Unaccompanied Children In I.N.S. Detention

Rosa Ehrenreich Brooks
Georgetown University Law Center, rosa.brooks@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1135

I was asked to speak today about the ways in which Immigration and Naturalization Service (INS) detention of unaccompanied children may violate the United Nations Convention on the Rights of the Child (Convention). I first became familiar with the issue of children in INS detention when I was working as a consultant for Human Rights Watch’s Children’s Rights Division doing the research for a report that was published in 1997, under the title *Slipping Through the Cracks: Unaccompanied Children Detained by the US Immigration and Naturalization Service*. In 1996, my Human Rights Watch colleague Lee Tucker and I visited three different places where children are held by the INS. My comments today will be based primarily on the research we conducted.¹

In Los Angeles County, children are put into one of several L.A. County juvenile detention centers. These are the same places they put children who have had contact with the juvenile justice system and who have been detained after criminal convictions of one sort or another. In Arizona, children in INS detention are not detained in a county-run juvenile corrections facility. Instead, the INS has a contract with a private company called Southwest Key, which specializes in operating private detention facilities. The facility in Arizona is not supposed to be a “secure” or punitive facility, but is supposed to be what the INS refers to as a “shelter-care facility.” In Chicago, Illinois, the INS also places unaccompanied children in a shelter-care facility, this one operated by a non-profit social services agency under contract to the INS. But there is a major difference between the agencies running the shelter-care facilities in Arizona and in Chicago. The Chicago facility is run by an agency with a long history of working with runaway youth and needy children, whereas Southwest Key, the company operating the Arizona facility, specializes in operating private prisons and juvenile correctional facilities. Thus, the Chicago agency has a history of care-giving, while the Arizona agency has a history of running establishments that are punitive in nature.

Let me begin by giving an overview of the situation faced by unaccompanied children who end up detained by the INS. First, who are these children, and how do they end up here?

Undocumented ‘alien’ children come to the United States for a wide variety of reasons. Some of them are children who come up from Mexico or Guatemala, seeking a better life. At the age of fourteen, fifteen, or sixteen, they travel hundreds of thousands of miles, hoping to cross the border unnoticed. Sometimes the children come with

¹ For a fuller account of the research and findings of the Human Rights Watch mission, see *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service* (New York: Human Rights Watch, 1997).
unrelated adults who are friends of the family. Sometimes they come alone. They usually come with very little money, and they usually do not speak English.

Some children are smuggled into the United States by organized smuggling groups. Often these children come to the United States of their own free will, but with little understanding of what they are getting into. We encountered some young girls from Mexico and Guatemala, for instance, who had been told that they were going to be taken to United States to work in babysitting jobs; they were assured that this was completely legal. What they found when they arrived in the United States was that they had, in fact, been brought here to be prostitutes.

Other children come to the United States as refugees, fleeing political persecution in their home countries. I should add, that we often mistakenly assume that children are not persecuted for political reasons because we assume that they are too young to be politically active. This is simply not true: older children, at least, are perfectly capable of engaging in the kind of political activities that are punished, in some states, by torture, detention, or beatings. And in a world where much persecution is along ethnic or religious lines, no one is too young to be persecuted for membership in a particular ethnic, religious, or social group.

It is important to note that children who end up in INS detention centers in the United States are not criminal detainees, but rather, administrative detainees. That is, they are not being held because they are accused or convicted of crimes. They are being held for two reasons only. First, the INS holds them in order to ensure their presence at immigration proceedings. They fear that if they let a child out, into foster care for instance, that child might not appear at any subsequent hearings or proceedings. Second, the government is legally required to look after these children in some way. Many of these children have no adult family members or guardians, and although they are undocumented, the United States has an obligation to be in loco parentis to these children for as long as they remain in the country. For reasons that are, I think, obvious, the INS cannot take an unaccompanied fourteen-year-old who has no means of support and no family members, and just shove her out onto the streets to fend for herself.

Some of the children we interviewed were children who had been living in the United States with very distant relatives or with family friends, and who previously had some contact with the criminal justice system. Usually the contact was quite minimal; often they had been picked up on suspicion of being involved in a gang activity or shoplifting. The police would then turn the children over to the INS when they realized that they were not citizens. Sometimes these children went directly to detention centers. At other times, they were prosecuted, served brief juvenile sentences, and then turned over to the INS. In all of these cases, however, by the time we interviewed the children, they were being detained only because they were going through immigration proceedings, not for the purpose of punishing them. As far as the juvenile justice system was concerned, these children had paid any debt to society they might have had. These were children who would not have been in detention but for their immigration status.

We do not have a very good statistical picture of who these detained unaccompanied children are because the United States Immigration and Naturalization Service keeps shockingly poor records on all people in their custody, particularly children. Strangely, the INS does not recognize children as a special category of detainee that might require some extra attention, even though children are uniquely vulnerable to abuse and neglect. When we questioned INS officials about their lack of record-keeping for minors in their custody, we were told by a high INS official that they could not realistically keep better statistics on minors than on any other categories of detainees, because that would be discriminatory. He claimed that other people would then demand that the INS should keep better statistics on other populations, such as "senior citizens." Needless to say, we thought that this was a ludicrous justification for their poor record-keeping practices. The INS now tells us that it will try to keep better records. But the truth is that at the moment, at least, their records are inadequate, so it is very hard to get a handle on who all these detained children are.

One thing we do know comes from an INS brief submitted to the Supreme Court in the case of Reno v. Flores a few years ago. According to that brief, in 1990 the INS arrested about 8,500 alien children. Of those 8,500, 70% were not accompanied by an adult, parent or guardian. Those are probably low estimates, and the INS officials we queried admitted that they did not even know
where those 1990 statistics came from. They claimed that the statistics submitted to the Supreme Court “must have just been a guess.”

At any given time, the INS says it has roughly 200 to 300 children who are in what we might call ‘longer-term’ INS detention. Legally, the INS can keep children for up to seventy-two hours in a wide variety of settings, and they keep no records on children detained during that initial seventy-two hour period. Some unknown number of detained children may be released to family members or accept voluntary departure to return to their home countries within that seventy-two hour period. But there are always some children who do not accept voluntary departure, who may be applying for asylum or who may have simply refused to acknowledge the court’s ability to deport them. Those children will be detained for a longer period—indeed, for a virtually indefinite period—if the INS cannot find a parent or guardian who is a legal resident of the United States to whom they can release that child. So at any given time, 200 to 300 children are in longer-term INS detention pending the outcome of their deportation hearings, their exclusion hearings, their asylum hearings, or whatever proceedings may follow.

During a one-week period in October 1996, 71% of the children who were detained in longer-term INS detention were from Mexico or other parts of Latin America, 22% were Chinese children, and the other 7% were mostly from Africa or from the Indian sub-continent. According to the INS, as of October 1996, of the children who were in detention waiting for their cases to be resolved in some way, 50% of them had been detained for over a month and 20% of them had been detained for over four months. Our own interviews with children suggested that many children were detained for even longer periods; we met many children who told us that they had been in detention for well over six months, and occasionally for as long as a year.

Let me summarize the findings of our report. We focused primarily on Los Angeles and Arizona; the Chicago visit was very, very brief. One of the most troubling things about the facilities in which the children were held is that they were essentially prisons, which is not an appropriate setting for children who are being held for administrative reasons only. Children in the Los Angeles facilities had to wear orange L.A. County detention uniforms. These were bulky, smock-type uniforms with “L.A. County Detention” stamped in big letters on the legs. Similarly, the children were often transferred to INS proceedings in handcuffs—again, something that is entirely inappropriate for administrative detainees. In Los Angeles, this seemed to be due to the lack of communication between INS officials and the detention center staff. Facility staff often failed to realize that the INS detainees in their charge were there for administrative reasons. Trained to deal with juvenile delinquents, they transferred their assumptions to the INS detainees. In our interviews with the staff, we heard comments like, “Well, I don’t quite know what these kids are doing here, but I assume that if they hadn’t done something wrong, they wouldn’t be in this facility.” This served as their justification for punishing and manhandling the children.

In general, detention center staff were unresponsive to requests from the children; again, this is perhaps because they assumed that the children were in the facilities to be punished. The children were confined to the premises, and in Los Angeles County they were behind fences, barbed wire, and locked doors, with guards all around. The children were living in rooms with cinder-block walls and metal cots, and they were not allowed any personal possessions. They could not go anywhere without the approval of the staff. These children were confined to a very small area, and had no freedom at all. If they wanted to go outside of their rooms, which ranged from six or eight metal cots in a room to rooms with forty or fifty beds, they needed permission from the guards. If they were going to sit outside, in the area immediately surrounding the facility, they had to be closely supervised by the guards at all times.

They had no personal privacy. In the Los Angeles County facilities we visited, there were toilets and showers right in the bedrooms, and neither the showers nor the toilets had doors. If a child wanted to take a shower or use the toilet, it had to be done in front of all the other children. The children were separated by sex, but they were not always separated (as they are supposed to be) from convicted juvenile offenders. Girls, especially, were often mixed together due to the lack of adequate space set aside for females. Girls who were INS detainees were in the same cells with girls who were serving criminal sentences.

In these detention centers, the children are also supposed to be going to school. However, they
were lucky if they had a couple of hours a day in any kind of classroom. Most of these children spoke little or no English, yet they were put in classrooms where the only medium of instruction was English. All of the educational materials were in English and the teachers only spoke English. Consequently, most of these children learned nothing at all.

These children also had very little access to family members, relatives, friends, or the outside world in general. As I said, they could not leave the premises. They were supposed to get frequent educational recreational field trips, but in fact they got none. In Arizona, we found that in a four or five-month period, a few children had been taken to visit a nearby shopping mall, but that was the extent of their travels.

This points to a broader problem faced by INS detainees (adults as well as children). Many of the detention facilities used by the INS are far from major ports of entry or urban centers, hundreds of miles away from the immigrant communities that might be supportive of the children. The Chicago facility we visited held children who had entered the United States via the Mexican border and via airports in New York and Los Angeles. These children, though unaccompanied, often were seeking to reach family friends living near their port of entry. By moving them to a detention facility in Chicago, the INS effectively made it impossible for these children to have much contact with those adult friends who might have helped them. The problem was even worse in the Arizona facility. An hour’s drive from both Tucson and Phoenix, the Arizona facility run by Southwest Key was in an isolated rural area—literally in the desert. About 50% of the children detained there were Chinese children who had entered the United States by plane, in New York or California. Had they been detained in either of those places, the Chinese children would have had access to a supportive network of Chinese-speaking people and community agencies. But in the Arizona desert, their chances of getting help—or even finding someone who could speak their language and explain their situation to them—were virtually nonexistent.

The problem was worsened by the fact that children we met in both the Los Angeles and Arizona facilities had only minimal access to telephones. In the Los Angeles facility, the telephones in one of the main detention centers were broken and had been broken for months. In response to our questions, the staff said, “Oh well, they’re broken, what can we do about it? The children can use the phones in our office.” However, it was only in rare circumstances that children could in fact get permission to use staff phones, and when they did, their calls were monitored by staff. In Arizona, initially, there was no pay phone for the children to use at all. Finally they put one in, but use of the phones was a limited privilege. The children would ask to call their mothers and would be told, “You can say two sentences. You can tell your mother where you are and what the phone number is and that’s it.”

A more serious problem with the phone systems in most INS detention facilities is that most of the phones will not accept incoming collect calls, and since most of the detained children have no money, they themselves are only able to make collect outgoing calls. Because most of these children come from very poor families, their relatives often cannot afford to accept collect calls. Many of these children have no relatives in the United States at all, and need to make overseas calls, but if you are trying to make a collect call to a rural village in Guatemala with only one pay phone serving the whole village, you are unlikely to be very successful. Ironically, some of the children we met had adult relatives or siblings detained in other INS detention facilities, but since the children could not make outgoing calls unless they called collect, and the facilities in which their relatives were held would not accept collect calls, there was virtually no way for family members to communicate with one another.

This problem led frequently to situations where children knew that they had a close relative who was detained a hundred miles away, but there was no way of contacting that person, because the INS has no arrangement for any kind of subsidized calling. The INS is, in theory, committed to a family unification policy, but we found repeatedly that detained children simply could not get in touch with their relatives, not because they did not know how to reach them, but because they could not afford the telephone call. One public interest attorney we spoke to in Arizona met with a detained boy at the detention facility. The boy told her, “I haven’t been able to contact my relatives in months although I know where they are, because I don’t get access to the phones.” The attorney offered the boy her cell phone. Ten minutes later he was in contact with his parents, to whom he had
not spoken in months. A week or so later, he was finally released into their care.

We also found that detained children were routinely denied access to legal information and representation. The United States requires the INS to give children information about their immigration status, in a language that they can understand. But our research made it clear that if the children were getting any information at all, which was rare, it was usually not in a language they knew or understood. It was usually only in English, with no provisions for translation (Spanish-speaking children sometimes did receive information in Spanish, or succeeded in finding a member of the facility staff who could translate for them). Children from places like China or Sri Lanka had virtually no way of getting information. In general, the INS was not giving the children the various rights advisory forms that court orders require the INS to distribute, and the children had no access to any kind of legal library materials.

Children do have a right to counsel in deportation hearings, but current statutes only give them the right to counsel at no expense to the government. Nonetheless, INS regulations and numerous court decisions have held that detained children have to be given lists of free legal service providers, and they have to be assisted in obtaining counsel of their choice. We found that for most children, the lack of access to phones and the lack of access to any private areas in which to talk were major factors inhibiting their ability to have any meaningful contact with attorneys.

The tendency of the INS to move children around very frequently, usually without notifying anybody at all, including the children's attorneys, was another factor making it hard for these children to get legal assistance. A child might be initially picked up by the INS in L.A., transferred to a detention facility in Illinois, and three weeks later transferred again to a site in New Jersey. This made it hard for the children to stay in touch with both family members and lawyers, because the INS rarely bothered to notify anyone when a child was transferred.

Recent restrictions placed by Congress on federally-funded legal service providers now make it illegal for such providers to represent undocumented aliens. As a result, the pool of attorneys who can represent indigent detained children (indeed, who can represent any INS detainee) has shrunk from small to virtually non-existent. Children who spoke no English had a particularly difficult time finding legal assistance, because there are few pro bono attorneys with the needed language skills. All of this leads to a situation in which very few detained children are represented by attorneys. Given the extreme complexity of immigration proceedings, this means that, in practice, even those children with valid reasons to stay in the United States (asylum claims, relatives living here legally) end up being removed. It also means that children have no means of challenging illegal detention conditions.

One of the biggest problems for these children is that they are often detained for months. We interviewed many children who had been detained for six months, eight months and in some cases, a year and a half. Because the children often do not speak much English and know virtually nothing about U.S. immigration law, they end up being detained indefinitely (as far as they are concerned) for reasons they cannot understand, and with no means of asking for help or altering their situation.

Needless to say, the problems outlined here all represent violations of the Convention on the Rights of the Child. In fact, there is hardly an article of the Convention that is not violated by current INS practices in detaining children. I will briefly run through a few examples of Convention articles that the INS is violating, in either the spirit or the letter.

Article 8 establishes the right of a child to preserve his identity and family relations. Article 9 establishes the right of a child not to be separated from his parents against his will. Article 10 lays out the right of children to remain in contact with their parents and have prompt family reunification when separated. Article 12 establishes the right of children to express their views freely and be heard in proceedings that affect them, whether those proceedings are administrative or criminal. Article 16 deals with the right not to be detained arbitrarily and the right not to have one's privacy interfered with arbitrarily. Article 20 states that children deprived of their family are entitled to special protection assistance from the state, with due regard to their ethnic and cultural background. Article 22 states that refugee children should get special protection. Article 28 deals with the right to an education. Article 30 notes the right to culture, religion, and language. Article 31 addresses children's right to leisure, recreation, and
Addresses

cultural activities. Article 37 prohibits arbitrary detention of children, and states that any detention should be a last resort and that detention should be limited to an appropriate period of time. Needless to say, the INS is generally ignoring these rights.

The Convention on the Rights of the Child also states that if there are higher standards stated in other international documents, those higher standards should apply. Particularly with regard to refugee children, there do indeed exist much higher standards. These standards essentially say that refugee children should not be detained and that if detention becomes absolutely necessary, children should not be detained in prison-like or punitive conditions. These children must also be given access to legal information and attorneys. Obviously, these international standards are also being violated by the INS.

I was asked to comment on the question of whether U.S. ratification of the Convention on the Rights of the Child would affect U.S. policy on children in INS detention. The short answer, unfortunately, is no. For the most part, the problem of detained children does not stem from the lack of a decent legal framework, the lack of decent policy guidelines, or the lack of court orders telling the INS what to do. The big problem is monitoring compliance at the INS. The INS has a rather thorough set of regulations for dealing with unaccompanied minors: the Reno v. Flores case led to a binding consent decree that lays out very detailed standards for the care of children who are in INS detention. There have been numerous court orders issued to the INS covering these issues. But the INS and its contracting agencies ignore these orders. They ignore them both because they are not aware of them and because some INS officials simply do not care. Although we interviewed many conscientious and caring INS employees, we interviewed an even greater number who showed a disturbing ignorance of the legal regulations, and an even more disturbing lack of concern for the children under their control.

In addition to poor INS compliance with court orders and INS regulations, there is too little outside monitoring. There is not an adequate system for checking up on the INS, and the INS has a built-in conflict of interest when it comes to detained children. The INS has a legally adversarial relationship with detained children—it is required to try to deport the children if at all possible, and be their adversaries in immigration hearings. Yet at the same time, the INS is also charged with protecting the children’s legal rights and caring for them. This is a recipe for problems. The dearth of public interest attorneys able to work with undocumented immigrants means that there are few people to monitor the INS. In light of that situation, it does little good to get a terrific set of court orders or INS policy guidelines, because there is no one to monitor implementation. And asking the INS to monitor itself does not work. Given the built-in INS conflict of interest, that is like asking the fox to guard the chicken coop.

Would the Convention on the Rights of the Child make a difference? With the problems of compliance and monitoring, probably not. Still, ratification of the Convention might hasten a few important changes. First, the Convention might have some impact on the right to counsel. The Convention arguably would require the government to provide juvenile INS detainees with counsel at government expense. Second, if the Convention is ratified, it would require states to take all appropriate measures to implement it. This would, in turn, require the United States government to put aside funding for the purpose of monitoring the Convention’s implementation.

Perhaps most importantly, ratifying the Convention would raise awareness of the issue of children in INS detention facilities, and would create yet another advocacy tool. It could be used to shame federal agencies into compliance: it is bad enough, we might tell them, that they are violating United States law and policy. It is even worse if they are violating international human rights law.