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## THE TORTURE OF CHILDREN AND ADOLESCENTS LIVING AND DYING IN GUATEMALA'S INSTITUTIONS

*Madeleine M. Plasencia\**

### ABSTRACT

*In this article, Professor Madeleine Plasencia examines the legal context of treatment of disabled children in Guatemala living in institutionalized environments. The article explores evidence that children confined in orphanages and other public care facilities in Guatemala endure conditions that violate the provisions against torture and other cruel or degrading treatment or punishment provided under various international instruments, including the Convention on the Rights of the Child. The article discusses the growing world-wide desperation from poverty and food scarcity that drives families to place their children with and without disabilities in state-supported institutions. The article argues that foreign funding and volunteer-tourism and international adoption networks contribute to the separation, institutionalization and subsequent commodification of children in an international market.*

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\* Copyright © 2018 Madeleine M. Plasencia, B.A. Cornell University; J.D. University of Pennsylvania. Formerly tenured Associate Professor at the University of Tulsa, School of Law, currently Affiliated Law Professor, University of Miami School of Law. Thanks to the University of Miami School of Law Dean Patricia D. White for support funds to travel to Guatemala. Thanks are due to the work of Disability Rights International, its founder and executive director Eric Rosenthal, the authors of numerous reports including *After the Fire*, and *Still in Harm's Way*, and the attorneys who prepared the petitions for precautionary measures in these cases. The conditions existing in these (and other) institutions both in Latin America and in other parts of the world would not be known without the legal and investigative work of DRI. I am grateful to Raquel Aldana and Steven Bender for very warm invitations to contribute to this symposium. Thanks also to the timely and thorough research and reference support of Robin C. Schard, Associate Director, Law Library & Lecturer in Law at the University of Miami, School of Law, and to the editorial staff of the UC Davis Journal of International Law & Policy. To my spouse, Elizabeth M. Iglesias I am profoundly grateful for encouraging me to visit Guatemala, a place of sublime enchantment and contradiction.

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I recently had the occasion to examine the Reports and Appendix C to the disability laws of the various countries posted at the website of the U.S. Department of State.<sup>1</sup> If you want to know how a country really feels about itself, and what it must be like to live, breathe, and work in any given country, take a look at how the State treats women, children, and the disabled.

In Europe, Sweden prohibits discrimination against persons with disabilities in the workplace and in university admission decisions. It protects the right to accessibility of health care and public services, but many buildings, such as apartments, restaurants, bars and various public transportation remain inaccessible.<sup>2</sup> Between 1934 and 1976, thousands of persons were forcibly sterilized, the majority of whom were either mentally or physically disabled.<sup>3</sup> Iceland's labor laws and regulations do not expressly prohibit discrimination on the basis of disability.<sup>4</sup> Although the constitution and other laws do prohibit discrimination in general, advocates report that persons with disabilities in Iceland continue to have a difficult time finding jobs due to prejudice.<sup>5</sup>

In the Western Hemisphere, in Cuba, no known law prohibits discrimination based on disability, and while there are no buildings that are accessible, there are no complaints.<sup>6</sup> In Jamaica, although the law prohibits discrimination against persons with disabilities, no law mandates accessibility, and thus persons with disabilities routinely encounter discrimination in employment and denial of access to schools due to lack of infrastructure.<sup>7</sup> Persons with mental disabilities in Jamaica endure inadequate medical care through the public medical system in "correctional centers" serviced by four part-time psychiatrists charged with providing care for 225 detainees diagnosed with mental disabilities in 11 facilities across the island, which spans 4,240 square miles.<sup>8</sup> In Jamaica, persons with mental disabilities have succumbed to arbitrary deprivation of life and other

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<sup>1</sup> U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2017 Guatemala App. C: Additional Resources (2017) [hereinafter U.S. Dep't of State Guatemala report].

<sup>2</sup> *Id.*

<sup>3</sup> See generally PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* app. 186 (1st ed. 2004) (specifically discussing the 2000 case in Sweden).

<sup>4</sup> U.S. Dep't of State Guatemala report, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Dep't of State Guatemala report, *supra* note 1; see also BLANCK ET AL., *supra* note 3, at app.197.

<sup>7</sup> U.S. Dep't of State Guatemala report, *supra* note 1.

<sup>8</sup> *Id.* See the website of the government of Jamaica for an overview of Parish Profiles, JAMAICA INFORMATION SERVICE, <https://jis.gov.jm/information/parish-profiles/> (last visited Aug 19, 2018) (Jamaica is the third largest island of the Greater Antilles and the largest English-speaking territory).

unlawful killings at the hands of government security forces. On March 23, 2017, in the parish of St. Thomas, seven officers on mobile patrol shot and killed a purportedly mentally disabled person, notwithstanding that the only weapon found at the scene was a machete.<sup>9</sup> Notably, in July 1999, police engaged in a mass roundup of persons with mental disabilities.<sup>10</sup> By January, unfit to plead, those detainees remained in prison without trial.<sup>11</sup> In 2001, a magistrate judge freed a 76-year-old man deemed unfit to plead his case due to mental disability—he had been held in prison for 29 years without trial.<sup>12</sup> And then, there's Guatemala.

## I. INTRODUCTION

As part of a conference of legal academics interested in studying the human rights situation in Latin America, I traveled to Antigua, Guatemala on May 17, 2018.<sup>13</sup> The town, touted as a UNESCO World Heritage Site, and “best-preserved Spanish colonial city in Central America” is a favorite destination for volunteers and expats, seeking an inexpensive yet comfortable lifestyle.<sup>14</sup> Antigua's forbidding roads of uneven cobblestones are edged by narrow sidewalks teeming with international tourists. Encircled by volcanoes, Antigua's roads form a maze-like plat of walled-in colonial complexes, buildings, convents, churchyards, and homes, cloistering from the outsider what lies within.

The timing of the visit to Guatemala happened to roughly coincide with the one-year anniversary of the tragic fire which had occurred at the Hogar Seguro Virgen de la Asunción (hereinafter “Hogar Seguro”) in Guatemala City.<sup>15</sup> I also learned, after returning to the U.S., that at least two

<sup>9</sup> U.S. Dep't of State Guatemala report, *supra* note 1.

<sup>10</sup> BLANCK ET AL., *supra* note 3, at app. 201.

<sup>11</sup> U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices Jamaica 2002 (Mar. 31, 2003) [hereinafter U.S. Dep't of State Jamaica report] (it is estimated that between 200 and 500 mentally ill persons were confined during this period).

<sup>12</sup> *Id.*

<sup>13</sup> The conference took place in Antigua, Guatemala, and was hosted by Raquel Aldana, and Steven Bender, organizers of the LatCrit SNX. This substantively rich opportunity to visit Guatemala with legal scholars who are focused on international law, and human rights law, yielded unique perspectives on topics ranging from the role of prosecutorial power that cannot be fired by the President, to the treatment of Latin American immigrants arriving to and through Mexico, to conversations with environmental justice activists.

<sup>14</sup> Lucy Brown, *Rent in Antigua, Guatemala from \$220 a Month*, INT'L LIVING, Dec. 21, 2017, <https://internationalliving.com/rent-in-antigua-guatemala-from-220-a-month/>; *Antigua Tourism: Best of Antigua*, TRIPADVISOR, [https://www.tripadvisor.com/Tourism-g295366-Antigua\\_Sacatepequez\\_Department-Vacations.html](https://www.tripadvisor.com/Tourism-g295366-Antigua_Sacatepequez_Department-Vacations.html) (last visited Aug. 28, 2018).

<sup>15</sup> PRISCILA RODRÍGUEZ ET AL., STILL IN HARM'S WAY: INTERNATIONAL VOLUNTOURISM, SEGREGATION AND ABUSE OF CHILDREN IN GUATEMALA iv (Madeleine M.

institutions—Hogar Virgen del Socorro-Obras Sociales del Hermano Pedro and Fundación Albergue del Hermano Pedro, housing young children with and without disabilities, whose deplorable conditions were reported on by human rights advocacy groups—could be found within minutes of the conference site in Antigua.<sup>16</sup>

This Article is offered in support of the effort to expose these conditions and inform those interested in the realities of life for children who find themselves living in institutions. Part II of this Article focuses on the impacts of human rights law violations specifically within the context of children with and without disabilities confined to public or private institutions in Guatemala.

Secondly, Part II explains how children are separated and removed from their families for reasons that have been held to violate international law. Further, these separations take place as a result of corrupt influences and criminal incentives permeating the treatment of children with and without disabilities from vulnerable families. Part III argues that both the fact of and manner of the separation of children from their families has such deleterious effects on the children and family members so as to amount to torture; lastly, Part IV argues that international donors, volunteer-tourism, and adoption networks have been found to play a central role in the separation of children from their families, as well as institutionalization and subsequent commodification of the children in an international market demanding children to adopt.

## II. THE TREATMENT OF CHILDREN WITH AND WITHOUT DISABILITIES

Children living in institutions in Guatemala find themselves in the crosshairs of enormous disadvantage—often compounded by occupying multiple categories of the society’s vulnerable—minor, female, poor, indigenous, and “orphaned” with disability. As many of these children mature, they may succumb to the enormous risk of becoming young people, then adults, enduring life-long confinement. Disaggregating the local and international legal regimes implied by these multiple burdens is not always a

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Plasencia trans. hereinafter “translation by author”), (Jul. 16, 2018), <https://www.driadvocacy.org/wp-content/uploads/Still-in-Harms-Way-2018.pdf>.

<sup>16</sup> Eyewitness accounts of conditions and treatment endured by children in the institutions paint a macabre picture—all children, regardless of ability, were fed from a bottle containing porridge, all children with disabilities were tied to chairs, some were tied to the railings, the youngest children were tied to wheelchairs, watching television; “aggressive” girls were locked up in cages; teenagers were bound “with their hands behind their backs while they were lying on mats.” RODRÍGUEZ ET AL., *supra* note 15, at 14–15.

clear-cut endeavor.

Three important sources of legal protection for persons with disability in the Inter-American system are—the Protocol of San Salvador,<sup>17</sup> the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities,<sup>18</sup> and ILO 159 pertaining to Vocational Rehabilitation and Employment (Disabled Persons).<sup>19</sup> Article 6 of the Protocol of San Salvador provides: “State Parties undertake to adopt measures to make the right to work fully effective in particular, those directed to the disabled.”<sup>20</sup> Article 9 provides for welfare support in the case of disability.<sup>21</sup> However, conventions of more general applicability may prove worth consulting such as, the Convention Against Torture.<sup>22</sup> Given the circumstances in these cases, the tightened focus is most often on the provisions and institutions pertaining most readily to children.

#### A. *Multiple and intersectional discrimination against children with disabilities*

The United Nations Committee on the Rights of the Child has expressed a “deep concern” that, in Guatemala, the institutionalization of children with disabilities is used as a main measure in cases involving poverty, neglect, violence, or family separation.<sup>23</sup> Children with disabilities are especially at risk of being confined in an institution, and they endure higher rates of abuse, neglect, and violence in all its forms.<sup>24</sup> If not confined, children with disabilities in Guatemala face segregation in educational settings and lack of access to community services.<sup>25</sup> Children in public facilities in Guatemala are at high risk of violence and abuse, and at an

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<sup>17</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, Inter-Am. Comm’n H.R., Nov. 17, 1988, [hereinafter Protocol of San Salvador], <http://www.cidh.oas.org/Basicos/English/basic5.Prot.Sn%20Salv.htm>.

<sup>18</sup> Organization of American States [OAS], Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, AG/RES. 1608 (XXIX-0/99) (June 7, 1999), <http://www.oas.org/juridico/english/treaties/a-65.html>.

<sup>19</sup> Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) [C-159], International Labor Organization, June 20, 1983.

<sup>20</sup> Protocol of San Salvador, *supra* note 17, at 6.

<sup>21</sup> *Id.*

<sup>22</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>23</sup> U.N. Comm. on the Rights of the Child [CRC], *Concluding observations on the combined 5th and 6th periodic reports of Guatemala*, ¶ 30, U.N. Doc. CRC/C/GTM/CO/5-6 (Feb. 28, 2018) [hereinafter CRC *Concluding observations*].

<sup>24</sup> CRC *Concluding observations*.

<sup>25</sup> *Id.*

increased risk of torture.<sup>26</sup> As of 2017, the U.S. Department of State lists among Guatemala's most significant human rights violations: "violence against persons with disabilities in public care; cases of killing of women because of their gender, which authorities were prosecuting; police violence against lesbian, gay, bisexual, transgender, and intersex individuals; trafficking in persons; children engaged in the worst forms of child labor."<sup>27</sup>

The UN Committee on the Rights of Persons with Disabilities has noted with concern that the government has misdirected limited funding from international sources to finance facilities where children and adults with disabilities become permanently segregated in contravention of the government's responsibilities under the Convention on the Rights of Persons with Disabilities.<sup>28</sup> Reports of deplorable living conditions, systematic maltreatment, trafficking of, and violence against and abuse of children, mainly affecting girls and children with disabilities, raise concerns that the orphanages and public care facilities of Guatemala violate the provisions against torture and other cruel or degrading treatment or punishment provided under the Convention on the Rights of the Child.<sup>29</sup>

### *B. Hogar Seguro Virgen de la Asunción*

Located in San José Pinula, in Guatemala, Hogar Seguro Virgen de la Asunción (Hogar Seguro) is a public institution that had been used as an orphanage. At the time of the fire, Hogar Seguro was a low-slung cement structure crowned with orange-painted corrugated metal. In places, the fluted metal and the razor wire allowed for escape.<sup>30</sup> A facility with a maximum capacity of 500, "there were very likely more than 700, [and reportedly as many as 800] children detained at the institution, 173 of which had a disability."<sup>31</sup>

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<sup>26</sup> Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, ¶ 33, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) (cited generally in RODRIGUEZ ET AL., *supra* note 15, at 2).

<sup>27</sup> U.S. Dep't of State Guatemala report, *supra* note 1.

<sup>28</sup> U.N., Convention of the Rights of Persons with Disabilities [CRPD], Comm. on the Rights of Persons with Disabilities, Concluding observations on the initial report of Guatemala, CRPD/C/GTM/CO/1 ¶¶ 74-75 (Sept. 30, 2016) [hereinafter CRPD initial report].

<sup>29</sup> G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

<sup>30</sup> William Cumes, *Two teenagers escape from the annex of the Safe Home Virgen de la Asunción*, PRENSA LIBRE, Apr. 2, 2018, <https://www.prensalibre.com/guatemala/sucesos/dos-adolescentes-escapan-de-anexo-del-hogar-seguro-virgen-de-la-asuncion> (translation by author).

<sup>31</sup> RODRIGUEZ ET AL., *supra* note 15, at 4 (citing UNICEF, *Hogar Seguro Crisis: Crisis of Institutionalized Childhood and the System of Protection of the Infancy in Guatemala*, 4 (2017), [https://www.unicef.org/guatemala/spanish/INFORME\\_HOGAR\\_SEGURO\\_SP\\_8\\_MESES.pdf](https://www.unicef.org/guatemala/spanish/INFORME_HOGAR_SEGURO_SP_8_MESES.pdf)



On March 7, 2017, amid protests of rape, forced prostitution, and trafficking by staff dating back from 2015, 104 girls escaped from the shelter.<sup>32</sup> By that early evening, and following an on-site meeting at the shelter, Deputy Secretary for Social Welfare Anahí Keller ceded control of the shelter to the police as conditions had devolved to the point where “the authorities did not know what to do.”<sup>33</sup> Later that evening, located and apprehended by the police, the majority of the girls were returned to the shelter, and as punishment, 56 were locked up in a room measuring 44 square meters and prohibited from using the bathroom.<sup>34</sup> Following the staff’s denial of the girls’ request to be allowed to go to the bathroom the next morning, [and under circumstances unclear as to cause] a fire broke out in the room, and 41 girls suffocated and burned to death; the remaining girls were severely injured.<sup>35</sup>

Although police had the key to open the door, the girls spent up to twenty-five minutes in a blazing room, that reached a temperature of over 300 degrees Fahrenheit for nine of those twenty-five minutes.<sup>36</sup> “Rescuers took nearly an hour to respond. The girls were silenced for speaking out about their abuse. The shelter’s staff and government officials were arrested and charged with crimes.”<sup>37</sup>

News of the tragedy was met in the international community with outrage and skepticism that the Guatemalan government would, on its own,

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f). The Human Rights Ombudsman, who had been monitoring the facility for many years prior to the fire, reported to the Inter-American Commission on Human Rights that as of March 2017, there were 800 children.

<sup>32</sup> “The girls had been protesting their rapes and forced prostitution at the hands of the staff at the facility.” RODRÍGUEZ ET AL., *supra* note 15, at iv; *see also* Mariela Castañón, *Indicios de una Red de Trata: 106 Niños del Hogar Virgen de la Asunción aún no Aparecen*, LA HORA, Mar. 27, 2017, <http://lahora.gt/indicios-una-red-trata-106-ninos-del-hogar-virgen-la-asuncion-aun-no-aparecen/>.

<sup>33</sup> Jody García, *The first evidences and the pending questions of the Safe Home*, NÓMADA, Apr. 5, 2017, <https://nomada.gt/pais/las-primeras-evidencias-y-las-preguntas-pendientes-del-hogar-seguro/> (translation by author); *see infra* *The role of the government in the tragedy* discussing President Morales’ orders.

<sup>34</sup> RODRÍGUEZ ET AL., *supra* note 15, at 4–5; Inter-Am. Comm’n H.R. [IACHR], *Situation of Human Rights in Guatemala* Report No. 208/17, 224, n. 765 (2017) [hereinafter IACHR Report No. 208/17].

<sup>35</sup> RODRÍGUEZ ET AL., *supra* note 15, at iv, v & n.1.

<sup>36</sup> Jerson Ramos, *Hogar Seguro: fire lasted 25 minutes*, PRENSA LIBRE, Apr. 4, 2017, <https://www.prensalibre.com/guatemala/justicia/hogar-seguro-virgen-de-la-asuncion-acusan-a-exdirectivos-de-la-sbs>. The Deputy Inspector of the National Civil Police delayed opening the door for 9 minutes, while she and her colleagues stood idly by, watching what would be captured on security camera footage and later displayed in the indictment hearing, thin columns of white smoke threading its way out of the room where the girls were locked up, progressively becoming a haze, then dark cloud entirely obscuring the roof of the shelter. García, *supra* note 33 (translation by author).

<sup>37</sup> RODRÍGUEZ ET AL., *supra* note 15, at 4.

fulfill its duty to guarantee the life and integrity of the children and adolescents and “investigate the incident, identify those responsible, and provide reparations to the victims.”<sup>38</sup> Reports of inadequate prosecutions of the individuals apprehended has fueled this skepticism.<sup>39</sup> Guatemala’s government has since failed to comply with a court order to pay the survivors a lifetime pension for support, even though they are burdened by hospital and medical expenses as a result of the fire, and some have required amputations.<sup>40</sup>

Disability Rights International (DRI), a 501(c)(3) international human rights organization located in Washington, D.C., responded to the reports of abuse. Quite remarkably, they arrived for an on-site visit to the shelter the very day of the fire, March 7, 2017. DRI’s investigative team interviewed the survivors. Remaining until March 11, DRI’s team produced a detailed report of its findings.<sup>41</sup> On an emergent basis, a petition for precautionary measures was submitted to the Inter-American Commission on Human Rights (hereinafter, “IACHR”) to allow immediate assistance for the return of the children to their families.<sup>42</sup> The IACHR granted the petitions for

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<sup>38</sup> Maria Cristina Perceval, *UNICEF mourns deaths of young girls in Guatemala Shelter, calls for end of institutionalization of children*, UNICEF (Mar. 9, 2017), [https://www.unicef.org/infobycountry/media\\_95071.html](https://www.unicef.org/infobycountry/media_95071.html).

<sup>39</sup> *Id.*; see also, Manuel Mayén & William Oliva, *Caso Hogar Seguro | Criminal process could fall by legal formalism*, PRENSA LIBRE, Apr. 11, 2018, <https://www.prensalibre.com/guatemala/justicia/caso-hogar-seguro---proceso-penal-podria-caerse-por-peritaje-rechazado> (translation by author).

<sup>40</sup> See Asier Vera, *Judge orders that Government increase pension to survivors of the Safe Home; PGN refuses*, NÓMADA, Aug. 21, 2018, <https://nomada.gt/nosotras/somos-todas/q500-para-las-sobrevivientes-del-hogar-seguro-mientras-la-pgn-se-niega-a-demandar-una-pension-digna/> (translation by author) (15 of the 56 girls locked in the room that became an inferno survived. The youngest of the 15 survivors suffered third and fourth degree burns on her face, lost both her ears, left foot, and the fingers on her right hand to the fire. Consequently she has a permanent disability, and also requires psychiatric treatment.).

<sup>41</sup> Eric Rosenthal et al., *After the Fire Survivors of Hogar Seguro Virgen de la Asunción at risk*, DISABILITY RIGHTS INTERNATIONAL (Mar. 15, 2017), <https://www.driadvocacy.org/wp-content/uploads/After-the-Fire-March-15.pdf> (also headquartered in Washington, DC, and comprised of seven independent members, serving in a personal capacity, the Inter-American Commission on Human Rights works together with the Inter-American Court of Human Rights in its mission to promote and protect human rights in the American hemisphere); see also, Inter-Am. Comm’n H.R. [IACHR], “*Hogar Seguro Virgen de la Asunción*” *respecto de Guatemala*, Res. 8/17, Org. of American States [OAS] (2017) [hereinafter IACHR Res. 8/17], <http://www.oas.org/es/cidh/decisiones/pdf/2017/8-17MC958-16-GU.pdf> (translation by author).

<sup>42</sup> IACHR Res. 8/17, *supra* note 41. See OAS, *IACHR Grants Precautionary Measure to Protect Separated Migrant Children in the United States*, (Aug. 20, 2018), [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/186.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/186.asp) (relatedly, on August 16, 2018, pursuant to the OAS charter and the American Convention on Human Rights mandates implementing the principles of family unity and the best interest of the child, the IACHR granted two separate requests for precautionary measures in connection with the

precautionary measures on March 12, 2017.<sup>43</sup>

### 1. History of the Hogar Seguro shelter

The Hogar Seguro orphanage, one of the largest institutions for children in Latin America until its closure in 2017, had housed thousands of children with little or no access to their families.<sup>44</sup> As early as 2010, the Hogar Seguro had been identified as a locus of violence and trafficking.<sup>45</sup> The UN Committee on the Rights of the Child (CRC) recommended investigation of the institution.<sup>46</sup> In 2013, the seventy-year-old United Nations Children's Fund (UNICEF), the agency tasked with providing humanitarian aid and developmental assistance to children, visited the Hogar Seguro orphanage reporting at that time: "Hogar Seguro houses children from 18 years old down to tiny premature babies. Some babies just days old, some reaching out from their cribs and bassinets, some quietly, others not so quietly, desperate to be held. One toddler, Isios, caught UNICEF Executive Director Anthony Lake's eye, crying out as Lake walked by before smiling when the Executive Director stopped and picked him up." "No matter how good and caring the institution – and this is a good one, the workers here are doing wonderful work – nothing can replace the love of a family," said the Executive Director.<sup>47</sup>

By 2017, things must have changed. A visit by an inspection team from DRI to Hogar Seguro and other Guatemalan institutions revealed serious and

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implementation of the U.S. "Policy of Zero Tolerance" relating to conditions of reception at the southern and northern border of the United States and Mexico, respectively. The resolutions are in favor of migrant children who remain unaccompanied, and five identified families, submitted by the National Human Rights Commission of Mexico, the Office of the Ombudsman of Colombia, the Office of the Ombudsman of Ecuador, the Office of the Ombudsman of Guatemala, the Office of the National Human Rights Commissioner of Honduras and the Office of the Human Rights Ombudsman of El Salvador Texas Civil Rights Project, the Women's Refugee Commission, the Immigration Clinic of the University of Texas School of Law and Garcia & Garcia Attorneys at Law, P.L.L.C.).

<sup>43</sup> IACHR Res. 8/17, *supra* note 41 (the IACHR Rules of Procedure provide that in cases involving serious and urgent situations presenting a risk of irreparable harm, the IACHR may, *sua sponte* or at the request of a party, request that a State adopt precautionary measures).

<sup>44</sup> *In Guatemala, Executive Director welcomes steps towards greater focus on child protection systems*, UNICEF (Apr. 1, 2013), [https://www.unicef.org/infobycountry/guatemala\\_68509.html](https://www.unicef.org/infobycountry/guatemala_68509.html).

<sup>45</sup> Leire Ventas, *A Murder, Rapes, Abuse and More Than 200 Escapes: The Creepy Record of the Safe Home Virgen de la Asunción, The Shelter in Guatemala in which 40 Children Died*, BBC MUNDO, Mar. 20, 2017, <https://www.bbc.co.uk/mundo/noticias-america-latina-39328896> (translation by author).

<sup>46</sup> IACHR Res. 8/17, *supra* note 41.

<sup>47</sup> UNICEF, *supra* note 44.

pervasive abuses.<sup>48</sup> Newly built facilities that had received government and international funding were engaging in egregious forms of abuse where DRI observed “hundreds of children tied to wheelchairs and furniture and locked in cages. In some facilities, their heads are shaved, they do not go outside, and they languish in inactivity.”<sup>49</sup>

Bounded by an orange aluminum corrugated sheet roof topped with razor wire, ostensibly so as to prevent escapes, the shelter’s shanty appearance is much like a porous and insecure prison.<sup>50</sup> Escapes from the Hogar Seguro were a regular occurrence.<sup>51</sup> Media accounts tell of 178 cases of disappearances of children from the Hogar Seguro in the 15 months preceding the fire, implying human trafficking and recruitment for child pornography, and sexual exploitation.<sup>52</sup> At least 100 of the reported cases of missing children between January 1, 2016 and March 12, 2017, were of girls between the ages of 12 and 17, and 78 boys between the ages of 9 and 17.<sup>53</sup> The IACHR narrated a litany of events taking place at the Hogar Seguro between 2013 to 2016, shining a light on the violence and risk to which the children confined there were routinely subjected.<sup>54</sup> There were previous

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<sup>48</sup> Rosenthal et al., *supra* note 41.

<sup>49</sup> RODRÍGUEZ ET AL., *supra* note 15, at v; *see, e.g.*, Rosenthal et al., *supra* note 41, at 1 (photograph of a little girl, on her knee, gazing up at the camera, with her head shaved, tied to a railing).

<sup>50</sup> *See* photographs in Castañón, *supra* note 32; *see also* photographs of Hogar Seguro located in Zone 15 of Guatemala City accompanying report in RODRÍGUEZ ET AL., *supra* note 15.

<sup>51</sup> *E.g.*, Willian Cumes, *Dos adolescentes escapan de anexo del Hogar Seguro Virgen de la Asunción*, PRENSA LIBRE, Apr. 2, 2018, <https://www.prensalibre.com/guatemala/sucesos/dos-adolescentes-escapan-de-anexo-del-hogar-seguro-virgen-de-la-asuncion> (reporting that two teenagers escaped from the annex); IACHR, *supra* note 34, at 223 (noting that from May to October 2016, 43 adolescents had run away from the shelter). By November 16, 2016, 18 of the adolescents had been reportedly located, while the whereabouts of the others remained unknown. *Id.* Moreover, the IACHR reported that 55 girls had allegedly disappeared between September to November, 2016; consequently, the Office of the Public Prosecutor brought criminal complaints to investigate the disappearances as linked to human trafficking. *Id.* at n.763.

<sup>52</sup> Castañón, *supra* note 32.

<sup>53</sup> *Id.*

<sup>54</sup> The IACHR describes a facility that had run amok and was entirely beyond the control of the authorities charged with protecting the children and adolescents: in April 2013, an adolescent girl with disabilities was sexually assaulted by 5 teenage boys, yet she was returned to Hogar Seguro following the event; in August and September 2013, dozens of adolescents escaped; a fire was ignited where the girls who had children themselves were housed; and on October 19, 2013, a 14 year old girl with disabilities was presumptively strangled to death by two other adolescents; in 2016, a visit by the Office for the Defense of Victims of Human Rights (Defensoría de Personas Víctimas de la Procuraduría de Derechos Humanos) found that conditions had not improved, and there were 49 revolving-door successful “escapes” suggesting that a human trafficking ring had established itself and had access to the facility. IACHR Res. 8/17, *supra* note 41; *see also* Jody García, *Las primeras evidencias y las*

reports of escapes by adolescents, as well as disturbing screams and cries for help emanating from the orphanage, called in by distressed neighbors.<sup>55</sup>

Discrepancies exist in the reports of the actual number of children living at the Hogar Seguro on March 7, 2017, at the time the fire broke out. Prior to the fire, the Human Rights Ombudsman reported that 800 children were living at the Hogar Seguro.<sup>56</sup> The government reported only 600 children.<sup>57</sup> After the fire, the Hogar Seguro was closed and the government has not made a complete accounting of the number or whereabouts of all of the survivors. For example, UNICEF has reported that after the fire, 33 children remain missing.<sup>58</sup> The shelter itself lacked any computerized database to keep track of the number and identity of its charges.<sup>59</sup>

One year after the fire, 180 children institutionalized at the Hogar Seguro were transferred to other institutions.<sup>60</sup> Of these 180 survivors, 120 have disabilities.<sup>61</sup> However, the precautionary measures resolution of the IACHR recommended that the government put in place effective measures and supports to enable the reintegration of the survivors with their biological, extended, or substitute families in the community.<sup>62</sup>

In 2016, the UN Convention on the Rights of Persons with Disabilities Committee (CRPD Committee) requested that Guatemala abolish the

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*preguntas pendientes del Hogar Seguro*, NÓMADA, Apr. 5, 2017, <https://nomada.gt/pais/las-primeras-evidencias-y-las-preguntas-pendientes-del-hogar-seguro/> (56 girls were placed overnight in a room with the capacity to sleep 11 persons).

<sup>55</sup> Cumes, *supra* note 30.

<sup>56</sup> OAS, *CIDH otorga medidas cautelares a Guatemala y lamenta muertes por incendio en el Hogar Seguro Virgen de la Asunción*, (Mar. 13, 2017), <http://www.oas.org/es/cidh/prensa/comunicados/2017/031.asp>.

<sup>57</sup> RODRÍGUEZ ET AL., *supra* note 15, at 4, 6. While there have been discrepancies in the reports of the number of the children at Hoar Virgen de la Asunción at the time of the fire the IACHR adopted the report of 800 children and adolescents. See IACHR Res. 8/17, *supra* note 41, at 2, 8. ¶ i (referencing the 800 children number in its decision).

<sup>58</sup> RODRÍGUEZ ET AL., *supra* note 15, at 6.

<sup>59</sup> Francisco Goldman, *The Story Behind the Fire That Killed Forty Teen-Age Girls in a Guatemalan Children's Home*, THE NEW YORKER, Mar. 19, 2017, <https://www.newyorker.com/news/news-desk/the-story-behind-the-fire-that-killed-forty-teen-age-girls-in-a-guatemalan-childrens-home>.

<sup>60</sup> RODRÍGUEZ ET AL., *supra* note 15, at 5, 25-26. As an example, DRI tells the story of one of the survivors of Hogar Seguro, Carlos, an 11-year-old boy whose physical disability causes him to use a wheelchair; his single mother lacks the resources or support to keep him at home.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> IACHR Res. 8/17, *supra* note 41, at 7. The IACHR specifically requested that the government put in place effective measures and supports to enable the reintegration of the survivors with their biological, extended, or substitute families in the community. Moreover, the I/A Court H.R. has recently ordered Guatemala "to guarantee the progressive deinstitutionalization of the girls, boys and adolescents who are under its care, applying alternative measures to institutionalization." *Ramírez Escobar et al. v. Guatemala*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 351, ¶ 408 (Mar. 9, 2018).

practice of institutionalizing children.<sup>63</sup> U.S. involvement in the Hogar Seguro has meant that funding received from the U.S. will be used to construct new institutionalized housing for survivors with disabilities; and the Hogar Seguro has been repurposed as a juvenile detention center.<sup>64</sup>

## 2. The role of the government in the tragedy

By April 27, 2018, thirteen months after the tragic fire, President Jimmy Morales<sup>65</sup> visited the Hogar Seguro for the first time, to inaugurate the repurposing of the orphanage as a “Centro Especializado de Reinserción” (Reinsertion Specialization Center) to confine juvenile offenders.<sup>66</sup> He made no mention of the event that occurred, nor the girls that perished under the watch of the Civil National Police (hereinafter “CNP”).<sup>67</sup> As discussed in *Hogar Seguro Virgen de la Asunción*, President Morales had been kept fully apprised as conditions developed at the shelter on March 7, and prior to the fire he had given the order that the girls be guarded by over 100 police officials of the CNP stationed at the shelter.<sup>68</sup> At the subsequent criminal

<sup>63</sup> CRPD, *supra* note 28, at ¶54; see Eric Rosenthal, *A Mandate to End Placement of Children in Institutions and Orphanages: The Duty of Governments and Donors to Prevent Segregation and Torture in PROTECTING CHILDREN AGAINST TORTURE IN DETENTION: GLOBAL SOLUTIONS FOR A GLOBAL PROBLEM*, 303, 326 (2017) <https://www.driadvocacy.org/wp-content/uploads/Rosenthal-Torture-seg-Feb-16.pdf>; see generally Eric Rosenthal & Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19(2) HUM. RTS. BRIEF 13, 15 (2012) (describing DRI’s efforts to seek recognition of improper treatment as torture).

<sup>64</sup> RODRÍGUEZ, *supra* note 15, at 6 (citing Asier Vera, *During his first visit to Hogar Seguro, Jimmy ‘forgot’ to mention the 56 girls*, NÓMADA, Apr. 27, 2018, <https://nomada.gt/nosotras/somos-todas/durante-su-primera-vista-al-hogar-seguro-jimmy-se-olvida-de-mencionar-a-las-56-ninas/>).

<sup>65</sup> Louisa Reynolds, *In Guatemala, anti-establishment presidential candidate benefits from corruption scandals*, THE TICO TIMES (Costa Rica), June 10, 2015, <http://www.ticotimes.net/2015/06/10/in-guatemala-anti-establishment-presidential-candidate-benefits-from-corruption-scandals> (Jimmy Morales had previously lost his mayoral bid in the city of Mixco in 2011, running for the since defunct right-wing party Acción de Desarrollo Nacional (ADN). Regarded as an anti-establishment candidate in the 2015 presidential elections, Jimmy Morales had been propelled to fame over the previous 15 years as a comedian in the popular television slapstick comedy series eponymously called “Moralejas” (“Morals”) playing alongside his brother Sammy Morales.).

<sup>66</sup> Asier Vera, *During his first visit to Hogar Seguro, Jimmy ‘forgot’ to mention the 56 girls*, NÓMADA, Apr. 27, 2018, <https://nomada.gt/nosotras/somos-todas/durante-su-primera-vista-al-hogar-seguro-jimmy-se-olvida-de-mencionar-a-las-56-ninas/> (translation by author) (in April, 2018, during his visit to the shelter, President Morales reportedly stood 20 meters from the room where the girls met their death and did not mention the girls at all, but instead, he instead (oddly) took the occasion of his invocation speech to profess his love of his wife).

<sup>67</sup> *Id.*

<sup>68</sup> RODRÍGUEZ, *supra* note 15, at 3, n.17 (citing Vera Asier, *The lies about March 8 and*

proceedings of the Deputy Minister for Social Welfare, Anahí Keller, who was directly in charge of the Hogar Seguro, and had ceded control of the shelter to the police, the “Femicide” unit prosecutor revealed that Lucinda Marroquín, the Deputy Inspector of the CNP, had refused to open the door to the room where the girls were being kept, telling other agents, “let those bitches burn. If they were so good at escaping [the day before], I want them to try to escape now.”<sup>69</sup> Although murder charges were brought against Marroquín, a judge has since dismissed the case against Keller.<sup>70</sup>

Among the many children and adolescents who had been institutionalized at the shelter were those who had been adjudged sexually abused, abandoned, mistreated, neglected, or just plain “rebellious.”<sup>71</sup> Like the children at the Hogar Seguro, but instead “orphaned” in the Hogar de la Asociación Los Niños de Guatemala, the Ramírez brothers’ story demonstrates that the separation of children from their families has been a long standing problem in Guatemala.<sup>72</sup>

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*Jimmy's order that changed everything*, NÓMADA, Nov. 20, 2017, <https://nomada.gt/nosotras/somos-todas/las-mentiras-sobre-el-8-de-marzo-y-la-orden-de-jimmy-que-cambio-todo/>.

<sup>69</sup> Asier, *supra* note 68 (I am greatly indebted to the research found in DRI’s RODRÍGUEZ ET AL., *supra* note 15, at n.17 directly quoting this remarkable language).

<sup>70</sup> Asier Vera, *This is why Anahí Keller could return to trial for the Safe Home*, NÓMADA, Jan. 8, 2018, <https://nomada.gt/nosotras/somos-todas/esta-es-la-razon-por-la-que-anahi-keller-podria-regresar-a-juicio-por-el-hogar-seguro/>; IACHR Report No. 208/17, *supra* note 34 ¶ 446, at 224 (seven persons, including Former Secretary of Social Welfare Carlos Antonio Rodas Mejía, Anahí Keller Zabala, Assistant Secretary of Protection and Foster Care for Children and Adolescents, and Santos Torres were charged with involuntary homicide, negligent bodily harm, abuse of authority, breach of duties, and mistreatment of minors); *see also*, Redacción, *Guatemala: Three former officers arrested in connection with the fire that killed 40 children*, BBC MUNDO, Mar. 14, 2017, <https://www.bbc.co.uk/mundo/noticias-america-latina-39266233>; García, *supra* note 33 (the prosecutor argued that neither Rodas, Keller or Torres had adequate training or experience to deal with the crisis at the Hogar Seguro. Keller’s professional background, in particular, he argued, left her ill-equipped to deal with the crisis as her professional experience was in television production prior to being elevated to the position of Assistant Secretary of Protection and Foster Care for Children and Adolescents, directly in charge of the Hogar Seguro).

<sup>71</sup> Pia Flores, *Being gay: They wanted to “cure” me with an exorcism and with the Safe Home*, NÓMADA, Feb. 7, 2018, <https://nomada.gt/identidades/ser-gay-quisieron-curarme-con-un-exorcismo-y-con-el-hogar-seguro/> (the rather vague term “rebellious” perhaps includes children and adolescents whose sexual orientation or gender identification is suspect. Interned at the Hogar Seguro at age 15 by his mother as punishment for being gay, “Alex” recounts his life with other gay boys at the shelter.); IACHR Report No. 208/17, *supra* note 34 ¶ 445, at 224, n.764 (“according to information from the Office of the Counsel General of the Nation (Procuraduría General de la Nación), the five major causes for the institutionalization of these 600 children and adolescents was: violated right, 104 children and adolescents institutionalized (17.3%); abandonment, 101 (16.8%); mistreatment, 82 (13.7%); neglect, 59 (9.8%); and rebelliousness, 41 (6.8%). Some of the children confined there have been institutionalized simply because they have no family to belong to.”).

<sup>72</sup> Ramírez Escobar et al., *supra* note 62 ¶¶ 84-86, at 31, ¶ 344, at 115 (the Ramírez boys

### C. *Caso Ramírez Escobar and others v. Guatemala*

In 1997, the Guatemalan government institutionalized two brothers, ages 7 and 2, after declaring them “abandoned,” and separating the boys from their mother, father, and grandmother, with the professed intention of restoring the children’s right to a family-through adoption.<sup>73</sup> Over twenty years later, on March 9, 2018, the Inter-American Court of Human Rights (hereinafter, the “Court” or the “I/A Court H.R.”) ruled that the Ramírez boys’ institutionalization as well as their adjudicated status of abandonment violated American Convention of Human Rights (hereinafter “ACHR” or “American Convention”) Articles 17 (protection of the family), 19 (rights of the child), 1.1 (discrimination), and 24 (equality before the law).<sup>74</sup>

#### 1. Inappropriate factors in the declaration of “abandonment”

The I/A Court H.R. held that Guatemala had discriminated against the Ramírez boys and their parents in violation of the American Convention by reaching the decision that the boys did not have any biological or extended family capable of providing the boys with protection and an adequate home, and that the Government reached this decision by rejecting the maternal grandmother on the basis of her sexual orientation.<sup>75</sup>

Taking the “unstable economic situation” of the boys’ mother and grandmother into account, the government removed the two Ramírez brothers from their family home and interned them in the Hogar de la Asociación Los Niños de Guatemala, even though the grandmother argued that the boys should live with her.<sup>76</sup> In addition to the family’s poverty, and in violation of Article 1.1 of the American Convention, the government expressly identified and factored in yet another inappropriate metric—their grandmother’s “homosexual preferences”—as manifest evidence that she was unfit to care or raise her own grandchildren.<sup>77</sup> The government argued that the children would not be safe with their grandmother as they would be

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were sent to the Hogar de la Asociación Los Niños de Guatemala on January 9, 1997; shortly thereafter, on or around February 3, the two brothers were separated and were not reunited; their mother was not told of the whereabouts of her children and was prohibited from visiting them at the “orphanage.”)

<sup>73</sup> *Id.* ¶ 19.b.ii, at 9-10.

<sup>74</sup> *See generally id.* ¶¶ 235-37, at 79.

<sup>75</sup> *Id.* at 106, at n.526.

<sup>76</sup> Ramírez Escobar et al., *supra* note 62 ¶ 98, at 36 (grandmother’s sexual orientation as basis for separation from family) and ¶ 303, at 98 (poverty as basis for separation from family).

<sup>77</sup> *Id.* ¶¶ 301-02, at 97-98.



taught these (lack of) “values” by their maternal grandmother if left under her care, thereby reaching the conclusion that the children did not have a biological family equipped to protect and raise them.<sup>78</sup>

## 2. Outcomes twenty years later

Illegal adoption is big business in Guatemala, fetching thousands of U.S. dollars per child.<sup>79</sup> For example, U.S. adoptive parents are reportedly willing to pay between \$20,000 and \$40,000 in adoption costs and expenses for a newborn baby.<sup>80</sup> The children’s parents alleged that the neighbor who was entrusted to care for and protect the children while their mother was running an errand for work, instead colluded with corrupt officials and judges to have the children kidnapped and subsequently sold and taken abroad through an illegal international adoption ring.<sup>81</sup> The Court discusses repeatedly, and at length, elements of possible corruption and illicit economic gain motives surrounding international adoptions in this and other cases in Guatemala.<sup>82</sup> The brothers were indeed adopted by separate families, in Illinois and Pennsylvania; the Court ordered an immediate investigation to find the younger brother as his whereabouts remain unknown.<sup>83</sup> Separation of children from their families under irregular or illegal circumstances may predetermine their safety. In the case of disabled children who grow up in institutions, and as adults are transferred to the notorious Federico Mora Hospital, grave risk to their safety is a significant concern.

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<sup>78</sup> *Id.* ¶¶ 98, 301.

<sup>79</sup> The problem of commodification of children through adoption existed in the 1990’s and persists in 2018. *See id.* ¶ 235, at 79; *see e.g.*, RODRÍGUEZ ET AL., *supra* note 15, at 17 (“owning an orphanage has become a booming business.”).

<sup>80</sup> Ramírez Escobar et al., *supra* note 62, at 102-03, n.511.

<sup>81</sup> *Id.* at 106, n.526.

<sup>82</sup> *See generally id.* ¶¶ 235-37. Although the Court noted that it had “previously concluded that the adoption of the Ramírez brothers was carried out after an arbitrary separation of the family and in breach of international regulations in issue of adoption, for what constituted an irregular or illegal adoption. Also, it was found that during the time of the events transnational organized crime networks were formed, dedicated to irregular adoptions promoting the commercialization of Guatemalan girls and boys.” (translation by author). *Id.* ¶ 318. The Court subsequently and specifically held that insufficient evidence existed in the case to prove that the crime of human trafficking and violations of article 2 of the American Convention took place. *Id.* ¶¶ 320-21.

<sup>83</sup> *Id.* ¶ 2(c)(2); *see also*, Rico Borz, *Guatemala: Osmin Ricardo Tobar Ramirez (Rico Borz) returns to his family after 15 years*, YOUTUBE (May 19, 2012), <https://www.youtube.com/watch?v=IEkmpGNGyz0>.

D. “Federico Mora” psychiatric facility for adults

“Walking into one of the wards is like entering a hell on Earth. We find more patients in rags sitting on the floor and in plastic chairs, rocking themselves for comfort. There appears to be no form of stimulation in the dark, sparse ward.”<sup>84</sup>

— Chris Rogers of the BBC reports while undercover at Federico Mora.

“The Federico Mora Hospital is the most dangerous facility our investigators have witnessed anywhere in the Americas.”<sup>85</sup>

— DRI, Petition for Precautionary Measures.

Located in one of the most dangerous zones of Guatemala City, and collocated immediately next door to a prison, the Federico Mora Hospital (the “Federico Mora”) is the only public psychiatric hospital and the only hospital in Guatemala that provides free outpatient services.<sup>86</sup> The Human Rights Commission reported that one woman did not receive medical treatment for a broken arm for three days.<sup>87</sup> A young man writhed on the hallway floor, possibly from a seizure, and did not receive medical attention.<sup>88</sup>

Presaging the conditions and practices at the Hogar Seguro, in 2004, the personnel and staff at the Federico Mora had absolutely no training or had outdated training.<sup>89</sup> On inspection, at the time of the petition for precautionary measures, children were found mixed in with the adult population, and criminal detainees “wandered around the facility at will.”<sup>90</sup>

1. Sexual abuses

To provide an idea of the unparalleled sexual abuse, torture, and undignified care observed in three years’ worth of in-person visits to the Federico Mora, a condensed catalog of the eyewitness accounts would

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<sup>84</sup> Chris Rogers, *Inside the ‘world’s most dangerous’ hospital*, BBC NEWS, Dec. 5, 2014, <https://www.bbc.com/news/magazine-30293880> (on December 5, 2014, the BBC published a stunning exposé of the Federico Mora, “the world’s most dangerous” and Guatemala’s largest public hospital. The report includes disturbing photographs videos, and an associated audio file.).

<sup>85</sup> DISABILITY RTS. INT’L & HUM. RTS. OFF. OF THE ARCH-BISHOP OF GUAT., PRECAUTIONARY MEASURES PETITION – 224 PATIENTS AT THE FEDERICO MORA HOSPITAL, GUATEMALA 1 (2012) [hereinafter FEDERICO MORA PETITION].

<sup>86</sup> *Id.* at 2–3.

<sup>87</sup> FEDERICO MORA PETITION, *supra* note 85, at 22.

<sup>88</sup> *Id.* at 21.

<sup>89</sup> *Id.* at 17.

<sup>90</sup> *Id.* at 10; RODRÍGUEZ ET AL., *supra* note 15, at 1 (in 2018, children are no longer found at the Federico Mora Hospital; however, abuses and ill treatment of the residents continue).

include: women and men patients left naked from the waist down;<sup>91</sup> accounts of guards who forced women to take off their clothes and dance, and also rape them;<sup>92</sup> and documented cases by the hospital's Human Rights Commission of guards ordering patients to undress, masturbate, or have sexual relations with other patients in front of them.<sup>93</sup>

## 2. Inhuman and degrading treatment

The Federico Mora also stood out as unmatched in its use of isolation rooms—where people detained are placed in dark, 2x2 meters in size barren rooms with nearly total sensory deprivation—“forced to urinate and defecate in the same place that they eat and sleep.”<sup>94</sup> One patient locked in the above isolation ward was a 16-year-old boy.<sup>95</sup>

## 3. Inhuman and degrading conditions

Patients were observed wearing filthy clothing, covered in their own urine or feces, with burns on their bodies and faces, and with swollen eyelids.<sup>96</sup> The water is unclean and unsuitable for drinking.<sup>97</sup> The hospital was filthy and unhygienic<sup>98</sup>—there were no products for personal hygiene, such as soap, toothbrushes, soap, toilet paper, or sanitary pads;<sup>99</sup> the toilets were observed to be blocked or destroyed;<sup>100</sup> the hospital's common areas, patio, and wards were full of feces;<sup>101</sup> and the mattresses were puddled with urine.<sup>102</sup> Elderly patients stood naked and shivering queued for a shower in cold water;<sup>103</sup> lice and fleas infected the patients.<sup>104</sup>

Many of the hospital's staff and medical personnel, fatigued by the overwhelming scale of abuse, and frightened for their own safety, hesitated to report the abuses.<sup>105</sup> On November 20, 2012, the IACHR granted

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<sup>91</sup> FEDERICO MORA PETITION, *supra* note 85, at 11.

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.* at 11.

<sup>94</sup> *Id.* at 13.

<sup>95</sup> *Id.* at 10.

<sup>96</sup> FEDERICO MORA PETITION, *supra* note 85, at 21.

<sup>97</sup> *Id.* at 25.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 26.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 27.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 10.

precautionary measures for 334 patients at the Federico Mora Hospital in Guatemala.<sup>106</sup> The request for precautionary measures alleged that *all* 334 children and adults who were hospitalized at the Federico Mora Hospital were in a situation of risk.<sup>107</sup> Even after seven years of documented “extensive sexual abuse and trafficking,” the hospital continues to be darkly characterized by abuses.<sup>108</sup> Persons unrelated to institutionalized female patients have been able to sign authorization forms and remove women from the hospital on nothing more than the say-so of the hospital deputy director.<sup>109</sup>

#### 4. Residents with mental disabilities

Patients with intellectual disabilities were subjected to worse, more grotesque inhuman treatment and conditions. For example, women and men housed in these wards were kept during the day on roofless outdoor patios, half-naked, and exposed to the sun in a facility where the water is not potable.<sup>110</sup> The prevailing conditions at the Federico Mora Hospital in August 2017, “reflect[ed] the lack of protection of persons with disabilities in Guatemala.”<sup>111</sup>

However, children with disabilities confined to orphanages in Guatemala most likely remain institutionalized for the rest of their lives—and may end up at the “Federico Mora” as adults.<sup>112</sup> Thus, for many children with disabilities in Guatemala a life of confinement in abusive facilities, and abuse at the hands of orphanage staff, and perhaps trafficking, may well be guaranteed.<sup>113</sup> Even a short stay on an emergent basis to receive

<sup>106</sup> Asier Vera, “A cualquiera que te quieras llevar ahorita, yo te la entrego”, dice el subdirector del Federico Mora, NÓMADA, July 16, 2018, <https://nomada.gt/identidades/guatemala-urbana/a-cualquiera-que-te-quieras-llevar-ahorita-yo-te-la-entrego-dice-el-subdirector-del-federico-mora/>.

<sup>107</sup> FEDERICO MORA PETITION, *supra* note 85, at 1.

<sup>108</sup> RODRÍGUEZ ET AL., *supra* note 15, at v; *see also* Rosenthal et al., *supra* note 41, at 317 (documenting the trafficking of girls for sex and forced labor within and from Guatemala; “women and girls are widely sterilized—at times explicitly as a way for institutions to cover up sexual abuse within institutions.”) (footnotes omitted).

<sup>109</sup> Asier Vera, *Audio desde el psiquiátrico: “A cualquier que te quieras llevar, te la entrego”*, NÓMADA, Aug. 6, 2018, <https://nomada.gt/nosotras/somos-todas/audio-desde-el-psiquiatrico-a-cualquier-que-te-quieras-llevar-te-la-entrego/> (“at the time of visiting the women’s pavilion, where there were 64 patients, the deputy director of Federico Mora prevailed upon this journalist to say: “Of these women who are here, I give you anyone; anyone you want to take, you right now. Whoever you want to take, I give her to you.”) (translation by author); *see also*, Vera, *supra* note 106.

<sup>110</sup> FEDERICO MORA PETITION, *supra* note 85, at 28–29.

<sup>111</sup> IACHR Report No. 208/17, *supra* note 34 ¶455, at 229.

<sup>112</sup> RODRÍGUEZ ET AL., *supra* note 15, at iv.

<sup>113</sup> *Id.* at v.

medical treatment in an institution for persons with disabilities could end tragically as is evidenced in *Damião Ximenes Lopes v. Brazil*, the first human rights decision of the I/A Court of H.R. involving a person with disability in detention.<sup>114</sup> As explained in *Multiple and Intersectional Discrimination Against Children with Disabilities*, the law applicable to children with disabilities may be gathered from regimes not focused specifically on children and that makes the *Lopes* case relevant to assessing the legality of observed use of restraints against children.

### *E. Damião Ximenes Lopes v. Brazil*<sup>115</sup>

Following a three-day stay at the Casa de Reposo Guararapes (Guararapes Rest Home, hereinafter “Rest Home”), Damião Ximenes-Lopes, who suffered a form of mental illness, died.<sup>116</sup> The record contained evidence of his having been physically beaten and tortured: cuts and bruises about the hands, feet, ankles and face.<sup>117</sup> Hours before his death his mother visited him at the Rest Home.<sup>118</sup> In a hospital purporting to provide her son with medical care, she instead “found him with his hands tied behind his back, bleeding and smelling of excrement.”<sup>119</sup> He would die a violent death.<sup>120</sup> An autopsy concluded that he had external injuries with cause of death listed as “unknown.”<sup>121</sup>

#### 1. The significance of *Lopes*

The case has major significance on several fronts. First, the Court held that Brazil was responsible for the acts and omissions of medical personnel acting in a *private* setting pursuant to an agreement between the private facility and the state. Second, the Court established that persons with mental disabilities living in or undergoing treatment at an institution are “particularly vulnerable to torture and other types of cruel, inhuman or degrading treatment.”<sup>122</sup>

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<sup>114</sup> ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 178 (2014).

<sup>115</sup> *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser C) No. 149, ¶ 2 (July 4, 2006).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* ¶ 47-1.

<sup>118</sup> *Id.* ¶ 112(9).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶ 112(11).

<sup>121</sup> *Id.* ¶ 112(14).

<sup>122</sup> *Id.* ¶ 106.

Lastly, and of particular relevance to the plight of children and adults with mental disabilities tethered to chairs and railings at the Hogar Seguro, and in many other institutions throughout Guatemala, the I/A Court H.R. invoked Articles 4 and 5 of the ACHR in evaluating the medical treatment and conditions of detention endured by Mr. Lopes.<sup>123</sup>

## 2. Specific holdings pertaining to the use of restraints

The Court concluded that the health care staff's use of restraints was in contravention of Article 5 of the ACHR, stating:

The Court considers that restraint is one of the most aggressive measures to which a patient under psychiatric treatment can be subjected. In order for restraint to be in accordance with the respect for the psychological, physical, and moral integrity of a person, pursuant to the standards required by Article 5 of the [ACHR], it should be used as a *last resort* and with the only purpose of protecting the patient, or else the medical staff or third persons, when the behavior of the patient involved is such as to pose a threat to their safety. Restraint can have no purpose other than the foregoing, and should be implemented only by qualified staff rather than by patients.<sup>124</sup>

The Court established the right of persons with mental disabilities to receive treatment in the least restrictive means possible with respect for the patient's welfare and dignity.<sup>125</sup> *Lopes* thus serves as genesis of international liability for failure to regulate and supervise publicly or privately-operated hospitals and clinics and established the rights to life and humane treatment and conditions of confinement of persons with mental disabilities in detention.

### *F. The U.N. Committee on the Rights of the Child February 28, 2018 Concluding Observations on the combined fifth and sixth periodic reports of Guatemala*

The perspective of the U.N. Committee on the Rights of the Child (hereinafter, "CRC Committee") is especially significant on this subject as it has studied for many years the case of Guatemala and the high number of children in institutions, calling for the deinstitutionalization and community

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<sup>123</sup> Ximenes-Lopes, *supra* note 115, ¶ 122.

<sup>124</sup> *Id.* ¶ 134.

<sup>125</sup> *Id.* ¶ 135.

reintegration of its children.<sup>126</sup> As of 2018, serious areas of concern pertaining to the rights of children persist in Guatemala.<sup>127</sup> Nearly one year after the fire, in February 2018, the CRC Committee continues to have “serious concerns” about the treatment of children in Guatemala, and its “persistently high rates of violence against and homicide and femicide of children[.]”<sup>128</sup> The CRC Committee has expressed serious concerns pertaining to the right to life, survival and development (paras. 15–16), torture and other cruel or degrading treatment or punishment (paras. 20–21), children deprived of a family environment (paras. 27–28), children with disabilities (paras. 30–31), standard of living (paras. 35–36) and indigenous children (paras. 42–43).<sup>129</sup>

1. Four points of reform recommended in response to the fire at Hogar Seguro

The CRC Committee urgently called for Guatemala to establish a comprehensive strategy to end abuse of children living in institutions and in juvenile detentions. Notably, the CRC Committee’s Concluding Observations singled out, *inter alia*, five points of reform necessary for Guatemala to respond to the fire at the Hogar Seguro—(a) an investigation into the events that led to and surrounding the fire, (b) an assessment of the psychosocial situation of the surviving victims of the fire, (c) a reparations program, (d) a guarantee of non-recurrence of such an incident, and (e) a

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<sup>126</sup> CRC *Concluding observations*, *supra* note 23, ¶¶ 74–75 (growing trend towards voluntarism in Guatemala); *see infra* note 146.

<sup>127</sup> Tracy Geoghehan, *The Many Faces of Exclusion: End of Childhood Report 2018*, 31–35, tbl.1 tbl.2 Save the Children (2018) (the End of Childhood Index 2018 tracks the number of children affected by these “childhood ender” events. The End of Childhood Index 2018 indicators are under-5 mortality rate (child dies), child stunting (child is severely malnourished), out-of-school children, children engaged in child labor (child begins work life), adolescents currently married or in union (% girls aged 15–19)(child marries), adolescent birth rate (births per 1,000 girls aged 15–19)(child has a child), population forcibly displaced by conflict, and child homicide rate (deaths per 100,000 population aged 0–19)(child is a victim of extreme violence). More than half of the world’s children are at risk for suffering an early end to their childhood. In absolute numbers, more than 1.2 billion children are at risk of either dying before reaching age 5, stunted growth from malnutrition, never entering or not completing school, child labor, child marriage, child pregnancy, extreme violence, and homicide as a result of poverty, conflict and discrimination against girls. The highest number of children at risk for enduring these life-changing, childhood-ending experiences live in the poorest, conflict-ridden, gender-biased countries. The 2018 “End of Childhood Index Rankings, Guatemala ranked 152 (with a total score of 619) out of 175 countries, characterized by discrimination against girls. Guatemala’s score is noted with the letter “G” indicating that the country is characterized by discrimination against girls.

<sup>128</sup> CRC *Concluding observations*, *supra* note 23, ¶ 15(a).

<sup>129</sup> CRC *Concluding observations*, *supra* note 23, ¶¶ 20, 30–31, 47.

deinstitutionalization and monitoring program to ensure that surviving children transferred from the Hogar Seguro are either deinstitutionalized and reunited with their families or are sufficiently monitored if transferred to other institutions.<sup>130</sup>

## 2. Recommendations pertaining to torture and cruel, inhuman and degrading (CID) treatment of children

Beyond the Hogar Seguro, the CRC Committee expressed “deep concern” at the high level of violence against children in Guatemala—including sexual violence and exploitation, abuse, trafficking, ill-treatment and neglect in *all* settings.<sup>131</sup>

In its discussion of children enduring torture and other cruel or degrading treatment in Guatemala’s institutions, the CRC Committee cited generally “[t]he deplorable living conditions and maltreatment of, and reports of disappearances and trafficking of, violence against and abuse of, children in public care centres, mainly affecting girls and children with disabilities”;<sup>132</sup> it also specifically, referenced the fire and deaths of 41 girls and serious injuries suffered by 21 girls in the Hogar Seguro.<sup>133</sup>

The CRC Committee recommended Guatemala take “urgent measures” to prevent further torture and cruel, inhuman and degrading (CID) treatment of children held at Hogar Seguro, due to “the absence of remedies and psychosocial redress for the surviving victims and the transfer of survivors to other care institutions, where they continue to be exposed to risks of violence, including corporal punishment, abuse and overcrowded conditions[.]”<sup>134</sup>

Moreover, the CRC Committee recommended that Guatemala establish a tracking system to document the “cases of torture and other cruel, inhuman or degrading treatment or punishment of children in all settings, as well as the number of prosecutions of perpetrators and the punishments imposed[.]”<sup>135</sup>

As has been noted by the former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment,

<sup>130</sup> *Id.* ¶ 21.

<sup>131</sup> *Id.* ¶ 22.

<sup>132</sup> CRC *Concluding observations*, *supra* note 23, ¶ 20.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* Also mentioned were “[t]he overcrowded and deficient living conditions in juvenile detention facilities and prisons, which can amount to torture or cruel, inhuman or degrading treatment of children, as well as incidents of violence and riots[;] *Id.* ¶ 20(c); and “[t]he high rates of impunity and low numbers of prosecutions and convictions of perpetrators of violence against children in public care institutions and detention centres”. *Id.* ¶ 20(d).

<sup>135</sup> *Id.* ¶ 21(h).



[c]hildren deprived of their liberty are at a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment. *Even very short periods of detention can undermine a child's psychological and physical well-being and compromise cognitive development.* Children deprived of liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.<sup>136</sup>

In addition to the Convention on the Rights of the Child, there are numerous international legal instruments that address torture and other ill-treatment in the context of children and would be relevant to cases involving children separated from their families and placed in an institution, particularly to disabled children.<sup>137</sup>

As UNICEF responded in the wake of the fire at the Hogar Seguro, "The Convention on the Rights of the Child and the United Nations Guidelines on Alternative Care for Children indicate that sending children to institutions should always be the *last option*, a temporary measure and always for the shortest possible time. Children have the right to grow up in a family and to have the support of the State so that families can fulfill their responsibilities. The confinement of children and adolescents for their 'protection' is inadmissible."<sup>138</sup>

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<sup>136</sup> Méndez, *supra* note 26, ¶ 16; see Rosenthal, *supra* note 63, 303-352 (describing the implications of the Méndez report for children placed in orphanages); see also KANTER, *supra* note 114, at 159-201 (provides a historical overview of the right to be free from torture in the context of disability).

<sup>137</sup> Méndez, *supra* note 26; ¶ 16; see G.A. Res. 39/46, Convention Against Torture and Other Forms of Cruel or Degrading Treatment or Punishment (Dec. 10, 1984); G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities [CRPD] (Dec. 13, 2006) ("the purpose of the Convention is to 'ensure the full, effective and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity'. Article 2 enshrines the principles upon which the Convention is based: dignity, freedom of choice, independence, non-discrimination, full inclusion, participation, respect for difference, acceptance of disability as part of human diversity, and equality of opportunity, accessibility, equality between men and women and respect for the evolving capacities of children with disabilities and their right to preserve their identities."; see also INNOCENT J. KISIGIRO, HUMAN RIGHTS LAW IN INTERNATIONAL AND NATIONAL CONTEXT: CHALLENGES, VIOLATIONS, DEROGATION, AND ENFORCEMENT (2011).

<sup>138</sup> Perceval, *supra* note 38 (emphasis added). On the rise is scholarship theorizing the linkages of human rights law to health, specifically as these dimensions have been catalyzed by the case of the Federico Mora Hospital. See e.g., Alicia Ely Yamin & Andres Constantin, *A Long and Winding Road: The Evolution of Applying Human Rights Frameworks to Health*, 49 GEO. J. INT'L L. 191, 240, 198-99 (2017); Carole J. Petersen, *Addressing Violations of Human*

### III. SEGREGATION OF CHILDREN WITH DISABILITIES

#### *A. Limited access to education, health, community and cultural life*

As previously mentioned *supra* in *The role of poverty and stigmatization in institutionalization of abuse*, up to 95% of children living in orphanages world-wide are not, in fact, orphans.<sup>139</sup> Desperation from poverty and food scarcity drives families to place their children with and without disabilities in state-supported institutions.<sup>140</sup> In Guatemala, the number of children under 5 years of age suffering from chronic malnutrition, more than 46.5 per cent, rises to 61.2 per cent among indigenous children.<sup>141</sup>

The CRPD Committee notes that in Guatemala "... children with disabilities living in poverty are at greater risk of abandonment and institutionalization."<sup>142</sup> The CRPD Committee recommends that Guatemala: "[e]stablish support mechanisms for families of children with disabilities to prevent abandonment" and "[r]eplace measures to institutionalize all abandoned children with disabilities with measures to promote their adoption or placement in foster care and ensure that foster families receive the requisite support for their care."<sup>143</sup>

The CRPD Committee noted with alarm that international funding intended to assist people with disabilities is instead funneled into a system of permanent segregation of people with disabilities through institutionalization, rather than to support for people with disabilities to remain with their families and be integrated into their communities, schools and workforce.<sup>144</sup> Concomitantly, "many such institutions are sustained by the growing trend towards voluntarism in Guatemala."<sup>145</sup>

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*Rights in Forensic Psychiatric Institutions: Philosophical and Strategic Debates*, 109 AM. SOC'Y INT'L L. PROC. 80, 83 (2015); Diana Damschroder, *Abuse in Guatemalan Hospital May Amount to Torture*, Hum. RTS. BRIEF (Apr. 3, 2013).

<sup>139</sup> RODRÍGUEZ ET AL., *supra* note 15, at 17.

<sup>140</sup> *Id.* at iv.

<sup>141</sup> CRC *Concluding observations*, *supra* note 23, ¶ 15(c).

<sup>142</sup> CRPD initial report, *supra* note 28, ¶ 57.

<sup>143</sup> CRPD initial report, *supra* note 28, ¶ 58.

<sup>144</sup> *Id.* ¶¶ 74-75; see also U.N. Secretary-General, *General Comment No.5 (2017) on living independently and being included in the community*, ¶ 37, U.N. Doc. CRPD/C/GC/5 (Oct. 27, 2017).

<sup>145</sup> CRPD initial report, *supra* note 28, ¶ 74.

*B. Increased risk of becoming victims of abuse, exclusion and discrimination*

In 2010, the CRC noted Guatemala's failure in securing access to education, health, and community for children with disabilities. The CRC recommended at that time that Guatemala guarantee the right to "education, health, community and cultural life and services for children with disabilities. . . . in order to prevent them from becoming victims of abuse, exclusion and discrimination and to give them the necessary support to enable them to exercise their rights as active members of their communities."<sup>146</sup>

IV. EXTREME POVERTY: THE ROLE OF "VOLUNTOURISM" AND ADOPTION

*"There is no way to ethically volunteer in an orphanage. . . . When children are subject to conditions that amount to torture within institutions, and when [they are] subject to increased rates of violence, abuse, exploitation and trafficking, donors and volunteers are perpetuating those abuses by supporting or volunteering in orphanages."*<sup>147</sup>

The extreme poverty suffered by a substantial percentage of the Guatemalan population makes families with children with disabilities especially vulnerable to predatory orphanages and institutions.<sup>148</sup> Thus, the CRC has asked Guatemala as a matter of urgency to adopt a comprehensive strategy to end all abuse of children in institutional care and address the root causes of violence and abuse against children.<sup>149</sup> UNICEF statistics on poverty in Guatemala paint a telling picture. In 2006, the multidimensional poverty rate of Guatemalan children was 79.7 per cent, the second highest in all of Latin America and the Caribbean.<sup>150</sup> More than 46.5 percent, rising to

<sup>146</sup> CRC, Consideration of reports submitted by States Parties under Article 44 of the Convention, ¶¶ 68-69, U.N. Doc. CRC/C/GTM/CO/3-4 (Oct. 25, 2010).

<sup>147</sup> RODRÍGUEZ ET AL., *supra* note 15, at 31 (emphasis in original).

<sup>148</sup> See e.g., U.S. Dep't of State, Office of the Under Secretary for Civilian Security, Democracy, and H.R., TRAFFICKING IN PERSONS REPORT, 22, (2018) <https://www.state.gov/j/tip/rls/tiprpt/2018/> [hereinafter TRAFFICKING IN PERSONS REPORT] (discussing the incentives and conditions in which exploitation of children are most prevalent. "Voluntourism not only has unintended consequences for the children, but also the profits made through volunteer-paid program fees or donations to orphanages from tourists incentivize nefarious orphanage owners to increase revenue by expanding child recruitment operations in order to open more facilities. These orphanages facilitate child trafficking rings by using false promises to recruit children and exploit them to profit from donations.").

<sup>149</sup> CRC *Concluding observations*, *supra* note 23, ¶ 22(a).

<sup>150</sup> UNICEF, Guatemala Country Programme Document 2015-2019, ¶ 4 (Sept. 12, 2014), [https://www.unicef.org/about/execboard/files/2014-PL14-Guatemala\\_CPD-Final\\_approved-](https://www.unicef.org/about/execboard/files/2014-PL14-Guatemala_CPD-Final_approved-)

61.2 percent among indigenous children under 5 years of age suffer from chronic malnutrition.<sup>151</sup>

Stigmatization of disability in Guatemala is so severe that infanticide of children with disabilities is a regular occurrence.<sup>152</sup> Extreme violence and abuse of women, children and people with disabilities in Guatemala takes place in the context of gender bias, stigmatization of child victims of sexual exploitation and abuse, and overall intolerance.<sup>153</sup> For example, Congressman Fernando Linares Beltranena of the Conservative party National Advancement Party (PAN) declared that “disabled people only constitute an expense for the country.”<sup>154</sup> He also reportedly has said that women are a “biological accident.”<sup>155</sup>

Following the fire at Hogar Seguro, Guatemala has created several group homes for children with disabilities.<sup>156</sup> 35 of the survivors with disabilities were moved to another *new* institution called Nidia Martinez.<sup>157</sup> The government’s plan, it appears, is to not only continue but to accelerate the practice of institutionalizing children with disabilities, even though experts have concluded that these children, with reasonable support, could readily live in the community.<sup>158</sup>

Moreover, the number of children “escaping” institutions, including the “residential centers” that the Hogar Seguro survivors have been transferred to, has *quadrupled* in the last year since the closing of the Hogar Seguro.<sup>159</sup> Guatemala’s Attorney General suspects that trafficking and institutionalization are linked as the children and teenagers who are regularly “escaping” may in fact be trafficked and then returned to the institution by adults involved in organized crime groups.<sup>160</sup> For those who do manage to

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EN.pdf.

<sup>151</sup> Compare CRC *Concluding observations*, *supra* note 23, ¶15(c), with UNICEF, *supra* note 150, ¶ 5 (reporting a chronic malnutrition rate of 49.8 per cent—the sixth highest rate in the world).

<sup>152</sup> RODRÍGUEZ ET AL., *supra* note 15, at 15-16 (noting that children with disabilities are reportedly killed by strangulation or through starvation once per month on average).

<sup>153</sup> CRC *Concluding observations*, *supra* note 23, ¶ 24(b).

<sup>154</sup> Javier Estrada Tobar, *Las 11 palabras que pueden costarle la curul al diputado del corbatín*, NÓMADA, July 26, 2018, <https://nomada.gt/pais/actualidad/las-11-palabras-que-pueden-costarle-la-curul-al-diputado-del-corbatin/>.

<sup>155</sup> *Id.*

<sup>156</sup> See generally RODRÍGUEZ ET AL., *supra* note 15, at 6-7.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 5-7.

<sup>159</sup> RODRÍGUEZ ET AL., *supra* note 15, at 7.

<sup>160</sup> *Id.* at 7-8; see also William Cumes, *Dos adolescentes escapan de anexo del Hogar Seguro Virgen de la Asunción*, PRENSA LIBRE, Apr. 2, 2018, <https://www.prensalibre.com/guatemala/sucesos/dos-adolescentes-escapan-de-anexo-del-hogar-seguro-virgen-de-la-asuncion>; see also Asier Vera, *The PDH asks the MP to investigate trafficking in minors in “Hogar Seguro” and in the annex of zone 15*, NÓMADA, May 22,

escape and attempt to migrate to other countries, extreme vulnerability to becoming victims of crimes such as sale of and trafficking in persons awaits them.<sup>161</sup>

As DRI has reported,

As a result of their popularity with volunteers and the donations they bring in, owning an orphanage has become a booming business – where children are the commodity. Unfortunately, *few if any volunteers are aware that up to 95% of children living in orphanages are not orphans at all and have at least one living parent and extended family.* Children are pushed into these facilities most often due to lack of supports for poverty or disability. Moreover, when comparing households with similar income, those families with people with disabilities are at a heightened risk of falling into even deeper poverty due to the cost for medical care or assistive devices.<sup>162</sup> In Guatemala, 50% of children under 5 years old are malnourished. Poor and desperate parents, hoping that their children will have a better life, are seldom aware of the dangers of putting children into residential care.<sup>163</sup>

#### A. *Hope of Life orphanage*

Many of the children who survived the fire at Hogar Seguro orphanage were moved to the Hope of Life orphanage, located one day's car travel from Guatemala City.<sup>164</sup> At Hope of Life, as elsewhere, the institution lacks an adequate medical staff.<sup>165</sup>

Hope of Life has a stated mission of “saving the lives of people in Guatemala, whatever their circumstance. . . . *Your support empowers this*

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2018, <https://nomada.gt/nosotras/somos-todas/la-pdh-pide-al-mp-investigar-trata-de-menores-en-el-hogar-seguro-y-en-el-anexo-de-la-zona-15/>.

<sup>161</sup> CRC, Consideration of reports submitted by States Parties under Article 44 of the Convention, *supra* note 146, at 82.

<sup>162</sup> Margaret Chan & Robert B. Zoellick, *Preface*, WORLD REP. ON DISABILITY, WORLD HEALTH ORGANIZATION [WHO] xi (2011) (“[a]cross the world, people with disabilities have poorer health outcomes, lower education achievements, less economic participation and higher rates of poverty than people without disabilities. This is partly because people with disabilities experience barriers in accessing services that many of us have long taken for granted, including health, education, employment, and transport as well as information.”).

<sup>163</sup> RODRÍGUEZ ET AL., *supra* note 15, at 14 (emphasis added).

<sup>164</sup> 40 of the 60 children with disabilities in Hope of Life are survivors from Hogar Seguro. *Id.* at 19.

<sup>165</sup> *Id.* at 9.

vision.”<sup>166</sup>

On its website, with pre-set bright orange clickable button “gifts” in amounts of \$25 to \$50 to “HELP SEARCH FOR THE SICK CHILDREN” or “FOR IMMEDIATE MEDICAL CARE AND TREATMENTS” Hope of Life collects monies from donors across the world as part of its “baby rescue” program. The children are then brought by volunteers to the “nutritional” hospital located on the same grounds as the Hope of Life orphanage.<sup>167</sup> In its promotional materials, Carlos Vargas, Hope of Life founder advertises:

*We go up to the mountains every day and usually come down with four, five, up to ten babies. Mothers won't bring them down because they don't have the money.*<sup>168</sup>

Yet in its investigation, DRI found that “[a]ccording to staff at Hope of Life, some babies who are ‘rescued’ never return to their families and are put in the facility’s orphanage.”<sup>169</sup> Hope of Life advertises that it has removed “almost 1000 babies in one year” in answering “over 3000 emergency calls last year.”<sup>170</sup>

International donors and volunteers fund the vast network of institutions catering to voluntarism.<sup>171</sup> With accompanying illustrative photos documenting young children tied to railings at the orphanages where the children live, and tigers displayed in cages for the entertainment of these volunteers amid resort-like amenities at the Hope of Life resort, DRI vividly explains,

At the Hope of Life orphanage, in a remote area six hours outside Guatemala City, Hogar Seguro survivors languish in barren rooms with few activities and little to do. The volunteers’ quarters look like a resort, with several swimming pools, a zoo with *lions* and *tigers*, and large dining areas where they are offered a buffet for their meals. For \$1,000 a week, guests stay in a 4-story building with air-conditioned luxury rooms surrounded by an artificial lake. The children do not have access to these beautiful facilities.<sup>172</sup>

Voluntourism refers to a flood of charitable and for-profit organizations in poor countries offering tourists, who pay between \$850 and \$1000 per

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<sup>166</sup> *Our Mission*, HOPE OF LIFE INTERNATIONAL, <https://www.hopeoflifeintl.org/impact/child-rescue/> (last visited Aug. 14, 2018).

<sup>167</sup> RODRÍGUEZ ET AL., *supra* note 15, at 22.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> HOPE OF LIFE INTERNATIONAL, *supra* note 166.

<sup>171</sup> CRPD initial report, *supra* note 28, ¶ 74.

<sup>172</sup> RODRÍGUEZ ET AL., *supra* note 15, at v.

week, lodging in resorts that typically arrange for contact and interaction with institutionalized children.<sup>173</sup> At Hope of Life, tiered packages (“The Significance Package”, “The Transformation Package”, or “The Dream-makers Package”) include varying levels of contact with the children such as “serving at our feeding center,” with “[a]dditional ministry add-ons available upon request.”<sup>174</sup>

The U.S. Department of State has reported that human trafficking schemes found in poor countries such as Guatemala often involve “child finders” who travel to local villages or communities to dupe unwitting desperate parents who, hoping for their children to have access to education, food security, and healthcare, allow their children to be removed.<sup>175</sup> These children are then placed in orphanages, where they are used to raise funds from donors who pay to interact with them.<sup>176</sup> “It is rare that background checks are performed on these volunteers,” notes the Report.<sup>177</sup>

### B. *The role of adopting “orphans”*

The UN Committee on the Rights of the Child (CRC) expressed grave concerns that children are sold as commodities in an international ring of

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<sup>173</sup> See e.g., *What is Voluntourism?*, PROJECTS ABROAD, <https://www.projects-abroad.org/voluntourism/> (last visited Sept. 4, 2018) (“a combination of volunteering and tourism, voluntourism is a popular form of international travel that allows you to contribute to sustainable development while exploring a new country and culture.”); *but see* Richard Stupart, *Does “voluntourism” do more harm than good?*, CNN, July 31, 2013, <http://travel.cnn.com/explorations/life/richard-stupart-voluntourism-does-more-harm-good-260269> (“a system has emerged in which parents will rent their children out for the day to play with gullible backpackers, creating fraudulent orphanages in response to visitors’ demand for them”); *see also* TRAFFICKING IN PERSONS REPORT, *supra* note 148, at 22 (“foreign travelers wishing to include a charitable element in their vacation often partake in “voluntourism” at orphanages, which child advocacy organizations and governments have documented as harmful.”).

<sup>174</sup> *Plan your trip to Hope of Life*, HOPE OF LIFE INTERNATIONAL, <https://www.hopeoflifeintl.org/plan-a-trip/> (last visited Aug 5, 2018) (Hope of Life, for example, “makes close to 10 million USD a year from volunteers, with a total budget of almost 19 million USD.”); RODRÍGUEZ ET AL., *supra* note 15, at 20; *see also*, Laurie Ahern, *Orphanages are no place for children*, WASH. POST, Aug. 9, 2013 (cited in RODRÍGUEZ ET AL., *supra* note 15, at 4, nn. 22, 17, 99); *see also* A Guide to Orphanage Volunteering Abroad, GOABROAD, <https://www.goabroad.com/volunteer-abroad/search/orphans/volunteer-abroad-1> (last visited June 4, 2018).

<sup>175</sup> TRAFFICKING IN PERSONS REPORT, *supra* note 148, at 22 (the Trafficking in Persons report from the US State Department found that “it is rare that background checks are performed on these volunteers, which can also increase the risk of children being exposed to individuals with criminal intent.”).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

illegal adoptions.<sup>178</sup> The confluence of extreme poverty suffered by a substantial percentage of the Guatemalan population, and the incentives to open institutions as “profit centers” begins to explain the entrenched nature of group housing or institutions.<sup>179</sup> “By directing funds towards institutions rather than supporting families to keep their children at home, Guatemala is failing to implement its obligations under human rights law,” warns DRI.<sup>180</sup> Indeed, the funding of institutions that maintain conditions that are demonstrably in violation of international standards, and that fuel a marketplace built on international child adoption, violates the Convention on the Rights of Persons with Disabilities (CRPD).<sup>181</sup>

Similarly, the Convention on the Rights of the Child protects all children, but it also requires that children with disabilities “should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child’s active participation in the community.”<sup>182</sup> Article 23 of the CRC further requires that “State Parties recognize the right of the disabled child to receive special care” and provide assistance to the “parents or others caring for the child.”<sup>183</sup> Thus, no child should have to be separated or removed from their family, home and community merely because of their disability.

## V. CONCLUSION

For the children in Guatemala who have been separated from their families, often for reasons that have little to do with the best interest of the children, and for adults and children with disabilities confined in institutions, compliance with international standards of dignified care, education,

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<sup>178</sup> CRC, Consideration of reports submitted by States Parties under Article 44 of the Convention, *supra* note 146, ¶ 60 (“the Committee is concerned about information that organized *criminal networks* that were active in the sale of children for international adoptions have not been dismantled, and the information given by the State party that there are 600 children ready for international adoption.”) (emphasis added).

<sup>179</sup> See e.g., RODRÍGUEZ ET AL., *supra* note 15, at 17 (orphanages have become a “booming business”).

<sup>180</sup> *Id.* at 25.

<sup>181</sup> G.A. Res. 61/106, *supra* note 137 (right to live in the community with choices equal to others (art. 19, CRPD); right to grow up with a family (art. 19, CRPD); requires international support to advance the “purpose and objectives” of the Convention (art. 32, CRPD); “where the immediate family is unable to care for a child with disabilities,” States must “undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting” (art. 23(5), CRPD)); see also RODRÍGUEZ ET AL., *supra* note 15, at 25, 29-30 (discussing the panoply of supports and rights conferred in the CRPD to children with disabilities and their families).

<sup>182</sup> G.A. Res. 44/25, *supra* note 29, at art. 23, ¶ 1.

<sup>183</sup> *Id.* at art. 23, ¶ 2.



medical treatment, or perhaps at a minimum, finally the right to be treated as a human being may not happen in Guatemala without swift and repeated legal intervention. If the most vulnerable members of society are not treated with the dignity that all human beings deserve, then the entire society is ultimately debased by allowing, and enabling the conditions that have produced what has been repeatedly reported as the “worst case of poor care and lack of humanity” ever seen.<sup>184</sup>

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<sup>184</sup> Rogers, *supra* note 84.