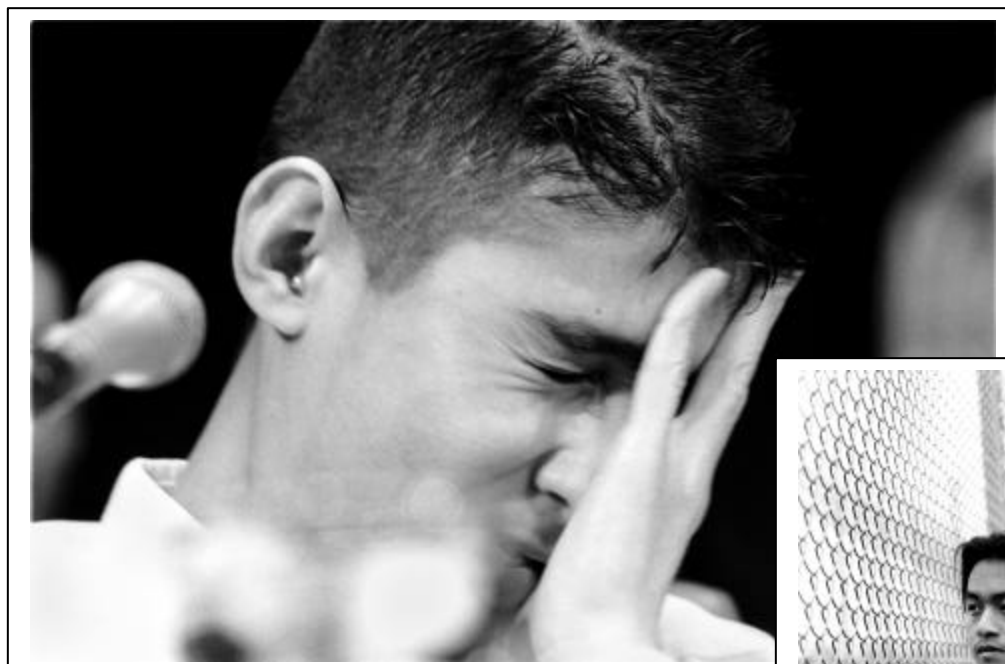


## PRISON GUARD OR PARENT?:

### INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN



Women's Commission for Refugee Women and Children

May 2002



Women's Commission for Refugee Women and Children  
122 East 42nd Street  
New York, NY 10168-1289  
tel. 212.551.3111  
fax. 212.551.3180  
wcrwc@ womenscommission.org  
www.womenscommission.org

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## Mission Statement

The Women's Commission for Refugee Women and Children seeks to improve the lives of refugee women, children, and adolescents through a vigorous program of public education and advocacy and by acting as a technical resource. Founded in 1989 under the auspices of the International Rescue Committee, the Women's Commission is the first organization in the United States dedicated solely to speaking out on behalf of women and children uprooted by armed conflict and human rights abuses.

The mandate of the Women's Commission is to work on behalf of all women and children who flee their homes and communities, including those seeking refuge in the United States. In 1995, the Women's Commission initiated a project to assess the treatment of women asylum seekers in the United States. The initial evaluation considered the physical conditions in which women are detained; their access to legal counsel and the U.S. asylum system; and their physical, mental, and social well-being. In 1997, the Women's Commission expanded the Detention and Asylum Project to address the critical protection needs of children asylum seekers who make their way to the United States. This includes assessing the treatment that children receive in detention as well as their ability to access the U.S. asylum system. The principles of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as other international human rights instruments, guide the project.

In the course of its Detention and Asylum Project, the Women's Commission has interviewed dozens of women and children asylum seekers, the government officials charged with their care, and the legal and social service providers who assist them. It has also visited approximately 40 detention centers across the country.

The following is a report on the treatment that children asylum seekers receive in juvenile correctional facilities used by the Immigration and Naturalization Service to detain children. The report is based on site visits to eight centers that were conducted in August 2001 and interviews with INS officials, facility staff, detained children, and their lawyers across the country.

## Acknowledgements

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Critical to the Women's Commission's work on behalf of detained children in the United States has been the support of the law firm of Latham & Watkins, which in the past year has donated more than 4,500 hours of *pro bono* assistance to unaccompanied minors in the custody of the INS. The firm's contribution has significantly advanced the effort to reform U.S. policy toward this vulnerable population.

The Women's Commission also wishes to acknowledge the assistance of the American Bar Association, which has shared with the Women's Commission numerous stories regarding the treatment of children in INS custody, and has offered both resources and expertise to lawyers across the country who are representing newcomer children.

Finally, the Women's Commission wishes to thank the legal service providers who provided both logistical support and their expertise to the delegation. It also would like to express a special thanks to the children who shared with the delegation their testimonies of flight from their home countries and experiences upon arrival in the United States.

The Women's Commission delegation included the following members: Andrew Morton, Government Relations Associate, law firm of Latham & Watkins; Julia Ormand, actress and human rights activist, who participated in the delegation's visit to Tulare County, California; and Wendy Young, Director of Government Relations and U.S. Programs, Women's Commission for Refugee Women and Children.

This report was written by Wendy Young. Mary Diaz, Executive Director, Women's Commission, Diana Quick, Director of Communications, Women's Commission, and Andrew Morton, Latham & Watkins, edited the report. Diana Quick designed the report.

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## Executive Summary

*Isau is a 14-year-old boy from Honduras. He fled his homeland and came to the United States to escape severe abuse at the hands of his stepfather and persecution by government death squads and youth gangs. His stepfather beat Isau with pieces of wood, rods, and a machete handle and burned him with various hot objects. His mother would disappear for months leaving Isau at the mercy of his stepfather. Isau finally fled his stepfather's home and began living on the streets where he faced harassment from the authorities and gangs.*

*The Immigration and Naturalization Service (INS) apprehended Isau upon his arrival in the United States and initially placed him in a children's shelter in Houston. It then denied Isau access to juvenile court which would have determined whether he was abused, abandoned, or neglected and eligible for long-term foster care, a finding that potentially would have allowed him to remain in the United States. Meanwhile, Isau appeared in immigration court without the assistance of counsel. After a pro bono attorney agreed to represent him, Isau filed for asylum, withholding of deportation relief, and relief under the Convention Against Torture. An immigration judge initially denied Isau's request for relief, at which point the INS transferred him to the Liberty County Juvenile Detention Center, a one and a half hour drive from Houston where his attorney was based. The attorney filed an appeal with the Board of Immigration Appeals. However, the INS unlawfully deported Isau back to Honduras while his appeal was pending. Isau had spent two years in detention before his deportation.*

*Several weeks later, Isau resurfaced in Mexico. His attorney reached an agreement with the INS that would allow Isau's return to the United States and a resumption of his request for relief from deportation. The INS, however, initially insisted that he again be detained in a secure facility and not be allowed to proceed to juvenile court. At the time of this report, Isau's attorney continues to negotiate for appropriate treatment to facilitate Isau's return.<sup>1</sup>*

Each year, thousands of unaccompanied children<sup>2</sup> representing dozens of nationalities arrive in the United States. In recent years, the U.S. Immigration and Naturalization Service (INS) has taken approximately 5,000 children into its custody annually.<sup>3</sup> These children range in age from toddlers to teenagers. The Department of Justice has reported that approximately 75 percent of the children are boys and 25 percent girls.<sup>4</sup>

Increasingly, among these minors are children fleeing armed conflict and human rights abuses, including forced military recruitment, female genital mutilation, forced marriages, forced prostitution, child labor, and life as street children. Others have been compelled to leave their homes because their parents or caregivers have abused, abandoned, or neglected them.

Despite the trauma child newcomers have frequently already experienced in their homelands and during flight, the United States often subjects them to detention in highly inappropriate conditions. The INS holds approximately one-third of unaccompanied children in its custody in secure juvenile halls designed

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<sup>1</sup> Interview with Hussein Sadruddin, Lawyers Committee for Civil Rights (January 2002).

<sup>2</sup> For purposes of this report, children are defined as individuals under the age of 18. This is the generally recognized definition of child under article 1 of the Convention on the Rights of the Child as well as the age used to define the category of minors covered under the *Flores v. Reno* stipulated agreement. See note 28.

<sup>3</sup> See testimony of Stuart Anderson, Immigration and Naturalization Service, before the Senate Judiciary Subcommittee on Immigration (February 28, 2002) (hereinafter, Anderson); "Unaccompanied Juveniles in INS Custody," Office of the Inspector General, US Department of Justice, Report Number I-2001-009 (September 28, 2001). Available at [www.usdoj.gov/oig/i0109/index.htm](http://www.usdoj.gov/oig/i0109/index.htm) (hereinafter, OIG Report); Tom Brune, "INS Housing Children in Jails," *Newsday*, page A5 (February 4, 2000).

<sup>4</sup> ---

for the incarceration of youthful offenders, regardless of the fact that the vast majority of INS-detained children are not delinquent. Despite their innocence and the fact that U.S. law grants them the right to pursue asylum, these children are often commingled with the delinquent population, subject to handcuffing and shackling, forced to wear prison uniforms, and locked in cells. They are frequently denied access to the legal and social services critical to their pursuit of asylum or other forms of immigration relief, sometimes because they are housed in remote facilities hours from the urban centers in which such services are available. The children are typically not provided adequate translation services, leaving them isolated and alone within the prison system.

Less than half of the children in immigration proceedings are represented by counsel, and there is currently no system for the appointment of guardians ad litem. As a result, many children asylum seekers give up hope and agree to deportation; in some cases, these children had earlier expressed a fear of return to their homelands. In other cases, children are forced to struggle through their immigration proceedings alone with an inadequate understanding of the laws and procedures that dictate the handling of their cases. The failure to provide child newcomers with legal and child welfare assistance during their immigration proceedings stands in stark contrast to other legal proceedings in the United States affecting children. It also is out of step with the practices of many other asylum countries.<sup>5</sup>

This report represents the findings from a multi-state assessment of secure juvenile facilities used by the INS to detain children. Conducted in August 2001, the assessment covers facilities in Texas, California, Oregon, and Washington. While the Women's Commission had identified 12 facilities that it wished to visit in these regions, the INS repeatedly denied the delegation full access to the facilities and/or the children. As a result, the team was only able to assess conditions in eight facilities. Nonetheless, the delegation was able to interview some of the children held in the facilities, as well as legal and social service providers assisting them and the INS and facility staff charged with their care. The report also draws upon the experiences of service providers from across the United States regarding INS treatment of children.

Overall, the delegation found a disturbing lack of regard for the rights and needs of children asylum seekers and other young newcomers. The failure to make individualized determinations with regard to each child's placement and psychosocial needs leads to a broken system based more on the logistical needs of the agency charged with their care and its institutional bias toward law enforcement than on what is in the best interests of the child.

The delegation found that the INS has been assigned two irreconcilable and competing functions. It is charged with providing custodial care to unaccompanied children at the same time that it is acting as the prosecutor arguing in favor of the child's removal from the United States. As a result, the INS is presented with an inherent conflict of interest, under which it is simultaneously acting as service provider and law enforcement agency. This conflict ultimately clogs the system with inefficiencies and inequities and threatens the best interests of the children in question. Moreover, the situation is exacerbated by the fact that the INS lacks the requisite child welfare expertise to provide appropriate care to children in its custody.

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<sup>5</sup> See "Children or Refugees?" Children's Legal Centre (1992) (identifying several western European countries which provide representation to child asylum seekers); Wendy Ayotte, "Separated Children Seeking Asylum in Canada," United Nations High Commissioner for Refugees (July 2001) (discussing provision of counsel and designated representatives to child asylum seekers); "TransAtlantic Workshop on Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe," Georgetown University, June 18-19, 2001 (Draft Workshop Report, August 22, 2001).



The INS has recently taken steps to reform its policies and practices with regard to children. However, without fundamental changes in infrastructure, staffing, attitude, and philosophy, these changes are likely to remain cosmetic at best.

One true measure of a society is its treatment of children. The United States must acknowledge and uphold the rights and needs of newcomer children in order to live up to its reputation as a leader in human rights and a nation that protects children.

# I. Overview

## Introduction

Since 1997, the Women's Commission for Refugee Women and Children has monitored the situation of children seeking asylum in the United States, including their treatment in detention and the services they are provided to assist them with their asylum claims. Some progress toward advancing the protection of children asylum seekers has been made in this time period, most notably the release of the "INS Guidelines for Children's Asylum Claims" in December 1998.<sup>6</sup>

Concurrently, however, the number of children who arrive in the United States alone and are apprehended by the INS has climbed rapidly, tripling to almost 5,000 a year.<sup>7</sup> Such children are subject to detention in much the same way as adults who arrive without the required documentation to enter the United States. Furthermore, they are forced through complex asylum proceedings without adequate adult assistance, as they are appointed neither attorneys nor guardians *ad litem*.

This report is based on an assessment of conditions of detention for children in the custody of the INS held in eight juvenile detention facilities in Texas, California, Washington, and Oregon. It also includes the testimony of children held in detention in other parts of the United States whose situation the Women's Commission has monitored. The report concludes with recommendations for reform of the U.S. detention and asylum systems to ensure better protection of children fleeing armed conflict and human rights abuses.

## Child Refugees and Asylum Seekers

Approximately half of the world's displaced are children, for a total of almost 20 million worldwide.<sup>8</sup> Children are not only caught in the crossfire of armed conflict, they are now directly subject to calculated genocide, forced military recruitment, gender-related violence, torture, and exploitation.<sup>9</sup>

While children often flee their home countries for the same reasons as adults, including armed conflict and political, religious, racial, and ethnic persecution, it is also true that children are increasingly becoming the targets of abuses directed at them because of their age. These include bonded labor, child trafficking, child prostitution, sexual servitude, child pornography, child marriages, life as street children, and female genital mutilation.

Unaccompanied children, who represent an estimated 2 to 5 percent of the refugee children population, are particularly vulnerable to abuses.<sup>10</sup> Such children may have lost their families due to armed conflict, human rights abuses, or the chaos of displacement. Sometimes, their families send them away to escape such violence. In some cases, the families are the source of abuse themselves, and the children have been forced to flee because they have been abused, abandoned, or neglected.

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<sup>6</sup> "Guidelines for Children's Asylum Claims," Immigration and Naturalization Service (December 10, 1998) (hereinafter, INS Children's Guidelines).

<sup>7</sup> See Anderson; OIG report; Tom Brune, "INS Housing Children in Jails," *Newsday*, page A5 (February 4, 2000).

<sup>8</sup> "World Refugee Survey 2001," US Committee for Refugees (2001).

<sup>9</sup> "The Impact of Armed Conflict on Children," United Nations (November 1996).

<sup>10</sup> "The State of the World's Refugees," United Nations High Commissioner for Refugees (1995).

*“I could not stay in my country because of the abuse I lived with for years. After my father died when I was four, my mother abandoned me. I ultimately ended up living with a cousin. For over seven years, from when I was seven to when I was thirteen, my cousin forced me to work on the streets and give him the money. When I didn’t earn enough money, he punished me, beating me with a noose, car tools, and other objects, leaving scars on my body, like the knees, legs, and arms. I did not report it to the authorities because my cousin threatened to throw me out on the street. I also did not know how to report him and I did not think the police would protect a child like me. I did not want to live on the streets because I had heard that the authorities and gangs kill children living on the streets. I had no other choice but to look for safety, and a real family, in the United States. I had heard wonderful things about the United States and how children are better treated here.”*

Testimony of Edwin Larios Munoz, before the Senate Committee on the Judiciary, Immigration Subcommittee (February 28, 2002). Edwin was detained by the INS for approximately seven months before being granted asylum in the United States.

While the vast majority of children are either internally displaced within their home countries or are living in countries close to their homeland, a significant and increasing number are making their way to the United States or other western asylum countries. These children reflect an array of nationalities. The top sending regions to the United States are China, Mexico, and Central America, but children also come from such troubled regions as Afghanistan, Sierra Leone, Algeria, Somalia, Colombia, Kosovo, Sudan, and Nigeria.

Unaccompanied children arrive in the United States in several ways. They may arrive truly alone either by crossing a U.S. border or through a U.S. port of entry. Some arrive in the company of a family friend or distant relative who is not the child’s traditional caregiver. Some arrive in the company of a smuggler who has been paid to facilitate the child’s arrival. Still others are coerced or forced to come to the United States by traffickers to work as child laborers or prostitutes.

Regardless of their mode of arrival or country of origin, children who arrive alone in the United States are inarguably a population in need of comprehensive care that is sensitive to their age, culture, past experience, and displacement.

## **Children and the U.S. Asylum System**

The U.S. asylum system has historically done little to accommodate the asylum claims of children. If a child was accompanied by a parent, his or her claim was typically subsumed under that of the parent and not considered separately. If the parent was granted asylum, so too was the child. This approach, however, failed to take into account the fact that in some cases, the family may be actively participating in, or at least condoning, the abuses experienced by the child. In other cases, the child may actually be the family member with the strongest claim to asylum; for example, it may be the child who is being forcibly recruited to serve in a military or guerrilla force. Without separate consideration of the child’s situation, such grounds for asylum were likely never to surface during the adjudication.

Alternatively, the cases of children who were unaccompanied by a parent were handled in the same way as those of adults. This “one-size-fits-all” approach frequently failed to take into account the unique situation of children, including their stage of development and the impact that may have on their ability to recollect and articulate traumatic experiences in their home countries. Such failure to consider the

circumstances of children risks undermining their ability to gain asylum; children cannot be expected to shed their childhood for purposes of a legal proceeding.

The INS addressed at least some of the barriers which confront children in the asylum process in December 1998. Working with nongovernmental organizations (NGOs), refugee and children's experts, and the United Nations High Commissioner for Refugees (UNHCR), the INS released "Guidelines for Children's Asylum Claims" (the Guidelines).<sup>11</sup> By doing so, the United States became the second country in the world to establish a framework for the consideration of children's asylum claims.<sup>12</sup> The Guidelines are groundbreaking in their comprehensive establishment of legal, evidentiary, and procedural standards to guide adjudicators.

Since issuance of the Guidelines, a number of children have won asylum based on unique claims. For example, Central American street children, Indian child laborers, Guatemalan boys forcibly conscripted into the military, and young Chinese girls forced into marriage have been granted protection.<sup>13</sup> Fundamental to the consideration of these cases has been an increasing acknowledgement that children may experience persecution differently from adults.<sup>14</sup>

However, the U.S. asylum system continues to deny children two critical sources of help: the guarantee of counsel and the appointment of guardians *ad litem*. Asylum proceedings are extraordinarily complex, and a recent study revealed that represented asylum seekers are four to six times more likely to win their asylum cases.<sup>15</sup> The ability of children who remain unrepresented to win their cases is even more questionable given their inherent lack of capacity to understand the proceedings in which they have been placed. Despite this, in contrast to many other western asylum countries, U.S. asylum law fails to ensure counsel for asylum seekers.<sup>16</sup> Under the Immigration and Nationality Act, non-citizens have the right to counsel in immigration court proceedings, but at no expense to the government.<sup>17</sup>

The practical reality for many detained asylum seekers is that they cannot afford or cannot access legal counsel.<sup>18</sup> This is even more true for children, who may not be aware of the importance of counsel to their cases. In addition, the sheer number of detention facilities in which children in INS custody are detained, combined with the remote location of many of these facilities, creates innumerable obstacles which charitable legal services organizations lack the resources to overcome. As a result, less than half of INS-detained children have legal representation.

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<sup>11</sup> INS Children's Guidelines.

<sup>12</sup> The first country to issue standards for the adjudication of children's asylum claims was Canada. See "Child Refugee Claimants: Procedural and Evidentiary Issues," Immigration and Refugee Board of Canada (September 30, 1996).

<sup>13</sup> See Christopher Nugent and Steven Schulman, "Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children," Interpreter Releases, page 1569 (October 8, 2001).

<sup>14</sup> For background on the INS "Guidelines for Children's Asylum Claims," see Jacqueline Bhabha and Wendy A. Young, "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," Interpreter Releases (June 1, 1998); Women's Commission for Refugee Women and Children, "Protecting the Rights of Children: The Need for U.S. Children's Asylum Guidelines" (December 1998).

<sup>15</sup> Memorandum from Andrew Schoenholtz, Institute for the Study of International Migration, Georgetown University (September 12, 2000).

<sup>16</sup> See note 5.

<sup>17</sup> Section 240(b) (4), Immigration and Nationality Act.

<sup>18</sup> See Jonathan Jacobs, "The State of Asylum Representation: Ideas for Change," Institute for the Study of International Migration, Georgetown University (May 2000) (noting that 30 percent of detained asylum seekers do not have representation and that this is more than twice the rate of non-representation as experienced by non-detained asylum seekers); Don Kerwin, "Charitable Legal Immigration Programs: Can They Survive?" Interpreter Releases, page 813 (May 19, 1997) (observing that representation for some immigrants, including detainees, has plummeted to scandalously low levels).

Also out of step with the practice of other countries,<sup>19</sup> as well as the practice in other areas of U.S. law such as abuse and neglect proceedings, is the fact that unaccompanied children in immigration proceedings are not appointed guardians *ad litem*. Guardians could usefully function *in loco parentis* to encourage children to participate to the fullest extent possible in their court proceedings and to help ensure that decisions reached on behalf of children during such proceedings comport with the principle of the best interests of the child.

The Department of Justice, most explicitly through the Executive Office for Immigration Review (EOIR), the branch in which the immigration judges and the Board of Immigration Appeals are located, has expressed support for the concept of providing government-funded counsel and guardians *ad litem* to children appearing before immigration courts.<sup>20</sup> It is a proposal that has also been embraced by key members of the U.S. Congress.<sup>21</sup>

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<sup>19</sup> See note 5.

<sup>20</sup> Testimony of Michael Creppy, Chief Immigration Judge, Executive Office for Immigration Review, before the Senate Committee on the Judiciary, Immigration Subcommittee (February 28, 2002) (stating that the immigration court process would be aided by a guardian *ad litem* when a juvenile does not have the capacity to make informed decisions on his or her own behalf); see also Anderson (describing the concept of guardians *ad litem* as one that may have value but expressing concerns about its implementation).

<sup>21</sup> See "The Unaccompanied Alien Child Protection Act of 2001" (S. 121/H.R. 1904) (mandating the appointment of guardians *ad litem* to children and their representation by counsel).

## **U.S. Immigration Law Provides Additional Avenues of Relief for Abused and Trafficked Children**

U.S. immigration law provides additional forms of relief to children for whom return to their homeland would be inappropriate.

Under the Immigration and Nationality Act, children who have been deemed eligible for long-term foster care by a juvenile court because they have been abused, abandoned, or neglected, are eligible for Special Immigrant Juvenile (SIJ) status, which results in lawful permanent residence and a “green card.”<sup>22</sup>

Many children who apply for asylum on the basis of domestic violence or their experiences as street children may also be eligible for SIJ status. Attorneys representing children will frequently pursue both forms of relief simultaneously.

Congress, however, amended the SIJ provision in 1997 and required the “express consent” of the INS before a child is allowed to proceed into juvenile court for a finding as to whether he or she is eligible for long-term foster care.<sup>23</sup> Since this restriction was put in place, the INS has consistently prevented children who are in its custody from proceeding to juvenile court for such a determination. This policy has effectively cut children off from a valuable form of immigration relief that would otherwise offer them protection from domestic violence or life on the streets.

More recently, Congress passed the Victims of Trafficking and Violence Protection Act of 2000,<sup>24</sup> which provides two new forms of protection. Victims of a range of criminal acts who have suffered substantial physical or mental abuse because of that criminal activity, including children, may now be eligible for a “U” nonimmigrant visa, if they help and cooperate in a criminal investigation. These include victims of domestic violence and trafficking victims.<sup>25</sup>

Victims of severe forms of trafficking in persons may also be eligible for a “T” nonimmigrant visa. They must demonstrate that they would suffer unusual and severe harm if they were removed from the United States. They must also comply with requests for assistance in investigations or prosecutions of acts of trafficking, unless they are under the age of 15.<sup>26</sup> “U” and “T” visa recipients may be able to adjust eventually to permanent residence in the United States.<sup>27</sup>

Many unaccompanied children are victims of child abuse and/or trafficking. While each program has particular criteria that applicants must meet, the “SIJ,” “U,” and “T” visas are additional forms of protection for children who have suffered abuses that may or may not also render them eligible for asylum protection. The INS and the Department of Justice must ensure that these programs are generously implemented so that children are not returned to harmful or dangerous situations in their homelands.

<sup>22</sup> Section 101(a) (27) (J), Immigration and Nationality Act.

<sup>23</sup> Section 113, Public Law 105-119; see also Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Adjudications Division, Immigration and Naturalization Service (July 9, 1999) (indicating that INS district directors must consent to the jurisdiction of a juvenile court before a minor in INS custody can pursue a dependency order); Memorandum from Katherine Brady, Immigrant Legal Resource Center (December 9, 1997) (discussing changes in the SIJ law).

<sup>24</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-396, 114 Stat. 1464.

<sup>25</sup> *Ibid.*, section 1513.

<sup>26</sup> *Ibid.*, section 107.

<sup>27</sup> See “INS Publishes Interim Rule Implementing ‘T’ Visa Requirements, Procedures for Trafficking Victims,” Interpreter Releases, page 173 (February 4, 2002).

## Children and the U.S. Detention System

The United States is one of the harshest countries in the world in terms of its detention policies for unaccompanied minors in immigration proceedings. Like adults, children who are apprehended by the INS and who lack the required documentation to remain in the United States are subject to prolonged detention, in some cases for more than two years, while their immigration status is resolved. Such detention, moreover, is often in inappropriate and inhumane conditions that jeopardize a child's well-being.

Despite a court decree to the contrary, INS detention of children continues to be driven by the agency's overwhelming bias on the side of law enforcement. INS policy and practice fail to consider adequately the best interests of the child principle, the cornerstone of child welfare policy, which holds that the needs of a child must be paramount in any decision affecting his or her well-being.

### *The Flores Agreement*

The legal framework for the custodial care and treatment of unaccompanied newcomer children derives from a consent decree known as the *Flores v. Reno* settlement agreement.<sup>28</sup> Filed as a class action lawsuit in U.S. federal court in 1985, the *Flores* case challenged the constitutionality of policies and practices regarding the detention and release of unaccompanied children taken into custody by the INS. The case went to the U.S. Supreme Court before being remanded to the court in which it originated, the District Court of the Southern District of California, at which point the plaintiffs and the government reached a settlement in 1996.<sup>29</sup>

The agreement was originally intended to become the basis for a regulation to be published by the INS that would incorporate the provisions of the agreement.<sup>30</sup> While the INS published a proposed regulation for public comment in 1998, it never finalized the rule.<sup>31</sup> This failure carried potentially serious consequences, as the agreement was scheduled to terminate in January 2002, which would have eliminated the existence of any legal framework to guide INS treatment of children.<sup>32</sup> The INS, however, recently agreed to re-publish its proposed rule and extend implementation of the agreement until the regulation is finalized. At the time of writing, the regulation had been published and reopened for public comment and was in the process of being finalized.<sup>33</sup>

In its current form, the *Flores* agreement addresses a range of detention issues pertaining to children, including release to family members or other responsible entities, placement, transportation, monitoring, and attorney-client visitation. In addition, the agreement delineates minimum standards of care for

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<sup>28</sup> Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996). Available at <http://www.centerforhumanrights.org/FloresSettle.html> (hereinafter, *Flores*).

<sup>29</sup> *Reno v. Flores*, 507 U.S. 292 (1993).

<sup>30</sup> *Flores*.

<sup>31</sup> "Processing, Detention, and Release of Juveniles," Federal Register, page 39759 (July 24, 1998).

<sup>32</sup> *Flores*.

<sup>33</sup> "Processing, Detention, and Release of Juveniles," Federal Register, page 1670 (January 14, 2002). While it is critical that the *Flores* agreement be incorporated into regulation, serious concerns exist that the regulation not serve to water down the provisions of the agreement. The proposed regulation fails to incorporate several critical protections, including the guarantee of minimum standards for facilities used to house children, the prevention of commingling of non-delinquent INS detainees with delinquent youth, and the judicial review of placement decisions. See Joint Comments of the Center for Human Rights and Constitutional Law, the Youth Law Center, and the Women's Commission for Refugee Women and Children to the Proposed Rule on the Processing, Detention, and Release of Juveniles (March 15, 2002).

licensed programs with which the INS contracts for the placement of children in its custody, such as access to health care, recreation, education, religious services, and legal representation.

The *Flores* agreement is premised on the notion that the INS must treat children in its custody with “dignity, respect, and special concern for their vulnerability as minors.”<sup>34</sup> It requires the INS to release children without unnecessary delay unless detention is required to secure the child’s appearance in court or to ensure the safety of the child or others.<sup>35</sup> The agreement lays out in order of preference categories of relatives, unrelated adults, and licensed child care settings to which children are to be released.<sup>36</sup>

The agreement also requires the INS to place children for whom release is pending or for whom no release option is available in the least restrictive setting that is appropriate to the child’s age and special needs.<sup>37</sup> However, the agreement defines exceptions to this general rule for children whom the INS has deemed escape risks, children who are believed or found to be criminal or delinquent, children whom the INS actually believes to be over the age of 18, children who present a risk to their own safety or that of others, or in cases of an emergency or an influx of children.<sup>38</sup> In such cases, the INS can place the minor in an INS-contracted facility or a state or county juvenile detention facility that has separate accommodations for minors. Under *Flores*, however, the child is supposed to be housed separately from the delinquent population in the facility.<sup>39</sup> Any child placed in a medium secure or secure facility must also be provided a written notice of the reasons why.<sup>40</sup>

The *Flores* agreement provides the opportunity to challenge in federal court the placement of a child in a secure setting.<sup>41</sup> However, until recently, attorneys for children and others concerned about the treatment of newcomer children have lacked the resources to challenge violations of the *Flores* requirements. As a result, INS compliance with *Flores* was largely self-initiated and self-monitored, a function INS has performed inadequately.<sup>42</sup>

Nonetheless, the *Flores* agreement provides a critical yardstick against which to evaluate INS practices with regard to children in its custody. Recent evaluations have found that INS compliance with *Flores* remains inconsistent. The Office of the Inspector General, a sister agency of the INS within the Department of Justice, concluded that while the INS has made progress, “deficiencies in the handling of juveniles continue to exist in some INS districts, border patrol sectors, and headquarters that could have potentially serious consequences for the well-being of the juveniles.”<sup>43</sup>

The Women’s Commission confirmed this finding in its August 2001 assessment. Release and placement decisions for children have frequently remained ad hoc, arbitrary, and inconsistent, with little heed given to what is in the best interests of each child.

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<sup>34</sup> Ibid., paragraph 11.

<sup>35</sup> Ibid., paragraph 14.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., paragraph 11.

<sup>38</sup> Ibid., paragraphs 12, 21.

<sup>39</sup> Ibid., paragraph 12.

<sup>40</sup> Ibid., paragraph 24.

<sup>41</sup> Ibid.

<sup>42</sup> See OIG report.

<sup>43</sup> Ibid.; see also “Detained and Deprived of Rights: Children in the Custody of the U.S. immigration and Naturalization Service,” Human Rights Watch (December 1998) (finding that the INS’s treatment of children is lacking based on site visits to the Berks County Youth Center in Pennsylvania); “Slipping Through the Cracks,” Human Rights Watch (April 1997) (finding that conditions of confinement for children detained by the INS violate international law).



## INS Structure and Staffing for Children's Programs

Over the years, the Department of Justice has shifted jurisdiction over the care and custody of newcomer children from office to office. It has also made numerous changes in the staff responsible for children's programs. At the time of writing, both the structure and staffing were again entering a period of turmoil.

For many years, shelters that housed children in INS custody were overseen by the Community Relations Service (CRS), a department that is within the Department of Justice but separate from the INS. CRS maintained a small staff of social workers to administer the children's shelters; private nonprofit agencies were contracted to run the shelters.

However, the INS absorbed the functions of CRS related to immigration in 1996. The CRS staff charged with the oversight of the shelters moved to the INS as well. Both the staff and their continuing operations were housed in the Humanitarian Affairs Branch (HAB), the department within the INS in which the asylum corps and overseas refugee processing are located. HAB is commonly recognized for its better-than-average service orientation within the overall INS structure.

In 2000, however, the INS decided to consolidate all of its children's programs into a Juvenile Affairs Division within its Detention and Removal branch, a department closely tied to the agency's law enforcement functions. Nongovernmental organizations concerned about the handling of children in INS custody feared that this transfer of authority would further aggravate the inherent conflict of interest between INS enforcement responsibilities and the provision of child welfare services.<sup>44</sup> The INS responded to this criticism by characterizing the move as a consolidation of efforts, expertise, and resources that would ensure program consistency and an enhancement of services.<sup>45</sup>

The concerns of immigrant and refugee advocates proved well-founded. After the Detention and Removal Branch assumed control over children's programming, the INS's enforcement concerns increasingly began to dominate decisions made on behalf of child newcomers. The INS consistently neglected the needs of children in favor of its deportation functions, budgetary concerns, and administrative and logistical priorities.

Moreover, regardless of where within the INS management structure oversight of children's programs has been lodged, INS staffing for children's programs has historically been highly decentralized. While decentralization characterizes most INS programs, it carries particularly troubling consequences for children.

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<sup>44</sup> See, e.g., letter from Ralston H. Deffenbaugh Jr., Lutheran Immigration and Refugee Service, on behalf of more than 50 nongovernmental organizations and individuals, to Doris Meissner, Immigration and Naturalization Service (October 17, 2000).

<sup>45</sup> Letter from Kenneth J. Elwood, Immigration and Naturalization Service, to Ralston H. Deffenbaugh, Jr., Lutheran Immigration and Refugee Service (December 6, 2000).

In practice, the supervision of children's programs has largely been implemented through the INS regional and district offices across the country. There are three INS regions and 33 INS districts, each of which functions with tremendous autonomy and little accountability to INS headquarters in Washington, D.C.<sup>46</sup>

Each region and district has a designated juvenile coordinator. These juvenile coordinators are generally not individuals with child welfare expertise but are detention and deportation officers who are charged with overseeing the handling of children in that particular district. Once designated as juvenile coordinators, however, they do receive some training regarding INS policies and procedures for children. In some districts, the appointment as juvenile coordinator is a permanent appointment, but in most cases it is a temporary assignment and may even be performed on a part-time basis. The regional juvenile coordinators in the three INS regions are full-time, permanent positions.

The line authority over and supervision of the regional and district juvenile coordinators has been through the district and regional structures. While counterintuitive, the Director of Juvenile Affairs in Washington, D.C., has only had dotted line authority over these officers, who actually have reported directly to their respective district and regional directors. This disconnect consistently led to decentralization, a lack of accountability, and inconsistent practices with regard to children from district to district and region to region.

## **INS Reorganization Plan Includes Restructuring of Children's Programs**

In response to public criticism and pressure from Congress, the INS released a proposal to overhaul its management and organizational structure in November 2001.<sup>47</sup> The heart of the proposal is to separate the agency's service and law enforcement functions into two bureaus, which would continue to report to the Office of the INS Commissioner.

Certain functions would not be lodged in either the service or the law enforcement branch. These offices cover functions that are viewed as essential to both bureaus, such as finances, information, legal affairs, congressional and public relations, and a newly created Office of Juvenile Affairs (OJA).

The INS has stated that the mandate of the OJA will be to act as the central policy office on children's matters and to direct national programs to address the needs of unaccompanied minors in INS custody. The INS Restructuring Proposal sets out the following tasks for the office:

*OJA will respond to the needs of juveniles (including but not limited to unaccompanied minors) in the custody and care of the INS, coordinate services to juveniles in INS field*

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<sup>46</sup> At the time that this report was going to print, the INS was under tremendous scrutiny by Congress, the Administration, and the public for its lack of effective management structure and inability to perform its various mandates. Proposals were under consideration in both the House of Representatives and the Senate that would dramatically overhaul the agency and dismantle its district and regional offices. The Department of Justice had formulated its own restructuring plan as well. See "Barbara Jordan Immigration Reform and Accountability Act of 2002," U.S. House of Representatives (H.R. 3231); "Immigration Reform, Accountability, and Security Enhancement Act of 2002," U.S. Senate (S. 2444); "Restructuring Proposal," Immigration and Naturalization Service (November 14, 2001) (hereinafter INS restructuring proposal); see also "INS Announces First Major Structural Changes in Restructuring," Immigration and Naturalization Service (April 17, 2002) (hereinafter INS announces restructuring changes).

<sup>47</sup> INS restructuring proposal; see also INS announces restructuring changes; "Restructuring: Questions and Answers," Immigration and Naturalization Service (April 17, 2002).

*offices, and ensure that juveniles found inadmissible/removable from the country are removed safely and correctly. The basic tenets of INS policy toward minors include developing research-based best practices and service approaches, ensuring consistent application of policies and procedures, facilitating family reunification, and developing effective case management systems.*<sup>48</sup>

While this change reflects the INS's growing awareness that it must revamp its treatment of children, it likely will not go far enough to bring about the kind of meaningful reform that would ensure that children receive appropriate care while their eligibility for immigration relief is being determined. Children are inherently different from any other population that the INS encounters. In contrast to adults, who are typically able to understand at least the fundamentals of the immigration system as they seek to regularize their immigration status, many children lack the capacity to appreciate the complexities of U.S. immigration law and to make reasoned decisions that will fundamentally affect their futures.

The INS's proposal fails to address the fundamental conflict of interest that the agency has when charged with both the care and custody of children at the same time that it is seeking their removal from the United States. Because the INS is dominated by enforcement concerns at the same time that it completely lacks child welfare expertise, its law enforcement functions frequently override consideration of the best interests of the children in its custody. This bias is illustrated in numerous ways, such as the INS's consistent pattern and practice of refusing to allow children who may be eligible for Special Immigrant Juvenile Status (SIJ) to appear before a juvenile court to determine whether the child has been abused, abandoned, or neglected, a threshold requirement for SIJ eligibility. It is also demonstrated by the INS's frequent denial of release to foster care for which it is already contracted to children who have been granted asylum, because the agency has decided to appeal the decision. This delay means that the child languishes in detention for several more months, often in secure juvenile detention centers, unable to enjoy the stability of a home-like environment.

The INS's original restructuring proposal failed to address the management flaw whereby the INS Director of Juvenile Affairs in Washington, D.C. only has "dotted line" authority over regional and district juvenile coordinators, who remain under the supervision of their respective districts and regions (see above.) After criticism from Congress, advocates, and others, the INS issued a second statement announcing that the Director will supervise officers in the field.<sup>49</sup> However, the day-to-day decision-making affecting a child's care and placement is likely to be retained by low-level INS enforcement officials, who lack the child welfare expertise to determine the most appropriate care arrangements for children.

Moreover, without significant changes in the agency's institutional mindset, the INS proposal will not resolve the endemic management issues within the agency that favor law enforcement over services. The proposal itself acknowledges this dilemma when it notes that "reorganization should not be seen as a panacea for all the challenges the INS faces."<sup>50</sup> The chronic failure of the INS to address critical protection issues confronted by children in its care and the lack of transparency in INS operations are issues that are likely to continue to plague the agency.

In fact, the shifting of responsibility for children's programs and the confusion that has chronically resulted from such uncertainty are ongoing. The restructuring proposal has yet to be implemented. Meanwhile, a recently appointed head of the Juvenile Affairs Division, who had been hired in Spring 2001 and heralded at the time as an expert in juvenile justice and child welfare, had been transferred to a

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<sup>48</sup> INS restructuring proposal, page 26.

<sup>49</sup> INS announces restructuring.

<sup>50</sup> INS restructuring proposal, page 5.

new position unrelated to children. His interim replacement is a former INS district director, whose background is in immigration law enforcement.<sup>51</sup>

### **Families Frequently Split While in INS Custody**

The INS frequently separates families seeking asylum into different detention centers, sometimes hundreds or thousands of miles apart. This includes splitting children, even toddlers in some cases, from their parents or adult relatives.

Such separation causes tremendous trauma to the family. Often, family members have only limited contact with their relatives held in other facilities. In addition to the emotional toil this causes, it also interferes with the ability of the family to adequately prepare their asylum claims.

The Women's Commission, for example, recently interviewed the Kutchemeshgi family, who were held in detention in Miami for several months while their asylum claim was pending. The mother and younger son, age 17, were held in a local motel while the older son, age 18, was held alone at the Krome Service Processing Center, an INS detention center in which adult males are imprisoned. The family had fled religious persecution in their homeland of Iran.

Bardia, the older son, was sexually teased while at Krome. He attributed this harassment to his young age, as he was the youngest male at the facility. When asked about the family's separation, his mother described it as "very hard and stressful."<sup>52</sup>

The INS has sought to address the problem of family separation by opening its first family detention center in Berks County, Pennsylvania. The facility, however, can only hold approximately 40 individuals at one time. Family members, moreover, are housed in separate wings at night, with the exception of children under age 7, who are allowed to stay with their mothers.<sup>53</sup>

### **Congress Poised to Overhaul Treatment of Children in INS Custody**

Congress is currently considering legislation that would dramatically change how child asylum seekers and immigrants are treated in the United States. The "Unaccompanied Alien Child Protection Act," introduced by Senator Dianne Feinstein (D-CA) in the Senate (S. 121) and by Representatives Zoe Lofgren (D-CA) and Chris Cannon (R-UT) in the House of Representatives (H.R. 1904), has garnered bipartisan support.

The legislation seeks to address many of the critical procedural gaps that undermine protection of child newcomers. It would resolve the conflict of interest that the INS experiences with children in immigration proceedings by transferring care and custody of such children to a new Office of Children's Services (OCS). The OCS would be part of the Department of Justice, but outside of the INS, and would be staffed by professionals with child welfare expertise. The OCS would have no direct interest in the outcome of a child's asylum or immigration case, thereby enabling the INS to focus its efforts on its law enforcement objectives.

The OCS would also be responsible for providing the assistance children require to navigate the U.S. asylum and immigration system. This would include ensuring that children are represented by counsel.

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<sup>51</sup> INS announces restructuring.

<sup>52</sup> Interview at Krome Service Processing Center (December 2001). Real names have not been used to protect the family's confidentiality.

<sup>53</sup> Hanna Rosin, "Asylum Seekers Decry Detention by INS," Washington Post, page A6 (June 17, 2001).

Such counsel would be funded by the government if no *pro bono* or paid resources are available. The OCS would also appoint guardians *ad litem* to develop recommendations regarding a child's custody, detention, and release; to assist a child in understanding and participating in his or her proceedings; to ascertain the facts and circumstances relevant to a child's presence in the United States; and to share recommendations with the immigration court regarding the appropriate outcome in a child's case.

Finally, the legislation would establish an age determination system that enables unaccompanied children to present various forms of evidence proving their age. It would also put in place an appeal procedure to challenge adverse age findings.

There is a strong likelihood that the Unaccompanied Alien Child Protection Act will become law before the conclusion of the 107<sup>th</sup> session of Congress in Fall 2002. The Senate recently incorporated the bill into comprehensive legislation to reorganize the INS known as the "Immigration Reform, Accountability, and Security Enhancement Act of 2002" (S. 2444). Given that the House of Representatives has already passed INS reform legislation, the stage is set for significant statutory changes that improve the treatment of unaccompanied children in immigration proceedings.

Such legislation is essential to prevent continued inconsistency in children's programming. Experience has shown that in the absence of a statutory mandate, the Department of Justice has a tendency to shift the responsibility for children in immigration proceedings from office to office, creating unclear mandates and confusion about responsibilities.

## Some Children in INS Custody are Wrongfully Detained as Adults

*I arrived at JFK International Airport on July 11, 1999, nine days before my 16<sup>th</sup> birthday....I was taken to the Wackenhut Detention Center in Queens, New York. I was held at an adult facility even though I was a minor, because the INS claimed that they could tell that I was over 18 from a dental examination. I was detained at Wackenhut for about six months. I was very sad at Wackenhut because I was put with adults and I wasn't supposed to be with them.... I was transferred to Lehigh County Prison, a criminal prison in Pennsylvania—moving me far from my family and my pro bono lawyers. I was detained there with criminals for one week. I felt like I was treated like a criminal. I was the youngest one among them and was very scared that the criminal detainees would hurt me. My cellmate had killed someone and would tell me about the crimes he had done. I was so afraid that I couldn't sleep at night.... I was transferred to York County Prison, another remote detention facility in Pennsylvania. I was detained there about five months. As I was transferred to my cell with INS detainees, I was handcuffed, chained, and shackled like a criminal.... I felt like my life was finished. I was too young to be there.”*

Testimony of Mekabou Fofana, Liberian teenager, before the Senate Committee on the Judiciary, Immigration Subcommittee (May 3, 2001). Mekabou was detained as an adult for one and a half years before being granted asylum by the Board of Immigration Appeals.

The Women's Commission for Refugee Women and Children has followed many cases in which youth under age 18 have been incorrectly identified by the INS as adults. This misclassification as adults carries serious consequences for the handling of the youths' cases and their placement in detention. Adults may be immediately returned to their home countries under the system of expedited removal unless they express a fear of return, whereas children under age 18 may not be so returned.<sup>54</sup> Moreover, young people misclassified as adults are commingled with adults in adult INS detention centers or prisons.

To determine the age of young people whose age is not readily apparent, the INS relies on dental radiograph exams or bone radiograph exams. Dental exams base age assessments on the eruption patterns of teeth. Dental experts have questioned the use of such exams for definitive age determinations. For example, in a letter to the Women's Commission, Dr. Herbert H. Frommer, DDS, Professor and Chair of Radiology at New York University, concluded, "It is my opinion that it is impossible to make an exact judgment based on radiographs of whether an individual is above or below the age of 18."<sup>55</sup> Other experts have echoed Dr. Frommer's concerns.<sup>56</sup>

These concerns are also shared by the Department of State. In 1998, it discontinued the use of bone testing to establish age out of recognition that ethnic and individual variations in development may also be exacerbated by cultural differences, malnutrition, and disease.<sup>57</sup>

Despite the inaccuracy of radiograph exams, the INS has typically defended their use. In response to concerns raised by the Women's Commission regarding the dental exams, the INS responded in writing almost a year later. It characterized the dental exams as a *bona fide* forensic technique.<sup>58</sup>

The INS recently stated that it is reconsidering its reliance on dental exams. In a speech in February 2002, INS Commissioner James Ziglar briefly noted that the INS is reviewing procedures for determining age.<sup>59</sup>

<sup>54</sup> "Unaccompanied Minors Subject to Expedited Removal," Memorandum from the INS Office of Programs (August 21, 1997).

<sup>55</sup> Letter from Herbert H. Frommer, DDS, Professor and Chair of Radiology, New York University, to Rachel K. Jones, Fellow, Women's Commission for Refugee Women and Children (August 7, 1997).

<sup>56</sup> See letter from Neil Serman, BDS, DDS, MS(Rad), Professor and Head, Division of Oral Radiology, Columbia University School of Dental and Oral Surgery, to Rachel Jones, Fellow, Women's Commission for Refugee Women and Children (August 21, 1997) (noting that there is great variation in age in eruption patterns of teeth); Alan Elsner, "New York Dentists Can Settle Fate of Migrants," Reuters (January 11, 2002) (citing concerns from dental experts that dental x-rays cannot accurately identify a person's age).

<sup>57</sup> Alan Elsner, "New York Dentists Can Settle Fate of Migrants," Reuters (January 11, 2002).

<sup>58</sup> Letter from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Mary Diaz, Executive Director, Women's Commission for Refugee Women and Children (July 22, 1998).

## II. Findings From the Women's Commission Assessment

### Introduction

In August 2001, the Women's Commission for Refugee Women and Children conducted a four-state assessment of the treatment of children detained by the INS. This study focused primarily on the INS's use of secure facilities from which the agency rents space to hold children in its custody. The INS utilizes approximately 90 such facilities across the country, the majority of which are operated under the auspices of county governments.<sup>60</sup>

Approximately one-third of children in INS custody spend time in juvenile detention centers, which effectively are jails designed for the incarceration of youthful offenders, for periods ranging from a few days to more than year. The vast majority of these children have not committed nor are suspected of having committed any criminal act.

The Women's Commission confirmed in its assessment the existence of a pervasive exploitation of secure confinement that violates the best interests of the children placed in such facilities. This is due to the increase in the number of unaccompanied children entering the United States, the INS's bureaucratic inefficiencies, and a grossly inconsistent system of placement decisions among the 33 INS district and three regional offices.

### Access to Facilities by Human Rights Groups

The Women's Commission encountered tremendous barriers to access to juvenile detention centers. These obstacles resulted from unclear visitation policies, a lack of communication among INS staff and offices, a lack of communication between the INS and facility administrators, and an apparent hostility to outside scrutiny of INS programs.

The Women's Commission sought access to twelve facilities used by the INS in California, Washington, Oregon, and Texas:

- Central Juvenile Hall, *Los Angeles, California*
- Los Podrinos Juvenile Hall, *Downey, California*
- Tulare County Juvenile Detention Facility, *Visalia, California*
- San Diego Juvenile Hall, *San Diego, California*
- Marin County Juvenile Facility, *San Rafael, California*
- Grant County Juvenile Detention Center, *Ephrata, Washington*
- Spokane County Juvenile Detention Center, *Spokane, Washington*
- Martin Hall, *Medical Lake, Washington*
- D.E. Long Juvenile Detention Center, *Portland, Oregon*
- Medina County Juvenile Detention Facility, *Hondo, Texas*
- Liberty County Juvenile Detention Center, *Liberty, Texas*
- Catholic Charities Children's Shelter, *Houston, Texas*

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<sup>59</sup> Speech by Commissioner James W. Ziglar, Immigration and Naturalization Service, before the National Immigration Forum (February 1, 2002).

<sup>60</sup> "Juvenile Facilities Under Contract with the INS," Immigration and Naturalization Service (undated copy obtained in May 2001).

The Women's Commission wrote letters to the INS Director of Juvenile Affairs and the local facilities themselves seeking permission to tour the facilities and to interview INS-detained children several weeks before the scheduled start of the tour. The director expressed his support for the assessment. All but one center expressed their willingness to allow access to the Women's Commission, although in some cases the facility administrators indicated that they would also have to obtain approval from the INS district and/or regional offices.<sup>61</sup>

Given the cooperation it received from the INS headquarters in Washington, D.C., and generally from the facilities themselves, the delegation fully expected to receive a similar level of openness at the INS district and regional levels. However, this did not hold true. In the majority of cases, the delegation met with opposition when it approached the regional and district INS staff.

The INS Houston District forbade the delegation to visit facilities under its jurisdiction entrance entirely. Therefore, the delegation was only able to visit the Liberty County facility, and then only because it accompanied an attorney of a child detained there. As the visit was conducted under the rubric of an attorney/client visit, the delegation was unable to view the children's living area. The delegation was denied any form of access to the Medina County Juvenile Detention Facility and the Catholic Charities Children's Shelter. It should be noted that the Women's Commission was granted access to the Catholic Charities shelter in 1998, at which time it was impressed with the openness of the facility and the professionalism of the staff. That same year, it was also given full access to the Liberty County facility, about which it raised serious concerns regarding the punitive conditions of detention in the facility.

The ability of the Women's Commission delegation to access the facilities used by the INS San Francisco and Los Angeles Districts was somewhat more successful than in Texas, but still hampered by restrictions placed on the visits. It was allowed to tour Central Juvenile Hall, Los Podrinos Juvenile Hall, and Tulare County Juvenile Detention Facility, but was not permitted to speak with INS-detained children.

This denial was particularly disturbing in the case of the Tulare Juvenile Detention Center. The delegation drove three and a half hours from Los Angeles to rural central California to reach the facility, accompanied by a volunteer Chinese interpreter, who was to facilitate interviews with several Chinese child asylum seekers detained in the center. The delegation had obtained the written permission of the attorney representing the children to interview her clients.<sup>62</sup> Once the delegation arrived at the facility, however, the San Francisco INS District juvenile coordinator informed its members that they would not be allowed to speak with the children. Even after an on-site telephone conversation with INS headquarters, including the Director of Juvenile Affairs, the INS stood behind the position of the regional and district juvenile coordinators. The INS General Counsel's Office in Washington, D.C., in fact, threatened to cancel the remainder of the Women's Commission delegation to the four remaining facilities it wished to visit if it persisted in its effort to interview the children detained in Tulare County. The INS regional juvenile coordinator indicated that the prior approval of the children's attorney was insufficient to facilitate access, stating that he had no means to authenticate the letter, despite the fact that the letter was on letterhead and indicated the attorney's willingness to confirm her consent by telephone.

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<sup>61</sup> The administrator of the Marin County facility outright denied access for a visit, with the justification that a visit had recently been conducted by the law firm of Latham & Watkins and that he was disinclined to allow another visit.

<sup>62</sup> Letter from Sarah Bronstein, Detention Attorney, Catholic Legal Immigration Network, Inc., to Tulare County Juvenile Hall (August 23, 2001) (requesting that the facility allow the Women's Commission delegation to visit with four children represented by her office); see also letter from Sarah Bronstein, Detention Attorney, Catholic Legal Immigration Network, Inc., to Michael Pearson, Executive Associate Commissioner, Immigration and Naturalization Service (September 17, 2001) (expressing concern that the Women's Commission delegation was denied access to interview the four children).



The delegation's subsequent visit to the San Diego Juvenile Hall further confirmed the arbitrariness of INS policy regarding access to juvenile detention centers. The delegation met with no resistance from the San Diego facility administrators, was provided a thorough tour of the facility, and was allowed to speak with INS-detained children in private. The delegation had notified both the facility and INS headquarters of its intent to visit the facility, but in this case, the facility administrator apparently felt no need to confer with the INS San Diego District office.

The delegation encountered further inconsistencies in INS policy during its visits to facilities in Washington and Oregon. Its visits to the Spokane County Juvenile Detention Center and the Grant County Juvenile Detention Center were open and unrestricted. However, it should be noted that the INS rarely uses either facility and, in fact, did not have children detained in either location at the time of the Women's Commission's visit.

The delegation did encounter resistance to its visit to Martin Hall, which is used regularly by the INS. The INS Seattle District juvenile coordinator attempted to prevent the delegation from speaking with the children in INS custody. However, the delegation overcame her refusal because the children's attorney had accompanied the delegation and he insisted that the delegation be allowed to speak with his clients. The administrators of the D.E. Long Juvenile Detention Center in Oregon cooperated in the delegation's visit and provided a full tour of the facility. However, the INS has greatly curtailed its use of the Long center since it received heated criticism in the Portland media in 2000.

The repeated denial of access to the Women's Commission delegation was troubling on a number of fronts. First, there currently exists no written policy on access to children's facilities, even though the INS has issued written guidelines for such visits to adult detention centers.<sup>63</sup> The delegation acted in good faith and relied on the expression of cooperation from the Director of Juvenile Affairs. The ability of local INS officers to override decisions made at the INS headquarters level is confusing, nonsensical, and reflective of a flawed management structure that permeates the policies and procedures for handling children in the custody of the INS. Subsequent to the delegation's tour, the INS headquarters indicated that it would develop a written access policy, but to date no such policy has been issued.

Second, the ability of human rights organizations such as the Women's Commission to evaluate U.S. treatment of children newcomers hinges on access to such facilities. Such organizations can play a valuable role in assessing current practices and offering recommendations for reform. Indeed, the Women's Commission has conducted such assessments in over 40 refugee settings around the world, the majority in countries with much more restrictive governments than that of the United States. Rarely has it encountered the lack of transparency it experienced in the United States.

Third, the INS's denial of access to the Women's Commission delegation was also questionable in its legality in one important aspect. An attorney designated under the *Flores* agreement as an attorney of record for all children in INS custody with regard to their conditions of confinement was a member of the Women's Commission delegation. Under the *Flores* agreement, such attorneys are to be given full access to children in INS detention.<sup>64</sup> The INS failed to adhere to this *Flores* requirement, however, even for this attorney. Its stated rationale for this was that the attorney was "switching hats" and that for purposes of the Women's Commission delegation was unable to act as a *Flores* attorney. It persisted in this justification even when the Women's Commission agreed to withdraw its own request for access in order to facilitate a *Flores* visit by the *Flores* attorney, even though under the agreement such attorneys may be accompanied by experts of their choice.<sup>65</sup>

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<sup>63</sup> Immigration and Naturalization Service, Detention Operation Manual, "Visitation" (September 20, 2000).

<sup>64</sup> *Flores*.

<sup>65</sup> *Ibid.*, paragraph 33.

Also of concern were reports from service providers that the INS had transferred children to other facilities just prior to the Women's Commission's visits or had attempted to create an artificial impression of conditions in the facilities. While the delegation was unable to confirm that this was due to its visit, the service providers believed that this was the case. Service providers in Houston reported that the average population in Liberty County is 20 to 25 INS-detained children. Just prior to the Women's Commission's visit to Texas, the population had dropped to six children.<sup>66</sup> The population of children in INS custody at the Martin Hall facility dropped from 17 children to four just prior to the Women's Commission visit. An attorney observed, "We don't know where the other 13 children are."<sup>67</sup> A child detained in Tulare County informed a lawyer that the facility staff had told the children to clean their cells as a group of "dignitaries" would be visiting.<sup>68</sup>

The reluctance of the INS to cooperate in visits to children's detention centers leaves the impression that the agency is fearful of outside criticism of its practices. The agency would be better served if it welcomed a public/private partnership with organizations with expertise in immigration, refugee protection, and children's rights and was transparent about its policies and practices, including access to children's facilities. While clearly the INS must regulate visits to the facilities in order to ensure the safety of the children and the smooth operation of the facilities, an arbitrary denial of such visits, or an effort to create an artificial impression of conditions in such facilities, does not serve either goal.

## **Release and Placement Decisions by the INS**

### **Release from Detention to Family or Other Appropriate Care Givers**

The preferred option under the *Flores* agreement is to release children into the custody of their parents or other appropriate care givers. The INS must implement this requirement unless continued detention is necessary to secure the child's appearance before immigration court or to ensure the child's safety. The agreement spells out a list of parties to whom children may be released in order of preference. These include:

- A parent;
- A legal guardian;
- An adult relative;
- An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the child;
- A licensed program willing to accept custody; or
- An adult individual or entity seeking custody, at the discretion of the INS, when there appears to be no likely alternative to long-term detention and family reunification does not appear to be reasonably possible.<sup>69</sup>

Increasingly, the INS has failed to exercise release of children even when one of these options is available. Service providers in Houston, for example, reported that family reunification for children held in the custody of the INS Houston District had dropped significantly. They indicated that this shift in

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<sup>66</sup> Interview with Houston-based immigration legal service providers (August 2001).

<sup>67</sup> Interview with Columbia Legal Services (August 2001).

<sup>68</sup> Interview with Catholic Legal Immigration Network, Inc. (August 2001).

<sup>69</sup> *Flores*.

policy escalated after the INS consolidated children's programs under its Detention and Removal branch in 2000.<sup>70</sup>

Family reunification is particularly problematic in cases involving release to undocumented parents or relatives. In such cases, the INS has increasingly moved toward requiring the undocumented individual to come forward to accept his or her child relative, even when another qualified U.S. citizen or permanent resident relative is available to whom the child can be released. In effect, the INS has interpreted the list of possible sponsors under *Flores* not as a preferential delineation of parties but as a hierarchical list.

In such cases, the INS then typically places the undocumented relative into removal proceedings by issuing him or her a "Notice to Appear," the equivalent of an immigration charging document. Children in effect are used as bait to force their relatives to appear before the INS. Moreover, if the relative refuses to appear before the INS to accept the child, the child pays the price as the INS will continue to hold the child in detention indefinitely.<sup>71</sup>

In Houston, this practice is used not only in cases involving undocumented relatives, but also for relatives who are in legal, but temporary, immigration status. For example, parents who are enjoying temporary protected status are still issued Notices to Appear.<sup>72</sup>

One Houston service provider observed: "The INS often cites the best interests of the child when it refuses to release a child to a family member. But, in fact, they are using the best interests principle as a barrier to family reunification."<sup>73</sup>

In Washington, attorneys reported that undocumented parents who wish to obtain custody of their children are not forewarned by the INS that they themselves will be placed in removal proceedings if they come forward. They reported that some parents have told them that the INS did not even identify itself when it contacted them to let them know that their child was in custody. In cases in which the child had a documented relative willing to accept the child, the INS refused to release to the documented relative and instead forced the undocumented relative to come forward.<sup>74</sup>

The Seattle INS juvenile coordinator conceded that undocumented parents are sometimes issued Notices to Appear. However, she denied that the district does not give the parent prior notice that they will be placed in removal proceedings upon appearance at the INS office.

Service providers in Los Angeles reported similar barriers to family reunification. The Los Angeles district juvenile coordinator admitted that it was the district's policy to issue Notices to Appear to undocumented relatives, including parents, who appear to accept custody of their children. In one case, a child had an undocumented sister who was residing in the United States. The INS refused to release the child to a family friend so that the undocumented sister would not have to appear at the INS. One service

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<sup>70</sup> Interview with Houston-based service providers (August 2001).

<sup>71</sup> See OIG report (citing INS letter to the United States Catholic Conference and the Lutheran Immigration and Refugee Service stating that it is INS policy to require undocumented relatives to appear before an INS officer and to be served a Notice to Appear and that if an undocumented parent refuses to do so, the child will continue to be held in custody).

<sup>72</sup> Temporary Protected Status (TPS) is granted to nationals who cannot return to their home countries due to armed conflict, natural disasters, or other disturbances temporarily rendering return difficult. TPS allows a recipient to live and work legally in the United States. Immigration and Nationality Act, section 244.

<sup>73</sup> Ibid.

<sup>74</sup> Interview with Columbia Legal Services (August 2001).

provider observed: “This puts the kids in a terrible position. They feel guilty that their family member has to risk their own status in order to pick them up.”<sup>75</sup>

The U.S. District Court for the Southern District of Florida recently considered a request to prevent the transfer of a Guatemalan boy from Miami to a Pennsylvania facility. The boy had already been transferred eight times from facility to facility. In the course of a preliminary hearing, the INS Miami District juvenile coordinator indicated that he would not release the boy to a licensed shelter program as required under the *Flores* agreement, even if petitioned to do so, because his office was aware that the boy had an 18-year-old undocumented brother in the United States. The juvenile coordinator stated:

“I would recommend denial [of release] in this case because...we already know that he has blood relatives in this country who are circumventing the law and refusing to come forward because they would be subjected to an immigration arrest.... So I’m not going to allow release to a non-relative when we know that there are relatives in the United States.”<sup>76</sup>

The district court judge then responded:

“I am outraged that someone would have made up his mind before hearing any evidence whatsoever.... Because right now what I have heard is that the INS is telling the petitioner, ‘Don’t file any petition, because before we even consider whether to release him in accordance with the regulations, I made up my mind and I am not going to do it.’”<sup>77</sup>

Unfortunately, the court later ruled that it lacked jurisdiction over the case and would not mandate the child’s placement into shelter or foster care, even though it believed that was the appropriate course of action.

### **Placement in Shelter or Foster Care**

*Fega, an eight-year-old girl from Nigeria, was abused and abandoned by her father and then put alone on a plane headed to the United States. She was held in an INS shelter care institution for 15 months before being released to an aunt. The INS refused to allow Fega access to a juvenile court for a determination as to whether she might be eligible for long-term foster care and a Special Immigrant Juvenile visa despite clear evidence of abuse and abandonment. Her attorney then filed for asylum. A social worker documented that Fega’s development and mental well-being had deteriorated as a result of her prolonged detention. Fega eventually lost her ability to speak her native language, relying instead on the two dominant languages in the facility—Spanish and English. Fega was only released after her case appeared in a New York Times article.*<sup>78</sup>

For those children for whom release is pending or proves impossible, the *Flores* agreement requires placement in the least restrictive setting appropriate to the child’s age and needs. The agreement also

<sup>75</sup> Interview with Catholic Legal Immigration Network, Inc. (August 2001).

<sup>76</sup> Transcript of Hearing, *A.L.S. v. Ashcroft*, case number 02-20421-CIV-MORENO (U.S. District Court, Southern District of Florida), page 40.

<sup>77</sup> *Ibid.*, page 42.

<sup>78</sup> Eric Schmitt, “INS Both Jailer and Parent to a Child Without a Nation,” *New York Times*, page A1 (June 24, 2001); Eric Schmitt, “Case of Detained Nigerian Girl Takes U.S. Agency to London,” *New York Times*, page A15 (June 26, 2001).

*“I crossed a border, no more. But they treat me as if I am a criminal. Other boys here have used weapons and drugs. All I did was cross a border. All I can do is look at these four walls and go crazy.”*  
Statement of 14-year-old asylum seeker who had been a street child in Honduras since he was a small boy. The boy was held at the San Diego Juvenile Hall for four months, where he shared a cell with a youthful offender who had committed assault with a deadly weapon.

defines the settings in which children are to be housed. With only limited exceptions, children are to be placed in non-secure settings. In order to implement this requirement, the INS has over the years contracted with various nonprofit agencies to operate shelter care facilities and to provide a limited number of foster care placements.

There are currently eight INS shelter care facilities located in California, Texas, Georgia, Arizona, Florida, and Illinois. There are additional shelter bed spaces available through service agreements entered into by the INS with county shelter care facilities. The former are designed specifically for foreign-born children in immigration proceedings, while the latter are designed primarily to house non-delinquent youth in the custody of local authorities.

The INS has also contracted on a limited basis for a few foster care placements, offering approximately 36 slots nationwide.<sup>79</sup> These placements are either supervised by local contractors which run INS shelters or by two national voluntary agencies, the Lutheran Immigration and Refugee Service and the United States Conference of Catholic Bishops.<sup>80</sup> In all, the INS has available almost 500 non-secure placements at any given time, a number more than sufficient to house its average daily population of children.<sup>81</sup>

INS shelter care facilities typically offer an environment of “soft” detention. Children sleep in dormitory-like rooms with other children or occasionally in private rooms, wear street clothing, and are offered educational classes. They are also sometimes taken off the facility premises to participate in sports events, go on educational trips, or to recreate in the park. However, the activities and location of the children are closely monitored by staff. Children are not allowed to leave the facility premises without staff, including to attend local schools. Doors to the facilities are typically alarmed and camera security is utilized. The facilities are in some cases also fenced in.

The staff at the shelter care facilities often play conflicting roles with the children in their care. Because the caseworkers at the shelters are typically the adults who spend the most time with children in INS custody, the children often rely on them for support and may confide sensitive information to them relating to the disposition of their immigration cases. However, through the contractual agreements between the INS and the shelter, the staff at the same time are in effect employed by the INS. This often leads to the divulgence of information that might normally be expected to be confidential. In fact, the INS has full access to the files the shelters maintain for each child’s case.

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<sup>79</sup> OIG report.

<sup>80</sup> For more than two decades, the Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops have provided specialized services to unaccompanied minors from refugee settings abroad who are identified as eligible for resettlement in the United States. These services are provided through foster care or independent living arrangements appropriate to the youth’s developmental needs and cultural, linguistic, and religious background. The program has been expanded on a limited basis under contract by the INS to accommodate children who have applied for or have been granted asylum in the United States. See Testimony of Julianne Duncan, Director of Children’s Services, U.S. Conference of Catholic Bishops, before the Senate Judiciary Subcommittee on Immigration (February 28, 2002); see also “Brief Description of the United States Resettlement Program for Unaccompanied Refugee Minors,” Lutheran Immigration and Refugee Service (August 2001); “Unaccompanied Refugee Minor (URM) Foster Care Program,” Lutheran Immigration and Refugee Service (1999).

<sup>81</sup> See Anderson.

Institutional in nature, the shelters are typically designed for the short-term care of children. Nonetheless, the INS frequently detains children in such facilities for long periods, sometimes in excess of two years. The use of such facilities for prolonged detention is troubling.

### **Placement in Secure Settings**

Despite the requirements of the *Flores* agreement that emphasize release or placement in shelter or foster care whenever possible, the INS continues to rely heavily on secure facilities to house children. This is largely due to an inappropriate emphasis on logistical and law enforcement concerns over the best interests of the child.

A significant percentage—more than one-third—of children in INS custody spend at least some time housed in secure juvenile detention centers.<sup>82</sup> Such facilities in fact are prisons designed for the incarceration of youthful offenders. Children in INS custody may be detained in such facilities for anywhere from a few days to more than a year.<sup>83</sup>

The *Flores* agreement theoretically limits the use of such facilities to five narrow categories of children:

- Children who have been charged with or are chargeable with a crime or a delinquent act, unless that is an isolated offense that does not involve violence;
- Children who have committed or threatened to commit a violent or malicious act while in INS custody;
- Children who have been disruptive while placed in a non-secure setting;
- Children who have been deemed a flight risk; and
- Children who must be held in secure facilities for their own safety.<sup>84</sup>

Under *Flores*, children who do not fall into one of these categories must be placed in the least restrictive setting appropriate within the first three to five days after apprehension by the INS.<sup>85</sup>

In 1999, the INS estimated that out of a total of 5,644 custody incidences, 1,958 were placed in secure settings. However, the agency revealed that only 675 of these cases fell into one of the accepted categories for secure confinement.<sup>86</sup>

The INS frequently justifies its placement of children in secure settings under a significant exception included in the *Flores* agreement that suspends application of the least restrictive setting requirement. In cases of emergencies or an influx of children, the INS may place a child in any facility having space, including a secure facility. However, the agency is required to transfer a child as soon as an appropriate bed space becomes available in a non-secure setting. The agreement defines an “emergency” to include natural disasters, facility fires, civil disturbances, and medical emergencies. The term “influx” is defined

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<sup>82</sup> See “INS’s Juvenile Detention and Shelter Care Program,” Immigration and Naturalization Service (September 7, 2000).

<sup>83</sup> The average length of stay for children held in the custody of the INS in secure and non-secure settings is 43.5 days. See Anderson. However, for those children who lack family to whom they can be released the length of stay can extend for much longer periods, particularly for those children with complex immigration cases, such as asylum.

<sup>84</sup> *Flores*.

<sup>85</sup> *Flores*.

<sup>86</sup> Tom Brune, “INS Housing Children in Jails,” *Newsday*, page A5 (February 4, 2000).

as those circumstances in which the INS has more than 130 children already placed or eligible for placement in non-secure settings in its custody.<sup>87</sup>

The influx exception is particularly problematic. The threshold number of 130 was agreed upon by the parties to the *Flores* settlement at the time of negotiation, as that was the number of shelter and foster bed placements that was then currently available to the INS.<sup>88</sup> Since the agreement took effect, however, the INS has expanded its shelter and foster care program to almost 500 beds. However, because the agreement has not kept pace with this reality, in effect the obligation to place children in the least restrictive setting appropriate is rendered meaningless because the INS consistently has more than that number in custody; i.e., there is a perpetual state of influx. In fact, the Women's Commission found that in several cases the INS justified placement of children in secure facilities by citing the influx exception. In the San Diego Juvenile Hall, some of the children had notices of secure placement in their possession that cited the influx exception. Some had been in the facility for several months.

Children are also sometimes arbitrarily labeled as "flight risks." This has become increasingly common for children who are denied relief and are then issued final orders of removal. The INS will frequently transfer such children to secure detention facilities while their cases are on appeal to the Board of Immigration Appeals. The San Francisco juvenile coordinator told the Women's Commission that it is the policy of the district to deem any child who has been issued a final order of removal a flight risk and move him or her to a secure facility, unless the child is very young. She conceded, however, that only one child in the custody of the district had ever absconded from shelter care.

Children are also sometimes moved to secure facilities because they have allegedly misbehaved while housed in an INS shelter. The Women's Commission delegation interviewed a Chinese boy at the Liberty County Juvenile Detention Center in Texas, who had first spent a year in an INS children's shelter in Chicago. The boy reported that he was in the vicinity of an altercation that occurred between two other children for which he was incorrectly held responsible. The boy was moved to the Liberty County facility, a stark maximum security juvenile jail in rural Texas.<sup>89</sup> The boy spent more than a year in the facility.

The Office of the Inspector General verified that the INS overuses secure confinement. It found that in fiscal year 2000, 1,414 children out of a total of 4,136 (34 percent) held in INS custody were held in secure facilities, some more than once, for a total of 1,933 instances of secure detention over the course of the year. Of these instances, 787 (40 percent) were cited as cases of influx, 277 (14 percent) as escape risks, and 46 (2.3 percent) as behavioral problems. Only 331 instances (17 percent) were due to delinquency.<sup>90</sup>

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<sup>87</sup> *Flores*.

<sup>88</sup> See OIG report, page 3, footnote 1.

<sup>89</sup> Although the Women's Commission was denied access to the Liberty County facility during its August 2001 investigation, it had visited the facility in 1998. The facility is surrounded by concertina wire. Children are housed in cell pods, living units in which cells are attached to a common area. The children are locked in their cell pods unless they are recreating outdoors. They are not allowed to keep personal belongings with them, and wear prison uniforms.

<sup>90</sup> See OIG report, pages 8-9.

## Conditions of Confinement in Secure Facilities

### Location of Secure Facilities

Many of the facilities used by the INS are in remote locations that lack immigrant communities and readily accessible legal and social services. This impedes the ability of the children to obtain asylum or other forms of protection. It also isolates them from outside sources of support that may increase their ability to endure detention.

The Tulare County Juvenile Detention Facility was a three and a half hour drive from Los Angeles in a rural farming area in central California. Attorneys for the children were generally based in Los Angeles, which rendered attorney/client visits extremely difficult.

Martin Hall is located in Spokane in eastern Washington. Most immigration lawyers willing to assist the children are based in Seattle, several hours to the west. An attorney noted, "They can't get community support in Spokane." There is only one attorney in Spokane who is able to represent the children, which she does on a part-time basis. She had become aware of the situation of the children in INS custody just a few months prior to the Women's Commission's visit.

The Liberty County Juvenile Detention Center is an almost two-hour drive from Houston. It is located in a small town in rural Texas.

### Lack of Information Exchange Between the INS and the Secure Facilities

The INS generally provides little information regarding individual children to the juvenile detention centers which it relies upon to provide bed space. The agency has also failed to inform facilities about the requirements of *Flores*, including those that mandate separation of INS-detained children from the delinquent population. This makes it extremely difficult for the facility to distinguish any special needs that the child may have.

The administrator at the San Diego Juvenile Hall indicated that the INS provides almost no information about the children who are held at the facility. No files are transferred to the facility outlining why the child is in INS custody or the status of the child's immigration proceedings. The INS only provides the child's name, his "A" number,<sup>91</sup> and the dates on which the child is to appear in immigration court.

Facility administrators at the D.E. Long Juvenile Detention Center also expressed concern about the lack of information provided to the facility about children in INS custody. The facility received extensive public attention when it was revealed that eight Chinese youth seeking asylum were housed there in 1999.<sup>92</sup> One administrator observed: "We found out more about the children from the interpreter than we did from the INS. The INS only gave us rudimentary information. No records came with the kids. We don't know if the kids are just undocumented or if they have been adjudicated delinquent. The INS doesn't differentiate between them." The facility was also not informed when the INS planned to bring children to the facility or when it planned to take them away.

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<sup>91</sup> Each newcomer to the United States is assigned an "alien number," commonly referred to as an "A" number.

<sup>92</sup> See, e.g., Julie Sullivan, "Political Asylum and a Child Behind Bars," *The Oregonian*, page A1 (December 10, 1999); Julie Sullivan, "Jailed Refugee Girl in Eye of Political, Legal Storm," *The Oregonian*, page A1 (December 11, 1999) (noting that Oregon's entire congressional delegation met with INS to encourage placement of the children into foster care).



Presumably, the INS could ask for specialized services for the children housed in secure facilities, as there is a large financial incentive for the counties to accommodate the INS. The counties from which the INS rents bed space often find the arrangement highly profitable. A service provider in Spokane reported that a county official had described children in INS custody as “a big cash cow.”<sup>93</sup> The three counties operating Martin Hall receive \$135/ day per INS-detained child. Juvenile Central Hall and Los Podrinos receive \$156/day per child.

## **Physical Settings**

The environment in juvenile detention centers from which the INS rents space is typically harsh and punitive. They are designed for the detention of youthful offenders, and very often hold youth who have committed serious crimes. The facilities which the Women’s Commission visited included in their populations young people who had committed violent felonies such as assault and battery, murder, and felony drug possession. In the secure facilities, the INS-detained children often become indistinguishable from the general population. They are typically forced to wear prison uniforms or institutional clothing, share living space with the general population, and are subject to the same rules and regulations.

The treatment that INS-detained children receive in the San Diego Juvenile Hall exemplifies many of the problems with the placement of newcomer children in jail settings. The San Diego facility is a large maximum security facility that can hold approximately 500 juvenile detainees. Some of the youth held in the center have committed serious violent offenses; for example, the so-called “San Diego school shooter” is incarcerated in the facility. The prison is constructed around 12 living units, three of which are designated for girls. The average stay for the general population at San Diego is 16 days and children are generally being held in pre-trial detention. However, the prison administrator indicated that those children with “federal holds,” including children in the custody of the INS, stay for much longer. The Women’s Commission met one boy who had been in the facility for five months.

The San Diego facility is dark and generally run down. It is constructed along long hallways to which cells housing two children each are attached. The windows into the cells are calcified, virtually cutting off any natural light. Children are locked in their cells at night and occasionally during the day. Whenever they walk down a corridor, they are required to cross their arms in front of their chests.

The girls’ wing in the San Diego Juvenile Hall is separate from the boys’ wing. However, the privacy needs of the children held in the facility are not necessarily accommodated with respect to gender. During the Women’s Commission’s visit to the facility, a male guard was overseeing the girls’ wing. From his control station, the girls’ toilets and showers were in plain view through a plate glass window less than ten feet away. The doors to the toilets and showers were only about two to three feet in height, offering little privacy.

Ironically, the boys’ wing was monitored by female guards. Again, the toilets and showers were almost completely exposed to view and offered little privacy. When the Women’s Commission inquired whether the use of guards of the opposite gender was of concern, the administrator replied, “We haven’t had problems in a long time.”

At the time of the Women’s Commission visit to the San Diego facility, there were 12 boys in the custody of the INS housed there. While there were no girls in the custody of the INS at that time, the facility administrator noted that the INS has placed “lots of Somali girls who stay forever.” He also noted that in the past, they had housed children of many nationalities who were in INS custody, including

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<sup>93</sup> Interview with Columbia Legal Services (August 2001).

Iranians, Hondurans, Salvadorans, Guatemalans, Mexicans, Brazilians, Russians, Chinese, and Armenians.

The Los Podrinos Juvenile Hall is also a large maximum security facility. At Los Podrinos, girls are housed in a small dormitory in which 16 girls are divided into two sleeping quarters. The doors to the building are locked and the windows are covered with grills. The girls are locked in their rooms from 8:30 p.m. until 6:00 a.m. They are not allowed free access to the outdoors, even though the recreation yard is attached to their building and fully fenced in. Boys in INS custody are housed in a dormitory that can hold up to 40 boys. As in the girls' dormitory, the doors to the building are locked.

The Tulare County Juvenile Detention Facility is a relatively new facility, structured around cell pods to which individual cells are attached. The cells are small and institutional. There is little privacy, with the toilets and showers in plain view through the slit window into each cell. The pod is locked. The outdoor recreation area is attached to the cell pod and consists of a cement, walled area approximately half the size of a basketball court.

The Tulare administrator indicated that the children have access to a garden. In fact, the "garden" consisted of a few bean plants in pots in the middle of the cement exercise area.

The administrators at the D.E. Long facility described the facility as geared toward short-term stays. Despite this, Chinese children in the custody of the INS had remained in the facility for a prolonged period.<sup>94</sup> One Chinese girl was detained in the facility for approximately six months before being granted asylum. Even then, it took the INS several more weeks to release her to her uncle.<sup>95</sup> The facility staff noted, "Our [county] kids are here for 30-90 days. We're just not equipped to handle a longer stay."

Some facility staff have questioned the placement of INS-detained children in secure settings and the treatment they receive there. A former caseworker at Martin Hall left his position at the facility partly due to his concerns regarding the treatment of children in INS custody. He indicated that the INS-detained children were viewed as a source of funding for the three counties which operate Martin Hall, and that the facility administration discouraged him from working with the children. He reported that his supervisors told him, "Don't spend your time with the INS kids, they'll all be deported anyway."

The caseworker cited several ways in which the needs of INS-detained children were ignored. For example, he provided calling cards to the INS-detained children as that was the only way that they could make international calls. His supervisor, however, ordered him to discontinue this practice, with the rationale that the children in county custody were not allowed to have calling cards, so the INS children should not either. This policy, however, ignored the fact that the children in INS custody were otherwise often unable to speak with their families in their home countries. The caseworker also noted that INS children were often not allowed to join in group activities and would be locked in their cells while children in county custody participated in such activities.

Of particular concern to the delegation was a report that the INS had held a pregnant 16-year-old girl in Martin Hall for three months. They failed to release her until her sixth month of pregnancy. The facility told an attorney upon the girl's release, "We don't want to be responsible for the infant."<sup>96</sup>

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<sup>94</sup> Julie Sullivan, "Jailed Refugee Girl in Eye of Political, Legal Storm," *The Oregonian*, page A1 (December 11, 1999) (indicating that Chinese youth had been held in the facility since May 1999).

<sup>95</sup> Julie Sullivan, "Political Asylum and a Child Behind Bars," *The Oregonian*, page A1 (December 10, 1999).

<sup>96</sup> Interview with Columbia Legal Services (August 2001).

## **Commingling with Youthful Offenders**

The *Flores* agreement forbids the commingling of children in INS custody with the general population of youthful offenders in secure facilities.<sup>97</sup> However, the delegation witnessed several violations of this requirement. The children themselves expressed tremendous fear of the delinquent youth. A Guatemalan boy observed, “I don’t understand why I’m in here, mixed with delinquents, if I just violated the immigration laws.”

Many facilities are structured in such a fashion that separation of the children in INS custody is virtually impossible. This appears particularly true for older facilities, such as the San Diego Juvenile Detention Center, which tend to have long corridors to which separate cells are attached rather than separate cell pods. In some cases, INS-detained children in the facility were actually sharing cells with youthful offenders. A 14-year-old asylum seeker from Honduras had been sharing a cell for four months with a boy serving time for assault with a deadly weapon.

Even if the San Diego facility were designed in a way that the two populations could be divided, it was unclear that such separation would be guaranteed. The administrator indicated that placement within the facility for children in INS custody is arbitrary and based on bed availability. Moreover, he indicated that he had never heard of the *Flores* agreement and its segregation requirements. He seemed unaware of the unique needs of children in INS custody and indicated that he believes that, “Compared to conditions in their home countries, this is heaven for the INS kids.”

Children held at the Martin Hall facility are also commingled. Again, due to the design of the facility, it is impossible to separate children in INS custody from the youthful offender population.

At the time of the Women’s Commission’s visit, the children in INS custody held at Los Podrinos were not commingled with youthful offenders. However, they did share space with status offender children who were in the facility due to truancy or other civil violations.

The Tulare County Juvenile Detention Facility had separate accommodations for children in INS custody. Tulare is a relatively new facility structured around cell pods. The INS-detained children, both boys and girls, were consolidated into one 60-bed cell pod. The cells are divided into four gender-segregated units off of which are attached single-person cells. The classroom is also located in the cell pod. Thus, the children have sight and sound separation from the youthful offenders incarcerated in the facility. They only encounter the general population when moving about the hallways en route to the health clinic or when arriving at or leaving the facility.

Due to their separation from the general population, the INS asserted that the facility is “run more like a group home.” However, other than the separation from the general population, Tulare is clearly a secure facility. While the separation from the general population was certainly an advantage over many other facilities visited by the Women’s Commission, the children in INS custody at Tulare are confined to a very small area. The outside world is virtually inaccessible, invisible, and remote.

The San Francisco juvenile coordinator described the children held at Tulare as “long termers.” She conceded that detention was often difficult for the children to endure. She observed: “If one of them cries, they all cry. If one of them laughs, they all laugh.”

At the time of writing, the INS had discontinued its use of Tulare.

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<sup>97</sup> *Flores*, paragraph 12 (stating that minors shall be separated from delinquent youth).

## Access to Legal Representation

Less than half of children in the custody of the INS have legal representation. This failure to provide appropriate assistance can have dire consequences for children who may be eligible for relief from deportation, including asylum, but do not have attorneys to help them obtain such protection. The result is the potential repatriation of children to conditions that threaten their lives, safety, or well-being.

In one case, an 18-month-old toddler appeared in immigration court in Miami for a preliminary hearing with no attorney or guardian *ad litem* to assist her.<sup>98</sup> In another case involving a six-year-old asylum seeker who was also unrepresented, the immigration judge asked the child's deportation officer to represent her in court, before a *pro bono* attorney offered her services.<sup>99</sup> The INS later challenged the attorney's representation of the child, arguing that as the child's legal guardian, only the INS has the authority to select counsel for her.<sup>100</sup> The INS later abandoned that argument.<sup>101</sup>

The Women's Commission interviewed a 17-year-old Guatemalan boy at the San Diego facility who had been in detention for five months and was scheduled to go to immigration court the following week. He was unrepresented by counsel, however. He indicated that lawyers had provided "know your rights" presentations to the INS-detained youth, but no lawyer had been available to represent him. He also indicated that he had never spoken to a representative from the INS.

Service providers in Spokane indicated that most children held at Martin Hall remain unrepresented. The lawyers, moreover, are only allowed to give "know your rights" presentations once a month. Attorneys in Texas have reported that they have been completely denied access to provide "know your rights" presentations to children detained at the Medina County Juvenile Detention Facility. Such sessions are critical to ensure that INS detainees have at least some basic understanding of their immigration proceedings and their potential eligibility for relief. They also provide an opportunity for attorneys to identify those children most in need of representation.<sup>102</sup>

A Guatemalan boy held at Martin Hall told the Women's Commission that he was afraid to return to Guatemala. He said: "There is no place for me to live. I have no family there." Despite his fear of return, he indicated that the immigration judge before whom he first appeared discouraged him from seeking legal representation. The boy reported that the judge told him, "You have to go back to Guatemala." The boy remained in detention for two months before he obtained legal counsel.

In March 2002, a U.S. District Court issued a preliminary injunction in the case of a 14-year-old Mexican boy detained at Martin Hall.<sup>103</sup> The Court ordered the INS to reach an agreement with the boy's legal counsel regarding his release from detention. If such an agreement could not be reached, the Court indicated that it would appoint counsel to the boy at government expense. The boy had earlier agreed to voluntary departure from the United States when he was unrepresented by an attorney. He later explained

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<sup>98</sup> Interview with Florida Immigrant Advocacy Center (February 2001).

<sup>99</sup> Interview with Florida Immigrant Advocacy Center (March 2001).

<sup>100</sup> See Response Brief, *In the Matter of Fega Achoja* (April 20, 2001); see also Letter from Wendy A. Young, Director of Government Relations, Women's Commission for Refugee Women and Children to the Honorable Kenneth Hurewitz, Immigration Judge, Executive Office for Immigration Review (April 19, 2001) (urging the appointment of a guardian *ad litem* to the child and the continued legal representation of the Florida Immigrant Advocacy Center).

<sup>101</sup> Interview with Florida Immigrant Advocacy Center (April 2001).

<sup>102</sup> See "Evaluation of the Rights Presentation," Executive Office for Immigration Review (1999); "Report on Rights Presentations Pilot Project," Florence Immigrant and Refugee Rights Project (January 29, 1999).

<sup>103</sup> See Jonathan Martin, "Mexican Orphan Becomes Case Study," *The Spokesman Review* (April 14, 2002) (noting that the suit seeks class action status for all children held in INS custody).

that he did not understand at the time what he was agreeing to when he consented to his repatriation to Mexico. The Court noted in its decision the significant hardships that detention had caused the boy.<sup>104</sup> This case represents the first challenge in federal court to the failure of the government to provide counsel to unaccompanied newcomer children.

Also disturbing is the tendency of some INS staff to encourage children to abandon their pursuit of immigration relief. In Houston, for example, service providers reported that the INS juvenile coordinator told a child that, “The judge won’t buy your story, and you’ll end up being in detention for a long time.”<sup>105</sup> Service providers in Spokane reported that the juvenile coordinator encourages children to agree to voluntary departure from the United States. A former caseworker who worked at the facility agreed, noting: “That’s typical. There was a Guatemalan girl who was afraid to go back to Guatemala but gave up. She didn’t have a lawyer.” The service providers also noted that the children do not necessarily appreciate the role that INS plays in their proceedings as the party arguing for their removal from the United States and often view the juvenile coordinator as their friend and a reliable source of legal advice.

Moreover, the INS in some cases has returned children under questionable circumstances. Typically, the INS relinquishes custody of children to government officials of the home country at the port of disembarkation. The San Francisco juvenile coordinator admitted that she was aware of Chinese children who were arrested and jailed upon their return to China, especially those returned to Beijing. A Honduran boy was returned to his homeland while his requests for relief, including his asylum claim, were still pending. The INS District counsel admitted that his deportation was a mistake.

### **INS Transfer Policies for Children**

The INS has designated all bed spaces as “national.” This means that any INS district can request transfer and placement of a child to wherever a shelter, foster care, or secure placement is available.<sup>106</sup> This policy is critical to ensuring that the *Flores* mandate of placement in the least secure setting appropriate is fulfilled, as many INS districts lack shelter care facilities in their jurisdictions. However, it also means that children are frequently transferred hundreds if not thousands of miles from their original port of arrival into the United States, even if their family members or attorneys are located at that site.

Transfers of children, in fact, occur frequently and often seem to be conducted for arbitrary reasons that have more to do with the logistical concerns of the INS than with the needs of the child. Moreover, the attorney representing the child is often not notified of the transfer ahead of time, even though this is generally required under the *Flores* agreement.<sup>107</sup>

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<sup>104</sup> M.G.M. v. Ashcroft, Case No. CS-02-0066-FVS, U.S. District Court for the Eastern District of Washington (March 5, 2002).

<sup>105</sup> Interview with Houston-based legal service providers (August 2001).

<sup>106</sup> “Juvenile Detention and Shelter Care Program and Family Detention and Shelter Care Program,” Immigration and Naturalization Service, Juvenile Affairs Division (power point presentation) (April 21, 2001).

<sup>107</sup> *Flores*, paragraph 27 (stating that no minor who is without counsel shall be transferred without advance notice to such counsel except in unusual and compelling circumstances, such as where the safety of the minors or others is threatened or the minor has been deemed an escape risk).

*In March 2001, three Guatemalan youth ranging in age from fifteen to seventeen were given thirty minutes notice in which to pack their bags and prepare for transfer from Miami to Chicago. Two of the youngsters had been held in a Miami shelter facility for more than a year. The third had recently arrived and was scheduled for her first immigration court appearance the next day. Despite this, their attorney, who works for a local charitable organization, was not notified of the transfer and only found out when she arrived at the shelter the next day. The INS, meanwhile, had convinced the immigration judge to change the venue of the case to Chicago, thus precluding her continued representation of the three youth. The attorney was given several justifications for the transfer from the INS Miami District, including a lack of bed space and an influx of Colombian children. However, she discovered that the shelter in Miami was in fact not full and that only three Colombian children were housed there.<sup>108</sup>*

### **Translation Assistance**

The vast majority of children in INS custody cannot speak even rudimentary English. The language barriers they encounter greatly exacerbate their fear, confusion, and desperate desire to be released from detention. The INS is supposed to provide translation by telephone, but this service is not regularly utilized by the facilities with which it contracts.

Translation assistance is rarely available in the juvenile jails with which the INS contracts. In the Liberty County Juvenile Detention Center, for example, a Chinese boy became upset when he reported to the Women's Commission that there was no one in the facility who could speak Chinese. He also reported that he attends classes in the facility, but that he does not speak in class because his English is not good enough.

When asked about on-site translation services, the administrator at Los Podrinos replied that one staff member was able to speak "three dialects of Asian." The facility has been used by the INS to house diverse nationalities, including several Asian nationalities.

The Tulare County Juvenile Detention Facility has staff who speak Spanish and Hindi, but the INS-detained children who have been held at the facility speak a diverse range of languages, including Chinese, Tamil, and Portuguese. Classes integrate general course studies with learning to speak English. The Tulare administrator dismissed concerns about language barriers, asserting, "We have ways to communicate, including using telephonic translation."

*I can communicate in English some now, but not when I first arrived. Now I can communicate but not quickly. I was knocked down a level in school because I couldn't understand. The teacher speaks Spanish. Statement of 17-year-old Guatemalan boy held at Martin Hall for five months. The boy speaks Mam, an indigenous Guatemalan language. The level at which the children are classified is critical because children classified in the lower levels, such as this boy, are locked in their cells all day except when attending classes or taking showers.*

In contrast, the administrator at the San Diego Juvenile Hall conceded that the diversity of languages spoken by INS-detained children and the lack of translation services are difficult for the facility to handle.

<sup>108</sup> Interview with Florida Immigrant Advocacy Center (April 2001); see also Elizabeth Amon, "Access Denied: Children in INS Custody Have No Right to a Lawyer, Those Who Get One Risk Retaliation," National Law Journal, page A1 (April 16, 2001).

He stated: "It's hard for us. It creates a lot of problems." He indicated that the staff generally try to find a live interpreter through the chaplain's office or the counseling program, and are usually able to find an interpreter within one to two days.

Martin Hall has staff who are bilingual in English and Spanish. However, the facility has housed children of many nationalities, including Polish, Ukrainian, Chinese, Korean, Filipino, Indian, and Russian, as well as children from Mexico, Central America, and South America. The facility administrator indicated that the facility will use telephonic translation, but only when a child is emotionally upset or experiencing a medical problem.

In the case of the INS Portland District, the INS resisted providing adequate translation services to assist children who were detained at the D.E. Long facility. In response to a request from the facility for additional Chinese interpretation services, the INS responded that it would provide 12 hours of such services. When the facility advised the INS that it would need more, the INS informed the facility that it would authorize further assistance on an emergency basis but that it would also require pre-approval for any expenses incurred as a result. The INS officer indicated that "he was spending taxpayers' money and had to be very judicious in this regard."<sup>109</sup>

### **Telephone Access**

Access to telephones at the facilities utilized by the INS is inconsistent and often limited. This is particularly true when children wish to place international calls to their families in their homelands.

Children held at the San Diego facility can only make collect calls. There are three to four telephones in each unit, each of which houses approximately 50 children. Children must request to make overseas calls and then can only do so from the intake area of the facility. Such calls are provided for free.

Children held at Martin Hall are provided free telephone calls to their attorneys when they make a request to the staff. However, a Salvadoran boy held at the facility indicated that these calls are made from the recreation room, which is very noisy and lacks privacy. The facility does have access to an "800" number through which the children can make international calls, but only to Latin America.

Martin Hall does not allow children to purchase calling cards, although such cards can be used if the child obtains one from someone outside the facility. A Salvadoran boy complained that calls he placed to his family were often cut off after 10 minutes. He also said that the children were only allowed to use calling cards on the weekends. The INS Seattle District, however, does at least try to accommodate the children's calls by allowing them to use a government calling card when the juvenile coordinator is on site or by arranging a three-way conference call through the Seattle INS office.

There was only one telephone per dorm at Los Podrinos, but the facility administrators indicated that the dorm is rarely full. During the Women's Commission visit, there were six boys residing in the facility, five of whom were in INS custody. The children can make collect calls or use calling cards. However, overseas calls can only be made collect. The children can contact their attorneys either through collect calls or by using the staff telephone upon request.

Tulare allowed children to use calling cards to make international calls. Children could also make collect calls, although the facility administrator indicated that it was very difficult to make collect calls to China,

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<sup>109</sup> E-mail from Ron G. Pitney, D.E. Long staff member, to Rich K. Scott, D.E. Long staff member, regarding "INS Interpreter Services for Young Ladies" (May 21, 1998).

the country of origin for many of the INS-detained children held at the facility. Also, children who have exhibited behavior problems are limited to six-minute calls, a disciplinary procedure that is inappropriate as it impedes the ability of the child to communicate with family and others.

## **Recreation and Exercise**

Access to the outdoors and exercise is generally subject to the same rules and regulations that are applied to the youthful offender population at the facilities used by the INS. Such access is extremely limited in some centers. Other facilities accommodate recreational and outdoor activities in recognition of the fact that they aid a child's adjustment to confinement.

At Los Podrinos, the children in INS custody had access to an outdoor recreation field outside the two small buildings in which they are housed. However, even though the field is fenced, the children are not allowed access to the outdoors at will. The children are also provided with various activities when they are not studying, cleaning their dorm, sleeping, or eating. These activities are structured, and include such things as games, videos, sewing, cooking, and arts and crafts for girls, and music appreciation, photography, and videos for boys.

During the Women's Commission visit to the San Diego Juvenile Hall, the children were in a common recreation room watching a Spanish-language video. They are allowed to go outdoors twice a day for one hour at a time. Typically, the children play soccer, volleyball, basketball, or flag football. The outdoor recreation area is spacious and at least partially grassy.

In contrast, children at Martin Hall are not allowed outside every day. When they are allowed outside, it is typically for 20 minutes at a time before classes. During the weekends, time outside is extended to one to two hours. The outdoor area is an extremely small cement area that inhibits interaction and play.

A Guatemalan teenager held at Martin Hall told the Women's Commission that the children do not go outside at all on some days. When they do go outside, there is no sports equipment available. He said, "We just stand around and talk."

## **Education**

The secure juvenile detention centers utilized by the INS offer education programs, but are designed to meet the needs of a youthful offender population. As a result, the programs are rarely responsive to the educational and linguistic backgrounds of the INS-detained children. The classes are typically conducted in English. They also are often based on the premise that the children will be staying in the facility for only a short length of time. The curriculum, therefore, may be repetitive for children who remain in the facility for extended periods.

A Spanish-speaking teacher runs the educational program at the San Diego facility and integrates learning English into the general coursework. The administrator admitted, however, that he did not know how the teacher handles students who speak neither English nor Spanish. He noted that the INS had placed a deaf Russian boy at the facility. The facility had to rely on both an interpreter and a signer to communicate with the boy.

The Women's Commission delegation spoke at length with a teacher supervising classes at the Los Podrinos facility in Los Angeles. It was impressed with her stated commitment to provide quality



educational services to the children. However, she also noted the challenges that teaching the INS-detained children present due to the language barriers and the differences in educational levels. She indicated that the teacher may confront as many as nine languages at one time in the same classroom.

An English as a Second Language teacher runs classes in Martin Hall. However, the facility administrator conceded, “Language barriers in the classroom are an issue.” He also stated: “But 75 percent of the students are Hispanic. And a lot of them pretend they don’t speak English.” The experience of the Women’s Commission calls into question this observation; the vast majority of children interviewed either spoke no English or spoke it with very limited proficiency.

### **Handcuffing, Shackling, and Other Restraint Measures**

The use of handcuffs, shackles, and pat and strip searches on children who have committed no crime exemplifies the law enforcement approach taken by the INS in its work with children. It also reflects the chronic disparity between stated national policy and actual practice by INS districts.

INS guidance from its headquarters to its field personnel limits the use of restraints on children.<sup>110</sup> It states that officers must be able to articulate the conditions which require the use of restraints, and defines such conditions as a record of criminal violations, aggressive or asocial behavior, or the suspected influence of alcohol or drugs.<sup>111</sup> Despite these guidelines, many INS districts regularly handcuff and shackle children regardless of whether or not they fall into one of these categories. Moreover, individual facilities often have their own policies regarding the use of restraints or searches to which the INS typically defers while a child is in the physical custody of the facility rather than insisting that the facility exempt INS-detained children from such requirements.

Attorneys in Los Angeles report that during transport the INS Los Angeles District handcuffs and chains children together, including to their immigration court proceedings. Moreover, at the Tulare County Juvenile Detention Facility, a center used by both the Los Angeles and San Francisco districts, INS-detained children are shackled whenever they are taken outside their pod, including to go to the medical clinic on site at the facility. The Women’s Commission delegation witnessed children in shackles squatting against a wall outside the medical clinic.

The San Diego Juvenile Jail has a blanket policy requiring the use of restraints when children are transported or when they misbehave while in the facility. This includes handcuffs, shackles, and waist chains. Children in INS custody are not exempt from this policy.

Children in INS custody at the San Diego facility are also subject to strip searches. Ironically, children who are status offenders are exempt from this policy. Strip searches are conducted after any visit the child receives, even in some cases after attorney visits. The San Diego Juvenile Hall administrator indicated that the staff at the facility also frequently use pepper spray to control the youth.

A 14-year-old asylum seeker from Honduras described his treatment in the San Diego juvenile jail: “Many of the [youthful offenders] were violent, frequently looking for a fight. Whenever there was a fight, the officers would order all of us into a cover, crouching position and often used pepper spray. Sometimes the pepper spray would hit children like me who had nothing to do with the incident. I was

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<sup>110</sup> “Enforcement Standard: Use of Restraints,” Detention and Deportation Officers’ Field Manual, Immigration and Naturalization Service (February 5, 1998).

<sup>111</sup> *Ibid.*, section III(C) and III(H).

sprayed twice and it made my eyes sting and I was afraid I would go blind...Every time [my attorney] visited, they made me take off all my clothes to search my body. This embarrassed me.”<sup>112</sup>

Children who are held at Martin Hall are subject to handcuffing and shackling when transported to the federal building in which their video immigration hearings are conducted. They remain shackled during the hearing. The INS, however, indicated that this policy is in place due to the U.S. Marshals Service, which transports the children, and disavowed responsibility itself, despite the fact that the children are in INS custody. The Seattle juvenile coordinator also noted that any use of handcuffs and shackles inside of Martin Hall is subject to the policies of Martin Hall, again disavowing any responsibility on the part of the INS.

Facility administrators at the D.E. Long facility indicated that they witnessed children in INS custody subjected to handcuffing and shackling when transported.

### **Spiritual Support**

Children’s religious and spiritual needs are not always met in a culturally appropriate manner due to the remote rural locations of many of the secure facilities used by the INS. For example, the chaplain at the Tulare County Juvenile Detention Facility was only able to arrange visits from representatives of the Catholic and Evangelical faiths. The chaplain is unable to provide Muslim or Buddhist services, as there are no representatives of those faiths available in the community.

Also of concern is the lack of access to other services that would offer support to children held in secure facilities. An attorney in Spokane reported that she had arranged for community representatives to visit children held in the facility. The INS reacted to this effort by requiring pre-approval from the juvenile coordinator before every visit. This included obtaining permission for visits by a local deacon. The juvenile coordinator indicated that the district will not allow visits from anyone other than parents or legal guardians. In such cases, the individual must offer proof of the family relationship.

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<sup>112</sup> Testimony of Edwin Larios Munoz, before the Senate Committee on the Judiciary Immigration Subcommittee (February 28, 2002).

### III. Conclusions and Recommendations

**The INS experiences an inherent conflict of interest with children in its custody. It cannot reconcile its role as a law enforcement agency charged with seeking the removal of children with its role as caregiver. Too often the agency's law enforcement concerns override what is in the best interests of the children in its care.**

- Congress must pass legislation that removes the custody of unaccompanied children from the INS and places it with a child welfare agency that has expertise in addressing the needs of foreign-born children. That agency should have no interest in the outcome of a child's immigration proceedings but should retain authority over the custody, placement, and care decisions affecting children.
- Social services agencies with expertise in meeting the needs of foreign-born children, such as the voluntary agencies that resettle refugee children from overseas and currently provide limited family reunification and foster care services under contract to the INS, should be more fully utilized by the Department of Justice to provide culturally appropriate foster and shelter care to unaccompanied children in immigration proceedings.

**The INS management structure overseeing children's programs remains highly decentralized without clear lines of authority or accountability. The Director of Juvenile Affairs lacks the power to ensure consistency in release and placement decisions among INS districts. Local juvenile coordinators lack the training and expertise to make decisions that reflect the needs of the children in their care.**

- INS Regional and District offices should be stripped of any authority over the handling of children's cases, including their release, custody, and care.
- INS should develop and implement a corps of child welfare professionals to assume the decision-making on behalf of children in the agency's custody. This staff should not be selected from the INS's enforcement personnel nor should it be lodged in the enforcement division.
- The INS Director of Juvenile Affairs should assume the management of this staff. He or she should retain the authority to hire, train, supervise, and hold accountable local juvenile coordinators, including overriding any decisions they make.

**The INS frequently violates the requirements of the *Flores* agreement by placing children in secure facilities that are incapable of meeting the needs of newcomer children.**

- The INS must greatly expand the capacity of its foster and shelter care program and better utilize its existing capacity.
- The INS must develop clear criteria for the placement of children into appropriate settings and rigorously enforce those criteria.
- The INS must discontinue the arbitrary placement of children into secure settings under the guise of an influx of children or by arbitrarily labeling them as flight risks.

- The INS must finalize regulations that incorporate fully the requirements of the *Flores* agreement.

**The INS frequently violates the *Flores* agreement by placing children in facilities where they are commingled with youthful offenders.**

- The INS must immediately discontinue the use of facilities in which children in its custody are commingled with youthful offenders.

**The conditions of confinement for children held in secure settings are harsh and inhumane, and fail to meet the best interests of newcomer children. Education, recreation, translation, telephone access, attorney access, physical and mental health care, spiritual support and other services are often insufficient or lacking.**

- The INS must immediately discontinue the placement of children into facilities that do not meet their basic needs as legally required under the *Flores* agreement.
- The INS must maintain a full flow of information to facilities with which it has contracted to educate and inform staff at such facilities about the needs and status of the children in INS custody and to ensure that such children receive appropriate services.

**Children in INS custody are often subject to handcuffing and shackling. They also may be subject to pat and strip searches. These practices are highly inappropriate for non-violent and non-criminal children and may cause unnecessary harm to the child's well-being.**

- The INS should immediately develop procedures prohibiting the unreasonable use of pat and strip searches, handcuffing, shackling, or other restraints on children.
- Facilities with which the INS contracts to hold children should also be required to implement procedures limiting the use of restraints and body searches.

**The INS inappropriately relies on radiograph exams to determine a child's age. Such exams are scientifically unsound.**

- Radiograph exams should not be the sole means for determining an individual's age.
- The INS must accept alternative forms of evidence that demonstrate a child's age.
- The Department of Justice must implement an appeal process for adverse findings regarding age that gives the authority to overturn adverse age determinations to an objective entity, such as the Executive Office for Immigration Review.
- The benefit of the doubt should be given to the child in the determination of age and resulting placement.
- The INS should develop a shelter care or group home setting in which youth whose age cannot be determined or youth between the ages of 18 and 21 can be housed.

**The INS is increasingly failing to release children to family when it knows or believes that the child has an undocumented relative in the United States. Often, an undocumented relative who comes forward to accept the child is then placed in removal proceedings. In such cases, the best interests of the child are neglected in favor of the INS's law enforcement goals.**

- The best interests of the child must be considered paramount when making release decisions. It is generally in the best interests of a child to be reunified with family rather than being held in an institutional setting.
- Family reunification should be completed as expeditiously as possible to prevent the unnecessary institutionalization of a child. Family reunification, however, should be grounded in home studies to ensure that the family is capable of providing for the child's physical and mental well-being.
- A relative's immigration status should not affect release of a child. Information pertaining to an individual's immigration status should be held confidential for purposes of facilitating family reunification and should not be used against the adult relative to initiate deportation proceedings.

**Children are not provided the assistance they need to successfully and expeditiously navigate their immigration proceedings. Less than half of children are represented by counsel. This drastically undermines due process for children, and creates the indefensible situation in which the INS is represented by counsel in the courtroom while the child is forced to defend him- or herself. It also creates costly inefficiencies, as immigration judges frequently delay reaching decisions in children's cases until counsel is identified.**

- Congress should enact legislation that provides government-funded counsel to children in immigration proceedings in cases in which the child lacks paid or *pro bono* legal representation.
- The INS and facilities with which it contracts should facilitate attorney access to children in INS custody. This includes access for legal rights presentations, as well as access for attorney client consultations.
- The INS should avoid the use of facilities that are located in remote areas in which attorneys with immigration expertise are not readily available.
- The Executive Office for Immigration Review should not move forward on any child's case in the absence of adequate legal representation.

**Virtually no children in immigration proceedings are appointed guardians *ad litem*. Such assistance is regularly provided to children in other legal proceedings affecting their welfare, as well as in many other western asylum countries, to ensure that a child's best interests are addressed.**

- Congress should authorize the appointment of guardians *ad litem* to children in immigration proceedings.
- Guardians *ad litem* should have expertise in child welfare and the needs of foreign-born children.
- Guardians *ad litem* should work directly and closely with the child to ascertain the child's views; help the child articulate his or her story; offer independent advice to the child; help develop the child's

awareness of the options that are open to him or her and elicit the child's preferences about these options; and act *in loco parentis* during the immigration proceedings to encourage the child to participate to the fullest extent possible and appropriate and to help ensure that the decisions reached on behalf of the child during the proceedings comport with the child's best interests.

- Guardians *ad litem* should be charged with making recommendations to the immigration court regarding what is in the best interests of the child.

**The INS Guidelines for Children's Asylum Claims represent a comprehensive and sensitive response to the need to ensure protection of children fleeing human rights abuses and armed conflict. Asylum decisions are generally moving toward a growing acknowledgment of the particular forms of abuses experienced by children around the world.**

- The INS and the Executive Office for Immigration Review should encourage asylum adjudicators to respond generously to asylum cases presented by children who demonstrate a fear of persecution.
- The INS and Executive Office for Immigration Review should periodically provide comprehensive training to asylum adjudicators and immigration officers who have contact with children asylum seekers in order to familiarize and sensitize such officers to the needs and rights of such children.

**The Unaccompanied Alien Child Protection Act (S. 121/H.R. 1904) would overhaul the system for handling children in immigration proceedings, provide for their appropriate care and custody, and ensure that safeguards are in place to reach decisions in their immigration proceedings that are in keeping both with the requirements of the Immigration and Nationality Act and the best interests of the child. The legislation would put in place the structure and resources necessary to quickly identify an appropriate outcome to each child's case, safely returning those children who are not eligible for release to their homelands and quickly moving those children who are provided relief into stable, home-like foster care settings where they can begin their lives anew.**

- Congress should expeditiously pass the Unaccompanied Alien Child Protection Act.
- Congress should provide consistent oversight of U.S. treatment of unaccompanied children in immigration proceedings.

## Appendix

### Synopsis of Applicable International Legal Standards

#### *International Legal Standards Pertaining to Refugee Protection*

The United States is bound by both treaty and customary international law in its policies and practices toward asylum seekers. After World War II, the international community joined together to establish international standards for the protection of refugees. This effort resulted in the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).<sup>113</sup>

The Refugee Convention imposes on countries the obligation to protect any individual found to have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.<sup>114</sup> Under the Refugee Convention, countries are prohibited from expelling or returning refugees to a country where their life or freedom would be threatened on the basis of these criteria.<sup>115</sup>

The United States ratified the Refugee Convention in 1968 and incorporated its principles into its domestic law through passage of the Refugee Act of 1980.<sup>116</sup> Neither the Refugee Convention nor the Refugee Act explicitly call for the protection of children from age-related persecution. However, in 1998, the INS issued “Guidelines for Children’s Asylum Claims,” which lay out procedural, evidentiary, and legal considerations for asylum adjudicators when addressing age-related claims. Since issuance of the Guidelines, U.S. jurisprudence has slowly evolved to extend protection to children who are victims of age-related persecution.

#### *International Legal Standards Pertaining to Detention*

Both treaty and customary international law prohibit prolonged arbitrary detention. Article 9 of the Universal Declaration of Human Rights, the cornerstone of human rights law, states that “No one shall be subjected to arbitrary arrest, detention, or exile.”<sup>117</sup>

Additional support for this principle is found in the International Covenant on Civil and Political Rights (ICCPR), which declares that “No one shall be subjected to arbitrary arrest or detention.”<sup>118</sup> The ICCPR further elaborates, “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>119</sup>

The Refugee Convention mandates that countries not impose penalties on asylum seekers on account of their illegal entry or presence as long as they present themselves without delay to the authorities and

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<sup>113</sup> United Nations Convention Relating to the Status of Refugees, 189 UN Treaty Series 137 (opened for signature July 28, 1951) (hereinafter, UN Refugee Convention); United Nations Protocol Relating to the Status of Refugees, 606 UN Treaty Series 267 (opened for signature January 31, 1967).

<sup>114</sup> UN Refugee Convention, article 1.

<sup>115</sup> *Ibid.*, article 33(1).

<sup>116</sup> The Refugee Act of 1980 (Public Law 96-212), 94 Statutes at Large 103 (1980).

<sup>117</sup> Universal Declaration of Human Rights, 71 UN Document A/810 (1948).

<sup>118</sup> International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A (XXI) (December 16, 1966) (entered into force March 23, 1976), article 9(1).

<sup>119</sup> *Ibid.*, article 9(4).

show good cause for their illegal entrance or presence.<sup>120</sup> This includes avoiding unnecessary restrictions on the movement of refugees.<sup>121</sup>

### *International Legal Standards Pertaining to Children*

The growing recognition of the rights of the child has represented a critical evolution in human rights law. Most significant was issuance of the United Nations Convention on the Rights of the Child (CRC) in 1989.<sup>122</sup> The CRC is the most widely ratified human rights treaty ever, with only two nations failing to endorse it: the United States and Somalia.

The core principle of the CRC is “the best interests of the child.” Article 3 mandates that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be the primary consideration.”<sup>123</sup>

The CRC specifically addresses the protection of children seeking asylum. It states, “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status...shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international or humanitarian instruments.”<sup>124</sup>

Also relevant to the consideration of how countries treat children asylum seekers are the UN Rules for Juveniles Deprived of Their Liberty.<sup>125</sup> These standards note that imprisonment of juveniles should only be used as a last resort, in exceptional cases, and only for the minimum period necessary.

### *Directives from the UN High Commissioner for Refugees*

The UN High Commissioner for Refugees (UNHCR) is the primary international agency mandated to protect refugees and to set standards for the international community as states seek to fulfill their obligations toward refugees. UNHCR has issued various directives, albeit non-binding, that are relevant to both detention and the consideration of children’s asylum claims.

In 1994, UNHCR issued “Refugee Children: Guidelines on Protection and Care.” In 1997, it issued “Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.” Both sets of guidelines urge that children seeking asylum not be kept in detention. They also urge that alternate and appropriate care arrangements be provided.

Moreover, the Guidelines call for the appointment of guardians in cases involving unaccompanied children. Such guardians can assist both with the refugee status determination process as well as the care provided the child and should be charged with ensuring that the best interests of the child are addressed.

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<sup>120</sup> Ibid., article 31(1).

<sup>121</sup> Ibid., article 31(2).

<sup>122</sup> United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25 (November 20, 1989) (entered into force September 2, 1990).

<sup>123</sup> Ibid., article 3.

<sup>124</sup> Ibid., article 22.

<sup>125</sup> United Nations Rules for Juvenile Deprived of Their Liberty, General Assembly Resolution 45/113 (April 2, 1991).



## *Conclusion*

Together, these international instruments, as well as other human rights instruments such as the Convention Against Torture, form an important context for the U.S. obligation to ensure that children asylum seekers are not returned to their home countries to face further human rights abuses and are provided humane and appropriate care pending the outcome of their asylum proceedings.

Women's Commission  
for Refugee Women and Children  
122 East 42<sup>nd</sup> Street  
New York, NY 10168-1289  
212.551.3088/3111  
[wcrwc@womenscommission.org](mailto:wcrwc@womenscommission.org)  
[www.womenscommission.org](http://www.womenscommission.org)

