he was taking voluntary return and would return to the U.S. with a smuggler as quickly as possible because he said he had no other way of reaching the United States. DIF workers themselves said a child who wishes to seek protection in the United States may have no other choice but to accept removal to their country of origin and subject themselves to the life-threatening journey again.

Conclusion

The governments of the United States and Mexico are violating domestic and international law by blocking unaccompanied children in Tijuana from seeking protection in the United States. These children are trying to follow the laws regulating access to asylum that have been in place for many years – only to find that they are no longer being implemented and that in reality, the U.S. government is actively putting in place policies and procedures that deny them access to U.S. protection.

These alarming violations of U.S. and international law are already claiming the lives of children, as we have seen in the recent murders of the two boys who were seeking protection in the United States.⁷ More murders and deaths of the most vulnerable are likely unless the United

⁴https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf

⁵ https://www.gob.mx/cms/uploads/attachment/file/413017/COMAR_2018.pdf

⁶ See Article 12 of the Convention on the Rights of the Child requiring due consideration of the child’s wishes in all procedures and decisions affecting the child; Convention on the Rights of the Child General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, at paras 43-45, explaining that assessment of the best interests of the child must include the child’s express views.

⁷ <https://www.reuters.com/article/us-usa-immigration-mexico-hondurans/officials-say-two-honduran-migrant-youths-killed-in-mexico-idUSKBN10I07R>

States truly allows unaccompanied children and other vulnerable groups to seek protection – consistent with its domestic and international legal obligations.

Recommendations

Governments:

The Mexican and U.S. governments must work together to ensure there is a pathway to protection for unaccompanied children. The two governments must eliminate the physical and procedural barriers blocking children from seeking protection. Bilateral negotiations between Mexico and the United States must address children's access to protection as provided for by international as well as Mexican and U.S. law.

The United States must not turn around a child who states or manifests a fear of return to his or her country of origin and must stop violating U.S. law and international conventions. The U.S. must adhere to its obligations under the TVPRA, which include allowing a child to ask for protection from a CBP official and to be admitted to the United States to have their case heard by an immigration judge.

The government of Mexico must also not interfere with a child's right to present their claim to protection at the U.S. border. Mexican officials should never block a child from physically accessing U.S. territory to make a protection claim.

The Mexican child protection law⁸ must be implemented in the most protective way possible to ensure safe, durable solutions for children migrating on their own. It must take into account children's wishes, consistent with Mexican obligations under the CRC. Children should not have to choose between receiving services and basic needs like - shelter, medical and mental health attention, and food, while in Mexico, and seeking protection in the United States. They should not have to forego protection and place themselves in heightened danger in order to try to seek protection in the U.S.

Mexico and the United States have a shared responsibility to provide access to care and protection to migrants and refugees. The U.S. government must uphold international and U.S. law, while Mexico must provide care and safety to migrants and refugees on its territory.

The United States and other stakeholders should address the root causes that are driving people to take the life-threatening journey to try to enter the United States by helping El Salvador, Honduras, Guatemala promote child protection and the rule of law and address corruption and the gang and narco-trafficker violence that pushes most children and families to flee.

Protection Agencies:

Child protection entities, both those working domestically in countries of origin as well as international organizations, must ensure that children are provided complete and accurate information about their legal options along the journey to their final destination. Any entity conducting a BID and making recommendations about a child's placement must consider all of the child's legal options and consider reunification with appropriate family members who are

⁸ http://www.diputados.gob.mx/LeyesBiblio/pdf/LGDNNA_200618.pdf

able to care for the child, regardless of the country in which the family members are living, and must give significant weight to the child's wishes and interests. International organizations and domestic non-governmental organizations should work together to develop materials to inform government partners working to ensure child protection about available legal options.

These children are facing complex legal systems and choices and should be given access to lawyers to help them navigate these systems and access protections. Legal organizations should also develop child-friendly materials that can be safely accessed by children living in camps and on the street to notify children of their rights in countries of transit and destination.

END

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Blocked From Safety: Unaccompanied Children along the U.S.-Mexico Border

April 29, 2019

Background

Beginning in December 2018, Kids in Need of Defense (KIND) conducted a series of visits to different points along the United States-Mexico border to learn about conditions and challenges experienced by unaccompanied children seeking protection and access to United States ports of entry. Following KIND's initial trip to Tijuana in December 2018, we published [*The Protection Gauntlet*](#), in which we reported concerns that unaccompanied children in Tijuana were being systematically prevented from accessing the San Ysidro port and therefore protection in the United States. This report provides an update to *The Protection Gauntlet* and explains the danger and challenges unaccompanied children currently face in Tijuana and along other parts of the U.S.-Mexico border.

Acknowledgments

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Introduction

KIND visited the U.S.-Mexico border several times from December 2018 – March 2019 to assess the protection needs of unaccompanied children.¹ KIND staff spoke with unaccompanied children living on the streets, in civil society shelters, and in Mexican state or municipal child protection shelters. We also met with Mexican child welfare, immigration, and refugee agency officials and with U.S. immigration officials, staff from civil society shelters, civil society organizations on both sides of the border that provide services to unaccompanied children, and international organizations that focus on refugee and child protection.

Throughout these border trips, we found children living in unsafe and extremely dangerous conditions, afraid, confused, and in deteriorating mental health. KIND observed that one child

¹ KIND traveled to Tijuana three times from December 2018 to February 2019; to Tapachula, Mexico in mid-February; and to the Rio Grande Valley and the Juarez-El Paso border region in mid-March.

who had been waiting on the Mexican side of the border for months had begun cutting himself, another had stopped eating, a third was suicidal, and a few others suffered from the mumps. A teenage boy stated that he could no longer wait in Tijuana and would instead risk crossing the border with a smuggler or go on his own.² A girl survivor of sexual abuse had run away from a shelter to cross the border with a smuggler; she was not heard from again. A 15-year-old unaccompanied girl was staying in a hotel with an adult male, suffering profuse vaginal bleeding and lacking medical care.³

KIND met with children in Tijuana who had been waiting months to present at the San Ysidro Port of Entry (POE) to seek U.S. protection, but who were trapped in Tijuana and blocked from accessing the United States. A group of unaccompanied children were being preyed upon by human traffickers in Tijuana after being forced to wait for months to access the POE.⁴ In the Rio Grande Valley, we saw children camping out on the international bridge waiting for an opportunity to present themselves at the POE.

Although distinctions exist along different parts of the border, during these visits KIND found an unambiguous pattern of unaccompanied children being prevented by Mexican and/or U.S. officials from reaching the U.S. border to apply for international protection—a violation of their rights under U.S. and international law. We found that U.S. and Mexican government policies and practices prevent unaccompanied children from accessing U.S. ports of entry, thus either driving unaccompanied children to attempt high-risk entries between the ports, trapping them in peril on the Mexican side of the border, or leading children to return to danger in their countries of origin.

CBP unlawfully turns away unaccompanied children at U.S. ports of entry

Across multiple ports of entry, unaccompanied children are being turned back by U.S. Customs and Border Protection (CBP) or told to wait in Mexico. Refusing to process an unaccompanied child or turning them back to Mexico violates both U.S. asylum law and the Trafficking Victims Protection Reauthorization Act (TVPRA), as well as international obligations of the United States as a party to the 1967 Protocol Relating to the Status of Refugees.⁵

Following KIND's visit to Tijuana in December, we shared our concerns with CBP about unaccompanied children being turned away from the San Ysidro POE in violation of the TVPRA, which mandates that unaccompanied children who are not Mexican be processed when they

² Observations and interviews with unaccompanied children at a civil society shelter in Tijuana.

³ KIND interview with local NGO, identity protected per request, Tijuana, February 28, 2019.

⁴ KIND interview, identity protected per request of source, March 29, 2019.

⁵ See Protocol relating to the Status of Refugees: <https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>; Immigration and Nationality Act (INA) Section 208(a)(1)(immigrants can request asylum at ports of entry); 8 U.S.C. Section 1232(a)(5)(D)(requiring that unaccompanied children be placed in removal proceedings, subject to exceptions for unaccompanied children from contiguous countries); 8 U.S.C. Section 1232 (b)(1-3)(requiring all departments or agencies of the federal government to notify the U.S. Department of Health and Human Services (HHS) within 48 hours of apprehending an unaccompanied child and to transfer the custody of such child to HHS within 72 hours).

arrive at the U.S. border and placed into removal (deportation) proceedings to consider their claims for protection under U.S. law. Although in late February, KIND observed some children being able to approach the POE when accompanied by an attorney, KIND interviewed other children in that same time period who had been turned away by CBP officials. KIND staff visited Tijuana, Mexico on April 25 and learned from local and international organizations that while some unaccompanied children had been able to access the San Ysidro POE alone or accompanied by volunteer lawyers and/or advocates, others have continued to face obstacles⁶, confirming KIND's previous findings.

Civil society organizations in El Paso, Texas, and in Reynosa, Mexico, informed KIND that CBP was turning back unaccompanied children at the POE there, including in early April 2019.

When children are turned away from ports of entry, it often leaves them no choice but to take serious risks to reach the safety of the United States. For example, staff at a civil society shelter in Reynosa reported that after some unaccompanied children there were turned back at the POE, some attempted to cross the Rio Grande River to enter between ports out of desperation. Others traveled through cartel-controlled areas to reach ports that they had heard were processing unaccompanied children.

In addition to unlawful turn-backs of children that CBP knows to be unaccompanied, CBP officials inadvertently turn away unaccompanied children that they have failed to identify as children or as unaccompanied. For example, about halfway between Juárez and the El Paso del Norte POE, CBP officials standing on the bridge check for U.S. passports or other forms of authorization to enter the United States. CBP agents do not systematically ask individuals to provide their age – running the risk that they may fail to identify unaccompanied children, particularly older teenagers who may easily be mistaken for young adults. In these cases, CBP may instruct the individual to wait in Mexico where adult asylum seekers must register on a waitlist⁷ to apply for asylum. Despite CBP claims that it processes unaccompanied children immediately and without delay, KIND has learned from civil society organizations in Nogales, as well as along other parts of the border, that CBP officials have informed unaccompanied children that the port is full. CBP has then turned them away because it failed to identify them as unaccompanied children, who are supposedly exempt from the requirements of the metering system.⁸

⁶ KIND did not directly observe the port during this trip.

⁷ For more information on the asylum waitlist and the unlawful practice of “metering” occurring at U.S. ports see https://supportkind.org/wp-content/uploads/2018/12/Protection-Gauntlet_12-21-18-FINAL.pdf; https://www.humanrightsfirst.org/sites/default/files/BARRED_AT_THE_BORDER.pdf

⁸ Other harmful and illegal policies, such as the “Migrant Protection Protocols,” more commonly referred to as “Remain in Mexico” has led to the return of over 6,000 asylum seekers from U.S. ports of entry to Mexico to wait there during the pendency of their asylum claims. See <https://www.cnn.com/2019/05/21/politics/migrants-returned-to-mexico-immigration/index.html>. The policy has been challenged in a case pending before the United States District Court for the Northern District of California. <https://www.aclu.org/legal-document/innovation-law-lab-v-nielsen-complaint>. Although this policy does not technically apply to unaccompanied children, with each new policy or practice restricting access to U.S. territory to seek international protection, children's safety and rights are jeopardized.

Mexican government blocks unaccompanied children from accessing U.S. protection

Mexican officials continue to deny unaccompanied immigrant children access to U.S. ports of entry, in flagrant disregard of the children's rights under Mexican,⁹ U.S., and international law. Mexican immigration officials and private security guards prevent children from accessing certain ports of entry, and the vast majority of Mexican child welfare officials refuse to let children in the agency's custody approach U.S. ports of entry.

After KIND's first visit to Tijuana in December 2018, KIND and other civil society and international organizations raised concerns about officials from Mexico's federal immigration agency (INM) and federal security agency physically blocking unaccompanied children from accessing the San Ysidro port and turning them over to Mexico's child protection agency (DIF).¹⁰

When we returned to Tijuana in late February 2019 and throughout the first three weeks of March, neither INM agents nor Mexican security appeared to be stopping unaccompanied children seeking access to the port. On March 21, 2019, however, it was reported that Mexican security officials prevented three unaccompanied children from reaching the port.¹¹ Any such interference with a child's ability to access the port undermines Mexico's child protection laws and obstructs children's right to seek protection and to have their best interests carefully considered.

Civil society organizations in Reynosa, Mexico, and attorneys working in the Rio Grande Valley of Texas told KIND that INM agents in Reynosa prevent unaccompanied children from approaching the U.S. ports. In other areas, INM officials, including those in INM's Grupo Beta – or humanitarian assistance unit—also prevent children from reaching U.S. ports, the organizations reported.

In Texas's Rio Grande Valley, children were sleeping in tents on the international bridge waiting for a chance to present themselves to ask for protection. As in other places along the border,

⁹ See Constitution of the United States of Mexico, Article 4 (guaranteeing that all actions and decisions of the State will safeguard and comply with the best interests of children and will guarantee children's rights, and that the best interests of the child principle shall guide the design and enforcement of public policies focused on children); Mexico's General Law on the Rights of Children and Adolescents (Ley General de los Derechos de Niñas, Niños y Adolescentes (LGDNNA), setting out the best interests of the child as a primary consideration in all public policies regarding children and in all actions and decisions regarding an individual child, requiring consideration of children's wishes in all decisions affecting them, and requiring Child Protection Authorities to take measures to guarantee restitution of children's rights).

¹⁰ <https://supportkind.org/resources/the-protection-gauntlet-how-the-united-states-is-blocking-access-to-asylum-seekers-and-endangering-the-lives-of-children-at-the-u-s-border/>

¹¹ <https://www.sandiegouniontribune.com/news/story/2019-03-29/unaccompanied-children-stuck-in-tijuana-hoping-to-reach-u-s>

unaccompanied children were told that they are not able to place themselves on the “waitlist” to be allowed to ask for protection.¹²

Mexican officials have prohibited civil society actors from helping unaccompanied children to access the POEs, and Grupo Beta agents restrict access of unaccompanied children to the United States by controlling how many migrants—including unaccompanied children—can sleep on the international bridge in Matamoros. This restricted access to the U.S. is leaving children in extremely dangerous conditions in Matamoros and gives many of them no choice but to sleep outside where they are exposed to the elements for months at a time. A child who was traveling alone explained that he had to wait to try to access the port because he was scared to cross the river himself due to crocodiles in the water.

Children turned away by CBP or blocked by INM or Mexican security agents have no way of accessing ports of entry. They are faced with either crossing between ports – which makes them vulnerable to human trafficking or smuggling—or to ceding their claim for protection in the United States and possibly returning to danger or death.

Children denied access to the United States live in exceedingly dangerous circumstances in Mexican border towns

Unaccompanied children turned back at U.S. POEs or waiting in Mexican border towns to access POEs live in high-risk conditions. In border areas like Ciudad Juárez and Tijuana, violence has increased in recent years, including violence targeting migrants.¹³ Unaccompanied children, like the two Honduran teenagers who were tortured and brutally murdered in Tijuana in December 2018, are primary targets.¹⁴

Some children denied access to the United States end up in civil society shelters along the border—which range from shelters licensed to house children to shelters licensed to house adults but not children, as well as shelters that have no license. With few safe and appropriate shelters available, unaccompanied children find themselves at risk of harm in shelters, on the streets, or taken in by strangers, and are easy prey for human traffickers and others who would persecute or harm them. KIND planned to meet with a girl at a shelter in Tijuana who had learned that a gang member who tried to force her to be his girlfriend in her home country was on his way to Tijuana to find her. The shelter where she was staying had no ability to protect her. Before we were able to meet her, she ran away from the shelter to try to go to the United States on her own.

¹² For more information on unaccompanied children being prohibited from registering for the asylum waitlist see <https://supportkind.org/resources/the-protection-gauntlet-how-the-united-states-is-blocking-access-to-asylum-seekers-and-endangering-the-lives-of-children-at-the-u-s-border/>

¹³ <https://www.24-horas.mx/2018/10/08/regresa-la-violencia-a-ciudad-juarez/>;
<https://www.jornada.com.mx/ultimas/2018/10/25/en-tijuana-uno-de-cada-10-homicidios-en-el-pais-7122.html>

¹⁴ <https://www.theguardian.com/world/2019/feb/16/tijuana-migrant-child-murders-mexico-us-asylum>

KIND staff met three unaccompanied teenage girls (two 15-year-olds and one 13-year-old) who were staying at an unlicensed shelter in a remote location near Tijuana that housed both adults and unaccompanied children together. One of the 15-year-olds was over four months pregnant and had been rushed to the hospital the night before because of dizziness and symptoms of dehydration. At the shelter, the girls were exposed to narcotics and inappropriate conditions. In addition, media was granted free access to them without consideration for their privacy, safety, or protection needs.

Mexico prevents children in child protective custody from seeking U.S. protection

Unaccompanied children who are held in DIF custody are prevented from seeking protection in the United States. Mexican law¹⁵ requires child protection authorities to conduct a best interest determination (BID) for every unaccompanied child prior to any decision to send a child back to his or her country of origin. In reality, however, very few unaccompanied children in Mexico receive a BID.

Mexico's child protection system involves two related but distinct agencies—the offices of the Child Protection Authority (Procuraduría de Protección de Niños, Niñas, y Adolescentes) and the offices of children and family services (Sistema Nacional para Desarrollo Integral de la Familia, "DIF"). The Child Protection Authority is the entity within the child protection system that is responsible for determining children's best interests and guaranteeing their rights.¹⁶ DIF is the agency that provides shelter and services to children within the system. Both DIF and the Child Protection Authority have municipal, state, and federal offices.¹⁷ Municipal, state, and federal Child Protection Authorities have overlapping jurisdiction, and the federal-level authority can intervene in any case in which the municipal or state authority either requests assistance or fails to guarantee a child's rights. Offices of the Child Protection Authority (as well as DIF) operate with a high level of independence. The commitment of each office to fulfill its mandate to protect migrant children's rights varies significantly, depending on the political will and the available resources of the individual office.¹⁸ This leads to very different treatment and outcomes for migrant children depending on the state or municipality in which they are detained or sheltered, as well as whether the federal Child Protection Authority becomes involved in their case.

¹⁵ Mexico's General Law on Rights of Children and Adolescents (Ley General de Derechos de Niños, Niñas, y Adolescentes, LGDNNA).

¹⁶ This responsibility includes, for example, issuing restitution orders to restore children's rights when they have been violated or not fully realized. In these orders the Child Protection Authority can request action by any Mexican agency that is necessary to guarantee the child's rights.

¹⁷ Municipal offices are charged with protection of children within the municipality; state offices cover protection across the state; and federal offices address protection within Mexico City, as well as federal level policy.

¹⁸ In no small part failure of the Child Protection Authority to conduct BIDs for unaccompanied children stems from lack of resources – lack of sufficient personnel, training, and time to perform in depth BIDs. UNICEF studied the costs and budget of the offices of the Child Protection Authority across Mexico and determined that each office receives between 7% to 27% of the funds they need to meaningfully fulfill their duties.

<http://sitios.dif.gob.mx/pdmf/wp-content/uploads/2018/12/InformeCosteo.pdf> at p. 41-48.

The federal Child Protection Authority has made important advances to comply with its obligation to guarantee the rights and best interests of unaccompanied children and has taken the position, consistent with Mexican law, that unaccompanied children must receive a BID that considers the United States as an option for the child. Recently, the federal Child Protection Authority accompanied to U.S. POEs some children in DIF custody for whom seeking protection in the United States was determined to be in their best interest, ensuring a safe approach to a port of entry for these children and compliance with international and Mexican law.

However, state and municipal offices of the Child Protection Authority—the offices that have custody over, and determine the fate of, the majority of unaccompanied children taken in by DIF—have been reluctant to fulfill their mandate on unaccompanied children due to scarcity in resources, and in some cases lack of political will. Most state and municipal offices of the Child Protection Authority do not inform children of their right to seek protection in the United States and do not permit children in DIF custody to apply for U.S. protection.

The offices of the Child Protection Authority in Tijuana and in Tapachula told KIND that when they conduct a BID for an unaccompanied child they only consider two options—stay in Mexico or return to country of origin. They do not consider whether seeking protection in the United States might be in the child’s best interests, regardless of the child’s circumstances, including whether it is unsafe for them to stay in Mexico or whether they have family in the United States. They also do not consider the child’s wishes. By failing to take the child’s desires into consideration and by performing BIDs that do not meaningfully consider the child’s best interests, DIF-conducted BIDs infringe on children’s rights under both Mexican law and the Convention on the Rights of the Child.¹⁹

However, consistent with Mexican and international law, the office of the Child Protection Authority in Juárez informed KIND that they conduct a BID for every unaccompanied child in DIF custody and consider the child’s wishes, including to seek protection in the United States. Although they sometimes find that going to the United States is in a child’s best interests, they interpret Mexican law, which does not specifically authorize or require them to accompany children to the U.S. POE, as a prohibition on doing so. They also do not permit children to approach the U.S. POE on their own because they believe it is too dangerous for children to go by themselves.

This leads to the perverse result that Mexico returns children to their country of origin even when Mexico knows that doing so is contrary to the child’s best interests and may involve return to danger. KIND learned of one teenager from El Salvador who had fled gang violence and made his way to Juárez, where he was taken into DIF custody. Although the Child Protection Authority had determined that it was in his best interests to seek asylum in the

¹⁹ See Article 12 of the Convention on the Rights of the Child requiring due consideration of the child’s wishes in all procedures and decisions affecting the child; Convention on the Rights of the Child General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, at paras 43-45, explaining that assessment of the best interests of the child must include the child’s express views.

United States, the Child Protection Authority would neither accompany him nor permit him to approach the POE on his own. Instead, he was sent back to the life-threatening danger he had escaped.

Mexico's weak asylum and child protection systems fail to offer viable protection

While Mexico has enacted progressive laws related to refugee status and child welfare, in reality Mexico's asylum and child protection systems remain weak and fail to provide adequate protection to migrant and refugee children. The majority of unaccompanied children taken into INM or DIF custody in Mexico are quickly sent back to their countries of origin. Contrary to Mexican law many are repatriated prior to receiving a BID, and in some cases without being informed of the right to seek asylum in Mexico.

We met with unaccompanied adolescent girls in Tijuana who painfully recounted their experience in DIF custody during their first attempt to reach the United States. The girls—who had fled gang violence in El Salvador—shared that once in DIF custody they were rapidly deported, even though they had articulated their fear of return.

Migration and child protection officials do not spend sufficient time with children to identify protection needs and frequently discourage children from seeking refugee status, telling children they will face long-term detention if they seek protection. Children who might consider seeking asylum in Mexico are dissuaded by the prospect of long-term detention and the lack of appropriate shelter options, especially for children who require long-term shelter care.²⁰ Some children plan to return to their countries and attempt to migrate again after arrival, rather than remain in detention in Mexico.²¹ KIND spoke with Honduran children in Tijuana who, for example, were already planning their return to the United States as Mexico was preparing their paperwork for “voluntary assisted return.”

Children who apply for refugee status in Mexico despite the barriers described above face an asylum system that lacks the capacity to adequately process their cases. Mexico has seen an over 2,000 percent increase in asylum applications since 2013²² and Mexico's refugee agency (COMAR) does not have the necessary resources or personnel²³ to process these applications. The weaknesses in Mexico's child protection and asylum systems result in the denial of applications of children with legitimate protection needs.²⁴ In Juárez, for example, of the ten

²⁰ Aside from one open-door DIF shelter in Tabasco that accepts only a limited number of unaccompanied children, DIF shelters are locked and the majority of unaccompanied children in those shelters receive limited education and recreation. DIF transfers a low number of unaccompanied children seeking asylum to unlocked shelters run by civil society organizations in Mexico City and Comitán. Children fare much better in these unlocked shelters.

²¹ Childhood Cut Short, p. 31.

²² COMAR website, <https://www.gob.mx/comar>

²³ In Chiapas, the state with by far the highest number of asylum applications in Mexico, as of February 2019 the COMAR office had only nine officials to hear cases and only two who are qualified to interview child asylum applicants.

²⁴ Childhood Cut Short p32.

asylum applications submitted by unaccompanied children since 2017, all have been denied by COMAR.

These obstacles prevent the vast majority of children with protection needs from seeking and receiving asylum in Mexico. In 2017, the most recent year for which full statistics are available, less than 5 percent of the unaccompanied children detained in Mexico applied for asylum there, and less than .5 percent were granted asylum.²⁵

Conclusion

A serious failure of child protection is occurring along the U.S.-Mexico border. Children fleeing violence in their home countries and seeking protection in the United States are being blocked or denied access to U.S. territory by the U.S. and Mexican governments. These children are trying to follow the laws regulating access to asylum that have been in place for many years. They reach the border only to find that the laws are no longer being followed, and that in reality, the U.S. and Mexican governments are actively putting in place policies and instituting procedures that deny them access to U.S. protection and trap them in Mexican border towns where human trafficking, sexual violence, and murder proliferate.

These alarming violations of U.S. and international law endanger the health and safety of children. Children denied the ability to ask for protection in the United States and summarily repatriated to their country of origin run the risk of return to danger, of undertaking the dangerous journey again, and of falling prey to human traffickers. Mexican authorities fail to ensure compliance of their own child protection and asylum laws when their actions deny children the ability to ask for protection.

Recommendations

Mexico and the United States have a shared responsibility to provide access to care and protection to migrants and refugees. **The Mexican and U.S. governments must work together to ensure there is a pathway to protection for unaccompanied children.** The two governments must eliminate obstacles to protection, including procedural barriers, immediate turnbacks, and prevention of entry to ports. Bilateral negotiations between Mexico and the United States must address children's access to protection as provided for by international as well as Mexican and U.S. law. Mexico must provide care and safety to migrants and refugees on its territory and asylum to asylum seekers who qualify, as well as critically needed mental health and medical services.

The United States must not turn around a child who states or manifests a fear of return to their country of origin. The U.S. must adhere to its obligations under the TVPRA, which include allowing a child to ask for protection from a CBP official and to be admitted to the United States

²⁵ INM Statistical Bulletin 2017, http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros alojados_y_devueltos_2017; COMAR Statistics 2013- 2017, https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf
www.supportkind.org

to have their case adjudicated by immigration officials. To ensure that unaccompanied children are not inadvertently turned away, CBP officials should ask the age of every individual who approaches the port of entry to seek asylum. CBP should ask those claiming to be under the age of 18 if they are unaccompanied.

The United States should immediately end all efforts to deny asylum seekers access to the United States, including the practice of metering, which violates U.S. asylum law and international obligations under the Refugee Convention and Protocol, and leaves asylum seekers in grave danger along the Mexican border. In addition to harming adults, these efforts make it more difficult for unaccompanied children to access protection at the ports of entry.

The government of Mexico must not interfere with a child's right to present their claim for protection at the U.S. border. Mexican officials should not block an unaccompanied child from physically accessing U.S. territory to make a protection claim.

The Mexican General Law on the Rights of Children and Adolescents must be implemented in the most protective way possible to ensure safe, durable solutions for children migrating on their own. Consistent with the law, Mexican immigration officials, including Grupo Beta, should not take action to undermine children's rights or best interests. As required under this law, unaccompanied children in Mexican custody should receive a best interest determination (BID), and no unaccompanied child should be repatriated prior to completion of a BID. Consistent with Mexican obligations under the Convention on the Rights of the Child, BIDs must take into account children's wishes and potential reunification with appropriate family members who can care for the child, regardless of the country in which the family members are living. BIDs should consider all of the child's legal options, including the possibility of the child seeking protection in the United States. Children should not have to choose between receiving services and help with their basic needs—including shelter, medical and mental health attention, and food—while in Mexico, and seeking protection in the United States.

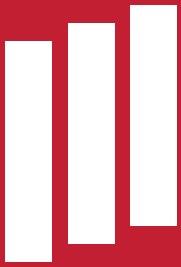
Mexico's federal office of the Child Protection Authority should issue guidance clarifying the mandate of state and municipal offices of the Child Protection Authority to defend and restore unaccompanied children's rights and to issue restitution orders that provide for the child's best interests. The guidance should clarify that when seeking protection in the United States is determined to be in the best interest of a child, an appropriate restitution order should include measures that ensure the child's access to a U.S. port of entry – including, for example, through accompaniment to the port.

The Mexican government should increase the budget for COMAR and should continue to build the capacity of its asylum system by hiring more individuals trained to adjudicate refugee cases, increasing COMAR's presence throughout the country, and streamlining processes and data collection to reduce the time from filing an application, to an interview, and to a decision.

The federal government and state governments of Mexico should increase the budgets for federal- and state-level DIFs and federal- and state-level offices of the Child Protection Authority to ensure they have the staffing and resources needed to fulfill their broad mandate under the General Law on the Rights of Children and Adolescents to protect, defend, and restore children's rights. Mexico's federal government should provide additional funds to states with relatively low levels of resources and significant numbers of migrant children, including Chiapas, Veracruz, and Tabasco, to strengthen protection for migrant children in those states.

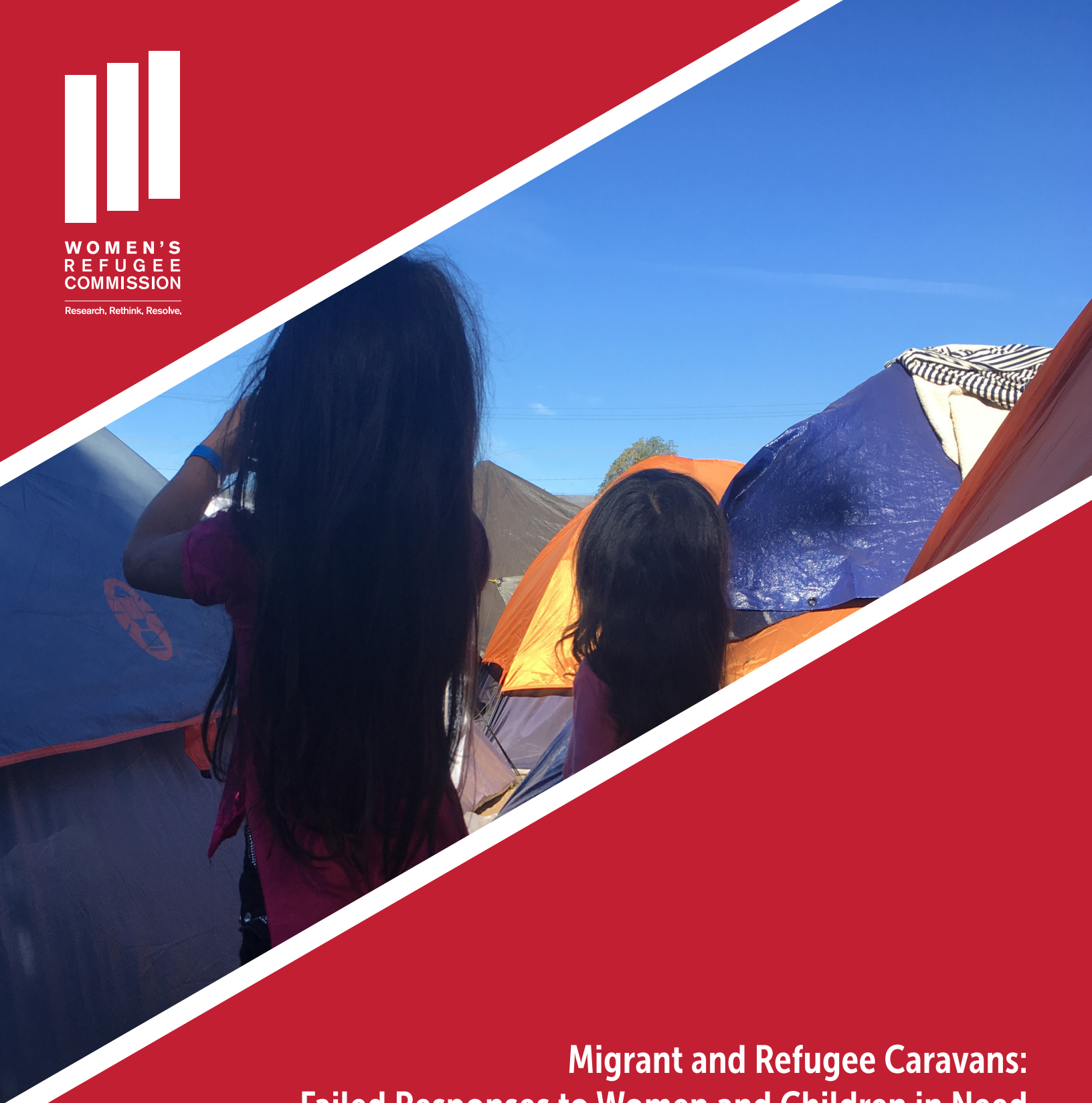
The United States and other stakeholders should address the root causes that are driving people to take the life-threatening journey to the United States by helping El Salvador, Honduras, and Guatemala promote child protection, education, and the rule of law. They must also address corruption, gang and narco-trafficker violence, and sexual and gender-based violence that pushes most children and families to flee. A long-term commitment to foreign assistance to support these efforts is key.

These children are facing complex legal systems and choices. They should be given access to lawyers to help them navigate these systems and access protections. **Legal organizations should develop child-friendly materials that can be safely accessed by children who are living in shelters and on the street in Mexico** to explain to children their rights in countries of transit and destination.




**WOMEN'S
REFUGEE
COMMISSION**

Research. Rethink. Resolve.



Migrant and Refugee Caravans: Failed Responses to Women and Children in Need of International Protection and Humanitarian Aid

May 2019



The Women's Refugee Commission (WRC) improves the lives and protects the rights of women, children, and youth displaced by conflict and crisis. We research their needs, identify solutions, and advocate for programs and policies to strengthen their resilience and drive change in humanitarian practice.

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Cover photo: Girls who traveled with the 2018 caravans at the Benito Juárez sports complex shelter.
© Michelle Brané

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"We left Honduras in July, before the caravans started. The Maras were after us.

"We moved slowly through Mexico. We were taking temporary jobs to have enough money to feed the kids and for a smuggler for the most dangerous parts of the journey. When the caravan arrived, we were already in San Luis Potosi, but we decided to go back and join it in Guadalajara. It would be safer. We were constantly afraid of being deported, extorted, robbed, or having a child kidnapped ... you know, the usual. In that, I do feel the caravan was safer than traveling alone. Also, people were nicer, they gave us food and clothes. Even a police officer helped me when my boy was dehydrated.

"But I never felt safe."

—Lili,¹ a woman from Honduras in her early 20s who joined the caravans in Mexico, traveling with her husband and four children. (Interviewed by the Women's Refugee Commission in Tijuana on November 30, 2018)

BACKGROUND

Over the last decade, an increasing number of Hondurans, Salvadorans, and Guatemalans have been forced to flee their countries of origin due to widespread criminal violence, life-threatening gender and domestic violence, and extreme economic hardship.² In recent years, particularly in the first months of 2019, the number of unaccompanied children and families forced to flee has sharply increased.³ The levels of violence and human rights violations Central Americans experience resemble those of people in war-torn countries.⁴ Notwithstanding, this humanitarian crisis has largely evolved in the shadows. It has been neglected by the US and Mexican governments, which—failing to recognize the refugee nature of the displacement—have turned a blind eye to the lack of safe and legal channels to claim asylum, as well as to the deadly risks and systematic abuses faced by Central Americans in their journey to safety.⁵

On October 12, 2018, a group of 160 people left San Pedro Sula, Honduras,⁶ one of the most violent cities in the world.⁷ The dire living conditions of people from Central America, paired with the well-known dangers of the migrant trail, proved fertile ground for turning the rumors of a historically large caravan into a self-fulfilling prophecy.⁸ By the time it reached the Mexican border with Guatemala, more than 7,000 refugees and migrants were moving north at the same time.⁹ Four additional smaller groups followed, bringing the estimated total to more than 17,900 caravan members traveling through Mexico between October and December 2018.¹⁰ Central Americans saw in caravans a traveling strategy to render themselves and their plight visible and thus obtain safe passage to Mexico and the US.¹¹



Drawing made by Salvadoran boy in psychosocial support activity. When asked to share his drawing and memories about his house in his hometown, he referred to violent incidents.

The size, cohesion, and organization of the 2018 caravan fueled constant monitoring and reporting by journalists and human rights defenders.¹² In the case of this group, putting the spotlight on people on the move generally deterred large-scale criminal activities and human rights violations. Moreover, it rallied humanitarian aid and highlighted the need for policy responses. To a certain extent, the 2018 caravans delivered on the expectation of reducing costs, granting protection, and facilitating transit through Mexico.¹³

However, a risk assessment conducted by the Women's Refugee Commission (WRC) found that the protection offered by caravans is extremely narrow. People who follow this traveling strategy still face myriad risks and protection gaps. Furthermore, WRC is concerned that, due to heightened xenophobia and immigration control, members of the caravans that traveled Mexico in the first four months of 2019 were more exposed to ever-present dangers such as police abuse and criminal activities¹⁴ and received less humanitarian support.¹⁵ Caravans had unintended consequences on public opinion and policy decisions that will affect refugees and migrants adversely over the long term.



OBJECTIVES AND METHODOLOGY OF THE ASSESSMENT

From November 26, 2018 to January 25, 2019, WRC assessed the protection risks faced by women, children, and families traveling in caravans through Mexico.

WRC engaged in semi-structured interviews with members of the caravan to learn about why they were fleeing their countries of origin and traveling in large groups, their needs, the risks they face during the journey, and their intended destination. Individuals were informed that they could refuse to participate or to answer questions they deemed sensitive. The team also met with relevant authorities and key stakeholders, such as international organizations, nongovernmental organizations (NGOs), and faith groups, to map their capacities and share concerns regarding the rights and well-being of caravan members.

WRC began the assessment in Tijuana because asylum seekers and migrants in this border city with the US had completed their journey through Mexico, which allowed them to report on the whole route. Additionally, it was the locality where the largest group concentrated for the longest time. This situation multiplied the needs and challenges in terms of service provision and protection. In Tijuana, WRC visited shelters run by civil society for families, women, and children, as well as the temporary shelters set up by the government at the Benito Juárez sports complex and the Barretal concert venue. Additionally, WRC visited the job fair offered by the Mexican National Employment Service (SNE) to learn about who was availing themselves of the option to regularize their immigration status in Mexico, how they were doing so, and why. WRC also visited the Mexican side of El Chaparral port of entry to document the dynamics that obstruct access to international protection in the US.

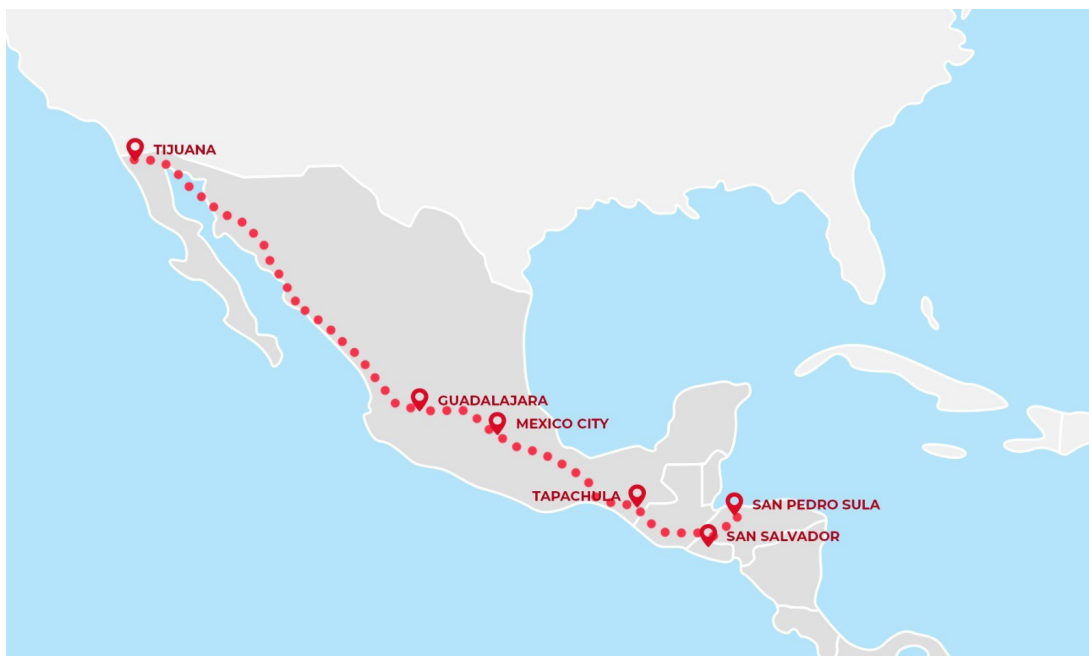
WRC returned to Tijuana to assess the evolution of the situation and follow up with persons interviewed in the first visit. The team identified the impact of having transferred refugees and migrants to Barretal as well as of the policies of the incoming Mexican administration of Andrés Manuel López Obrador.

Following the research conducted in Tijuana, WRC traveled to Tapachula to identify the needs and risks faced by the caravan when they arrived to Mexico, as well as of women, children, and youth who separated from the main group. In this border city with Guatemala, the team made a field visit to the immigration station Siglo XXI, the largest in Mexico; visited shelters run by civil society and UNHCR; and participated in psychosocial activities for refugee children.

To have a comprehensive perspective, WRC met with representatives of the Mexican federal government in Mexico City and of national headquarters of international organizations and NGOs that have provided services and protection to the 2018 Caravans and inquire about their preparedness for future caravans. Additionally, WRC conducted media monitoring and desk research.

This initial evaluation is a snapshot of a moving target and constantly changing dynamic and political context.

MAP OF THE REGION AND MAIN ROUTE OF THE 2018 CARAVAN



MEXICO: PROTECTION GAPS AND RISKS

WRC was particularly troubled by the fact that neither the caravan itself nor the Mexican government response to it provided adequate protection to women and children. The caravans provided unaccompanied children and single women the option to link themselves with a family, friends, or partner for the journey north. While these relationships offer some protections, WRC identified a significant number of cases in which they created problematic situations that led to violence and abuse. A service provider shared a story of a 12-year-old Mexican girl who joined the caravan to look for her mother, who lived in northern Mexico. On the journey, she met a family with whom she stayed for protection but eventually they restricted her movement and prevented her from speaking to or approaching authorities, service providers, and even other children. When her real identity was discovered and she was rescued and referred to Mexico's child services agency (DIF),¹⁶ authorities found her real family had been looking for her.¹⁷

Overall, pressure to stay with the caravan in a group put the most vulnerable populations at high risk by preventing them from seeking assistance and support when needed and rendering them and their specific needs invisible. WRC spoke with women and children who were unwilling to go to specialized shelters that could provide better care and services. They said they would rather sleep on the streets or stay in the overcrowded, unsafe, and unhygienic temporary shelters set up by the government than split from the larger group. A pregnant woman told the WRC that she crossed the Suchiate river just after a threatened miscarriage of her seven-month pregnancy because she did not want to be left behind in Guatemala while the rest of the group advanced into Mexico.¹⁸



Women and children told the WRC that they would rather sleep on the streets or stay in the overcrowded, unsafe, and unhygienic temporary shelters set up by the government than split from the larger group.

Despite the pressure and efforts to stay together, the caravan left women and children behind, in both a metaphorical and a literal sense. Structural barriers, such as security considerations and having to care for the children, prevented them from participating in decision-making meetings.¹⁹ Those who followed the caravan, such as humanitarian workers, human rights and international organizations, reported that, as the group advanced, the presence of women and families reduced. They pointed out that contingents composed mostly of young single men who could move faster took the lead.²⁰ WRC met a boy in southern Mexico who was unable to keep up with the caravan because his prosthetic leg broke.²¹ He is only one example. Many women, families, and people with disabilities who could not maintain the pace lagged or stopped along the route, were left behind, or opted for voluntary repatriation. Women who traveled in the caravan, service providers, and government officials expressed outrage that women and children were pushed to the front of the caravan whenever there was confrontation with authorities. Otherwise, they were left behind.²²

Furthermore, the humanitarian response, both from Mexican authorities and nongovernmental actors, was lacking and had few or no age and gender considerations, reproducing systemic obstacles that hamper women and children's access to information and services, as well as their ability to exercise their rights. WRC did not identify any safe space for women or child care services to assist them. In Tijuana, the Mexican government set up a job fair featuring representatives from the agencies that process asylum claims and humanitarian visas. Due to the lack of services that addressed women's needs, women interviewed by WRC were often unaware of the job fair because this information did not reach them or did not attend because they assumed that having to care for their children meant they would not qualify for a job, or because accessing those locations with children was a challenge.

Service provision was intermittent, placed a heavy reliance on overburdened civil society organizations and inexperienced volunteers, and was distributed without engaging beneficiaries. WRC spoke with women and children who had gone days without eating and who reported that water was scarce or not potable. Mothers and humanitarian aid workers expressed concerns that children were at risk of malnutrition.²³ People on the move slept on the streets or were housed in overcrowded, unsanitary shelters. The WRC team observed how unhygienic conditions and lack of protection against the elements resulted in widespread sickness.

Privacy and safety considerations geared to prevent sexual and gender-based violence were substandard. When WRC visited Benito Juarez and Barretal, the two temporary shelters the Mexican government set up in Tijuana to hold caravan members, the team observed that overcrowding resulted in insufficient designated space for families, women, and children. There was only one space for these three populations, which implied that even single women, women with their children, and unaccompanied girls in a so-called safe space were placed together with men they did not know. Moreover, while these shelters claimed to offer sex-separated toilets, in most cases they were rows of portable toilets that were used interchangeably and had broken locks. Showers had no privacy barriers; at best they were separated by improvised sheets and blankets.

WRC learned of instances of domestic violence, sexual harassment, physical assaults, transactional sex, forced prostitution, and rape, and yet there was no clear referral network for survivors. Assistance services were bureaucratic and cumbersome, rendering them practically inaccessible. The absence of prevention and response to sexual and gender-based violence was stark. There were no safe spaces for women to privately report abuse. When people would raise questions about post-rape care, they were met with silence and frozen looks by health care providers at Barretal, even though by law they should be available.²⁴

Access to protections in Mexico is not always meaningful. The asylum system has considerable shortcomings, including prolonged or unnecessary use of immigration detention, proceedings that last for years with restrictions on geographical mobility that force applicants to remain in insecure and underdeveloped areas, limited integration options, and underdeveloped and under-resourced refugee status determination procedures.²⁵ In the case of unaccompanied children, these shortcomings are compounded by flawed or nonexistent best interests determinations. In Mexico, children in need of international protection are inadequately screened, or not screened at all, and are often returned to places where they fear irreparable harm,²⁶ violating the principle of *non-refoulement*—a cornerstone of refugee protection that prescribes that no one should be returned to a country where his or her life or freedom would be threatened by persecution, other ill-treatment, or torture.²⁷ Furthermore, since the Mexican and US child protection services do not communicate with each other, the Mexican protection service does not consider protection or family reunification in the US as an option.²⁸

The glaring lack of information, coupled with the troubling widespread misinformation, heightened risks. WRC spoke in Tijuana and Tapachula²⁹ with refugees and migrants who were making ill-informed decisions—such as abandoning their asylum applications, rejecting moving to safer spaces, or hiring a smuggler—that increased their vulnerability and in some cases put them at grave danger. The inability of the Mexican government, international organizations, legal service providers, and humanitarian agencies to fill the information void facilitated dangerous power dynamics that led to manipulation and abuse. Both in Tapachula and in Tijuana, WRC spoke to numerous people who were deeply confused and misinformed about immigration procedures both in Mexico and the US. An accredited humanitarian worker shared that, while they gave accurate information about asylum in Mexico, people in the caravan with megaphones accused them of being untruthful.³⁰



Protection gaps were compounded by the indisputable fact that parts of Mexico are not safe.³¹ WRC learned of cases of child labor, forced prostitution, forced recruitment, kidnapping, forced drug dealing, and trafficking, as well as misconduct and human rights violations by authorities. Service providers shared stories of an accusation of sexual assault against a government official in Tapachula,³² men in Benito Juárez shelter being tricked into jobs and having been forced to clean blood from cars,³³ and girls and trans women being forcibly prostituted.³⁴ The two places where caravan members waited the longest—Tapachula and Tijuana— have a large presence of criminal organizations and are hubs of the illegal sex industry.³⁵

“A man offered me and some friends a job. He also offered to bring us to a safe shelter; that is how we got here. We did not follow up with the job offer because I noticed he had a Barrio 18 tattoo.³⁶ I have not left the shelter since we arrived. I do not want to run into him and I’m scared of gangs and organized crime operating in the city.”

—Adriana, a woman in her 40s from El Salvador who traveled in the caravan with some friends. Interviewed by WRC in Tijuana on December 19, 2018.

All service providers interviewed by WRC agreed that institutional challenges were aggravated by the Mexican government’s lack of leadership and preparedness in responding to the caravans. Even though the advance of the 2018 caravan was widely reported, when it reached Mexico there was no protocol in place to grant humanitarian assistance nor to process the arrival of large numbers of people seeking protection. Federal authorities at the time decided that local governments would be responsible for providing basic needs and social services. This resulted in poor planning, for example the government of Tijuana opening a temporary shelter with capacity for 2,000 persons that, two weeks later, held over 6,000 persons in precarious conditions. This shelter later closed, and the people still housed there at the time had to be transferred to a new shelter.³⁷ Additionally, the avenues available to caravan members to seek legal status in Mexico were constantly changing—ranging from strict border enforcement to a two-week pilot program of documenting all caravan members with humanitarian visas.³⁸





Shelters set up for migrants soon became severely overcrowded and unsanitary.

To date, no long-term policy has been outlined or implemented by the Mexican government. As a result, since mid-March there is a mounting administrative and humanitarian crisis at Mexico's southern border. More and more people are stranded in precarious conditions because Mexico's National Institute of Migration (INM) increased immigration enforcement against caravans and temporarily suspended immigration procedures in Tapachula, where the immigration station is at capacity and people are being held in detention-like temporary shelters.³⁹

One reason for the Mexican government's insufficient response for the 2018 caravans was the fact that, in the last third of that year, a significant number of authorities at all levels of government, including the president, were in a lame duck period.⁴⁰ While the synchronized displacement of more than 10,000 people would naturally create challenges, Mexico has the capacity to offer an adequate humanitarian response.⁴¹ Once the new government came into power, it has struggled to reconcile its seemingly contrasting objectives of avoiding a confrontation with the US government⁴² and fulfilling its promise of a new immigration policy that follows a human rights approach and leaves behind its deterrence and contention approach.⁴³

Improvisation, lack of clarity regarding responsibilities, changing strategies, informal procedures, and overreliance on volunteers have prevented the government from mitigating risks and left basic needs unsatisfied.

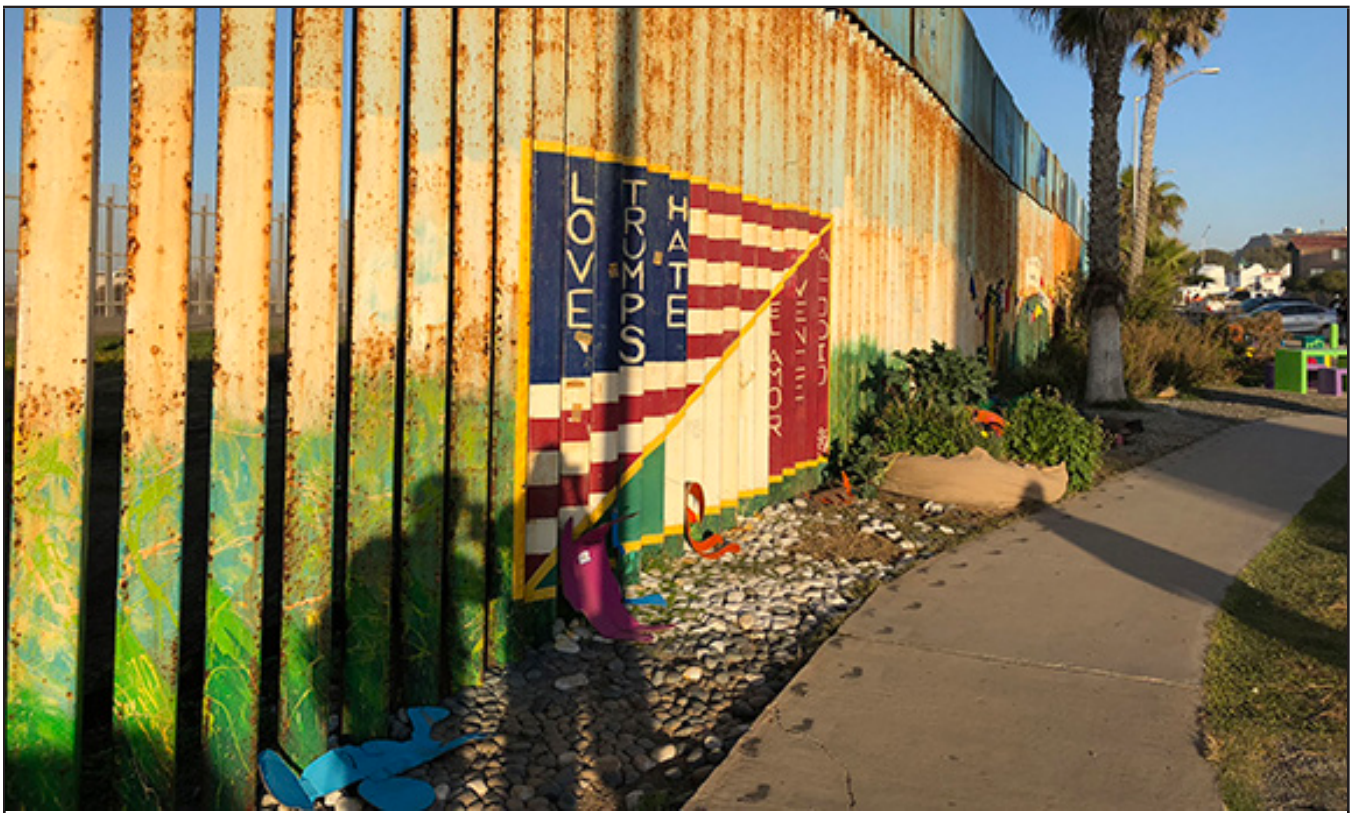
UNITED STATES: CLOSING BORDERS

Caravan members were trapped in one of Mexico's most dangerous cities⁴⁴ as a direct consequence of a preexisting US practice of turning back and regulating the number of asylum seekers that can present themselves at a port of entry (a practice known as "metering").⁴⁵ Everything about this illegal



practice, which is currently under litigation,⁴⁶ jeopardizes the rights and integrity of people in need of international protection. WRC observed on its visits to Tijuana that asylum seekers are asked to register on an unofficial list with an average two-month waiting time to present their claim. This practice was confirmed by a Customs and Border Protection (CBP) officer in San Diego⁴⁷ and is also occurring at ports of entry across the border.⁴⁸ Given that neither the US nor Mexico accept their evident participation in this ad hoc process, the list is run by migrants themselves. As it has no clear guidelines, regulations, oversight, or accountability, the process prevents the most vulnerable populations from being identified, jeopardizes people's privacy, and opens the floodgates for corruption and abuse. On the day after WRC spoke with list managers—questioning what oversight existed to prevent exploitation—the team learned of a migrant who came forward to report demands for sex and/or money in exchange for getting on the list.⁴⁹ Since then, interviews with migrants have revealed numerous instances of extortion.⁵⁰

Even more problematic, WRC identified that metering is leaving unaccompanied children with no avenue to present themselves at a US port of entry, systematically ignoring their best interests and denying their right to seek asylum or be granted protection under US laws. Unaccompanied migrant children are not only turned back by Mexican authorities when they approach a US port of entry, they are also not allowed on the list.⁵¹ CBP confirmed to WRC that unaccompanied children who approach the border without authorization are turned back and told to get in line unless they are with an attorney.⁵² Migrants managing the list in Tijuana told WRC that children must be with an adult in order to get on the list or go the border once their name is called. This practice denies children access to their right to claim protection in the US independent of related adults, in violation of the Trafficking Victims Protection Reauthorization Act, US immigration and asylum law, and the 1951 Refugee Convention.⁵³



The border.

Mexican and US immigration officials are aware of the illegalities of this practice. WRC directly informed them of our findings and concerns.⁵⁴ Nonetheless, CBP continues to accept children only reluctantly in some cases where they are escorted by Members of Congress, lawyers, or advocacy organizations.⁵⁵ These exceptions, while lifesaving for those children who find assistance, do not address the illegality of turning away unaccompanied children. Accompaniment is not a legal requirement for seeking protection. At the time of this writing, unfortunately only a handful of the more than 100 unaccompanied children in Tijuana have been identified and assisted.⁵⁶

WRC observed that unaccompanied children who have not found representation or assistance through volunteers are living in unhealthy and dangerous conditions. Children hesitate to approach Mexico's child services agency (DIF),⁵⁷ because it will not allow them to claim protection in the US—even if doing so is in their best interests. In fact, the WRC team was told repeatedly that children run from and avoid DIF, and that they are often distrustful of adults approaching them to offer assistance.⁵⁸ Left with no other option, unaccompanied children must make impossible choices between the dangers of:

- A. staying stranded in Tijuana indefinitely;
- B. entering the US without inspection between ports of entry;
- C. looking for a smuggler or another adult to accompany them across the border (thereby creating an opportunity for those who wish to traffic or otherwise harm a child to prey upon them by exploiting this practice); or
- D. submitting to voluntary return (even when it means returning to a place where their life and freedom are at risk, amounting to *refoulement*).

All these are situations the US government should aim to prevent rather than encourage. In December 2018, three Honduran children in Tijuana who traveled with the caravan and had not presented themselves at a port of entry due to metering, were tortured—and two of them were brutally murdered. At least two of them had already been identified as having a strong case for accessing protection in the US.⁵⁹ This was a painful confirmation that the caravan, Mexico, and especially the US are failing to protect children on the move. In the words of the director of the shelter where the children were staying: "It was Mexican criminals who killed them, but it was the US government who sent them to the slaughterhouse."⁶⁰

Furthermore, the 2018 caravan had the unintended consequence of giving the US government pretext to move forward with its plans to extra-territorialize the waiting time of asylum procedures to Mexican territory by expanding the interpretation of section 235(b)(2)(C) of the US Immigration and Nationality Act (INA).⁶¹ This expanded interpretation allows for the return to Mexico of asylum seekers—arriving at a port of entry or entering the US from Mexico between ports of entry—for the duration of their immigration proceedings.

This policy, officially named "Migrant Protection Protocols," also known as "Remain in Mexico," has created insurmountable barriers to due process, access to counsel, and the ability to present meaningful defenses to removal before US courts. Remain in Mexico disrupts the right to family unity for those with loved ones already residing in the US and traps asylum seekers in a potentially dangerous environment. On April 8, 2019, a federal court issued an injunction on these returns.⁶² However, this policy has not yet been ruled out. On May 7, 2019, an appeal court overturned the injunction. Remain in Mexico and metering are examples of how the US and Mexican governments are blocking access to protection and endangering migrants.⁶³



HEIGHTENED TENSIONS AGAINST IMMIGRANTS IN MEXICO AND THE US

While the visible forced displacement of large numbers of Central Americans—and the precarious, dangerous conditions in which they traveled—rallied altruistic and humanitarian support among some sectors of Central American, Mexican, and US societies, in others it fueled xenophobic sentiments that led to calls for increased border and immigration enforcement.⁶⁴

In January 2019, a new caravan began its journey in search of a safe haven.⁶⁵ Mexico's incoming administration expressed its intention to offer a comprehensive response following a human rights approach—seeming to signal a positive step to safeguard the rights of migrants, guarantee adequate humanitarian response, and address root causes by promoting regional development.⁶⁶ For two weeks in January, Mexico offered humanitarian visas to more than 12,500 caravan members arriving at Mexico's southern border.⁶⁷ However, six months in, no long-term policy has been put in place and service provision to members of caravans in Mexico still has considerable shortcomings.⁶⁸ President Trump's strong criticism of Mexico's immigration policies⁶⁹ seems to be contributing to a shift in Mexico's policy back to its old deterrence and containment approach.⁷⁰ WRC is concerned that, if implemented without adequate oversight or human rights considerations, immigration enforcement in Mexico will continue to violate people's rights and put them in extremely dangerous situations.

Heightened xenophobia, Mexico's inconsistent policies, and the US decision to continue narrowing avenues to protection suggest that future caravans might face even grimmer conditions than the 2018 caravan.

To prevent another humanitarian disaster and the loss of more lives, the US, Mexico, and Central American countries need to come together to offer a comprehensive regional response— not only to caravans but also to address the underlying refugee situation and its root causes.

RECOMMENDATIONS

Design and implement a comprehensive regional strategy

- El Salvador, Guatemala, Honduras, Mexico, and the US should **design and implement a comprehensive**, rights-based, gender- and age-sensitive **regional strategy** that honors domestic and international obligations to refugees and migrants, ensures adequate humanitarian relief to people on the move, and addresses the root causes of displacement.

Honor domestic and international law

- The US should **allow asylum seekers**—particularly unaccompanied children—to **present themselves immediately at ports of entry**, and should **stop metering** asylum seekers and implementing the Migrant Protection Protocols, also known as **Remain in Mexico**.
- Mexico should oppose **US actions that limit access to protection** in violation of international law,



including the Migrant Protection Protocols and safe third-country declarations.

- Mexico and the US should **establish** communication, collaboration, and referral **mechanisms to respect the best interests of the child** where appropriate.
- Mexico and the US should **streamline** their **asylum systems**—while still ensuring due process, family unity, and non-refoulement—**and enhance reception capacity**.
- All relevant actors should actively **counter growing anti-immigrant rhetoric and practices**.

Ensure adequate humanitarian relief

- All relevant actors⁷¹ should **prioritize planning and preparedness** for large displacements of people, and **meaningfully engage refugees and migrants**.
- Mexico should comply with international standards and guidelines for shelter sites and service provision.
- **International humanitarian agencies should offer technical expertise, and capacity**.
- All actors should **ensure availability of and access to information**.
- **Human rights defenders** should continue to **monitor and take adequate measures when abuse is identified**.

Address root causes

- All governments should continue to advance initiatives that **promote human security, rule of law, accountability, and prosperity in the region**.



ACRONYMS AND ABBREVIATIONS

CBP	US Customs and Border Protection
COMAR	Mexico's Commission for Refugee Assistance
DHS	Department of Homeland Security
DIF	National System for Integral Family Development
IACHR	Inter-American Commission on Human Rights
IOM	International Organization for Migration
INM	Mexico's National Institute of Migration
KIND	Kids in Need of Defense
NGO	Nongovernmental organization
SEGOB	Mexico's Ministry of the Interior
SNE	Mexico's National Employment Service
SRE	Mexico's Ministry of Foreign Affairs
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees
WOLA	Washington Office on Latin America
WRC	Women's Refugee Commission

ENDNOTES

- 1 All names have been changed to protect the privacy and identity of the persons interviewed.
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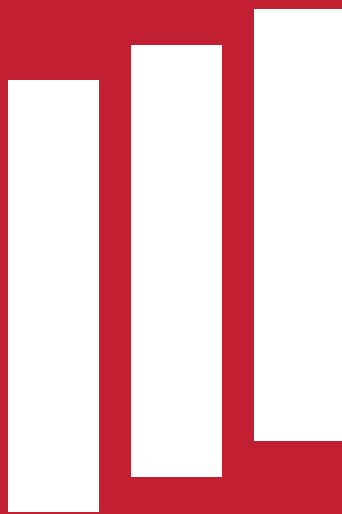


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