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POLICY BRIEF

Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States

by Jacqueline Bhabha*

Children who travel unaccompanied to the United States experience not only the trauma of family separation and the frequently predatory behavior of the traffickers who bring them, but also harsh treatment by an immigration bureaucracy that often incarcerates them with little access to legal counsel or professional support.

On November 3, 2003, the *New York Times* ran a front-page story entitled “Littlest Immigrants, Left in Hands of Smugglers.”¹ Under the title was a picture of a five-year-old Mexican girl, crying and anxiously clutching a plastic bag, standing in front of an armed U.S. Border Patrol officer in Douglas, Arizona, while being handed over to a Mexican official whose hand rested on her shoulder. The story and the image conveyed a chilling message: young children who cross the border alone in search of protection and family reunification are at great risk – in the hands of smugglers, border guards, and detention facilities. Similar stories about the immigration dilemmas facing children stopped at ports of entry or after they have entered the country have been appearing with increasing regularity since the dramatic and tragic story of Cuban asylee Elian Gonzalez first burst onto the world scene. The right to family life, much vaunted in political rhetoric and international human rights law, is in fact illusory for many of these children.

There are many reasons why migrant children traveling unaccompanied to the United States confront harsh conditions. The very fact of family separation is itself a traumatic reality which entails profound material and psychological deprivation. Children may be separated from their families by the effects of war (as in Sudan, Sri Lanka, Somalia, Bosnia, Kosovo, Afghanistan, Sierra Leone, Liberia); persecu-

tion (Iraq, India, China, Iran); natural disasters (Honduras, Ethiopia); or civil, political and economic upheaval (Guatemala, El Salvador, Mexico, Haiti, Nigeria). They may be subjected to arduous, terrifying journeys; exposed to starvation, the rigors of the elements and crossing borders by foot, and the predatory behavior of smugglers and traffickers for whom human transport is at best a lucrative business, but – all too frequently – an occasion for physical and sexual abuse as well. Sadly, the arduousness of their journeys is often complicated by encounters with state officials, which in the United States are frequently oppressive and terrifying rather than reassuring and protective. As a result, stories of children in tears, withdrawn into deep depression, or paralyzed by acute anxiety are commonplace.

Rights vs. Reality

It is widely accepted that children are entitled to protection of their “best interests” and, as the preamble to the 1989 United Nations Convention on the Rights of the Child (CRC) states, that “the family [constitutes] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”² Although the United States has not ratified the convention, it has been a signatory since February 1995 and therefore has an obligation to refrain from conduct which would defeat the

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objectives of the convention. Moreover, in December 1998 the United States adopted “Guidelines for Children’s Asylum Claims” which draw heavily on international human rights law, including the CRC. Even though these guidelines are not binding and only apply to children in asylum proceedings, they signal official U.S. recognition of the importance of international protective provisions for children.

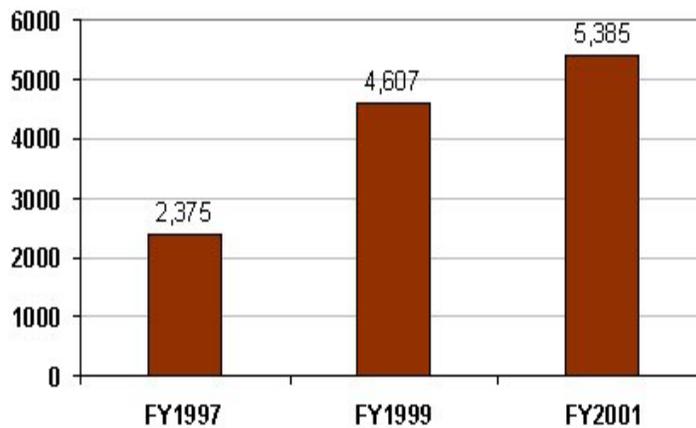
However, there is growing evidence that migrant children, particularly those who are unaccompanied, fare badly at the hands of U.S. authorities. It is not just that they face difficulties reuniting with their parents because they often are summarily removed from the country when they seek entry. They also are subjected to harsh punishment by immigration authorities, even in cases where no criminal charges arise. As Amnesty International commented in its June 2003 report *Why am I here? Children in Immigration Detention*, “The number of unaccompanied children detained in the United States has more than doubled over the last five years,” rising to over 5000 in 2001. “Not charged with committing any crime, these unaccompanied minors may be held for months or even years, in punitive conditions alongside juvenile offenders.”³

Unlike any other western country where significant numbers of unaccompanied children arrive seeking asylum or other forms of protection, the United States regularly and systematically detains them, often for long periods of time and in harsh conditions. Long-

term detention of unaccompanied children has increased four fold since 1996. Detention policy is governed by the settlement in the landmark Supreme Court case of *Flores v Reno*, which stipulates that minors be detained “in the least restrictive setting appropriate to the minor’s age and special needs.”⁴ However, the settlement also permits indefinite detention of qualifying minors.⁵

One third of detained, unaccompanied children are placed in secure facilities, alongside juvenile offenders convicted of crimes. The punitive measures to which they are subjected include use of handcuffs and shackles, placement in the isolation wings of detention centers, food deprivation, arbitrary physical punishment, and vindictive abuse. These practices violate international norms for the treatment of children and put the United States completely out of line with other western states, many of which deal with similar immigration control dilemmas. The practices also are the subject of outrage by congressional observers and human rights organizations. However, despite persistent public criticism, such practices prevail and proliferate.⁶

**Unaccompanied Children Detained by the INS
1997-2001**



Source: Immigration and Naturalization Service Fact Sheets: “INS’ Office of Juvenile Affairs” (August 1, 2002) & “INS’ Juvenile Detention and Shelter Care Program” (September 7, 2000).

A Broken System

Responsibility for the custody and care of unaccompanied children entering the United States recently changed. Under the administrative system in force until February 2003, the Immigration and Naturalization Service (INS) was charged with both enforcing immigration laws and protecting minors. The conflict of interest inherent in this dual role attracted con-

siderable criticism, since the agency responsible for detaining and deporting minors also was supposed to care for them. As a result, reforms were instituted. As of March 1, 2003, the Department of Homeland Security's Bureau of Immigration and Citizenship Enforcement (BICE) is responsible for enforcing immigration laws, whereas the Department of Health and Human Services' Office of Refugee Resettlement is in charge of minors' care.

The change from the dual role of the INS to a separation between the immigration enforcement and custodial functions is welcome in principle, although the practical benefits remain to be demonstrated as organizational changes gradually take effect. So far, many of the personnel charged with the custody and care of unaccompanied children remain the same. Recent evidence suggests that there have not yet been significant improvements in the quality of care, although the number of children released from detention and placed in foster care has increased.⁷ However, many children are still detained at length, effectively as prisoners – not allowed to wear regular clothes or to freely contact their relatives. The indefinite detention of innocent children is unacceptable, regardless of which agency is responsible for oversight. In the words of one child advocate, despite the recent administrative changes, “Right now, it’s a broken system.”⁸

Deficiencies in the Current System

In addition to the pervasiveness of detention and the inherent conflicts between enforcement and custodial functions, the current system for addressing the needs and rights of unaccompanied migrant children is plagued by other serious deficiencies. Among them are:

Professional Support

Unlike the situation that prevails in most other western countries, unaccompanied migrant children in the United States are not entitled to a guardian (or “designated representative,” as

the position is called in Canada) who acts *in loco parentis* – investigating the circumstances surrounding the child’s departure from their home country and helping the child navigate the complexities of the legal system, the strangeness of their new environment, and the loneliness of separation from family and familiarity. This is a serious omission, especially since immigration attorneys typically lack any training in how to communicate with children or deal with the potentially complex tensions between representing a child’s best interests and a child’s wishes. Guardians also play important roles in advising the court on how best to proceed with cases, investigating family circumstances, and arranging social support and appropriate custodial placement, schooling, and therapeutic services.

Legal Representation

There currently is a radical deficit in legal representation for unaccompanied children. It may surprise many to learn that the U.S. system does not afford the right to government-appointed counsel for unaccompanied children. As a result, only 10% of children appearing in immigration courts are represented. The absence of guaranteed legal representation is remarkable given the very high stakes of immigration hearings, which can result in deportation or removal to a country where a child alleges persecution or in prolonged separation from caregivers or close relatives. Moreover, studies have shown that legal representation significantly increases the chance that an immigration appeal will have a positive outcome.⁹ In one recent case, an immigration judge was forced to adjourn a case where an 18-month-old child appeared unrepresented before the court.¹⁰

Interpreters

The overwhelming majority of unaccompanied child migrants require an interpreter to present evidence and interact with the judge. The role of the interpreter is critical to the proceedings, both because the interpreter is

the person to whom the child speaks and listens most directly in court, and because the interpreter is often seen by the child as a mediator between the home and host societies. This represents a very complex set of dialogues and interactions, yet children typically encounter their interpreters just as their immigration hearings begin and, on occasion, must use Berlitz interpreters who translate over the phone. This is not conducive to full, complete, or relaxed disclosure of information, or comfort in the court room. In addition, there is concern that little attention is paid to dialect and accent variation in the assigning of interpreters, which hinders full comprehension and accurate translation. Small translation errors or incorrect nuances can dramatically prejudice proceedings for an applicant, particularly a child, and thus can negatively affect the outcome of a case.

Transparency

The process by which decisions are rendered in the cases of unaccompanied migrant children is inefficient, slow, and utterly lacking in transparency. In general, children in detention do not know how long they will be detained, when their next hearing will be, whether or not they will be moved to different facilities, or when they will be able to contact family members or legal representatives. As a result, most children awaiting decisions on their cases are trapped in a stressful, seemingly endless limbo of uncertainty and powerlessness. They report having no idea how or when their cases will be decided and of feeling abandoned by their advocates and other representatives.¹¹ It is widely acknowledged that prolonged uncertainty about one's fate is profoundly distressing psychologically and likely to cause illness and mental disorders such as anxiety, sleep disturbance, depression, and even suicidal tendencies. This is particularly true for children, especially refugee children who often have been traumatically uprooted from their homes. "Permanency planning" that minimizes uncertainties, insecurities, and dis-

placements should be an essential component of institutional custody for children.

Recommendations

Considerable work has been done over the last few years to highlight the deficiencies in current policies for dealing with unaccompanied migrant children and to press for improvements in practice. These efforts have taken the form of media events, academic conferences, and public lobbying. Such initiatives focus on a number of key reforms which, if implemented, would immeasurably benefit unaccompanied children:¹²

1. The best interest of the child, including the paramount importance of family reunification, should be the primary consideration in making arrangements for the custody of unaccompanied child migrants. A child's release from detention should never be conditional upon a relative's immigration status. (At present, children are sometimes used as bait to ensnare undocumented parents who are then detained and deported).
2. Children should be entitled to federally funded counsel to represent their immigration interests and advise them on the right to claim asylum or pursue other suitable legal remedies. Such counsel should be specially trained in representing traumatized and unaccompanied child migrants.
3. Children should be assigned a professional child welfare advocate, such as a *guardian ad litem*, to act *in loco parentis* and assist them throughout the immigration process. The guardian, or an appointed social worker or other qualified professional, should supervise placement of the child in an appropriate foster home or child care facility for a reasonable period of time.
4. The physical tests used to corroborate or contradict the age claims of young migrants – such as dental radiographs and bone mass measurements – are often flawed and inaccurate. They should be combined with other findings based on

testimony to establish age. Given the unreliability of existing tests, a generous margin of error should be adopted. The recommendation of the United Nations High Commissioner for Refugees (UNHCR) that the benefit of the doubt should be given to the individual in cases where age cannot be conclusively determined should be followed.

5. Children should not be detained except in wholly exceptional circumstances, and then only for the shortest possible time in suitable settings.
6. Interviews of children, whether by immigration authorities or counsel, should conform to accepted methodologies. These include child-friendly techniques designed to minimize trauma and increase comprehensibility and confidence. The common spectacle of children giving evidence with tears streaming down their cheeks should be unacceptable.
7. Children should never be transferred from one site of government custody to another without prior notification of their attorney.
8. Child-specific persecution as defined and elaborated in the U.S. Guidelines for Children's Asylum Claims should be uniformly recognized as the basis for grants of asylum. In recent years, immigration judges have held that persecution, as defined under the 1951 Convention on the Status of Refugees, includes situations involving sale of a child, domestic violence, forced labor within the family, social cleansing (of street children), gang membership, sexual orientation, severe disability (autism), and family position (in violation of population control policies). These precedents, though non-binding in law, must be relied upon by advocates representing child asylum seekers and adhered to by judges.
9. District-level immigration authorities should act consistently and promptly in granting consent to local or state courts conducting dependency hearings to determine whether a child qualifies for Special Immigrant Juvenile Status (SIJS). This is an important and useful remedy for unaccompanied children who are found to have been abused, neglected, or abandoned, whether or not they also qualify for asylum. SIJS can provide permanency and rights to particularly deprived children more speedily and comprehensively than asylum, and therefore should be preferred and encouraged when a choice exists.¹³
10. The government should, in concert with other countries receiving large numbers of unaccompanied children, collect systematic data on the numbers, provenance, current location, and reasons for travel of undocumented children. A uniform definition of "unaccompanied child" should be used, following the UNHCR definition.¹⁴
11. More law-enforcement resources should be devoted to curb trafficking in children. A first step should be to increase human-rights protections and support for trafficked children and to prioritize their needs for protection, care, and family reunification. In addition, border police forces must be professionalized and subject to uniform standards in order to eliminate corruption and widespread complicity with trafficking. Political will and resources are required to ensure enforcement of child-labor prohibition laws, institute effective witness-protection schemes, and increase prosecutions for abuse and criminal maltreatment of children.

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Endnotes

¹ Ginger Thompson, “Littlest Immigrants, left in hands of smugglers,” *New York Times*, November 3, 2003.

² CRC, Preamble.

³ Amnesty International, ‘*Why am I Here?*’: *Unaccompanied Children in Immigration Detention* (Amnesty International USA, June 2003): 1.

⁴ *Reno v Flores* 507 U.S.292 (1993); see www.centerforhumanrights.org.

⁵ Qualifications include exhibiting violent or criminal behavior, being an escape risk, or being at risk of abuse or abduction. In practice the majority of minors currently detained in secure facilities are there as “overflows,” because no space is available in less restrictive settings.

⁶ Amnesty International report: ch. 3.

⁷ David B. Caruso, “Advocates push for changes in handling of detained children,” Associated Press Newswires, November 18, 2003.

⁸ *ibid*, quoting Washington lawyer Chris Nugent.

⁹ D. Martin and A. Schoenholtz, “Asylum in Practice: Successes, Failures and Challenges Ahead,” 14 *Georgetown Immigration L.J.* (2000): 589,595.

¹⁰ Women’s Commission for Refugee Women and Children, *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children* (New York, May 2002): 30.

¹¹ Human Rights Watch, *Slipping through the cracks: Unaccompanied Children Detained by the US Immigration and Naturalization Service* (1997): 36.

¹² For detailed policy recommendations see Women’s Commission and Amnesty International reports.

¹³ Christopher Nugent and Steven Schulman, “Giving Voice to the Vulnerable: On Representing Detained immigrant and Refugee Children” 78(39) *Interpreter Releases*, October 8, 2001: 1569, 1589.

¹⁴ UNHCR, and other international agencies, have tended to prefer the term “separated children” to the older and more common term “unaccompanied children” to emphasize the critical impact that separation has on a child’s security and welfare. UNHCR has defined a separated child as “one who is under the age of 18 and who is separated from both parents and is not being cared for by an adult who, by law or custom, is responsible so to do.” UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR: Geneva, 1994): 121.