

**The Inter American Human Rights Commission
Testimony of Christopher Nugent
October 12, 2007
Washington, D.C.**

Honorable Commissioners:

My name is Christopher Nugent. I am a full-time pro bono attorney with the international law firm of Holland & Knight LLP and pro bono counsel to the Women's Commission for Refugee Women and Children.

It is a privilege and honor to testify before the Commission at this unprecedented hearing concerning the United States government's policies and practices in the area of immigration detention and compliance with treaty obligations under the Convention and customary human rights law. My remarks will focus on US governmental policies and practices pertaining to the plight of voiceless and vulnerable constituency of unaccompanied alien children. More than 8,000 alien children arrive on our shores on an annual basis without parents or guardians, and experience arrest, detention and adversarial immigration removal proceedings. An additional 80,000 Mexican children are arrested upon entry but swiftly granted voluntary departure and repatriated to Mexican authorities.

These children come to this country for a variety of compelling reasons including for asylum protection in order to escape persecution or torture by their State or groups the State cannot or will not control such as in the case of many Central American children, notorious gangs like MS-13 and quasi-paramilitary death squads which target homeless street children in Central America for social cleansing. Others flee abuse, abandonment and neglect by family members which could qualify them for Special Immigrant Juvenile Status and lawful permanent residence. Some children are in fact trafficked into the United States for illicit purposes including sex trafficking such as our teenage client from a Latin American country who with several teenage girls was deceived and lured to the United States for seemingly gainful employment. Thankfully and ironically, our client was arrested by immigration authorities and spared the fate of the other girls who were enslaved in brothels and tortured.

Once apprehended by immigration authorities, these children encounter, from their perspective and experience, a United States immigration system which is terrifying and traumatizing. This system was fundamentally designed for adult aliens. There are seven priority policy issues for the Commission to consider which implicate children's international human rights:

I. Abuse/Mistreatment and Punitive Conditions of Confinement by Department of Homeland Security Customs and Border Protection (CBP)

Contrary to the international human right to be free from abuse and arbitrary detention, we have been hearing numerous reports of both physical and psychological abuse of unaccompanied children by CBP officials during their arrest and initial detention where they are detained arbitrarily in Border Patrol stations or jail-like facilities without access to counsel, education, sufficient food or health care. Even low-level CBP officials have repeatedly and anonymously complained to advocates, Congress and the international media that as a law enforcement agency, they lack the training and expertise to care for these children.

II. DHS Failure to Transfer Children to the Office of Refugee Resettlement (ORR)

The *Flores v. Reno* class action settlement agreement, Case No. CV85-5455 RJK (C.D. Cal. 1996), requires DHS to transfer custody of unaccompanied alien minors to ORR within a strict three to five day time limit. Since the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296 S. 49, 1196 Stat. 2153 (2002), ORR is exclusively responsible for care, custody and placement of unaccompanied children. However, in contravention of the fundamental right to be free from arbitrary detention, transfers reportedly are not happening within the

requisite time period, thereby causing traumatized children to languish in border patrol stations and jail-like cells for excessive periods of time.

III. DHS Erroneous Age Determinations

Unlike other federal agencies and foreign governments, the Department of Homeland Security relies on unreliable forensic testing of a child's bones and teeth to determine their age when his or her age is in question. Medical experts including the former Immigration Health Services Director consider this practice to constitute junk science since forensic testing has margin of error of up to three years. This practice has led to the erroneous classification of untold numbers of children as adults and their arbitrary detention in adult detention facilities, which are typically private prisons or state or county jails where they could even be commingled with criminal offenders.

IV. DHS' Game of Playing Hide and Seek with Children

Despite the Homeland Security Act of 2002's mandate that *all* unaccompanied alien children are to be housed and cared for by ORR, DHS reportedly uses 19 facilities around the nation to detain children, the majority of which are juvenile

jails. DHS arbitrarily decides not to transfer certain children to ORR for reasons that are not transparent such as DHS' classification of the child as accompanied if they have a parent or guardian in the United States; if the child has a juvenile delinquency matter; if the child is a material witness for a federal prosecution or is related to a national security interest. DHS headquarters reportedly does not maintain statistics on the facilities' use let alone cannot identify where the children are at any given time.

V. Continued Warehousing of Children at the Border

ORR inherited a dysfunctional de facto detention program from Legacy Immigration and Naturalization Service but has made significant reforms by prioritizing child welfare considerations despite limited resources. However, unlike in other Western countries where unaccompanied children are housed in group living environments in the community and attend local schools, under the current system, as a byproduct of INS' approach of warehousing children in larger facilities to achieve an economy of scale, unaccompanied alien children in the United States are housed by ORR in geographically remote shelters holding several hundred children at any same time without access to counsel. To date, no body has

investigated the psychological impact of warehousing on unaccompanied alien children.

VI. Adversarial Immigration Proceedings Without Counsel or Guardians

As stated previously, the children are being held for administrative removal proceedings before the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice. These proceedings are administrative and adversarial, and pit the lone child, carrying the same burden of proof and persuasion of evidence as any adult alien, against a trained DHS trial attorney before an Immigration Judge. Without the statutory right to government-appointed counsel let alone guardians, despite on-going pro bono efforts, the vast majority of unaccompanied alien children go unrepresented in their removal proceedings and are ordered deported. According to the bipartisan United States Commission on International Religious Freedom's report on expedited removal, aliens represented by counsel have up to eight times greater likelihood of being granted asylum than unrepresented aliens. Legal proceedings for children without the provision of counsel obviously impinge on the children's due process rights under international law.

VII. Repatriation of Children to Unknown Fates

Contrary to safeguarding the best interests of the child as required under international law, the United States government refuses to provide any repatriation services to the thousands of children forcibly removed from the United States.

There have been shocking reports by advocates and the media of unaccompanied children facing perilous circumstances upon deportation including death. ORR lacks jurisdiction over this issue and DHS' position is their responsibility is solely to enforce immigration law and execute the removal order and turn the child over to the child's government. Without any repatriation services and effective oversight, children face the possibility of abuse and trafficking upon return to their countries of origin.

Conclusion

These tragic phenomena are due in large measure to the lamentable fact that the United States fails to adhere to the fundamental principles enshrined in international human rights law including the child's fundamental right to special protection by the State given the child's limited psychological and physical development. Indeed, as a matter of both federalism and a function of sovereignty,

the treatment of these children under U.S. immigration law is considered a matter conferred to the executive branch where the interests of the child lose ground to other institutional interests. However, unaccompanied children deserve that their best interests are prioritized as paramount in all actions taken by the State, from their arrest to their repatriation. In such desperate circumstances, these voiceless children cannot- and this honorable Commission should not- wait for the U.S. government to assume responsibility and provide transparency and accountability for its practices consistent with international human rights law. Thank you for listening and caring about the children. I look forward to your questions.