

Unaccompanied Children in the United States

Challenges and Opportunities

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ABSTRACT

Overview of the realities, institutions and procedures within the United States determining the fate of unaccompanied children from Mexico and Central America and showing the challenges and opportunities for action.

U.S. Context

Every year thousands of children under the age of 18 come to the United States without authorization and without the protection and supervision of a parent or guardian. According to the Department of Homeland Security (DHS) more than 86,000 accompanied and unaccompanied¹ children were apprehended each year from 2001-2005.² This number reached 101,952 children in 2006.³ Four out of five of these children were from Mexico.⁴ The U.S government agencies do not keep thorough statistics on unaccompanied children to have an accurate number. Despite this, statistics from the Office of Refugee Resettlement (ORR) show that 7,000-9,000 unaccompanied children have been referred to the ORR from the DHS each year since 2005.⁵ Approximately 85 percent of children in ORR custody came from Guatemala, El Salvador and Honduras, of whom 74% were male and 26% female with 80% being between the ages of 15-18 and 20% ages 0-14. Most entered the United States by way of the Mexican border traveling by foot, train or motor vehicle.⁶ Clearly the issue of child immigration is a regional challenge.

Most often, unaccompanied children come into contact with U.S. immigration services when Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) or the U.S. Coast Guard (USCG) apprehends them along the U.S. – Mexico border or in offshore waters.⁷ However, another source of possible unaccompanied children is due to an increased number of worksite enforcement operations that ICE carried out in the interior of the U.S. Just three worksite raids in 2006 and 2007 affected 501 children.⁸ More investigation is needed to determine the exact number who became unaccompanied and what policies and practices are needed to protect children as a result of these operations.

Compared to other unaccompanied children apprehended at the border, the Border Patrol returns Mexican children without a hearing before an immigration judge.⁹ In 1985, advocates brought a lawsuit that resulted in a nationwide injunction prohibiting the INS from getting “voluntary departure” agreements from unaccompanied children unless they were first given notice of their rights and put in contact with a relative or a nonprofit organization (*Perez-Funez v. District Director*). Concerns remain among advocates that the low number of Mexican children that enter the system through DHS is most likely the result of ICE and the Border Patrol putting pressure on these unaccompanied children to sign for “voluntary departure.” This practice is harmful for Mexican children who might otherwise qualify for immigration benefits in the U.S. if they actually had a hearing before an immigration judge. Also, the risks to child trafficking victims increase considerably when the standard practice is voluntary departure or expedited removal.¹⁰

Most children take enormous risks to come to the U.S. in order to escape poverty, violence, abuse or abandonment, while some come seeking to reunify with their parents or other relatives. In their journey to the U.S. these children are exposed to the same dangers and hazards as adults but their age makes them more vulnerable. Unaccompanied children report being sexually and physically assaulted, abandoned by traveling companions and unable to find food and shelter. They report being raped by other migrants or law enforcement officials.¹¹ While these children are in need of care that is sensitive to their age, previous experiences, culture, and language, various reports document that children in DHS detention experience harsh conditions that often violate their human rights while in the custody of U.S. institutions.¹²

U.S. Institutions and Policies

Department of Homeland Security and Office of Refugee Resettlement

With the passage of the Homeland Security Act of 2002, Congress eliminated the Immigration and Naturalization Services (INS) and transferred immigration and enforcement functions to the newly created Department of Homeland Security. In 2003, the authority for the care and custody

of unaccompanied children was transferred to the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS).¹³

In most cases unaccompanied children are placed in ORR custody after they are apprehended by one of the subsidiary agencies of the DHS for allegedly violating immigration law by trying to enter the U.S. without inspection. When a person who appears to be a minor is apprehended, the DHS places him or her in a detention facility to determine whether he or she is under 18 and unaccompanied.¹⁴ The DHS determines the age of the person based on dental exams or wrist and bone x-rays. Medical doctors and practitioners in this field question the reliability of these methods and advocate for other forms of evidence such as birth certificates and reliable testimony.¹⁵ Once this determination is made, the DHS has 3-5 days to transfer that child to ORR custody. The person remains in DHS custody if it is determined that he/she is not an unaccompanied minor and deportation proceedings begin thereafter.

Flores Settlement Agreement

In 1985, human rights groups filed a class action lawsuit challenging INS procedures regarding the detention, treatment and release of unaccompanied children in its custody.¹⁶ The 1997 settlement of *Flores et al v. Janet Reno* is based on the premise that immigration authorities must treat children in their custody with dignity, respect, and special concern for their vulnerability as minors. *Flores* placed essentially three specific obligations on the former INS to: (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the “least restrictive” setting appropriate to the age and special needs of children; and (3) implement standards relating to care and treatment of children in U.S. immigration detention. *Flores* stipulates various requirements relating to standards of treatment, including transportation arrangements, legal representation, telephone access, health care, counseling, education, recreation, and religious services.¹⁷ Reports show a severe lack of compliance of U.S. institutions with these agreements. Advocacy groups specifically mention these violations: 1) misclassification of unaccompanied youth as “accompanied”; 2) inaccurate age determination techniques; 3) the use of unaccompanied children as “bait” in order to apprehend family members; 4) unsafe repatriation practices;¹⁸ 5) overextended initial detention period; and 6) placement in secure detention facilities with accused felons.¹⁹

Forms of Relief for Unaccompanied Children

The forms of relief available to unaccompanied children include: asylum, withholding of removal and protection under the United Nations Convention against Torture (CAT); Special Juvenile Immigrant Status (SIJS); a T-visa, and a U-visa. *Asylum and the related remedy of withholding of removal* are based on a child's past experiences or fears of future persecution by the government or groups the government cannot or will not control on account of race, religion, nationality, membership in a particular social group, or political opinion. Too often, however, children are expected to meet adult standards for asylum and withholding of removal and are unprepared to make a clear case for asylum or withholding of removal. Also, United States authorities do not recognize children as being a cognizable social group for asylum and withholding eligibility. *CAT* protection is for children who have experienced or fear torture at the hands of the government or with governmental acquiescence vis-à-vis non-state actors. *SIJS Status* is for children who have been victims of domestic abuse, abandonment, or neglect or have suffered abuse as street children, may be eligible to obtain relief from removal from the U.S. under the provisions of what is known as a Special Immigrant Juvenile Status (SIJS).²⁰ A *T-visa* is available to children who were victims of trafficking. Congress passed the Victims of Trafficking Protection Act in 2000 designed to prosecute traffickers and protect victims. The *U-visa* pertains to those children who are victims of other criminal acts and are willing to cooperate in criminal investigations.²¹

Researchers and advocates believe that more children are eligible for asylum, SIJS, T-visas and U-visas than have been granted them. From January 2003 to July 2006, approximately 70% of adjudicated cases resulted in deportations and only 2% of the asylum petitions were granted.²² The number of children who were granted SIJS is unknown, but one extrapolation of data estimates that 521 were granted in 2002.²³ Between fiscal years 2002-2004, 32 children were identified as victims of trafficking and therefore eligible for a T-visa.²⁴ A number of procedural reforms and new actions could make these existing forms of protection more available.

Challenges and Opportunities for Impact

Steps to remedy the problems facing unaccompanied children fall into three areas: a) passing new U.S. legislation; b) changing administrative procedures; and c) adopting international human rights standards.

A. PASSING NEW U.S. LEGISLATION

Due to the DHS emphasis on enforcement, advocates maintain that the rights of unaccompanied children are routinely abused. Placing primary responsibility for the custody of unaccompanied children into the hands of the Secretary of Health and Human Services would offer the opportunity to make the child welfare values of the “best interests of the child” paramount.

Opportunities for Impact

- 1. Pass the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 in the U.S. Senate.** This act develops: (1) policies and procedures to ensure that unaccompanied children in the United States are safely repatriated to their country of nationality or of last habitual residence; and (2) a safe repatriation pilot program for children. It stipulates that the care and custody of unaccompanied children in the United States shall be the responsibility of the Secretary of Health and Human Services.
- 2. Amend the Temporary Protection Status (TPS) law to allow family reunification.** Parents from El Salvador and Honduras who have lived in the U.S. legally for many years under TPS cannot legally bring their children into the US. In 1998 and 2001, the attorney general granted TPS to approximately 374,000 Central Americans due to natural disasters. Since then, their temporary status has been extended every 18 months. Although these individuals are legally in the U.S. they lack legal permanent residence and therefore cannot file a petition for an immigration visa for their minor children. In many cases these families seek to bring their children into the U.S. without authorization.

B. CHANGING ADMINISTRATIVE PROCEDURES

The majority of children apprehended at the U.S.-Mexico border are Mexican nationals who flee their country for similar reasons as other children. However, unlike other children, U.S. officials pressure Mexican children to sign voluntary departure and then return them to Mexico without a hearing before an immigration judge or without fully knowing their rights.²⁵

Opportunities for Impact

- 3.** The Department of Justice should examine the repatriation policies and processes and the effectiveness of the agencies involved.²⁶
- 4.** NGOs should create a regional unaccompanied child support network that provides housing, counseling, advocacy and legal services to children migrating to the U.S.²⁷
- 5.** The U.S. Congress should commission a thorough report of what happens to children who are repatriated to Mexico to better understand the impact of the current policies.

Lack of Compliance with Existing Law and Procedures Advocates criticize the DHS for not adequately implementing the *Flores Agreement* including holding children in harsh detention conditions, not accurately determining their ages and not apprising them of their rights. Additionally, accurate data on the ages and numbers of unaccompanied children is either difficult to obtain or nonexistent making it harder to develop good policies.

Opportunities for Impact

6. Via congressional oversight, the U.S. government must ensure that all agencies dealing with unaccompanied children comply with all relevant national laws, regulations, and international standards concerning the detention conditions of these children.²⁸
7. All employees whose duties bring them into contact with juveniles should receive training on the special needs and rights of unaccompanied children, including the requirements of the Flores Agreement, the *Perez-Funez v. District Director* and international standards.²⁹
8. The DHS should ensure that all facilities used to house children prior to transfer of custody to ORR meet the requirements of the *Flores Agreement*.
9. Federal agencies should improve service coordination, data gathering, data management and tracking of unaccompanied and separated children served by the federal government.³⁰

Inadequate Legal Access Even if given a hearing, the vast majority of unaccompanied children do not have legal counsel and are confronted with language barriers and complex legal proceedings. Unaccompanied children in removal hearings have a statutory right to legal counsel according to section 292 of the Immigration and Nationality Act but not a right to government funded legal counsel. This means that they either hire an attorney or obtain *pro bono* assistance. Lack of legal representation nearly dooms the child to deportation. The Transactional Records Access Clearinghouse determined that 93 percent of asylum claims are denied when the asylum seeker does not have legal representation.³¹ Lack of legal representation also stems from the remote geographic locations of ORR detention facilities and the related unavailability of qualified *pro bono* attorneys.

Opportunities for Impact

10. Designate a Guardian *ad litem*³² to advocate for the best interest of the child.³³
11. The U.S. government should guarantee that all unaccompanied children are provided with legal representation. If a child cannot afford legal representation, and meaningful *pro bono* legal representation cannot be secured, it should be provided at the government's expense.³⁴
12. Create a national network of geographically dispersed *pro bono* attorneys to provide legal representation and provide expert training for them.³⁵

C. ADOPTING INTERNATIONAL HUMAN RIGHTS STANDARDS

The United Nations 1989 Convention on the Rights of the Child (CRC) provides the international framework for the protection of child refugees. Every nation in the world ratified the CRC except the failed state of Somalia and the U.S. Therefore, the U.S. is not required to enforce those provisions in domestic law but, since they signed the convention, Congress cannot pass laws in contradiction to it.³⁶ The CRC is founded on the principle of the “best interests of the child,” a legal standard that seeks to ensure the protection and welfare of children. While the best interest principle has been incorporated into U.S. child welfare laws, it has not been included in immigration laws. Some government agencies, however, have issued procedural guidelines that do include the principle. The Executive Office for Immigration Review (EOIR) issued *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, provide enhanced due process procedural safeguards for unaccompanied children appearing before Immigration Judges, but well-defined and binding criteria for assessing a child's best interest are seriously lacking.³⁷

Opportunities for Impact

13. Advocate for the U.S. Senate to ratify the UN convention of the Rights of Children.³⁸
14. The U.S. government should ensure that no child is returned to a country where he or she would be at risk of serious human rights abuses.³⁹
15. The “best interests of the child” should be incorporated into existing and future immigration policy and legislation.⁴⁰

Framework for Action:

The U.S. Congress needs to pass new legislation, enforce existing policies and procedures protecting unaccompanied children and incorporate international standards into national law. Achieving these changes will require a regional education, advocacy and action campaign to protect the rights of this vulnerable population. In the U.S., a campaign showing the human face of this tragedy and appealing to societal moral and political responsibility toward children could galvanize the interest of the nation and mobilize the actions of human rights, legal, social service and faith-based organizations.

ENDNOTES

¹ The term "unaccompanied minors" is used both by the United Nations Children's Fund (UNICEF) and by UNHCR to refer to persons who are under 18 years of age or under a country's legal age of majority, are separated from both parents, and are not with and being cared for by a guardian or other adult who by law or custom is responsible for them.

² *Unaccompanied Children in the United States: A Literature Review*, Olga Byrne, Vera Institute of Justice, April 2008, p-9.

³ CRS Report to Congress, *Unaccompanied Alien Children: Policies and Issues*, Chad C. Haddal, March 1, 2007, p-1.

⁴ *Ibid.*

⁵ *Unaccompanied Children in the United States: A Literature Review*, p-9.

⁶ *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, Jacqueline Bhabha and Susan Schmidt, *Journal of the History of Childhood and Youth* (v.1.1), The Johns Hopkins University Press, 2008.

⁷ *Unaccompanied Children in the United States: A Literature Review*, p-16.

⁸ *Paying the Price: The Impact of Immigration Raids on America's Children*, The Urban Institute for The National Council of La Raza, Randy Capps, Rosa Maria Castañeda, Ajay Chaudry, Robert Santos, Washington DC, 2007, p-19.

⁹ *The Lost Dream: Unaccompanied Migrant Children and Victims of Human Trafficking on the US/Mexico Border*, United States Conference of Catholic Bishops, October 2006, p-5.

¹⁰ *Ibid.* p-13.

¹¹ *The Lost Dream*, p-6.

¹² *United States of America, Unaccompanied Children in Immigrant Detention*, Amnesty International, 2003, p-5.

¹³ *Unaccompanied Children in the United States: A Literature Review*, p-16.

¹⁴ *Ibid.* p-17.

¹⁵ *Ibid.* p-18.

¹⁶ *Unaccompanied Children in the United States: A Literature Review*, p-20.

¹⁷ Amnesty International, p-16-17.

¹⁸ CRS Report to Congress, p-1.

¹⁹ *Unaccompanied Children in the United States: A Literature Review*, p-23.

²⁰ Amnesty International, p-14

²¹ Amnesty International, p-16.

²² CRS, p-4.

²³ *Seeking Asylum Alone: Unaccompanied and Separated Children & Refugee Protection in the U.S.*, p-16.

²⁴ *Op cit.*

²⁵ *Lost Dream*, p-12.

²⁶ *Op cit.*

²⁷ *The Lost Dream*, p-13.

²⁸ Amnesty International, p-78.

²⁹ *Op cit.*

³⁰ *Seeking Asylum Alone*, p-178.

³¹ *Unaccompanied Children in the United States: A Literature Review*, p-34-35.

³² Child welfare professionals charged with advocating the best interests of a child involved in a court proceeding

³³ *Ibid.* p-35

³⁴ Amnesty International, p-78.

³⁵ Nugent, Christopher, Senior Counsel, Holland and Knight, author interview.

³⁶ *Unaccompanied Children in the United States: A Literature Review* , p-12-13.

³⁷ *Ibid.* p-14.

³⁸ Amnesty International, p-79.

³⁹ *Ibid.* p-78.

⁴⁰ Schmidt, Susan, *Bridging Refugee Youth and Children Services, a Joint Project of the Lutheran Immigrant and Refugee Services and the U.S. Conference of Catholic Bishops/Migration and Refugee Services*, May 2004, p-16.