

**Testimony**  
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**United States Sentencing Commission**  
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**Introduction**

I appreciate the opportunity to testify on behalf of Kids in Need of Defense (KIND) and to submit our views on proposed sentencing guidelines regarding the smuggling of unaccompanied children into the United States.

KIND was founded by the Microsoft Corporation and UNHCR Special Envoy Angelina Jolie in 2008 to ensure that unaccompanied immigrant and refugee children are provided pro bono legal representation in their immigration proceedings. KIND has assisted more than 8,500 children and trained over 11,000 volunteer attorneys in our seven years of operation.

We also promote greater protection of unaccompanied children in the Northern Triangle of Central America and Mexico through assistance to children returning to their countries of origin, the provision of guidance to children applying for resettlement to the U.S., and evaluation of the prevalence and response to sexual and gender based violence against child migrants, particularly girls. This work gives us a comprehensive understanding of the urgent protection needs of children on the move throughout the region.

The U.S. has experienced in recent years an unprecedented migration of children from Central America that is rooted in the pervasive and growing gang and narco-trafficking violence in the region. More than 100,000 children have come alone in the last two years, far outpacing previous years and seriously straining the U.S. system designed to provide care and custody for these particularly vulnerable children. The crisis began in fall 2011 when the number of unaccompanied children arriving from Central America began to noticeably increase. Every year from then forward, the numbers of children arriving at the border doubled until the height of the crisis in 2014 when more than 68,000 unaccompanied children were apprehended. This represented a nearly tenfold increase from the historical norm of 7,000-8,000 children from 2004-2011.<sup>1</sup>

The crisis came to the public's consciousness when unaccompanied children began to back up at U.S. Customs and Border Patrol (CBP) stations in the Rio Grande Valley. Images of children held in cell-like rooms, sleeping on mattresses on the floor under emergency blankets, and

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<sup>1</sup> U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Children's Program, *ACF Fact Sheet*, (updated January 2016), [https://www.acf.hhs.gov/sites/default/files/orr/orr\\_uc\\_updated\\_fact\\_sheet\\_1416.pdf](https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf)

provided triaged food and health care assistance flooded the media for weeks, creating the impression that the southern border was out of control.

In fact, weak border controls were not the source of the problem. Thousands of children were turning themselves in to CBP. Rather, poor planning was the issue. Resources were inadequate to keep pace with the increased numbers, and as a result ORR lacked the bed space to facilitate the transfer of children from CBP to its custody within 72 hours as required under law. CBP therefore had no option but to hold children for as long as two weeks, in conditions largely designed for the processing of adult immigrants, by an agency the mission of which is to enforce U.S. borders, not to care for vulnerable children.

Until recently, these children had little, or no way of gaining access to the U.S. protection system from their home country or from the region. As a result, the many children who feared for their lives, or the families who feared for their children, felt they had no choice but to find a way for the child to enter the U.S. In the case of children traveling without a parent or legal guardian, this has meant resorting to smugglers who they are forced to trust to lead them hundreds or thousands of miles to cross into the United States. Desperate situations cause people to do desperate things. Similar scenarios play out around the world in which people cross borders to escape persecution from which their governments cannot or will not protect them. They are refugees; international law states that they may be eligible for international protection. Many of those fleeing from Central America are no different.

KIND has been deeply concerned that the U.S. has addressed this surge in child migration using a primarily law enforcement approach that fails to acknowledge the need to protect vulnerable individuals from rampant and targeted violence in their countries. The outflow of Salvadoran, Honduran, and Guatemalan families and children is fundamentally a refugee movement. Attempting to address it as an issue of border security will fundamentally lead to ineffective policies that neither curb the migration flow nor provide the necessary protection to those who need it.

## **Background**

Congress has long recognized the unique vulnerability of unaccompanied immigrant and refugee children. The Homeland Security Act of 2002 (HSA) transferred the custody of unaccompanied children from legacy Immigration and Naturalization Service to the Department of Health and Human Services/Office of Refugee Resettlement (ORR) to ensure that children who arrive in the U.S. without a parent or legal guardian are provided appropriate care during the pendency of their immigration proceedings.<sup>2</sup> The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 built upon the HSA by mandating comprehensive

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<sup>2</sup> Homeland Security Act of 2002, P.L. 107-296, Sec. 462, [https://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf)

services to unaccompanied children including the provision of pro bono legal representation to the maximum extent practicable.<sup>3</sup>

Since enactment of these two pivotal pieces of legislation, numerous steps have been taken by the range of federal agencies that have jurisdiction over unaccompanied children to address their rights as children and to improve their treatment. These include, among others:

- The expansion by ORR of shelter care facilities and foster care to house unaccompanied children in more child appropriate settings
- Issuance of guidelines by U.S. Citizenship and Immigration Services (USCIS) for the adjudication of children's asylum claims to acknowledge the challenges that children face when required to navigate the complexities of U.S. asylum law and articulate a basis for protection from persecution
- Implementation of juvenile dockets by the Department of Justice to provide more child-appropriate settings and procedures when children appear in immigration court
- Government support for the provision of pro bono legal representation to unaccompanied children
- Appointment of child advocates to address the best interests of unaccompanied children
- More systematic training of asylum officers, immigration judges, and border patrol officers in the unique needs of unaccompanied children and how best to address them.

These steps, among many others, have constituted the building blocks toward creation of a child-oriented system that balances protection at its core with the need to determine whether a child is eligible for relief under U.S. immigration and asylum law or can be safely returned to their country of origin. It is the result of strategic policy reforms that have developed over time through interagency cooperation and consultation with civil society.

There is no doubt that the system remains imperfect. The Central American child migration crisis that exploded in spring 2014 underscored some critical weaknesses in the system that jeopardized the safety of children, including the failure to adequately ensure in some cases that children are released to sponsors who will protect the child's safety and well-being. KIND believes strongly that we must learn from this experience and implement further reforms that close these protection gaps while resisting efforts that emphasize law enforcement and deterrence of further migration.

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<sup>3</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, Sec. 235(c)5 <https://www.gpo.gov/fdsys/pkg/PLAW-110publ457/pdf/PLAW-110publ457.pdf>

## Central American Crisis

Unaccompanied children, who range in age from toddlers to teenagers, are uniquely vulnerable, having traveled hundreds or thousands of miles without a parent or legal guardian, risking a life-threatening journey to a country they do not know. Many of the children who have been arriving from the Northern Triangle of Central America in recent years are fleeing organized criminal violence caused by gangs and drug cartels that the governments of the countries of origin—El Salvador, Honduras, and Guatemala—are unable to control. The murder rates in these countries mirror those in conflict zones. In fact, El Salvador’s homicide rate is one of the highest in the world and now surpasses that experienced during the height of its civil war; Honduras and Guatemala are close behind.<sup>4</sup>

Sadly, children have been specifically targeted by the gangs and criminal rings that terrorize large parts of the Northern Triangle. The gangs attempt to forcibly recruit children, especially those in their early teens, but sometimes as young as kindergarten age. Girls are forced to become "girlfriends" of gang members, which in reality are non-consensual relationships that result in rape by one or more gang members.

If children resist gang recruitment, they face rape, kidnapping, and/or murder. The weak governments that characterize the region are unable or unwilling to control the violence. Law enforcement agencies are under-resourced and plagued with corruption. For the same reasons, judicial systems fail to prosecute perpetrators; less than 2 percent of rapes, for example, are investigated and prosecuted.<sup>5</sup> Impunity is assumed, leading to even more violence.

As a result, according to the UN Refugee Agency (UNHCR), at least 58 percent of children arriving at the U.S. border have been forcibly displaced and are potentially in need of international protection.<sup>6</sup> It should also be noted that the United States is not the only country receiving asylum seekers. From 2008 to 2014, UNHCR documented a 1,185 percent increase in asylum applications from El Salvador, Honduras, and Guatemala filed in Belize, Costa Rica, Mexico, Nicaragua, and Panama.<sup>7</sup>

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<sup>4</sup> The Guardian, "U.S. Government Deporting Central Americans to their Deaths," October 12, 2016.

<http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>

<sup>5</sup> The Daily News, "In Central America, Women are Killed with Impunity Just Because they are Women," January 10, 2014, <http://www.nydailynews.com/news/world/femicide-rise-central-america-article-1.1552233>

<sup>6</sup> United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection*, (2015), pg. 6, available at

[http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf)

<sup>7</sup> UNHCR, <http://unhcrwashington.org/children>

## Smuggling and trafficking

Until recently, there were few, if any, ways a child could access U.S. protection from their home country or in the region. Children have repeatedly told KIND that they felt they had only two choices: flee their home country or die.

When **Olivia** was 14 years old she was attacked by several masked men while walking to a store nearby her indigenous Mayan community in Guatemala. The men drugged her and raped her for four days. Her family contacted the police but nothing was done to search for their missing child. Olivia was eventually released when her family was able to pay the ransom the kidnappers had demanded. Olivia and her family then made a report to the Guatemalan police and asked for help. Despite clear medical evidence of sexual violence, the police refused to help. With no one to protect her, Olivia was terrified of leaving the house and unable to go to school. Her family started receiving calls and threats that Olivia would be attacked again. Facing near certain violence and perhaps death, Olivia decided to make the journey to the United States. She was referred to KIND, which matched her with a pro bono attorney. Olivia and her family were thrilled when Olivia was granted asylum in 2013.

Families do not take the decision to send their child with a stranger to the U.S. lightly. They are often terrified for their child, but as one mother put it, “I would my child die on the journey to the United States than die on my doorstep.” It is heartbreaking calculus for a mother to make, but it is the reality for many families and their children in Central America.

**Jesus**, at just three years old, was sent by his family to the United States after his family received threats of harm against him. Jesus’s family witnessed the torture and beheading of another toddler in their community by gangs. The family knew the police would not help them and feared for Jesus’s life.

Smugglers are taking advantage of vulnerable families and children and facilitating their travel to the United States. Smuggling rings are highly organized and closely associated with the very same criminal cartels that are generating the violence in the countries of origin. They prey upon their victims and exploit them even further by charging high fees to transport children as young as two years old to the U.S. border.

Children referred to KIND have told us about smugglers who denied children the food they were paid to provide, numerous instances of sexual assault and rape of both boys and girls, and other abuse. Smugglers have also at times “sold” the children they agreed to transport to local criminal elements who then hold the children and demand ransom from their families to release them or additional money to bring the children across the border.

Yesenia is an example of a child who ended up traveling completely alone and was kidnapped.

**Yesenia** had suffered two very traumatic events in her life by the age of 14. She was sexually assaulted by an adult neighbor in the home she was living in with her grandparents. She later set off to travel with her older brother to the US, but the two became separated in Mexico after three weeks. Yesenia traveled for six more days by herself, before members of the Los Zetas gang kidnapped her. Yesenia was taken to a house where numerous adults and children who had also been kidnapped were being held. She spent 11 days at this house, where she witnessed members of the gang brutally murder two men, was forced to eat spoiled food, and was beaten with a wooden slab. The kidnapers demanded information regarding Yesenia's parents and sent ransom notes demanding money for her release. Yesenia was then moved by her kidnapers to a stash house in Texas, where she witnessed the murders of two adults and two children. Yesenia was told that if her parents did not pay the ransom, she would be used as a prostitute. Yesenia's parents wired the ransom to the kidnapers and called the police. Federal authorities then raided the stash house, freeing 18 migrants who were held there. Yesenia met with federal law enforcement officials to provide detailed information regarding the criminal cartel. Yesenia was paired up with a KIND pro bono attorney, who helped her successfully obtain a T (trafficking) visa.

As border controls in the U.S. have tightened in recent years, smugglers have changed their routes to more remote and more dangerous passages that put the children they are charged with transporting at even greater risk.

KIND is also concerned that the greater the law enforcement approach that targets migrants, the further underground they will go, and the more vulnerable they will become.

To compound to the challenges, the line between smuggling and trafficking can be a fine one<sup>8</sup>, as Mary's case below exemplifies.

**Mary** was beaten and abused by her family members. She was forced to work various jobs instead of attending school and went hungry because her family often did not give her food. When Mary was a teenager, a woman offered her the opportunity for a better life in the US. The woman said that her friends would give Mary a safe home in the US

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<sup>8</sup> According to the U.S. State Department, human trafficking is a crime against a person and centers on exploitation. Sex trafficking is defined as when a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery. Human smuggling is a crime against the state and centers on transportation. It is generally defined as the importation of people into the United States involving deliberate evasion of immigration laws. This offense includes bringing illegal aliens into the country, as well as the unlawful transportation and harboring of aliens already in the United States.

and pay for her travel expenses. Mary accepted the woman's offer and agreed to travel with the woman to the US. Soon thereafter, Mary discovered that the woman had lied about her intentions. In fact, the woman and her friends were sex traffickers. Mary suffered repeated sexual and physical violence before she was abandoned in the US near the border with Mexico. Mary was taken into custody by US Immigration and Customs Enforcement officials and, eventually, transferred to Massachusetts where she lives with a foster family.

KIND is also concerned about increased law enforcement tactics being used for deterrent purposes and to "send a message" to individuals in Central America that they should not come to the United States. When fleeing to save their lives and those of their family, unaccompanied children and mothers with young children will not be deterred by the threat of deportation. They will still engage smugglers to help them cross the border. In addition to being ineffective, the use of deterrent tactics has been shown to heighten traumatic responses in a population that has already experienced intense trauma.

The U.S. will continue to face increased migration from Central America until the root causes of this flight are addressed. Families and children who are facing mounting levels of violence that their governments are unable or unwilling to control are making the only choice available to them and the only choice that any family would make—they are fleeing for their lives in search of safe haven. As the world's leading democracy, it is not surprising that many are seeking that safety in the United States.

### **Recommendations**

Unaccompanied immigrant and refugee children are—first and foremost—children. They deserve the protection and care we would want extended to any child. In virtually every other area of U.S. law, we recognize that children require additional protections because of their reduced developmental capacity. We should expect that all children are provided a heightened level of protection in our legal, judicial and adjudicative processes.

More effective than a focus on law enforcement and targeting smugglers is to ensure that all children in adversarial proceedings are afforded counsel. Upon release from ORR custody, approximately half of unaccompanied children appear in immigration court without representation. Children as young as toddlers are often forced to appear before an immigration judge in a formal courtroom. While the child is unrepresented, the government is represented by an attorney who has been trained U.S. immigration law. It is fundamentally unfair for any child to face removal proceedings without the assistance of counsel. Our staff has witnessed children as young as three years old appear in court without an attorney. This violates due process and contradicts the U.S. principle of due process and respect for the rule of law.

The root causes of the migration from Central America must also be addressed. Congress provided \$750 million in funding in the FY16 omnibus spending bill that will provide essential assistance to a region that the U.S. has long neglected. A significant portion of this funding

should go towards strengthening national child welfare and education systems in El Salvador, Honduras, and Guatemala to provide protections for at-risk children and enable them to remain in their countries of origin safely and sustainably.

While the Obama administration has expanded the ability of people in Central America to apply for U.S. protection through its new refugee settlement program from countries in the region, and for children to apply for U.S. protection from within El Salvador, Guatemala, and Honduras, these are limited responses and are in no way substitutes for their right to migrate spontaneously and to apply for asylum in the U.S. through a full and fair process.

Fundamentally, we must prioritize a protection-oriented approach to the child migration issue that upholds our nation's commitment to the most vulnerable. There are no easy answers but with protection as our guiding light, we will better serve the children who are coming to the U.S. to seek safety. As children, they deserve nothing less.

Thank you again for the opportunity to appear before you today.