

To: United Nations Special Rapporteur on the Human Rights of Migrants

From: Lutheran Immigration and Refugee Service, Florence Immigrant and Refugee Rights Project, and Center for Social Justice, Seton Hall Law School

Re: **Detention and Deportation of Unaccompanied Children in the United States**

## **INTRODUCTION**

Each year over 100,000 undocumented children come to the United States, and of those who remain, approximately 8,000 unaccompanied children are detained.<sup>1</sup> These children arrive without parents or guardians, facing arrest, detention and adversarial removal proceedings by immigration officials. Mexican children are eventually, if not immediately, granted administrative voluntary departure and repatriated to Mexican authorities.<sup>2</sup> Children who are not turned away at the border are usually detained in federal custody while their asylum eligibility is determined or while the government puts them through removal proceedings. These children come to the United States for a variety of compelling reasons. Some flee persecution in search of freedom and safety. Others are escaping abuse, abandonment, and neglect by their family members. Others are trafficked into the United States for illicit purposes. Additionally, others seek to reunify with immediate family members.

In 2002, with the passage of the Homeland Security Act of 2002,<sup>3</sup> the U.S. Congress transferred the responsibility of unaccompanied children in immigration proceedings from the former immigration service (INS) to the Office of Refugee Resettlement (ORR), an agency within the US Department of Health and Human

---

<sup>1</sup>See DHS OIG-05-45, available at <http://trac.syr.edu/immigration/library/P963.pdf>; The numbers presented in this document are from Customs and Border Protection (CBP), just one of the 15 federal agencies involved in the apprehension and detention of unaccompanied children. As detailed in a recent study entitled “Seeking Asylum Alone,” no agency collects data on whether juveniles are unaccompanied or accompanied upon apprehension. This precludes an exact number of unaccompanied children detained annually; see also ORR Program Overview, available at <http://www.acf.hhs.gov/programs/orr/programs/uac.htm>; “The Littlest Deportees,” New America Media, News Feature, Camille Taiara. Posted March 9, 2007. Available at [http://news.ncmonline.com/news/view\\_article.html?article\\_id=2d08b89f8d9448961b645becd8e9a669](http://news.ncmonline.com/news/view_article.html?article_id=2d08b89f8d9448961b645becd8e9a669).

<sup>2</sup> “Are the Kids Really All Right? Towards Plugging the Black Holes to Protect Unaccompanied Alien Children,” National Prison Rape Elimination Commission, Testimony of Christopher Nugent, Senior Counsel, Community Services Team, Holland & Knight LLP and Pro Bono Counsel to the Women’s Commission for Refugee Women and Children, Los Angeles, California (December 13, 2006) at 1.

<sup>3</sup> Pub. L. No. 107-296 S. 49, 116 Stat. 2153 (2002).

Services.<sup>4</sup> The Division of Unaccompanied Children's Services (DUCS) was created within the Office of Refugee Resettlement in March 2003 with the following responsibilities: a) holding legal custody of unaccompanied children under the age of 18 years, referred by the Department of Homeland Security Bureau of Immigration, Customs & Enforcement (herein after ICE); b) providing basic necessities for child while in custody (food, medical and mental health services, education, etc.); c) locating placements within a network of ORR- funded providers; d) making all final decisions regarding care and placement arrangements until child is released or removed; e) approving release decisions to relatives or other sponsors in the United States.

Of the 8,000 minors apprehended by ICE each year and turned over to DUCS custody, some have parents or other relatives in the United States to whom they may be released, but others are without family reunification options. Some may have avenues for legal relief, such as special immigrant juvenile status (SIJS), a T-visa for victims of human trafficking, or asylum. There is no form of relief available for unaccompanied children simply by virtue of their classification as an unaccompanied minor, even when return to the home country would not be a safe option for the child. All these children face administrative removal proceedings before the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice (DOJ). These proceedings are administrative and adversarial, and pit the lone child, carrying the same burden of proof and persuasion of evidence as an adult alien, against a trained DHS trial attorney before an immigration judge.

Unaccompanied children experience a myriad of human rights violations throughout their encounters with the immigration system, from the border to detention to deportation. Nevertheless, efforts at carving out a role for a "best interest of the child" consideration in U.S. immigration proceedings are on-going within the advocacy community.

### **Unaccompanied Children Encounter a Law Enforcement Model, Not a Child Welfare System That Places Emphasis on the Best Interests of the Child**

**Law Enforcement Model:** The INS had a poor track record in caring for children prior to 2003, and faced a fundamental conflict of interest in acting as police officer, prosecutors, and guardians of the children simultaneously. The INS also prioritized law enforcement considerations over child welfare considerations, placing, for example, one third of unaccompanied children in secure detention juvenile jails for lack of bed space in

---

<sup>4</sup> This is the same agency responsible for social services to refugees, trafficked victims and other "refugee like" populations. A key consideration in the transfer of responsibilities was the experience of the ORR in serving unaccompanied refugee minors and the desire to separate the enforcement functions by the federal government by the newly formed US Department of Homeland Security from the care decisions for these unaccompanied children.

shelter facilities.<sup>5</sup> ORR has made substantial progress; for example, it decreased the use of juvenile detention centers from 23 in 2003 to 3 in 2005, used exclusively for children who need a secure environment. However, unaccompanied children continue to be housed in geographically remote shelters out of range to advocates, the local community, and the public at large. The DHS and the ORR do not have clearly distinguished mandates and responsibilities in some key areas where blanket law enforcement considerations trump individualized child welfare considerations.

These areas include:

- Privacy and confidentiality – ICE misuses privileged and confidential ORR information for a litigation advantage against unaccompanied children in their immigration proceedings.
- Conditions of confinement – There are reports of unaccompanied children not being routinely transferred from DHS custody to the ORR within the 3-5 day timeframe stipulated in the *Flores* Settlement Agreement.
- Age determinations – DHS relies too heavily on dental and bone forensics to determine a child’s age, which are scientifically fallible given a margin of error of several years. DHS’ erroneous age determinations result in many children being wrongfully detained in adult facilities and commingled with general criminal populations.
- Classifying children – DHS sometimes labels certain children as accompanied or unaccompanied for law enforcement purposes and thereby acts as “gatekeeper.”
- Separation of families – Sometimes DHS separates families and thereby “manufactures” a child as unaccompanied, presumably because of a lack of planning and a lack of family shelters.
- Repatriation

**Best Interest Principle:** The “Best Interests of the Child” principle is a basic child welfare concept that expresses the need to look at multiple factors, listen to multiple voices and consider multiple interests in determining the best course of action for a child. The best interest is based on the need to always keep the focus on the well-being of the child—physically, psychologically, in the present and over the long term (permanency). Some key concepts/beliefs that have been developed based on studies of children and child welfare services include: i) the parent has a unique role in the well-being of the child. Substitute caregivers may have important information about the child, but their wishes should not carry the same weight as a parent or legal guardian. The use of Guardians or Child Advocates is one way to insert the parental role into the decision-making process; ii) the child should be a participant in the process to the extent that they are able according to their developmental stage and ability to comprehend the process; iii) the well-being of the child includes their physical safety, physical, emotional and psychological health. Ensuring that their basic needs are met, they have nurturing relationships and providing opportunities for their continued development and healing

---

<sup>5</sup> Amnesty International USA, United States of America: Unaccompanied Children in Immigration Detention at 18 (2003), available at [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf).

from past harm; iv) children need stability in order to thrive. Reunification with parents should always be the first possibility considered for the long term care of the minor. When this is not possible, efforts to reunite with other close family members, including siblings is important. If neither of these options is available, then every effort should be made for a child to be placed in a long-term, stable, nurturing and loving family environment. Likewise, the need for permanency should impact other decisions that are being made on behalf of the child. While immigration officials and advocates alike may not be able to predict the ultimate consequences of a particular course of action, whenever possible decisions about immediate or short-term arrangements should not preclude the pursuit of permanency.

Best Interests of the Child considerations related to the detention or release of unaccompanied children in the U.S can be applied in various contexts, including i) detention, ii) release to family members or care-givers, and iii) evaluating immigration options to pursue. In each of these contexts, a “Best Interest of the Child” analysis regularly, when possible, ensures that the child is an active participant in the decision-making process. Each of these three areas of the application of the best interest standard to the immigration context is discussed below:

**Detention:** Children should be placed in the least restrictive setting. This means understanding the individual needs of the child and the safety concerns for the child and others. The ORR is mandated to ensure the “safety and well-being” of unaccompanied children in their care. One important “institutional” aspect of this approach is the role of the Field Coordinator. The field coordinator is an employee of a national NGO (LIRS is one of two such agencies). Each regionally-based field coordinator oversees the best interest of children in ORR custody regarding care and release decisions. In providing oversight, field coordinators act as liaisons among contracted care providers, ORR, immigration attorneys, DHS and immigration court; work with local providers to continuously assess the level of care necessary for each child; make placement/transfer recommendations; review applications for release to sponsors in the U.S. and make recommendations; and facilitate access to other services. This third-party oversight function is crucial to ensuring that the individual needs of the child are considered when making any decision on their behalf regarding their care arrangements.

**Release to Family or other care givers:** Decisions for release to sponsors is based primarily on child welfare concerns—relationship to potential sponsor, safety and well-being of the child. The Field Coordinator assesses the suitability of the potential sponsorship based on a number of risk factors and makes a recommendation to the ORR. The ORR has the ultimate decision on whether or not to release the child. In a small percentage of cases, a home visit is conducted as part of a more intensive suitability assessment process to ensure the safety and well-being of the child. Children who are suspected of trafficking or smuggling, sponsors with prior history of domestic violence, substance abuse or other safety concerns are examples of reasons for this additional safeguard. In these cases, 90-days of follow-up services are also provided that enable a social worker to work directly with the child and sponsoring family to ensure appropriate services and transitional support.

**Immigration -- Process:** When considering the immigration process, it is important to separate out the forms of immigration relief from the decision-making process itself. A core principle for best interests is that children should be fully informed and a participant in the decision-making process. Too often adults make children into objects of the process. In the U.S. this is addressed through the use of “Know Your Rights Presentations” by NGO legal services projects. Such presentations include information on different types of immigration benefits (e.g. refugee status/asylum) as well the court process, role of the judge, government counsel, etc. In the US there are no attorneys provided for immigration matters. Therefore, NGOs, in conjunction with pro bono attorneys from private law firms, struggle to represent as many children as they can. Nevertheless, the majority of the separated children appear in immigration court without any legal representation.

The use of guardians *ad litem* or child advocates is another means to ensuring that the voice of the child is brought into the proceedings. The advocate is someone who is skilled at listening to the child and able to present these concerns to the decision-making authority. The advocate is serving as a surrogate parental role, accompanying the child and looking out for his or her best interests. The advocate, therefore, is not limited to simply repeating the child’s wishes, but is also able to assess the issues at stake from a best interests perspective and present a recommendation. Unlike the immigration attorney, the advocate is not focused on legal strategies and immigration relief, but rather how different immigration options would serve or not serve the best interests of the child. There is currently no child advocate assigned to children in immigration proceedings in the U.S. However, there is legislation that has been introduced to establish child advocates and allow for their involvement in immigration proceedings and related matters.

Time is an important consideration in any process involving a child. On the one hand, a child’s perception of time is much slower than for an adult. A few weeks can seem like forever. On the other hand, it may take a series of meetings and several hours for an unknown adult to establish sufficient rapport with a child for that child to talk freely and openly about their experiences. This is especially true for survivors of trauma. Too often judges have insisted on a case moving forward when insufficient information is available to determine whether or not a child is in need of international protection. Once such information has been made available, however, those in a decision-making position should act promptly to make a determination and communicate the decision to the child. Living for months or years in “immigration limbo” can be detrimental to the development and emotional health of the child. In the U.S. unaccompanied children’s cases are exempt from the case completion timelines set for adult cases. This allows judges the flexibility to grant continuances to allow attorneys the necessary time with the child to prepare the application for immigration relief.

Children respond differently to trauma and grief than adults. It is essential that immigration officials, attorneys and others receive adequate training so that they do not misinterpret a child’s acting out or other behavioral responses. LIRS has published

Working with Refugee and Immigrant Children: Issues of Culture, Law and Development as a training tool (1998). This manual has been used by non-governmental agencies, law firms and the US Executive Office of Immigration Review for their training of professionals working with children in immigration proceedings.

**Immigration –Relief:** For separated children without immigration status in the U.S., the majority face either an Order of Removal (deportation) or Voluntary Departure (leave U.S. voluntarily). While an Order of Removal can bar the re-entry to the United States for several years, Voluntary Departure does not impact the ability to apply for a visa in the future. The majority of separated children who are granted the right to remain in the U.S. find such relief under one of three humanitarian-based statuses: i) Special Immigrant Juvenile Status, an immigration benefit providing to minors who have been adjudicated as dependent upon a family court because of abuse, abandonment, or neglect, are eligible for long-term foster care/placement; and it is in the child’s best interest to remain in the U.S.; ii) T-Visa, which is specifically for an individual in the U.S. who is a victim of "a severe form of trafficking in persons" as defined in §103 of the Trafficking Victims Protection Act (TVPA) of 2000<sup>6</sup>; iii) Asylum, which is based on the 1980 Refugee Act which consolidated U.S. law to reflect its obligations under the 1951 UN Convention Relating to the Status of Refugees and 1967 Refugee Protocol and provides for in-country refugee status determination. While some recent decisions have begun to look at grounds for refugee status from a child’s perspective, more could still be done. In recent years, for example, this has been true in cases which have recognized “street children” or “former gang member” as a particular social group. In general, however, the defining elements for “well-founded fear of persecution” are the same for a child as for an adult.

Current developments in each area are explored here:

### **Unaccompanied Children Lack the Right to Government-Funded Counsel**

Under current U.S. law, unaccompanied immigrant children do not have the right to government-appointed counsel in their immigration proceedings.<sup>7</sup> As a result, far too many children attend immigration court without an attorney. The National Center for Refugee and Immigrant Children strives to match unaccompanied children with *pro bono* counsel. Indeed, since 2005, it has already matched more than 545 children with *pro*

---

<sup>6</sup> The TVPA defines trafficking as “Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” Additionally, the individual must demonstrate s/he would suffer extreme hardship if removed from the United States.

<sup>7</sup> There is a right to counsel for indigent children charged in juvenile delinquency proceedings. See *In re Gault*, 367 U.S. 1 (1967).

*bono* counsel. But the need is vast and resources are scarce and relatively untapped in most parts of the country.<sup>8</sup>

For example, Harlingen Immigration Court has jurisdiction over the largest numbers of detained unaccompanied minors in the country, approximately 200 minors detained at any given time. This number is twice the number in any other region in the United States, and encompasses approximately one third of all the detained children in ORR custody.<sup>9</sup> In a letter from the Director of the American Bar Association to the Chief Immigration Judge in May 2005, the ABA noted that ProBAR, the South Texas Pro Bono Asylum Representation Project, is the only agency in South Texas which is willing or able to serve the unaccompanied minor population. At that time, ProBAR had only one attorney and a part-time volunteer paralegal to serve this entire population.

### **Unaccompanied Children Regularly Experience Border Patrol Abuses**

In 2006, FIRRP worked with 1600 children who were detained in Arizona. The vast majority of these children were apprehended crossing the border, alone or with relatives other than their parents. Almost all children are held by Border Patrol (BP) before being transferred to ORR custody. (Some children are arrested in the interior of the U.S. and therefore are detained by ICE instead of BP stations along the border.) While the Flores Settlement Agreement (see US Law section) established minimum standards and conditions for the housing and release of juveniles in INS custody, BP does not uphold these standards for the custody of unaccompanied minors in Arizona. Minors do not receive adequate or sufficient food and water, are held in extremely restrictive conditions, do not receive information about their rights, are not allowed phone calls, and sometimes are held in adult or criminal facilities. Personal testimony that we have gathered from children shows that BP and (ICE) regularly violate the rights of children in their non-compliance with the Flores agreement and in their deliberate disregard for the human rights of children and migrants.

Unaccompanied minors apprehended crossing the border in Arizona, usually spend between 3 and 5 days in Border Patrol custody, before they are transferred to ORR shelters in Phoenix. Minors may spend up to 8 days in custody, as is the case with minors who are transferred from Texas. These minors are held in cells with no windows and sometimes may be held alone for days, without ever going outside. Almost all children report feeling sad and hopeless while in custody. They may be transferred between stations several times, often without any explanation that they are being transferred to a shelter for juveniles. Minors in BP custody rarely are able to make phone calls and often think that they are waiting to be deported.

They are seldom given the required three meals per day, two of which should be hot; instead they subsist only on crackers and juice and sometimes small hamburgers.

---

<sup>8</sup> Amanda Levinson, "Alone in America" (Aug. 23, 2005), available at <http://www.alternet.org/story/24309>.

<sup>9</sup> Letter from Robert Evans, ABA, to Chief Immigration Judge Michael Creppy, dated May 19, 2005.

After many have spent several days walking in the desert, this food is not sufficient and almost all children say that they remained hungry while in custody. In rare instances, children have had clean water to drink, but usually, they drink water from the tap in their holding cells. They either sleep on the floor or on cement benches and are not always given blankets. The toilet is located within their cell and is shared among whoever is detained there. Children do not have the chance to bathe. Some minors report that the air conditioning in the holding cells is kept very high so that the children suffer prolonged exposure to cold temperatures.

BP stations are meant to be temporary holding facilities where children can be held separately from adults. These facilities are not designed to hold children in the “least restrictive setting possible”, as prescribed by the Flores settlement. Instead, children are being held regularly far longer than prescribed by DHS policy and the Flores settlement, and under conditions which violate their rights. For children who can be as young as toddlers or already adolescents, spending 3-5 days locked in a room is extremely traumatic. Many children say that being held by BP custody was terrible because it was the first time in their lives that they had ever been locked up.

The treatment that children receive from BP agents seems to be completely arbitrary. While some agents seem to take their particularly vulnerable status into account, many yell at the children or taunt them. Recently one child recounted that he was held in a room with no toilet. When he asked if he could be taken to the bathroom, the agent on duty said that he should hold it like the coyote had made him do while coming here. He eventually let the child use the bathroom only after making him wait. Another child spent one night and two days, in handcuffs and shackles sitting on benches with adults, before going to the ORR shelter in Phoenix. Unaccompanied minors are threatened verbally and physically by BP agents.

There are serious concerns about the ability of children to contact family members and have access to legal counsel while in BP custody. Children are not regularly permitted to make phone calls to family while they are detained. Children are sometimes given a sheet with information on legal service providers in Arizona, but the sheet is often in English, and BP agents do not inform children of their rights. Children sign papers without understanding what they mean. Children who are detained along with adult relatives other than parents, are immediately separated from their relatives and almost never have a chance to say goodbye before the relative is taken to an adult detention facility. Children never have the opportunity to communicate with their adult relatives in detention, even after the children have been transferred to ORR.

While the regular practices of BP constitute severe violations of the rights of unaccompanied children in custody, some children experience even worse: including physical harm during arrest and detention, detention with adults or in adult facilities, or detention in juvenile corrections facilities.

Moreover, unaccompanied minors are being placed in expedited removal proceedings by the Office of Border Patrol in Texas and Arizona. The ABA noted at

least 4 incidents that occurred to detained minors at the Port Isabel Detention Center with expedited removal orders out of Laredo CBP. These individuals reported that after informing CBP officers that they were under eighteen, the officers insisted that they were older and insisted on placing them in expedited removal proceedings. In some cases, officers were physically abusive and otherwise intimidating, including telling the minors that they did not have any legal relief.<sup>10</sup> OBP responded to a letter from the ABA, dated June 14, 2005, stating that expedited removal does not apply to unaccompanied minors. OBP further stated that Border Patrol agents are specifically trained to deal with unaccompanied minors. As of January 2006, however, allegations continued about a systemic, ongoing problem of the mistreatment of minors. In a letter dated January 26, 2006, the ABA notes that detained minors made allegations that they were forced to

- Sleep on the floor, in cold temperatures, with either no blankets or small blankets to share with others;
- Denied adequate food and/or water;
- Subjected to verbal harassment, threats, intimidation, and humiliation, including derogatory slurs;
- Subjected to physical abuse;
- Commingled with adults; and
- Made to sign papers with no explanation or translation

Declarations that we have collected from children show that detention by BP/ICE is a terrifying and isolating experience, where children are sometimes exposed to physical harm, and are regularly deprived their human and legal rights despite multiple national and international agreements which afford them protections.

### **Unaccompanied Children Cannot Obtain Temporary Protected Status and Reunite with their Families**

TPS is a remedial scheme meant to provide a temporary safe haven to individuals who cannot safely return to their home country due to ongoing armed conflict, natural disasters, or other extraordinary conditions that prevent safe return.<sup>11</sup> Congress established the TPS remedy to “allow nationals from war-torn or otherwise dangerous countries to remain in the United States temporarily until conditions in the home country stabilize.”<sup>12</sup> USCIS, however, interprets the TPS scheme in a restrictive manner that undermines this humanitarian purpose by denying children the opportunity to reunite with their families in the United States.

Despite its protective function, USCIS has interpreted the TPS scheme to not apply to unaccompanied children who travel to the United States after their parents and

---

<sup>10</sup> Letter from Robert Evans, ABA, to David Aguilar, Chief, Office of Border Patrol, CBP, dated April 14, 2005.

<sup>11</sup> See INA § 244 (b)(1), 8 U.S.C. § 1254 (b)(1).

<sup>12</sup> Extension of Application Deadline for Special Temporary Protected Status for Salvadorans, H.R. REP. 102-123, 102<sup>ND</sup> Cong., 1<sup>st</sup> Sess. 1991, to accompany H.R. 2332, legislative history available at P.L. 102-65.

who seek either derivative or late TPS. USCIS maintains that there is no provision in the TPS statute allowing parents to petition for their immediate family members. This interpretation of the TPS scheme that keeps families apart does not effectively fulfill Congress' mandate to protect individuals from harm in their countries of origin.

Our client, a 14 year old girl, lived in El Salvador with her 6 year old sister and aunt. Their parents had gone to the United States in order to make enough money to care for ailing relatives in El Salvador. Our client witnessed gangs attack two female acquaintances in her neighborhood. She became so frightened that something similar would happen to her that she and her sister undertook a 5-week trip crossing borders to get to the United States. Her father paid the smugglers close to \$10,000 to bring his daughters over. At the border, our client was apprehended by ICE and separated from her little sister, who was kidnapped by one of the smugglers and kept for ransom in Las Vegas. Her father incurred a debt of \$5000 to recover his younger daughter. Our client is now in removal proceedings and her younger sister has no status.

### **There is Inconsistent Guidance About Special Immigrant Juvenile Status**

Congress created Special Immigrant Juvenile Status – commonly referred to as “SIJS” – specifically in response to the problem of undocumented youth who have been abused, abandoned, or neglected. SIJS allows young people who are either in foster care or otherwise under the Family Court’s jurisdiction due to abuse, neglect or abandonment to apply for lawful permanent residence in the United States. Young people are only eligible for SIJS until they turn 21. Under current policy, this means that they must not only file their applications before they turn 21, but that the application must be adjudicated by that time. Many young people who are eligible for SIJS will never be eligible for any other form of lawful immigration status in the United States. This is because SIJS beneficiaries are exempted from many statutory bars to becoming a lawful permanent resident, such as not having enough money or being in an unlawful immigration status. Young people placed in foster care, guardianships, or adoptions who miss their opportunity to obtain SIJS face a grim future. As undocumented immigrants, they are not eligible for most of the government programs that youth leaving foster care depend on for survival. In addition, they cannot work legally or obtain federal financial aid to go to college. And of course they face the constant threat of deportation.

Though SIJS is a federal immigration benefit, the federal statute and regulations leave determinations of abuse, neglect or abandonment to the state courts because they are more experienced with making such adjudications. This has caused some level of confusion as the terminology used in the federal statute and regulations does not always match that used by the state. Recently, this confusion has led to several state courts erroneously concluding that they are not able to make the specific findings of fact needed to apply for SIJS when children are in removal proceedings.

## **Unaccompanied Children Are Held to an Adult Asylum Standard**

Even though asylum cases are adjudicated on a case-by-case basis, DHS often applies a strict enforcement lens to children's asylum claims in their policies. Their fear of opening borders to other children seeking asylum limits the broadening of asylum social group law to include street children, gang resisters, and children facing domestic violence.<sup>13</sup> Although the INS had established guidelines for children's asylum claims, they do not apply to or bind the EOIR and the DHS prosecutors in children's cases.<sup>14</sup>

## **Return to Country of Origin**

For children who do not have any legal avenues for immigration relief in the US, most are "forced" to accept Voluntary Departure. In studies conducted on return practices for separated children, child experts agreed that the return of children to country of origin should be voluntary. This is not the practice in the U.S., where thousands of children have no option but to accept Voluntary Departure, regardless of whether or not it is in their best interest. In one case where LIRS was involved, the minor stated clearly to the judge that he was afraid to return to his country. Nevertheless, the judge signed a Voluntary Departure order anyway and the child was returned home to danger.

U.S. deportation policies for unaccompanied children do not reflect international laws or even national child welfare standards. In a recent analysis of unaccompanied children in the United States, researchers found that the principle of "best of interest of the child," routinely applied in family and juvenile law, is curiously absent in the immigration arena.<sup>15</sup> In many instances, the United States returns children to situations that pose great risk to their safety and well-being. In response to reports of the more egregious situations, Congress urged the DHS, the ORR, and the State Department to develop policies that protect the child throughout the repatriation process.<sup>16</sup> The likelihood of full compliance with this request, without funding or legislation, is in question.

## **Legal Framework**

### **US Law**

In 1996, a settlement agreement was reached in Flores v. Meese, No. 85-cv-8544 (C.D. Cal. Sept. 16, 1996), which "sets out nationwide policy for the detention, release,

---

<sup>13</sup> Christopher Nugent, *Article: Whose Children Are These? Towards Ensuring the Best Interests And Empowerment of Unaccompanied Alien Children*, 15 B.U. Pub. Int. L. J. 219, 226-27 (Spring 2006).

<sup>14</sup> New Guidelines for Children's Asylum Claims, INS Memorandum from the Office of International Affairs (Dec. 10, 1998).

<sup>15</sup> Seeking Asylum Alone, Bhabha & Schmidt, 2006.

<sup>16</sup> House Report 109-699, 2006.

and treatment of minors in the custody of the INS.” It applies to all minors in the custody of ICE and DHS, not just unaccompanied minors. Flores Settlement, para. 9. The parties to that Agreement established two fundamental principles: (1) children should be treated with dignity, respect, and special concern for their particular vulnerability as minors, and (2) children should be held in the least restrictive setting appropriate to the minor’s age and special needs. ORR inherited the *Flores* Settlement Agreement when responsibility was transferred and is bound to comply with the Agreement.<sup>17</sup> The Settlement expresses a policy preference for the release of minors where possible, and sets out standards for the conditions of detention where release is not available. Under paragraph 14, if ICE or DHS determines the detention of a minor is not required to secure his or her appearance in immigration proceedings or for safety reasons, the minor “shall be released from custody without unnecessary delay” to a parent, a legal guardian, an adult relative, an adults designated by the child’s parent, a licensed program willing to accept legal custody, or an adult individual or entity seeking custody. Flores also requires minors to be separated from unrelated adults, and when this is not immediately possible, “an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.” (paragraphs 11 and 12A).

Flores was never intended to be the final word on the authority for the detention of minor children in immigration custody. Over ten years later, neither DHS nor Congress has yet promulgated binding rules regarding standards for the detention of minors. DHS has taken varying ideas of policy and procedure from its Detention Operations Manual and *Flores*, resulting in no uniform requirements for these centers. In its Detention Manual, DHS does list 36 standards that ICE and its facilities are to follow, including visitation procedures, grievance policies, medical care, and discipline, access to counsel, telephone access and food service. However, because these standards have never been incorporated into statutory regulations, the level to which each detention center follows them is varied.

### **International Law**

The United States ratified the 1976 International Covenant on Civil and Political Rights (“ICCPR”) in 1992.<sup>18</sup> As a party to the ICCPR, the United States is bound to uphold its international obligations as a party to the treaty. The ICCPR protects the rights of individuals to self-determination. Article 9 guarantees a person’s right to liberty and security of his or her person. Article 10(3) specifies that the penitentiary system shall comprise treatment of prisoners which shall include their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. Article 14 (3) of the ICCPR requires that an individual facing a criminal charge shall be entitled to be informed promptly and in detail in a language he understands of the nature and cause of the charge against him . .

---

<sup>17</sup> Paragraph 41 of the Flores settlement indicates that it is binding on the parties’ successors, and it should therefore be binding on Customs and Border Patrol and ICE because custodial functions were transferred to these agencies from the former INS.

<sup>18</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), entered into force 23 March 1976.

. to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him . . . without payment by him in any such case if he does not have sufficient means to pay for it.” Article 23 of the ICCPR further incorporates family unity provisions, and Article 17 of ICCPR cautions that “No one should be subjected to arbitrary or unlawful interference with his... family.”<sup>19</sup>

The Convention on the Rights of the Child (CRC) has been ratified by 193 countries.<sup>20</sup> In 1995, the United States signed onto the CRC, evidencing its support for its provisions, although it has yet to ratify the treaty.<sup>21</sup> Under Article 3(1), “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 a primary consideration.” Article 8 of the CRC provides for the obligation of the States to respect the child’s right to preserve his family relations and Articles 9 and 10 provide protections of family unity and reunification.

Article 6(2) requires states to ensure the maximum extent possible the survival and development of the child. Article 19 mandates states to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.” Article 37(b) provides that no child shall be subject to an unlawful or arbitrary deprivation of liberty. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Article 37(c) mandates that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. The provision further mandates the separation of children from adults unless it is considered in the child’s best interest not to do so. Article 37(d) guarantees the right to prompt access to legal and other appropriate assistance.

Article 40(1) calls on states to treat children accused of, or recognized as having infringed the penal law to be treated in a manner that promotes his or her sense of dignity and worth and which also takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society. To do this, states should 40(1)(b)(ii) promptly inform the child of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and

---

<sup>19</sup> *Id.*, Article 17, Paragraph 1.

<sup>20</sup> U.N. Convention on the Rights of the Child (1989), UN General Assembly Document A/RES/44/25, entered into force 2 September 1990, at Article 9.

<sup>21</sup> Although the CRC was not ratified by the U.S., it shares similar fundamental principles with U.S. domestic law; *See, e.g., Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (in family law cases concerning abuse, “the child’s welfare predominates over other interests”); 59 Am. Jur. 2d Parent & Child § 10 (1987) (general tenets of family law includes best interests of the child); 2 Am. Jur. 2d Adoption § 136 (1994) (in adoption, “best interests of the child” is the paramount consideration).

to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (vi) provide the free assistance of an interpreter if the child cannot understand or speak the language used. Article 40(3)(b) also urges states to enact, whenever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. These measures could include (4) a variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care in a manner appropriate to the child's well-being and proportionate both to their circumstances and the offence.

### **Comparative Practice**

On October 12, 2006, the European Court of Human Rights ruled that Belgium had violated several aspects of the European Convention for the Protection of Human Rights and Fundamental Freedoms in its treatment and detention of a five-year-old Congolese girl who was going to live in the Netherlands with a relative before going on to Canada to join her mother. Specifically, the Court declared that the girl's Article 3 right to be free from inhuman or degrading treatment was violated when she was detained for two months "in the same condition as adults" with no parents or anyone to look after her.<sup>22</sup> The Court held that the state owes a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention. The Court also affirmed that the girl's detention had caused "serious psychological effects."

The Court is in no doubt that the second applicant's detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her. In the Court's view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.<sup>23</sup>

In 2005, the Council of Europe's Committee of Ministers adopted a set of guidelines that address the "forced return" process. The Guidelines state that member states should only detain immigrant children as a last resort, that detained children have a right to education and leisure, that detained families should have separate and private accommodation, and that the "best interest of the child shall be a primary consideration in the context of the detention of children pending removal."<sup>24</sup>

---

<sup>22</sup> Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application No. 13178/03) ECHR 12 Oct. 2006, para. No. 50. Art. 3 of the European Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."

<sup>23</sup> Id., para. 58.

<sup>24</sup> Committee of Ministers, Council of Europe. "Guidelines on all stages of the 'forced return' process." [CM (2005) 40]. Guidelines 10 and 11, quoted in Amnesty International. "Italy: Temporary Stay – Permanent Rights: The Treatment of Foreign

With respect to safe repatriation, in 2006, UNICEF published a reference guide evaluating the application of the best interest of the child standard as established by CRC to the safe return of minor victims of human trafficking.<sup>25</sup> The same principles ought to apply to the return of any unaccompanied migrant child. The UNICEF guide emphasizes that the return to the country of origin is not an option if it would lead to a “real [reasonable] risk” of certain factors occurring, stating that the fundamental human rights of the child should always be considered and return to the country of origin shall only be arranged if such return is in the best interests of the child.<sup>26</sup> According to UNICEF, in order to assess whether return to home country is in the best interest of the child, the following factors must be considered: i) safety, security and conditions, including socio-economic conditions awaiting the child upon return; ii) availability of care arrangements for that particular child; iii) views of the child expressed in exercise of his or her right to participation and those of the caretakers; and iv) child’s level of integration in the host country and the duration of absence from the home country. In order to assess and uphold these factors, it is necessary to trace a child’s parents or relatives and assess whether there would be unacceptable risks if the child returns to her or his country of origin and/or to the family.<sup>27</sup>

Policies regarding the detention of children in Australia have recently shifted as well. The Australian advocacy group Children Out of Detention found that a range of documents had shown “that detention itself is the cause of significant mental health problems in children, additional to the trauma and persecution already experienced by them in their home country and during their journey to ‘freedom’.”<sup>28</sup> After this report’s publication, Parliament adopted a new law that ends the practice of detaining children and families. This 2005 law gives the Minister for Immigration and Multicultural and Indigenous Affairs the “non-compellable power” to “specify alternative arrangements for a person’s detention,” so that the Minister can “allow families with children to reside in the community at a specified place in accordance with conditions that address their individual circumstances.”<sup>29</sup> The new law also specifies that minors should only be

---

Nationals Held in ‘Temporary Stay and Assistance Centres.’” London: June 2005. AI Index: EUR 30/004/2005. PP. 61-62.

<sup>25</sup> “Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe,” UNICEF, pg 135 – 138, found at: [http://www.unicef.org/ceecis/protection\\_4440.html](http://www.unicef.org/ceecis/protection_4440.html)

<sup>26</sup> Id at 138.

<sup>27</sup> Id.

<sup>28</sup> Children Out of Detention (2002). “The Heart of the Nation’s Existence: A Review of Reports on the Treatment of Children in Australian Detention Centres.” Pg. 2, available at :

[http://idcoalition.org/portal/component/option,com\\_remository/Itemid,105/func/fileinfo/id,16/](http://idcoalition.org/portal/component/option,com_remository/Itemid,105/func/fileinfo/id,16/).

<sup>29</sup> House of Representatives, Parliament of the Commonwealth of Australia. “Migration Amendment (Detention Arrangements) Bill 2005: Explanatory Memorandum.” Pg. 1. Available at <http://www.ajustaustralia.com/resource.php?act=attache&id=78>.

detained as a last resort.<sup>30</sup> In Sweden, someone under the age of eighteen can only be detained for three days or less and unaccompanied children who arrive in Sweden are taken to government-run group homes.<sup>31</sup> With regard to minimum ages required for detention, countries in Western Europe have varied policies, but generally the minimum age for detention ranges between 14 and 18.<sup>32</sup>

### **Recommendations for federal authorities:**

- Urge lawmakers to pass the Unaccompanied Alien Child Protection Act of 2007 re-introduced by Senator Feinstein in March 2007. It has twice been passed by the U.S. Senate in unanimous votes in both the 108<sup>th</sup> and 109<sup>th</sup> sessions of Congress and offers the promise of systemic reform and protection of unaccompanied immigrant children that would provide the requisite responsibility, transparency, and accountability of all governmental stakeholders, thereby facilitating the protection of unaccompanied children. However, the House of Representatives failed to entertain a vote on the legislation in both sessions of Congress. In the 110<sup>th</sup> Congress, it is likely that the proposed bill will go before both chambers of Congress and be incorporated into a comprehensive immigration reform bill. **BUT** need to urge lawmakers to increase the age of juveniles eligible to apply for Special Immigrant Juvenile Status from 18 to 21 years (otherwise half of applicant pool for SIJS is left out).
- Remove children from jail-like detention centers and place them in home-like facilities. Due care should be given to rights delineated for children in custody in the ABA Standards for the Custody, Placement, and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States.
- In abiding faithfully to a best interest of the child standard, there should be a mechanism through which this information can be given weight or credence in removal proceedings. In situation where return has been decided, measures should be undertaken to ensure the safety of the child upon return. Examples include: assessment of country conditions and the ability of the competent authorities to protect the minor; home assessment in the case of potential

---

<sup>30</sup> Id.

<sup>31</sup> Professional Alliance for the Health of Asylum Seekers and Their Children (May 2002). "Submission to Human Rights and Equal Opportunity Commission Inquiry into Children in Immigration Detention." Pg. 51, available at [http://www.racp.edu.au/hpu/policy/asylumseekers/alliance\\_inquiry.pdf](http://www.racp.edu.au/hpu/policy/asylumseekers/alliance_inquiry.pdf).

<sup>32</sup> The Austrian Penal Code is 16; Germans is 14; Denmark is 18; France is 15; Sweden is 18; and the United Kingdom requires Inspector authorization for under 18. Hughes, J. and Field, O. "Chapter 1: Recent Trends in the Detention of Asylum Seekers in Western Europe," Detention of Asylum Seekers in Europe: Analysis and Perspectives. The Hague: Kluwer Law International. 1998. PP. 41-43.

family reunification or the securing of alternative arrangements with the competent child welfare authorities.

- Alternatively, ORR should increase funding for guardians *ad litem* or Child Advocates for unaccompanied children who are going through removal proceedings. These Advocates can help identify the children's eligibility for relief, and advocate for their best interests. Lawmakers should be urged to pass introduced legislation that would establish child advocates and allow for their involvement in immigration proceedings and related matters.
- Temporary Protected Status should be amended to grandfather unaccompanied children whose parents have TPS so they can derive status through their parents.
- A specific BP/ICE juvenile protocol, inclusive of Flores standards, with plans for implementation and accountability. There must be mandatory training for BP personnel on the Flores settlement, and legal rights of minors.
- BP must allow visits by independent non-governmental organizations and representatives to their processing and holding stations so that conditions of detention can be monitored.
- Unaccompanied minors must never spend more than 48 hours in BP custody. Temporary holding cells that imprison minors are not appropriate settings for any child to spend more time than is absolutely necessary. The Office of Civil Rights and Civil Liberties made this recommendation in a report released internally within DHS in the spring of 2006. These recommendations and other changes in BP policy must be implemented immediately.
- BP must begin providing adequate food and water immediately to all detained minors. Children cannot be allowed to subsist for 3 or 4 days or more eating only crackers and drinking tap water.
- There must be no private contract for the operation of BP facilities. While Wackenhut Corporation has taken over the transportation of BP detainees along the U.S./Mexico border, unaccompanied minors should never be held or transported by officials working for private corporations, who will have even less accountability for the treatment of juvenile detainees than DHS.

**Recommendations for city/state authorities:**

- Require that all Administration for Children's Services intake forms, permanency hearing reports, and service plan review forms include the question, "where were you born?" for children with whom ACS has contact along with instructions on the form to the worker to refer that young person to an immigration attorney for consultation.

- Create a SIJS unit within ACS under the Director of Immigrant Services.
- Fund a non-profit organization whose sole purpose would be to help young people in guardianships obtain SIJS. Assuming the SIJS Unit is created, this could be done by reallocating Department of Youth and Community Development funds currently being used to fund nonprofits to help youth in foster care to those who seek to aid children who are being appointed a legal guardian.
- Propose to the State Legislature that all Family Court and Surrogate's Court judges be required, in the course of every Family Court proceeding to ask the child's place of birth and if s/he is found to be born outside the U.S., to refer the young person to the appropriate nonprofit to ensure all immigration options are explored.
- If a child is not living with his or her parents at enrollment or is enrolled by someone other than his or her parents, the school shall provide the youth with a list of free legal providers.