

## The challenges of the mexican state in the application of the rules of international law in the protection of the rights of unaccompanied irregular migrant girls and children

### Los retos del estado mexicano en la aplicación de las normas de derecho internacional en la protección a los derechos de las niñas y niños migrantes irregulares no acompañados

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#### Abstract

The irregular migration of children has increased alarmingly in recent years, which is why the institutions of Mexican State have acted accordingly; but nevertheless; the excessive flow and the conditions in which the phenomenon occurs are complex; given the circumstances that surround it. In this sense, the purpose of present is to reflect about the challenges of our country in the application of the internal norm and the control of conventionality, the harmonization between both in order to protect the rights of irregular migrant girls and boys, with special attention to those who travel without the protection of their family. The conclusions point to the impossibility of Mexico to face the phenomenon that reaches the point of humanitarian crisis, the inapplicability of the internal norm and even less the international one the matter.

#### Control of conventionality, Interational deals, Irregular migrations

#### Resumen

La migración irregular de niñas y niños se ha incrementado en los últimos años de manera alarmante, por lo que las instituciones del Estado mexicano han actuado en consecuencia; sin embargo; el flujo desmedido y las condiciones en que se presenta el fenómeno se observa complejo, dado las circunstancias que lo rodean. En este sentido, el propósito del presente es reflexionar sobre los retos de nuestro país en la aplicación de la norma interna y del control de convencionalidad, la armonización entre ambas con miras a proteger los derechos de las niñas y niños migrantes irregulares, con especial atención a los que viajan sin la protección de su familia. Las conclusiones apuntan hacia la imposibilidad de México para afrontar el fenómeno que alcanza tintes de crisis humanitaria, a la inaplicabilidad de la norma interna y menos aún la internacional en la materia.

#### Control de convencionalidad, Tratados internacionales, Migración irregular

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**Introduction**

People move to other territories for many different reasons: work, tourism, studies, cases in which migration generally occurs in safe conditions; However, there is another way of moving individuals from one place to another that has its origin in one of the most deeply rooted instincts in the human being: that of survival.

The migratory phenomenon has intensified in recent years throughout the world, the effect of situations that threaten the harmonious development of people who, paradoxically, in their desire for better conditions, risk their lives and that of their families by engaging in trips in which they face any number of dangers. It is on this type of irregular migration that this exercise is focused.

In the case of our country, as a source of human movements towards the northern countries it has decreased in recent years; However, as a recipient of immigrants in the destination and / or transit modality, it has increased exponentially, bringing with it a series of complications in the face of the massive waves of citizens coming mostly from Central America, characterized, among other things, by bringing in They are a large number of children, accompanied by their families and, most alarmingly, alone, which has generated a problem that takes on a humanitarian crisis, given the challenges that the State must assume in order to meet their basic needs, in addition of additional protection for minors, who are more susceptible to inclement weather, diseases and, of course, easy targets for crime and organized crime.

Concomitantly with this phenomenon, there is that related to people deported by the United States government, among which in the same way, there are children together with their families and unaccompanied, who also require attention from the state administration.

For this purpose, regardless of the regulations that the Mexican State has, there are legal provisions derived from international treaties, signed and ratified by it, which it is obliged to observe, as well as those derived from the American Convention on Human Rights and the jurisprudence developed in the Inter-American Court of Human Rights.

In the first instance, it could be affirmed that, with such a broad body of regulations, no human being, and even less a child, would have to feel or be in fact in a situation of vulnerability as far as their rights are concerned; However, this is not the case, reality shows us a very different picture. It is here where, with increasing frequency, a figure generated from the decisions issued by the Inter-American Court of Human Rights has been appealed to, which has been resorted to in search of protection. Reference is made to the Control of Conventionality, a figure whose purpose is for the member states of the Convention to harmonize the internal norm applicable to the situation, its provisions and the jurisprudence of the Inter-American Court of Human Rights.

In this context, this exercise focuses on identifying the challenges of the Mexican State in the care of irregular migrant children, based on the internal regulations and the obligations derived from the provisions of the Convention and the jurisprudence of the Inter-American Court.

**Overall objective**

Reflect on the challenges of Mexico in the application of the internal norm and the control of conventionality, the harmonization between both with a view to protecting the rights of irregular migrant girls and boys, with special attention to those who travel without the protection of their family.

**Framework****Conceptual framewor**

Child.

Article 1 of the United Nations Convention on the Rights of the Child of 1989 (CRC) defines a child as any human being under eighteen years of age. In this sense, regardless of the various concepts that may be found, for the purposes of the present, it is considered precisely the one embodied here.

Irregular migrant children.

All persons under 18 years of age (girls, boys and adolescents), who are outside their country of origin, or nationality, to work or reunite with their family, or change their residence temporarily or permanently, and who have an irregular immigration status, whether or not they are accompanied by a relative (Ortega, 2015: 188).

#### International human rights bodies.

UN Charter-based bodies, including the Human Rights Council and those created under international human rights treaties, made up of independent experts mandated to monitor the compliance of treaty states with their obligations<sup>i</sup>.

Among these are those based on the Charter of the United Nations:

- The Human Rights Council.
- Universal Periodic Review.
- The Human Rights Commission.
- The special procedures of the Commission on Human Rights.
- Complaint procedure of the Human Rights Council (Ortega, 2015: 188).

As well as 9 committees or subcommittees created under the human rights treaties, which supervise their application.<sup>ii</sup>

#### Treaties.

According to the Vienna Convention on the Law of Treaties, these are “the international agreement concluded in writing between States and governed by international law, whether it is contained in a single instrument or in two or more related instruments and whatever its particular denomination ”(Vienna Convention on the Law of Treaties, 2019. Article 2, subsection a).

#### Advisory Opinion.

It is a legal consultation made to the Inter-American Court by the member states of the American Convention on Human Rights, on the interpretation of the Convention itself, of treaties and agreements, signed by the requesting parties, who must also have recognized the advisory competence of court.

#### Jurisprudence.

From the Latin root *jurisprudencia*, which in turn is made up of the words *juris*, whose meaning is "Right, fairness" and *prudencia*, which means "knowledge, science"; In this sense it can be defined as "science of law or science of fair and unfair" (Enciclopedia Jurídica Mexicana, 2004: 794-801).

In the case of international jurisprudence on human rights, it constitutes the official interpretation and, in certain hypotheses, the final or definitive one, about the provisions of an international human rights treaty, in such a way that the meaning and The scope of a provision of this type is determined jointly with a text that expresses it and by its interpretation; Thus, both make up the normative standard whose compliance may be required, and which must be observed by the States (Carmona, 2019: 245).

#### Conventionality Control.

Regardless of addressing the issue in a later section, Conventionality Control is defined as:

A procedural protection mechanism exercised by the Inter-American Court of Human Rights, in the event that domestic law (Constitution, law, administrative acts, jurisprudence, administrative or judicial practices, etc.) is incompatible with the American Convention on Human Rights or other - applicable - treaties, in order to apply the Convention or another treaty, through an examination of normative confrontation (domestic law with the treaty), in a specific case ... in order to guarantee the supremacy of the American Convention. (King, 2008: 43).

#### Country of origin.

The State in which the irregular migration process begins, based on the need to seek better living conditions in another.

Destination country.

Towards which the irregular migratory flow is oriented, in order to achieve better living conditions, family unity, etc..

Country of transit.

It refers to those territories that serve as a route for migrants, in order to reach another.

Return country.

They are the States to which irregular migrants are returned by the immigration authorities, which may be natives of the country of return or of a different country.

However, it is important to note that the status of countries can change depending on the fact that, on many occasions, migrants, intending to reach another country, for various circumstances remain in the one that served only as a route, when the same as those who are deported, for not wanting to return to their country of origin.

## Theoretical framework

### About Conventionality Control

Regarding its purpose, the Control of Conventionality finds its immediate antecedent in the Control of Constitutionality; both figures were created to protect human rights: the second, in the domestic sphere and the first, in the international sphere, with the inclusion of the national.

Opinions regarding its origin are diverse: there are those who consider its exercise from the moment the American Convention on Human Rights entered into force, on July 18, 1978, based on the content of Article 1. of its Statute that establishes: "Article 1. The Inter-American Commission on Human Rights is an organ of the Organization of American States created to promote the observance and defense of human rights and to serve as a consultative body of the Organization in this matter" ( Statute of the Inter-American Commission on Human Rights, 1979).

There are authors who consider it a recent creation of the Inter-American Court of Human Rights, with the aim of "increasing the effectiveness and influence of the standards on human rights, of the Inter-American System for the Protection of Human Rights in the national legal systems of the region "(González, Zúñiga and Reyes, 2016: 8).

In the same way, regarding its function, the considerations have been varied: from those who have thought that the Control of Conventionality is, by its origin, the exclusivity of the Inter-American Court of Human Rights, inasmuch as the courts of the States are limited to analyzing the controversies that arise between the domestic norm and international treaties, only in what refers to their area of competence, while the Inter-American Court has international influence, with respect to all matters, and even has advisory powers.

In any of the cases, this doctrine has been strengthened and incorporated into the judicial systems of the member countries of the American Convention, as a tool that seeks to harmonize local and international norms in favor of the observance of human rights.

International human rights law finds its immediate precedent in the resolutions taken as a result of the excesses committed during the Second World War (although it is not ignored that after the first one sought to protect some of them, such as that of minorities, from foreigners, work, etc., through the creation of the United Nations).

The Charter signed by the member countries, signed on June 26, 1945 in San Francisco, which came into force almost three months later, establishes in its first article the purposes of the Organization, which at all times are aimed at maintaining peace. and international cooperation.

Since its creation, within the United Nations, various documents have been produced that, over the years, have laid the foundations for what we now know as international human rights law.

Among these is the American Declaration of the Rights and Duties of Man, approved at the Ninth International American Conference in Bogotá, Colombia in 1948, by virtue of which, in 1959, the Inter-American Commission on Human Rights was created, which became operational the following year, in order to promote respect and defense of the rights included in said Declaration. 10 years later, derived from the Inter-American Specialized Conference on Human Rights, held in San José, Costa Rica, the Inter-American Court of Human Rights emerged, whose resolutions are binding on all member countries that ratify it, beginning 9 years later. Its functions derive from article 2 of its Statute that establishes:

The Court exercises jurisdictional and advisory functions:

1. Its jurisdictional function is governed by the provisions of Articles 61, 62 and 63 of the Convention.
2. Its advisory function is governed by the provisions of Article 64 of the Convention (Statute of the Inter-American Court of Human Rights, 1979).

Mexico has been part of the Conference since March 1981; however, it recognized the contentious jurisdiction of the Inter-American Court of Human Rights until December 1998.

Derived from its jurisdictional power, on September 26, 2006, the Inter-American Court of Human Rights jointly used the term Control of Conventionality, when deciding the *Almonacid Arellano et al. Case against Chile*. In number 124 of subsection d) of section VII of Proven Facts, it is indicated:

124. The Court is aware that domestic judges and courts are subject to the rule of law and, therefore, are obliged to apply the provisions in force in the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to it, which obliges them to ensure that the effects of the provisions of the Convention are not diminished by the application of laws contrary to its object and purpose, and which from the beginning lack legal effects. In other words, the Judicial Power must exercise a kind of "conventionality control" between the internal legal norms that apply in specific cases and the American Convention on Human Rights... (*Almonacid Arellano et al. Vs. Chile*, 2006: 53)

Since then, the Inter-American Court of Human Rights has used the term in a reasonable number of cases submitted to its consideration, in which it has refined its scope, not devoid of controversy and analysis, whereas, in the case of Mexico, at some point it has come into apparent conflict with the principle of hierarchy of the Standard, which in its case is not part of this exercise; However, on the topic, it is important to refer to the fact that, despite the fact that, still in 2016, at the work table, the former judge and President of the Inter-American Court, Sergio García Ramírez affirmed that: "there is no Sufficient answer, on a continental and not even national scale, about what is conventionality control? What does it produce? What are its scope? " and invited to use conventionality control with "reason and relevance, otherwise the result might not be what we want" (Castilla Juárez, 2019: 89), the Supreme Court of Justice of the Nation, in a resolution published in The month of April 2014, through the Contradiction of Thesis number 293/2011, seems to resolve the conflict, stating that the criteria established by the Plenary of the same must prevail as jurisprudence, that is, that the parameter of Constitutional control, with respect to human rights, comes from both the Constitution and international treaties, with the exception that, when there is an express restriction on their exercise in the Constitution, the content of the latter must prevail.

Likewise, the principle of progressivity of the law was applied by establishing that the jurisprudence issued by the Inter-American Court is binding for Mexican judges, as long as they are more favorable to the person and, although in the first instance it could be thought that the figure is directed to Those who are entrusted with the laudable task of imparting justice, the reality is that it is an obligation that extends to all the activity of the State, within the scope of the competences of each of its institutions.

This is clear from the most recent jurisprudence of the Inter-American Court of Human Rights, as a result of the analysis of the compatibility of a democratically approved amnesty law with the obligations imposed by it, which states:

... The democratic legitimation of certain facts or acts in a society is limited by the international norms and obligations for the protection of human rights recognized in treaties such as the American Convention, so that the existence of a true democratic regime is determined by the characteristics both both formal and substantial, therefore, particularly in cases of serious violations of the norms of International Rights Law, the protection of human rights constitutes an insurmountable limit to the majority rule, that is, to the sphere of the "susceptible to be decided" by the majorities in democratic instances, in which a control of conventionality must also prevail, which is the function and task of any public authority and not only of the Judicial Power ... (Case Gelman v. Uruguay, 2011: 69).

Regarding the observance of international treaties, Mexico has signed a large number of them, which by provision of Article 1 of the Federal Constitution, it is obliged to observe, as well as the judgments issued by the Inter-American Court in The cases in which it is a party, assumption in which it must comply in all its terms, while those resolutions in which it was not, should serve as a guide that orients what to do of the State, which complements the Contradiction of Thesis 293 / 2011 that was discussed above, since it closes the circle of the level of compliance of the Mexican State, when carrying out an exercise of Control of Conventionality.

### **International regulations applicable to the situation of girls and boys in the face of the phenomenon of irregular migration**

Mexico is a country with vast international experience in the signing of international treaties, in fact, with regard to the issue of human rights, currently it is part of almost all the treaties and conventions on the matter (Pedroza, 2003: 759), which, in a strict sense, can be said to increase their responsibility so that the observance of each one of them is carried out in a timely manner. Regarding the topic, in the scale of importance, it is binding, in the first instance, those of a general nature: the American Declaration on the Rights and Duties of Man, the Universal Declaration of Human Rights, the United Nations Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the American Convention on Human Rights and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

Regarding the specific protection of children's rights, there are:

- The Convention on the Rights of the Child, approved by the United Nations General Assembly in its resolution 44/25, on November 20, 1989, which in its article 2 indicates the obligation of states to respect and ensure the application of the rights contained in it in favor of children; as well as to guarantee its compliance. Similarly, Article 19 establishes the responsibility of the States parties to the Convention to adopt measures from all State institutions and in society to protect children against any situation that violates their rights.
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.
- International Convention on the Elimination of all Forms of Racial Discrimination.
- Convention on the elimination of all forms of discrimination against women.
- Convention against torture and other cruel, inhuman or degrading treatment or punishment.
- Communications Procedure (OPIC).
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- Convention on the Rights of Persons with Disabilities.
- International Convention for the Protection of All Persons from Enforced Disappearance.

Accordingly, all public and private institutions must observe, in the terms indicated, the resolutions of the Inter-American Court of Human Rights; jurisprudence in general and the advisory opinions issued by it, as long as it has been requested by the State. With regard to the protection of girls, it is important to mention the jurisprudence generated from the resolution issued by the Inter-American Court, regarding the Veliz Franco et al. V. Guatemala Case, in which it was considered:

It follows from the foregoing that, according to the regulatory framework set forth, in relation to violence against women, the duty of guarantee acquires special intensity in relation to girls. This is so because the inherent vulnerability to childhood can be framed and enhanced due to the condition of being a woman. In this sense, it should be noted that girls are, as has been asserted, "particularly vulnerable to violence". The aforementioned special intensity translates into the State duty to act with the greatest and strictest diligence to protect and ensure the exercise and enjoyment of the rights of girls in the face of the fact or mere possibility of their violation by acts that, in current or potential involve violence for gender reasons or could lead to such violence "(Case law of the Inter-American Court of Human Rights No. 5:17).

As well as Advisory Opinion 18/03 requested by Mexico regarding the Juridical Condition and Rights of the Undocumented Migrants of September 17, 2003, in which the State's obligation to respect and guarantee fundamental rights was determined, under pain of incurring responsibility international, weighing the principles of equality and non-discrimination as fundamental for the safeguarding of human rights. It also ruled for the recognition of the right to due process as a minimum guarantee for migrants.

The international standards generated from Advisory Opinion OC21 / 14, promoted by the countries of Argentina, Brazil, Paraguay and Uruguay, regarding the Rights and Guarantees of Boys and Girls in the Context of Migration and / or in Need for International Protection from which the obligation of countries to legislate in this regard and implement mechanisms to provide international protection to unaccompanied migrant children follows.

Paragraph	Extract
82	It is relevant to differentiate between those who migrate in search of opportunities to improve their standard of living, from those who require some type of international protection, including; but not limited to the protection of refugees and asylum seekers [...] ... States are obliged to identify children who require international protection.
83	The border authorities should not prevent foreign girls and boys from entering the national territory, even when they are alone, they should not require documentation that they cannot have and should immediately direct them to personnel who can assess their protection needs, from a approach in which their condition as girls and boys prevails ... the Court is of the opinion that the creation of a database with the registry of girls and boys entering the country is necessary for an adequate protection of their rights.

90	... the highlights Court that the situation of girl or boy unaccompanied or separated expose them to various risks that affect life, survival and development, such as trafficking for sexual exploitation or other or participation in criminal activities that may harm the minor or, in extreme cases, death.
91	... It is essential that States adopt all the measures necessary to prevent and combat trafficking in persons, among which all those investigative measures, protection for victims and information and dissemination campaigns stand out.
92	Specifically, States have the obligation to adopt certain border control measures in order to prevent, detect and prosecute any type of trafficking in human beings. For this, they must have specialized officials in charge of identifying all those victims of human trafficking, paying special attention to those who are women, girls or children.
101	It is necessary to collect information on personal factors, such as personal history and physical and psychological health condition, as well as the environmental environment in which the migration took place, to determine the specific situation of risk of violation of rights in their country of origin. , transit or in the receiver that merits complementary protection or shows other needs for protection or humanitarian assistance, such as those arising from torture, violence, trafficking or traumatic experiences.
105	With regard to girls or boys unaccompanied or separated from their families, it is essential that States seek to locate their family members, but not without first verifying that these measures correspond to the best interests of the girl or of the child and, if it is possible and satisfies the best interests of the child, proceed to their reunification or reunification as soon as possible.
106	... States have the duty to protect them against a new risk of victimization and to provide them with legal and medical assistance, trying, as far as possible, to protect the privacy and identity of the victim. Likewise, the States, as far as possible, should consider the possibility of fulfilling the aforementioned purposes by providing: a) adequate accommodation; b) advice and information, in particular regarding their legal rights, in a language that victims of human trafficking can understand; c) medical, psychological and material assistance; and d) educational and / or training opportunities.
155	... States have the obligation, in accordance with Articles 19 of the American Convention and VII of the Declaration, to opt for measures that promote the care and well-being of the girl or boy with a view to their integral protection rather than their deprivation of freedom ...

250	In this sense, when a migrant girl or boy is identified as a potential applicant for asylum or recognition of refugee status, she or he must receive the necessary guidance regarding the procedure to be followed, in a language and manner that you can understand and, where appropriate, you should be given the opportunity to contact a representative of the UNHCR or entity that performs your functions if you are not in the country.
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**Table 1**

Source: own elaboration with information from the Case Law of the Inter-American Court of Human Rights, No. 5 Boys, girls and adolescents

### **National regulations applicable to the situation of girls and boys in the face of the phenomenon of irregular migration.**

For the case, it could be said that at the national level, the regulatory framework can be as broad as the situation arises, therefore, the main applicable laws and regulations are mentioned:

- The Political Constitution of the United Mexican States, which, through its 1st article, establishes:
- In the United Mexican States, all persons shall enjoy the human rights recognized in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, the exercise of which may not be restricted or suspended, except in the cases and under the conditions that this Constitution establishes (Political Constitution of the United Mexican States, 2019: 1).
- Migration Law and its Regulations.
- Refugee Law, Complementary Protection and Political Asylum and its Regulations.
- Nationality Law and its Regulations.
- General Law on the Rights of Girls, Boys and Adolescents and its Regulations.
- General law of health.
- General Education Law.
- Federal Law to Prevent and Eliminate Discrimination.

- General Law to Prevent, Punish and Eradicate Crimes in Human Trafficking and for the Protection and Assistance to the Victims of these Crimes.
- General Law on Women's Access to a Life Free of Violence.
- Federal Law against Organized Crime.

Regarding the Migration Law, it provides an account regarding the care of unaccompanied migrant girls, boys and adolescents, through the content of articles 29, 52, 73, 74, 109, 112 and 120, which in At all times they aim at their protection, their attention by specialized personnel, establishment of suitable areas for their permanence, with separation from adults and between children and adolescents, being under the immediate guardianship of the National System for Integral Development of the Family, provide them with information and the right to demonstrate, as well as ensure their assisted and accompanied return, among others.

In the regulation of the aforementioned Law, apart from establishing the “hows”, it is determined in a special section for unaccompanied migrant girls, boys and adolescents, the consideration of the prevalence of the best interests of the child, assessed through specialized personnel and trained in child protection. In the same way, it establishes that in its valuation it should be:

- Obtain information about the location of their parents, or those who exercise parental authority over them, as well as the reasons why they are separated from them.
- Identify possible situations of risk or violation of their human rights that may arise or have occurred in the country of origin or habitual residence, or in the national territory.
- Identify when the girl, boy or adolescent is offended, victim or witness of a crime in the country of origin or habitual residence or in the national territory.
- Determine any need for international protection.



- Propose temporary accommodation alternatives in public or private institutions where adequate care can be provided.
- Take into account the opinion and informed participation of the unaccompanied migrant girl, boy or adolescent throughout the process in the decisions that concern them.
- If necessary, seek the opinion of other family members, close people or institutions involved in their care (Regulation of the Migration Law, 2012: 61)

In both normative bodies, principles of migration policy stand out, applicable to the case at hand:

- Unrestricted respect for their human rights.
- Hospitality and international solidarity.
- International mobility / complementarity to labor markets.
- Equity between nationals and foreigners.
- Family unity and best interests of the girl, boy or adolescent.
- Social and cultural interaction between nationals and foreigners.
- Facilitate the return to national territory (Model of care for unaccompanied migrant girls and boys, 2016: 25).

The General Law on the Rights of Girls, Boys and Adolescents contains a chapter for special protection that must be granted by the State to migrant girls, boys and adolescents, accompanied or not.

Through its articles, like the Migration Law, it establishes the right of unaccompanied migrant children to stay in accommodation corresponding to boys and girls; as well as the prohibition of expelling or rejecting them, accompanied or not, when their life or safety are threatened by any circumstance and the responsibility of the National DIF System to generate a database, which includes, among other aspects, the causes of their migration, transit conditions, their family ties, risk factors at origin and transit, information on their legal representatives, information on their accommodation and legal situation.

In the same way, the institutions and government areas in charge of the care of unaccompanied migrant children are obliged to observe the normative body that is enunciated, plus the following (it is described only by way of example):

- Federal Law of Administrative Procedure.
- Federal Law of Administrative Litigation Procedure.
- Federal Civil Code and Civil Procedures.
- Regulatory Amparo Law of articles 103 and 107 of the Political Constitution of the United Mexican States.
- Law of the National Human Rights Commission; f) Federal Police Law.
- National Security Law.
- Federal Law of the Public Defender's Office.
- Federal Law of Rights.
- Federal Law of Patrimonial Responsibility of the State.
- Federal Law of Responsibilities of Public Servants.
- Federal Law on Administrative Responsibilities of Public Servants.
- Organic Law of the Federal Public Administration.

- Federal Law to Prevent and Punish Torture.
- Federal Criminal Code, Federal Code of Criminal Procedures.
- Institutes of Health Law.
- Law of the National Institute of Women.
- Law of the National Registry of Data of Missing or Disappeared Persons.
- Organic law of judicial power.
- Organic Law of the Federal Court of Fiscal and Administrative Justice.

### **About irregular migration in Mexico**

Migration is a phenomenon inherent in the history of man; their ability to move in search of better living conditions, gave rise to the societies that existed, prevail and most likely will be born in the future.

In this mobility process that occurs throughout the world, countries act to a greater or lesser extent as generators; recipients, transit and / or return of migrants.

According to the International Organization for Migration (IOM), between 1990 and 2017, the world migratory flow amounted to 152,542,373 people, with the United States being one of the destination countries for people from around the world. Likewise, the phenomenon of children migrating unaccompanied has increased. According to figures from Global Migration 2018, in 2015-2016, there were five times more children than in the period 2010-2011 (Global Migration, 2018: 41).

Economic deficiencies, armed conflicts, natural disasters, are just some of the reasons that trigger the urgent need to migrate to different places in search of better living conditions, originating in the process situations that violate the rights of people, those that States are obliged to safeguard, both in the domestic context, and through international cooperation treaties and instruments.

In this phenomenon that is discussed, the case of child migration deserves special attention, which, in recent years has increased to such a degree that, today, it constitutes a social problem of great proportions.

In their internal context, the countries have laws, programs and actions of a very diverse nature for the protection of migrants in general and minors in particular; However, the magnitude of the problem has led international organizations to work on the design of specific tools and strategies that attempt to standardize their actions and expand the protection of minors. Additionally, over the years, international organizations have designed and perfected instruments that guarantee the observance of these provisions. Particular case: the Control of Conventionality, a figure through which the States are obliged to observe, together with their normative framework, the rights recognized in the international treaties signed and binding for them.

In the case of the Mexican State, its geographical location makes it a strategic place for this phenomenon to occur in all its latitudes and modalities; that is, it receives migrants through its northern and southern borders, through the Gulf of Mexico and the Pacific Ocean, serving as the country of origin, destination, transit and return of the migrant population.

Its proximity to the United States identifies it as a demarcation of transit for migrants, the vast majority from Central America, who in search of a better life, try to reach the United States; destination, of all those who wish to stay in our country or are forced to do so when their possibilities to enter the northern country are canceled or when they are deported from that country and do not want to return to their own country and, of origin, when the nationals are move to other countries.

This phenomenon, already complicated in itself, has been aggravated, largely because it has taken a different form than always, which was characterized by the fact that adults or families participated in the irregular migration process, at most, who were passing through from Mexico from their countries of origin, with the intention of reaching the United States; today the situation is somewhat different.

On the one hand, as of 2018, migration, especially from Central American countries, has been carried out in large groups and, on the other hand, a considerable number of unaccompanied children and adolescents move into these groups, not yet quantified. Of course, of those who re-enter through the northern border.

According to the National Institute of Migration (INM), each year, around 40 thousand children who migrate are repatriated from the United States to Mexico, of these, 18,000 travel alone. In this regard, it is important to emphasize that between 2017 and 2018 this figure increased considerably, while, in 2017, 17,093 deportations of children were registered, from January to August 2018, they were received through the northern border, 18,922 minors, most of them from Honduras, Guatemala and El Salvador (Villa and Caña, 2018).

In the preliminary document derived from the Latin American and Caribbean Regional Meeting of Experts on International Migration Preparatory to the Global Compact for Safe, Orderly and Regular Migration, held on August 30 and 31, 2017 in Cepal, Santiago de Chile, it was established that the migration of minors has increased, going from less than 6,000 apprehensions in 2012, to 18,000 in 2014 and 38,000 in 2016, highlighting in the phenomenon the presence of unaccompanied minors, who went from less than 3,000 at the beginning of the decade, to 17,000 in 2016 (Channels, 2017: 9).

On the other hand, across the southern border, only in October 2018, a caravan made up of 7,233 people, mostly from Honduras, El Salvador and Guatemala, entered the country, of which 1,000 307 were girls and one thousand seventy boys, that is, one in three immigrants were minors (Institute for Outreach Studies on Migration AC, 2019). Situation that was repeated two more times in that year, without there being any precise data so far regarding the total number of people who entered, adults or children, accompanied or not.

According to a note published in the digital newspaper vaticannews.va, in January 2019, almost two thousand people entered, which has led to the presentation of figures that reach almost 45,000 individuals who have passed through Mexico in the period.

Regarding unaccompanied children, the figures are very diverse:

According to official data, until November 9, 2018, there were 11 migrants of nursing age (0 to 11 months), 99 of preschool age (1 to 4 years), 159 of school-age (5 to 11 years) and 163 adolescents (12 to 17 years old), of which 62, between 14 and 17 years old, traveled alone, data that contrasts with the figures of the United Nations Children's Fund (Unicef), which indicate that some 2,300 migrant children entered Mexico between October 19 and 22 of that year (Telemundo 52, 2018).

Other data from the United States Department of Homeland Security reported that more than 49,000 children without an adult companion were detained at the United States border so far in 2018 (eldiario.es, 2018).

Although the numbers are important, to date it is not possible to establish them precisely, given that, on the one hand, it is a situation that is occurring at the moment, and on the other, the passage of irregular migrants across the border southern Mexico on more than one occasion has been like a human avalanche, which has prevented a real control of people crossing and, although the National Migration Institute offers data regarding unaccompanied children, These correspond to those who have been presented to that authority, so although it is a reference, the reality is that many of these go unnoticed.

However, the phenomenon exists, is latent and is increasing alarmingly, which has triggered the Mexican State to establish a normative framework that provides protection and guarantees the best interests of the child, since these are precisely the most vulnerable subjects during the period. migration process, being an easy target of crime in all its forms, the risk of contracting diseases, not having access to basic services and seeing other rights undermined such as access to education, health, housing, among others, with special pronouncement on unaccompanied children who are deported through the northern border and those who enter through the southern border.

Girls and boys are not only deprived of their most basic rights, but are exposed to a series of dangers, being easy targets of physical and sexual assaults, robbery, trafficking, torture, of being taken over by organized crime, among others.

Similarly, in the international context, both the Universal Human Rights System and the Inter-American System, made up of the Inter-American Commission and the Inter-American Court, both on Human Rights, have ruled in this regard, through the resolution of cases in particular, in the generation of jurisprudence and advisory opinions.

However, the situation worsens, the lack of control in the entry of migrants, especially through the southern border, even with an updated internal normative body, strengthened and expanded by international instruments, complicates its applicability in favor of the protection of minors. Its reality is very diverse despite a robust national regulatory framework and strengthened by international legislation.

### **The practice**

The reality that the Mexican State is experiencing in the face of irregular migration is very different from what the legal framework establishes. It is institutionally overwhelmed to respond to a situation that today is treated at the level of humanitarian crisis.

The situation of the southern border is out of control due to the impossibility of containing the human tide that has crossed the territorial limits, which has led to the impossibility of identifying unaccompanied girls and boys and, where appropriate, meeting their needs and protect your rights.

The State has acted reactively through various actions such as mass arrests, to later return people to their place of origin; give facilities to those who wish to continue on their way in order to try to cross to the neighboring country to the north, offer them shelter, offer them work, among others.

Regarding the first, it is a control practice that criminalizes the irregular migration process and, in any case, there is talk of the lack of comprehensive protection of their human rights, to the detriment not only of adults, but also of girls and boys, who, due to their condition, enjoy expanded human rights. Paradoxically, they are rescued when they are transported in truck boxes, crammed together and without oxygen, to be taken to overcrowded detention centers, where children reportedly lack space outdoors.<sup>iii</sup>

The centers are over-capacity and it is unlikely that national and international standards will be met, as regards the establishment of separate special places for girls and boys.

In the case of adolescents whose age is approaching adulthood, the lack of documents that prove it leads in many cases to be treated as adults, until the interviews and corresponding studies that prove their minority are carried out. On the other hand, the temporary shelters for those who are crossing the national territory do not meet the minimum conditions for the protection of the rights of unaccompanied children. Still others roam the streets without any support or protection from the State.

Thus, the conditions of irregular migrant girls and boys are adverse in every way; If they are lucky enough to be informed and taken care of by the Mexican State, the observance of their rights will depend on the possibilities of the latter to take care of them.

The efforts of the INM with regard to the attention of the children who are presented to it are not ignored; But reality shows that there are more who pass through our country with the only protection than the mass of people with whom they go.

### **Investigation Development**

The exercise presented is qualitative documentary as a methodological procedure was carried out that included the review of legal, doctrinal, institutional and journalistic documents to build a knowledge of social reality, to understand the set of interrelated qualities that characterize a certain phenomenon.

It is explanatory because although its performance increased understanding of the study topic, it does not offer conclusive results as it was carried out until the very moment the exercise was concluded; However, if the reasons why an analyzed phenomenon occurs were found and explained and, where appropriate, it can be replicated to give it greater depth and obtain new points of view on the phenomenon.

## Conclusion

Mexico's challenges are many. Although it can be affirmed that historically the Mexican State has shown interest in participating in whatever treaty, pact or agreement that is generated for the protection of the human rights of people in general, and of girls, boys and adolescents, in particular, the reality is that in practice, there is much to do.

It is clear that there is a great deal of agreement between the domestic norm and international law, contained in international treaties and derived from the advisory resolutions and jurisprudence of the Inter-American Court of Human Rights, and that even the latter complement and extend the first of harmonic way; But the reality is that the State has been overwhelmed in its institutions by the irregular migratory phenomenon, which in waves of hundreds of people have crossed the national territory without any control, breaking down other weak barriers on the southern border and even running over officers in charge of protecting it, bringing with them an unusual number of women, girls and boys, accompanied by their families and alone.

Regarding the latter, to date there is no data that allows shedding light on the number of unaccompanied girls and boys who have crossed the country in the last two years and, those on whom there is a record, do not have access to the safeguard. of all their rights, therefore the State does not even comply with the internal regulations.

Nor is there a database that allows knowing irregular migrant girls and boys, given that, only in 2018, there was talk that the DIF System would receive the support of the National Institute of Migration to build it and, in any case, given the problems raised, most likely contains only that information about children that have been presented to you.

The efforts of the Mexican State to implement actions aimed at safeguarding the rights of irregular migrant girls and boys are in no way ignored; however, it is pending to extend its arms towards those who are not presented to it, those who go unnoticed by the majority and who are easy targets for all kinds of adverse situations.

Internal regulations are important, they must be applied; but also the State, through its institutions, is obliged to carry out a conventionality control that allows it to harmonize, complement and expand the rights of unaccompanied migrant girls and boys and guarantee their application and compliance.

The control of conventionality is not a decorative figure of the international normative framework, it is a tool that, in addition to seeking to harmonize the local and international norms as far as human rights are concerned, obliges all member states of the American Convention to comply with it. Human rights. In this sense, Mexico faces a great challenge in favor of the rights of irregular migrant girls and boys.

## References

Beloff, M. Modelo de la protección integral de los derechos del niño y de la situación irregular: un modelo para armar y otro para desarmar, Justicia y Derechos del Niño, 1999, núm. 1.

Castilla Juárez, C. Control de Convencionalidad. Una propuesta de orden ante diez años de incertidumbre. *Recuperado de <https://mail.google.com/mail/u/0/#inbox?projector=1>*.

Canales I., A. & Rojas W., M. L. Panorama de la migración internacional en México y Centroamérica. Resumen ejecutivo. Versión preliminar sujeta a modificaciones. Santiago de Chile, 2017. *Recuperado de [https://refugeesmigrants.un.org/sites/default/files/eclac\\_mexico\\_y\\_centroamerica\\_resumen\\_ejecutivo.pdf](https://refugeesmigrants.un.org/sites/default/files/eclac_mexico_y_centroamerica_resumen_ejecutivo.pdf)*

Carmona Tinoco, J. U. La recepción de la jurisprudencia de la Corte Interamericana de Derechos Humanos en el ámbito interno. El caso de México. *Recuperado de [www.juridicas.unam.mx](http://www.juridicas.unam.mx)*.

Caso Almonacid Arellano y otros Vs. Chile. Corte Interamericana de Derechos Humanos. Sentencia de 26 de septiembre del 2006 (Excepciones Preliminares, Fondo, Reparaciones y Costas). *Recuperado de* [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_154\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp.pdf)

Casos: Trabajadores cesados del Congreso; La Cantuta; Boyce; Heliodoro Portugal.

Constitución Política de los Estados Unidos Mexicanos. *Recuperada de* <https://www.juridicas.unam.mx/legislacion/ordenamiento/constitucion-politica-de-los-estados-unidos-mexicanos#10536>

Convención de Viena sobre el Derecho de los Tratados. *Recuperado de* [https://www.oas.org/xxxivga/spanish/reference\\_docs/convencion\\_viena.pdf](https://www.oas.org/xxxivga/spanish/reference_docs/convencion_viena.pdf).

Corte Interamericana de Derechos Humanos: Caso Gelman vs. Uruguay, 24 de febrero del 2011.

Cuadernillo de jurisprudencia de la corte interamericana de derechos humanos no 5: niños, niñas y adolescentes. Corte Interamericana de Derechos Humanos.

De la Cruz, M. 25 de octubre del 2018. Aumenta la deportación de niños migrantes en México. El Universal. *Recuperado de* <https://www.eluniversal.com.mx/nacion/aumenta-deportacion-de-ninos-migrantes-en-mexico>.

Enciclopedia Jurídica Mexicana. *Instituto de Investigaciones Jurídicas*, 2ª ed., México Porrúa-UNAM, 2004, t. IV F-L. 99 794-801

Estatuto de la Comisión Interamericana de Derechos Humanos, aprobada mediante la Resolución No. 447 adoptada por la Asamblea General de la OEA, en su noveno periodo ordinario de sesiones, celebrado en La Paz Bolivia, octubre de 1979. *Recuperado de* [http://www.oaes.org/es/cidh/mandato/Basicos/estatuto\\_CIDH.asp/](http://www.oaes.org/es/cidh/mandato/Basicos/estatuto_CIDH.asp/).

Estatuto de la Corte Interamericana de Derechos Humanos. Corte Interamericana de Derechos Humanos. *Consultado en* <http://www.corteidh.or.cr/index.php/es/acerca-de/estatuto>.

García Méndez, E. La legislación de menores en América Latina: una doctrina en situación irregular, en García Méndez, Emilio, *Derecho de la infancia/adolescencia en América Latina: de la situación irregular a la protección integral*, Santa Fe de Bogotá, *Forum Pacis*, 1994.

González Contró, M. ¿Menores o niñas, niños y adolescentes? Reflexiones en el contexto del debate en América Latina, en Pérez Contreras, María Montserrat y Macías Vázquez, Ma. Carmen (coords.), Marco Teórico Conceptual sobre Menores versus Niñas, Niños y Adolescentes, México, UNAM, *Instituto de Investigaciones Jurídicas*, 2011.

González, P., Zúñiga, M. & Reyes, N. *La Doctrina del Control de Convencionalidad y su aplicación en algunas experiencias nacionales*. Centro de Estudios de Justicia de las Américas. Chile, 2016.

Instituto de Estudios y Divulgación sobre Migración A.C. *Recuperado de* <https://www.estudiosdemigracion.org/2017/04/13/estadisticas-2/>.

Modelo de atención de niñas y niños migrantes no acompañados, 2016. *Recuperado de* [https://www.gob.mx/cms/uploads/attachment/data/file/222573/MODELO\\_DE\\_ATENCION\\_DE\\_NIAS\\_Y\\_NIOS\\_MIGRANTES\\_NO\\_ACOMPAADOS.pdf](https://www.gob.mx/cms/uploads/attachment/data/file/222573/MODELO_DE_ATENCION_DE_NIAS_Y_NIOS_MIGRANTES_NO_ACOMPAADOS.pdf)

Ortega Velázquez, E. Los niños migrantes irregulares y sus derechos humanos en la práctica europea y americana: entre el control y la protección. *Boletín mexicano de derecho comparado*. Vol. 48. No. 142. México. Enero-abril 2015. Versión On-line. *Recuperado de* <http://www.scielo.org.mx/pdf/bmdc/v48n142/v48n142a6.pdf>.

Pedroza de la Llave, S. y García Huante, O. (comps.), *Compilación de instrumentos internacionales de derechos humanos, firmados y ratificados por México*, México, *CNDH*, 2003, t. I, 759 pp., y t. II, 706 pp. Asimismo, véase [www.ordenjuridico.gob.mx/derechos\\_humanos.php](http://www.ordenjuridico.gob.mx/derechos_humanos.php) y [www.scjn.gob.mx/tratadosinternacionales/default.htm](http://www.scjn.gob.mx/tratadosinternacionales/default.htm).

Reglamento de la Ley de Migración. *Recuperado de* [http://www.diputados.gob.mx/LeyesBiblio/regley/Reg\\_LMigra.pdf](http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LMigra.pdf)

Rey Cantor, E. Control de Convencionalidad de las leyes y derechos humanos. México. Editorial Porrúa- *Instituto Mexicano de Derecho Procesal Constitucional*, 2008.

<https://www.un.org/es/sections/un-charter/introductory-note/index.html>.

#### Documents

[https://www.ohchr.org/sp/hrbodies/pages/humanrights\\_bodies.aspx](https://www.ohchr.org/sp/hrbodies/pages/humanrights_bodies.aspx).

<https://www.acnur.org/fileadmin/Documentos/BDL/2003/2351.pdf>.