



UNACCOMPANIED MIGRANT CHILDREN: U.S. LAW & POLICY BACKGROUNDER PROTECTING THE BEST INTERESTS OF ALL CHILDREN

Who are Unaccompanied Migrant Children (UCs)?

Non-citizen children who arrive to the United States without a parent or guardian and who lack immigration status are known in legal terms as **unaccompanied alien children** (UC). The definition comes from the Homeland Security Act of 2002. These children come fleeing violence or persecution, and embark on an often dangerous journey from their home countries to seek protection in the U.S. Historically, these children have mostly come from Mexico and Central America—in particular, El Salvador, Honduras and Guatemala (the countries that make up the Northern Triangle of Central America). Unaccompanied children range in age from infants to age 17, and are both boys and girls. Since 2012, the demographics of children seeking refuge from Central America has shifted to include more girls and younger children.ⁱ

Why Is There an Increase of Children from El Salvador, Honduras and Guatemala?

The number of children apprehended by Border Patrol along the southwest border has increased significantly since 2012, from more than 13,000 in FY 2012 to more than 59,000 in FY 2016. During the same time period, numerous reports by human rights, humanitarian and faith organizations have documented a sharp increase in violence in the Northern Triangle countries—detailing brutal and terrorizing acts against families and children - even toddlers.ⁱⁱ

- UNHCR reports a 1,185% increase in asylum applications in the countries neighbouring Honduras, El Salvador and Guatemala, namely Mexico, Panama, Costa Rica, Belize and Nicaragua, from 2008-2014.
- Targeted children often face rape, assault, torture, murder, extortion, and other threats of violence from which their governments are unable to protect them.

Our Strong American Legacy of Protecting Vulnerable Children:

- **Protecting Those Fleeing Persecution**—With *the Refugee Act of 1980* the U.S. demonstrated its commitment to welcome those fleeing persecution by providing asylum-seekers, regardless of legal status, with a legal right to submit a claim for protection. It also affirmed the principles of *non-refoulement*: the legal obligation to not return or expel a person to a country where their life or freedom is threatened.
- **Treating Children Humanely and Preventing Family Separation**—The *Flores v. Reno Settlement Agreement (1997)* requires the U.S. government to comply with an array of legal due process rights for migrant children (including the right to a hearing and judicial review). The settlement also established a mandatory policy favoring release of children to family members instead of detention, and required the U.S. to place children in **the least restrictive custody**. Many of these standards were later codified in the **Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)**. Under *Flores* a child should remain with a family member for the duration of his or her legal proceedings instead of in federal immigration custody.
- **Ensuring All Children in the U.S. Are Cared For According to Child Welfare Standards**—The *Homeland Security Act of 2002* established the Department of Homeland Security and broke apart the former Immigration and Naturalization Service. Under the HSA, care and custody of unaccompanied children was moved to the Department of Health and Human Services' Office of Refugee Resettlement (ORR). The U.S. also asserted a strong moral voice by saying **the best interest of the child** must be considered whenever a child is in the custody of the government, and assigning an agency with child welfare expertise as custodian for children who arrive without a parent or legal guardian.
- **Establishing Minimum Safeguards for the Most Vulnerable Children**—The *Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)* codified elements of *Flores* as it pertains to unaccompanied children, but also put the onus on DHS to ensure that children are screened for potential trafficking before return to their home countries. It also reaffirmed the U.S. commitment to the **best interests of the child**.

- Under the **Homeland Security Act**, Mexican children were excluded from the best interest of the child protections and screenings for **Refugee Act** protections. TVPRA of 2008 sought to establish procedures to guarantee **Mexican unaccompanied children** are screened for trafficking crimes and for asylum *before* being repatriated to Mexico. If a determination cannot be made within **48 hours**, a Mexican child must be transferred to ORR. **DHS has failed** to fully implement the TVPRA of 2008 and **fulfill their legal obligations of screening and non-refoulement** of Mexican children who arrive alone and instead return roughly 95% of all Mexican children.ⁱⁱⁱ
- In addition to codifying some of the custody requirements under *Flores*, the TVPRA of 2008 outlines other child welfare protections. It requires all potential sponsors to have an **identity verification** and **assessment** for potential risk to the child, and for especially vulnerable children (who experienced trafficking, child abuse or have special needs) it establishes minimum standards for safe release to a sponsor, requiring a **home study** and **post-release services**.
- The TVPRA of 2008 also requires ORR to ensure (to the greatest extent practicable) the **legal representation** of all UCs in legal proceedings and matters to protect them against trafficking, exploitation and mistreatment. As of November 2016, **50% of unaccompanied children did not have legal representation in immigration court**. Children without attorneys are five times more likely to be deported back to a country where they are unsafe. **Many children who are eligible for relief are not winning their immigration case because there is no one to help them navigate the legal processes**. Attorneys also assist with a child's appearance in court; both EOIR and National Association of Immigration Judges (NAIJ) have found attorneys for children greatly improves court efficiency.^{iv}

UC Data and Care and Custody Information:

Health and Human Services (HHS) is the appropriate federal agency to take custody of these children. HHS has the child welfare expertise, as well as experience in using best practices to encounter and serve trafficking victims and asylum seekers. Because these children are incredibly vulnerable, HHS provides them with care that is in the child's best interests. HHS places a child in the *Flores*-mandated least restrictive form of custody after assessing the community and the child's safety needs.

- Unaccompanied children are usually apprehended by the Department of Homeland Security's Customs and Border Protection (CBP) along the southwest border of the U.S. By law, they must be transferred to ORR within 72 hours. During the influx of children in the summer of 2014, ORR was not able to open up bed space fast enough to accommodate arrival numbers. Children were forced to stay on average 7-14 days in CBP custody. Conditions in CBP short-term holding facilities are inappropriate for long-term custody. Children may not have space to sleep, bedding, clean clothes, access to showers, hot meals or adequate medical care.
- Once at ORR, children receive medical attention, screening, and a child protection assessment. These screenings are conducted by trained child welfare personnel and are incredibly important in identifying trafficking, trauma, abuse, mental health and family history. It also may take time to elicit information about protection needs without re-traumatizing the child.
- While children are in ORR custody, ORR locates family members to act as sponsors for the child while the child's immigration removal case proceeds. ORR also works with partners, like LIRS, in assessing the type of services a child may need upon release to help ensure the child is not released to a trafficker or child abuser, help the child locate legal service providers, and ensure the sponsor knows where and when to show up for immigration court.
- Approximately 85% of children are released to family in the U.S. for the duration of their immigration court proceedings. These sponsors sign an agreement with ORR to ensure the child's appearance in court. The Legal Orientation Program for Custodians (LOPC) funded by the Executive Office of Immigration Review (EOIR), ensures sponsors are made aware of their obligation to take a child to court, and connects them with resources in their communities.

Additional information:

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ⁱ <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

ⁱⁱ *Forced from Home: Lost Boys and Girls of Central America* (Women's Refugee Commission 2012); *Mission to Central America: The Flight of Unaccompanied Children to the United States* (United States Conference of Catholic Bishops November, 2013); *Human Development Report for Latin America 2013-2014* (UNDP Nov 2013); *Persistent Insecurity: Abuses against Central Americans in Mexico* (Jesuit Refugee Service November 2013); *Children on the Run* UNCHR (March 2014), "Unaccompanied Minors: Humanitarian Situation at US Border," UNHCR, <http://unhcrwashington.org/children>.

ⁱⁱⁱ *Children at the Border: Screening, Protection and Repatriation of Mexican Unaccompanied Minors*, (Appleseed 2011)

^{iv} U.S. GOVERNMENT ACCOUNTABILITY OFFICE, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 18-37 (July 2015), available at: <http://tinyurl.com/z69yprd>; United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 56 (2014), available at <http://tinyurl.com/qbwgtnh>; Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges 294-96 (Center for Gender & Refugee Studies and National University of Lanús, eds., 2015), available at <http://tinyurl.com/jczymp2>; *The Plight of Migrant Children at the Border Highlights Need to Invest in Central America*, Washington Office on Latin America (June 17, 2014), <http://tinyurl.com/zxknfup>.