

# **DETAINED MIGRANT CHILDREN: ILLEGAL, DISCRIMINATORY, AND RACIALIZED NORMS IN MEXICO AND THE UNITED STATES**

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## **Introduction**

One of the actions states carry out to control irregular migration is to detain migrants who do not have an entry or residency permit or a job, and then later to expel or deport them. This implies criminalizing irregular migration and is the cause of mistreatment and other violations of the human rights of these persons. In the case of children,<sup>1</sup> detention is never an appropriate option and only increases the vulnerability they are already subject to. In addition to their age, that vulnerability stems from the fact that they are mobile in the first place, that some are unaccompanied or have been separated from their parents, from their irregular migratory status, their ethnic group, gender, sexual preference, and gender identity in the case of adolescents, and also, to a great extent, from the context of generalized violence they come from.

Despite the fact that international human rights norms state as a general principle that children should not be detained due to irregular migratory status, both Mexico and the United States have illegal, discriminatory, racist systems for the detention of unaccompanied child migrants. In fact, in these two neighboring countries, detention is a fundamental part of their policies of control and dissuasion of irregular migration, despite the fact that it violates human rights and for years has proven to be inefficient.

The central hypothesis of this chapter is that, in practice, the political imperative of controlling irregular migration takes precedence over the right of unaccompanied migrant children to not be detained and to be treated with dignity, regardless of the country involved and how that country views international human rights law.

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<sup>1</sup> In this chapter, I will use the terms “children,” “boys,” “girls,” and “adolescents” interchangeably.

First of all, I study the principle of non-detention of unaccompanied migrant children in international law, which in general terms affirms and recognizes that right; however, it also recognizes that in practice migrant children are detained. For that reason, it stipulates that if detentions do take place, it must be as a measure of last resort and must be done with certain guarantees.

Secondly, I analyze the detention system for migrant children in Mexico, which is legalized in migratory legislation and policies, and illegalized in laws protecting the rights of children on different levels (international, constitutional, and federal) that affirm the principle of their non-detention. That is to say, in Mexico a constant tension exists between the different normative spheres (control/protection) that coincide in the treatment of migrant children; without a doubt, control predominates. This is a normative framework that comes under no convention, is unconstitutional and illegal and has normalized and legalized differentiated, discriminatory treatment of migrant children for the simple fact of being migrants.

Thirdly, I examine the U.S. detention system in a country that has an open preponderance of border control constitution the rights of children, to the point that it does not even have a provision stipulating that children have the right not to be detained. The detention system for unaccompanied migrant children is completely legal there, but “shielded” by a series of legal guarantees so that detention conditions are the least onerous possible for the children. The issue is that these protections rest on racialized laws that apply only to one class of unaccompanied migrant children, excluding Mexicans from that sphere of protection. That is, the law openly and in a racist way only protects one class of children.

Fourthly, I conclude that both Mexico and the United States offer no effective protection for unaccompanied migrant children, but rather criminalize them and treat them according to illegal, discriminatory, racist standards directly conflict that with the human rights proclaimed by the international system. Thus, when children become migrants, they lose access to the rights they have as children and, in general, as persons, given that the access to those rights unfortunately continues to be inextricably linked to the citizenship/nationality binomial and the legal/ processed migratory status in the case of non-nationals.

## **The Principle of Non-Detention of Migrant Children in International Law: Detention as a Measure of Last Resort with Guarantees**

Legally, detention of a migrant because of his/her migratory status, regardless of age, can be called for in two situations.<sup>2</sup> As a *criminal sanction*, for breaking immigration law, which penalizes, among other things, a) the irregular entry of foreign persons into a country or their entry through non-official places; b) entry into the country when a prohibition of re-entry is in place; c) being in the country when the law stipulates specific entry impediments; or, d) being in the country in order to work, study, or reunify with family without the corresponding authorization. This is the case of states that expressly penalize and criminalize irregular migration. The second situation is as a *precautionary measure* (administrative detention), in order to a) investigate a foreign individual's migratory status that is presumed to be irregular; b) investigate their identity; c) ensure their permanence and accessibility while their administrative proceedings for expulsion or deportation are being carried out; or, d) ensuring that their expulsion/deportation order is carried out and they leave the country.

The detention of migrants due to their irregular migratory status, whether as a criminal sanction or as a precautionary measure, criminalizes the migrant and is the cause of mistreatment and human rights violations. However, the practice is generalized in different places despite the negative effects it has on migrants and their human rights. When dealing with children, it never seems an appropriate option and results in the increase in the vulnerability they are already subject to because of factors such as: traveling unaccompanied or having been separated from their parents, irregular immigration status in their destination country, ethnic background, gender, sexual preference, gender identity, and the context of generalized violence they have left behind.

<sup>2</sup> In this essay, I refer to a person as being "detained" if he/she has been deprived of his/her freedom, without being able to freely enter and leave the place where he/she is lodged, regardless of the different terminology or euphemisms used to describe that situation: to house, to apprehend, to secure, to intern, to lodge, to have in custody, to hold, etc. This is because what is important are the practical implications and the legal nature of this fact, which often lead to understanding it in accordance with the principles, norms, and standards involved in the right to personal freedom.

For all of these reasons, in international law, the principle of non-detention of migrant children prevails. In fact, current human rights discourse maintains that all children, regardless of who they are, have rights and require that states adopt special protective measures due to their age and the vulnerable circumstances they are in, for example, due to their mobility. Thus, international human rights norms stipulate that, regardless of their nationality or immigration status, migrant children must have access with no discrimination whatsoever to a minimum level of rights in the state they find themselves in, guaranteeing them and respecting at all times their best interests, their right to survival and development, and their right to be heard in those proceedings that affect them (Ortega Velázquez, 2019).

Specifically, with regard to detentions, the conventions on the Rights of the Child of 1990, the international standard par excellence for the rights of the child, stipulates that detention must be considered the very last resort and absolutely exceptional (Art. 37 b, c, and d). In the words of the Inter-American Court of Human Rights (IACHR), taking migrant children's freedom away as a punitive sanction to ensure migratory control is "arbitrary" and contrary to the American Convention on Human Rights (COIDH, 2014a: par. 147). In the same way, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) has stated,

In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37 (b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation. (CDTM, 2013: par. 61)

The UN High Commissioner for Refugees (UNHCR) has stated that children who need international protection must never be detained and, whenever possible, must be handed over to the care of family members already residing in the country of asylum. Otherwise, the authorities whose duty

is to assist unaccompanied children must find alternative solutions to ensure they have appropriate accommodations and supervision (ACNUR, 1999: Directive 6).

Thus, we can say that the general rule in international law is non-detention of children for migratory reasons. And, diverse national and international bodies that work on human rights issues have made declarations in the same vein. For example, when the CMW examined rulings that stipulated the loss of liberty for infringing on regulations governing entry into a country, it has recommended that, in order to adjust national legislation with the Convention on Migrant Workers, as well as other international instruments, depriving a person of his/her liberty for having irregularly entered in the territory [of another state] should be eliminated as a crime punishable by law (CDTM, 2006: par. 15). Along the same lines, Mexico's National Human Rights Commission has emphasized that "the criminalization of undocumented migrants . . . increases their vulnerability, since they are at all times susceptible to the arbitrary actions of federal, state, and municipal public servants for extortion, mistreatment, and, on occasion, even sexual abuse" (CNDH, 2005: 2).

If a child migrant is detained, international law maintains, on the one hand, that certain substantive and procedural guarantees must be observed as required by international and national norms to avoid an arbitrary detention. On the other hand, specific protection mechanisms must be included to make sure those guarantees are appropriate for children's rights, particularly the principle of the best interest of the child (Art. 9, International Pact of Civil and Political Rights, and Article 7 of the American Convention on Human Rights) (COIDH, 2001a: par. 124; 2001b: par. 102; 2022: par. 115-135; 2003a: par. 123). Any restriction to the right of personal freedom must be imposed exclusively due to the causes and conditions established beforehand by the constitutions or laws emanating from them and specifically stated in them, and subjected strictly to procedures defined objectively therein (COIDH, 2014a: par. 416 and 419).

In the case of children, the right to be heard (Art. 9.2, Convention on the Rights of the Child) is particularly important: they must be given swift access free of charge to legal assistance and assistance of other kinds, and in addition, they must have a tutor and legal representative appointed for them to defend their interests and ensure their well-being (Comité sobre los Derechos del Niño, 2005: par. 63). Any delay in the implementation of these

measures represents a threat to their safety, leaving them more exposed to the risk of being victims of trafficking and other abuses (Asamblea Parlamentaria del Consejo de Europa, 2005). These guarantees must also be taken into account in the framework of the procedures related to alternative measures to detention (or to determine the most appropriate option in each case). In addition, children must be guaranteed the right to question the legality of being deprived of their freedom before a court or other competent, independent, and impartial authority, and to a swift decision about that action (Art. 37, Convention on the Rights of the Child). That is, they must be guaranteed the right to have effective recourse to avoid arbitrary detention (COIDH, 2003a: par. 126; TEDH, 2002).

In cases of detained unaccompanied migrant children, the right to contact a family member is fundamental. That is why both the detaining authority and those in charge of the place where the child is held must immediately notify his/her relatives or representatives, taking into account his/her best interest. The aim of the notification is so the child may receive timely assistance from the person contacted (COIDH, 1999a: par. 106; 2003b: par. 130; 20004: par. 93). Finally, migrant children have the right to consular assistance, recognized for any foreign person detained outside his/her country of origin, according to Article 36 of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990). This right implies the detainee's ability to communicate with a consular official and that the state in whose territory he/she was detained must notify him/her of that right and ensure the means for making it a reality (COIDH, 1999: par. 119).

In short, international law affirms in general terms the principle of non-detention of unaccompanied migrant children. However, it recognizes that in practice these detentions do take place, and therefore stipulates that they must be made only as a last resort and observing certain guarantees.

### **The Detention System in Mexico: Illegal, Discriminatory Norms, and Counterposed Normative Frameworks**

In Mexico, constant tension exists between the normative frameworks that come into play in dealing with migrant children: on the one hand, the frame-

work of the rights of the child, whose constitutional and federal regulations offer solid bases for saying that migrant children may not be detained in the country; and, on the other hand, the immigration framework, whose federal norms also offer solid bases for maintaining that Mexican immigration law has legalized in a discriminating, differentiated way the detention of migrant children, contravening the international, constitutional, and federal framework of the rights of the child. That is, Mexico has two counterposed normative frameworks: one for protection, based on the international human rights system, and the other for control, based on border controls. The latter is the one that prevails.

#### a) THE NORMATIVE FRAMEWORK FOR PROTECTION

Article 4, paragraphs 9 and 11 of the Mexican Constitution recognizes the principle of the best interests of the child, which must guide all actions of the state with regard to children and closely follows that established in the Convention on the Rights of the Child. In addition, Article 1 of the constitution stipulates that all persons in Mexico shall enjoy the human rights recognized in the document and the international treaties the country is party to. This implies that the norms and principles both of the universal system and the inter-American system of human rights are fully applicable and mandatory for all authorities since Mexico has ratified both the Convention on the Rights of the Child (September 21, 1990) and the American Convention on Human Rights (March 2, 1981), plus the fact that it has accepted the jurisdiction of the Inter-American Court of Human Rights (December 16, 1998), responsible for enforcing the American Convention.

The 2014 General Law on the Rights of Girls, Boys, and Adolescents (LGDNNA) focuses on protection and recognizes that children have rights and are a priority group that requires special intervention; at the same time, it recognizes that they must be considered in their own terms and that they require a distinct, specific approach. In addition, it includes special protection measures for vulnerable groups, such as migrant girls (Art. 89). The law also stipulates that shelters to house the children must be managed by the National System for Integral Family Development (DIF) and that they must fulfill standards of well-being (Art. 94), such as respect for the principle of

separation and the right to a family unit (Art. 95). Due to the logic of holding children for as short a time as possible in closed-door facilities, the LGDNNA obliges DIF authorities to find as soon as possible the best solution for the child and avoid his/her stay in shelters given the last-resort, exceptional nature of this measure, which implies, in the last analysis, that the child is not free (Art. 111.VIII).

b) THE NORMATIVE FRAMEWORK FOR CONTROL:  
ILLEGAL, DISCRIMINATORY NORMS

The 2011 Migration Law uses a security approach and stipulates that all migrants who cannot prove their legal presence in Mexico shall be detained at a National Migration Institute (INM) immigration station as a matter of “public order,” until their immigration status can be determined (Art. 99). The law calls the act of depriving a migrant of his/her liberty as “presentation,” which implies “temporary lodging,” until his/her immigration status can be regularized or he/she can be “helped to return.” Nevertheless, regardless of the euphemism utilized, we are talking about being detained at an immigration station for later deportation.

In the case of unaccompanied migrant children, the INM is obligated to immediately turn them over to the DIF in order to put a priority on their being held in places where they can receive appropriate attention while their migratory situation is resolved and so the consulate of their country can be advised (Art. 112.I). However, breaking with the logic of protection for all children required by the LGDNNA, the Migration Law allows migrant children to be “lodged” under “exceptional circumstances” in immigration stations until they are transferred to a DIF facility (Art. 112.I). These “exceptional circumstances,” according to Article 176 of the law’s regulation, are the unavailability of DIF shelters and in cases when the children require attention that “cannot be offered” in the DIF shelters. Thus, the law allows for the detention of migrant children under these circumstances and leaves the authorities with a very broad margin of discretion for determining what the “exceptional circumstances” are that allow them to detain them in immigration stations. Once the children are detained, INM Children’s Protection Officials (OPI) must begin proceedings to determine their best interest and



establish the protective measures to ensure it (Art. 169 to 177 of the Regulation and Art. 4 and 7 of the Circular that Stipulates the Procedure for Attention of Unaccompanied Migrant Boys, Girls, and Adolescents).

The law states that the detention can only be made by INM personnel and it cannot exceed thirty-six hours, counted from the time when the person is placed in the custody of the INM (Art. 68). However, Article 111 states as a general rule, that from the moment when detainees are “presented” (detained), the INM has fifteen more working days to resolve their immigration status. This time period can be extended to sixty working days when there is no information about their identity and/or nationality, or difficulties arise for obtaining their identity and travel documents; when the consulates of the country of origin or residence need more time to issue those documents; when there is an impediment for their travel through third countries or obstacles for establishing the itinerary for travel to their final destination; and when a medically accredited illness or physical or mental disability makes it impossible for them to travel. This time period can be extended indefinitely—as, therefore, can the detention of the individuals involved—if an administrative appeal (a request for review) or a legal appeal (a request for appeal) is presented (Art. 111).

The length of detention stipulated by the Migration Law is excessive and violates Article 21 of the Constitution, which sets thirty-six hours as the maximum duration of an administrative detention, which is the kind of detention a migrant is subject to. However, immigration authorities have attempted to play a game of concepts, arguing that, since it is not a detention, but a “lodging,” they are not limited to the thirty-six hours established in the constitution (Sin Fronteras IAP, 2012: 17).

In short, the Migration Law and its regulation has openly legalized the detention of migrant children at immigration stations for excessive periods of time that are not in accordance with the general standards applied to the administrative detention of other persons who are not migrants. This is in frank contradiction to the international, constitutional, and federal normative frameworks that prohibit their detention and argue for differentiated treatment, precisely due to their age, and for the protection of all children. The Mexican detention system is characterized by conferring differentiated, discriminatory treatment that is disrespectful of their rights to migrant children for the simple reason that they are migrants. What prevails in this case

is not their status as children and human rights, but their status as migrants and the security approach. For this reason, the Migration Law has escape valves that allow them to be detained “in exceptional circumstances.” The problem is that the system operates almost entirely through the exception and detains children every day, despite all the legal human rights norms that prohibit it.

The main effect of all of this is that these children’s vulnerability is increased and their human rights are violated even more (CNDH, 2005; Musalo and Frydman, 2015; Ceriani, 2012). This unmasks at least two situations in Mexico: the de facto criminalization of irregular migration and the lack of immigration laws, practices, and policies with an approach compatible with children’s rights and needs (Consejo de Derechos Humanos, 2009: par. 24-25). Thus, in Mexico, migrant children fall between two radically opposed normative spheres: one that is inclusive and aims at protection, referring to the rights of the child; and another that is exclusionary, that aims at control, with reference to the national policies and laws for controlling irregular migration (Ortega Velázquez, 2015).

### c) THE DETENTION SYSTEM IN ACTION: ILLEGAL, DISCRIMINATORY PRACTICES UNDER COVER OF COUNTERPOSED NORMATIVE FRAMEWORKS

Mexico’s detention system is illegal and discriminatory: it violates the international, constitutional, and federal standards of children’s rights and human rights. What is more, in practice, the treatment of migrant children in Mexico also violates the standards of the Migration Law itself (even taking into account its own illegal and unconstitutional aspects and its not conforming to international conventions).

In the first place, despite the fact that most of the time the children are detained by INM agents, reports also exist accusing federal, state, and municipal police forces of also detaining them, often illegally, since they are not authorized to do so and can only do so with a prior cooperation agreement with the INM (CNDH, 2006). In addition, the OPI, which should accompany the children throughout the entire process, has been criticized because it suffers from the conflict of interest of being judge and jury in the migratory process, as well as being insufficient in number and not being well trained in children’s

rights (INSYDE, 2013: 3; CNDH, 2016: 78 and following; Consejo Ciudadano del Instituto Nacional de Migración, 2017: 80).

In the second place, although the law stipulates that the INM must immediately transfer unaccompanied migrant children to DIF shelters, in practice, this only happens to a very limited extent. The main reason is the DIF's operational and financial incapacity. For example, a 2015 study points out that only 6 percent of the children who arrived at a detention center were transferred to a DIF shelter. Two things happen to the remaining 94 percent: they are summarily deported or they remain in detention at the immigration stations for 15 to 300 days (Musalo and Frydman, 2015).

In the third place, the best interests of the child are not respected:

- 1) Immigration detention centers are closed spaces that do not guarantee the rights that the children must be able to exercise during their stay (education, recreation, health, appropriate nutrition, etc.), and not all of them have a specific space for children (Consejo Ciudadano del Instituto Nacional de Migración, 2017: 140-144; Asilegal, Sin Fronteras and FUNDAR, 2019: 32; CNDH, 2005, 2017);
- 2) The best interests of the child are not determined in the administrative immigration proceedings. The case files are identical for children and adults. This is very serious if we take into account that children, precisely due to their age, do not have the ability to understand, interpret, or evaluate their participation in those proceedings that an adult would (Asilegal, Sin Fronteras, and FUNDAR, 2019: 21; Consejo Ciudadano del Instituto Nacional de Migración, 2017: 81, 146-147);
- 3) Some reports point to children remaining in detention at immigration stations for from 15 to 300 days (Musalo and Frydman, 2015). This detention is prolonged even further if they seek asylum and are held in DIF shelters (Georgetown Law Human Rights Institute Fact-Finding Project, 2015: 30), up to six months (Asilegal, Sin Fronteras, and FUNDAR, 2019:21);
- 4) No real, legal alternatives to detention exist. The law includes as the only possibility that of undergoing the immigration proceedings at liberty in "custody" (Art. 101), which would mean that the migrant would be handed over in custody to his/her diplomatic representative or a recognized, respected entity or institution whose aim is linked to the protection of human rights. However, this alternative is very lim-

ited: for example, in 2013, fourteen persons were handed over in this kind of custody (Sin Fronteras, 2012). And despite the fact that more have been given this treatment in recent years, it does not seem to be a widely used measure (Consejo Ciudadano del Instituto Nacional de Migración, 2017: 42).

In the fourth place, under the pretext of the COVID-19 pandemic, in 2020, Mexico detained and summarily deported unaccompanied migrant children to their countries of origin in the first months of the pandemic. It is estimated that from March to July 2020, Mexico deported 447 children, especially to El Salvador, Honduras, and Guatemala (UNICEF, 2020). This practice violates sanitary standards to prevent the propagation of the virus to other countries, since the children were deported without having tested them to see if they had COVID-19. In addition, their rights to due process and to request asylum were also violated. What is more, they were returned to the very places and to the people from whom they were fleeing (for example, street gangs in the case of the countries of northern Central America). This puts their lives at risk in two ways: not only because they return to the context of violence and poverty they were initially fleeing from, but also because of the stigma and discrimination they face because of their return and being possible carriers of the virus, in addition to the imminent collapse of the health services in their countries of origin (Ortega Velázquez, 2020a).

## **The Detention System in the United States: Racialized, Instrumentalized Laws**

### **1. A LEGAL DETENTION SYSTEM WITH “PROTECTIONS”**

In the United States, the system openly gives border control preponderance over the rights of the child: unaccompanied migrant children do not have a fundamental right that protects them from detention, either internationally or constitutionally. In this country, the system for the detention of unaccompanied migrant children is completely legal, but is “shielded” by a series of protections established in a legal decision and two federal laws that regulate the conditions of detention and establish standards of their protection while in government custody.

Internationally speaking, the standards for non-detention of migrant children established in the Convention of the Rights of the Child are not binding for the United States because it has not ratified this international treaty. On a regional level, despite its being a member of the Organization of American States (OAS), the inter-American standards prohibiting the detention of migrant children also do not apply because it has not ratified the American Convention on Human Rights, nor has it accepted the jurisdiction of the Inter-American Court of Human Rights (COIDH). Thus, the United States has a weak—or practically non-existent—acceptance of the international standards regarding children.

On a constitutional level, the Supreme Court has decided that unaccompanied migrant children do not have a fundamental right to be free of government custody because “juveniles, unlike adults, are always in some form of custody” (U.S. Supreme Court, 1993: 302). In 1985, human rights defenders brought a suit against the government in the case of *Flores v. Meese* to question government policy on custody of unaccompanied migrant children (U.S. Supreme Court, 1993: 296). In this case, the plaintiffs argued that the right of due process had been denied the children due to the conditions of their detention and restrictive policies about liberty. However, the court maintained that “the best interests of the child” is likewise not an absolute and exclusive constitutional criterion for the government’s exercise of the custodial responsibilities that it undertakes” (U.S. Supreme Court, 1993: 304). For this reason, since no fundamental right was involved, the court concluded that the regulatory legislation of the Immigration and Naturalization Service (8 c.F.r. § 242. 24) did not infringe on the detained children’s right to due process, and that, rather, to the contrary it was part of the pursuit of a “legitimate public end” that the court itself identified as “the children’s welfare” (U.S. Supreme Court, 1993: 306-311). Thus, for the court, the detention of unaccompanied migrant children does not violate the Constitution. The only important point from the constitutional point of view is that the detention must comply with minimum standards and that the children’s fundamental rights must not be infringed upon (U.S. Supreme Court, 1993: 303-304).

The detention system for unaccompanied child migrants is regulated in three instruments: the legal settlement agreement of *Flores* (the government’s response to the *Flores v. Meese* case) and two federal laws.

- a) The Flores Agreement of 1997 is centered on three issues:<sup>3</sup> 1) it requires that the government free children from migratory detention without unnecessary delays into the custody of their parents, other adult relatives, or authorized programs that are willing to accept their custody; 2) if the aforementioned is not possible, it requires that the government place the children in a “less restrictive” environment, appropriate for their age and any special need they may have; and, 3) it mandates the government to implement minimum standards of well-being for the care and treatment of the children in migratory detention.
- b) The Homeland Security Act of 2002 (§462) mandates, on the one hand, the Department of Homeland Security (DHS) to detain, transfer, and deport unaccompanied migrant children, and, on the other hand, the Department of Health and Human Services (HHS), through its Office of Refugee Resettlement (ORR), to care for and take custody of unaccompanied children during their stay in the country. In the custody of the ORR, the children receive basic education services, are evaluated by social workers and health professionals, and are assigned a social assistant who aids in handing them over to a qualified sponsor, who may be a parent, a close or distant relative, or an unrelated sponsor (GAO, 2016: 30). The ORR’s general orientation is to place the children in the least restricted environment possible and connect them with a tutor or sponsor in the United States. In certain circumstances, in addition, it must do follow-up services to guarantee the child’s safety after reunification.
- c) The Trafficking Victims Protection Reauthorization Act 2008 codifies parts of the Flores Agreement and includes three categories of protections to 1) improve the care and custody of unaccompanied children; 2) guarantee the safe placement of these children with tutors or sponsors; and, 3) make the immigration process friendlier for the children. The law requires the DHS, through Customs and Border Protection (CBP), to notify the ORR that it has an unaccompanied migrant child in its custody within forty-eight hours of the apprehension. Then, ICE must transfer the child to the ORR within seventy-two hours. However, in the case of children from Mexico or Canada, this is only pos-

<sup>3</sup> The full name of the agreement is the Stipulated Settlement Agreement, *Flores v. Reno* CV 85-4544-RJK (Px) (CD Cal 1997) (Flores Agreement).

sible if they argue before the DHS that they have been victims of human trafficking or they fear a return to their country of origin. Otherwise, they are deported to their country of origin (8 USC, §1232 (a) (2); (b) (1) (2) (3); (c) (2)).

In short, in the United States, unaccompanied migrant children have neither a fundamental nor a human right to not be detained in accordance with the international standards. The fact that children must always be under government custody because of their age is normalized and legalized, but judicial and legal standards do exist that regulate the treatment of their detention. In general, priority is given to their being handed over to relatives or, if that is not possible, their being placed in the “least restrictive” environment possible. In addition, the conditions of detention must comply with minimum criteria for the well-being of the children.

## 2. THE DETENTION SYSTEM IN ACTION: RACIALIZED AND INSTRUMENTALIZED LAWS

The legal, protective, humanitarian detention system for unaccompanied migrant children in the United States does not operate in practice as stipulated by the legal bases that “shield” them with protection.

In the first place, this is because the system’s protections are constructed with the exclusion of Mexican children. That is, it is a system whose protective standards are based on racialized norms that protect a certain class of children and exclude the children who are nationals of Mexico or Canada—a country from which it is very improbable that there will be a large number of unaccompanied migrant children, compared to Mexico. Mexican children who migrate alone and are apprehended by the DHS only have the right to be transferred to the ORR and enjoy the protections mentioned in the Flores Agreement and the national security and trafficking laws if they argue that they have been victims of trafficking or are afraid to return to Mexico. In all other cases, they are detained in immigration jails to await deportation to Mexico.

In the second place, this is because the system in action, just like in the Mexican case, does not operate as stipulated by law; much less is there

respect for the best interests of the child (Lee and Ortega Velázquez, 2020). For example, the transfer of unaccompanied migrant children—clearly, the non-Mexicans—to the ORR does not always happen in the seventy-two hours stipulated by law, and the children often remain in the CBP border cells for longer periods (LIRS, 2015: 13; Rogerson, 2016: 871). In addition, the Trump administration made it more difficult in recent times for children to be released from ORR custody to that of qualified sponsors because of a policy that requires fingerprint and verification with ICE of the sponsor's immigration status (ORR, 2019). This criminalizing policy dissuades parents or relatives, who are also migrants with irregular status, from requesting custody of the children, despite the fact that they would be the most appropriate adults to care for them (Justice for Immigrants, 2019).

In the third place, this is because the system has a predetermined approach: usually the ORR institutionalizes the children in large bodies. In fact, they are not placed in more appropriate places because the DHS does not give it information about the children's background that would help with an appropriate placement (LIRS, 2015: 15-16, 22-23; Aronson, 2015: 39-40). In addition, in these institutions, the information about the children, including their meetings with counselors, is not confidential, and can be used against them during their immigration proceedings (Nilsen, 2018). Recently, federal data even revealed thousands of complaints about sexual abuse and harassment of children in these facilities (Gonzales, 2019).

### 3. RACIALIZED AND INSTRUMENTALIZED LAWS THAT FORM THE BASIS FOR THE DETENTION AND DEPORTATION OF UNACCOMPANIED MIGRANT CHILDREN FROM THE UNITED STATES IN TIMES OF COVID-19

Taking advantage of the COVID-19 pandemic and in order to “stop the spread of the virus” (International Rescue Committee, 2020), the U.S. government has intensified the detention and swift deportation of irregular migrants, both children and adults, and of asylum-seekers. It does this regardless of whether it deports migrants who have contracted the COVID-19 virus (Montes, 2020), thus propagating the virus (Kassie and Marcolini, 2020) in poor countries (Brigida and Pérez, 2020) with broken health systems. In the case of the children, the Trump administration violated their right to due process and



to apply for asylum and completely ignored the legal protections that exist in the detention system for unaccompanied migrant children.

The Trump administration legally based these practices on the March 24, 2020 Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists (HHS, 2020), an interim emergency regulation that allowed the Centers for Disease Control and Prevention (CDC) to prohibit the entry into the United States, for reasons of public health, of persons who could propagate diseases, in accordance with the faculties given them by the Title 42 of the Code of Federal Regulations §70 and §71. The peculiar thing about this norm is that it is only applicable to a certain class of persons: undocumented migrants, including asylum-seekers and unaccompanied migrant children who arrive by land to one of the U.S. borders; and the southern border with Mexico is clearly the one with the most traffic (Ortega Velázquez, 2020).

The justification for this racialized norm is that these persons could be carriers of COVID-19 and that they could be a threat for the detention centers and their staff (Kanno-Youngs and Semple, 2020). For this reason, when Border Patrol agents apprehend them on the borders, especially the southern border, they summarily deport them (Lind, 2020), mainly to Mexico (Miroff, 2020), even if they argue that they fear persecution in their countries of origin or if they are unaccompanied migrant children.

This policy dismantles the legal protections written into the detention system for unaccompanied children, since none of the regulations included therein are followed. Some children are deported only hours after stepping onto U.S. soil. Others are taken out of U.S. government shelters in the middle of the night and put on airplanes without even telling their families (Dickerson, 2020), in direct violation of the ICE policy that stipulates that they must only be repatriated during the day (Congressional Research Service, 2020). Still others are detained and shut away in hotels for days or weeks instead of sending them to government shelters, which are empty and where they would be able to get legal advice, to await deportation to their countries of origin (Merchant, 2020). This situation is quite controversial and has already sparked legal suits against the Department of Justice. The latter has attempted to evade court supervision by detaining unaccompanied children in hotels, arguing that the hotels fall outside the area of protection offered by the Flores Agreement (AZCENTRAL, 2020).

The deportation of almost 2,000 unaccompanied migrant children (*Dallas Morning News*, 2020) in the middle of the pandemic flagrantly contravenes the norms of the legal protections in the case of being apprehended and detained by the DHS. In the past, if they arrived at the border without an adult, they had access to an administrative procedure that allowed them to argue their reasons for staying in the United States. Those who did not manage to pass through this filter were deported to their countries of origin, but care was taken that they would have a safe place to return to. In today's context, these practices are no longer current and the U.S. system is one of "custody keep-away" (O'Toole, 2020); later, they deport them alone, returning them to the places they have been fleeing from.

In short, the CDC order is not part of a coherent public health plan for dealing with the pandemic. Rather, it is a clear example of how the law is instrumentalized to serve specific political interests in racist, classist immigration and asylum management by the United States.

## Conclusions

Since the adoption of the Convention on the Rights of the Child (1989), children's rights have become an important international concern. An entire discourse has been constructed around them, which fights to consider them subjects with full rights and to whom states owe certain extra obligations due precisely to their age. This discourse, rising out of human rights, is based on non-discrimination and is written in the convention as the maxim, "all children, all rights." This means that the enjoyment of the rights established therein is due to all children present within the jurisdiction of a state, regardless of whether they are nationals or foreigners (whether they have regular or irregular immigration status), refugees, asylum-seekers, or those without a country.

Despite this, when certain issues involve the sovereignty of states (for example, the handling of migrants and asylum-seekers), the human rights discourse no longer seems so clear. In the case studied in this chapter, international law affirms in general terms the principle of non-detention of unaccompanied migrant children. However, it also establishes an escape valve so that detention of these children can take place; but in that case, certain guarantees must be established and it must take place as the last possible

resort. That is, there is no absolute human rights norm that protects migrant children from detention, despite being children and not having committed any crime. The international system itself recognizes the possibility that detentions happen, but as a last resort and fulfilling certain guarantees.

The government administration of migrants uncovers the nation-state's mechanisms of exclusion of the "others" (foreigners), reflected in the citizenship-nationality/foreignness, belonging/deportability, and rights/injustice binomials. For this reason, the political imperative of controlling irregular migration undoubtedly always takes precedence over the right of unaccompanied migrant children to not be detained and to be treated with dignity, regardless of the country involved and its acceptance or not of international human rights law. In the cases of Mexico and the United States, two countries with very different traditions in terms of international law acceptance, the results seem to be similar: neither gives effective protection to unaccompanied migrant children; rather, both countries criminalize them and treat them according to illegal, discriminatory, racist standards that cannot possibly be in accordance with the human rights proclaimed by the international system. Thus, when children become migrants, they lose access to the rights they might have as children and, in general, as persons, given that the access to rights unfortunately continues to be inextricably linked to the citizenship/nationality binomial and legal/processed immigration status in the case of non-nationals.

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