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Niños, Niñas y Adolescentes in Guatemala: Reflections on the Implementation of the *Ley PINA*

STACY KOWALSKI*

Quizás no hay indicadores sociales más claros sobre el desarrollo de un país que aquellos referidos a la niñez, en ellos se traslucen la salud o la enfermedad de un pueblo, en ellos quedan claramente reflejados los equilibrios o desequilibrios de una sociedad.

Perhaps there are no social indicators more clear regarding a country's development than those related to children; in them we see the health or sickness of a people, in them we can see clearly reflected the equilibriums or disequilibriums of a society.¹

* University of California, Hastings College of the Law, J.D. Candidate, 2016. I would like to extend my sincere gratitude to the HRPLJ staff for all of their time and effort making thoughtful edits and suggestions to this Note. It has been such a pleasure working with you all this year. To Liliana García, I am so grateful for all of the work you put into helping me with this Note, and for your endless patience. It has been a true privilege working with you this year. A very special thank you to Professor Karen Musalo, not only for her help and guidance with this Note, and in the Refugee & Human Rights Clinic, but for being such an inspiration, an example to aspire to, and a teacher I have learned so much from. To Alexandra Wilson, my partner on this project, my colleague, and my great friend, it has been such a gift to work with you over these years, and I am so grateful for all of the blood, sweat, and tears you poured into this project. To Carol Bisharat, I truly loved working with you, and I am very thankful for all of your work and your help.

1. This quote is from Monseñor Juan José Gerardi, who created the Office of Human Rights for the Archdiocese of Guatemala (*Oficina de Derechos Humanos del Arzobispado de Guatemala*, or ODHAG) and was a prominent figure in human rights advocacy during Guatemala's civil war. Two days after publishing *Guatemala: Nunca Más*, the first truth commission report, which attributed more than ninety percent of the war's atrocities to the Guatemalan military, Monseñor Gerardi was bludgeoned to death in his garage by three members of the military. The report was part of

Introduction

In 2014, the number of unaccompanied migrant youth entering the United States—fleeing primarily from Mexico and the so-called “Northern Triangle” (Guatemala, Honduras, El Salvador)—more than doubled.² In June of that year, President Obama declared this “surge” an “urgent humanitarian crisis” and created a taskforce to coordinate a national response.³ In addition, Obama asked Congress to allot more than \$1 billion to help house, feed, and transport these children.⁴

U.S. politicians, media outlets, scholars, and advocacy groups attempted to explain the reason behind the increased flight. Many of these commentators cited violence, reunification with family living in the United States, and poverty as the principal reasons that children and adolescents chose to take the dangerous trek alone from Central America.⁵ The White House, for example, claimed that “instability”

ODHAG’s Recovery of Historical Memory Project (*Proyecto Interdiocesano de Recuperación de la Memoria Histórica*). Ming Zhu, *Power and Cooperation: Understanding the Road Towards a Truth Commission*, 15 BUFF. HUM. RTS. L. REV. 183 (2009). Now-ousted former President Pérez Molina has been accused of orchestrating the murder. Francisco Goldman, *From President to Prison: Otto Pérez Molina and a Day for Hope in Guatemala*, NEW YORKER (Sept. 4, 2015), <http://www.newyorker.com/news/news-desk/from-president-to-prison-otto-perez-molina-and-a-day-for-hope-in-guatemala>. See also *New Evidence Suggests Guatemalan President Played Role in 1998 Murder of Human Rights Activist Bishop Juan Gerardi*, DEMOCRACY NOW! (Oct. 31, 2007), http://www.democracynow.org/2007/10/31/new_evidence_suggests_guatemalan_presidential_candidate.

2. Seventy-four percent of unaccompanied migrant youth entering the United States between January and June 2014 originated from Mexico, Guatemala, Honduras, and El Salvador. Ian Gordon, *70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?* MOTHER JONES (July/Aug. 2014), <http://www.motherjones.com/politics/2014/06/child-migrants-surge-unaccompanied-central-america>.

3. *Id.*

4. Marissa Cabrera, Maureen Cavanaugh, & Amita Sharmaand, *Obama: Child Migrants Urgent Humanitarian Issue*, KPBS (June 3, 2014), <http://www.kpbs.org/news/2014/jun/03/obama-child-migrants-urgent-humanitarian-issue/>.

5. Diana V. Negroponete, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, BROOKINGS INST. (July 2, 2014), <http://www.brookings.edu/blogs/up-front/posts/2014/07/02-unaccompanied-children-central-america-negroponete>;

in these countries explained the surge.⁶ The United Nations High Commissioner for Refugees (UNHCR) pointed to the false promises made to desperate families by trafficking rings of *coyotes*, who promised that if paid enough, they could get the children to the United States where they would be granted permission to stay due to a relaxed immigration policy.⁷ Vice President Joe Biden traveled around Central America to squash these rumors, threatening to “send the vast majority of you back,” despite the fact that UNHCR estimated that at least fifty-eight percent of these youth “were forcibly displaced because they suffered or faced harms that indicated a potential or actual need for international protection.”⁸

In October 2014, the Refugee and Human Rights Clinic at the University of California, Hastings College of the Law, in collaboration with the Center for Gender and Refugee Studies, sent a delegation of attorneys and law students to understand the major issues children and adolescents in Guatemala face, and to understand why Guatemala’s legislative and policy efforts aimed at the protection of children and adolescents have largely failed.⁹ Those in the 2014 delegation interviewed government officials, and representatives of non-governmental organizations (NGOs) and the United Nations who work to protect children and adolescents in Guatemala.¹⁰ The

Danielle Renwick, *The U.S. Child Migrant Influx*, COUNCIL ON FOREIGN RELATIONS (Sept. 1, 2014), <http://www.cfr.org/immigration/us-child-migrant-influx/p33380>; Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html>.

6. *Under-Age and on the Move*, ECONOMIST (June 28, 2014), <http://www.economist.com/news/briefing/21605886-wave-unaccompanied-children-swamps-debate-over-immigration-under-age-and-move>.

7. *Id.*

8. *Id.*; U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 31 (Mar. 2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.

9. The author participated in the delegation.

10. The interviews conducted include:

Interview with Byron Ruben Alvarado Fuentes, Exec. Subsecretary of the Nat’l Comm’n on Children & Adolescents (*Subsecretario Ejecutivo, Comisión Nacional de la Niñez y de la Adolescencia*, or CNNA).

information contained in this Note draws on these primary sources, as well as secondary sources such as publications from government offices, human rights organizations, and international organizations. As such, the opinions and criticisms expressed in this Note represent those of child advocates in Guatemala, rather than those of the author.

This Note attempts to understand the situation specific to Guatemalan children and adolescents. It seeks to understand what

Jean Paul Briere Samoya, Congressman & Chairman of the Comm'n on Migration (*Diputado y Presidente de la Comisión de Migración, Congreso de la República*).

Gloria Castro, Ombudsman for Children & Adolescents, Office of the Human Rights Ombudsman (*Defensora de la Niñez y Adolescencia, Procuraduría de Derechos Humanos*, or PDH); Sandra Gulate, Ombudsman for Victims of Trafficking, Office of the Human Rights Ombudsman (*Defensora de Víctimas de Trata*, PDH); Aura Beatriz Sosa, Assistant Ombudsman of Migrant Populations, Office of the Human Rights Ombudsman (*Auxiliar de la Defensoría de la Población Migrante*, PDH).

Alex Colop, Head Prosecutor of the Office of the Prosecutor Against Human Trafficking (*Fiscal Encargado de la Fiscalía Contra la Trata de Personas*).

José Cortés Chacón, Subsecretary for the Secretariat Against Sexual Violence & Trafficking (*Subsecretaría, Secretaría Contra la Violencia Sexual y Trata de Personas* or SVET).

Leonel Asdrubal Dubón Benfeldt, Exec. Dir., El Refugio de la Niñez.

Emma Galindo, Nat'l Child Consultant, Plan International (*Asesora Nacional de Protección, Plan Internacional*).

Vilma Gonzáles, Head Juvenile Prosecutor, Public Ministry (*Fiscal, Fiscalía del Menor o de la Niñez, Ministerio Público*).

Golda Ibarra, Dir. of the Migrant Children's Program, Office of the Sec'y of Soc. Welfare (*Directora del Programa Niñez Migrante, Secretaría de Bienestar Social*).

Judge in the First Instance Court for Adolescents in Conflict with the Law (requested anonymity) (*Juez, Juzgado de Primera Instancia de Adolescentes en Conflicto con la Ley Penal*).

Nery Rodenas, Exec. Dir., Human Rights Office of the Archbishop of Guat. (*Director Ejecutivo, Oficina de Derechos Humanos del Arzobispado de Guatemala*, or ODHAG).

Julio Ságiül, Attorney at the Office of the Nat'l Gen. Procurator, Children & Adolescent Division (*Procurador, Procuraduría de la Niñez y Adolescencia de la Procurador General de la Nación*).

Estuardo Sánchez, Adviser for Child Protection (*Consultor de la Protección de la Niñez*), UNICEF.

Ines Tobar Cruz, Attorney, Multidisciplinary Team, Nat'l Comm'n on Adoptions (*Abogada, Equipo Multidisciplinario, Comisión Nacional de Adopciones*, or CNA).

María Eugenia Villarreal, Dir. of ECPAT Guat. (End Child Prostitution, Child Pornography, and Trafficking of Children for Sexual Purposes).

steps the Guatemalan government has taken to protect its children and adolescents, and why these efforts have not effectively improved the situation of children and adolescents. Part One of this Note introduces the historical context of the Guatemalan civil war. Part Two discusses the principal human rights violations that children and adolescents in Guatemala face. Part Three sets forth the current Guatemalan legal framework aimed at protecting its youth, and the ways these efforts have been effective and ineffective, both as a result of the way in which these laws were drafted, and due to a lack of implementation. Finally, Part Four addresses possibilities for improvement in the protection of children's rights in Guatemala.

I. Historical Context of the Guatemalan Civil War

In 1954 the United States worked to support and direct Guatemalan military leaders to overthrow the democratically elected Jacobo Arbenz government, thwarting a ten-year effort to build a democratic Guatemala.¹¹ U.S. actions were motivated by fear that Arbenz posed a threat to U.S. investments in the country, as the centerpiece of United Fruit's "banana republics;"¹² to U.S. bank loans to the Guatemalan government; and to U.S. control of the region due to Arbenz's support from the communist bloc.¹³ Five decades of repressive governments followed the coup.¹⁴ The Guatemalan civil war was Latin America's longest and most violent civil war, lasting

11. Mark Gibney, *United States' Responsibility for Gross Levels of Human Rights Violations in Guatemala from 1954 to 1996*, at 7 J. TRANSNAT'L L. & POL'Y 77, 84–85 (1997).

12. *Id.* at 82; see also PETER CHAPMAN, BANANAS: HOW THE UNITED FRUIT COMPANY SHAPED THE WORLD (Canongate 2007).

13. Stephen Kinzer, *Ideas and Trend: Iran and Guatemala, 1953-54; Revisiting Cold War Coups and Finding Them Costly*, N.Y. TIMES (Nov. 30, 2003), <http://www.nytimes.com/2003/11/30/weekinreview/ideas-trends-iran-guatemala-1953-54-revisiting-cold-war-coups-finding-them.html>; David M. Barrett, *Sterilizing a "Red Infection": Congress, the CIA, and Guatemala, 1954*, U.S. CENTRAL INTELLIGENCE AGENCY (Aug. 3, 2011, 02:53 PM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol44no5/html/v44i5a03p.htm>; SUSANNE JONAS, THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER 30 (Latin Am. Perspectives Series 1991).

14. Barrett, *supra* note 13.

more than three decades and leaving 200,000 dead, many of whom were peasants killed by Guatemalan forces,¹⁵ with Mayans constituting the vast majority of the victims.¹⁶ In the 1970s, the Mayan population protested the repressive policies of the government.¹⁷ In response, the Guatemalan army began targeting the Mayan population which was purported to be supporting the guerrilla soldiers, in what was known as "Operation Sofía."¹⁸ More than 600 villages were destroyed, 1.5 million people were displaced, raped, tortured, and starved, and 50,000 were "disappeared" during Operation Sofía.¹⁹ Furthermore, the army carried out its "scorched earth" policy, which killed crops and livestock, and left water sources contaminated.²⁰ The civil war ended with United Nations-brokered peace accords signed in 1996 between the Guatemalan government and the guerrilla group, the Guatemalan National Revolutionary Unity (*Unidad Revolucionaria Nacional Guatemalteca*, or URNG).²¹

The accords directed the United Nations to form a Commission of Historical Clarification (*Comisión de Esclarecimiento Histórico*, or CEH) whose mandate was to clarify human rights violations between 1960 and 1996.²² The CEH found that the Guatemalan government had committed genocide against four specific groups: the Ixil Mayas,

15. Elisabeth Malkin, *An Apology for a Guatemalan Coup*, N.Y. TIMES (Oct. 20, 2011), http://www.nytimes.com/2011/10/21/world/americas/an-apology-for-a-guatemalan-coup-57-years-later.html?_r=0.

16. Susanne Jonas, *Guatemalan Migration in Times of Civil War and Post-War Challenges*, MIGRATION POL'Y INST. (Mar. 27, 2013), <http://www.migrationpolicy.org/article/guatemalan-migration-times-civil-war-and-post-war-challenges>.

17. *Genocide in Guatemala (1981-1983)*, HOLOCAUST MUSEUM HOUSTON, https://www.hmh.org/la_Genocide_Guatemala.shtml (last visited Feb. 18, 2016).

18. *Id.*

19. *Id.* Guatemala was the first country in Latin America to experience phenomena such as death squads and forced disappearances, which became common tactics in counterinsurgency wars throughout the region. Gibney, *supra* note 11, at 80 (citation omitted).

20. HOLOCAUST MUSEUM HOUSTON, *supra* note 17.

21. *Id.* See also *Truth Commission: Guatemala*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-guatemala> (last visited Apr. 20, 2016).

22. HOLOCAUST MUSEUM HOUSTON, *supra* note 17; U.S. INST. OF PEACE, *supra* note 21.

the Q'anjob'al and Chuj Mayas, the K'iche' Mayas, and the Achi Mayas.²³ Several military commissioners, generals, and soldiers were found guilty of genocide and crimes against humanity.²⁴ In spite of these efforts, the relics of the civil war still have a strong presence in Guatemala.

In 2012, Guatemalan Attorney General Claudia Paz y Paz, as then-head of the Public Ministry (*Ministerio Público*, or MP), initiated prosecution against the U.S.-backed former dictator from 1982 to 1983, José Efraín Ríos Montt.²⁵ The prosecution was seen as a break from centuries of virtual impunity when the justice system was heavily influenced by the political, business, and criminal elites.²⁶

During the trial, supporters for Ríos Montt who were funded by the Foundation Against Terrorism, a group of current and former members of the military, initiated a campaign using newspaper propaganda to discredit the prosecution, the Catholic Church, human rights defenders, and denied any existence of the genocide.²⁷ In a move to preclude Paz y Paz from directing her team of prosecutors to carry forward with the trial, corporate lawyer Ricardo Sagastume, whose father was president of the Supreme Court during Ríos Montt's tenure, successfully argued that she be removed from office seven months early, despite her numerous international accolades, including a nomination for the 2013 Nobel Peace Prize.²⁸ Paz y Paz applied for reelection and received the nominating committee's second-highest ranking but was ultimately excluded from the short list of six candidates approved for the April 2014 election.²⁹ The

23. HOLOCAUST MUSEUM HOUSTON, *supra* note 17; U.S. INST. OF PEACE, *supra* note 21.

24. *Id.*

25. Lauren Carasik, *Ríos Montt Edges Closer to Escaping Accountability for Genocide*, AL JAZEERA (Nov. 14, 2013), <http://america.aljazeera.com/opinions/2013/11/rios-montt-guatemalagenocidetrial.html>.

26. Nina Lakhani, *Claudia Paz y Paz Ousting Puts Spotlight on Guatemalan Justice System*, GUARDIAN (Feb. 19, 2014), <http://www.theguardian.com/global-development/poverty-matters/2014/feb/19/claudia-paz-y-paz-guatemala-justice-system>.

27. *Id.*

28. *Id.*

29. Elisabeth Malkin, *Attorney General in Guatemala Excluded From Re-Election Bid*, N.Y. TIMES (Apr. 30, 2014), <http://www.nytimes.com/2014/05/01/world/americas/attor>

continuation of the Ríos Montt trial was postponed until 2015, after Paz y Paz's tenure as Attorney General expired.³⁰

Ultimately, in May 2013, Ríos Montt was found guilty of genocide and crimes against humanity, marking the first time a former head of state was convicted of genocide in a national court.³¹ Ten days after Ríos Montt's conviction, Guatemala's Constitutional Court annulled the eighty-year sentence.³² The head of Ríos Montt's defense team, Francisco García, was twice expelled after accusing the judges of bias and demanding their dismissal.³³ When the remainder of Ríos Montt's defense team walked out of the courtroom in protest, the court ordered that he be represented by a public defender.³⁴ When Ríos Montt rejected appointed counsel, the court carried on with the trial.³⁵ The half-day that Ríos Montt spent without an attorney resulted in an annulment of the eighty-year sentence due to "procedural error."³⁶

Ríos Montt was then retried. Ríos Montt's defense team unsuccessfully argued that the former dictator was too ill to attend the retrial. With Ríos Montt entering the courtroom wheeled in on a gurney the January 5, 2015 retrial was ultimately suspended because his defense team successfully argued for the main judge to recuse herself for having written her master's thesis a decade ago on the topic of genocide.³⁷ Ríos Montt was then ordered to stand before a special

ney-general-in-guatemala-excluded-from-re-election-bid.html. The nominating committee is comprised of eleven law school deans, two members of the bar association, and the president of the Supreme Court. Malkin, *supra*.

30. Carasik, *supra* note 25.

31. *Id.*

32. *Former Guatemala Dictator Faces Genocide Retrial*, AL JAZEERA (Jan. 5, 2015), <http://america.aljazeera.com/articles/2015/1/5/former-guatemaladictatorfacesgenocide-retrial.html>.

33. *Guatemala Annuls Rios Montt's Genocide Conviction*, BBC (May 21, 2015), <http://www.bbc.com/news/world-latin-america-22605022>.

34. *Id.*

35. *Id.*

36. *Id.*

37. José Elías, *El Juicio a Ríos Montt Aviva la División en Guatemala*, EL PAÍS (Spain) (Jan. 8, 2015), http://internacional.elpais.com/internacional/2015/01/08/actualidad/1420752035_263308.html.

retrial in which all evidence and witnesses would be presented behind closed doors. Regardless of any conviction, however, he will likely not be sentenced after the Guatemalan National Institute of Forensic Science (*Instituto Nacional de Ciencias Forenses de Guatemala*, or INACIF) declared Ríos Montt incompetent to stand trial because of senile dementia.³⁸ His defense attorneys unsuccessfully appealed to excuse him from criminal prosecution under the country's postwar amnesty law.³⁹ The trial was set to begin in January 2016,⁴⁰ but was again suspended indefinitely so that the court may resolve outstanding legal petitions.⁴¹ The failed prosecution of Ríos Montt is an example of the consistent political interference in the court system, which has cast doubt on the once hopeful expectation for justice for the atrocities committed during the civil war.⁴²

38. *INACIF Dictamina: Efraín Ríos Montt Padece Demencia Senil*, EL PERIÓDICO (Guatemala) (July 7, 2015), <http://elperiodico.com.gt/2015/07/07/pais/inacif-dictamina-efrain-rios-montt-padece-demencia-senil/>; Associated Press, *Guatemala Court: Former Dictator Can Be tried for Genocide – But Not Sentenced*, GUARDIAN (Aug. 25, 2015), <http://www.theguardian.com/world/2015/aug/25/guatemala-rios-montt-genocide-trial-not-sentenced>.

39. *Alto Comisionado ONU Ve Como Precedente el Rechazo de Amnistía a Ríos Montt*, LA VANGUARDIA (Spain) (Oct. 10, 2015), <http://www.lavanguardia.com/internacional/20151010/54438020891/alto-comisionado-onu-ve-como-precedente-el-rechazo-de-amnistia-a-rios-montt.html>. See Decreto-Ley 8-86 (Decree 8-86) (Guatemala) (granting amnesty to any person responsible for political offenses and related practices committed between March 1982 and January 1986).

40. *Guatemala: Court Ruling on Ríos Montt's Case Highlights Flaws in Justice System*, AMNESTY INT'L (Aug. 25, 2015), <https://www.amnesty.org/en/latest/news/2015/08/guatemala-court-ruling-on-rios-montt-s-case-highlights-flaws-in-justice-system/>.

41. Jorge D. Lopez, *Genocide Trial for Guatemala Ex-Dictator Rios Montt Suspended*, REUTERS (Jan. 11, 2016), <http://www.reuters.com/article/us-guatemala-trial-idUSKCN0UP21F20160111>.

42. *Justice Confused*, ECONOMIST (Jan. 10, 2015), <http://www.economist.com/news/americas/21638190-trial-ailing-ex-dictator-plagued-chaos-justice-confused>.

II. Current Conditions for Children⁴³ in Guatemala: Violence Against Children and Adolescents in Guatemala Is Widespread, and Indicative of Attitudes that Carry On Decades After the Conclusion of the Civil War.

Children in Guatemala face many different forms of violence, including: gender-based violence, emotional and psychological violence, negligence and abandonment, and sexual violence.⁴⁴ Poverty, lack of economic and educational opportunities, and high rates of malnutrition are not unique to Guatemala yet they contribute to the high levels of violence in Guatemala. This Part explores only those sources and levels of violence unique to Guatemala.

A. Post-Conflict Violence

Twenty years after the peace accords were signed, Guatemala still struggles to protect its most vulnerable populations. It is important to pause and note that anthropologists find that Guatemala's

[v]iolence seems a symptom of historically shaped conditions and structural problems (e.g., a legacy of state violence, deep socioeconomic inequality, the penetration

43. Under the Convention on the Rights of the Child, a child is defined as any human being below the age of eighteen years old. Convention on the Rights of the Child art. 1, Sept. 2, 1990, 28 ILM 1456, 1577 U.N.T.S. 3. Guatemalan law refers to boys, girls, and adolescents (*niños, niñas y adolescentes*), with boys and girls defined as a person from conception until the age of thirteen, and adolescents as those from thirteen up to eighteen years old. Law for the Comprehensive Protection of Childhood and Adolescence (*Ley de la Protección Integral de la Niñez y Adolescencia*), Decreto 27-2003 (Decree 27-2003) art. 2 (Guatemala) [hereinafter *Ley PINA*]. For purposes of this Note, "children" will generally be used to refer to individuals under the age of eighteen. If reference is made specifically to adolescents, it is referring only to those individuals between the ages of thirteen and seventeen.

44. Interview with María Eugenia Villarreal, Dir. of End Child Prostitution, Child Pornography, & Trafficking of Children for Sexual Purposes (ECPAT) Guat., in Guatemala, Guat. (Oct. 22, 2014) (on file with author).

of extractive industries, the erosion of political and social infrastructures, and disparate access to health care, education and life chances) rather than simply the product of itinerant youth, organized crime, and/or other stereotyped and pathologized subsets of the population.⁴⁵

One such contributing factor to the violence in the country today is the legacy of the Mayan genocide in Guatemala.⁴⁶ Some of the illegal groups and clandestine death squads that developed during the civil war and were supported by the State to carry out political-military missions have evolved into organized criminal networks.⁴⁷ Many of those who were soldiers during the war are now private security guards, and the tactics of sexual violence the State trained its soldiers to carry out during the war continue to this day, including rape, dismemberment, torture, and mutilation.⁴⁸ Additionally, the Guatemalan government has not sufficiently responded to clandestine groups that participate in illicit activity, including the sale of black-market goods, kidnapping, and the trafficking of weapons, narcotics and people.⁴⁹

45. Peter Benson, Edward F. Fischer & Kedron Thomas, *Resocializing Suffering: Neoliberalism, Accusation, and the Sociopolitical Context of Guatemala's New Violence*, 35 *LATIN AM. PERSP.* 38, 50 (2008).

46. BEATRIZ MANZ, *WRITE NET* (Commissioned by U.N. High Comm'r for Refugees, Status Determination & Prot. Info. Section), *CENTRAL AMERICA: PATTERNS OF HUMAN RIGHTS VIOLATIONS 2* (2008), <http://www.refworld.org/pdfid/48ad1eb72.pdf>.

47. ADRIANA BELTRÁN, *WASH. OFF. ON LATIN AM., THE CAPTIVE STATE: ORGANIZED CRIME AND HUMAN RIGHTS IN LATIN AMERICA 2* (2007).

48. *The International Violence Against Women Act: Could IVAWA Save Guatemala from Femicide?*, COUNCIL ON HEMISPHERIC AFF. (Aug. 5, 2010), <http://www.coha.org/the-international-violence-against-women-act-could-ivawa-save-guatemala-from-femicide/>. There are extensive issues with the private security forces in the country. The State has not been capable of handling the country's high levels of violence. The lack of public security has become big business for these private companies. There are now four times as many private security guards in Guatemala as there are police officers. This creates a system of security for those who can afford it because the State cannot handle the violence on its own. ODHAG, *SITUACIÓN DE LA NIÑEZ GUATEMALTECA, INFORME 2012-2013*, at 30 (2014), <http://www.odhag.org.gt/pdf/Informeninez2012-2013.pdf> [hereinafter ODHAG INFORME NIÑEZ 2012-2013].

49. COUNCIL ON HEMISPHERIC AFF., *supra* note 48; ODHAG INFORME 2012-2013,

Violence due to political corruption is still ever-present.⁵⁰ Despite the creation of the United Nations International Commission against Impunity in Guatemala (*Comisión Internacional Contra la Impunidad en Guatemala*, or CICIG),⁵¹ intimidation and corruption among justice system officials remains high.⁵² Impunity also pervades the judicial system: the Council on Hemispheric Affairs reports that ninety-eight percent of crimes and offenses committed in Guatemala are met with impunity.⁵³ These high levels of impunity greatly affect children and adolescents, and their ability to assert their rights.

B. Cultural Norms Contribute to High Levels of Impunity

While the relics of the war continue to affect the country, an array of long-held cultural attitudes and modern issues contribute to the violence and instability that particularly affects Guatemalan children and adolescents. Fifty-one percent (7.5 million) of the population of Guatemala is under the age of eighteen.⁵⁴ An estimated two out of

supra note 48, at 30.

50. For example, fifty-one people were murdered in the 2007 election. MIRANDA LOUISE JASPER & COLLEEN W. COOK, CONG. RESEARCH SERV., RS 22727, GUATEMALA: 2007 ELECTIONS AND ISSUES FOR CONGRESS 3 (2008), <http://www.fas.org/sgp/crs/row/RS22727.pdf>.

51. See CICIG, <http://www.cicig.org/index.php?page=about> (last visited Feb. 8, 2016).

52. HUMAN RIGHTS WATCH, WORLD REPORT 2014: GUATEMALA (2014), <http://www.hrw.org/world-report/2014/country-chapters/guatemala>. The mere existence of CICIG, unprecedented by the UN, or any other international organization, demonstrates the extent of current and historical levels of impunity in Guatemala. CICIG works similarly to an international prosecutor but in Guatemalan courts and under Guatemalan law, trying cases against organized criminal networks. The power these criminal networks hold in Guatemala, and the impunity under which they operate, is considered to be a major impediment to the stability of the country. See ABOUT CICIG, <http://cicig.org/index.php?page=about> (last visited Jan. 17, 2016).

53. Cameron McKibben, *Corruption, Impunity, and the International Commission Against Impunity in Guatemala*, COUNCIL ON HEMISPHERIC AFF. (Apr. 30, 2015), <http://www.coha.org/corruption-impunity-and-the-international-commission-against-impunity-in-guatemala/>.

54. UNICEF & INSTITUTO CENTROAMERICANO DE ESTUDIOS FISCALES, ¡CONTAMOS! ANALISIS DEL PRESUPUESTO GENERAL DE INGRESOS Y EGRESOS DEL ESTADO DE GUATEMALA

three children in Guatemala are considered to be living in poverty.⁵⁵ Eighty percent of Guatemalan children suffer from some form of malnutrition.⁵⁶ Despite these statistics, the State invests only \$191 a year per child, making it the country that invests the least in its children out of all of Latin America.⁵⁷ In addition, only 3.1 percent of the Gross Domestic Product is invested in children.⁵⁸ Budgets allocated for services aimed at the protection of children have been cut and legislative initiatives have not been rigidly implemented.⁵⁹ This lack of investment is indicative of the low priority the State places on the protection and advancement of Guatemalan children.

As the Executive Director of End Child Prostitution, Child Pornography & Trafficking of Children for Sexual Purposes (ECPAT) points out, Guatemala “is a patriarchal country that invests too little in social programs.”⁶⁰ It has an exclusionary structure that does not

2014 ENFOCADO EN NIÑEZ Y ADOLESCENCIA 8 (2013), http://www.unicef.org/guatemala/spanish/CONTAMOS_15-path.compressed.pdf [hereinafter ANALISIS DEL PRESUPUESTO GENERAL].

55. CONSORTIUM FOR STREET CHILDREN, NGO SHADOW REPORT FOR THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD, 54TH SESSION: GUATEMALA 3 (2009), <http://www.streetchildrenresources.org/wp-content/uploads/2013/01/guatemala-shadow-report-2009.pdf>.

56. ODHAG, INFORME DE LA SITUACIÓN DE LA NIÑEZ Y ADOLESCENCIA EN GUATEMALA 2011, at 30 (2012), <http://www.odhag.org.gt/pdf/InformeNinez2011.pdf> [hereinafter ODHAG INFORME NIÑEZ 2011].

57. COALICIÓN GUATEMALTECA A FAVOR DEL CUMPLIMIENTO DE LOS DERECHOS DE LA NIÑEZ Y ADOLESCENCIA DE GUATEMALA, PRESENTACIÓN UPR: GUATEMALA 4 (2012), <http://www.ciprodeni.org/observatorio/material/UPR-Guatemala.pdf>.

58. ANALISIS DEL PRESUPUESTO GENERAL, *supra* note 54, at 4. “In November 2013 the Congress of Guatemala decided not to approve the budget proposal presented by the official party for 2014, leaving in place the budget approved for 2013. The country faces a complex scenario with the possibility of a reduction in the public social spending to 7.9% of the GDP.” *Id.*

59. *Id.*

60. Interview with Villarreal, *supra* note 44. UNICEF notes that any effort to curb violence against children must be holistic, address both societal and familial violence, and incorporate both preventive and rehabilitative programs. “[This] is particularly important regarding the prevention of violence against children and adolescents, [and must be] comprised of efforts including overcoming cultural factors associated with the ancestral patriarchal heritage—in the use and abuse of power, largely by men—which prevails in the region, such as circumstances associated with

provide education or access to work or opportunities for large sectors of the population, which contributes to the ongoing violence.⁶¹ Social disparagement of children promotes the growing violence against them,⁶² as Guatemalan children are not seen as humans with rights.⁶³

C. Familial Violence

Parents are some of the most consistent perpetrators of violence against their own children.⁶⁴ Before children are even born there is violence in their homes, in both rural and urban areas.⁶⁵ Insufficient attention is paid to child victims, due both to parental attitudes that treat children as objects rather than subjects of protection, and to high levels of governmental corruption.⁶⁶ Violence committed against children and adolescents has become normalized and justified in Guatemalan society, through conceptions of hierarchy and

discrimination in its various manifestations, and the practice of treating girls and boys as property of adults, not as individuals with rights, in accordance with the principles of the Convention on the Rights of the Child and other international legal instruments ratified and adopted by the [Latin American] countries." UNICEF, *LA VIOLENCIA CONTRA NIÑOS, NIÑAS Y ADOLESCENTES 27* (2006) (translated by author).

61. Interview with Nery Rodenas, Exec. Dir., Human Rights Office of the Archbishop of Guat. (*Director Ejecutivo, Oficina de Derechos Humanos del Arzobispado de Guatemala*, or ODHAG), in Guatemala, Guat. (Oct. 23, 2014) (on file with author).

62. ODHAG, *INFORME NIÑEZ*, *supra* note 56, at 105.

63. Interview with Emma Galindo, Nat'l Child Consultant, Plan Int'l (*Asesora Nacional de Protección, Plan Internacional*), in Guatemala, Guat. (Oct. 23 2014) (on file with author). Note that child advocates no longer use the word "minors" (*menores*) to refer to youth. "Minor is a stigmatizing word. It implies that children are less than adults, and leads to the view that children have less rights (*menores en sus derechos*) and [this] is a concept of control. That's why we use the terminology boys, girls, and adolescents. The CRC advises not to use the concept of minor." *Id.*

64. Interview with Julio Ságüil, Attorney at the Office of the Nat'l Gen. Procurator, Children & Adolescent Division (*Procurador, Procuraduría de la Niñez y Adolescencia de la Procurador General de la Nación*), in Guatemala, Guat. (Oct. 24, 2014) (on file with author).

65. Interview with Villarreal, *supra* note 44.

66. Interview with Ságüil, *supra* note 64; Interview with Estuardo Sánchez, Adviser for Child Prot. (*Consultor de la Protección de la Niñez*), UNICEF, in Guatemala, Guat. (Oct. 24, 2014) (on file with author).

authority.⁶⁷ As a result, seventy percent of children are abused in the home.⁶⁸ Girls are particularly vulnerable due to deep-rooted gender biases, which result in weak investigations and prosecutions of cases involving female victims.⁶⁹

It is rare that the State will intervene to protect a child in cases of violence from within the family.⁷⁰ If a parent puts visible marks on the child, this will draw attention but even in these cases it is believed that parents have the right to instill their values by any means they see fit.⁷¹ Experts estimate that ninety percent of domestic violence cases go unreported, and little to no statistics are able to capture the pervasiveness of this issue.⁷²

D. Sexual Violence

Sexual assault rates in the country have increased seventy percent from 2009 to 2013, according to government statistics.⁷³

67. ODHAG INFORME NIÑEZ 2012-2013, *supra* note 48, at 91. Even the nation's strongest legislation in support of children's rights requires that children "respect and obey their parents or guardians, to contribute to familial loyalty and unity," demonstrating state imposition of the subordination of children. Ley PINA, art. 62(b) (translated by author).

68. UNICEF, MÍRAME 70 (2007); *see also* Interview with Ságüil, *supra* note 64 (noting that attorneys charged with representing youth in cases where their rights have been violated have discretion under the Ley PINA to represent children in these cases, but often decide against it because it is "a family matter").

69. Karen Musalo & Blaine Bookey, *Crimes Without Punishment, An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L. J. 265, 269 (2013).

70. Interview with Rodenas, *supra* note 61; Interview with Ságüil, *supra* note 64.

71. ODHAG INFORME NIÑEZ, 2011, *supra* note 56, at 105; Interview with Judge in the First Instance Court for Adolescents in Conflict with the Law (requested anonymity) (*Juez, Juzgado de Primera Instancia de Adolescentes en Conflicto con la Ley Penal*), in Guatemala, Guat. (Oct. 22, 2014) (on file with author); Interview with Galindo, *supra* note 63.

72. LET GIRLS LEAD, ESTUDIO DE CASO AGALI: COMBATIENDO LA VIOLENCIA SEXUAL EN GUATEMALA 1 (2013), <http://programaagali.org/esp/wp-content/uploads/2013/06/AGALI-CONACMI-Case-Study-FINAL-Spanish-6-7-13.pdf>.

73. U.S. STATE DEP'T OVERSEAS SECURITY ADVISORY COUNCIL, GUATEMALA 2015 CRIME AND SAFETY REPORT (2015), <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17785>.

Children face exponentially higher levels of sexual abuse than adults: in 2014, 11,000 children were hospitalized for sexual abuse; the PNC reported 4,608 cases of physical violence against children in the same year.⁷⁴ In nine out of ten of cases of abuse against children, family members are the perpetrators, and in eight out of ten cases, the abuse is committed within the home.⁷⁵ Incest has been culturally assimilated and thus accepted by many as a normal part of childhood.⁷⁶ Girls in particular are rarely provided police protection when faced with aggression and sexual exploitation at the hands of family members.⁷⁷ Furthermore, abused children are regularly revictimized because the State maintains a policy of removing the child from the home rather than removing the abuser.⁷⁸

Guatemala has the highest teenage pregnancy rate in Latin America⁷⁹—5,000 girls under the age of fifteen became pregnant in 2014.⁸⁰ More than one-third of the population is victim to early or forced marriage, which leads to greater instances of teen pregnancy.⁸¹ Most girls under the age of fourteen become pregnant as a result of rape by their fathers or other relatives.⁸² For example, in 2012, nearly

74. *Menores Afectadas por la Violencia, SIGLO 21* (Guatemala) (Mar. 4, 2015), <http://m.s21.com.gt/nacionales/2015/03/04/menores-afectadas-violencia>.

75. *Id.*

76. Interview with Byron Ruben Alvarado Fuentes, Exec. Subsecretary of the Nat'l Comm'n on Children & Adolescents (*Subsecretario Ejecutivo, Comisión Nacional de la Niñez y de la Adolescencia*, or CNNA), in Guatemala, Guat. (Oct. 22, 2014) (on file with author).

77. *Id.*

78. *Id.*

79. German A. Ospina, *Why Is Guatemala's Teen Pregnancy Rate So High?*, COUNCIL ON HEMISPHERIC AFF. (June 17, 2015), <http://www.coha.org/why-is-guatemala-teen-pregnancy-rate-so-high/>.

80. Alicia Menendez, *Why Are 10-Year-Olds Having Babies in Guatemala?*, FUSION (Sept. 28, 2015), <http://fusion.net/video/204565/teenage-pregnancy-guatemala/>. Fifty-nine thousand girls and adolescents became pregnant in 2012. ECPAT, INFORME DE MONITORE DE PAÍS SOBRE LA EXPLOTACIÓN SEXUAL COMERCIAL DE NIÑOS, NIÑAS Y ADOLESCENTES (ESCENNA): GUATEMALA 14 (2014), http://www.ecpat.net/sites/default/files/CMR_GUATEMALA_FINAL.pdf [hereinafter ESCENNA: Guatemala].

81. ESCENNA: Guatemala, *supra* note 80, at 11.

82. Anastasia Moloney, *Fathers Rape with Impunity, Fuelling Guatemala's Teen Pregnancies: Rights Group*, REUTERS (Oct. 2, 2015), <http://www.reuters.com/article/20>

ninety percent of these pregnancies involved relatives, including uncles and cousins, with thirty percent of those pregnancies the result of rape by fathers.⁸³ These girls are then forced by family members to leave the home while perpetrators go unpunished.⁸⁴ The violence does not stop at the victim—only forty percent of infants born of mothers under the age of eighteen live to be more than one year old.⁸⁵

Within indigenous cultures of Guatemala, girls are invisible in the patriarchal structure⁸⁶ under which they are considered second-class citizens.⁸⁷ Moreover, when an indigenous mother bears a girl,

15/10/02/us-guatemala-teenage-pregnancy-idUSKCN0RW22D20151002.

83. Moloney, *supra* note 82.

84. Within the last decade, article 200 of the Penal Code permitted a person who committed rape to escape criminal prosecution if s/he married the victim, so long as the victim was above the age of 12. See Código Penal, Decreto 17-73, Artículo 200, (Penal Code, Decree 17-73, art. 200) (Guatemala). As the law now stands, anyone under the age of fourteen cannot consent to sex, and perpetrators receive an aggravated sentence if the victim becomes pregnant as a result. *El Sí de las Niñas (el Decreto 8-2015 en Tres Actos)*, EL PERIÓDICO (Guatemala) (Nov. 22, 2015), <http://elperiodico.com.gt/2015/11/22/domingo/el-si-de-las-ninas-el-decreto-8-2015-en-tres-actos/>.

85. *Embarazo en Niñas*, OBSERVATORIO EN SALUD REPRODUCTIVA, <http://www.osar.guatemala.org/> (last visited Nov. 28, 2015).

86. “Customary law in many Mayan communities recognized a man’s right to hit his wife and children. When couples married, elders informed new husbands that they must control their wives, which they could achieve with restrained levels of physical force. In turn, women learned that they must always obey their husbands and endure occasional beatings. Such counsel was part of the social process that sustained violence. It also reified highland men’s gendered powers” David Carey Jr. & M. Gabriela Torres, *Precursors to Femicide: Guatemalan Women in a Vortex of Violence*, 45 *LATIN AM. RES. REV.* 142, 146 (2010) (internal citations omitted). See also MARÍA G. TEJIDO & WIEBKE SCHRAMM, *GUATEMALA’S INDIGENOUS WOMEN, in RESISTANCE: THE FRONTLINE OF THE COMMUNITY’S STRUGGLE TO DEFEND MOTHER EARTH AND HER NATURAL ASSETS* 15–16, 21–22 (2010), http://www.pbi-guatemala.org/fileadmin/user_files/projects/guatemala/files/english/Mujeres_Completo_ING.pdf. This patriarchal structure has been met with strong resistance by indigenous Guatemalan women. *Id.* at 16; Lorena Cabnal, *Acercamiento a la Construcción de la Propuesta de Pensamiento Epistémico de la Mujeres Indígenas Feministas Comunitarias de Abya Yala*, in *FEMINISTA SIEMPRE, FEMINISMOS DIVERSOS: EL FEMINISMO COMUNITARIO* 10 (2012); see generally RIGOBERTA MENCHÚ, I, *RIGOBERTA MENCHÚ: AN INDIAN WOMAN IN GUATEMALA* (1984).

87. UNICEF, *LOOK AT ME! STATUS OF INDIGENOUS GIRLS IN GUATEMALA* 15 (2008), http://tracestone.pbworks.com/w/file/attach/64193815/look_at_me_part1%20In

the child is seen as a burden for the family. Indigenous mothers are blamed for their daughters being raped or becoming pregnant at a young age.⁸⁸ In all, the State has failed to adequately address the high rates of sexual abuse perpetrated against Guatemalan youth, particularly when perpetrated in indigenous Guatemalan communities.

E. Forced Marriage

The State has only just begun to address the issue of forced marriage within the country. Forced marriages are marriages that occur without the free or valid consent of one or both parties. Early marriage is related to forced marriage because, under a number of international instruments,⁸⁹ minors under the age of eighteen are deemed incapable of giving informed consent.⁹⁰ Abject poverty, high birth rates, and cultural attitudes that devalue children lead to the lamentable fact that some parents sell their children as a commodity, the way one would sell a cow.⁹¹ Children are sold—sometimes to be transported out of the country to be married—or traded with a neighbor in exchange for livestock.⁹² However, forced marriage has only recently been identified as being linked to trafficking.⁹³

Adolescent girls in Guatemala, typically thirteen to fourteen

digenous%20Girls%20in%20Guatemala.pdf [hereinafter LOOK AT ME!].

88. LOOK AT ME!, *supra* note 87, at 25.

89. See The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, Nov. 7, 1962, 32 U.N.T.S. 231, <http://www.unhchr.ch/html/menu3/b/63.htm>; Universal Declaration of Human Rights; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 54/4, annex, 54, <http://www1.umn.edu/humanrts/instree/e1cedaw.htm>; Convention on the Rights of the Child, *supra* note 43.

90. CHERYL THOMAS, UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, FORCED AND EARLY MARRIAGE: A FOCUS ON CENTRAL AND EASTERN EUROPE AND FORMER SOVIET UNION COUNTRIES WITH SELECTED LAWS FROM OTHER COUNTRIES 2 (2009), http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Cheryl%20Thomas%20revised_.pdf.

91. Interview with Villarreal, *supra* note 44.

92. *Id.*

93. THOMAS, *supra* note 90, at 2.

years old, poor, and lacking a nuclear family structure, are most vulnerable to be sold for forced marriage.⁹⁴ Girls are substantially more likely to be forced to marry than are boys, and Guatemalan law, until very recently, supported this: a fourteen-year-old girl in Guatemala could legally consent to marriage but not until age sixteen could a boy consent to marriage.⁹⁵ Until November 2015, both sexes could marry by the age of twelve with parental consent.⁹⁶ In November, after a successful campaign by UNICEF, Congress passed a law⁹⁷ increasing the legal age of marriage to eighteen for both sexes and permitting exception via judicial decree only for adolescents aged sixteen or older.⁹⁸ The hope is that this change in law will work to minimize cases of sexual violence including early and forced marriages and teenage pregnancy.⁹⁹

Forced marriage perpetuates poverty and enslaves women and girls.¹⁰⁰ Girls married as children are cut off from family and friends—they are socially isolated, with limited opportunities for education, and more likely to experience domestic and sexual violence.¹⁰¹ Forced

94. THOMAS, *supra* note 90, at 2.

95. UNICEF, ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS 2 (2014), http://data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/Child-Marriage-Brochure-HR_164.pdf; Interview with Galindo, *supra* note 63.

96. *Id.*

97. Decreto 8-2015 (Decree 8-2015) (Guatemala).

98. Decreto 8-2015, art. 82. UNICEF began the campaign #18Sí14No (“#18Yes 14No”) to raise public support for Congress to increase the marriageable age to eighteen. By 2014, this policy was being implemented in 68 municipalities. UNICEF, ANNUAL REPORT 2014: GUATEMALA 7 (2014), http://www.unicef.org/about/annualreport/files/Guatemala_Annual_Report_2014.pdf.

99. *Id.* at 12.

100. Human Rights Council Holds Panel Discussion on Preventing and Eliminating Child, Early And Forced Marriage, UNITED NATIONS OFF. OF HIGH COMM’R ON HUM. RTS. (June 23, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14760&LangID=E>.

101. UNICEF, ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS 4 (2014), http://data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/Child-Marriage-Brochure-HR_164.pdf; *Child Marriages: 39,000 Every Day – More than 140 Million Girls Will Marry Between 2011 and 2020*, UNWOMEN (Mar. 7, 2013), <http://www.unwomen.org/en/news/stories/2013/3/child-marriages-39000-every-day-more-than-140-million-girls-will-marry-between-2011-and-2020>.

marriage is especially prevalent among indigenous Mayan communities in rural areas.¹⁰² In rural Guatemala, more than fifty percent of women aged twenty to twenty-four were married before the age of eighteen.¹⁰³ Early and forced marriage, therefore, represent additional barriers perpetuating the inability of Guatemalan girls to assert their rights.

F. Displaced Children, or “Street Children”¹⁰⁴

Physical and psychological violence within the family unit have been considered the main factors driving the displacement of children in Guatemala.¹⁰⁵ Increasing rates of abandonment are of grave concern with thirty-five children orphaned each day in Guatemala—a country without a historical culture of adoption.¹⁰⁶ Many parents

102. *Guatemala Bans Child Marriage but ‘Cultural Shift’ Required, Advocates Say*, GUARDIAN (Nov. 11, 2015), <http://www.theguardian.com/world/2015/nov/11/guatemala-bans-child-marriage>.

103. CTR. ON FOREIGN REL., CHILD MARRIAGE: A CFR INFOGUIDE PRESENTATION (2013), http://www.cfr.org/peace-conflict-and-human-rights/child-marriage/p32096#!/?cid=otr_marketing_use-child_marriage_infoguide#!%2F.

104. The widely recognized phrase “street children” is an umbrella description for children that live and/or work in the street. UNICEF notes that the label “street children” perpetuates stigmatization and demonization by mainstream society, and furthers beliefs that these children are dangerous and/or criminals. THE STATE OF THE WORLD’S CHILDREN 2006: EXCLUDED AND INVISIBLE 40, UNICEF (2006), http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf.

105. CONSORTIUM FOR STREET CHILDREN, *supra* note 55, at 4; BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP’T OF ST., GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011, at 20 (2012), <http://www.state.gov/documents/organization/186728.pdf> [hereinafter ST. DEP’T HUM. RTS. 2011].

106. Interview with Ines Tobar Cruz, Attorney, Multidisciplinary Team, Nat’l Adoption Council (*Consejo Nacional de Adopciones* or CNA), at 2–4, in Guatemala, Guat. (Oct. 21, 2014); UNICEF: *75% de Impunidad en los Casos de Violencia Contra Menores*, LA HORA (Guatemala) (Sept. 17, 2014), <http://lahora.gt/unicef-75-de-impunidad-en-los-casos-de-violencia-contra-menores/>. In 2008 Guatemala began implementation of the new National Adoption Law (*Ley de Adopción, Decreto Número 77-2007*), putting a moratorium on international adoption as an attempt to curb decades of trafficking of children out of Guatemala by *notarios*. Due to the lack of culture of adoption within the country, the State found it difficult to get parents to adopt. In response, the CNA initiated programs requiring six weeks of waiting before a mother

leave Guatemala for the north, leaving their children home with distant relatives, which increases their vulnerability for abuse.¹⁰⁷ Estimates of the number of displaced children in Guatemala ranges from 1500-5000.¹⁰⁸ These youth are subject to homelessness, police brutality, and lack of access to vital services.¹⁰⁹ Organized crime rings often recruit displaced children to steal, transport contraband, for prostitution and illegal drug activities.¹¹⁰ Further, police often exert physical and sexual abuse on the displaced youth they detain.¹¹¹

The major factors threatening the health of displaced children are violence, drugs, early sexual experience, malnutrition, and diseases linked to living conditions.¹¹² Mayan children in particular have experienced historical and ongoing discrimination, segregation, and far less access to resources and services.¹¹³ Government departments charged with protecting the rights of children in Guatemala are not allocated sufficient funds or have proper organization to protect children from becoming displaced.¹¹⁴

can give her child up for adoption, psychological exams, and therapy, which has reportedly led to an increase in child abandonment—mothers abandon their children rather than turn them over to the appropriate authorities to avoid this psychologically harmful, government-mandated “therapy” process. See Mary Anastasia O’Grady, *Guatemala’s Stranded Orphans*, WALL ST. J. (Jan. 26, 2014), <http://online.wsj.com/articles/SB10001424052702303947904579340613770603296>. Furthermore, Guatemala has criminalized leaving the infant with firefighters or peace keeping authorities, requiring mothers instead to undergo this psychological process. Interview with Cruz, *supra* note 106.

107. Interview with Leonel Asdrubal Dubón Benfeldt, Exec. Dir., El Refugio de la Niñez, in Guatemala, Guat. (Oct. 24, 2014) (on file with author). “I believe the three main reasons for migration are (1) desperation; (2) family reunification; and (3) violence—there is a lot of gang pressure and heavy harassment.” *Id.*

108. CONSORTIUM FOR STREET CHILDREN, *supra* note 55, at 3.

109. *Id.*

110. ST. DEP’T HUM. RTS. 2011, *supra* note 105, at 20.

111. CONSORTIUM FOR STREET CHILDREN, *supra* note 55, at 6.

112. CONSORTIUM FOR STREET CHILDREN, *supra* note 55, at 6.

113. Jonas, *supra* note 16.

114. Jonas, *supra* note 16. The Secretariat for Social Welfare (*Secretaría de Bienestar Social* or “SBS”) and the National General Procurator (*Procurador General de la Nación* or “PGN”) are the two main bodies charged with protecting the rights of children in Guatemala. See discussion on the governmental bodies charged with implementing child protection laws, *infra* Part III.

G. Indigenous Communities Experience Heightened Levels of Violence

Mayan women and girls have a fear of speaking out, of expressing their views and feelings due to centuries of submission and subordination.¹¹⁵ Racial discrimination leaves indigenous youth marginalized from essential public services, and leads to social exclusion, marginalization, and limitation.¹¹⁶ As a result of their rural residency, many indigenous mothers are unable to obtain an identification card due to their rural residency, a card that is required to register births with the Register of Vital Statistics. Without this registration, children essentially do not exist in the legal system, rendering them unable to exercise their rights.¹¹⁷

H. Child Labor

Seven out of ten children and adolescents in Guatemala work or are exploited through forced labor.¹¹⁸ Indigenous children and adolescents comprise more than two-thirds of child labor in Guatemala.¹¹⁹ Some children are forced to beg on behalf of their

115. LOOK AT ME!, *supra* note 87, at 7.

116. *Id.*

117. *Id.* Regardless of registration, indigenous children are treated as less deserving of emergency state protection. In the context of unaccompanied minors repatriated to Guatemala, eighty percent of these children are indigenous, yet the State does not provide any interpreters in their procedures for recognizing fear of return or returning children to their parents—even in Xela, one of the country's two repatriation centers. Interview with Golda Ibarra, Dir. of the Migrant Children's Program, Office of the Sec'y of Soc. Welfare (*Directora del Programa Niñez Migrante, Secretaría de Bienestar Social*) in Guatemala, Guat. (Oct. 22, 2014) (on file with author). "[T]he families do not understand the process because it is not in their language. Many use their fingerprints as a signature because they can't even write their name—they are illiterate. The process is really just a formal handing over [of the child]; there is no one to watch out for their right to assure that they are protected." Interview with Sánchez, *supra* note 66.

118. Interview with Villarreal, *supra* note 44.

119. 2014 FINDINGS ON THE WORST FORMS OF CHILD LABOR - GUATEMALA, U.S. DEP'T OF LABOR (2014), <http://www.dol.gov/ilab/reports/child-labor/findings/2014TDA/guatemala.pdf>.

families or on behalf of organized crime.¹²⁰ Others are forced to sell fruits in the street, work in the sugarcane and coffee fields, or even in construction.¹²¹ Young girls are often brought to work with their mothers where they are made to clean houses.¹²² Because many children work at all hours of the day, they do not attend school and do not acquire a number of necessary skills, thereby reducing their lifetime earning potential and preventing upward mobility.¹²³

I. Violent Crimes

The violent crime rate in Guatemala is “critical” and one of the highest in Latin America.¹²⁴ The high level of violence severely destabilizes economic growth and general well-being; money that could be used for social services is instead budgeted to combat violence.¹²⁵ The U.S. Department of State attributes Guatemala’s high murder rate—fifth highest in the world¹²⁶—to a variety of factors,

120. Interview with Ságüil, *supra* note 64.

121. Cristián Dávila, *Leyes No Sancionan Explotación Infantil*, PRENSA LIBRA (Mar. 27, 2014), http://www.prensalibre.com/noticias/justicia/Leyes-sancionan-explotacion-infantil_0_1109289087.html. See also Interview with Ságüil, *supra* note 64.

122. Dávila, *supra* note 121.

123. *Id*; KOFI A. ANNAN, WE THE CHILDREN: MEETING THE PROMISES OF THE WORLD SUMMIT FOR CHILDREN 9 (2001) http://www.unicef.org/specialsession/about/sgreport-pdf/sgrep_adapt_part2c_eng.pdf.

124. The United States Department of State has marked the level of violence in Guatemala as “Critical.” See BUREAU OF DIPLOMATIC SECURITY, U.S. DEP’T OF ST., GUATEMALA 2014 CRIME AND SAFETY REPORT (2014), <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15656>. The capital city of Guatemala has the third highest murder rate of any major city in the Americas. See GLOBAL STUDY ON HOMICIDE 2013: TRENDS, CONTEXTS, DATA, U.N. OFFICE ON DRUGS & CRIME (Mar. 2014), http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf. The country is now the third most dangerous in all of Latin America and has the fifth highest murder rate in the world. FORENSIC & LITIGATION CONSULTING, PUBLIC INSECURITY IN LATIN AMERICA 2 (2014), <http://www.fticonsulting.com/global2/media/collateral/united-states/2014-latin-america-security-index.pdf>; *Which Countries Have the World’s Highest Murder Rates? Honduras Tops the List*, CNN (Apr. 11, 2014), <http://www.cnn.com/2014/04/10/world/un-world-murder-rates/>.

125. U.S. DEP’T OF ST., GUATEMALA 2014 CRIME AND SAFETY REPORT, *supra* note 124.

126. *Which Countries Have the World’s Highest Murder Rates? Honduras Tops the List*, CNN (Apr. 11, 2014), <http://www.cnn.com/2014/04/10/world/un-world-murder->

including increased narco-trafficking activity, increased gang-related violence, high gun ownership (roughly sixty percent of the population possess a firearm), and a police/judicial system that is both unable and unwilling to hold perpetrators of violence against children accountable.¹²⁷ Normalized violence, as a result of the thirty-six-year civil war, also contributes to perpetually high levels of brutal violence.¹²⁸

Guatemala has the second highest rate of child murder in the world.¹²⁹ In just the first two months of 2015, 848 children went missing.¹³⁰ Homicide is the leading cause of death among adolescent boys in Guatemala.¹³¹ INACIF found that 112 of the 156 violent deaths of minors (which INACIF defines as ages zero to eighteen) in the three months between January and March 2015, or about seventy-two percent, were children killed by firearms.¹³²

The country has one of the world's highest rates of femicide and government officials and agencies have been unwilling and/or unable to investigate the vast majority of these cases.¹³³ An average of two females are killed every day in Guatemala.¹³⁴ Infanticide is

rates/.

127. U.S. DEP'T OF ST., GUATEMALA 2014 CRIME AND SAFETY REPORT, *supra* note 124.

128. Michael Sheen, *Why Guatemala is One of the Worst Places in the World to Be a Child*, THE TELEGRAPH (U.K.) (Mar. 9, 2015), <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/guatemala/11457584/Why-Guatemala-is-one-of-the-worst-places-in-the-world-to-be-a-child.html>.

129. *Id.*

130. *Id.*

131. UNICEF, HIDDEN IN PLAIN SIGHT: A STATISTICAL ANALYSIS OF VIOLENCE AGAINST CHILDREN 165 (2014), http://data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/VR-full-report_Final-LR-3_2_15_189.pdf.

132. Wendy Villagrán, *Menores Arrastrados Por la Violencia*, LA NACIÓN (Guatemala) (Apr. 12, 2015), https://issuu.com/lanaciongt/docs/edici_n_12-4-15. State-provided statistics, however, are unreliable—INACIF and the Guatemalan National Police (*Policia Nacional Civil*, or "PNC") had a sixteen-percent discrepancy in homicide reports in 2012 and 2013, for example. One reason for such a discrepancy is that the PNC does not count the crime as a homicide if the victim left the crime scene alive but subsequently died as a result of the injuries. U.S. DEP'T OF ST., GUATEMALA 2014 CRIME AND SAFETY REPORT, *supra* note 124.

133. Jonas, *supra* note 16.

134. LET GIRLS LEAD, *supra* note 72.

disproportionately committed against females due to the belief that females have less social value than males.¹³⁵

J. Gang Violence

The issue of gangs must be understood within the systems of structural violence under which Guatemalan children are brought up.¹³⁶ Anthropologists find that gangs have emerged and are able to thrive amidst conditions shaped by governmental policies, foreign political influence, and global economic restructuring.¹³⁷ These anthropologists further note, “The category ‘gang member’ functions as something of a scapegoat in contemporary Guatemala. By attributing violence to delinquent youth, people distance themselves from feelings of complicity and resignation.”¹³⁸

Within the last decade, the number of youth street gangs (*maras*) has grown significantly, resulting in both increased violence and the number of children at risk of being recruited into gangs.¹³⁹ Although there are no reliable statistics on the number of children and adolescents involved in gang activity,¹⁴⁰ the Alliance for the Prevention of Crime (*Alianza para la Prevención del Delito*) estimates there to be 200,000 youth gang members in Guatemala.¹⁴¹ Youth in Guatemala are the demographic most affected by this increased gang activity—regardless of whether they are involved with gangs or not.¹⁴²

135. ODHAG INFORME NIÑEZ 2012-2013, *supra* note 48, at 91.

136. Benson, Fischer & Thomas, *supra* note 45, at 43.

137. *Id.* at 50.

138. *Id.* at 43.

139. *Id.* Gang activity is primarily concentrated in Guatemala City, especially zones 3, 5, and 18, and also in the departments of Huehuetenango (located near the border of Mexico), Chimaltenango, and Quiché. Interview with Ibarra, *supra* note 117. Where poverty is high, gang activity is high. Interview with Nery Rodenas, *supra* note 61.

140. INTERPEACE, VIOLENCIA JUVENIL, MARAS Y PANDILLAS EN GUATEMALA 30 (2009), <http://www.interpeace.org/publications/central-american-youth-programme/36-youth-violence-maras-and-pandillas-in-guatemala-spanish/file>.

141. UNICEF, ADOLESCENCIA, INTRODUCCIÓN, <http://www.unicef.org/guatemala/spanish/adolescence.html> (last visited Feb. 18, 2015).

142. MANZ, *supra* note 46, at 5.

An estimated eighty-five to ninety percent of cases in the Courts for Adolescents in Conflict with the Law (*Juzgados de Primera Instancia de Adolescentes en Conflicto con la Ley Penal*) are related to gang activity.¹⁴³ Gang members threaten children to either join the gang or run the risk of being killed.¹⁴⁴ These are not empty threats; many children die for refusal.¹⁴⁵ Police know that many children are killed for refusing to join gangs, yet even when reports are filed, police do not investigate.¹⁴⁶

As a result of the high number of children in gangs, many are wrongly associated with gangs, and are even killed based on this assumption.¹⁴⁷ The inability of the State to effectively reduce violence in the country has led to increased levels of mistrust within society and the underreporting of crimes.¹⁴⁸ In fact, three out of four crimes go unreported, with most victims citing lack of confidence in the State's ability to protect them, and ten percent fearing reprisals.¹⁴⁹ A recent poll found that seventy-six percent of the population has little or no trust in the police.¹⁵⁰

Those children who willingly join or who are coerced into joining gangs come from unstable homes and conditions of violence.¹⁵¹ There

143. Interview with Judge, *supra* note 71.

144. Interview with Rodenas, *supra* note 61.

145. Interview with Judge, *supra* note 71.

146. *Id.* "The gangs threaten and yes, they carry it out. If [children] are threatened, they comply, or they risk death. Some gang members offer kids money to commit a crime and since they don't have parents or they are simply poor, they'll do it. But others are threatened and they comply. They can't go to the police, and if they did, the police wouldn't do anything anyway. The police don't care, even though it's demonstrated that they kill these kids for not entering into the gangs. I have cases of 13 and 14 year-olds killed by the gangs for refusing. No one can save them; no one can protect them. It's well understood that they are threatened to comply and nobody can save them." *Id.*

147. *Id.*

148. CICIG, INFORME ESTADÍSTICO DE LA VIOLENCIA EN GUATEMALA 13-14 (2007), http://www.who.int/violence_injury_prevention/violence/national_activities/informe_estadistico_violencia_guatemala.pdf.

149. *Id.*; LA HORA, *supra* note 106.

150. MAUREEN TAFT MORALES, CONG. RESEARCH SERV., R42580, GUATEMALA: POLITICAL, SECURITY, AND SOCIO-ECONOMIC CONDITIONS AND U.S. RELATIONS 1 (Aug. 7, 2014), <http://fas.org/sgp/crs/row/R42580.pdf> (citation omitted).

151. Interview with Vilma Gonzáles, Head Juvenile Prosecutor, Public Ministry

is a lack of opportunities, insufficient resources, and little means to get ahead or get out.¹⁵² Children in the peripheral areas of cities where poverty is higher are especially vulnerable to being pulled into a gang.¹⁵³ Some join the gangs where they are accepted because their family and society has excluded them; other children join gangs because they see the gang members as family and believe they will be protected.¹⁵⁴ Those who join gangs must undergo a hazing process during which new members are tasked with crimes to prove themselves—many times the task is to kill a person and even cut up the body.¹⁵⁵

It is widely recognized by police, judges, prosecutors, and those within civil society that organized crime rings use children to commit crimes.¹⁵⁶ As a result of this growing association, children and adolescents are now carrying out assassinations, extortions, kidnappings, and robberies on behalf of the organized crime rings.¹⁵⁷ Organized criminal networks and gangs operate largely with impunity in part because officials accept bribes to dismiss charges.¹⁵⁸

Gangs target children under age thirteen to commit assassinations; roughly forty percent of murders are committed by

(*Fiscal, Fiscalía del Menor o de la Niñez, Ministerio Público*), in Guatemala, Guat. (Oct. 24, 2014) (on file with author); Interview with Rodenas, *supra* note 61.

152. Interview with Rodenas, *supra* note 61.

153. *Id.*

154. *Id.* A prosecutor in the Office of the Prosecutor of Minors anecdotally mentioned a case involving a twenty-two-year-old that joined a gang at age ten; “I have lived,” he boasted, because many children in gangs do not live into their twenties. Interview with González, *supra* note 151.

155. *Id.*

156. Interview with Jean Paul Briere Samoya, Congressman & Chairman of the Comm’n on Migration (*Diputado y Presidente de la Comisión de Migración, Congreso de la República*) in Guatemala, Guat. (Oct. 24, 2014) (on file with author); Interview with Rodenas, *supra* note 61; Interview with González, *supra* note 151.

157. Interview with Rodenas, *supra* note 61. Mr. Rodenas explained that there is a difference in the type of criminal activity committed explicitly by gangs (*maras*) and that which is associated with organized crime. Gangs typically extort businesses, rob ATMs, assault people, and kill children in other gangs. Gangs associated with organized crime are typically involved in narcotics and sexual trafficking, kidnapping, and robbery. *Id.*

158. Interview with Villarreal, *supra* note 44.

children under the age of thirteen.¹⁵⁹ Gang members gather children between the ages of nine and eleven, and teach them to shoot.¹⁶⁰ Because the crime rings in Guatemala are highly structured and well-connected, and are equipped with guns, vehicles, manpower, and collaborators who work in different governmental institutions, they are able to exercise their power across various socio-economic groups.¹⁶¹ The deception and exploitation of children by adults is pervasive and manifests in many different forms of violence against Guatemalan youth.

K. Sexual Exploitation and Trafficking

The sexual exploitation of minors is largely invisible yet widespread in Guatemalan society.¹⁶² Sexual exploitation of children and adolescents is not particular to any specific sector of the population—every sector is seriously exposed to risk—however the young, poor, and indigenous of the country are most vulnerable to sexual exploitation.¹⁶³ The major forms of sexual exploitation of minors in Guatemala include child pornography, sexual abuse and violence (including sex tourism), rape, enslavement, forced marriage, forced prostitution, and sex trafficking.¹⁶⁴

Sexual exploitation is one of the forms of violence that most affects children and adolescents in Guatemala.¹⁶⁵ The Specialized

159. Interview with Gonzáles, *supra* note 151. “Adults who are part of criminal networks who want to kill someone will take a child under the age of thirteen, give them a revolver and direct them to kill the person. Those who are under the age of thirteen do not yet have the conscience to say no.” *Id.*

160. Interview with Judge, *supra* note 71.

161. *Id.*

162. ESCNNA: Guatemala, *supra* note 80, at 8.

163. NAJAT MAALLA M’JID, PROCURADURÍA DE DERECHOS HUMANOS, INFORME A LA RELATORA ESPECIAL DE NACIONES UNIDAS SOBRE LA VENTA DE NIÑOS, LA PROSTITUCIÓN INFANTIL, Y LA UTILIZACIÓN DE NIÑOS EN LA PORNOGRAFÍA 5 (2012), http://www.pdh.org.gt/archivos/descargas/Biblioteca/Informes%20Especiales/informe_de_relatora_onu_prostitucion_pornografia_y_venta_de_nios_final.pdf.

164. ESCNNA: Guatemala, *supra* note 80, at 17.

165. Interview with Villarreal, *supra* note 44 (citing sexual exploitation just after child labor as the form of exploitation affecting children and adolescents in

Prosecutor on Human Trafficking reports that about eighty percent of trafficking and sexual exploitation cases involve children and adolescents.¹⁶⁶ According to ECPAT, the factors that make Guatemalan children especially vulnerable to sexual exploitation and trafficking include: poverty, lack of opportunities, ramifications of the civil war, high rates of violence, high rates of impunity, lack of credibility of State institutions, combined with cultural factors, history of gender-based violence, structural machismo, female wage gap, and a general lack of education.¹⁶⁷ Guatemalan high society is also a part of the trafficking structure, exercising control from within the government.¹⁶⁸ As the Executive Director of Refugio de la Niñez points out, “[The] patriarchal culture has a strong influence, including on judges who sometimes decide in favor of organized crime [rather than] the child victim.”¹⁶⁹

However, the primary perpetrators of trafficking for sexual exploitation are networks of organized crime and gang members.¹⁷⁰ These networks often deceive parents with promises of bringing their children to the United States for a better life; instead, these children are sold in Guatemala for “use” in these criminal structures.¹⁷¹ Traffickers use women—because they are generally more trusted in

Guatemala).

166. Interview with Alex Colop, Head Prosecutor of the Office of the Specialized Prosecutor on Human Trafficking (*Fiscal Encargado de la Fiscalía Contra la Trata de Personas*) in Guatemala, Guat. (Oct. 23, 2014) (on file with author).

167. *Id.* at 16.

168. “For example there was a mayor who had a catalogue of girls to choose from for the parties they gave.” *Id.* “Congress members sexually abuse girls, mostly seventeen to nineteen-year-old girls from the middle class. They get them from brothels.” Interview with NGO Representative [Source withheld due to requested anonymity] in Guatemala, Guat. (Oct. 22, 2014) (On file with author). In July 2013, five people were caught selling girls and boys for sexual exploitation to “exclusive clients” including doctors, members of Congress, mayors, exposing both the tolerance and complicity of government actors in cases of sexual exploitation of children in Guatemala. ODHAG INFORME NIÑEZ 2012-2013, *supra* note 48, at 31.

169. Interview with Dubón Benfeldt, *supra* note 107; *see also* Interview with Judge, *supra* note 71; Interview with Villarreal, *supra* note 44.

170. Interview with Villarreal, *supra* note 44; Interview with Dubón Benfeldt, *supra* note 107.

171. Interview with Dubón Benfeldt, *supra* note 107.

the communities—to approach these families to convince them to give up their daughters and sons to take them “to better conditions.”¹⁷² The many ways in which children’s and adolescents’ rights are violated evince the need for legislation and policies which require the State to protect children’s rights.

III. State Efforts to Protect Children and Adolescents

Through specialized legislation, Guatemala has outlawed a number of forms of violence perpetrated against children and adolescents. Such legislation closely resembles Guatemala’s obligations to protect the country’s youth under international law. This Part looks at the legal framework Guatemala has established in order to improve protection of its children and adolescents, and examines its effectiveness.

A. Legal Framework to Address Violation of Children and Adolescent’s Rights in Guatemala

The road toward improved recognition of children’s rights in Guatemala has been long and primarily led by international organizations and NGOs.¹⁷³ In 1996, the Guatemalan Congress passed the Code of Childhood and Youth (*Código de la Niñez y Juventud*) (“the Code”).¹⁷⁴ The Code provided children with rights that had never before been recognized in Guatemala, such as the right to denounce abusive parents, and included a prohibition on corporal punishment.¹⁷⁵ Several entities within Guatemala did not want to see the Code implemented, arguing that it over-empowered children and adolescents, and removed parents’ rights to discipline their children.¹⁷⁶ Opponents were successful in their fight against the law

172. Interview with Villarreal, *supra* note 44.

173. Interview with Sánchez, *supra* note 66.

174. Guatemala: Decreto No. 78-1996, *Código de la niñez y la juventud* [Childhood and Youth Code], Sept. 27, 1996, <http://www.refworld.org/docid/3dbe6b686.html>.

175. Guatemala: Decreto No. 78-1996, arts. 61, 192.

176. *Id.* Interview with Fuentes, *supra* note 76. Religious leaders and then-president Ríos Montt lead the charge in objecting to the implementation of the Code.

and the Code ultimately never went into effect.¹⁷⁷

A 1999 ruling by the Inter-American Court of Human Rights (IACHR) regarding displaced children who were murdered by the National Civil Police (*Policía Nacional Civil*, or PNC) held that Guatemala was not sufficiently in compliance with international standards on child protection and ordered the State to take measures to improve.¹⁷⁸ This ruling revived the movement for a new law in line with the United Nations Convention on the Rights of the Child (CRC), which Guatemala had both ratified and codified in 1990.¹⁷⁹ The CRC was the first international instrument to incorporate the full range of human rights—civil, cultural, economic, political, and social—to legally bind parties to advocate for the protection of children’s rights, helping them to meet their basic needs, and expanding opportunities so that children may reach their full potential.¹⁸⁰ The four main principles of the CRC include nondiscrimination, faithfulness to the best interests of the child, the right to life, survival, and development, and respect for the views of the child.¹⁸¹ To comply with the 1999 IACHR ruling, and to bring Guatemala in line with the CRC, the Congress collaborated with organizations of civil society to write the Ley PINA—the Law for the Comprehensive Protection of Children and Adolescents (*Ley de Protección Integral para la Niñez y Adolescencia*).¹⁸²

The Code permitted children to divorce their parents, and objectors felt this gave children too much power.

177. Interview with Sánchez, *supra* note 66.

178. Case of the Street Children (Villagrán Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. IACHR (ser. C) No. 63 (Nov. 19, 1999).

179. *Principales Tratados Internacionales Sobre Derechos Humanos Aprobados y Ratificados por Guatemala*, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, https://docs.google.com/viewerng/viewer?url=http://wikiguate.com.gt/wp-content/uploads/2014/09/Ratificaciones_DH_guatemala.pdf (last visited June 17, 2015); *Convención Sobre los Derechos del Niño, Decreto del Congreso Número 27-90*, May 10, 1990 (Convention on the Rights of the Child, Congressional Decree No. 27-90) (Guatemala).

180. Convention on the Rights of the Child, *supra* note 43.

181. *Id.*

182. Interview with Sánchez, *supra* note 66.

B. The Ley PINA

The Ley PINA (“the law”) was enacted in 2003 to establish the obligation of the State to protect the physical, mental, and moral health of children and adolescents.¹⁸³ The Ley PINA requires that Guatemala maintain compliance with the CRC.¹⁸⁴ The law was established as a “legal instrument for family integration and social promotion, which seeks to achieve the comprehensive and sustainable development of Guatemalan children and adolescents within a democratic framework and with an unconditional respect for human rights.”¹⁸⁵ The law mandates that all Guatemalan children and adolescents have the right to life,¹⁸⁶ equality,¹⁸⁷ political rights,¹⁸⁸ and social rights—including health and education,¹⁸⁹ as well as economic rights.¹⁹⁰

1. The Ley PINA Designates Bodies to Create Policies and Execute its Mandates

The Ley PINA established new bodies charged with overseeing new protections the law provided and designated new tasks for existing bodies. This subsection describes the functions of these institutions, as well as the challenges they have faced in attempts to carry out their mandate under the Ley PINA.

a. The CNNA and the SBS

To oversee creation and coordination of policies for implementation, the Ley PINA created the National Commission on

183. Ley PINA, *supra* note 43; Convention on the Rights of the Child, *supra* note 43.

184. Ley PINA, arts. 3, 5, 8, 12, 22, 58, 67, 90, 92, 107(e), 108(d), 140.

185. Ley PINA, art. 1 (translated by author).

186. Ley PINA, art. 9.

187. Ley PINA, art. 10.

188. Ley PINA, arts. 12–17.

189. Ley PINA, arts. 25–49.

190. Ley PINA, art. 51.

Children and Adolescents (*Comisión Nacional de la Niñez y de la Adolescencia*, or CNNA), a body made up of an equal number of representatives from the State and from NGOs.¹⁹¹

The Ley PINA, in lieu of establishing specific measures for implementation, instead created the CNNA to develop policies for the implementation of the broad, vague mandates of the law.¹⁹² The CNNA is charged with drafting public policy to specify and delegate how these mandates will be carried out. The CNNA thus does not provide any services but rather solely writes policy while another agency, the Social Welfare Secretariat (*Secretaría de Bienestar Social*, or SBS) actually oversees the implementation of these policies.

The SBS is an administrative body in the executive branch, charged with the “formulation, coordination, and execution of the public policies of the Ley PINA . . . developed by the CNNA.”¹⁹³ The CNNA is subject to the authority of the SBS, the “mother of the Commission.”¹⁹⁴ This division means that one agency charged with overseeing the law, the SBS, has more power than the other, the CNNA. The result is that the CNNA is static, unable to produce policy, and lacking credibility.¹⁹⁵

Insufficient budgetary allocations cripples the CNNA’s ability to create effective policies as well as the SBS’s ability to execute such policies. Congress, for example, does not allocate any money to the CNNA.¹⁹⁶ Rather, the CNNA may receive funds from the SBS,¹⁹⁷ from “ordinary or extraordinary contributions and grants it receives from

191. Ley PINA, arts. 85–86.

192. For example, articles 54 and 55 of the Ley PINA hold that the State must adopt legislative, administrative, social and educational measures to protect children from physical abuse, sexual abuse, negligence, and emotional abuse. Any person with knowledge of such abuse is obligated to report.

193. GOBIERNO DE GUATEMALA, SECRETARÍA DE BIENESTAR SOCIAL SOCIAL DE LA PRESIDENCIA, QUIENES SOMOS, <http://www.sbs.gob.gt/quienessomos.html>.

194. Interview with Fuentes, *supra* note 76; Interview with Galindo, *supra* note 63.

195. Interview with Sánchez, *supra* note 66.

196. One of the responsibilities of the CNNA under the Ley PINA is that it “obtain resources for its operation.” Ley PINA, art. 88(d) (translated by author).

197. Ley PINA, art. 85(a).

the State and other national and international bodies.”¹⁹⁸ Alternatively, it may obtain funds from “legal or individual entities.”¹⁹⁹ The SBS lacks a sufficient budget to be able to carry out its own mandate under the Ley PINA and is therefore unable to significantly contribute to the CNNA.²⁰⁰ The CNNA is thus underfunded and ineffective.

Article 83 of the Ley PINA requires that the CNNA and its municipal counterparts create policies that direct governmental bodies to implement the law.²⁰¹ A year after its passage, the CNNA simply failed to create such a policy, so NGOs, particularly Save the Children, submitted a policy to Congress.²⁰² Congress passed a resolution²⁰³ approving the 2004-2015 National Action Plan for implementation of the Ley PINA, without apportioning any budget to its implementation.²⁰⁴

Article 81 requires that each municipality create its own municipal commission on children and adolescents.²⁰⁵ Although the law went into effect in 2003, it was not until 2013 that an accord was reached to create such municipal commissions.²⁰⁶ As of October 2014, however, only sixty-eight of the 334 municipalities (about twenty percent) had created these commissions.²⁰⁷ In the municipalities where local commissions do exist, they, like the CNNA, are solely able to create policy and are not permitted to execute these policies through administering services to children and adolescents whose rights are violated.²⁰⁸

The CNNA was doomed to fail since its inception. Zero

198. Ley PINA, art. 85(b) (translated by author).

199. Ley PINA, art. 85(c) (translated by author).

200. Interview with Fuentes, *supra* note 76.

201. Ley PINA, art. 83.

202. Interview with Galindo, *supra* note 63.

203. Acuerdo Gubernativo No. 333-2004, Oct. 19, 2004 (Governmental Accord No. 333-2003) (Guatemala).

204. Interview with Galindo, *supra* note 63.

205. Ley PINA, art. 81; *see also* Interview with Fuentes, *supra* note 76.

206. Interview with Fuentes, *supra* note 76.

207. *Id.*

208. Interview with Sánchez, *supra* note 66.

congressional budgetary allocation to the body charged with creating all of the policy for implementation of the law makes it apparent that the government created a skeleton of a law with no teeth. The broad, vague requirements of the law are rendered meaningless without the creation of policies specifying concrete measures for implementation. Without a proper budgetary allocation, or State prioritization of the CNNA, there is realistically little chance for effective protection of children and adolescents in Guatemala under this law.

b. The PGN and the MP

The Ley PINA obligates a small number of government bodies to carry out the numerous mandates of the law. As aforementioned, the CNNA is tasked with the creation of policy and the SBS is to coordinate and ensure the execution of such policy. The other governmental body charged with implementing the protection requirements of the Ley PINA is the General Procurator (*Procurador General de la Nación*, or PGN), which is responsible for representing child and adolescent victims when their rights under the Ley PINA are violated.

The PGN, equipped with its team of attorneys, social workers, psychologists, and investigators, is charged with representing the child or adolescent victim's interest for protection during the criminal prosecution of the perpetrator.²⁰⁹ Additionally, the PGN carries out the investigation in cases of the violation of a child or adolescent's rights under the Ley PINA.²¹⁰ The PGN has offices located in the provincial capitals of all but three of Guatemala's twenty-two departments.²¹¹

The two most pressing issues impeding the PGN's ability to effectively carry out its obligations include insufficient budgetary

209. Ley PINA, art. 108; Interview with Ságüil, *supra* note 64.

210. Ley PINA, art. 120; Interview with Ságüil, *supra* note 64.

211. Interview with Ságüil, *supra* note 64. When individuals are not able to reach the PGN's services in the capital, which is often the case, a Peace Tribunal (*Juzgado de Paz*), which is located in each of the 334 municipalities, can notify the PGN. *Id.*

allotment and insufficient specialized training.²¹² The PGN is tasked with an array of additional tasks after the passage of the Ley PINA but the increased responsibility was not matched with an increased budget allocation.²¹³ The entire PGN is allocated sixty-five million Quetzales (about \$8.55 million), spread across its twelve units, including that of the Child and Adolescent department.²¹⁴ The PGN is the weakest organization charged with implementation of the Ley PINA, yet it has the most responsibility.²¹⁵ The designation of the PGN as the main body to represent children and adolescent's rights under the Ley PINA was seen as a positive but, at its current capacity, the PGN is simply unable to fulfill all of its numerous obligations.²¹⁶ The Child and Adolescents unit of the PGN needs at least double its current budget to operate properly, especially to effectively execute the psychological and social services aspect of their mandate.²¹⁷

The PGN does not receive training specific to the types of abuses

212. Interview with Gloria Castro, *Defensora de la Niñez y Adolescencia*, [Ombudsman for Children & Adolescents], Sandra Gularte, *Defensora de Víctimas de Trata* [Ombudsman for Victims of Trafficking], & Aura Beatriz Sosa, *Auxiliar de la Defensoría de la Población Migrante* [Assistant Ombudsman of Migrant Populations], *Procuraduría de Derechos Humanos* [Office of the Human Rights Ombudsman] in Guatemala, Guat. (Oct. 22, 2014) (on file with author) [hereinafter Interview with PDH].

213. *Id.* The PGN works in all cases where the child is a victim of an abuse of her rights under the Ley PINA, and also has a whole host of other duties, including (but not limited to): investigating prospective parents for the National Adoption Counsel (*Consejo Nacional de Adopción* or CNA) in potential adoption cases; running the Alba Keneth Alert (*Alerta Alba-Keneth*), alerting all relevant bodies when an individual is reported missing; and working with the SBS to repatriate deported children and adolescents. Interview with Ságüil, *supra* note 64.

214. Interview with Ságüil, *supra* note 64. It is not necessarily true that all units receive equal allocations of this congressional allotment. The other units of the PGN include: Labor; Criminal; Constitutional Matters; Civil and Commercial Affairs; Administrative Litigation; Human Rights and International Matters; Elderly and Disabled; Environmental; Defender of the Rights of Women and the Family; Psychology; and Social Work; and the National Headquarters unit. See PROCURADURÍA GENERAL DE LA NACIÓN, <http://www.pgn.gob.gt/> (last visited Dec. 29, 2015).

215. Interview with Sánchez, *supra* note 66.

216. Interview with PDH, *supra* note 212; Interview with Sánchez, *supra* note 66.

217. Interview with Ságüil, *supra* note 64.

that their child and adolescent clients typically endure.²¹⁸ Rather, these attorneys are trained generally on working with children.²¹⁹ The PGN maintains that it holds discretion whether or not to intervene in a case or to alert the prosecutor to initiate prosecution against a perpetrator.²²⁰ The result, in a country with a history of not respecting the rights of a child or a woman's voice, is that in "isolated incidents" the PGN does not find reason to further investigate or to litigate the case.²²¹ If the PGN in its investigation determines that the child is, in their opinion, "in good conditions," and that the complaint was filed due to "a family matter," the PGN will not intervene and the case will not be tried.²²² This is the same rhetoric that has permitted impunity in cases of sexual and gender-based violence to remain pervasive throughout Guatemala.²²³

Furthermore, lack of coordination between the prosecution and the PGN results in many cases where the PGN does not appear in criminal cases on the child victim's behalf, as the PGN is required to do under the Ley PINA.²²⁴ The judge will then reschedule the case, resulting in a further backlog and, in some cases, revictimizing the child or adolescent victim.²²⁵

The last major governmental body charged with implementation of the Ley PINA is the Public Ministry (*Ministerio Público*, or MP). The MP is tasked with prosecution of adolescents accused of committing crimes, discussed *infra* Section III.B.2.²²⁶ Additionally, the many specialized branches of the MP, such as the Prosecutor Against Trafficking, are responsible for prosecuting those who violate children and adolescents' rights under the Ley PINA.

218. Interview with Ságüil, *supra* note 64.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. See Karen Musalo, Elisabeth Pelligrin & S. Shawn Roberts, *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L. J. 161, 171 (2010).

224. Interview with PDH, *supra* note 212; Ley PINA, art. 108(c).

225. *Id.*

226. Ley PINA, art. 108.

c. The Court System Created by the Ley PINA

The Ley PINA established specialized courts.²²⁷ Generally, the theory behind the establishment of specialized courts is that the judges are able to process cases more efficiently and deliver more consistent rulings. Ideally, specialized courts ensure that judges, with the assistance of prosecutors and social service agencies, can follow up on cases, work with victims, and hold offenders accountable.²²⁸

The Ley PINA established two types of specialized courts: one to hear cases involving violations of children and adolescents' rights under the law, and the other to hear cases for adolescents accused of committing crimes, or are "in conflict with the criminal law."²²⁹ This next subsection examines the procedures established for children and adolescents' whose rights are violated, followed by a section laying out the procedure established for adolescents in conflict with the law—with each section providing an overview of how the procedure should function, as well as issues with the actual implementation of that procedure.

2. Children Whose Rights Are Violated

The Ley PINA designates a number of government agencies that are able to receive complaints if a child or adolescent's rights under the Ley PINA have been violated to facilitate the process for victims to report.²³⁰ Anyone may bring forth a complaint, including children

227. Ley PINA, art. 98.

228. *Specialized Courts*, NAT'L INST. JUSTICE (Mar. 14, 2013), <http://www.nij.gov/topics/courts/pages/specialized-courts.aspx>.

229. Ley PINA, art. 101.

230. A child who has been the victim of a violation of her rights under the Ley PINA can file a complaint (*denuncia*) in the: Supreme Court (*Corte Suprema de Justicia*); Appeals Court for Children and Adolescents (*Sala de la Corte de Apelaciones de la Niñez y Adolescencia*) through its Management and Information Unit (*Unidad de Gestión e Información*); Tribunals of the Peace (*Juzgados de la Paz*); Child and Adolescent Tribunals (*Juzgados de Niñez y Adolescencia*); the Public Ministry (*Ministerio Público*, or MP); National General Procurator (*Procuraduría General de la Nación* or "PGN"); Human Rights Ombudsman (*Procuraduría de Derechos Humanos* or "PDH"); National Civil Police (*Policia Nacional Civil* or "PNC"); and at health centers, educational

or individuals acting on their behalf, and complaints may be made anonymously.²³¹ If a parent is the perpetrator of violence against their own child, the PGN is required to go to the house within twenty-four hours of reporting.²³²

Once a complaint has been filed, the PGN then seeks protective measures (*medidas cautelares*)²³³ from a Peace Tribunal (*Juzgado de la Paz*), which is accessible twenty-four hours per day.²³⁴ The Peace Tribunals are small, local courts with limited jurisdiction that can handle emergency matters and minor crimes.²³⁵ There is one Peace Tribunal in each municipality and 322 in the entire country.²³⁶

With regard to the violations of children and adolescents' rights under the Ley PINA, the Peace Tribunals have jurisdiction to determine whether to issue protective orders, such as placing the child in temporary housing,²³⁷ but they do not have jurisdiction to rule on the merits of charges.²³⁸ The result of this limited jurisdiction is

centers, as well as with NGOs. Each of these institutions transfer complaints to the Management Unit of the Court of Appeals (*Unidad de Gestión de la Sala de la Corte de Apelaciones*) or to the corresponding Child and Adolescent Tribunals. *MANUAL El Movimiento Social por los Derechos de la Niñez, Adolescencia y Juventud en Guatemala*, 5, 2009, cited in Sandra Jeaneth Gómez Arango, *Material Didáctico Multimedia Acerca de Cómo Denunciar Violaciones a los Derechos de la Niñez y la Adolescencia en Guatemala*, UNIVERSIDAD DE SAN CARLOS DE GUATEMALA 20 (Nov. 2010), biblioteca.usac.edu.gt/02/02_2987.pdf.

231. Ley PINA, art. 117.

232. Interview with Ságuil, *supra* note 64.

233. Ley PINA, art. 116(a) and 118. In this hearing, an interview will be conducted and the child's declaration will be recorded. If the child is not present, the complaint is sent to the MP, the PGN, and to any intervening parties. *Proceso de Niñez y Adolescencia Amenazada o Violada en sus Derechos Humanos*, CENTRO DE INFORMACIÓN, DESARROLLO Y ESTADÍSTICA JUDICIAL, ORGANISMO JUDICIAL, http://www.oj.gob.gt/estadisticaninez/index.php?option=com_content&view=article&id=111:proceso-de-ninez-y-adolescencia-amenazada-o-violada-en-sus-derechos-humanos.

234. *Id.*

235. See ORGANISMO JUDICIAL, http://www.oj.gob.gt/index.php?option=com_content&view=article&id=210&Itemid=281 (last visited Dec. 30, 2015); Ley PINA, art. 103.

236. Ignacio Goicoechea, *INFORME DE LA MISIÓN DE RELEVAMIENTO FÁCTICO SOBRE LA ADOPCIÓN INTERNACIONAL EN GUATEMALA (2007)* http://www.hcch.net/upload/wop/mission_gt33s.pdf.

237. See Ley PINA, arts. 112, 115 for a list of protection measures available.

238. Ley PINA, art. 103(A). See also Interview with Sánchez, *supra* note 66.

that children in rural areas must travel 100 miles in some cases to reach the specialized tribunal in the capital where the merits of their case can be heard. This means that rural children and/or adolescents simply may not seek vindication for violation of their rights because the distance makes it virtually impossible.²³⁹ The restricted jurisdiction of these courts is a major flaw of the judicial system established by the Ley PINA.²⁴⁰ UNICEF has proposed expanded multidisciplinary teams at the municipal level, including expanded jurisdiction for these courts so that cases could actually be resolved.²⁴¹

If a protective order is issued against the child's parent, the PGN must work to find someone to care for the child, such as grandparents, cousins, uncles—to avoid sending the child to a shelter.²⁴² A child's first line of protection should be the family.²⁴³ Children and adolescents deprived of this protection have the right to special protection, assistance, and alternative care.²⁴⁴ If a relative cannot be located, or there is no relative who can adequately care for the child, the State may place the child with a foster family (*familia sustituta*).²⁴⁵ Because there are too few of these available, in most cases the Peace Judge, upon receiving a complaint, immediately orders a child to the shelter in order to remove the child from their abusers at home.²⁴⁶ These children remain institutionalized throughout their cases which can take as long as two years, and there is no process for reintegration once children leave the shelter.²⁴⁷

There are six public protection shelters for children in need of protection, all located in Guatemala City, run by the SBS. The public

239. Interview with PDH, *supra* note 212; Interview with Sánchez, *supra* note 66. In cases where the child is not housed in a shelter for the duration of their case, they are dependent on their parents, who may very well be the accused perpetrator, to bring them to the distant court.

240. Interview with PDH, *supra* note 212; Interview with Sánchez, *supra* note 66.

241. Interview with Sánchez, *supra* note 66.

242. *Id.* Articles 114 and 116(b) of the Ley PINA require that the PGN send a child or adolescent to a shelter only as a last resort.

243. ANNAN, *supra* note 123, at 72.

244. *Id.* at 73.

245. Ley PINA, art. 112(g); Interview with PDH, *supra* note 212.

246. Interview with PDH, *supra* note 212.

247. *Id.*

shelters are overcrowded.²⁴⁸ For example there is one shelter for children ages zero to seventeen with a capacity for 600 children, but currently houses 1,000 children.²⁴⁹ A large government shelter was constructed in 2010 but the SBS did not separate the children into appropriate categories based on age, sex, and treatment needs.²⁵⁰ Most children are sent to the country's 130 privately run shelters, which, on average, take a maximum of thirty or forty children each.²⁵¹

The PDH monitors the private shelters but there is no process for their regulation.²⁵² Some private shelters do not observe minimum standards and the Ley PINA does not provide the authority to sanction them.²⁵³ Because the children are all mixed together, they don't receive special care or attention, the SBS does not employ treatment modalities, and the shelters do not have enough trained professional personnel.²⁵⁴ According to the Children's Rights Defender of the Office of the Human Rights Ombudsman, "There is no control, just disorder. There is no formal structure."²⁵⁵ This puts sheltered children at risk, removing children from one situation of abuse only to place them in a different situation of abuse.²⁵⁶ In rural areas, the police or the MP often rescue children and then return them to their families without services because there are no shelters.²⁵⁷ Unfortunately, their families do not know how to help them reintegrate,²⁵⁸ and a significant majority of trafficking victims are

248. ODHAG, INFORME NIÑEZ 2012-2013, *supra* note 48, at 138; Interview with PDH, *supra* note 212.

249. Interview with PDH, *supra* note 212.

250. *Id.* For example there are no detox services offered for victims who come in with an addiction; they become violent and other children in the shelter are affected. Children with disabilities that end up in shelters have an especially difficult time. There are private shelters that are able to cater to the needs of children with disabilities but the State shelters do not have this capacity. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

trafficked again.²⁵⁹

Although the prosecution rates of traffickers remain low,²⁶⁰ Guatemala has made efforts to improve services to victims of trafficking.²⁶¹ There are now three specialized shelters, opened in September 2014, with specially trained personnel who attend to victims of sexual abuse and trafficking, run by the Secretariat against Sexual Violence, Exploitation and Trafficking of Persons (*Secretaría Contra la Violencia Sexual, Explotación y Trata de Personas*, or SVET).²⁶² However, attitudes toward children have not improved. Employees in state-run shelters treat children and adolescents as if they were delinquents, re-victimizing them with severe punishments and in

259. Interview with PDH, *supra* note 212.

260. Interview with Colop, *supra* note 166. “[The reason for such low prosecution rates is that] we only just created the institutions.” Interview with José Cortés Chacón, Subsecretary for the Secretariat Against Sexual Violence & Trafficking (*Subsecretaria, Secretaría Contra la Violencia Sexual y Trata de Personas* or SVET), in Guatemala, Guat. (Oct. 23, 2014) (on file with author).

261. Recognizing that children and adolescents are the demographic most affected by trafficking in Guatemala, and that existing laws, including criminal laws and the Ley PINA, proved insufficient in effectively combatting trafficking, Congress passed the Ley Contra la Violencia Sexual, Explotación y Trata, or Ley VET, Decreto 9-2009 (Law Against Sexual Violence, Exploitation, and Trafficking, Decree 9-2009 (Guatemala). The Ley VET recognizes sixteen different forms of trafficking. The most common forms of trafficking of children and adolescents in Guatemala are sexual exploitation and sex trafficking, irregular adoption, forced labor, and child pornography. The Office of the Prosecutor on Trafficking has seen a great increase in funding, resulting in four times as many attorneys, specialized units for pornography, labor exploitation, sexual exploitation, and trafficking. There are fifty-eight investigators that work in the office of the prosecutor for trafficking, and fifty-eight in the PNC, each having national jurisdiction. There are nearly sixty investigators for sexual exploitation as well. The United States Immigration and Customs Enforcement (“ICE”) helped to select police from the academy that were suitable for a three month course and special training on investigation focused on crimes of sexual exploitation and trafficking. Interview with Colop, *supra* note 166; Interview with Cortés Chacón, *supra* note 260.

262. Interview with PDH, *supra* note 212. The shelters are located in Guatemala City, Coatepeque, and Vera Paz, Cobán. Interview with Cortés Chacón, *supra* note 260. Each shelter can house approximately thirty children at one time, and each stays for an average of two months. After two months, children are transferred to Protection Shelters (*Hogares de Protección*), operated by the SBS, or go back to their families. *Id.*

some instances, through extreme systems of control.²⁶³

In addition to improvements needed in the system of protective shelters, Guatemala must improve protection and sheltering of children and adolescents who testify against those who violate their rights.²⁶⁴ Children and adolescents fear serving as witnesses, because they may be severely injured or killed by the person they are testifying against.²⁶⁵ The Law Against Sexual Violence, Exploitation, and Trafficking of Persons (*Ley Contra la Violencia Sexual, Explotación, y Trata de Personas*, or Ley VET)²⁶⁶ and the Ley PINA do not provide for any special protection for witnesses.²⁶⁷ Only the Law Against Organized Crime (*Ley Contra la Delincuencia Organizada*)²⁶⁸ has provisions for relocation of victims—so only when charges are brought under that law can a witness receive special protection.²⁶⁹ Under the Ley PINA or the Ley VET, a child or adolescent willing to testify can be taken to a hotel for protection during the trial but after the proceeding there is no protection.²⁷⁰ Other methods utilized to protect witness informants are the Cámara de Gesell and testimony taken in advance, often by telephone to try to avoid asking the victim to testify in open court.²⁷¹

The Ley PINA certainly brought awareness to the need to

263. Interview with Rodenas, *supra* note 61.

264. Interview with Colop, *supra* note 166; Interview with Dubón Benfeldt, *supra* note 107; Interview with Cortés Chacón, *supra* note 260; Interview with González, *supra* note 151; Interview with Judge *supra* note 71.

265. Interview with González, *supra* note 151, at 6.

266. Ley VET, *supra* note 261.

267. Cases where witnesses will testify against a criminal defendant are almost exclusively individual crimes and not related to gangs or organized crime. Interview with Colop, *supra* note 166.

268. Law Against Organized Crime (*Ley Contra la Delincuencia Organizada*) Decreto 21-2006 (Guatemala), http://www.wikiguate.com.gt/w/images/0/01/Ley_Contra_la_Delincuencia_Organizada.pdf.

269. Interview with Cortés Chacón, *supra* note 260.

270. Interview with Cortés Chacón, *supra* note 260. “The MP washes his hands of the witness, who is on their own when the trial is over.”

271. The Cámara de Gesell is a method of blocking the witness from the view of the perpetrator while testifying. Mr. Colop said that this method is used in about ninety percent of the cases. Interview with Colop, *supra* note 166.

establish protocols for immediate protection measures to safeguard children and adolescents when their rights are violated.²⁷² From the foregoing, however, it is clear the shelters need more oversight, organization and protocols, trained personnel, and follow-up in order to avoid further victimization.

Returning to the procedural requirements for children whose rights are violated, after the Peace Judge makes the determination regarding which protective measures to apply, the case then moves to the Tribunal for Children and Adolescents (*Juzgado de la Niñez y Adolescencia*) where an Evidentiary Hearing (*Audiencia de Conocimiento de Hechos*)²⁷³ will commence within at least ten days of the Hearing for Protective Orders.²⁷⁴ The Tribunal for Children and Adolescents has jurisdiction to rule on the merits of cases involving children whose rights have been threatened or violated that arise within its departmental jurisdiction.²⁷⁵ There are twenty Tribunals for Children and Adolescents in the country's twenty-two departments.²⁷⁶ Each

272. Interview with PDH, *supra* note 212.

273. Ley PINA, art. 119.

274. Ley PINA, art. 118. The Evidentiary Hearing may be scheduled thirteen days after issuance of protective orders if it is to make up for the distance necessary to travel to the court. This is permissible under article 48 of the Law of the Judiciary, Decree 2-89 (*Ley del Organismo Judicial, Decreto 2-89*), https://www.rgp.org.gt/docs/legislacion_registral/Ley%20del%20Organismo%20Judicial.pdf; CENTRO DE INFORMACIÓN, DESARROLLO Y ESTADÍSTICA JUDICIAL, ORGANISMO JUDICIAL, *supra* note 233. Information from the Peace Judge, PNC, PGN, MP, and the child victim will be presented at the Fact Hearing. *Id.*

275. Ley PINA, art. 104.

276. The twenty Child and Adolescent Tribunals are located in: Cobán, Alta Verapaz; Salamá, Baja Verapaz; Chimaltenango, Chimaltenango; Escuintla, Escuintla; Guatemala, Guatemala; Villanueva, Guatemala; Mixco, Guatemala; Huehuetenango, Huehuetenango; Puerto Barrios, Izabal; Jalapa, Jalapa; Jutiapa, Jutiapa; San Benito, Petén; Santa Cruz del Quiché, Quiché; Coatepeque, Quetzaltenango; Quetzaltenango, Quetzaltenango; La Antigua Guatemala, Sacatepéquez; Malactatán, San Marcos; Cuilapa, Santa Rosa; Sololá, Sololá; Mazatenango, Suchitepéquez; Zacapa, Zacapa. There are no Child and Adolescent Courts in the departments of Chiquimula; El Progreso; Totnicapán; Retalhuleu. Interview with Ságuil, *supra* note 64; *Órganos Jurisdiccionales de Niñez y Adolescencia*, ORGANISMO JUDICIAL, <http://www.oj.gob.gt/estadisticaninez> (last visited Mar. 29, 2015); *Guatemala*, CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS, http://www.cejamericas.org/reporte/2008-2009/pdf4/Guatemala_08-09.pdf (last visited Mar. 29, 2015).

tribunal has one social worker, except in Guatemala City, which has four social workers in each tribunal.²⁷⁷

When a case is brought against an individual who has violated the rights of a child, the hearings in the Child and Adolescent Tribunals should take place within ten days²⁷⁸ but in practice take two to five months.²⁷⁹ Some procedures to declare violations of the rights of family, such as abandonment, can take one to two years.²⁸⁰

The final step, after the Evidentiary Hearing, is the Definitive Hearing (*Audiencia Definitiva*) wherein a different judge reviews the evidence and listens to the oral recording of the Evidentiary Hearing.²⁸¹ This judge then issues a resolution that same day or, at most, within three days.²⁸² Resolutions determine what happens to children in need of long-term protection or to unsuitable parents, among others.²⁸³

The backlog and issues with protections measures of the Child and Adolescent Tribunals are significant impediments to their ability to adequately protect children and to prevent future abuses. Nonetheless, the creation of these specialized courts is a significant advancement toward the effective protection of children's rights in Guatemala.

3. Adolescents in Conflict with the Law

This Subsection addresses part two of the Ley PINA, regarding "Adolescents in Conflict with the Law." A child under the age of thirteen is not subject to the penal code, but rather will be sent to psychiatric, medical or educational centers if they commit a crime.²⁸⁴ A child under thirteen who commits a crime is reintegrated into the

277. Goicochea, *supra* note 236, at 33.

278. Ley PINA, art. 118.

279. Goicochea, *supra* note 236.

280. *Id.*

281. Ley PINA, art. 119.

282. CENTRO DE INFORMACIÓN, DESARROLLO Y ESTADÍSTICA JUDICIAL, ORGANISMO JUDICIAL, *supra* note 233; Ley PINA, art.123(c) and (d).

283. Ley PINA, art. 112 and 115.

284. Ley PINA, art.138.

family where cooperation rules are imposed, such as requirements that the child attend school.²⁸⁵ Often these requirements are not followed.²⁸⁶ According to the Prosecutor of Minors, if a child has been abandoned and has no available family to whom they can be turned over to, the State simply leaves them to fend for themselves—a child under the age of thirteen.²⁸⁷ These children are easy and common targets for gang recruitment.²⁸⁸

In Guatemala, a minor between the ages of thirteen and seventeen is considered an adolescent and subject to criminal liability.²⁸⁹ If an adolescent is caught in the act of committing the crime, the police bring the adolescent immediately to the MP and within six hours must be brought before a judge competent to hear the case.²⁹⁰ In practice, however, this six-hour rule is never followed.²⁹¹ The Ley PINA requires that a case against an adolescent charged with a crime be brought by a specialized prosecutor in the Minor Prosecutor's Office (*Fiscalía de la Niñez o del Menor*), which operates under the MP.²⁹² There is one such office for the entire country, located in Guatemala City.²⁹³ Under the Ley PINA, adolescents have the right to be represented by a public defender.²⁹⁴ In practice, however, children are not guaranteed legal aid in instances where they cannot afford a private lawyer.²⁹⁵

285. Interview with González, *supra* note 151.

286. *Id.*

287. *Id.*

288. *Id.*; Interview with Rodenas, *supra* note 61.

289. Ley PINA, arts. 132 and 133.

290. Ley PINA, art. 195. In places where the MP does not have an office, the Peace Court judge should immediately resolve the matter. *Id.*

291. Interview with Judge, *supra* note 71. "The six hour rule is not used, we do not have this in practice. It does not work." *Id.*

292. Ley PINA, art. 168.

293. Interview with González, *supra* note 151.

294. Ley PINA, arts. 154, 167.

295. *Legal Assistance for Children in Conflict with the Law*, THE INT'L JUVENILE JUST. OBSERVATORY, <http://www.oijj.org/legal/situation.php?c=4&p=74>. Note, however, that a Judge in the Court of First Instance for Adolescents in Conflict with the law rebutted this claim and remarked instead that all children in this court in the capital city always have representation. An estimated ninety percent to ninety-five percent

There are two venues for minors who are charged with a crime: the Courts of Peace (*Juzgados de Paz*) and the Courts of First Instance (*Juzgados de Primera Instancia*).²⁹⁶ An appeal must be filed within three days of sentencing.²⁹⁷ There is one specialized appellate court in the country for children and adolescents, the *Sala de la Corte de Apelaciones de la Niñez y Adolescencia*.²⁹⁸ Less serious crimes, those carrying a maximum sentence of less than three years, can avoid a full trial and are resolved before judges in the Peace Tribunals.²⁹⁹

In cases where a complaint is filed (the child is not caught in commission of the crime), the MP leads the investigation, including direction of the PNC, which should not exceed a period of two months.³⁰⁰ Once the MP files charges, the adolescent must be notified within one day, and the preliminary hearing (*procedimiento intermedio*) must begin within five to ten days.³⁰¹ In actuality, investigations take much longer, partially due to limited resources.³⁰² For charges based on less serious crimes, such as petty theft or an issue between neighbors, the MP will first attempt to resolve the case through conciliation.³⁰³ If a minor is charged with committing a serious crime, such as murder or rape, the MP will initiate an investigation.³⁰⁴ Prosecutors present evidence before a judge in order to obtain an

of adolescents in conflict with the law are represented by public defenders. Interview with Judge, *supra* note 71.

296. *Id.*

297. Ley PINA, art. 230.

298. ORGANISMO JUDICIAL, *supra* note 235; CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS, *supra* note 276; Ley PINA, art. 265.

299. *Id.*

300. Extensions are permissible. Ley PINA, arts. 199–200; Interview with Colop, *supra* note 166.

301. Ley PINA, art. 204.

302. In the Prosecutor of Minors Office, for example, there is only one vehicle for the entire office of twenty-two, resulting in attorneys traveling to court on public transportation which is not possible when traveling with evidence, including machetes and guns. And there are only four investigators to investigate all cases (police do not investigate). Interview with Gonzáles, *supra* note 151.

303. Ley PINA, art. 186; Interview with Gonzáles, *supra* note 151.

304. Interview with Gonzáles, *supra* note 151.

arrest warrant.³⁰⁵

The deprivation of liberty (jailing) of adolescents in conflict with the law is supposed to be used as a last resort, both in pretrial detention and upon conviction,³⁰⁶ but a Judge in this court remarked that in actual practice this is rarely the case due to the gravity of crimes now committed by minors in the country.³⁰⁷ The judge explained that within the last five to ten years, adolescents have started to commit increasingly serious crimes such as assassinations, femicides where women are dismembered and cut up into pieces, violent rape, and murder associated with transit obstruction.³⁰⁸ Deprivation of liberty is acceptable under article 182 of the Ley PINA due to the gravity of these crimes.³⁰⁹

There are four juvenile detention centers in the country: three for boys and one for girls.³¹⁰ All four are in Guatemala City.³¹¹ The SBS is in charge of the juvenile detention centers.³¹² Detention centers are not divided by crime and age.³¹³ Furthermore, despite the clear right under the Ley PINA to be incarcerated separately, and even held in a

305. Interview with Gonzáles, *supra* note 151.

306. Ley PINA, arts. 222(a)–(c), 252 (pertaining to detention upon conviction), & art. 182 (pertaining to pre-trial detention). An adolescent may be detained pending trial but only in exceptional cases where less serious means are unavailable, especially where the person charged is thirteen to fifteen years old. Ley PINA, art. 182. This article lists which cases may be deemed “exceptional” and would thus permit pretrial detention of an adolescent, including cases with flight risks, or where the crime committed is one of serious sexual or physical violence. Those detained before the trial must be in a separate detention center and may never be detained in the same place as the general prison population for adolescents. *Id.* Ley PINA, art. 195 sets forth criteria for pretrial detention.

307. Interview with Judge, *supra* note 71.

308. Interview with Judge, *supra* note 71. Additionally, many of these adolescents have been abandoned by their parents, so they are detained because they are deemed flight risks. *Id.*

309. Ley PINA, art. 182.

310. Interview with Judge, *supra* note 71.

311. *Id.*

312. Interview with Gonzales, *supra* note 151; Interview with Judge, *supra* note 71.

313. Interview with Gonzales, *supra* note 151.

separate police station from adult detainees,³¹⁴ children are incarcerated with adults due to overcrowding, a violation of the Convention on the Rights of the Child.³¹⁵ Human Rights Watch reports that children have been raped and beaten by adult detainees, and compelled to pay money in order to have a place to sleep.³¹⁶

Societal attitudes about children are reflected in police treatment of youth in Guatemala. According to the U.S. Department of State, youth detained by police are subject to continual physical and sexual abuse.³¹⁷ Detention centers are often flooded during the rainy season; there is no light or air circulation.³¹⁸ Other problems in detention centers include a lack of staff trained to work with children, lack of standards of care, lack of reintegration programs, and a concentration of centers in cities, making it difficult for families in rural areas to visit.³¹⁹

Consequently, these prisons ultimately become training grounds for criminality, as well as a link for youth, upon release, to the more sophisticated organized crime networks.³²⁰ In response to State efforts to curb abuses that prison guards commit against youth detainees, guards have learned to beat detainees in places that are not easily visible so that a judge does not recommend prosecution.³²¹ The

314. Ley PINA, art. 195.

315. *Id.* at art. 37, Convention on the Rights of the Child, *supra* note 43; HUMAN RIGHTS WATCH, PROMISES BROKEN: AN ASSESSMENT OF CHILDREN'S RIGHTS ON THE 10TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD (1999), <https://www.hrw.org/legacy/press/1999/nov/children.htm>.

316. HUMAN RIGHTS WATCH, *supra* note 315.

317. ST. DEP'T HUM. RTS. 2011, *supra* note 105, at 19; U.S. DEP'T OF ST., GUATEMALA 2013 HUMAN RIGHTS REPORT 1 (2013), <http://www.state.gov/documents/organization/220657.pdf>.

318. "The Ley PINA is just a window dressing on this issue. It's a torture center. Not even animals could live there" (describing the juvenile detention centers). Interview with Judge, *supra* note 71.

319. Interview with Judge, *supra* note 71; Interview with Gonzáles, *supra* note 151.

320. MANZ, *supra* note 46, at 5. "They enter as thieves and leave as murderers." Interview with Gonzales, *supra* note 151. See also Interview with Galindo, *supra* note 63; Interview with Briere Samoya, *supra* note 156.

321. Interview with Judge, *supra* note 71; Interview with Gonzáles, *supra* note 151.

treatment of youth convicted of crimes does not lead to rehabilitation, but toward further brutalization.

IV. Possibilities for Improving the Protection of Children's Rights in Guatemala

Guatemala successfully passed a forward-thinking and progressive law that incorporates the major tenets of the Convention on the Rights of the Child. Yet, as we have seen, children and adolescents in Guatemala still face egregious violations of their rights. Part Four looks at what those who work directly on these issues in Guatemala—in the government, local NGOs, and international organizations—have identified as steps the State could take to improve child and adolescent protection in Guatemala.

Part of the problem can be attributed to the fact that parts of the Ley PINA were written bare bones, with policy meant to be supplemented by the National Commission on Children and Adolescents—which Congress never funded. Thus, we are left with a law that is bold on paper but weak in actual protection.³²² As the head of the Human Rights Ombudsman for Children and Adolescents put it, “We achieved a measure of sensitivity and a weak system of protection . . . because Congress does not make it a priority.”³²³

One suggestion, proposed by UNICEF, and backed by local and international NGOs,³²⁴ is that Congress should pass a supplemental law that would give the CNNA the power to execute its own policies, thus encouraging a more streamlined and coordinated

322. See UNICEF, ESTUDIO JURIMÉTRICO GUATEMALA 2011 (2012); Interview with Sánchez, *supra* note 66; Interview with Galindo, *supra* note 63; Interview with Briere Samoya, *supra* note 156; Interview with Judge *supra* note 71. Some feel that the Ley PINA was passed as a vain attempt to show international organizations that the State was taking steps to comply. But with no budget attached, the law is seen as merely a farce. See Interview with Villarreal, *supra* note 44.

323. Quote by Gloria Castro, Interview with PDH, *supra* note 212.

324. Refugio de la Niñez, Plan Internacional, for example. Interview with Dubón Benfeldt, *supra* note 107; Interview with Galindo, *supra* note 63; Interview with Sánchez, *supra* note 66.

implementation of the law.³²⁵ Further, the State must focus on establishing Municipal Commissions on Children and Adolescents, as the Ley PINA requires, so that violations of children's rights can be handled by the State, not NGOs, at the local level.³²⁶

If there is to be a meaningful implementation of this law to improve protection of children and adolescents in Guatemala, the State must invest more.³²⁷ An increased budget should be allocated toward improvement of shelters, increased specialized training for staff, and additional services. The State must prioritize children's issues, and invest accordingly.

Furthermore, the Ley PINA does not provide preventive mechanisms. The result is that the governmental bodies charged with protecting the rights of children only have the capacity to react to past abuses rather than to proactively prevent future abuse.³²⁸ The State must increase its focus on preventive measures, including specialized training for those individuals and institutions which interact with children and adolescents the most. Priority for such specialized training should begin with those who work in shelters and detention centers, as well as police, judges, and prosecutors. Preventive measures and educational campaigns are needed to begin a cultural shift that could change how parents think about their children, and restructure the mechanisms by which government officials interact

325. The CRC recommended that the position of the CNNA be elevated; NGOs attempted to get legislation passed that would make the CNNA independent of the SBS and grant it an operational capacity. The PGN issued an opinion (*un dictamen*), in line with CRC recommendations, in 2012. The *dictamen* opined not only that the CNNA should have its own budget, but also that it be linked to the Executive Branch. The *dictamen* was ultimately never implemented. Interview with Galindo, *supra* note 63; Interview with Sánchez, *supra* note 66; Interview with Alvarado Fuentes, *supra* note 76.

326. Interview with PDH, *supra* note 212; Interview with Sánchez, *supra* note 66; Interview with Judge, *supra* note 71.

327. ODHAG INFORME NIÑEZ 2012-2013, *supra* note 48, at 164; Interview with Colop, *supra* note 166; Interview with Galindo, *supra* note 63; Interview with Cruz, *supra* note 106; Interview with Ibarra, *supra* note 117; Interview with Villarreal, *supra* note 44; Interview with Ságuil, *supra* note 64; Interview with González, *supra* note 151; Interview with Sánchez, *supra* note 66; Interview with Rodenas, *supra* note 61.

328. Interview with Colop, *supra* note 166.

with youth victims and adolescent criminal defendants.

Violence against children and adolescents is a complex and multi-causal phenomenon. The State's approach to curb violence against children must be holistic, simultaneously taking on all factors that create risk at the individual level—at home and in the community—and in society in general.³²⁹ Experts warn that “political and social responses that fail to recognize postwar violence as a broad condition in which endemic poverty, rapid structural adjustment, and a lack of law enforcement are clustered, risk compounding rather than ameliorating [the high levels of violence in Guatemala].”³³⁰ In addition to an increased attention to preventive measures, the State must amplify and create rehabilitative programs. There are currently insufficient programs to rehabilitate and reinsert children into society. As a result, the root causes of these problems go unaddressed.³³¹ There must be follow-up to properly rehabilitate children whose rights have been violated.

The PDH warns that when the public is consistently confronted with a system that does not work, government officials and the public grow to accept this.³³² If one reports abuse committed against a child and nothing happens, people lose trust in the law.³³³ This delegitimizes the State. If Guatemala does not improve its system of protection for children and adolescents, the legal framework it has developed will be rendered meaningless.

329. UNICEF, *LA VIOLENCIA CONTRA NIÑOS, NIÑAS, Y ADOLESCENTES*, *supra* note 60, at 26.

330. Benson, Fischer & Thomas, *supra* note 45, at 53.

331. Interview with Briere Samoya, *supra* note 156.

332. Interview with PDH, *supra* note 212.

333. *Id.*