

"Flores Agreement Under Siege - The Implications of the Weakening or Elimination of the Flores Agreement for Immigrant Children in the US"

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The southern US border has been crossed without proper permission for generations and the typical profile of the undocumented immigrant was a young male adult from Mexico looking for work. Yet in the last years, the largest percentage of immigrants is only from three Central American nations of El Salvador, Guatemala and Honduras, the so-called Northern Triangle. Still, male adults are robustly represented among those looking for a better future in the US, but increasingly more unaccompanied minors – including teenage females – and family units arrive at the southern border. The percentage of family units – as families are called in the immigration statistics – increased from 26% in October 2016 to 66% in May 2019, a trend that began moving steadily upwards.¹ The Central American families are forced to leave their homes because of gang violence, widespread corruption, endemic poverty, and high levels of domestic violence. But an additional factor could be the information spread up by smugglers' cartels that the newly installed Trump administration would close up the border in 2017.

Successive administrations have tried to discourage migration by tightening conditions for those caught at the border in order to deter other waves from coming and children were not spared of harsh treatment. However, accompanied by their relatives or coming alone, immigrant minors constitute a special category of migrants due to their vulnerability to the worst human rights abuses.

For generations the US immigration policies did not make a clear distinction between minors and adults in processing unauthorized immigrants who crossed the southern frontier as they had not been protected explicitly by any legislative measure. Numerous times unaccompanied children or children separated from their families at the US southern border have been placed in congested facilities with limited access to basic necessities for long waiting periods until release or return to the country of origin.

However, at least from 1997, their rights have been guaranteed by the Flores Settlement Agreement (FSA), a crucial court decision, requiring the government to assure minimum national standards of care and treatment of minors in custody by Department of Homeland Security (DHS) and Department of Health and Human Services (HHS).

In 1985, Lisette Flores, a minor asylum seeker from El Salvador, along with other female minors complained about atrocious treatment suffered in government custody. They filed a class action lawsuit against what is now called the Immigration and Customs Enforcement (ICE), claiming that they were abused and challenging the procedures

regarding detention, treatment, and release of children. After 12 years of litigation, including an appeal to the US Supreme Court, in 1997 the parties reached a settlement that was materialized in the so-called Flores Settlement Agreement (from the name of the girl who initiated this process)².

The whole agreement is based on the principle of respecting "the best interest of the child" by placing immigrant children in the "least restrictive" setting possible in order to protect them from abuses. Specifically, minors in government custody must be housed in facilities that meet certain standards (including state standards for housing and care of dependant children). FSA establishes state licensing authority over detention facilities and defines a "licensing program". The government has to provide safe and sanitary facilities, toilets and sinks, drinking water, food, medical assistance, immunization, temperature control, supervision, educational services and leisure activities appropriate to the child's age and special needs. Acknowledging special needs of children, the contract requires contact of children with the family members and visitations by family members, as well as, it assures their educational needs, access to regular religious services, classes of English, leisure time, and regular access to counseling. As well, while under government custody, the assigned case managers should maintain biographical and case records, provide notice of rights, and facilitate access to attorney services and to the local Immigration Court hearings for non-citizen children.³ Last but not least, the government should demonstrate continuous and concrete efforts to find immediate family members in the US, to convince a family member to sponsor the child and to do all the legal formalities for a rapid release to the sponsor. The original agreement has been amended several times as we will see further on.

Flores Agreement is not a law, but a legally binding contract between two parties: on one hand, the government as a defendant and, on the other hand, the child protection organizations representing these girls as plaintiffs. A third party, which is the judge of a federal court from California, is asked to monitor if the agreement is correctly implemented.

In recent decades, the FSA has been attacked, but no presidential administration has been more hostile to it than the previous administration. Trump's anti-migration policy has been a key pillar of his agenda, playing on the anxiety of a significant segment of American voters. His presidential campaign in 2015 started with a strong xenophobic, nativist, and anti-immigration message, and since he had become president, one of the preferred targets was FSA seen as a "catch and release" loophole of the undocumented immigrants.

This article aims to study how the Trump administration handled the immigration of minor immigrants and how it relentlessly attacked FSA. The study will focus especially on the period April 2018 - January 2020, the period marked by the most important measures for the purpose of this research. Obviously, we will consider events before and after the analyzed time horizon.

Trump administration's relentless attack of FSA played three partially overlapping strategies:

- a. Weaponize FSA
- b. Terminate FSA
- c. Outsource FSA

a. Weaponize FSA

Soon after taking the power, the Trump administration did not make a secret from making family separation as a deterrent against Central American migration. On February 2nd, 2017 a DHS official, during a town hall briefing, stated that DHS had been actively considering separating women from children, but the agency did not make a decision yet⁴. At that time usually immigrant families applying for asylum – adults and children – were promptly released, continuing their immigration procedure for months and years under the sponsorship of family members. Donald Trump candidate and other people related to his presidential bid repeatedly attacked the release of family units as a completely unacceptable policy, a sort of "catch and release" that undermines the nation's sovereignty and the work of immigration authorities. The DHS sent other signals that a policy change would come soon. For example on March 3rd, 2017, in a statement to Reuters, DHS representatives said that "With safety in mind, the Department of Homeland Security continually explores options that may discourage those [Central American families] from even beginning the journey".⁵ Three days later, John Kelly, then-White House Chief of Staff, asked by a CNN reporter if the department he led really planned family separation, he nonchalantly said: "Yes, I am considering, in order to deter more movement along this terribly dangerous network, I'm considering exactly that. They will be well cared for as we deal with their parents."⁶

Conceived as a deterrent to Central American families that might contemplate taking the risk to come to the US, the DHS intended to formalize and expand on similar practices of deterrence already implemented on a more ad-hoc basis. Alongside the Border Wall, the intended family separation policy as deterrence appeared as top priority for Trump, who promised to be "tough on immigration". He and most of Republican leaders saw the release of parents together with their children as a powerful pull factor. In their opinion, parents, especially women, are aware of numerous dangers along the trip to the US, but they accept the risks because they are sure that, if apprehended, they will be set free with their family sponsors to continue their cases for months, if not for years. Moreover, various conservative leaders complained that many of the released asylum-seekers skip the Court hearings anyway, cheating the system.

On the other hand, human rights advocates and pro-immigration activists criticized vehemently the Republicans as disregarding totally the push factors – endemic corruption, extreme gang violence, widespread domestic violence, generalized poverty, etc – as the real causes of family exodus to the US.

The core idea of weaponizing FSA is that if it cannot be disposed of easily, at least we can utilize it in reaching our goal of deterrence. The plan entered fully in action on April 6th, 2018 when Attorney General Jeff Sessions notified all U.S. Attorney's Offices along the Southwest Border of a policy change. He wrote: "Accordingly, I direct each United States Attorney's Office along the Southwest Border to the extent practicable, and in consultation with DHS – to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a). This zero-tolerance policy shall supersede any existing policies."⁷ He added in a communique issued the same day: "The situation at our Southwest Border is unacceptable. Congress has failed to pass effective legislation that serves the national interest – that closes dangerous loopholes and fully funds a wall along our southern border. As a result, a crisis has erupted at our Southwest Border that necessitates an escalated effort to prosecute those who choose to illegally cross our border."⁸ The new policy of "zero tolerance" meant the full prosecution of all adult immigrants who crossed the border without proper documentation. For many years, federal prosecutors, being aware of the limited institutional capacity, used to send first-time offenders to immigration courts with civil charges or simply deport them after a guilty plea. Civil charges made the whole process more fluid, especially in times of immigration surges. Only multiple offenders and those who were suspected or committed serious crimes were fully criminally prosecuted. The "zero tolerance" change would impact dramatically other areas of the immigration process. For adult immigrants who crossed the border together with their children, the full prosecution of all offenders meant a *de facto* separation from their kids. They had to spend shorter or longer periods of time in adult immigration jails and their children, after a maximum of 72 hours under the Customs and Border Protection (CBP) detention, had to be placed in facilities for minors under the supervision of the Office of Refugee Resettlement (ORR), an agency of the Department of Human and Health Services (HHS). ORR supervises a network of more than 100 state-licensed facilities which offer children-appropriate services according to FSA. They should act in the child's best interest and make all the efforts to release the children with a vetted sponsor, preferably, a family member or, in some cases, in foster care in no more than 20 days, as FSA requires.

The new policy had to be sold as mere applying the rule of law. Attorney General, Jeff Sessions, said also on April 6th: "To the Department's prosecutors, I urge you: promoting and enforcing the rule of law is vital to protecting a nation, its borders, and its citizens."⁹ The claimed principle of "rule of law" requires not only full prosecution of all undocumented adults, but also the full respect of the FSA. Actually, the government exploited craftily an ammendment of the FSA by the 9th Circuit of Appeal in 2016. For almost two decades FSA dealt only with unaccompanied minors, but in 2014, facing an upsurge of family units, Obama administration opened large family detention centers in Texas and New Mexico.¹⁰ Soon after that, Flores lawyers complained that these centers violate the FSA on multiple counts. The government lawyers answered that the FSA applies only to unaccompanied children who came to the US without the support and the protection of their parents. The Federal Judge of 9th Circuit of Appeal, Dolly Gee, disagreed with the Obama administration and decided that all migrant children, accompanied or not, are protected by FSA and asked the authorities to release them from the family detention centers in not more than 20 days. In such a way, Judge Gee initiated

a concrete timeframe in which authorities have to release children to family sponsors across the US.¹¹ FSA lawyers then asked for releasing of the parents too since it is detrimental to the children's wellbeing to be separated from their parents.¹² But the 9th Circuit Court held out that nothing in FSA requires the release of whole families detained by ICE, in such a way opening the avenue for *de facto* family separations. In reality, no federal law or regulation mandates family separations – as Trump administration claimed frequently – but also none of them requires the release of the children together with the accompanying adult parents. The previous administration speculated this legal ambiguity aptly with intended and unintended consequences.

The sudden "zero tolerance" policy caught the institutions involved in immigrant children services completely overwhelmed and ill-equipped for such a task. The immediate institutional effect was a massive flow of children separated from their parents in need to be processed fast. The overwhelmed immigration system had to rapidly accommodate them not only in the established facilities, but also in ad-hoc locations (in tents, former military bases or stores, even in a closed Walmart).¹³ The complete lack of preparation for such a drastic policy change led to endless numerous cases of blatant violations of the FSA. Horror stories came to light about children kept in cage-like congested areas, in too low or too high temperatures, with no access to warm food and basic sanitary conditions, etc.¹⁴ Media and third-party inspections revealed cases of wrongful administration of medications, physical and sexual abuses, and poor mental health and educational services. Certainly, the image which will be forever associated with the family separation policy will be that of kids in cages. Photos and film shots of kids confined in cage-like spaces, sleeping on the floor and covered with foil sheets shocked public opinion domestically and internationally. Even Donald Trump, a celebrity obsessed by image, said "The 'steelcages' make us look bad".¹⁵ Psychiatrists and psychologists draw attention to serious mental health problems related to forcedly separation of children from their parents. Numerous studies and reports demonstrated that children – especially the younger ones – have responded to being separated by toxic stress, anxiety disorders, aggression, suicidal ideation and post-traumatic stress disorder.¹⁶ "Even after reunification and attempted reintegration into society, children suffer from emotional liability, difficulties in school, behavioral challenges, and nightmares."¹⁷ Very disturbing effects for the development of younger children as a consequence of prolonged separation from the parent were observed at the level of bonding and attachment of children to their parents, in some cases little kids having real problems to re-connect emotionally to them.¹⁸ Of great concern was also the fact that seven children died in ICE custody until the end of May 2019, after almost a decade of no deaths.¹⁹

The decision-makers displayed total neglect for the preparation for such a monumental change. A telling and tragic example of the total disregard for the "best interest of the child" would be the inability to track down the family members separated by the "zero tolerance" policy. In spite of several top-level declarations that the administration had a central database to identify the children and their parents, the reality was that ICE and ORR did not corroborate the biographical information of the family members separated. They failed to collect even the most rudimentary identification data as family units in a centralized database. On May 1st, 2019 NBC News published excerpts from the work

emails of the top officials of the above-mentioned agencies. A HHS official informed a top ICE official on June 23rd, 2018 "[I]n short, no, we do not have any linkages from parents to [children], save for a handful...We have a list of parent alien numbers, but no way to link them to children."²⁰ Indeed, the involved authorities could link only 60 parents with their kids, out of more than 3000 already separated families.²¹ For years, ORR and ICE officials would have to comb painstakingly thousands of files in order to extract the needed information manually. The main problem was that children and adults followed two tracks of information collection. While adults would have continued to be detained in ICE (DHS) facilities, children got reclassified as unaccompanied minors, received separate Alien Numbers, and got entered into ORR (HHS) database.²² Simply put, children and parents entered two completely separated bureaucratic universes. Numerous times, border patrol officers failed to mention in the child's paperwork that he or she came together with a family member. Later on, ORR case managers did not know that the child came accompanied, unless the child said that. Sometimes children are too young, unaware of their situation, afraid of the ORR officials, or unable to speak Spanish (more than 50% of Guatemalans speak mostly local Mayan languages). Sometimes they came without any personal document and they did not know the full name of the parent and/or they did not know their full name and date of birth. There were instances when children stated in the initial interviews that they came with a family member, but they were separated when apprehended by *La Migra* (as they called the Border Patrol) and they did not know where their parents were located. Or they stated that they have relatives in the US, but did not remember any phone numbers, or the numbers got lost in the river they crossed or taken by the Border Patrol.

Journalists and human rights activists documented numerous cases of blatant violations of the right of children to maintain constant contact with their parents. According to a Boston Globe investigation²³, parents in McAllen (Texas) facility "reportedly had no phone numbers available for their use and, when demanded, were given a false number to ICE". In other cases, the immigration officials stated that they gave to parents flyers with a phone of ORR, but an attorney in Harlingen (Texas) stated at the end of 2018 that none of her clients received it.²⁴ Other reports present situations when parents had to stay on hold for long periods of time, a challenge for the detained parents who have limited financial resources and limited opportunities to call outside the prison. Lawyers also documented instances when finally the parents managed to get through to officials, but they were unwilling or unprepared to offer any information about their children.²⁵

The communication and family reunification difficulties could become insurmountable if the adults had been already deported. Usually, adult cases are processed faster through expedited removal and there were cases of parents who had been deported without being informed about the whereabouts of their child(ren). Even if the parents had been released from the DHS facilities, they faced painstaking difficulties to locate their children. There is strong evidence that the top governmental decision-makers did not show any interest in keeping the separated children in communication link with their parents. Even now authorities cannot count exactly how many children were separated from their parents. The government stated that 2,814 children were separated during the "zero tolerance" policy²⁶, but human rights lawyers identified more than 700 children separated in 2017,

before the policy, and several hundreds after the official revoking of the policy. However, the hard truth is that in October 2020, 545 children were still not reunified with their parents.²⁷ Unfortunately, some of them might not be reunified ever.²⁸

The reactions to family separations were prompt and decisive. Very soon human rights lawyers filed hundreds of federal court lawsuits. The crisis of family separation caused a huge backlash from mass-media and civil society, with frequent daily media events, street rallies, petitions, open letters, and public statements condemning this policy. Dozens of national human rights and professional organizations – like American Psychological Association or American Academy of Pediatrics – have protested vehemently.²⁹ World leaders from global institutions, such as the UNICEF, Amnesty International, Save the Children etc. have actively criticized the family separation. All important national and international religious leaders (the Pope, among others)³⁰, former US presidents and first ladies have made public statements against the policy.³¹ The public opinion polls showed that two thirds of Americans also disagreed with the "zero tolerance" policy.³²

Confronted with numerous federal courts lawsuits, and a huge backlash from mass-media and civil society, the Trump administration reversed the policy. Even if previously Donald Trump stated that "You can't [reverse the policy] through an executive order", he issued an executive order on June 20th, 2018 in order to stop the policy. Yet the order specifies that, "where appropriate and consistent with law and available resources", the government would detain families together until their legal case will be definitely decided. Six days later, US Judge Sabraw at the ACLU ordered the Trump administration to reunify separated families with children under age 5 years within 14 days of the order and families with minor children age five and over within 30 days of the order.³³ In fact, Judge Sabraw corrected Trump's executive order that mandated the cessation of the family separation, but did not display any mandate and mechanism of the reunification of the already separated families.

As well, at the end of June, the Department of Justice lawyers asked the US District Court, Dolly Gee, to alter her 2015 ruling "Reno vs. Flores" on the conditions of family detention by DHS. Basically, the Trump administration asked for the termination of the 20 days limitation on family detention due to "destabilizing migratory crisis"³⁴ and to end the requirements stating that minors have to be held only in facilities that are state-licensed.³⁵ In fact, this government request sow the seeds of the subsequent strategy I will discuss further on.

The answer from the US District Court Judge Dolly Gee, who oversees and enforces FSA, came soon. On July 9th, she ruled that the elimination of 20 days time limit for detaining children is like "light[ing] a match to the Flores Agreement". She totally opposed to the DoJ request to hold families indefinitely in ICE facilities as well to exempt the ICE family detention centers from the state-licensing conditions for that purpose.³⁶ The government lawyers initially appealed the decision, but finally they withdrew their appeal.³⁷

b. Terminate FSA

After several attempts to exploit FSA through the family separation policy, the Trump administration has changed the tactics and moved to the full termination of it. Firstly the DHS and the HHS came with a policy proposal on September 5th 2018 to eliminate the FSA by selective inclusion. The proposal was highly criticized in the Fall of 2018, but this did not disavow the government to advance it. Next year, on August 21, 2019 the proposal morphed already into a common "HHS and DHS Federal Rule on Flores Agreement" regarding the standards of care for minor immigrants in custody. The federal rule was advertised as comprehensive and superior to the FSA regulations that will not bind the governmental agencies legally. More specifically, the provision of releasing children after 20 days would be discarded because the families units (adults and related minors) had to be detained in so-called Family Detention Centers. The administration tried to demonstrate that the FSA rule – a rule that initially was intended to be temporary - will not be necessary since the adults and their related children will be detained together in modern detention facilities in which all children's rights will be respected.

The detained families will stay together until their immigration cases will be definitively solved. Kevin K. McAleenan pointed out that the family detention would "eliminate the major pull factor fueling the current crisis" at the southern border.³⁸ The administration attempted to convince the critics that the immigration cases will be judged faster. When children are placed in sponsors' care, their cases are delayed because sponsors and children skip the Immigration Court hearings or fail to go to Court altogether. Cases will have court decisions in months, not years as usually. In short, the families will be better cared, all the children and adults' rights will be respected, and the court proceedings will be expedited. However, the children's rights advocates draw the attention that the proposed changes do not offer specific timeframes in releasing children from institutional care. Children could spend months, but also years and this type of long periods of detention would be detrimental to their normal psycho-social development. No timeframe means indefinite detention and this is totally against the basic children's rights. Taking into account the previous experience, experts demonstrated that the goal of several months could be unattainable since on average court proceedings last on average 731 days.³⁹ As well, legal specialists argued that the intended centers will negatively affect the due process. Children behind the walls of Family Detention Centers will have limited legal representation since they and their families will face additional obstacles to reach the pro-bono attorneys for instrumenting their asylum cases. When children are released to sponsors, usually they go to large urban areas with vast networks of legal organizations, ready to help them out with legal representation. Most of the detention centers would be located in remote areas, mostly in arid areas of the Southern states, with limited infrastructure and access to diversified and quality legal services.

The critics of the FSA "improvement by elimination" also draw attention to the inhumane and cruel past experiences of immigrant children in governmental care, especially in ICE facilities. A relevant illustration of why human rights activists complain about the good faith of the Trump administration is the case when governmental attorneys attempted to

demonstrate in a local court that hot meals, clean water, toothbrushes, and decent bedding were not part of the FSA as they are not explicitly required.⁴⁰ On August 15th, 2019 a federal California three-judge panel overseeing the FSA rejected the government's argument. Judge Marsha S. Berzon stated that " [...] assuring that children eat enough edible food, drink clean water, are housed in hygienic facilities with sanitary bathrooms, have soap and toothpaste, and are not sleep-deprived are without doubt essential to the children's safety."⁴¹

The legal reaction against the FSA elimination came fast and decisive. On August 26th, 2019, under the leadership of the Democratic Attorney Generals from California - Xavier Becerra - and Massachusetts - Maura Healey-, a coalition of 20 states filed a case against Trump administration's intention to get rid of FSA. Their main point was that the new federal rule is a flagrant violation of the due process laws.⁴² Judge Dolly Gee of the Ninth Court of Appeal, who oversees the implementation of FSA, reacted swiftly too. On September 27, 2019, she decided that the new rules intending the elimination of FSA are a de facto policy of indefinite detention and this is a direct contradiction with "one of the primary goals of the Flores Agreement, which is to instate a general policy favoring release and expeditiously place minors 'in the least restrictive setting appropriate to the minor's age and special needs...'"⁴³ Her decision blocked the government definitive rule of family detention centers and suspended the FSA elimination by selective incorporation. The fight continued in 2020, when the government and the 9th Court of Appeal entered a cat and mouse play.

Trump administration, using the pretext of Covid 19 infection threat, became relaxed in applying the "20 days" rule for releasing the children in government's custody. At the end of March 2020, Judge Dolly Gee required DHS and HHS to respect FSA and release promptly all children or to justify their long-term detention amid a global pandemic.⁴⁴ Three months later, Judge Gee ordered the quick release of 124 migrant children from three ICE family detention centers located in Texas and Pennsylvania.⁴⁵ She called for release together with their parents or, if not possible, to place them with "available suitable sponsors or in other available Covid-free non-congregate settings" with the consent of their parents or guardians.⁴⁶

The government changed the tactic again, using newly-issued Centers for Disease Control interim final rule to close the border based on a 75-year-old quarantine law. DHS not only expelled 90 % of migrants to dangerous areas south of the border in April 2020 alone, many of them being vulnerable children, but also had run a shadow system of keeping immigrant children and their families in hotels out of public supervision. According to FSA stipulations, children can be housed in hotels for short periods (not more than 2 days) in very specific situations as part of the removal process.⁴⁷

Hoteling drew the attention of the immigrant children's rights advocates who claimed that hotel detentions are violations of FSA. Judge Dolly Gee intervened on Sept 5, 2020, ordering DHS to cease keeping immigrant children in secretive unlicensed hotels. She mentioned that the conditions in hotels "are not adequately safe and do not sufficiently account for the vulnerability of unaccompanied minors in detention."⁴⁸

The ICE answered that the practice of hoteling is in the best interest of children during the raging pandemic and that staff caring for children in hotels were "non-law enforcement staff trained to work with minors". Court documents showed that in the in 2019 more than 570 unaccompanied children and more than 80 children accompanied by their family members housed in more than 25 hotels in three states - Arizona, Texas, and Louisiana - have been detained for a few days to several weeks.⁴⁹ So many children scattered in so many hotels, many times under secretive protection, made access to legal immigration services more than substandard. Judge Gee asked for facilitation of the access of immigration lawyers and, also, inspection by independent monitors in all facilities where children were detained. She also stated: "This Court [...] recognizes that the pandemic may require temporary, emergency modifications to the immigration system to enhance public safety." She added: "But that is no excuse for DHS to skirt the fundamental humanitarian protections that the Flores Agreement guarantees for minors in their custody, especially when there is no persuasive evidence that hoteling is safer than licensed facilities."⁵⁰

At the end of 2020, a three judges panel of the 9th Circuit upheld most of the Judge's decisions of September 2019 referring to dismantling FSA and creation of family detention centers. Judge Marsha Berzon stated that the most of DHS's new regulations "differ substantially" from the FSA provisions because they narrow the grounds of releasing the migrant children detained with their parents and allow the government to license its own family detention centers.⁵¹

c. Outsource FSA

As the "zero tolerance" failed and family detention centers faced already robust opposition, the Trump administration launched a new strategy, attempting to make FSA irrelevant by exporting the problem south of the border. This strategy was based on two programs: "Migrant Protection Protocols" (MPP) or "Remain in Mexico" and "Asylum Cooperative Agreement" (ACAs).

1. "Migrant Protection Protocols" (MPP) or "Remain in Mexico"

As the "zero tolerance" policy failed and family detention centers faced already robust opposition, the Trump administration launched a new strategy. On December 20th, 2018 then DHS Secretary Kirstjen M. Nielsen stated confidently that "We will confront this crisis head-on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.' In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution." In fact, Secretary Nielsen announced the so-called "Migrant Protection Protocols" (MPP) which colloquially are known as the "Remain in Mexico" program. This policy was essentially returning back to

Mexico the non-Mexican asylum-seekers, regardless if they came alone or as a family unit. After having received notices to appear in immigration court, they were expected to wait in line to be assessed for "credible fear" on the Mexican territory. Eventually, the immigrants would be informed to access a specific port of entry at a specific date in order to go to court hearings inside the US. Mexican nationals and unaccompanied minors were not included in this program.

From the very beginning of the "Remain in Mexico" policy, in January 2019, human rights activists vehemently denounced it for exposing people already at risk in dangerous Mexican border cities and with limited resources to support themselves. Until spring 2020 more than 70,000 asylum seekers - many parents and their children - have been sent back to wait in Mexico. The program was seen as a cruel and unsustainable alternative in the long-run for already tired and scared people, especially for vulnerable children and their mothers, fleeing persecution, domestic and gang violence, corruption, and exploitation. Soon reports from human rights organizations brought abundant evidence of the risks that asylum seekers- minors or not - face south of the border.

For example, on November 21st, 2019 Human Rights First published the preliminary report of its running database (deliveredtodanger.org) of abuses on asylum-seekers subject to the "Remain in Mexico" program. Kennji Kizuka, Human Rights First senior researcher and policy analyst for refugee protection wrote: "There have been more than 400 public reports of rape, torture, kidnapping, and other violence against asylum seekers and migrants whom the United States is forcing to wait in some of the most dangerous cities in the Western Hemisphere. As the vast majority of asylum seekers have not been interviewed by journalists or human rights monitors, the scale of kidnappings and assaults are clearly much higher than the 400 public reports this year."⁵² The database presents dozens of cases of kidnapping and extortion as the migrants - adults or children - are sent back by foot from the US ports of entry.⁵³ The cartels in the border towns and cities have started hiring people in the lucrative business of kidnapping and asking ransom from the asylum-seekers relatives in the US.

The database also includes dozens of cases of kidnapping as the United States returns asylum seekers to Mexico in a way that makes them easy targets of drug cartels' kidnap and ransom businesses. Migrants are often sent back by foot over international bridges at the same time every day, carrying their immigration paperwork and missing their shoelaces. Cartels target asylum seekers as returned into Mexico from the United States or as they return to ports of entry to attend court hearings.⁵⁴

On June 6th, 2020 another organization, Human Rights Watch (HRW), filed a formal complaint to DHS for "knowingly subjecting asylum seekers to situations of persecution and other serious harm in the Mexican state of Tamaulipas in violation of its own policies and its obligations under the US and international law." HRW documented 32 separate instances of kidnapping or attempted kidnapping of asylum seekers subject to the MPP program in Tamaulipas between November 2019 and January 2020. In the same period, 80 asylum seekers were kidnapped and at least 38 children were kidnapped or subjected to kidnapping attempts in these incidents. The HRW analysts found evidence of eight

asylum-seekers robbed and four sexually assaulted. In five additional cases, Mexican police abducted asylum seekers for a short period of time and extorted them, a practice known as “express kidnapping.”⁵⁵

Another highly criticized aspect is the deficient legal representation. According to the non-partisan TRAC Immigrant Access only 7.5% of the asylum-seekers waiting in Mexico ever managed to hire a lawyer.⁵⁶ Due to the unstable situation in border cities and towns of Mexico, few US lawyers would spend considerable periods of time south of the border. In addition, migrants have real difficulties hiring local lawyers with expertise and credentials to represent them in the US Immigration courts. Some organizations, such as Women Refugee Committee, brought to the public attention how the "Remain in Mexico" program leads to family separation on the other side of the US frontier. Women Refugee Committee found at least 20 cases when one part of the family is processed on the territory of the US, while the other part is returned to Mexico where they have to await separate court proceedings.⁵⁷

However, the endless abuses of asylum-seekers in Mexico – many of them vulnerable children – did not attract massive condemnation in the US. Soon the pandemic crisis started to dominate the mass media and public opinion. In a way, the "Remain in Mexico" program could be conceptualized as an outsourcing of the "unpleasant work of dealing with immigrants". "Subcontracting" the screening of the asylum-seekers soon got paired with a new policy, the so-called "Asylum Cooperative Agreements" (ACAs)

2. "Asylum Cooperative Agreement" (ACAs)

Through a series of bilateral agreements reached with Guatemala, Honduras, and El Salvador in the summer and early fall of 2019, the US has started sending asylum-seekers to these countries. According to the “safe third country” principle, established by the international refugee treaties, they should ask for asylum in the first country they crossed the border on their route to the US. Basically, the rule was to ask for asylum in El Salvador, if you came from Honduras, in Guatemala, if you are Salvadoran, and in Mexico, if your place of origin is Guatemala. The policy becomes "kafkaesque" when it was decided that Mexican nationals who crossed the border in the US cannot be returned to Mexico because this would constitute a violation of international treaties by returning an asylum-seeker to the country he or she has flown while the case is still undecided. Yet some Mexican asylum-seekers have been deported to Guatemala under Guatemala Asylum Cooperative Agreement, even if they crossed to the US border directly from their country of origin, Mexico.

Under the threat of assistance termination and sanctions, in July 2019, Guatemala was the first Central American state to accept the "safe third country" agreement imposed by much powerful neighbor. Several weeks later, Guatemala started to accept transfers of asylum seekers who reached the US territory through Guatemala, except for Guatemalans.⁵⁸

In September 2019 El Salvador and Honduras signed bilateral agreements with the US, in many ways similar to that of Guatemala, stipulating that asylum-seekers who have not applied for asylum in El Salvador and, respectively, in Honduras would not have the right to apply for asylum. The bilateral agreements were suspended in March 2020 because of Covid 19 pandemic and, finally, revoked by the Biden administration in the first days after having taken the power.

The "safe third country" agreements were vehemently condemned inside and outside the country as a blatant violation of the US and international refugee laws. Firstly, the critics argued that none of "Northern Triangle" countries are safe. Each of them is refugee-producing, not refugee-receiving countries, with staggering rates of criminality, endemic poverty, deeply-rooted corruption and impunity, widespread violence, especially gang and domestic violence. The Mara gangs have transnational ties and it is no safe haven for an asylum-seeker fleeing Honduras to Guatemala due to gang violence. Guatemala is notorious for one of the highest rates of domestic violence in the world. Taking into account that 75 percent of the migrants returned to Guatemala for asylum-seeking procedures under the ACA were women and children, the risk of being harmed or killed is elevated.⁵⁹ Under such circumstances, by March 2020 only 20 of the 939 transferees (about two percent) applied for asylum in Guatemala even if the majority of them might have credible cases of persecution in their countries of origin.⁶⁰ The immigrants transferred from the US were granted only 72 hours to decide if they would apply for asylum in a country where they felt insecure and, from many points of view, plagued by the same social problems as their country of origin.

In addition, Guatemala, Honduras, and El Salvador are not prepared for receiving and processing a large number of asylum-seekers. They do not have the administrative capacity, experience, resources to process so many asylum-seekers. For example, between 2002 and 2014 Guatemala processed only seven asylum cases per year on average and employed only 12 officials to work in this area of governmental policy.⁶¹

Final Considerations

The relentless attacks of FSA could be regarded from different angles. In terms of institutional efficiency, all three strategies were half-backed, akin to ad-hoc improvisations, contradictory, and sometimes, pure disasters. In a May 2018 interview, then-White House Chief of Staff, John Kelly, when questioned about the cruelty of the policy, he answered "The children will be taken care of — put into foster care or *whatever*."⁶² The word "whatever" encapsulates the consideration of the Trump top decision-makers in respecting the best interest of immigrant children. The issue of undocumented children should be discussed from the viewpoint of vulnerable people versus huge bureaucratic structures. All large organizations - governmental or non-governmental - tend to see people as numbers and cases. In a way, it is a sort of "mild" dehumanization. Many administrators, so concerned with their goals and deadlines, forget about the humans behind the numbers or, in our situation, vulnerable children in front of (almost) all-powerful organizational agents. The first instinct of political leaders and their subordinates is to choose the least friction solution and, numerous times, this is

deterrence by hardening the immigration process. When forced to deal with immigrant children, way too often the decision-makers firstly they see them as "immigrants" before realizing that they deal with vulnerable children. Regardless of how they reached the southern border, accompanied or unaccompanied, they are children with specific needs and vulnerabilities.

However, from a political standpoint, the strategies reached their political goal to keep the Trump political base motivated and content. Perhaps it is not coincidental that the first two strategies started and consumed most of their political fuel in 2018, just before the mid-term elections of November of that year. The third strategy seemed to work better in terms of reducing the number of families and children arriving at the southern border. In the second part of the year 2019, there were 60 percent fewer family units and unaccompanied minors apprehended on the border and some analysts correlated that with the "Remain in Mexico" and "ACAs" policies.⁶³ But the third strategy could be more consequential in the long run. Placing the "hot potato" south of the border means also removing most of the legal and PR battles. If immigrant children would be kept out of the borders, the FSA becomes irrelevant and the decision-maker would cherish a better image inside the country. Asylum-seekers in Mexico, Guatemala or somewhere else in Latin America become like Syrians, Venezuelans or Rohingya refugees who do not disturb the domestic political agenda and media image. Politically, international refugees are not a priority unless they reach the national territory. If the government outsources the "dirty work" south of the border, the social issue would generate less visibility, empathy, and mobilization. The potential defenders of the asylum-seekers would have real problems to get organized in notoriously dangerous areas. Different versions of the first two strategies could be attempted in the future, but the third strategy of outsourcing seems to have the highest chances of being replicated in the future.

For now, the FSA contract, as imperfect as it is, appears as the best guarantee of protection for the immigrant children since the US Constitution or other domestic laws do not address them and, on the other side, the international treaties US has adhered to do not deal explicitly with them. In all UN member states, the rights of all children, citizens or non-citizens, are guaranteed by the UN Convention on the Rights of the Child that was ratified in 1990. The United States signed it but did not ratify it. Actually, the US and Somalia are the only UN members that did not ratify the most comprehensive treaty protecting children in the world.

It is a shame that FSA was created in 1997 as a temporary fixture of a thorny social issue after an exhausting 12-year court battle and this is still the main legislative reference to protect immigrant children. I dare to predict that many years from now on the chances to issue a law in this area are close to zero as the political scene is so divided and polarized. The Courts protecting the agreement have been the only bulwark against total disregard of immigrant children's rights. As Judge Gee wrote "The blessing or the curse - depending on one's vantage point - of a binding contract is its certitude"⁶⁴ and the FSA is the only legislative act that still protects them [children].

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