

**CONFIDENTIAL REPORT  
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES  
REGIONAL OFFICE WASHINGTON, D.C.  
FOR THE UNITED STATES AND THE CARIBBEAN**

**FINDINGS AND RECOMMENDATIONS RELATING TO THE 2012 - 2013 MISSIONS TO  
MONITOR THE PROTECTION SCREENING OF MEXICAN UNACCOMPANIED CHILDREN  
ALONG THE U.S.-MEXICO BORDER**

**June 2014**

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## ABBREVIATIONS

CBP	Customs and Border Protection
DHS	Department of Homeland Security
DIF	El Sistema Nacional para el Desarrollo Integral de la Familia (National Agency for Family Development)
DCS	Division of Children's Services
HHS	Department of Health and Human Services
HSI	Homeland Security Investigations
INM	Instituto Nacional de Migración (National Migration Institute)
JDM	Juvenile Detention Module
NTA	Notice to Appear
ORR	Office of Refugee Resettlement
OFO	Office of Field Operations
POE	Port of Entry
TVPRA 08	William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UAC	Unaccompanied Child
UNHCR	Office of the United Nations High Commissioner for Refugees
USBP	United States Border Patrol
VLC	Virtual Learning Center
WA-NTA	Warrant for Arrest – Notice to Appear

## EXECUTIVE SUMMARY

The Office of the United Nations High Commissioner for Refugees (UNHCR) Regional Office for the United States and the Caribbean in Washington, DC (ROW) presents this report based on the monitoring of U.S. Customs and Border Protection (CBP) operations in the Laredo, San Diego, Rio Grande Valley and Tucson Sectors at the request of CBP regarding the protection screening of unaccompanied children (UAC) from Mexico. The goal of the four monitoring trips was for UNHCR to review and observe CBP's methods for implementing the screening requirements of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 08) and U.S. obligations of non-rejection or return of persons, including current screening practices, operational challenges faced by CBP in implementing the screening provisions, the tools and training available.

During the course of the four visits, UNHCR identified certain positive practices by CBP, received from CBP its concerns regarding the processing of UAC, and identified issues of concern to UNHCR. In evaluating CBP's implementation of the protection screening mandated by TVPRA 08, UNHCR's observations of positive practices and concerns are informed by U.S. and international law and standards related to human trafficking and protection and guided by the following four child protection principles:

- 1) The extent to which the procedures acknowledge and address the **Safety & Emotional Well-Being** of the unaccompanied child. This applies to the attention given to any physical or emotional needs at the time the child first comes into contact with CBP and throughout their time in CBP custody, as well as the ability to identify and address any fear of return or risk of human trafficking.
- 2) The extent to which the process is designed to employ **Child Sensitive Procedures**, such as modified interview techniques to take into account the child's age, maturity, psychological development, and ability to articulate experiences and emotions.
- 3) The extent to which the child is able to have **Meaningful Participation in the Decision Making** as it relates to the child's ability to understand and respond to the questions and make an informed decision as to whether to withdraw an application for admission in favor of return and that such agreement to return is voluntary.
- 4) The **Accountability and Transparency** of CBP operations through the use of appropriate documentation, reporting and review of all interactions between the government officials and the unaccompanied child.

The theme of the positive CBP practices identified by UNHCR is improving accountability and efficiency. UNHCR noted the employment of technological strategies to improve record-keeping of the UAC in CBP custody which also helps ensure that CBP meets the benchmarks set for UAC care. UNHCR observed sound inter-governmental relationships which are important to maintain when there are as many stakeholders involved as there are for UAC. UNHCR also observed the centralization of certain UAC functions which serves to increase efficiency but also provide better service through a smaller, more experienced group of officials.

The concerns that CBP itself has are diverse. In some instances, CBP representatives expressed that it is constrained by law or policy and that it cannot always react logically to

the situation as it arises. One example given by CBP is that of Mexican UAC working in the smuggling industry against whom CBP cannot take enforcement action, such as prosecution, and instead must return them immediately to Mexico. Other concerns raised by CBP, such as the conditions and amenities at CBP facilities, reflect the challenges of working within a limited budget while others, such as insufficient training, reflect the challenges of working with a young population which can take a toll on the CBP officials.

The information gathered in all four sectors led UNHCR to conclude that, while the law is clear regarding DHS's burden to establish that each Mexican UAC does not have an international protection need, CBP's operational practices, including new efforts to implement the TVPRA mandate to DHS, continue to reinforce the presumption of an absence of protection needs for Mexican UAC rather than a ruling out of any needs as required under TVPRA 08. Indeed during UNHCR field missions, UNHCR observed a predominant bias, influenced by a range of valid and invalid factors, desensitizing officers to any protection needs of Mexican children. In all sectors visited, CBP communicated to UNHCR that Mexican UAC are always returned to Mexico. This reflects the current state of the institutional culture on this narrow issue and this entrenched practice and approach to Mexican UAC presents the single largest challenge in implementing the mandate under TVPRA. This plays out in a number of ways of concern to UNHCR: a number of CBP officials employ overly restrictive standards by which to assess trafficking and fear of persecution upon return to one's home country; CBP's mandate to assess each Mexican UAC's capacity to make an independent decision is often overlooked; children with needs that Congress intended to protect are likely rejected at the U.S. border.

UNHCR is concerned about the manner of communication between CBP and UAC and the setting of the interviews, especially in light of the power dynamic between children and government authorities. Based on UAC interviews, UNHCR learned that many UAC do not understand the information conveyed to them by CBP officials and do not understand what rights they have. In addition, the public area in which UAC are questioned and the speed of questioning did not appear conducive to UAC revealing very personal details about having been trafficked, the risk of trafficking, or the circumstances that may cause them to fear returning to Mexico.

Especially given the operational challenges to identifying individuals with protection needs in a mixed migration flow, UNHCR is also concerned about the adequacy and effectiveness of the training CBP officials receive on CBP's responsibilities towards UAC in particular, and refugees and asylum-seekers, generally. Interviews with CBP revealed confusion regarding the definitions of "UAC", "persecution", and "trafficking", which are all essential concepts in identifying the protection needs of unaccompanied children. In addition, CBP feedback regarding the Virtual Learning Center course on UAC issues indicates that it is not extensive enough to prepare CBP agents and officers to adequately screen Mexican UAC for protection needs.

Following its review of the four US Border Patrol sectors visited and in the current climate of unprecedented UAC arrivals, UNHCR recommends concrete action steps, which it believes feasible, to bring about an immediate improvement in the screening of UAC for protection needs. UNHCR stands ready to support DHS in all of them as appropriate.

1) Refer All Mexican UAC to ORR

UNHCR recommends that DHS automatically refer all Mexican (and Canadian) UAC to ORR's custody and outsource the DHS responsibility to screen all such children for protection needs to trained child welfare with expertise to identify indicia of trafficking and persecution. This function can be outsourced to other government entities or to appropriate private contractors. Rather than CBP conducting the screening immediately after its apprehension of the UAC, the screening can be conducted once the child has arrived in ORR's custody and has a chance to settle down in a setting that is much more child-friendly with staff that are already trained in working with children and victims of trauma. UNHCR believes that this recommended mode of operation would result in more equal treatment for UAC of all nationalities, relieve CBP of the pressure of assessing UAC's protection needs, and that it might also serve the added purpose of discouraging the practice of recruiting Mexican children into the smuggling industry.

2) Redesign the Screening Tools Available Including Form 93

UNHCR recommends that it, along with other experts on children, asylum and trafficking, redesign Form 93 to improve its utility and support a robust and efficient screening process. As part of its approval and socialization process, DHS should conduct a survey of the staff who will be utilizing the form to solicit their anonymous feedback on the proposed form so that it is clear the form is accepted by them and will be effective when used. Once the new form is finalized, including any appropriate edits from the survey, and approved by DHS, experts should conduct trainings on how to use the form for an effective screening.

UNHCR recommends that the Forms 93 and I-770 be officially translated to Spanish and made available to the entity conducting the screening and all stations and POEs, respectively. UNHCR observed that some locations had a translated copy of one or both of the forms, although it was not clear who had made the translation, but many other locations only had access to the English versions. In light of the fact that the vast majority of questioning is handled in Spanish, UNHCR believes it would be useful to the screeners and the agents and officers to have a translated copy of the Form 93 and Form I-770, respectively, to ensure a more accurate and consistent translation.

UNHCR recommends that easy-to-use reference kits be available at all USBP stations and OFO POEs on the requirements for processing UAC cases. UNHCR observed that certain locations took the initiative to create their own binders of official policy on UAC, step-by-step instructions, flow charts, and checklists which appeared to be a useful reference for agents and officers.

3) Protection Awareness Trainings

UNHCR recommends that trainings provided to all CBP agents and officers include at a minimum: the international and U.S. legal frameworks; the rationale behind the protection screening; identification of trafficking victims; and country of origin information for the top countries of origin of arriving UAC. In order for CBP to handle its role with the UAC, there is

a need for agents and officers to be sensitized to the needs of the UAC and why a separate standard is applied to them than to adults.

Because all law enforcement personnel should be trained in the identification of human trafficking victims, UNHCR recommends that new guidance and instruction should include the identification of fact patterns and indicators consistent with current trends in human trafficking and should be developed with the help of UNHCR and other government and NGO experts with direct experience with human trafficking of unaccompanied children. This could include a review of identified human trafficking cases in order to look at patterns of behavior exhibited by human traffickers while the victim (or intended victim) is still in transit, other forms of criminal smuggling or exploitation and the interplay between human trafficking and other illicit activities, and factors that increase children's susceptibility to coercion and intimidation.

#### 4) Improve Use of CBP Space and Conditions

UNHCR recommends that, where feasible, USBP stations and OFO POEs identify a space within their facilities in which UAC can be interviewed in private in order to process their cases. UNHCR recommends that special measures are taken so that UAC are warm enough in order to prevent illness and have mats or cots to sleep on while in CBP custody.

#### 5) Support the Field by Providing Refreshers on Protection Screening

Pending delegation of screening responsibility to ORR, UNHCR recommends that the field receive continued guidance and reminders on the following policies or standards which UNHCR noted were inconsistently applied. These refreshers should include:

- It is mandatory that all Mexican UAC are to be screened for protection needs on a case-by-case basis, including children recruited into the human smuggling industry. CBP is the *only* entity charged with this responsibility, delegated from DHS, and is in the position of first responder to enable protection for the children who may need it.
- As required by TVPRA 08, each Mexican child is to be assessed for his or her ability to make an independent decision to return to Mexico.
- The interviewer must establish the absence of risk to the UAC upon return by finding that the UAC *is not afraid* to return due to a credible fear of persecution, that the UAC *has not been* subject to a severe form of trafficking in persons, and that there is no credible evidence that the UAC is *at risk* of being trafficked upon return.
- The definition of unaccompanied alien child and the associated consequences for who can speak for the child, who can be detained in the same cell with a child, and to whom a child can be released.
- CBP is responsible for making the assessment whether Mexican UAC are to be referred to ORR based on its assessment under the TVPRA 08. This assessment is made independent of the Mexican Consulate. CBP is able to reverse a decision to return a Mexican child based on the Consulate's recommendation to refer the child to ORR, but cannot decide to return a child to Mexico based on the Consulate's opinion. The Mexican Consulate and CBP have different mandates which may conflict.

- UAC are to be shown the Know What to Expect video before they are questioned so that the information provided is timely and helps facilitate the processing of the UAC.

## BACKGROUND

While the total number of U.S. Border Patrol (USBP) apprehensions in FY 2013 is 58% of what it was in FY 2008<sup>1</sup>, the number of unaccompanied children (UAC)<sup>2</sup> apprehended in FY 2013 is approximately two and a half times what it was in FY 2008.<sup>3</sup> In FY 2013, CBP apprehended 41,890 UAC seeking entry into the United States<sup>4</sup>, of whom 18,754 - 45% - were Mexican nationals.<sup>5</sup> Of the total number of UAC apprehended by U.S. authorities in FY 2013, 24,668 were referred to the Office of Refugee Resettlement (ORR) and placed in removal proceedings where they had the opportunity to request asylum or other remedies.<sup>6</sup> This number is nearly double the 13,625 UAC referred to ORR in FY 2012. Of the 24,668 UAC referred to ORR in FY 2013, 846 of them were Mexican nationals.<sup>7</sup> While Mexican UAC comprised 45% of the UAC apprehended, they only account for 3.4% of the UAC referred to ORR custody. Only 4.5% of all Mexican UAC apprehended by CBP in FY2013 were not returned at the border and instead were subsequently placed in the custody of U.S. Department of Health and Human Services (HHS), Office for Refugee Resettlement (ORR) after screening by CBP. The remaining 95.5% of Mexican UAC were returned to Mexico, ending any opportunity to seek protection or other relief in the U.S., if needed.

Two key questions explored by the Office of the United Nations High Commissioner for Refugees (UNHCR) Regional Office for the United States and the Caribbean in Washington, DC during the four monitoring visits, and as discussed throughout this Report, is *whether the current screening mechanisms in place are adequate to accurately identify children in need*

<sup>1</sup> USBP, Nationwide Illegal Alien Apprehensions Fiscal Years 1925 – 2013, available at: <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Apprehension%20Statistics%201925-2013.pdf>

<sup>2</sup> The term Unaccompanied Child is defined by section 462(g) of the Homeland Security Act of 2002. (6 USC § 279(g)) as “a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” Any reference to minors, juveniles, or children in this report are considered to also meet the UAC definition.

<sup>3</sup> USBP, Sector Profile – FY 2013, available at:

<http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>; Unaccompanied Children (Age 0-17) Apprehensions: Fiscal Year 2008 through Fiscal Year 2012, previously available on CBP’s website and cited to in several recent reports about unaccompanied children, see *Mission to Central America: The Flight of Unaccompanied Children to the United States* (United States Conference of Catholic Bishops Nov. 2013); and *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (U.C. Hastings, Center for Gender and Refugee Studies, and KIND, Feb. 2014).

<sup>4</sup> USBP and OFO statistics shared with UNHCR.

<sup>5</sup> USBP and OFO statistics shared with UNHCR.

<sup>6</sup>The Office of Refugee Resettlement, *The Year in Review - 2013*, available at: <http://www.acf.hhs.gov/programs/orr/resource/office-of-refugee-resettlement-year-in-review-fy2013>

<sup>7</sup> Statistics from the Office of Refugee Resettlement.

*of protection as required by the mandatory legal framework and whether the screening mechanisms are appropriately applied in order to do so.*

## LEGAL PROTECTION FRAMEWORK

Under the Immigration and Nationality Act, DHS has the discretionary authority to return to Mexico Mexican nationals apprehended at or near the border without initiating formal removal proceedings. Bilateral agreements between the U.S. and Mexico in part address how this authority is put into practice across the U.S.-Mexico border. Before 2008, these arrangements led to specific concerns that unaccompanied children of Mexican nationality were being returned to Mexico without an assessment of whether they were at risk of persecution, torture, trafficking or other harm as required both by international and domestic laws.

For refugees, the principle of "non-refoulement" is enshrined in the 1951 [Convention relating to the Status of Refugees](#) and is also contained in the 1967 Protocol and Article 3 of the 1984 UN Convention Against Torture. This cardinal principle is found under Article 33 (1) of the 1951 Convention relating to the Status of Refugees, which states that:

"No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I (1) of that international legal instrument.

International human rights law provides additional forms of protection in this area. Article 3 of the 1984 UN Convention Against Torture stipulates that no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.<sup>8</sup>

All relevant provisions of these conventions have been incorporated into domestic U.S. law. Congress enacted the Refugee Act of 1980 expressly to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608 at 9 (1979)). As the Supreme Court has recognized, "'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 [Protocol] . . . ." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37). The U.S. obligation of *non-refoulement* under Article 3 of the Convention Against

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<sup>8</sup> Similarly, the U.N. Human Rights Committee has interpreted Article 7 of the International Covenant on Civil and Political Rights (ICCPR) as prohibiting the return of persons to places where torture or persecution is feared; however, the United States does not agree with the Committee's view that States Parties to the ICCPR have accepted a non-refoulement obligation under the Covenant.

Torture has been implemented through federal regulations that establish “procedures for raising a claim for protection from torture, as directed by the Foreign Affairs Reform and Restructuring Act of 1998.” 64 FR 8478-01 (February 19, 1999) (the final regulations are found primarily at 8 C.F.R. §§ 208.16(c)-.18, 1208.16(c)-.18).

Procedures or arrangements for identifying refugees should provide a meaningful opportunity for noncitizens in the country to seek and, if eligible, secure protection from *refoulement*. Such procedures or arrangements are particularly important in the U.S. context as it receives asylum-seekers, including children, within mixed migratory movements which often makes the identification of asylum-seekers more difficult.

To enhance screening procedures for UAC arriving from a contiguous country at a land border or port of entry, including those relating to identifying risk of trafficking in persons and fear of persecution, and to ensure that such UAC are safely repatriated, Congress enacted Section 235(a) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 08), which mandates a screening process specific to such UAC that includes screening for protection needs for UAC who may be victims of trafficking or at risk of being trafficked upon return, or fear return to their home country because of a credible fear of persecution. In doing so, the provision requires DHS to determine that UAC from contiguous countries meet certain requirements before they are allowed to withdraw their application for admission and be returned to their country of nationality. Placing the burden of proving a negative on the government, the TVPRA 08 requires that the screening official establish the *absence* of a reason to provide protection rather than establishing a reason to provide it, which is the case for adults. Thus, at a minimum, the TVPRA 08 requires DHS to screen each unaccompanied child, who is a national or habitual resident of Mexico or Canada,<sup>9</sup> arriving at a land border or port of entry in order to establish that:

- i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child’s country of nationality or of last habitual residence;
- (ii) such child does not have a fear of returning to the child’s country of nationality or of last habitual residence owing to a credible fear of persecution; and
- (iii) the child is able to make an independent decision to withdraw the child’s application for admission to the United States.<sup>10</sup>

If every one of these criteria cannot be satisfied, the procedure is to mirror that followed for all other UAC from non-contiguous countries. In these cases, the child shall be handed over

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<sup>9</sup> Although both Canada and Mexico are contiguous to the United States, it is only in the context of Mexico that the concern about inadequate protection screening has been identified. And while TVPRA 08 mandates the screening only for unaccompanied children from Canada and Mexico, CBP policy requires all UAC from every country be screened.

<sup>10</sup> TVPRA § 235(a)(2)(A). UAC who are not from contiguous countries are automatically referred to the care and custody of the Division of Unaccompanied Children within the Office of Refugee Resettlement, Department of Health and Human Services, for legal orientation and the opportunity to seek protection or other relief in immigration proceedings. *See* TVPRA 08 § 235(a)(5)(D), (b), (c)(4)(5).

to the care and custody of the Secretary of Health and Human Services (HHS), who in turn has delegated responsibility for UAC to ORR, Division of Children Services (DCS), and the child shall be placed in removal proceedings under Section 240 of the Immigration and Nationality Act with an opportunity to seek protection or other forms of relief from removal.

CBP implements the DHS responsibility of making contiguous UAC screening determinations under the TVPRA 08, as CBP is the agency within DHS that controls entry into the U.S. at POEs, and monitors the border for those who enter or attempt to enter unlawfully. The two offices within CBP charged with carrying out these duties are the U.S. Border Patrol and the Office of Field Operations.

## OVERVIEW AND OBJECTIVES

The UNHCR Regional Office in Washington has identified the vulnerability of UAC as a primary concern to be addressed in accordance with UNHCR Global and Regional priorities and in light of the sizeable population noted above. UNHCR works with governments and others to best ensure that national and regional migration policies are sensitive to potential protection needs of children. In UNHCR's view, respect for the principle of *non-refoulement* can therefore be most effectively ensured through procedural safeguards that substantively and expeditiously determine the protection needs of individuals. These procedures must be adapted so that children, especially those unaccompanied, may still access the protection system as needed. In addition, UNHCR strives to ensure that measures to combat smuggling, which is understood to mean unlawfully bringing or attempting to bring individuals into the U.S. and trafficking, which is the unlawful bringing of individuals into the U.S. expressly for purposes of exploitation in the form of forced labor or forced prostitution or related exploitative reasons, often against the will or without the knowledge of the persons being trafficked, are carefully designed to help reduce risks of violence and exploitation and that individuals in need of protection are able to seek it.

In furtherance of these commitments, UNHCR sought to assist the U.S. government to ensure that all UAC with protection needs, in particular those from Mexico seeking to enter the U.S. who historically have not been given the same automatic access to protection as UAC from other countries, are properly screened for protection needs and provided the opportunity to seek protection from the U.S. accordingly. In keeping with these goals and concerns, UNHCR has a long-standing, collaborative relationship with DHS, ORR and other U.S. Government departments and agencies addressing issues related to ensuring the protection of unaccompanied children. In particular, following the passage of TVPRA 08, UNHCR has participated in on-going efforts within the U.S. Government and among other stakeholders to ensure the provisions of that law are carried out as effectively and efficiently as possible with an eye to monitoring the U.S. commitment to *non-refoulement* of UAC.

## METHODOLOGY

This report presents UNHCR's final findings and recommendations based on the four monitoring trips it conducted from 2012 to 2013, hosted by U.S. Customs and Border Protection (CBP)<sup>11</sup> in the following USBP sectors.

Laredo, Texas: 23 January 2012 to 3 February 2012

San Diego, California: 27 November 2012 to 7 December 2012

Rio Grande Valley, Texas: 11-19 November 2013

Tucson, Arizona: 4-11 December 2013

In consultation with CBP and DHS, the Laredo Sector was chosen as the first site due to the high volume of UAC typically apprehended there and the reasonable distances between USBP Stations within the Laredo Sector and between POEs within the Laredo Field Office. For the second trip, UNHCR proposed San Diego to provide sufficient contrast to Laredo. Unlike Laredo where most of the UAC are handled by USBP, most of the UAC seen in San Diego come through the POEs and are handled by OFO. In addition, UNHCR had heard San Diego mentioned as a site that employs good practices in its work with UAC and as such was considered an important location to observe. For the third trip, UNHCR chose the Rio Grande Valley (RGV) Sector in order to observe the location with the highest volume of UAC. The Tucson Sector was selected as the final location due in large part to its historical position as the most traveled sector before southwest Texas became the most popular and in order to visit a third state.

The methodology for the issue specific monitoring trips agreed to by UNHCR, DHS, and CBP included on-site observation of CBP's processing of UAC, group meetings with USBP and OFO as well as individual interviews with agents and officers, and interviews with the UAC in custody. UNHCR also met with ORR officials, toured ORR shelters and interviewed UAC at the shelters during the Laredo and San Diego trips. During all four trips, UNHCR met with the local Mexican Consul General and also met with officials from Mexico's National Institute of Migration (INM) during the Laredo and RGV trips. During all the trips, except the last one to the Tucson Sector, UNHCR met with officials from the National System for Family Development (DIF) which runs shelters in Mexico for children including repatriated Mexican children. While visiting the DIF shelters, UNHCR also spoke with the Mexican UAC who had recently been repatriated to Mexico. In the first three trips, UNHCR also met with representatives from local NGOs who provide legal representation to UAC in immigration court.

Over the course of the monitoring project, UNHCR conducted 68 interviews with USBP agents, 28 interviews with OFO officers, 33 interviews with UAC in CBP custody, 24 of whom were Mexican, and observed the processing of 17 UAC. These interviews and observations took place at 20 USBP stations and checkpoints and seven POEs.

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<sup>11</sup> In this report, CBP will be used when discussing matters relating to both agencies within its ambit, the U.S. Border Patrol (USBP), which monitors the border areas outside of the lawful ports of entry and Office of Field Operations (OFO), which monitors the lawful Ports of Entry, or, as will be identifiable by the context, when referring to CBP Headquarters. Where necessary to make a distinction between the two, USBP or OFO will be specified.

In keeping with UNHCR's proposal to the U.S. Government, the findings and recommendations in this report are informed by U.S. and international law and standards related to human trafficking and protection and guided by the following four child protection principles:

- 5) The extent to which the procedures acknowledge and address the **Safety & Emotional Well-Being** of the unaccompanied child. This applies to the attention given to any physical or emotional needs at the time the child first comes into contact with CBP and throughout their time in CBP custody, as well as the ability to identify and address any fear of return or risk of human trafficking.
- 6) The extent to which the process is designed to employ **Child Sensitive Procedures**, such as modified interview techniques to take into account the child's age, maturity, psychological development, and ability to articulate experiences and emotions.
- 7) The extent to which the child is able to have **Meaningful Participation in the Decision Making** as it relates to the child's ability to understand and respond to the questions and make an informed decision as to whether to withdraw an application for admission in favor of return and that such agreement to return is voluntary.
- 8) The **Accountability and Transparency** of CBP operations through the use of appropriate documentation, reporting and review of all interactions between the government officials and the unaccompanied child.

## FINDINGS

### Summary of Findings

During the four monitoring trips, UNHCR identified areas of positive CBP practice, areas of concern to CBP regarding its work with UAC, and areas of concern to UNHCR. These findings are the result of UNHCR's multiple observations and interviews with CBP officials<sup>12</sup> and with UAC. Unless otherwise specified, the positive practices and concerns indicate an observed pattern of practice.

The theme of the positive CBP practices identified by UNHCR is improving accountability and efficiency. UNHCR noted the employment of technological strategies to improve record-keeping of the UAC in CBP custody which also helps ensure that CBP meets the benchmarks set for UAC care. UNHCR observed sound inter-governmental relationships which are important to maintain when there are as many stakeholders involved as there are for UAC. UNHCR also observed the centralization of certain UAC functions which serves to increase efficiency but also provide better service through a smaller, more experienced group of officials.

The concerns that CBP itself has are diverse. In some instances, CBP representatives expressed that its hands are tied by law or policy and that it cannot always react logically to

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<sup>12</sup> In this report, UNHCR uses the term "CBP officials" to refer to both USBP agents and OFO officers as a collective when it is not necessary to distinguish between them. All references to officials, agents and officers are to individuals UNHCR met with in the field and not to CBP staff at Headquarters in Washington, DC.

the situation as it arises. One example given by CBP is that of Mexican UAC working in the smuggling industry against whom CBP cannot enforce any consequences, such as prosecution, and instead must return them immediately to Mexico. Other concerns raised by CBP reflect the challenges of working within a limited budget while others reflect the challenges of working with a young population which can take a toll on the CBP officials.

UNHCR noted multiple areas of concern during the course of the four trips, which affect the manner in which CBP conducts the protection screening required by the TVPRA 08. The information gathered in all four sectors led UNHCR to conclude that, while the law is clear regarding DHS's burden to establish that each Mexican UAC does not have an international protection need, CBP's practices strongly suggest the presumption of an absence of protection needs for Mexican UAC rather than a ruling out of any needs as required under TVPRA 08. This conclusion is supported by a range of CBP feedback including first and foremost the statement commonly voiced that Mexican UAC are always returned to Mexico. In addition, a number of CBP officials employ overly restrictive standards by which to assess trafficking and fear of persecution upon return to one's home country.

UNHCR is concerned about the manner of communication between CBP and UAC and the conditions of the questioning, especially in light of the power dynamic between children and government authorities. Based on UAC interviews, UNHCR learned that many UAC do not understand the information conveyed to them by CBP officials and do not understand what rights they have. In addition, the public area in which UAC are questioned and the speed of questioning did not appear conducive to UAC revealing very personal details about having been trafficked, the risk of trafficking, or the circumstances that may cause them to fear returning to Mexico.

Especially given the operational challenges to identifying individuals with protection needs in a mixed migration flow, UNHCR is also concerned about the adequacy and effectiveness of the training CBP officials receive on CBP's responsibilities towards UAC and refugees and asylum-seekers generally. Interviews with CBP revealed confusion regarding the definitions of "UAC", "persecution", and "trafficking", which are all essential concepts in identifying the protection needs of unaccompanied children. In addition, CBP feedback regarding the Virtual Learning Center course on UAC issues indicates that it is not extensive enough to prepare CBP agents and officers to adequately screen Mexican UAC for protection needs.

The observations and findings discussed below are divided into the following sections: *Positive CBP Practices; Concerns Expressed by CBP; and Areas of Concern Identified by UNHCR.*

## **Positive CBP Practices**

### **Genuine Concern for Wellbeing of UAC and Prioritization of UAC Processing**

UNHCR commends the concern for the well-being of UAC shared throughout USBP and OFO officials in all four sectors visited. UNHCR was made aware of many examples of generosity by officials, such as donated clothes, toys and blankets from their own homes for children in

custody along with the number of fast food meals officials admitted to buying for the children.<sup>13</sup> Many of the CBP officials interviewed expressed their distress at the circumstances of children in general, particularly all UAC.

CBP repeatedly conveyed to UNHCR that UAC are considered to be priority cases and are processed as soon as they are identified at the POE or brought to a USBP station in an effort to minimize the time a child spends in CBP custody. Both USBP and OFO stressed that they do all they can, in cooperation with the Mexican Consulate, to contact family members of Mexican UAC and facilitate family reunification.

### **Technological Systems in Place to Monitor UAC in Custody and Improve Accountability**

At the various locations, USBP and OFO provided an electronic tour of its software programs for recording all individuals apprehended, e3 and Sigma respectively. Over the course of the trips, UNHCR learned of the various efforts to maintain a transparent record of all UAC in custody, most recently the Detention Module in e3 as seen in the RGV and Tucson Sectors. A record of all UAC in custody is input into the Detention Module including the length of time in CBP custody and when various actions are taken with respect to the UAC, which helps monitor and facilitate USBP's compliance with the *Flores v. Reno* Settlement governing the detention, release, and treatment of children in immigration custody in accordance with their particular vulnerability, to the extent it remains applicable to DHS.<sup>14</sup> Part of its function is to maintain a log of all actions taken regarding each child in USBP's custody. Anytime a child is checked on, offered a meal, or other activity is performed, the USBP agent taking that action must enter and time-stamp that information into the e3DM. The e3DM can be viewed by those authorized within the sector and also by USBP Headquarters. UNHCR also observed OFO's system, SIGMA, which also has a module for recording and tracking every UAC in OFO custody. As explained to UNHCR, these electronic records assist supervisors in knowing at all times how many UAC are in custody and ensuring that all required actions with respect to UAC are taken in a timely manner. In light of CBP's temporary custodial role with regard to UAC, these record-keeping measures are important safeguards to ensure UAC are not harmed or neglected while in CBP custody.

### **Sector Juvenile Coordinator Improves Accountability**

In all four sectors visited, CBP has implemented some type of juvenile coordinator position in order to ensure that CBP's UAC-specific policies are followed. The Laredo and Tucson sectors each have a USBP sector-wide juvenile coordinator. In the RGV sector, each USBP station that regularly processes UAC has its own juvenile coordinator. In San Diego where most UAC were seen at the POEs rather than by USBP, OFO has a juvenile coordinator. UNHCR believes that a position within CBP at the local level, dedicated solely to the UAC cases, is an important step in ensuring that the policies unique to UAC are understood and implemented correctly and consistently.

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<sup>13</sup> This raises a concern regarding insufficient allocation of CBP funds to provide the necessary child-appropriate supplies for the UAC in custody.

<sup>14</sup> See TVPRA 08 § 235 (codified in part at 8 U.S.C. § 1232) (placing responsibility for the custody and placement of UAC with the Secretary of HHS); see also Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified at 6 U.S.C. § 279) (transferring UAC responsibilities to ORR).

In the Tucson Sector, UNHCR learned that the sector-wide juvenile coordinator position there is generally viewed by USBP as a good practice. Through interviews with the past and current juvenile coordinators along with USBP processing agents, UNHCR was informed that the position has resulted in greater efficiencies through a variety of means: improving communication with external stakeholders such as ICE, ORR, and the Mexican consulates through a regular point of contact at USBP; improving and creating additional resources available to agents including an updated USBP intranet page with UAC policies and guidance, an extensive UAC resource binder with instructions for every type of UAC case, and access to the juvenile coordinator herself; and through additional in-house training to USBP agents with step-by-step instructions on processing UAC cases, how to avoid common processing mistakes, and new CBP guidance.

UNHCR appreciates this focus on the UAC cases. By making a juvenile coordinator responsible full-time for the UAC cases, CBP creates a position of accountability in which the coordinator is responsible for those cases and does not have other conflicting responsibilities. The very existence of a juvenile coordinator position also serves to raise awareness internally that the UAC in CBP custody are to receive special attention. However, as discussed below in greater detail in the section on UNHCR concerns, the improvements brought to date through such juvenile coordinator positions have focused on efficiency and the technicalities of the process, especially in the current environment of surging numbers of arriving UAC and the resulting pressure placed on CBP. There remains an important opportunity now to focus efforts on the substance of the UAC process - how to effectively interview UAC and assess their potential protection needs – which is critical to ensuring that children with protection needs are identified. CBP has the opportunity to provide additional training to the juvenile coordinators to develop their expertise in areas such as child welfare and child-specific interview techniques with a focus on child victims of trauma, meaning of persecution and trafficking, and how to identify children who may be at risk of being trafficked so that they in turn can train their fellow officers or agents who are handling the UAC cases. In the alternative, DHS has the opportunity to arrange for another government office which already has such existing child and trauma expertise to manage the substance of the UAC protection screening rather than developing the expertise within CBP.

### **Central Processing Improves Accountability**

In both the RGV and Tucson Sectors, UNHCR learned of and observed USBP efforts to centralize the processing of UAC who are referred into ORR's custody. UNHCR noted several advantages, described below, of this centralization related to protecting the children, but also noted that the children not referred to ORR - the large majority of Mexican UAC - do not benefit from them.

In the Tucson Sector, there are nine USBP stations that have varying levels of apprehensions of UAC. When a UAC from any country other than Mexico is apprehended by any of the stations, the assigned processing agent creates the UAC file with the Field Form 826 completed and other required forms for the WA-NTA packet if possible. Then the UAC is soon transported to the Tucson Sector Coordination Center (TCC) where agents at the TCC complete the file including the steps necessary to refer the child to ORR's custody. The TCC

functions only as a case processing hub and does not apprehend any individuals. At the TCC, there is a designated juvenile processing team on each shift, a specific area for juveniles, and the Sector Juvenile Coordinator is present at the TCC. The juvenile processing teams are selected by the TCC and the agents interviewed by UNHCR on these teams view each other as having specific skills that make them effective at processing and interacting with UAC: organized; patient; effective communicators in part because they are fully bilingual in English and Spanish; and a minimum of one year's experience in processing cases. The UAC-designated section of the processing area is in the corner, thereby avoiding some of the overall commotion, and on the wall is a board which records all the UAC in the TCC's custody along with a checklist of required action steps USBP must take in their cases. In the course of completing each child's file, the TCC also serves to correct errors made during the initial processing at the stations.

The RGV Sector does not have a processing-only center like the TCC, but one station, Weslaco Station, has been designated as the hub for processing all non-Mexican UAC apprehended throughout the sector along with all UAC, including Mexican UAC, apprehended by the Weslaco Station's agents. The Weslaco Station's centralization of UAC processing is not as advanced as at the TCC in that there is not space within the processing area that is only used for UAC and the agents assigned to UAC processing are not part of a special team but rather rotate daily. Also, the RGV Sector does not have a sector-wide juvenile coordinator, but there is one for the Weslaco station. Similar to what was heard at the TCC, agents interviewed by UNHCR reported that in completing the cases for UAC apprehended at another station and transferred to Weslaco they very often correct mistakes that were made in the file at the apprehending station.

In UNHCR's view, a centralized process for the UAC cases can function with a team of agents with the expertise to process the cases in a comprehensive, protection-oriented and expeditious manner, a strategy that is more feasible than training all agents to be experts. It also allows interested agents to apply to the special teams thus matching existing skills and interests with job duties and incentivizing agents and officers in this function to improve processing and screening of UAC. Currently, these agents do not receive any additional training in child-sensitive interview techniques or in USBP's policies, however, USBP could more feasibly provide such training to this smaller group of agents rather than all USBP agents.

Unfortunately, the benefits of both the Tucson and RGV models are not shared by the Mexican UAC, the majority of whom are returned to Mexico by the station that apprehended them without passing through a UAC processing hub. Therefore, any expertise exercised by the agents who handle UAC cases at the hubs is not applied to the protection screening conducted on most of the Mexican UAC. It is imperative that this large gap in service be addressed.

UNHCR notes an additional concern related to the otherwise good practice of employing processing hubs. When more than one agent interviews a child, two different written statements may be created. Due to their age, the stressful environment in which they are questioned, and the lack of counsel while in CBP custody, it is not unlikely that children may give a different answer to one agent than to another, in particular if the child is more

comfortable speaking with one or the other. The creation of two statements may lead to a due process violation when potentially conflicting UAC statements are produced in the child's immigration hearing.

### **Good Intra- and Intergovernmental Coordination**

The procedures for processing UAC in CBP custody require some form of coordination outside of CBP regardless of the outcome of the protection screening. The responsibility of government officials for the safety and well-being of the children in its custody extends up until the moment the child is released. It is essential that the coordination is complete and detailed so that no child is negatively impacted by any breakdown in the process.

UAC who are not from a contiguous country along with Mexican UAC who have been identified as potentially in need of international protection or are not able to make an independent decision to voluntarily return home are referred to HHS for placement within the DCS program in ORR. This referral involves the ICE FOJC as an intermediary between CBP and ORR. In San Diego, UNHCR was able to observe the coordination between OFO and the FOJC and saw that the ICE FOJC was well known to the CBP points of contact for UAC. While the ICE FOJCs for the RGV and Tucson Sectors are not located in the immediate area of Sector Headquarters, UNHCR spoke with the CBP juvenile coordinators responsible for coordinating with them in both locations. In addition to the specific points of contact responsible for liaising with the ICE FOJC, USBP agents and OFO officers at the supervisory level were largely able to describe to UNHCR the coordination processes or knew where to turn for instructions.<sup>15</sup> These factors all indicate to UNHCR that coordination mechanisms are in place for when a UAC is to be referred by CBP to ORR for placement.

For the Mexican UAC who are not referred to ORR, because the custody transfer of a child across an international boundary must be handled carefully, TVPRA 08 stipulates that the United States should pursue an arrangement with Mexico that provides for additional protection during the repatriation of children to Mexico:

- no child shall be returned to the child's country of nationality or of last habitual residence unless returned to appropriate employees or officials, including child welfare officials where available, of the accepting country's government;
- no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and
- border personnel of the countries that are parties to such agreements are trained in the terms of such agreements<sup>16</sup>.

Under this framework, Mexican UAC who are identified as not in need of international protection by agents or officers, are determined to be capable of making an independent

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<sup>15</sup> UNHCR noted during interviews with non-supervisors, however, that many were unaware of or misinformed about the process for referrals to ORR and what happens to Mexican children who are not immediately returned to Mexico. Training could include an overview of the entire UAC continuum to improve knowledge about the UAC system as a whole.

<sup>16</sup> TVPRA 08, Section 235(a)(2)(C)

and informed decision to return home, and who make that decision may be returned to the Mexican immigration authorities, INM, with the assistance of the local Mexican Consulate.

In all four sectors visited, UNHCR learned from CBP of the local agreements made with the Mexican officials that dictate the manner of repatriation to Mexico of Mexican UAC. These agreements designate the hours and specific POE(s) when and where CBP can hand off Mexican UAC into the custody of the Mexican officials, namely to INM often with the facilitation of the Mexican Consulate depending on the location. Particularly in the case of USBP, it appears that these agreements are respected, although there were reports in more than one location of some children being returned after the approved hours.<sup>17</sup>

Both OFO and USBP staff underscored that one of their strongest assets in dealing with Mexican UAC is their good relationship with their respective Mexican Consulates. In all locations visited, CBP has well-established lines of communication with the Mexican Consulate and in addition to notifying the Consulate of all Mexican nationals in CBP custody, agents and officers also turn to the Consulate routinely for assistance in verifying age and nationality of Mexican UAC, when it is in question, and locating their family members to be contacted. The Consulate also facilitates the coordination between U.S. and Mexican immigration officials when returning a Mexican UAC back to Mexico. In the San Diego sector, the Mexican Consulate has been given office space within the San Ysidro POE with a desk and computer station where the consular official can meet with all Mexican UAC being returned because that process is funneled through the San Ysidro POE for all Mexican UAC in the sector.<sup>18</sup>

During the San Diego trip, UNHCR accompanied OFO in returning several children to Mexico. An OFO officer drove a van with the UAC accompanied by a Mexican consular official directly to a door in the border wall where the van was met by officials from INM and DIF. The consular official accompanied the children from the van into the INM building and physically turned the UAC over to the INM officer. It was explained to UNHCR by DIF and the Consulate that DIF personnel then transported the UAC from the INM office to the DIF reception center in Tijuana for processing and release, if viable, to the parent or other caregiver.

This careful hand off of the children from one authority to the next is a good practice. The return procedures at other POEs were described to UNHCR but only in San Diego was it observed. Such a return procedure provides for the immediate safety of the child, hinders any immediate contact with a trafficker or smuggler, provides additional opportunities for

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<sup>17</sup> UNHCR is concerned that not all of the Mexican children who are being repatriated or returned to Mexico are done so in the safe manner provided for in TVPRA 08 because two out of the three Field Offices visited, Laredo and Tucson, told UNHCR that they are not technically bound by these local agreements with Mexico because the agreements address the process of “repatriation”, whereas OFO’s return process is the withdrawal of a UAC’s application for admission. The language of TVPRA 08, §235(a)(2)(C) uses both “repatriation” and the more generic term “return” indicating that the processes employed by both USBP and OFO are to be covered by the local repatriation agreements.

<sup>18</sup> At the Brownsville POE, the Mexican Consulate also has a small area inside the port in order to meet with Mexican nationals. UNHCR, however, did not have the opportunity to observe the procedure at that port.

Mexican authorities to screen family members prior to reunification and for the child to disclose any fears or concerns about the proposed reunification.<sup>19</sup>

### **Concerns Expressed by CBP Related to Screening of UAC**

In meetings and conversation with both OFO officers and USBP agents in all four sectors visited, the overall message conveyed was that CBP believes it does a good job in handling the UAC in its custody and protecting their interests through its coordinated efforts with the other entities involved. At the same time, some of these officials did express the following concerns regarding its processing of UAC and offered suggestions for improvement:

#### **Inability to Stop the Revolving Door of UAC from Mexico**

USBP in most locations shared with UNHCR its concerns with respect to UAC who have been recruited into the smuggling industry. USBP reported that smuggling operations in Mexico purposefully recruit minors because they know the U.S. authorities will almost never prosecute children and instead will immediately return them to Mexico. In fact, some agents acknowledged that they are the victims of their own efficient procedures when on the rare occasion they apprehend the same child twice in the same day. Many USBP agents expressed frustration seeing the same UAC pass through their hands again and again without being able to do anything other than return them to Mexico. A number of the agents expressed the wish that more of these children who work in the smuggling industry could be prosecuted, but that it was rare for the United States Attorney to do so without extenuating circumstances.

#### **Definition of Accompanying Family Members Is Too Restrictive**

In various meetings, officials from both USBP and OFO reported to UNHCR that separating UAC from any relative other than a parent or legal guardian is too restrictive in the face of the situation as it exists at the U.S.-Mexico border. They reported that it is very common for Mexican UAC to be traveling with aunts, uncles, grandparents, or adult siblings, often because, according to CBP, children have a parent already living in the U.S. whom they wish to join.<sup>20</sup> In many of these situations, the child had been raised by an extended family member who had assisted in bringing the child to the U.S. border. Likewise, UNHCR was told that married UAC present a challenge when CBP is required to separate a married UAC from his or her adult spouse. In such a situation, the couple is generally handled as two separate individuals and as a result, placement in the U.S. or repatriation is generally not coordinated.<sup>21</sup>

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<sup>19</sup> A protective transition in custody is imperative, particularly in light of the high numbers of Mexican UAC who work as foot guides in the smuggling industry and who are from the border region. Any gaps in custody may result in their immediate return to their homes and employment without DIF having the opportunity to assess whether a return to their caregivers is safe and in the child's best interests.

<sup>20</sup> In UNHCR's 2014 report, *Children on the Run*, UNHCR found that only 19% of the 102 Mexican children it interviewed for the study had at least one parent in the U.S.

<sup>21</sup> The Tucson Sector follows an unofficial policy of repatriating Mexican UAC with their non-parental /legal guardian family members. UNHCR is concerned that the application of this policy poses potential risks to the safety of the UAC unless certain safeguards are in place, such as formal verification of the

Throughout these discussions, CBP officials, in particular officers from OFO, attributed the requirement to separate such relatives to the TVPRA 08 when in fact it was the Homeland Security Act of 2002 which defines an “unaccompanied alien child”. While TVPRA 08 did not change the definition of a UAC, the requirement that a UAC be able to make an independent decision to return home did have an impact particularly for the young UAC who were not capable of making an independent decision and therefore by law could no longer be turned right back around accompanied by only an extended family member. UNHCR shares CBP’s concerns that this can be very traumatic for the children and is a difficult burden on the agents and officers to enforce.

### **Need to Limit Children’s Time Spent in CBP Custody**

At every location visited, OFO and USBP repeatedly stated that their facilities are not appropriate for the care of minors and therefore it is in the children’s best interests to be processed as quickly as possible and moved elsewhere. Over the course of these trips, a period in which the numbers of UAC drastically rose<sup>22</sup>, CBP increasingly conveyed to UNHCR its frustration at how long UAC were forced to remain in CBP custody pending an available space in ORR custody. CBP underscored its commitment to transfer custody in under 72 hours as required in the TVPRA 08. However, it has not always been possible due to lack of space in ORR’s program. Even for the time that children do remain in CBP custody, many agents and officers expressed their desire for the provision of child-appropriate amenities to lessen the children’s anxiety. This would also serve to ease the burden on agents and officers who are responsible for maintaining calm and order within the station or port.

### **Challenges to Effective Communication with UAC**

CBP in all locations informed UNHCR that the majority of UAC apprehended are smuggled into the U.S. The resulting difficulty, which is also true of children who are being trafficked, is that many UAC have been coached to conceal information about their identity and other key information. CBP reported seeing cases of children claiming to be adults or non-Mexicans claiming to be Mexican so as to be more easily returned and have another chance to try again to cross the border. CBP has also seen adults claiming to be minors to receive better treatment. OFO stated that at the POEs in particular, children may pose as the child of the adult smuggling them. CBP reported that it is a significant challenge to obtain accurate information from the children being smuggled and to do so without delaying the processing of their case.

An additional challenge to communication identified by CBP is that children may be scared or overwhelmed, a condition exacerbated by the CBP environment. Some agents and officers find it difficult to elicit information from children in this state or to explain things to them in a way that they understand, especially without specific training on how to work with children. Circumstances identified by CBP that may heighten a child’s anxiety include the intimidating setting of a detention area, the lack of amenities for children, the

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familial relationship and assessment that the relative is a safe guardian, and that USBP agents might consider this UAC as accompanied and fail to conduct the TVPRA 08 screening.

<sup>22</sup> January 2012 – December 2013.

interviewer's uniform, language barriers between the interviewer and the child, the traumatic experience such children may have just been through and the lack of private space in which to talk about it, possible separation from a loved one in the process of apprehension; and the child's uncertainty about what will happen to them or how they will be treated. UNHCR agrees with CBP that these factors present a challenge to the agents and officers who work with the UAC.

### **Need for Additional Training and Information Related to UAC and Effective Screening**

When asked what would help CBP to better handle the UAC cases, some supervisors along with some processing agents and officers from all four sectors visited responded that additional training would be valuable. Among these responses, UNHCR identified three areas of focus for the training: understanding what human trafficking is and how to identify it, child-specific interviewing techniques, and a holistic understanding of the process for UAC beyond their time in CBP's custody. Based on its observations and interviews, UNHCR agrees that these are three important areas in which training would better enable CBP to fulfill its protective responsibilities and benefit the UAC in custody.

Training on human trafficking would improve CBP's ability to identify those at risk of trafficking as well as those who have been trafficked. Such training would include understanding the definition and scope of human trafficking and learning techniques to identify trafficking. Supervisors in more than one sector also expressed the view that reports on actual trafficking cases identified in the U.S. would assist CBP in learning what to look for in the screening process and that for cases which were identified as having passed through CBP's hands at some point, CBP would be able to back track to understand what trafficking indicators they may have missed. This kind of feed-back would require the cooperation of other law enforcement entities and awareness-raising regarding CBP's position as first responder regarding human trafficking crossing into the United States.

UNHCR believes that training in how to employ child-specific interviewing techniques would benefit every UAC who is in the custody of CBP and is integral to the identification of those who have been trafficked or are at risk of being trafficked, who fear return to their home country, or who are not capable of making an informed decision to return to their country. CBP reported to UNHCR that new agents and officers do receive some training on interviewing techniques at the academy, but that they do not receive any such instruction specific to children to address child development and its effect on communication with children, including children's capacity to understand legal rights, ability to process information or experiences, and ability to articulate them to adults. CBP communicated to UNHCR that these skills cannot be taught through a VLC, but must be taught and practiced in person.

Education on the custody and process for UAC beyond their time in CBP custody would help officers and agents to understand the importance of their role and place in the process. Many agents and officers shared that they did not know where UAC went after they left CBP custody, in particular for the children who are referred to the custody of ICE and then ORR and also for the Mexican children who are repatriated to Mexico. It is natural that CBP staff would want to know how their role fits within the larger picture of unaccompanied children

and its relative importance. It also may assist the agents and officers filling out the paperwork to better understand the paperwork. UNHCR observed a USBP agent processing a young Guatemalan UAC. The boy told the agent that he was afraid to go home because he had been forced to carry drugs. In the course of completing the file, the agent completed a form to initiate a credible fear interview, gave the UAC a handout to read on the reasonable fear interview, explained the UAC's rights to him and had him sign the I-770 and then told him he would see an immigration judge. The pile of paperwork was as confusing to the agent as it was to the UAC and he called the supervisor over for assistance. Better education about the process for UAC would allow the agent to see for himself that the paperwork for a credible or reasonable fear interview is not applicable.

### **The Consequences of the High Volume of Apprehensions**

In the RGV Sector, UNHCR observed the high volume of individuals apprehended and placed in custody, including UAC. Some officials in the RGV Sector expressed their concern for the safety of both the USBP agents and also for the children themselves when at times there are dozens of individuals inside a cell together, along with large groups of individuals in the processing area outside the cells often outnumbering the agents. In addition to the concern over security, agents and officers identified health concerns. While UNHCR visited the Hidalgo POE, there was a family in custody with scabies. They were separated from others in custody, but officers expressed the concern that the room, which is especially equipped for families and UAC, and all the items in it would not be adequately cleaned to prevent spread of the scabies.

In addition to the above concern for the physical safety and health of agents and children, some supervisors also noted their concern for the mental well-being of agents and officers who routinely process the children's cases, in particular in the RGV Sector. They shared that such agents and officers sometimes "burn-out" after apprehending and processing such large numbers of children. UNHCR notes that in addition to the impact on the agents and officers, "burn-out", and its associated loss of empathy, affects their ability to do their job as well in terms of how they communicate with the children. Most of the agents and officers spoke to UNHCR about the personal impact on them from working with the children, often mentioning that they themselves have families and would not want their own children to be in such a situation and it is therefore difficult to see so many children apart from their families in such conditions.

### **Areas of Concern Identified by UNHCR**

#### **Need for Greater Understanding of UAC Framework and Protection Mandate**

After conducting the four monitoring trips, UNHCR is very concerned by USBP agents' and OFO officers' low baseline understanding of the legal framework for the protection of UAC and CBP's important role within it safeguarding against the return of UAC to actual or potential harm. This indicates a need to increase the level of education and training on these issues.

The following is a stark example of how not all agents and officers have internalized their important role as first responders to protect against harms such as trafficking. UNHCR interviewed a USBP agent who worked regularly on UAC cases. During the interview, he told how he once was handling the case of an unaccompanied teenage girl from Mexico. She was processed for voluntary return and he was the one who drove her to be returned to Mexico. He explained how he liked working with the children and that he felt comfortable talking to them. During the drive, they chatted and he asked her more about why she left Mexico. She revealed that some members of the cartel that operated in her town had been pursuing her and she was worried that they were going to force her into prostitution. The agent told UNHCR how he was obviously concerned for her when he heard that but he did not think there was anything he could do because they had already left the station and were en route to meeting the Mexican officials. He told the girl to stay in school and wished her luck before she was handed over at the border. This well-meaning agent knew his role in preventing undocumented immigrants from entering the U.S., but he did not fully comprehend his role in protecting this girl from the risk of trafficking she faced upon return.

All USBP agents and OFO officers are trained on the definition of an unaccompanied child and the screening requirements for them under the TVPRA 08. This training is given via a module in the Virtual Learning Center (VLC), a computer-based learning program which must be completed annually. Across all four sectors, CBP officials spoke of the high number of VLC trainings which must be completed each year, jokingly calling it “death by VLC”. While a number of the CBP officials interviewed reported that they thought the VLC on UAC was sufficient, they did not display an appropriate level of knowledge of UAC and the protection needs at the heart of the TVPRA 08 screening. A number of other officials expressed a desire for further instruction, particularly in-person training, noting that the amount learned from the computer-based training depends on how carefully the person chooses to read through the presentation. Having viewed the VLC module on UAC, UNHCR identified a number of gaps in the material<sup>23</sup> and believes that additional and improved training is required to meet TVPRA 08’s requirement for “specialized training” including “identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate”.<sup>24</sup> Below are the primary gaps observed by UNHCR in CBP officers’ and agents’ understanding of the legal framework to protect UAC.

In all four sectors, UNHCR observed a significant need for greater understanding of the three key concepts addressed by the TVPRA 08 screening: fear of persecution in home country, human trafficking, and a child’s capacity to make an independent decision regarding return to home country. It was also evident that many agents and officers do not understand the rationale behind TVPRA 08: while a Mexican UAC is asked to decide if he or

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<sup>23</sup> UNHCR is willing to provide detailed comments on the VLC if needed.

<sup>24</sup> TVPRA 08, §235(e): TRAINING.—The Secretary of State, the Secretary of Home-land Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state and local personnel, who have substantive contact with unaccompanied alien children. Such personnel shall be trained to work with unaccompanied alien children, including identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate, including children described in subsection (a)(2).

she would prefer to return to Mexico or remain in the U.S. to pursue legal status, in the event that the UAC chooses return, it becomes DHS' responsibility, currently delegated to CBP, as the UAC's temporary custodian to decide whether the UAC is permitted to make that decision. If CBP finds that the UAC fears returning to his or her home country due to fear of persecution, or has been or is at risk of being trafficked upon return, or is not able to make such a decision for him- or herself, then CBP is required to refer the UAC to the custody of Health and Human Services instead of carrying out the UAC's decision to return home. Only if CBP finds that the UAC does not fear returning to his or her home country due to fear of persecution, has not been or is not at risk of being trafficked upon return, and is able to make such a decision is the UAC allowed to exercise his or her decision to return to Mexico.

### *Fear of Persecution*

UNHCR is concerned by the fact that a number of the CBP officials interviewed are acting as de facto adjudicators of the children's potential asylum claims, which in the case of Mexican UAC means that CBP may be returning a child who fears persecution if returned to Mexico, thus rejecting a legitimate asylum-seeker. In this respect, TVPRA 08 merely requires DHS to determine whether a Mexican UAC is afraid to return to Mexico owing to a credible fear of persecution, without any follow-up assessment of what the basis of the feared persecution is. With some notable exceptions<sup>25</sup>, most officials said that they asked UAC if they are afraid to return home as required by the current CBP forms. However, how the officials proceeded based on the children's answers varied significantly and resulted in a failure to protect in an unknown number of cases.<sup>26</sup> More than half of the officials stated that it was not their job to assess a child's fear of return to his or her home country, only to process the case so that the child's claim can be heard by the appropriate adjudicator. A significant number of officials, however, stated that persecution is limited to harm inflicted directly by the government and that children who fear gangs or cartels do not therefore fear persecution and are returned home. Not only is this not an accurate legal conclusion, given the prevalence of violence perpetrated by non-state actors in Mexico against whom the Mexican Government is either unwilling or unable to protect its citizens, this misconstruction of asylum law and the standard in TVPRA 08 has likely resulted in Mexican children being returned despite their need for further evaluation of their protection needs.

A second common misunderstanding about the nature of the fear claimed by UAC is at what point harm rises to the level of persecution. Some officials stated that it was their responsibility to assess the degree of harm the child fears and that for the Mexican children only harm that amounted to a threat to life was sufficient to refer the child to ORR rather than return him or her to Mexico. This understanding of a minimum threshold for persecution as fear of torture or a threat to life is incorrect and does not conform to

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<sup>25</sup> Most of the officials who stated that Mexican UAC are not asked if they are afraid to return were from the Laredo sector. UNHCR believes that this error was not seen as often, although it did occur, in the subsequent trips most likely due to the surging number of arriving UAC which necessitated improved and more frequent instruction to the field on UAC processing.

<sup>26</sup> This concern about CBP acting as an adjudicator is not limited to UAC only, but also extends to adult asylum-seekers received by CBP.

guidance from both UNHCR and U.S. jurisprudence and DHS policy.<sup>27</sup> In order for harm or a threat of harm to amount to persecution, it is not necessary to establish a threat to life or freedom, physical harm, or even malignant intent on the part of the persecutor, but it is necessary to take into account the individual’s circumstances including age. Due to the overly-restrictive understanding of what constitutes persecution by some officials, UNHCR is concerned that Mexican children have been returned despite their need for further evaluation of their protection needs or as mandated by TVPRA 08.

### *Human Trafficking*

UNHCR is likewise concerned about the limited knowledge the CBP agents and officers have of human trafficking. The majority of USBP agents and OFO officers interviewed were unable to provide a clear definition of human trafficking and were unable to distinguish it from human smuggling and other forms of exploitation. Officials interviewed by UNHCR were unable to articulate in their own words the basic elements of the following definitions:

<b>Human Smuggling is</b>	<b>Human Trafficking is</b>
<p>“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident . . .”<sup>28</sup></p>	<p>“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>29</sup></p>

<sup>27</sup> See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, UN Doc. HCR/IP/4/Eng/REV.1 (1979, reissued Dec. 2011) (reissued as *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, (*Handbook*), ¶ 52-53 available at <http://www.refworld.org/docid/4f33c8d92.html>); see generally *1998 Guidelines for Children’s Asylum Claims*, U.S. Department of Justice, issued by legacy Immigration and Naturalization Service, now U.S. Citizenship and Immigration Services (USCIS) (*USCIS Child Guidelines*) (10 Dec. 1998), available at <https://www.immigrantjustice.org/sites/immigrantjustice.org/files/INS%20Guideline%20on%20Childr en%20Asylum%20Claims.pdf>; See *Asylum Officer Basic Training Course Lesson Guidelines for Children’s Asylum Claims* (Rev. Date 1 Sep. 2009), available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-divisiontraining-programs> (see link at page bottom).

<sup>28</sup> Article 3, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime

<sup>29</sup> Article 3, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime

When asked what their understanding of human trafficking is, most officials interviewed described the practice of human smuggling, including at least one person acting as a juvenile coordinator. While human trafficking and human smuggling may share some commonalities and a situation that starts out as one of smuggling may devolve into a trafficking scenario, it is essential that the individual agents and officers who conduct the screening of UAC, and who also may be called on to assist in the prosecution of a smuggler or trafficker, be able to distinguish the two practices.

Under the TVPRA 08, border officials are required to conduct two distinct screening assessments concerning trafficking: 1) a determination that a UAC is not a victim of a severe form of human trafficking; and 2) that there is “no credible evidence” that a UAC is at risk of being trafficked upon return to his or her country. In order to effectively make both determinations, officials conducting screening interviews must not only understand the definition of trafficking but also be well-aware of the established trafficking indicators and common fact patterns, and be able to recognize them from the information provided by the UAC. It bears underscoring that this identification of risk does not require the UAC to identify him or herself as a victim of human trafficking—the responsibility rests solely on DHS, and by delegation to CBP, to assess the child’s information in light of trafficking indicators. UAC cannot be expected to understand or articulate what trafficking is or the warning signs that suggest they might be at risk of being trafficked.

When UNHCR asked officials what they look for when assessing if a child has been trafficked or is at risk of being trafficked, many responded that they would recognize trafficking when they see it and noted they would look for obvious physical signs of injury or abuse. While some people who have been or are in the process of being trafficked will have outward signs of abuse, not all will and CBP does not conduct a physical exam. This indicator of trafficking is also not useful for children who are not currently trafficked but are at risk of it upon return to Mexico. While the Form 93 includes some of the situational indicators of possible trafficking such as restrictions of freedom of movement and the child’s identity documents in the possession of someone else, the agents and officers interviewed were unable to provide any concrete examples of how they would interpret and apply the questions to a UAC or how severe forms of human trafficking might be identified in the context of border enforcement. None of the agents or officers interviewed said they had ever identified a child trafficking victim or one at risk of trafficking.

And yet the United States Department of State Trafficking in Persons Report of 2013 states: “The United States is a source, transit, and destination country for men, women, and children—both U.S. citizens and foreign nationals—subjected to forced labor, debt bondage, involuntary servitude, and sex trafficking.”<sup>30</sup> Mexico is one of the top countries of origin for foreign victims of human trafficking in FY 2012.<sup>31</sup>

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<sup>30</sup> USDOS, 2013 Trafficking in Persons Report, p. 381.

<sup>31</sup> USDOS, 2013 Trafficking in Persons Report, p. 381.

### *Able to Make an Independent Decision*

UNHCR is concerned that CBP as a whole is not assessing whether a Mexican UAC “is able to make an independent decision to withdraw [his or her] application for admission to the United States” and return to Mexico, the third prong of the screening required by TVPRA 08.

As written by Congress, this aspect of the screening serves to protect children who may be too young or not have the mental capacity to make their own decision regarding their safety and welfare. Unlike with screening for trafficking and fear of persecution, there are no questions or instructions built into CBP’s process for CBP officials to assess a UAC’s ability to make the decision to return to Mexico. This lack of a mechanism to ensure that agents and officers are fulfilling the third part of the screening makes it easier to not do so and more difficult for a supervisor to catch the failure. UNHCR found the USBP agents in the RGV and Tucson Sectors to be the least aware of the requirement to assess each UAC’s decision-making ability. When presented with hypothetical examples of a child who is not able to make an independent decision about returning home – a very young child or one who is mentally handicapped – and questioned about whether they would handle the processing of such a Mexican UAC any differently, a number of agents responded that while they would likely take a softer approach with those children, they would be returned to Mexico like the other Mexican UAC. The OFO officers in those two sectors interviewed by UNHCR were more aware that some children are deemed unable to make the decision to return home because when asked the same questions as the USBP agents, they said that Mexican UAC under 14 years old are referred into ORR’s custody instead of being returned to Mexico, a clear reference to the CBP guidance which states that children 14 years and older are presumed to be capable of making the decision to return home. Despite their practice of referring the younger children to ORR, the OFO officers did not indicate a broader awareness of their role in assessing each child’s ability on a case-by-case basis to make such a decision. These responses are quite revealing not only about the lack of knowledge of the specific requirements for processing the UAC but also the bigger picture of the role of CBP in affording protection to these children who are not in a position to make a decision for themselves and do not have a parent or legal guardian with them to make it for them.

### **Assumptions and Narrative Relating to Mexican UAC and Their Protection Needs**

One of UNHCR’s primary concerns is that nearly every agent and officer UNHCR spoke with stated that Mexican UAC are voluntary return cases, meaning that across the board they are returned to Mexico. This sweeping statement was made not just in reference to the Mexican UAC already processed by CBP but also to all Mexican UAC that CBP would be encountering. As such, it presupposes the outcome for the many Mexican UAC yet to be seen and is contrary to the child protection-oriented standard written into TVPRA 08 which only permits return based on an actual finding on a case-by-case basis that:

- i) such child *has not* been a victim of a severe form of trafficking in persons, and there is *no* credible evidence that such child is at risk of being trafficked upon return to the child’s country of nationality or of last habitual residence;

- (ii) such child *does not have* a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and
- (iii) the child *is able* to make an independent decision to withdraw the child's application for admission to the United States.<sup>32</sup>

Significantly, almost all Mexican UAC interviewed by UNHCR in Laredo reported that they had never been asked by CBP if they were afraid to return to Mexico or whether they had been a victim of human trafficking or other kind of abuse, although a few children did recall being asked by CBP only about sexual abuse.<sup>33</sup> In the RGV Sector, only one of the five Mexican UAC interviewed there said he was asked if he was afraid to return to Mexico. UNHCR is concerned that when a generalization such as the one about Mexican UAC is said and repeated as consistently as UNHCR heard it said in all four sectors, it generates an operational bias influencing how those cases are handled.

UNHCR observed that one vulnerable population in particular was not recognized as having protection needs: Mexican UAC who work as guides for human smuggling operations. The USBP agents interviewed shared that nearly all Mexican UAC who are suspected of acting as foot guides are routinely given voluntary return, even those with a lengthy history of apprehensions by USBP. The virtual automatic voluntary return without investigation regarding the smuggling activities indicates a belief that these UAC are acting solely on their own volition and there is no reason to believe they are at risk of danger upon return to Mexico. UNHCR heard views from some USBP agents that because these children are involved in such work, they cannot also be victims. At the same time, USBP agents widely reported that the border region is heavily controlled by organized armed criminal groups. One USBP supervisor noted that "independent" guides or smugglers were in physical danger of being attacked by the criminal group in control of that particular region and that most guides are working for a crime lord. Several agents within the special investigative units noted that the Mexican UAC who are typically recruited into the smuggling business come from similar backgrounds that increase the children's vulnerability: no father figure in the home, large family, living in poverty, sick alternative caregivers, and coming from a family already involved in the smuggling industry. They also noted that some of the children are afraid to return to Mexico but are even more afraid of not returning and being labeled a snitch against their employers. Nevertheless, when UNHCR asked the agents responsible for screening the UAC if they believed that the children acting as guides may in fact have a protection need, in general the agents indicated that they did not think so and that they did not inquire into the nature of the UAC's involvement, including whether fraud or coercion was used to force them into or to remain in these activities. Some of the agents then admitted that it was something they had never thought of before. UNHCR is concerned that the failure to consider whether a UAC's involvement in such activities might not be voluntary or whether such a child might have an unrelated protection need means that a

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<sup>32</sup> TVPRA §235(a)(2)(A) (emphasis added).

<sup>33</sup> Five of the seven UAC interviewed in USBP custody stated that they were not asked if they were afraid to return. One of the two UAC who were asked by USBP in Laredo if they were afraid, had not been asked the previous time he had been apprehended by USBP in Hidalgo, Texas. All six UAC interviewed at the DIF shelter in Nuevo Laredo stated that they had not been asked if they feared returning to Mexico. Of the UAC interviewed at the DCS facility in San Antonio, only two were apprehended at the border, one of whom was not asked if he was afraid to return to his country.

UAC with a potential protection need may not be identified and referred appropriately and would thereby be returned to a dangerous situation.

By the very nature of their work, these children present indicia of likely human trafficking and should be assessed on a case-by-case basis for whether they have been victims of a severe form of trafficking or are at risk of being trafficked upon return to Mexico. Again, TVPRA 08 places the burden on DHS to demonstrate that they are not victims of trafficking or at risk of being trafficked.

[C]hildren are exploited by adults – including the cartels that control the human smuggling industry – and are made to engage in unlawful and dangerous activities. Children in this situation are often lured in with the promise of money, the likes of which cannot be earned through what few legitimate work opportunities might be available to them. Once ensnared, the children are not easily allowed to stop performing the smuggling tasks and are caught in a web of criminal activity and threats to their safety and well-being. Given their young ages, rampant poverty, lack of opportunity and often unchecked crime-related violence in at least some parts of Mexico, serious questions are raised as to the coercion and exploitation of these children as opposed to a true informed and voluntary decision to participate in this often-dangerous criminal activity.<sup>34</sup>

The exploitation of the children subject to these practices represents serious human rights violations and is a strong indication that these children may be in need of international protection. As such and in light of UNHCR's observations, UNHCR is concerned that CBP is not taking sufficient steps to meet its burden under the TVPRA 08 to determine that "there is no credible evidence that such child is at risk of being trafficked upon return" to Mexico.

The belief that the Mexican UAC are unlikely to have protection needs affects the quality of all aspects of the screening process including the manner in which CBP questions the UAC; explains to them their rights and decisions to be made; judges their ability to make an informed, independent decision; and understands and responds to their potential protection needs. This ultimately affects the outcome of the screening process, which may result in Mexican UAC in actual or potential need of protection not having the opportunity to request protection in the U.S. and being returned to Mexico where they may face real harm. In addition, the presumption of an *absence* of a protection need rather than a *ruling out* of any possible protection needs imposes a greater burden on the child to articulate specifically why he or she may be afraid to return to Mexico well beyond the child's capabilities to do so, in particular at that place in time so soon after apprehension, and beyond what the TVPRA 08 requires.

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<sup>34</sup> UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, p. 39 (Mar. 2014), available at: [http://www.unhcrwashington.org/sites/default/files/UAC\\_UNHCR\\_Children%20on%20the%20Run\\_Full%20Report\\_ver2.pdf](http://www.unhcrwashington.org/sites/default/files/UAC_UNHCR_Children%20on%20the%20Run_Full%20Report_ver2.pdf)

## Need for Child, Victim, and Refugee-Sensitive Approaches

A central requirement for interviewing children for protection needs is to incorporate a child-sensitive approach. This means accounting for the child's age, level of maturity, psychological development, and ability to articulate past and current experiences and emotions. As UNHCR wrote in its report, *Children on the Run*,

International standards as well as the policies and practices of many States, among them the United States, recognize that any assessment of the protection needs of children – in particular international protection – must take into account age, development, vulnerability, psychological state and other factors relating to a child's ability to identify and articulate what are often complex and intertwined aspects of their young lives.<sup>50</sup> Children cannot be expected to provide adult-like accounts of situations they have faced and may have difficulty articulating their fears. They may be too young or immature to be able to evaluate what information is important or to interpret and convey what they have witnessed or experienced in a manner that is easily understandable to an adult. These factors can affect children of all ages – even those 12 years or older. Older children may also provide superficial or even artificial answers about experiences or events that were harmful or traumatizing. They may wish to avoid talking about difficult subjects, or they may not directly connect hardships or other experiences or fears with the questions they are being asked.

Children's responses to questions, such as why they left home, are often layered, with easier responses shared first. When questioned by officials such as CBP about situations or experiences that may be difficult or traumatic to discuss, children may provide answers that are simple, "safe" and more easily repeated. Sometimes children provide information based on what they have heard from someone else. They may feel ambivalent about their decision to leave their homes or despondent about being apprehended by immigration officials, both of which may impact how they relate their situations, experiences, fears and concerns.<sup>35</sup>

### *Manner of Communication*

UNHCR observed that, in general, CBP's style of interviewing Mexican UAC seemed to focus on producing quick answers rather than substantive ones. UNHCR understands that this screening is one of many responsibilities of all CBP agents and officers but remains concerned that where case completion and transfer of custody outside of CBP are the overriding goals, questions about protection needs are not likely to elicit informed or truthful answers, especially not from children. While some agents and officers mentioned the importance of questioning children in a conversational tone, others reported that when

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<sup>35</sup> UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, p. 20-21 (Mar. 2014), available at: [http://www.unhcrwashington.org/sites/default/files/UAC\\_UNHCR\\_Children%20on%20the%20Run\\_Full%20Report\\_ver2.pdf](http://www.unhcrwashington.org/sites/default/files/UAC_UNHCR_Children%20on%20the%20Run_Full%20Report_ver2.pdf). The report cites to UNHCR's *Guidelines on Child Asylum Claims*, US DOJ's *Guidelines for Children's Asylum Claims* (1998) and US DOJ's *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (2007).

they use Form 93, they ask the questions straight off the form without deviating.<sup>36</sup> Although UNHCR does support using the entire content of Form 93, it believes that it is not effective to ask questions about fear, abuse, and danger in the same routine style and tone as questions about one's date and place of birth. A child is not likely to have ready an answer to a question asking if she fears she would be harmed or in danger if returned to her home country in the way she likely would when asked a simpler question like what is her mother's name. In addition, the speed and tone of questions of such sensitive nature may further inhibit a child, who may already be fearful or traumatized, from speaking up. Such questions and answers require more time, patience, and gentle probing.

UNHCR conducts refugee status determinations in over 100 countries and is well-positioned to understand the challenges in balancing high volumes of processing with the interview techniques required to allow a person, especially a child, to share details necessary for appropriate adjudication.

UNHCR understands from CBP that UAC are priority cases and are to be processed as quickly as possible. The concern is that not enough time is devoted to a meaningful questioning about the child's potential protection needs. The following example from Laredo highlights this concern. Following a change of shift, a new agent took over responsibility for processing of a Mexican UAC. While UNHCR was not present during the processing of this UAC before the shift change, the file showed that the first agent had already filled out Form 93 and the UAC had answered 'no' to all the questions that ask a child about fear of return. Nonetheless, the second agent went through Form 93 again while UNHCR observed. The second time, the UAC disclosed a fear of domestic violence. In a subsequent private interview, UNHCR asked the UAC why he had not revealed the information the first time he was asked. He said that the first interviewing agent went through the questions very quickly, whereas the second agent went through them slowly and gave him more time to think and respond. In addition to being handled first, prioritization of UAC cases should also mean a focus on the substance of the work.

Regarding CBP's capacity to conduct in-depth interviews in order to identify potential victims of trafficking or traffickers, UNHCR observed that USBP demonstrated the ability to better train certain agents in interviewing techniques and investigations, yet this was not applied to agents tasked with working with children and identifying potential victims of trafficking or other trauma. In San Diego, this unit was the Tactical Enforcement Unit (TEU) and in RGV and Tucson, it was the Anti-Smuggling Investigation and Deterrence Unit (ASID). UNHCR learned from interviews with the USBP agents detailed to these units that they believe their interviewing technique is improved and more effective since joining the unit, they have greater understanding of the criminal activity prevalent in the border region, and they believe it is important that they conduct their interviews in plain clothes in private offices. Those with additional training demonstrated a more nuanced and understanding attitude towards the UAC interviewed, indicated that they had more advanced interviewing skills, and demonstrated greater depth of understanding of the dynamics of migration and recruitment of Mexican children for alien and drug smuggling along the border region. They interviewed the children in separate rooms and while in plain clothes. UNHCR observed a

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<sup>36</sup> As stated in the previous section on the use of Form 93, UNHCR is concerned about the effectiveness of the form as written.

lead agent from this unit open the interview by working to build rapport with the UAC, using language that was age-appropriate, in a fully bilingual manner, and repeatedly stated that he was not judging the child and wanted to hear the child's story. The agent used open-ended questions and UNHCR observed that the child shared his story in detail with the ASID agent.

### *Interview Setting*

Key to establishing a child sensitive interview approach is providing a physical environment that puts the child at ease and allows the child to safely discuss any protection needs. UNHCR understands that CBP must have a functional, secure facility in which to conduct its law enforcement duties all within a limited budget. Incorporating child sensitive conditions, however, will increase the effectiveness and efficiency of UAC screening interviews, making it easier for CBP to identify UAC with protection needs, and may improve the information CBP receives concerning smuggling activities and related criminal operations in the area.

During tours of USBP facilities in all four sectors, UNHCR observed that the screening of UAC occurred in the common processing area along with all other apprehended individuals. The processing areas typically have a semi-circle of computer stations at which agents question each apprehended individual across a counter within view and often earshot of the other individuals being questioned as only a couple feet separate the stations. All of the UAC observed were questioned in this setting despite the availability of at least one private interview room at each station visited. When asked if the private rooms were ever used to interview UAC, agents' responses varied – most saying never, some saying they were used in the rare cases of UAC who show signs of or express fear or were victimized, and some at particular stations saying that the interview rooms were used all the time for UAC but only by the specialized investigative units who gather intelligence on smuggling and other criminal organizations. In sum, however, USBP stated that it was standard practice to conduct all processing of the UAC in the open processing area. UNHCR does not believe that CBP officials should depend on the UAC to express his or her need for privacy in order to conduct a private interview because the UAC may be afraid to speak up to an official in uniform to make a demand or may not know that it is even an option to answer the official's questions privately.

At the ports of entry, UNHCR observed that OFO's facilities for questioning individuals who are brought to secondary inspection, which includes all UAC, are less uniform than USBP stations due to the limitations of the buildings available for OFO use. In general, the space available for questioning is smaller and officers have to creatively use the space if they want any privacy. Similar to the situation at the USBP stations, UNHCR observed that OFO officers generally interviewed UAC in an open area next to others in custody although some officers did report searching out a more private space on occasion to speak with UAC.

UNHCR observed that the physical setting of the processing areas, most notably in the USBP stations, creates physical and emotional barriers to open disclosure of difficult information by anyone, and with UAC it undermines DHS' ability to meet its burden under TVPRA 08. The set-up makes it difficult for CBP staff to directly engage the UAC, particularly with any degree of privacy. The temperature of most of the USBP stations visited was extremely

cold, especially for children who are confined without much mobility and who are not permitted to keep with them any outer layers of clothing. Depending on the age and size of the child, the physical barriers may be very intimidating, and for all children, the close proximity to other apprehended individuals is not conducive or appropriate for sharing potentially sensitive or distressful information. UNHCR observed that the children were often extremely distracted by the activity around them. Their attention was continually drawn to the movement of other individuals in and out of cells and to the conversations CBP was having with other individuals, some of whom may have traveled in the same group as the UAC.

This lack of sufficient separation between the UAC and unrelated adults in the processing areas is also a concern not just for mere distraction but also for the fact that such an adult could be a trafficker who is able to retain his or her power over the UAC through such close proximity. One interview observed by UNHCR shows just how easy this could be. A USBP agent was interviewing a young unaccompanied teenager from Guatemala. While the agent had a calm open manner and the child did not appear to be afraid of the agent, the child did appear a bit anxious due to the fact that he did not understand some of the questions asked him, including in what state his village in Guatemala was located. A Guatemalan adult was being processed right next to the UAC by another agent and upon seeing the child's confusion the man started whispering to the child. After a few minutes of the child and adult engaging in whispered conversation, the agent processing the UAC case finally asked if the two had traveled together. They said they had not and then the Guatemalan adult proceeded to fully participate in the conversation with the child, a conversation in which the child admitted that he had been forced to carry drugs back in Guatemala and he was afraid to go back. In this example, the adult from Guatemala did not appear to pose a risk to the child, but it is evident how easily other individuals can participate in and may influence CBP's screening of a UAC. Therefore, the open setting of the interview is not only distracting but it may also be dangerous for the UAC.

By contrast, UNHCR observed a couple cases at a POE where the OFO officer completed the processing interview in a private office, seated across from the UAC at a desk. As UNHCR observed, the office setting provided an environment much more conducive to eliciting information, because, among other reasons, it increased privacy, it was easier for the officer to make eye contact with the child, the officer was more conscious of the child's emotional state, and the child was more engaged with the officer without the distraction of others nearby. Also of note, at the USBP stations where the anti-smuggling investigative units routinely question UAC, they did so in private interview rooms. The agents in those units stated that it was easier to build a rapport with the children when in private.

### *Language Access*

Communication between officials and UAC in a language with which all are comfortable is essential to the screening process. In addition to being able to clearly communicate any protection needs, for some UAC, the ability to meaningfully participate in an independent decision to return to Mexico is related to their language needs and the capacity of CBP to meet those needs. UNHCR was informed that both USBP and OFO academy training includes mandatory instruction in the Spanish language and that a certain level of

proficiency must be obtained before being assigned to a post, but a number of CBP officials did share that over the years the language requirements have been reduced and it has hurt CBP's language capacity.

UNHCR spoke with CBP officials at each location who admitted not being comfortable communicating in Spanish. These individuals had a number of strategies to manage the communication gap, including calling on a fellow agent or officer to assist and using Google Translate, a free online translation application, to translate into Spanish the questions CBP must ask. A few officials admitted to conducting the interviews in English and using hand gestures to get their point across. One agent said that if unable to communicate with a UAC, the interviewing agent could contact the Consulate of the UAC's country for assistance in communicating which raises obvious protection concerns if a determination of safe return has not been made. For individuals, including UAC, who do not speak English or Spanish, UNHCR observed that CBP either enlisted another person in custody who could interpret or called a telephonic interpreter.

Two screenings observed by UNHCR illustrate the challenges and gaps in protection when there is a language barrier. In the RGV Sector, UNHCR observed an agent making use of a young Guatemalan boy to interpret for an unrelated young Guatemalan girl who did not speak Spanish. Such an arrangement likely impeded the girl's willingness to answer certain questions honestly and completely. In the Tucson Sector, UNHCR observed the processing of a Mexican girl at a POE in which a new officer receiving on-the-job training resorted to Google Translate in order to communicate with the girl. UNHCR watched as he input every single question from Form 93 into Google Translate and read the translation to the girl, not ever directly engaging her with eye contact while speaking. For each question, the girl had to repeat back to him what she thought he was trying to ask because the translation often did not make sense and the officer's ability to read and pronounce in Spanish was very poor. The officer's inability to understand the girl's health problems was of particular concern. At times other officers assisted with the interpretation but it was still difficult for the officers to gather her full story. In UNHCR's view, her story raised a couple red flags which OFO could have better pursued if able to communicate fully.

Regarding the use of telephonic interpretation, UNHCR noted favorably that most agents and officers interviewed in the RGV and Tucson Sectors were aware of the telephonic interpretation service available, although it was not evident how frequently the service was used. While UNHCR appreciates the initiative agents and officers take in order to communicate, professional interpreter services such as the telephonic service should be used whenever possible. In addition to the concern noted above regarding the use of the Consulate to interpret, other individuals in custody also pose a risk to UAC if used as interpreters. CBP cannot determine their language ability, they have not agreed to a professional code of conduct, and it would enable a human trafficker or other such dangerous person to take advantage of the UAC.

## Need for Effective Tools to Screen UAC

### *CBP Form 93, Unaccompanied Alien Child Screening Addendum*

Form 93 is the principal tool created to assist CBP in screening UAC as required by TVPRA 08. It was designed to assist the agent or officer handling the case to identify whether each Mexican UAC should be allowed to exercise his or her decision to return to Mexico. An effective interviewing tool not only makes DHS' job easier, it facilitates the interviewing process and better ensures the information required by law is obtained. However, UNHCR is of the view that taking into account the current level of training provided to CBP officials on the issues addressed in the form, Form 93 does not provide the necessary guidance for the interviewing agents and officers in a clear, accurate, and user-friendly manner. UNHCR's three primary concerns with Form 93, detailed below, are:

- The form's format can cause confusion because not all the questions are directed to the same audience;
- The form's instructions regarding identification of potential trafficking is difficult for many agents and officers to understand; and
- The form does not contain any instructions or any questions to be asked to assess the child's capacity to make independent decisions for him- or herself.

One source of confusion observed by UNHCR is that there is more than one audience for the form's questions. The Credible Fear Determination section asks the questions directly to the UAC whereas in the Human Trafficking section they are written as questions for the interviewing agent or officer to answer about the UAC. When observed by UNHCR, the interviewing agents and officers did ask the questions in the Credible Fear section although rarely expanding on those questions. The Human Trafficking section in particular, however, revealed the spectrum within CBP of interviewing skills and understanding of how to use Form 93 as a tool.

The Human Trafficking section constitutes the bulk of Form 93. It was designed to offer flexible guidance for the interviewing official so that the questioning can be adapted for each child depending on his or her circumstances. Over the course of the four sectors visited, UNHCR did observe a couple of officials who employed excellent interviewing techniques with the children and were adept at crafting a natural conversation based on the guide posts provided by the form and following up on the children's own responses to assess whether each child had been or was at risk of being trafficked. The majority of the interviews observed by UNHCR involved what was merely perfunctory questioning of potentially extremely painful and sensitive experiences for the children. And in the remainder, the questioning, or lack of questioning, was poorly executed.<sup>37</sup> In sum, most of the officials either did not know how or chose not to follow the form's instructions to

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<sup>37</sup> During the Laredo trip, UNHCR had serious concerns over the number of agents and officers who said that the questions on Form 93, including those in the Credible Fear section, did not apply to Mexican UAC, notably the children who were returned to Mexico and those who came from the border region and were suspected of working in the smuggling industry. Over the course of the four trips, however, UNHCR noted a marked upward trend in CBP awareness that Form 93 is to be used for all UAC, which UNHCR believes is likely due to the greater emphasis on UAC processing communicated to the field during this period of surging UAC arrivals.

“pursue age appropriate questions” and to “ensure follow up questions are asked based on the answers given.”

During observation, most of the OFO officers and USBP agents read aloud the Form 93 as written in their conversations with the UAC, which led to a very rigid communication style not suited to obtaining potentially sensitive information from a child. Most read the questions one after another, often with little eye contact with the UAC. In the cases observed, the entire interview, including review of the Form I-770 (discussed below) and the Form 93 questions took approximately ten minutes. In one interview observed, the OFO officer was not fluent in Spanish and read the questions from a verbatim translation in Spanish, which confused the child because as mentioned above, the trafficking questions are directed at the official to answer. In order for the questions to make sense, the translation added “or you” in each question so that for example, the officer asked the child: “Was the child, *or you*, recruited for one purpose and forced to engage in some other job?” Asking this question directly to the child is already problematic in that it requires him or her to understand, contextualize and articulate experiences in an adult framework when this is the interviewer’s burden. Asking the question in the third person and then adding “or you” only further complicates it and, in this particular case, seemed to make it virtually impossible for the child to understand the questions. In another interview, the agent thought the trafficking indicators and questions applied to the UAC’s time in CBP custody. As he explained it to UNHCR, the child did not have freedom of movement because he was in CBP custody, he did have adequate food and water because he was being fed while in custody, and so forth. The agent otherwise interacted with the UAC in a child-appropriate manner. With some guidance on the substance of what he is screening for, this agent could build on his personable manner to more effectively screen the UAC for protection needs. In yet another interview, the child questioned said that he was afraid to return to Mexico but did not volunteer why. The officer later told UNHCR that “I only asked the questions I am supposed to and that’s why I don’t know why he is afraid.”<sup>38</sup>

Another key shortfall of the Form 93 is that it requires the official conducting the interview to make certain determinations for which the form provides no guidance or instruction. In addition to determining whether a child has expressed a fear of returning to his or her home country, for which there are questions to ask the child, and whether a child appears to have been the victim of trafficking, for which indicators are listed, the form also requires the official to indicate whether the child appears to be a potential victim of trafficking and whether the child is able to make an independent decision to request voluntary return. Form 93 does not provide any tools or instruction on how to make those two determinations. The indicators for when a child may be at risk of being trafficked if returned to his or her home country do not all mirror the indicators provided on the form to assess whether the child is a current victim of trafficking. The assessment of the child’s capacity to make an independent decision to return to his or her home country involves a different type of inquiry for which the form provides no instruction.

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<sup>38</sup> The quotation is paraphrased.

### *Notification of Rights for Informed Decision-Making (Form I-770)*

The TVPRA 08 requires DHS to make a determination whether a UAC is able to make an independent decision to withdraw his or her application for admission to the U.S. and return to his or her home country. UNHCR believes that for an independent decision to be made, it must be an informed decision. With CBP's focus on swift processing of UAC, UNHCR remains concerned that the necessary time is not taken to sufficiently inform the Mexican UAC of their rights and options in order to make such an important decision.

Form I-770, Notice of Rights and Request for Disposition, is the form provided to all UAC in CBP custody informing them that they have the right to use a telephone to contact an adult, to be represented by a lawyer, and to a hearing before a judge, and documents the UAC's decision whether to exercise these rights. The UAC must sign the form and return it to the official. Based on observation of CBP and interviews with UAC, UNHCR is concerned that this information is not being communicated effectively to UAC. The form I-770 does not provide sufficient explanation for children who are unfamiliar with the U.S. immigration system and laws to make an informed decision regarding their rights, particularly to be represented by a lawyer and to request a hearing before an immigration judge.<sup>39</sup> Based on UNHCR's observations, any additional explanation given by the officials conducting the interviews is not enough to make up for the shortcomings of the form.

UNHCR observed that CBP officials did little to inform UAC about the decisions each child must make beyond providing a copy of the Form I-770 or summarizing it orally. Children were not informed of the meaning of the choices before them. For example, a number of the children UNHCR interviewed were not familiar with the Mexican Consulate or its role. Through interviews with CBP officials and observation, UNHCR learned that often when a UAC did ask questions about requesting to see a judge, they were generally told that there would be a long wait before they could expect to see a judge. This is of course an important piece of information, but it can be misleading in isolation. Information about a protracted wait may deter UAC from making such a request if they are not also told that during the wait to see the judge they will live in a shelter for children, not in CBP's cells, as many assume.

CBP told UNHCR that the question the UAC ask most often is where they are going. Many agents and officers said that they simply tell the Mexican UAC that they are going back to Mexico. UNHCR observed a USBP agent explain to a potential Mexican UAC whose age was in question that if he was determined to be less than 18 years old, he would be sent back to Mexico. UNHCR observed the interview at length and did not hear any explanation that he would also have the option to elect to see an immigration judge. UNHCR also interviewed numerous Mexican UAC who believed they had no option other than to return to Mexico. Many UAC told UNHCR that they did not understand the papers that were given to them and that they signed them because they were instructed to. The Know What to Expect video created by CBP was designed to help inform UAC, but as explained below in the section *Inconsistent Implementation of CBP Policy on UAC*, the screening of it has not been effectively implemented yet. Without adequate information as to what their choice entails,

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<sup>39</sup> UNHCR is aware that DHS has begun the process of revising Form I-770 and UNHCR submitted comments on the draft revised form in response to DHS' request in May 2012.

the Mexican UAC are not able to make an independent decision to withdraw the application to enter the U.S. and CBP cannot make a determination that the child has made an independent decision.

UNHCR observed a number of other instances in which the UAC were not fully informed of their rights. At one USBP station, UNHCR observed the agent tell a Mexican UAC that he could talk to an attorney or the judge, but that the agent intended to return the UAC in two hours to Mexico. The child opted to return to Mexico. After the processing, UNHCR interviewed the UAC in private and he indicated that he had been apprehended in the Tucson Sector before and at that time he had not been asked the same questions as this time. He stated that he did not understand the right to a hearing before an immigration judge that had just been explained to him and no other agent had ever asked him before. Of the other seven Mexican UAC UNHCR spoke with, four children were not informed of their rights to an attorney or judge, but were advised of a right to contact the consulate. Two other Mexican UAC also recalled being advised of their rights to an attorney and an immigration judge, but declined to exercise them believing they would remain in USBP custody and that the judge was actually a criminal proceedings judge. In the RGV Sector, UNHCR observed the processing of a Mexican UAC for whom the I-770 was pre-filled and the agent did not advise the child of his rights contained in the I-770. One Mexican UAC UNHCR interviewed did not recall whether he had been informed of his rights, but when UNHCR inquired if he could explain a "right" or an "attorney," he stated that he did not understand these words. UNHCR acknowledges that CBP may be notifying the UAC of their rights, but if the UAC does not understand the information, he or she has not been truly notified. Asking a child if he or she understands often results in a yes or no answer that may not be truthful but instead be what the child thinks is expected. The notification of rights is an opportunity for CBP to engage UAC with open-ended questions to determine whether they do in fact understand the information provided and such open dialogue may also facilitate the rest of the conversation when it turns to the protection screening.

OFO in Tucson informed UNHCR that it only recently began using the Form I-770. According to OFO, the language in the form referencing admissions of deportability and seeking an immigration hearing does not procedurally fit into the process at a port of entry and therefore the language in the I-770 should be revised for the form to be relevant to OFO. It was not clear to UNHCR how OFO in Tucson notified the UAC of their rights prior to adopting the form.

UNHCR also considers the timing for completing the Form I-770 to be important. In all four sectors visited, UNHCR had the opportunity to observe various practices and as a result, UNHCR's understanding of how and when the notification of rights should be administered to the UAC evolved and shifted since the previous confidential report. UNHCR would like to correct itself and note that it agrees with CBP's practice of notifying all UAC of their rights before screening them for protection needs, and would urge that it be done as early as possible. What remains concerning are the handful of instances UNHCR observed where the interviewing official printed out the Form I-770 with the areas necessary for voluntary return already completed before even *speaking* with the UAC. Such a practice, when it occurs, demonstrates an assumption by the agent or officer that cannot be made on behalf of the UAC.

## **Inconsistent Implementation of CBP Policy on UAC**

In addition to the gaps in understanding the fundamental concepts of protection provided for in the TVPRA 08 screening, UNHCR found that there were also gaps in the practical application of many of CBP's policies on UAC by agents and officers.

### *Confusion and Inconsistencies Regarding Application of Policies*

As mentioned above, CBP policy states that all UAC over 14 years old are presumed to be capable of making an independent decision to return to their home country, thus implying that no such presumption exists for children under age 14. OFO supervisors informed UNHCR that in practice, almost all Mexican UAC under age 14 are referred to ORR's custody. One notable example of practice not conforming to policy was observed during the San Diego visit. In one case an unaccompanied eight year old Mexican girl was intercepted at a POE while attempting to enter by car with a woman and other children, all unrelated and unknown to the girl in question. CBP policy dictates that this girl be referred to ORR because of her age unless it is established that she is able to make the decision to return home. An OFO officer interviewed her and the case was discussed amongst several of them. Even though the interviewing officer voiced concern that the child was too young to answer many of the questions, no one made an assessment as to whether she was "able to make an independent decision to withdraw her application for admission to the United States"<sup>40</sup> and she was returned to Mexico at the urging of the Mexican Consulate. Also, as noted above, the USBP agents in the RGV and Tucson Sectors interviewed by UNHCR were not cognizant of their responsibility to assess the decision-making capacity of UAC and as part of that were not following the CBP guidance specifically on the issue.

### *Definition of Accompanying Family Members and Release to Family is Unclear and Inconsistent*

Throughout all four monitoring visits, UNHCR heard conflicting information from USBP and OFO about who is an "accompanying" family member and to whom a UAC can be released. As referenced earlier in this report, the Homeland Security Act defines an unaccompanied alien child as "a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." However, across the locations, there were agents and officers who erroneously believed that a child is not "unaccompanied" as defined above if traveling without a parent or legal guardian but with another relative. The list of other relatives that agents and officers said could be an "accompanying" family member included grandparents, adult siblings, and sometimes aunts and uncles. UNHCR noted that some of the CBP officials consider a child, particularly a young child to be "accompanied" if his or her parents are in Mexico and able to come collect the child at the border. USBP and OFO officials as well as Mexican officials during the Laredo trip confirmed that this is the practice and UNHCR was informed of the same practice in San Diego. This misunderstanding of the definition of "unaccompanied alien child" was not held by all those

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<sup>40</sup> TVPRA 08 § 235(a)(2)(A)

interviewed. As noted in the above section, *Concerns Expressed by CBP*, some of the CBP officials who do understand the definition of UAC believe that TVPRA 08 forces them to separate UAC from other caregivers to the detriment of the children. UNHCR understands the desire to ensure that UAC are not separated from close family members. However, the practical effect of determining a child with a family member other than a parent or lawful guardian is “accompanied” is to bypass the requirement that the child be screened under the TVPRA 08. The TVPRA 08 mandates that all Mexican children who do not have a parent or legal guardian in the U.S., able and willing to provide care and custody, are to be screened for protection needs before any possible return to Mexico. This legislative intent is not met if children traveling with other family are not determined to be “unaccompanied” and therefore not screened using the TVPRA 08 standard.<sup>41</sup>

UNHCR noted confusion in the Tucson Sector over terminology when observing the screening of a Mexican UAC whose adult brother was also present at the station. The USBP supervisor explained to the agent assigned to process the Mexican UAC that he should process the child as unaccompanied, but repatriate him with his adult brother. UNHCR learned from the agents and supervisors that they had received a recent directive to treat children who were with adult siblings as unaccompanied children, which by definition they are. UNHCR noted the way that the instruction given to the agent presumed the Mexican UAC would be repatriated even before the agent interviewed him. On a previous day, UNHCR interviewed a Mexican UAC who also had an adult brother in custody. In that case, he was processed as “accompanied”. His adult brother did the talking for them and the UAC was not questioned separately other than to confirm their relationship as brothers. Because his brother said they were afraid to go back to Mexico, the younger brother was referred to ORR.

#### *Know What to Expect Video*

In the middle of the four trips conducted, CBP produced and released two versions of a Know What to Expect video designed for UAC in CBP custody. It was first released as part of a pilot project and then was expanded to all of the USBP sectors with instructions for all UAC in custody to watch it. OFO informed UNHCR that it is not yet mandatory that the video be played for UAC at the POEs. The video explains the steps of the process that UAC are going through and where they will go once they are released from CBP. UNHCR believes that the video can be a helpful tool in informing UAC, particularly Mexican UAC, of their rights and the choices they must make while in CBP custody.

In the RGV Sector, UNHCR did not observe the video being played for UAC other than at the Falfurrias Border Patrol Station. In the Tucson Sector, there was a clear effort to demonstrate that the video was being shown to UAC at every station, but there were challenges. At one station, an agent expressed frustration when he explained that they do

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<sup>41</sup> Children accompanied by a parent or legal guardian can be placed in the expedited removal process which involves questioning about fear of return to one’s country due to a fear of persecution. It however does not include the additional protections of assessments of trafficking risk and capacity to make an independent decision as required by TVPRA 08. In addition, the head of the family may speak for the whole family and the child may be not questioned separately to assess his or her particular protection needs. As such, CBP would employ a less protective screening standard for a UAC misidentified as an accompanied child than for a UAC.

show the video to all UAC during processing, but that sometimes a Mexican UAC will approach the agent after having seen the video to request a hearing with an immigration judge. The agent felt that this was not a choice a Mexican UAC can make or that CBP can permit unless a risk of trafficking or a fear of return had been identified, failing to understand that UAC are not subject to expedited removal. In one case observed by UNHCR, a Mexican UAC was processed and was about to leave the station to be repatriated when an agent remembered to show the video. It took some time before the agent could get the DVD to play at one of the processing stations, but it was eventually played for the UAC immediately before he left the station to be taken back to Mexico. Another agent told UNHCR that the video is shown to Mexican UAC even though it is not applicable to them. These examples show that the children are not benefitting from the video as intended due in part to some of the agents' lack of education regarding its content, the applicability to all UAC, and when in the process is appropriate to view it.

### **False Belief in a "Safety Net"**

In both the Laredo and San Diego sectors in particular, UNHCR observed a dependence on the Mexican Consulate to act as a safety net for the Mexican UAC who might have a protection need. In Laredo, some of the USBP agents interviewed expressed the view that the Mexican Consulate is better positioned to assess whether a Mexican UAC has a protection need because the Consular official can better communicate with them and knows the situation in Mexico better than the U.S. authorities. These agents seemed to expect the Mexican Consulate to function as a backup to the TVPRA 08 screening. In San Diego, CBP and the Mexican Consulate have a unique arrangement in that the Consulate has a daily presence at the San Ysidro POE, in part to interview the Mexican UAC.<sup>42</sup> As mentioned above in the section on positive practices, this proximity facilitates a close working arrangement between the two governments which can offer protection for Mexican UAC during the repatriation process. However, as observed by UNHCR, the daily in-person communication with the Consular official who is interviewing the same children as OFO can blur the lines of responsibility between the two, thus inducing some of the OFO officers into believing that there is an additional safety net in the form of the Consular official.

Officials in both the Laredo and San Diego sectors told UNHCR that part of the Mexican Consulate's questioning of UAC is to determine if there is any risk to the child upon return to Mexico. This is a serious misperception. Having listened to many conversations between UAC and the Consulate during the trips, it is clear to UNHCR that the consular interview is

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<sup>42</sup> As explained to UNHCR by a consular official and as observed during consular interviews with UAC, a member of the consular protection team is at the port a few hours each day in order to interview the UAC prior to their removal and for on-going coordination with the OFO officers. Depending upon the number of children in custody, the consular official interviews the children in groups or individually, confirms basic biographical and family information, and enters the information into a Mexican database during the interview. The consulate staff does not make any direct contact with family members in Mexico. The consular officer contacts the Mexican DIF office in Tijuana in order to inform them of any removals that day and to provide family contact information. The DIF office is then responsible for confirming family relationships and determining the safety of release to the parent or other caregiver within Mexico. In many cases the child is being released to a grandparent, aunt or uncle in Mexico because the parents are in the U.S. or their whereabouts are unknown.

not likely to discover protection needs missed by CBP and is not designed to do so. Most importantly, it is not the responsibility of the Mexican Government to assess whether its own citizens merit international protection outside of Mexico. The authority to make this critical determination as to whether a Mexican UAC may have a protection basis to remain in the U.S. and should not be returned to Mexico rests solely with the United States and goes to the very heart of the protection screening requirements under the TVPRA 08.

It is evident that some information sharing between CBP and the Consulate is mutually beneficial. In the case of the eight year old girl described in the section above, *Confusion and Inconsistencies Regarding Application of Policies*, the girl was not able to provide clear information to the interviewing OFO officer, but the Mexican Consular official was able to confirm the child's identity and discover that her grandmother had taken her to meet the woman driver who later brought her to the U.S. border in order to follow her parents who had come to the U.S. one week earlier. UNHCR was present at both the OFO and the consular interviews with the child as well as when the consular official reported his interview to OFO. UNHCR's concern, however, arises from how this information is used and by whom. In this case, the Consular officer unilaterally decided that the child should not be reunited with the parents and instead should be returned to the grandparents in Mexico. He then presented this conclusion to OFO declaring that the primary caregivers of the child were the grandparents and not the parents and it was therefore in her best interests to be returned to them. The OFO officers ultimately relied on the Consular officer's opinion to return her to Mexico - without any independent assessment of the facts - and returned her to Mexico contrary to both the requirement under TVPRA 08 that the child must be able to make that decision herself and to CBP policy that children under 14 years old are not presumed to be able to make that decision. The presence of a consular official can increase efficiencies and safeguards in the return process, but does not affect the responsibility of CBP to make its own determination as to whether a UAC has a protection need or otherwise should not be returned to Mexico. This protection screening responsibility under TVPRA 08 falls squarely with DHS and cannot and should not be delegated to another country.

Related to the concern over the perception by some agents and officers in CBP that the Mexican Consulate is a safety-net for Mexican UAC is the fact that there are no safeguards for them. In the section, *Good CBP Practices*, the centralization of certain functions and skills related to the UAC cases is highlighted as a good practice. Organizational strategies such as the TCC allow for UAC cases to be reviewed by a team of agents who choose to specialize in UAC cases. The only cases they review, however, are for the UAC who are referred to ORR custody. At both locations in the RGV and Tucson Sectors where UAC to be referred to ORR were transferred to another station to complete the processing, the agents stated that they had to correct errors or even redo most files that were sent to them. There is no second review or specialized team who serves that function for all of the Mexican UAC who are returned to Mexico.

## Opportunities for Further Investigation

Throughout the course of the four sectors visited, UNHCR identified several areas in which CBP consistently overlooked avenues of inquiry or its own ability to investigate, especially related to human trafficking.<sup>43</sup>

In multiple locations, when UNHCR inquired about CBP's role in identifying trafficking victims and in understanding the trafficking networks in order to do so, UNHCR heard from CBP officials that when it comes to trafficking cases, it is Homeland Security Investigations (HSI) that conducts such investigations and that CBP is not involved. While it is one function of HSI to investigate human trafficking, some of the CBP officials who mentioned this overlooked CBP's role as a first responder at the border, well-positioning CBP to identify possible human trafficking before HSI is alerted to the case. Instead, these officials indicated that all work related to uncovering human trafficking was the domain of HSI.

In addition, UNHCR learned from USBP agents in the later sectors visited that USBP does not gather the same amount of information regarding the child's journey to the border from Mexican UAC as they do from UAC from other countries. Agents communicated to UNHCR that Form I-213, which gathers biographical information and also details the child's trip to the U.S., was not fully filled out any longer for the Mexican UAC because agents were instructed not to record the details of the Mexican UAC's journey to the U.S. This is a missed opportunity to look out for indicators of possible human trafficking which may be most evident while the trafficking victim is being transported.

Regarding CBP's capacity to conduct in-depth interviews in order to identify potential victims of trafficking or traffickers, UNHCR observed that USBP demonstrated the ability to better train certain agents in interviewing techniques and investigations, yet this was not applied to agents tasked with working with children and identifying potential victims of trafficking or other trauma. During the San Diego, RGV and Tucson studies, UNHCR learned of the various special investigative units within USBP which are charged with gathering intelligence on alien smuggling organizations and transnational criminal organizations. In San Diego, this unit was the Tactical Enforcement Unit (TEU) and in RGV and Tucson, it was the Anti-Smuggling Investigation and Deterrence Unit (ASID). UNHCR learned from interviews with the USBP agents detailed to these units that they believe their interviewing technique is improved and more effective since joining the unit, they have greater understanding of the criminal activity prevalent in the border region, and they believe it is important that they conduct their interviews in plain clothes in private offices.

UNHCR had the greatest opportunity to interview and observe ASID agents in the Tucson Sector. UNHCR interviewed seven USBP ASID agents in the Tucson Sector, six of whom were currently detailed to ASID and one formerly. With two exceptions, the ASID agents

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<sup>43</sup> UNHCR also noted individual examples of a failed opportunity for further investigation. UNHCR observed screenings of UAC where the screening official did not pursue avenues of inquiry related to potential trafficking based on the UAC's statement. One brief example of insufficient questioning was that of a fifteen-year old Mexican girl who was traveling with two adult men who were not related to her. One of the men was identified as her boyfriend, but the screening official did not question any of the relationships between the three nor did he question why they were traveling together.

demonstrated a more nuanced and understanding attitude towards the UAC interviewed, indicated that they had more advanced interviewing skills, and demonstrated greater depth of understanding of the dynamics of migration and recruitment of Mexican children for alien and drug smuggling along the border region. They interviewed the children in separate rooms and while in plain clothes. UNHCR observed one interview by two ASID agents and the lead agent opened the interview by working to build rapport with the UAC, using language that was age-appropriate, in a fully bilingual manner, and repeatedly stated that he was not judging the child and wanted to hear the child's story. The agent used open-ended questions and UNHCR observed that the child shared his story in detail with the ASID agent.

Overall, these units train agents to develop greater interviewing skills and to apply a child-specific approach in order to build rapport. Through their work, they also have greater knowledge and understanding of children's migration and experience being recruited into the smuggling industry. While these units do not currently have a protection-oriented function, their creation demonstrates a capacity within CBP to develop expertise and focus on a particular issue facing CBP operations. UNHCR sees a missed opportunity on CBP's part for not applying similar resources to fulfill its mandate to identify unaccompanied children who are at risk of being harmed.

## **IMMEDIATE RECOMMENDATIONS**

In light of UNHCR's concerns noted above and in the current climate of unprecedented UAC arrivals, UNHCR recommends certain steps be taken, which it believes feasible, to bring about an immediate improvement in the screening of UAC for protection needs.

### 1) Refer All Mexican UAC to ORR

UNHCR recommends that DHS automatically refer all Mexican (and Canadian) UAC to ORR's custody and outsource the DHS responsibility to screen all such children for protection needs to trained child welfare with expertise to identify indicia of trafficking and persecution. This function can be outsourced to other government entities or to appropriate private contractors. Rather than CBP conducting the screening immediately after its apprehension of the UAC, the screening can be conducted once the child has arrived in ORR's custody and has a chance to settle down in a setting that is much more child-friendly with staff that are already trained in working with children and victims of trauma. UNHCR believes that this recommended mode of operation would result in more equal treatment for UAC of all nationalities, relieve CBP of the pressure of assessing UAC's protection needs, and that it might also serve the added purpose of discouraging the practice of recruiting Mexican children into the smuggling industry.

### 2) Redesign the Screening Tools Available Including Form 93

UNHCR recommends that it, along with other experts on children, asylum and trafficking, redesign Form 93 to improve its utility and support a robust and efficient screening process. As part of its approval and socialization process, DHS should conduct a survey of the staff who will be utilizing the form to solicit their anonymous feedback on the proposed form so

that it is clear the form is accepted by them and will be effective when used. Once the new form is finalized, including any appropriate edits from the survey, and approved by DHS, experts should conduct trainings on how to use the form for an effective screening.

UNHCR recommends that the Forms 93 and I-770 be officially translated to Spanish and made available to the entity conducting the screening and all stations and POEs, respectively. UNHCR observed that some locations had a translated copy of one or both of the forms, although it was not clear who had made the translation, but many other locations only had access to the English versions. In light of the fact that the vast majority of questioning is handled in Spanish, UNHCR believes it would be useful to the screeners and the agents and officers to have a translated copy of the Form 93 and Form I-770, respectively, to ensure a more accurate and consistent translation.

UNHCR recommends that easy-to-use reference kits be available at all USBP stations and OFO POEs on the requirements for processing UAC cases. UNHCR observed that certain locations took the initiative to create their own binders of official policy on UAC, step-by-step instructions, flow charts, and checklists which appeared to be a useful reference for agents and officers.

### 3) Protection Awareness Trainings

UNHCR recommends that trainings provided to all CBP agents and officers include at a minimum: the international and U.S. legal frameworks; the rationale behind the protection screening; identification of trafficking victims; and country of origin information for the top countries of origin of arriving UAC. In order for CBP to handle its role with the UAC, there is a need for agents and officers to be sensitized to the needs of the UAC and why a separate standard is applied to them than to adults.

Because all law enforcement personnel should be trained in the identification of human trafficking victims, UNHCR recommends that new guidance and instruction should include the identification of fact patterns and indicators consistent with current trends in human trafficking and should be developed with the help of UNHCR and other government and NGO experts with direct experience with human trafficking of unaccompanied children. This could include a review of identified human trafficking cases in order to look at patterns of behavior exhibited by human traffickers while the victim (or intended victim) is still in transit, other forms of criminal smuggling or exploitation and the interplay between human trafficking and other illicit activities, and factors that increase children's susceptibility to coercion and intimidation.

### 4) Improve Use of CBP Space and Conditions

UNHCR recommends that, where feasible, USBP stations and OFO POEs identify a space within their facilities in which UAC can be interviewed in private in order to process their cases. UNHCR recommends that special measures are taken so that UAC are warm enough in order to prevent illness and have mats or cots to sleep on while in CBP custody.

### 5) Support the Field by Providing Refreshers on Protection Screening

Pending delegation of screening responsibility to ORR, UNHCR recommends that the field receive continued guidance and reminders on the following policies or standards which UNHCR noted were inconsistently applied. These refreshers should include:

- It is mandatory that all Mexican UAC are to be screened for protection needs on a case-by-case basis, including children recruited into the human smuggling industry. CBP is the *only* entity charged with this responsibility, delegated from DHS, and is in the position of first responder to enable protection for the children who may need it.
- As required by TVPRA 08, each Mexican child is to be assessed for his or her ability to make an independent decision to return to Mexico.
- The interviewer must establish the absence of risk to the UAC upon return by finding that the UAC *is not afraid* to return due to a credible fear of persecution, that the UAC *has not been* subject to a severe form of trafficking in persons, and that there is no credible evidence that the UAC is *at risk* of being trafficked upon return.
- The definition of unaccompanied alien child and the associated consequences for who can speak for the child, who can be detained in the same cell with a child, and to whom a child can be released.
- CBP is responsible for making the assessment whether Mexican UAC are to be referred to ORR based on its assessment under the TVPRA 08. This assessment is made independent of the Mexican Consulate. CBP is able to reverse a decision to return a Mexican child based on the Consulate's recommendation to refer the child to ORR, but cannot decide to return a child to Mexico based on the Consulate's opinion. The Mexican Consulate and CBP have different mandates which may conflict.
- UAC are to be shown the Know What to Expect video before they are questioned so that the information provided is timely and helps facilitate the processing of the UAC.