

Protecting the Rights of Children:

The Need For U.S. Children's Asylum Guidelines

Women's Commission
for Refugee Women and Children

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Executive Summary

Sudha (a pseudonym), an 11-year-old Indian girl, hunches over in the hard plastic seat in the waiting room outside the immigration courtroom. She is thin with long dark hair, fragile in her appearance. Even with her head and eyes downcast, her nervousness is apparent. She glances at her companion, a child welfare professional who has agreed to help her at the request of her attorney. The woman puts her arm around Sudha, and murmurs softly. Her pro bono attorneys chat sporadically about the upcoming hearing, until the Immigration and Naturalization Service (INS) trial attorney appears. The trial attorney pulls files from her bag, flipping through them until she reaches the case of the moment, and remarks in dismay as she realizes it is a “juvenile exclusion case.”

The immigration judge calls the child’s representatives and the trial attorney into the court room for consultation. Sudha waits outside.

Eventually, the trial commences. Sudha visibly shrinks into herself, frightened and confused, as the trial attorney suggests that she has no reason to be in the United States, other than perhaps to join family here, supporting evidence for which the trial attorney has only a Border Patrol agent’s statement. The attorney goes on to argue that there must be “someplace” in India to which Sudha can go and that she should be returned to her home country.

Sudha shares her story in halting English without the assistance of an interpreter. Her parents abused her (she shows a large round scar on her neck to support this claim) and placed her in a home for unwanted children. They then gave her to a male stranger who accompanied her by plane to the United States. Her attorney argues that the man was a child trafficker and she was sold for child labor. As the trial proceeds, Sudha struggles to understand the legal complexities in a language not her own.

Finally, the immigration judge, who is clearly sympathetic to Sudha’s plight but worried about what will happen to her either if she is returned to India or allowed to stay in the United States, suggests that the case be continued until a further date in order to secure an interpreter’s services to assist Sudha. The trial attorney objects, arguing that the child’s attorneys had their chance and that their examination of Sudha should be considered “done.” She then argues for a seven-month continuance, and the immigration judge compromises with a three-month extension. Sudha returns to the INS detention center where she has been held for more than a year. Three months later, she is finally granted asylum.

While the exact numbers are unknown, each year hundreds, if not thousands, of children enter the United States in search of protection from human rights abuses in their home countries. These abuses include child labor, forced conscription, female genital mutilation (FGM), forced marriage, sexual servitude and many others. Representing dozens of nationalities, and ranging in age from newborn babies to 17 years old, some children are accompanied by parents or other adult caregivers while others make the incredibly dangerous trip alone. Some are victims of child trafficking rings, an increasingly high profit international industry.

The United States asylum system traditionally has been a “one size fits all” process. Often children like Sudha struggle to tell their stories. They are intimidated in the courtroom where they face judges wearing robes and unknown adults posing difficult and abstract questions. The special vulnerability of children and recognition of their unique needs have largely gone unheeded. As a result, children have been forced to overcome the same complex procedural, evidentiary, and legal barriers as have their adult counterparts.

Fortunately, this is about to change. The INS has released “Guidelines for Children’s Asylum Claims” (Children’s Guidelines) that for the first time establish standards for the child-sensitive consideration of children’s asylum claims. The Children’s Guidelines were the result of a model collaboration among the INS, the Women’s Commission for Refugee Women and Children and other nongovernmental organizations (NGOs), academic institutions, and individuals with expertise in refugee and children’s rights. They build upon the precedent-setting children’s guidelines issued by Canada in 1996 and the model guidelines issued by the UN High Commissioner for Refugees in 1997, as well as the United States’ own experience with its 1995 Gender Guidelines.

The Children’s Guidelines lay out procedural, evidentiary, and legal standards that take into account the limited capacity of a child to present an asylum claim while at the same time ensuring that the child’s voice is heard throughout the process. They also call for training of INS personnel to help asylum officers develop the skills to address children’s claims.

However, work remains to be done. Training of INS officers must begin immediately, a step the agency has indicated it plans to take in early 1999. The Executive Office for Immigration Review (EOIR) must move forward to adapt the Guidelines to its own adjudication process. But clearly, with the Children’s Guidelines, the

United States has demonstrated leadership in the international arenas of refugee protection and the defense of children's rights.

I. The Women's Commission's Children and Asylum Project

The Women's Commission for Refugee Women and Children (the Women's Commission) acts as a voice for refugee women and children around the world, regardless of their geographic location. In 1995, concerned about the erosion of asylum protection in the United States, the Commission began to address the situation of women seeking asylum in the United States, with a specific focus on the conditions of detention in which women are held by the INS pending the outcome of their asylum proceedings. This work resulted in the issuance of a groundbreaking report, *Liberty Denied: Women Seeking Asylum Imprisoned in the United States*.

In contrast to women, the unique needs of children in detention had received attention from a range of organizations and the government itself and had been the subject of a national class action lawsuit.¹ However, the Women's Commission recognized that questions remained to be addressed, including:

- What measures are in place to ensure that the best interests of the child are addressed throughout the asylum process?
- What are the root causes for children's flight to the United States?
- How are children identified by the INS when they first arrive in the United States?
- How are children's cultural, developmental, educational, gender-based, and health needs being addressed?
- How are children's legal service needs being met?
- Is the asylum adjudication process equipped to handle a claim brought by a child?
- What procedures are in place to ensure that a child is returned safely to his or her home country if denied asylum?
- What procedures are in place to reunify a child with family in the United States or to place him or her in a stable home environment if granted asylum?
- Do other countries offer models from which the United States can draw lessons in seeking to improve its own practices in this area?

After consultation with a number of experts in the

fields of refugee, human, and children's rights, the Women's Commission launched its Children and Asylum Project in March 1997 to address these questions. The project incorporates research in select countries of origin, field investigations in the United States, and a legal analysis of the treatment that children's asylum claims have received in the past.

This report includes findings from field investigations in Chicago, Illinois; Harlingen, Texas; Houston, Texas; El Paso, Texas; Reading, Pennsylvania; Los Angeles, California; and Toronto, Ontario. It is based on interviews with children asylum seekers as well as the service providers assisting them. It is also based on interviews with local INS officials and shelter staff in whose custody children are placed.

Most importantly, this report analyzes the INS's newly released "Guidelines for Children's Asylum Claims." With these Guidelines, the INS has taken a positive step forward by acknowledging that children seeking asylum present unique challenges to the U.S. asylum system that must be addressed if the United States is to live up to its international obligation to protect refugees and its commitment to ensuring that no child is denied his or her childhood.²

II. The Child Refugee

Sadly, children around the world are no more exempt from the trauma of war, civil conflict, and human rights abuses than are adults. In fact, approximately half of the world's refugees are children, for a total of 20 million children worldwide.³ And while children often flee their home countries for the same reasons as adults, it is also true that children are increasingly becoming the direct targets of abuse themselves.

The groundbreaking Graça Machel study issued by the United Nations documented the effects of armed conflict on children. It noted that children are no longer innocent bystanders caught in the crossfire of armed conflict, but are now subject to calculated genocide, forced military recruitment, gender-related violence, torture, and exploitation.⁴ The results are devastating: in 1996, UNICEF reported that in the prior decade, war and upheaval had killed two million children, disabled four to five million, rendered homeless 12 million, and psychologically traumatized 10 million more.⁵

Children are also subject to human rights abuses that are unrelated to armed conflict. These include child traf-

ficking, bonded labor, child prostitution, and child pornography. They may also be subject to certain cultural practices that cause them harm or trauma, such as female genital mutilation (FGM), infanticide, child marriage, and religious sexual servitude. Finally, they may be deprived of certain rights bestowed on them as children that would not necessarily be persecutory if aimed at adults, such as deprivation of education, homelessness, and separation from the family.

Unaccompanied children are particularly vulnerable to abuse, neglect, violence, and exploitation. They have been separated from their families either as a result of displacement or because their parents have sent them away. The UN High Commissioner for Refugees (UNHCR) estimates that two to five percent of refugee children, or approximately 250,000 children, are unaccompanied.⁶

While the vast majority of the world's refugees remain in or close to their countries of origin, some individuals come to the United States to seek asylum. These asylum seekers increasingly reflect a diverse array of nationalities and ethnic groups, coming from Africa, Asia, and Europe, as well as regions closer to U.S. borders, such as countries in Latin America and the Caribbean. Children are also part of this refugee flow. Some children arrive in the United States accompanied by family members, some seek to join family already in the United States, and others are truly unaccompanied and lack any family ties in the United States. Some children are victims of child trafficking rings, an increasingly high-profit international industry.

The exact number of children asylum seekers in the United States is difficult to ascertain for several reasons. First, many children never become known to the U.S. government or immigration service providers because they slip across U.S. borders and enter the shadow society of undocumented immigrants. Second, those children apprehended by the INS are not regularly tracked by the type of status they are seeking. Third, a potentially significant percentage of children in INS custody may have valid claims to asylum they have not raised because they lack the legal counsel necessary to help them explore potential avenues for relief. Fourth, there are some older teenagers who are misclassified by the INS as adults, and their cases are handled accordingly. Fifth, some children may have meritorious asylum claims which never are formally raised because their cases are subsumed under a parent's asylum claim (known as derivative applications). Finally, some children file for asylum after they are released by the INS and the INS

does not track their status.

With these caveats in mind, the little data available seems to indicate that the number of children who may qualify for asylum in the United States numbers in the hundreds, if not thousands, each year. Human Rights Watch has reported that in 1990 the INS apprehended approximately 8,500 undocumented children, 70 percent of whom were unaccompanied.⁷ An unknown number of these children were seeking asylum or could have sought asylum based on their experiences in their home countries. From January 1998 through the end of July 1998, the INS detained approximately 4,295 children, a significant percentage of whom may have or may have had a basis for asylum. (This number may be somewhat misleading because children who have been apprehended more than once may be double counted.) As this report goes to print, the INS is compiling comprehensive data on the children who have been in its custody during 1998, which should be available by the end of the year.⁸

Children seeking asylum in the United States represent many nationalities. In the course of its research, the Women's Commission learned of children from Afghanistan, Honduras, Guatemala, Nicaragua, El Salvador, China, India, Somalia, Rwanda, Sierra Leone, Sri Lanka, Haiti, Nigeria, the former Yugoslavia, and Yemen. The ages of children apprehended by the INS range from newborn infants to 17 years old. The majority of young asylum seekers, however, are teenage boys.

Regardless of their numbers, children are arguably the most at risk of all populations fleeing persecution. This special vulnerability deserves careful consideration in the implementation of U.S. asylum policy.

III. International Standards for Refugee Protection and Children's Rights

In the aftermath of World War II, the international community crafted new standards for the protection of refugees. These principles are embodied in the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention), which impose on countries the obligation to protect any individual found to have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.

Children, of course, are technically eligible for the same protection under international refugee law as are adults. The Refugee Convention, however, fails to address the specific protection of children. More often than not, refugee children have been viewed as appendages of their families; if the adult relative is deemed a refugee, then so, too, is the accompanying child.

Recognition of the rights of the child is a relatively recent phenomenon. The 1989 Convention on the Rights of the Child (CRC) defines a range of rights that countries are to accord to children, including those seeking asylum. Most importantly, the CRC recognizes the core principle of “the best interests of the child,” and mandates that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be the primary consideration.”⁹

The CRC specifically addresses the protection of children seeking asylum in Article 22, which states that “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status ... shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments....”

The CRC has become the most widely ratified human rights treaty in history. The United States is one of only two countries that have failed to endorse it. (The other country is Somalia, which lacks an internationally recognized government.) However, the Convention is arguably now customary international law and therefore binding on all countries, including the United States.

Other international directives, albeit non-binding, are also relevant to the consideration of children’s asylum claims. In February 1997, UNHCR released “Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum” (UNHCR Guidelines).¹⁰

The UNHCR Guidelines outline the steps governments should take to provide protection and assistance to unaccompanied minors in a systematic, comprehensive, and integrated manner. They urge that all unaccompanied children, due to their vulnerability, be identified at the border and provided access to a country’s territory and asylum procedures. Professionally qualified per-

sons trained in refugee and children’s issues should be used to interview and interpret for children. The Guidelines urge the appointment of an adult familiar with the child’s background to assist a child through the asylum process and to protect his or her interests. In the examination of a child’s asylum claim, adjudicators should consider the child’s stage of development and special vulnerability. Finally, the UNHCR Guidelines support the appointment of a multidisciplinary panel to assist in identifying the most appropriate durable solution in a child’s case, i.e., local integration in the host country, resettlement in a third country, or return to the home country.

These international instruments, together with broad human rights standards embodied in the Universal Declaration on Human Rights and specific human rights treaties such as the Convention Against Torture, provide an important context for U.S. obligations both internationally and domestically to ensure that refugee children are not returned to their home countries to face further abuse.

IV. Other Country Models for the Adjudication of Children’s Asylum Claims

The UNHCR Guidelines were preceded by a Canadian initiative. In September 1996, the Immigration and Refugee Board (IRB), the federal agency charged with the adjudication of refugee claims brought by individuals seeking asylum in Canada, issued groundbreaking guidelines to its Board members entitled “Child Refugee Claimants: Procedural and Evidentiary Issues” (Canadian Guidelines).

The Canadian Guidelines represented the first governmental acknowledgment of the unique challenges confronting children in an asylum adjudication process. They established procedural steps and evidentiary standards for adjudicators to follow to ensure that a child’s testimony is fully heard and understood. Most significantly, the Canadian Guidelines called for the appointment of a guardian, or “designated representative,” to each child refugee claimant to ensure that the child’s best interests are met throughout the asylum process. Reflecting the principles of the CRC, the Canadian Guidelines also explicitly recognized that a refugee determination must support the best interests of the child.

The province of Quebec has gone one step further than the federal government. In Quebec, a social services agency, Service d'Aide aux Réfugiés et Immigrants de Montréal Metropolitan (SARIMM), has received federal funding to coordinate legal and social service delivery to child refugee claimants. SARIMM is notified when an unaccompanied child arrives at a port of entry in Quebec. The agency then places the child in a foster home and retains legal counsel and a qualified interpreter to assist the child with his or her asylum claim. If no relative is available to act as the child's designated representative, a child welfare professional employed by SARIMM guides the child through the hearing process, locates witnesses to testify in support of the child's refugee claim, makes contact with family in the home country, and guarantees that the child's claim is addressed with sensitivity to his or her culture and developmental level. SARIMM also conducts any fol-

low-up to the child's case by helping the child to apply for permanent status if asylum is granted or to file an appeal or a request for humanitarian relief if the asylum request is denied.¹¹

The United Kingdom has also taken steps to ensure that a child's best interests are addressed when he or she applies for refugee status. Its asylum system offers a second model for the appointment of a guardian to a child asylum seeker. In 1994, the United Kingdom's Home Office funded the development of the Refugee Council Panel of Advisers for Unaccompanied Refugee Children. The advisers' role in fact surpasses that of the designated representative under the Canadian system. While government funding supports the Panel, it operates independently from the U.K. Immigration and Nationality Department under the auspices of a quasi-nongovernmental organization. The Panel offers "independent advice, support, and where necessary, advocacy

The U.S. Asylum System

It is important to understand the broader context of U.S. asylum law, both historically and in its present state. The United States has long prided itself on being a nation of immigrants, and indeed among the first newcomers to the country were refugees fleeing persecution in their homelands. In reality, however, U.S. history demonstrates an ambivalent attitude toward newcomers with periods of generous immigration and refugee admissions interspersed with years in which harsh restrictions have been enforced to keep people out, regardless of their reasons for coming to the United States.

In 1980, the United States finally incorporated the Refugee Convention into its domestic law. Among other reforms, the Refugee Act of 1980 mandated establishment of an asylum procedure to protect individuals with a well-founded fear of persecution who are physically present in the United States. This provision recognized that the United States at times acts as a country of first asylum. As such, it is obligated under

international law to offer protection to those individuals who meet the refugee definition.

In 1991, the United States fulfilled the requirements of the Refugee Act by establishing a specialized corps of asylum adjudicators. These asylum officers are trained in human rights and country conditions, a response to years of criticism for biased and politically motivated adjudication of asylum claims.¹⁵ The asylum corps, which is a part of the INS, is charged with adjudicating affirmative asylum claims, that is, claims brought to it by individuals who present themselves to the INS and express a fear of returning to their homelands.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) placed a restriction on all asylum applicants by requiring them to submit their applications within one year of entering the United States.¹⁶ Exceptions to the deadline are allowed only for individuals who can demonstrate a material change in circumstances since they

entered the United States or prove that extraordinary circumstances caused the delay in filing.¹⁷

Asylum experts have expressed concern that the one-year filing deadline for affirmative asylum claims could seriously harm individuals who have meritorious asylum cases but have inadvertently missed the one-year deadline.¹⁸ These concerns are particularly pertinent to children seeking asylum. Children are not statutorily exempt from the deadline, despite the fact they may lack the maturity to appreciate the deadline requirement. Expecting a young person to grasp the complexities of U.S. asylum law is unreasonable and the arbitrariness of the filing deadline could result in the return of a child to a situation in which he or she would face serious harm.

Fortunately, the INS regulations implementing the filing deadline recognize the particular vulnerability of unaccompanied minors. They explicitly define the "extraordinary circumstances" exception to the deadline to include "legal disability (e.g., the appli-

cant was an unaccompanied minor ...) during the first year of arrival.”¹⁹

The deadline, by inference, still applies to accompanied minors. Presumably, the INS judged such children would benefit from the savvy of their caregiver and thus could be held accountable to the deadline. It is possible, however, that some adult caregivers may be unaware of the deadline and this ignorance will affect not only themselves but the child in their care. In other cases, the adult caregiver may have an interest in *not* applying, thus going against the child’s best interests. For example, the caregiver may be barred under the Immigration and Nationality Act from applying for asylum.²⁰ Alternatively, the child may qualify for asylum on the basis of domestic violence or some other abuse inflicted on him or her by the caregiver. Clearly, there is a strong likelihood that the caregiver will avoid assisting the child in presenting an asylum claim under these circumstances.

The process for raising an asylum claim is different for individuals apprehended by the INS at U.S. ports of entry. IIRIRA created a system of “expedited removal,” under which an INS inspections officer posted at the port of entry has the authority to screen individuals who lack the appropriate documentation to enter the United States. If an asylum seeker fails to articulate his or her desire to apply for asylum or a fear of return, the person can be immediately returned to his or her homeland. This process, known as secondary inspection, occurs without the benefit of rest, consultation with an attorney or other advocate, or possibly even translation.

Those individuals who make it over this difficult initial hurdle then

face a second screening by an asylum officer. This interview generally takes place in a detention center within two to seven days of apprehension. During the second screening, the asylum seeker must demonstrate to the satisfaction of the asylum officer that he or she has a “credible fear” of persecution. Asylum seekers deemed not to have a credible fear will be ordered removed or can request a review of that determination by an immigration judge. Immigration judges are lodged in the Executive Office for Immigration Review (EOIR), which like the INS, is part of the Department of Justice. Individuals deemed credible either by the asylum officer or after review by the immigration judge are then placed into “removal proceedings,” during which an asylum claim can be raised as a defense to deportation. To gain asylum, the applicant has to meet the internationally accepted and higher evidentiary standard of a “well-founded fear” of persecution.

Expedited removal generated extreme controversy prior to its enactment as part of IIRIRA. Asylum advocates raised serious concerns that it would pose insurmountable barriers to refugees and result in the return of persecuted individuals to life-threatening situations. The INS has denied nongovernmental organizations and others with expertise in asylum issues the access to monitor the secondary inspection process. However, preliminary evidence suggests that these asylum advocates’ fears were accurate.

In a study conducted by Santa Clara University, researchers interviewed individuals who had made it through secondary inspection and the service providers assisting them. They discovered that a disproportionate number of individuals who are being subjected to immediate return are

women, non-English speakers, and persons of low socio-economic background.²¹ Enough “red flags” are raised by this study to, at a minimum, argue for NGO access to the secondary inspection process. Ideally, Congress will reconsider the expedited removal process itself.

The INS compensated for Congress’s failure to exempt most children from the harsh requirements of expedited removal. In a memorandum issued in August 1997, the INS instructed its field officers to place most unaccompanied minors in regular removal proceedings rather than expedited removal. It directs that unaccompanied minors be placed in expedited removal only if the minor commits an aggravated felony in the presence of the INS officer, has been convicted or adjudicated delinquent of an aggravated felony either within or outside the United States, or has previously been ordered removed from the United States.²² However, to date this qualified exemption is formulated only in a non-binding INS memorandum, thus leaving open the possibility of reversal by the INS at any time. Like the filing deadline exemption, it also fails to address the situation of children accompanied by caregivers.

With the limited exceptions of these more recent exemptions, however, U.S. asylum policy has generally treated children asylum seekers in the same way as it has adults. This failure to acknowledge the unique needs of young asylum seekers has placed children in the untenable situation of having to meet legal, evidentiary, and procedural standards crafted with adults in mind. Fortunately, this will soon change, as the INS is poised to implement new guidelines for the adjudication of children’s asylum claims.

[to children] to ensure that they receive fair and equal access to the services to which they are entitled, e.g., legal representation, care, and accommodation.”¹²

Like designated representatives in Canada, advisers under the British system do not act as the child’s attorney but play an active role in ensuring that the child is represented by counsel and in supporting and encouraging the child through the asylum process. The adviser accompanies the child to interviews, and assists him or her with health care, education, housing, and other social welfare needs. Most importantly, the adviser establishes trust with the child.¹³ The work of the Panel has received the strong support of the U.K. immigration authorities, legal counsel, and social services staff by ensuring a continuity in services and the child’s smooth transition to life in the United Kingdom.¹⁴

The efforts of other countries to ensure that children enjoy a full and fair opportunity to have their asylum claims considered serve as important models as the United States moves forward with its own asylum reforms.

V. The Consideration of Children’s Asylum Claims

Background

The refugee definition, crafted in the aftermath of World War II, has steadily evolved to meet the complexity of human rights today. One example of this evolution is the growing recognition that an individual fleeing gender-based persecution deserves protection. In 1993, Canada led the world community by adopting procedural and legal guidelines to steer the IRB in the adjudication of gender-based asylum claims.²³ The United States quickly followed suit by issuing its own “Gender Guidelines” in 1995.²⁴ The Gender Guidelines have had a significant impact on the consideration of asylum claims brought by women who have fled such abuses as rape, forced marriages, domestic violence, and FGM.²⁵

As previously discussed, Canada again demonstrated international leadership by issuing children’s guidelines to the IRB in 1996. These guidelines outline procedural and evidentiary standards for the adjudication of children’s asylum claims. While Canadian advocates are concerned that implementation of the Canadian Guidelines has been slow and imperfect, they offer some lessons

upon which the United States can draw in developing and implementing its own guidelines.

The Women’s Commission monitored two hearings involving three Somali child refugee claimants in Toronto, Ontario in November 1997. All three claimants were girls, ranging in age from 10 to 17 years old. The hearings demonstrated the significant impact that the Canadian Guidelines can have on ensuring that a young asylum seeker is provided a child-sensitive hearing.

In both hearings, the IRB board members, refugee claims officers (the Canadian equivalent of an INS trial attorney), and the children’s attorneys held pre-trial conferences to reach an agreement on how the trial should proceed. In the first hearing, for example, the refugee claims officer and the child’s attorney agreed that the claims officer would conduct a direct examination of the girl rather than her attorney in order to avoid the need for cross examination. This decision is in keeping with the idea that questioning of a child should generally be as limited as possible to avoid trauma and confusion.

Second, the children were accompanied by designated representatives whose role under the Canadian Guidelines is to act in the best interests of the child. In both cases, the designated representatives were family members of the claimants.

Third, the hearings were conducted in a less formal setting than that provided in a U.S. immigration court. The board members, refugee claims officer, attorney, and child were seated in a square around tables. The board members wore regular business attire rather than robes.

Fourth, the hearing in one case had to be continued, but the judge worked with the court scheduler to calendar the case for the earliest possible date, which was approximately one month later. Under the Canadian Guidelines, children’s cases are given scheduling and processing priority unless it is in the best interests of the child to delay the hearing.

It must be noted, however, that Canadian asylum advocates have pointed out weaknesses in the Canadian Guidelines. First and foremost is the failure of the IRB to train newly-appointed Board members under the Guidelines. One attorney who has represented many child claimants noted, “Although there has been interest in the past in developing sensitivity to children’s cases under the Guidelines, a recent emphasis on efficiency and economy at the Board has resulted in the curtailing of such efforts. We’re not seeing the resources put into place to ensure the training of new Board members.”²⁶

Second, Canadian practitioners are concerned about the appointment of a child’s relative as the designated

representative. They point out that a relative is generally not a trained child welfare expert nor able to appreciate the refugee adjudication process sufficiently to adequately assist a child claimant. Moreover, the relative may have interests that are not in keeping with those of the child. In one particularly disturbing case, the testimony of the adult relative was used to impeach the credibility of the child claimant. Furthermore, when a relative is not available, the Board generally appoints an attorney as the designated representative. The attorneys are also not trained child welfare professionals and may be confused about whether their role in the hearing is to act as a child's legal counsel or as the designated representative.²⁷

This issue could be overcome by the development of a Panel of Advisers as has been done in the United Kingdom. Another advantage to the United Kingdom system is that the adviser is not only conversant in child welfare practices but is also often a refugee from the child's community. These qualifications help ensure that the adviser's role remains distinct from that of the attorney.

Developing the U.S. Guidelines

In November 1997, the Women's Commission proposed to the INS leadership that the agency again follow in the steps of Canada by creating its own guidelines for the adjudication of children's asylum claims. The INS promptly endorsed the concept and agreed to work informally with the Women's Commission and other NGOs to develop such guidelines. The INS Office of International Affairs, the department in which the asylum corps is lodged, took the lead in drafting the guidelines. They were assisted by the INS Office of General Counsel.

The resulting "Guidelines for Children's Asylum Claims" are noteworthy both in their scope and content. They not only reflect many of the procedural and evidentiary standards contained in the Canadian Guidelines, but they also surpass the Canadian Guidelines by incorporating a substantive legal analysis of how the rights of the child fit within the framework of U.S. asylum law. In this way they follow the model of the Gender Guidelines, which contain a similar section analyzing gender-based persecution claims.

The need for the Children's Guidelines is compelling, as the cases outlined below demonstrate. The historical lack of direction provided for the adjudication of such claims has resulted too often in ill-informed decision making. Frequently, the voice and needs of the child are

lost in the system, as all parties struggle to squeeze the child's claim into a legal framework designed for adult cases. Service providers have shared with the Women's Commission their difficulties in representing children. They themselves frequently believe that they lack the skills to adequately represent children. Moreover, they believe that the INS, EOIR, and federal courts also struggle to address children's claims within the confines of the adjudication process and existing asylum law. As the Guidelines themselves point out, "Increasing the understanding of and sensitivity to children's issues will improve U.S. asylum adjudications."

Following are some of the key considerations that demonstrate the need for children's guidelines, many of which the INS addresses in its new guidelines.

Child-Sensitive Interviews

It is important to create a child-friendly environment in which a child feels comfortable enough to freely discuss the details of his or her claim. This requires techniques for building rapport with a child applicant. The adjudicator should explain the interview to the child in terms that the child can comprehend, taking into account the child's development and culture. Testimony should be interpreted from a child's perspective, as children may not be able to present testimony with the same degree of precision as adults.

Invisibility is a problem for children, and too often the child is viewed only as a dependent of an adult. It is important to inquire about the child's case when it appears that the parent does not have an approvable claim.

The failure to create an adjudication environment in which the child feels comfortable enough to share his or her story can be devastating to the success of the child's case. One attorney related the story of Mirai (a pseudonym), a 14-year-old Indian girl whom he represented. While Mirai did not express her fears directly, he was convinced that she had been abused by her parents. He requested that the immigration judge grant a continuance, certain that his young client needed more time to face up to the trauma she had experienced.

The immigration judge, however, refused to grant the continuance, stating that the case had been pending for too long already. On the day of the hearing, Mirai cried throughout her testimony, and her words were often incomprehensible. Her attorney believes she was overwhelmed by her fear of returning to India, intimidated by the courtroom setting, and confused about the

proceedings. The immigration judge lost patience with Mirai's crying. The INS trial attorney subjected her to a particularly unpleasant cross-examination. In the end, the judge denied her request for asylum and Mirai was deported back to India. Her attorney truly fears what might have awaited her upon her return.

The attorney remarked, "The cases involving Indian children which I handled were the most compelling of my legal career. Neither the judge nor the trial attorney made any effort to recognize that the cases of the children were unusual and that they needed special care. A young girl who is sent half way around the world—there must be something there. It is different from a Mexican male who comes over the border to find work. How the INS handled [the situation] was going to have a profound impact on her life."²⁸

In a suppression hearing in Texas on behalf of a teenage boy from Yemen, witnessed by the Women's Commission, the atmosphere was tense and uncomfortable. The immigration judge was visibly impatient with the boy's testimony. She interrupted him and told him to shorten his answers, chiding: "This is important, young man. Don't go into long drawn out answers. We will be here forever. You tend to go on and on." She was also impatient with the child's representative. Several times, the judge and the representative engaged in heated exchanges about the merits of the motion to suppress, conversations which were not translated for the boy. The INS trial attorney was visibly disdainful of the proceedings, several times sighing loudly. The boy, who was seated off to the side of the courtroom by himself, was noticeably confused.

The motion to suppress was denied by the judge. The boy, who was residing in New York City with a family member, had to return to Texas for his asylum hearing before the same judge. He traveled for three days by bus, only to be told that his hearing had been postponed. He traveled back to Texas a second time. His asylum claim was ultimately denied.

The Children's Guidelines recommend concrete steps that can be taken to create a child-friendly hearing process, which potentially will address many of the problems encountered by the children in the cases cited above. The Guidelines, however, are designed primarily for asylum officer interviews, which by nature are much less formal than removal proceedings before an immigration judge. Immigration judges should adopt these recommendations from the Guidelines to improve the handling of children in removal proceedings. In addition, changes should be made to courtroom settings in

removal proceedings to ensure a child-sensitive environment.

A typical immigration court is very formal, presumably to inspire respect for the gravity of the proceedings. Such settings, however, are highly inappropriate for children, often inspiring fear rather than respect. The immigration judge wears a robe and sits behind an elevated bench. The child's attorney and the INS trial attorney stand behind a podium in front of a microphone. The asylum seeker sits in front of a podium. In one particularly disturbing case reported by the Center for International Studies of the University of Chicago, adult detainees who were handcuffed, shackled and wearing prison uniforms were seated in the courtroom during a child's hearing, presumably awaiting for their own proceedings to commence.

The Use of Guardians to Assist Children

In other areas of U.S. law, guardians are regularly used to assist children in legal proceedings. In contrast, generally there has been no one in the U.S. asylum system whose primary role is to guard the best interests of the child. Precedent existed only for the ad hoc use of guardians. In the past two years, some immigration judges have agreed to the appointment of guardians to assist child asylum applicants. Two cases involving Indian children demonstrate the critical difference guardians can make.

The Women's Commission monitored the asylum hearing of an 11-year-old Indian girl. She was visibly terrified during the hearing, at which the trial attorney argued that she had no basis for asylum and could be safely returned to India. No interpreter had been provided to the girl, who was a Gujarati speaker. The child testified in halting English that she was afraid to return to India, where she had been the victim of repeated beatings by her parents. The young girl revealed a scar on her neck, the result of her mother pressing a hot metal iron against her skin. Her parents had eventually sent her to a home for unwanted children, where she performed manual labor for two years and was the victim of further beatings. One day, her father reappeared and took her to the airport in the company of a strange man. Her father had apparently sold her to the stranger, most likely for child labor. Upon her arrival in the United States, the INS apprehended her at the airport. She had spent the last year in a juvenile detention center.

The immigration judge, who prior to the hearing had

agreed to the appointment of a guardian to assist the child, was clearly sympathetic. The judge allowed the guardian, who was a trained child welfare specialist, to testify. The guardian voiced her professional opinion that the child had been severely and chronically abused and that she had a deep and well-founded fear of return to India. The guardian reported that the girl was distraught and cathartic when she finally shared her story. The case was continued for three months, due to the lack of an interpreter. Finally, in a strong opinion that relied heavily on the guardian's testimony, the judge granted the girl asylum on the basis of her membership in the social group of "unwanted and abused children sold for labor."²⁹ The young girl is now living with an Indian foster family.

The guardian played an equally important role in the case of a young Indian boy, who insisted for months that he was afraid to return to his home country. His attorney struggled to elicit from the boy the details of his case. As best the attorney could ascertain, the boy had been sold by his family to a third party as part of a bonded labor scheme. The attorney believed from the child's story that if the child were returned to India, he would face the wrath of his parents and possibly that of the child traffickers.

The attorney feared that he was not able to elicit the full facts of the boy's story because the boy perceived him as an authority figure he could not fully trust. The immigration judge agreed to appoint a guardian to the boy. The guardian was able to spend significant time with the boy, who was housed in an INS detention center. Eventually, the boy broke down and admitted that he really wanted to go home. The guardian helped him to contact his parents in India, who were overjoyed to hear from him and asked that the child be returned home. The family had simply hoped the boy would receive a better education in the United States than he would in India.

Establishing trust with a child to the point where he or she is willing to share information with an adult is a time-consuming and difficult task. However, it is obvious from the disparate outcomes of these two cases that it is an absolutely essential step if the asylum adjudication is to reflect the best interests of the child. A guardian can greatly facilitate this process of trust by spending time with the child and developing a relationship with him or her in which the child feels comfortable sharing his or her story and expressing his or her needs and wishes.

The INS Children's Guidelines are groundbreaking in

their call for the appointment of guardians to children asylum seekers. The Guidelines describe this person as a "trusted adult" and state, "it is generally in the child's best interests for Asylum Officers to allow a trusted adult to attend an asylum interview with a child asylum applicant." They go on to explain that the trusted adult is a support person who can bridge the gap between the child's culture and the asylum interview, assist the child psychologically, and serve as a source of comfort and trust for the child. The asylum officer should allow the trusted adult to help the child explain his or her claim. However, at the same time, the asylum officer must ensure that the child has the opportunity to express him or herself.

The Guidelines follow the Canadian model, rather than that provided by the United Kingdom, by suggesting that a child's parent or other relative is the logical and appropriate person to act as the adult presence. If the child is unaccompanied, another trusted adult may serve instead.

Based on the Canadian and British experiences, the most effective trusted adults would be child welfare professionals well-versed in the child's culture. Arguably, a trusted adult could be a child welfare professional.

The Guidelines do not elaborate beyond this about the exact role of the trusted adult or his or her desirable qualifications. Also unanswered is the critical question of confidentiality, i.e., whether the trusted adult can be called upon to share information about the child with the asylum officer.

The Guidelines themselves state that further guidance on the role of the trusted adult will be issued as needed. Clearly, the use of such a person will be an evolving concept in which, hopefully, NGOs and service providers can work with the INS to ensure the effectiveness of the system.

Evaluating Evidence in Children's Cases

Many case examples demonstrate the need for flexibility and sensitivity to a child's development, past experience, culture, and gender when eliciting testimony from him or her and seeking out alternative sources of evidence. A 15-year-old Guatemalan boy, Jorge (a pseudonym), requested asylum alleging that if he were returned to Guatemala, the military would carry out their threats to kill him and his brother because his brother had witnessed four soldiers torturing and killing their cousin. Jorge himself had been recruited into the guerrilla

forces at the age of 13 after his father was killed by the Guatemalan authorities. The guerrilla forces subjected him to a harsh indoctrination that included training in the use of fire arms, drinking a dog's blood, carrying corpses, starvation, and infliction of pain.

Jorge's attorney arranged for him to be diagnosed by a clinical psychologist. The psychologist concluded that Jorge was suffering from Post-Traumatic Stress Disorder, had suicidal tendencies, and episodes of psychotic behavior. Both the psychologist and the attorney strongly suspected that in fact Jorge himself rather than "his brother" had witnessed his cousin's brutal murder. The immigration judge denied Jorge asylum on the basis of insufficient evidence to support the claim. This case is on appeal to a federal circuit court. Clearly, this child was unable to articulate his fear of return in the same way that an adult might have and was therefore denied a fair trial. The appointment of a guardian, moreover, might have made a pivotal difference to Jorge's ability to articulate his claim.

In some disturbing cases, a young person's testimony regarding his or her fear of persecution is disbelieved simply because of the child's age. The Board of Immigration Appeals (BIA) denied asylum to a 16-year-old Ethiopian girl, finding that the immigration judge had been correct in his conclusion that the girl's credibility could not be assessed because she had been only three years old at the time that her father and brother were killed and her mother disappeared. The BIA rejected the girl's claim, stating that it would do so even if it assumed the facts were true. In reversing the BIA's decision, a federal judge noted, "Even at age three, one is likely to remember the traumatic loss of one's family."³⁰

Adjudicators have also found children lacking in credibility because they do not believe that children would be the targets of persecution. In one case, a federal court upheld the denial of asylum to a 15-year-old Haitian girl, because it found it "...almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children." The child had testified that her house had been stoned and ransacked and her dog had been stoned by the Ton Ton Macoutes after she was publicly overheard voicing her support for President Aristide. The dissenting judge, however, rightly pointed out that "the question, in any event, is not what an administrative law judge sitting in the safety of the United States can choose to believe; the question is what a young person, who is forced to hide under the bed in the middle of the night, in terror of being killed, would think about her safety if she were

returned home."³¹

In another case, a 13-year-old Chinese girl was told by an immigration judge that she could not apply for asylum due to her young age, in clear disregard for U.S. international and domestic obligations to refugee protection. Instead, the judge told the child and her aunt that the child's only recourse was to return to China to apply for a student visa.

The Children's Guidelines recognize that it is necessary for asylum officers to take into account a child's ability to express his or her recollections and fears when evaluating evidence in a child's case. This is reinforced by the UNHCR Handbook, which interprets the Refugee Convention and has been characterized by the U.S. Supreme Court as providing significant guidance in U.S. asylum law. The Handbook advises that a liberal benefit of the doubt be given to a child's testimony when evaluating the child's fear of persecution.

The Guidelines also suggest that INS officials may need to seek out other sources of evidence. This evidence could include: documentation on country conditions; evidence from family members; evidence from members of the child's community; evidence from medical personnel, social workers and other professionals who have worked with the child; and documentary evidence pertaining to persons similarly situated to the child or his or her group.

Prioritizing the Scheduling of Children's Cases

While slow processing of asylum claims is undesirable for any asylum seeker, it is particularly problematic for children. This is especially true for children in INS detention, as prolonged institutionalization can seriously harm the well-being of a child.

In one case monitored by the Women's Commission, the immigration judge decided to continue the case because there was no interpreter available. The trial attorney, who was noticeably unprepared for the hearing, asked for a seven-month continuance, during which time the child would have had to remain in a detention center (she had already been in detention for a year). Fortunately, the immigration judge denied this request, instead granting a three-month continuance.

While efforts to process children's claims expeditiously are important, these efforts must be balanced with consideration of the child's well-being and ability to cope with the hearing process. Furthermore, a prompt hearing should not be scheduled at the expense

of full exploration of the child's claim.

A recent case involving a Guatemalan boy demonstrates the caution necessary when scheduling children's cases. Diego (a pseudonym) had been detained in an INS shelter for several months. Initially, he insisted that he wanted to return to Guatemala. After three months, however, he began to experience horrible nightmares and would wake up crying. Diego finally revealed that he had been kidnapped and forced to join a guerrilla force, which beat him and threatened his life if he tried to escape. This abuse went on for five years before Diego was able to flee the country. Clearly, this is a case in which time was needed for the child to face the trauma he had endured and express his fear of returning to Guatemala.

The Guidelines direct asylum offices to give high priority to requests for interviews in children's cases.

Recognizing the Rights of the Child

Just as asylum law has evolved to embrace gender-based persecution claims, with the Children's Guidelines the United States is signalling its recognition that children also enjoy rights that derive from their age and unique vulnerability. Two types of cases can effectively illustrate this point: cases involving child soldiers and cases involving street children.

Emilio Hernandez-Xicara describes his life as a child soldier in Guatemala as a "nightmare." At age 14, Emilio was abducted into the military and forced to fight. Emilio reported that his superior often beat him and denied him food. He finally deserted the army after a year and a half, but he was forced to live in hiding and avoid contact with his family. In 1996, he escaped to the United States, where he was held in an INS detention center in Texas for more than a year. Emilio was finally granted asylum by an immigration judge. The Lutheran Immigration and Refugee Service arranged for Emilio to live in a foster home and he is now attending a Michigan high school.³²

José (a pseudonym) is approximately 15 years old. At the age of seven, José fled his home to the streets of Honduras to escape the severe abuse inflicted on him by his stepfather. His stepfather would regularly beat him, suspend him from the ceiling by his feet, and force him to engage in hard manual labor. During his asylum hearing, José described how he never had enough to eat, lacked shelter, and lived in constant fear of street gangs, known for abusing and murdering street children. In his asylum application, José stated: "If I returned to

Honduras, I have no doubt that the situation would be the same. I am still a child and thus have no means of protecting myself [from the gangs and violence on the streets].... I was approached and harassed by the gangs. They forced me to give them the meager money I possessed, and I watched friends of mine being drowned and hanged for the sole reason of refusing to join a gang." The immigration judge granted José asylum, finding that he was persecuted by his stepfather, that he could not obtain protection from the Honduran government, and that he was a member of the social group of Honduran street children.³³

In an investigation of the case of another Honduran street child pursuing asylum, National Public Radio traveled to Honduras to look into the situation of street children. It found that street children face a life fraught with dangers, including violence, drug use, and child prostitution. When it asked the child asylum seeker whether he had dreams at night, the boy responded "Just nightmares,... just regular nightmares."³⁴

The Guidelines recognize the CRC as embodying standards for the rights of all children, including those children who are refugees. They point to specific human rights abuses against children as examples of persecution that may well merit asylum protection. These abuses include bonded labor, rape and sexual assault, prostitution, child soldier issues, FGM, and deprivation of food and medical treatment.

The Guidelines place the adjudication of children's asylum claims and the protection of their unique rights in the context of existing U.S. asylum law. By doing so, they open the door to a rational yet humane consideration of asylum claims brought by a particularly vulnerable population.

VI. Outstanding Issues that Merit Consideration

While the Guidelines considerably advance the adjudication of children's asylum claims, other issues that affect the safety and well-being of children asylum seekers remain to be addressed. These issues include the need for legal counsel to assist children with their asylum cases, further improvements in the treatment of children in INS custody, and adoption of better methods to ascertain the age of an individual who claims to be under age 18.

Need for Legal Counsel

Generally, fewer than 11 percent of detainees have legal representation.³⁵ This statistic appears to be even lower for children, whose need for assistance of counsel is arguably even greater than that of adult asylum seekers. The reasons for this lack of legal services are many. First, the U.S. government does not provide funding for the representation of asylum seekers, and funding from other sources for such representation is woefully short of the demand.

Second, children are sometimes detained in facilities in remote areas where legal resources are inadequate. In June 1998, the Women's Commission visited the Liberty County Juvenile Correctional Center, located in a small town one hour outside Houston, Texas. The INS had more than 80 children detained in this maximum security facility. It appeared that only one child had legal counsel, and that attorney was located six hours from the facility.

Third, although the INS is required to provide children with a list of legal counsel, children may lack the capacity to grasp the concept of legal assistance.

Finally, legal service programs may lack the time, expertise, and staffing to adequately serve all the children who need assistance. One attorney has estimated that it takes her 200 hours to properly prepare an adult's asylum application and the applicant him or herself for the asylum hearing; however, she requires double that time to prepare a child's claim.³⁶

Legal representation is essential for any asylum seeker to achieve the successful resolution of an asylum claim. It is particularly critical to children, who often lack the maturity and capacity to grasp the basics, let alone the nuances, of U.S. asylum law and the adjudication process. Without adequate legal representation, the protection offered by the Guidelines may be lost.

Detention of Children

As mentioned previously, significant attention has been paid over the years to the situation of children in INS detention. Advocacy by refugee and children's rights organizations and resolution of a national class action law suit, *Flores v. Reno*, have brought about improvements in INS detention practices. For instance, in some regions group shelters have been opened under the auspices of the INS Office of International Affairs.

INS districts, however, continue to use juvenile correctional facilities to detain children in Texas, Pennsylvania, and Los Angeles. Under the *Flores* settlement agreement, the INS is allowed to detain children in such facilities in three situations: 1) if the child is at risk of absconding; 2) if the child has a criminal record or presents a risk to the community; or 3) the United States has experienced an emergency influx of children. INS districts appear to use these exceptions randomly to justify detaining children in maximum security facilities.

One such maximum security facility is the Liberty County Juvenile Correctional Facility. The prison is surrounded by concertina wire fences, and the children are locked in cell pods for 23 or more hours a day. They wear prison uniforms and are frequently pat searched. Educational classes are provided for three hours each day; however, the classes are in English and most of the detainees' first language is Spanish.

The INS district justified its use of the Liberty County facility by claiming that the district had experienced an emergency influx of children. More recently, the agency has reported that the number of children held in Liberty County has dropped significantly, because the agency has moved the children to newly opened bed spaces in other parts of the country.

The INS plans to continue to expand its detention program for minors. If this expansion proceeds, it must be done responsibly. New facilities should follow the shelter model and the use of correctional facilities should be avoided. Adequate foster care placements should also be expanded.

Prolonged institutionalization, particularly in an inappropriate setting, can seriously jeopardize a child's well-being. This, in turn, can affect a child's ability to successfully pursue his or her asylum claim.

The Age Identification Process

The INS relies primarily on dental radiograph exams to determine the age of an individual whose age is in dispute. These individuals are typically in their teen years. Dental experts question the use of such exams. Particularly when

developmental, cultural, and dietary differences are considered, such exams are considered unreliable for such definitive age determinations.³⁷ Despite its questionable accuracy, there is no review process in place to challenge an exam which finds that a teenager is above age 18.

The age determination process carries serious repercussions for the asylum seeker. First, a finding that a person is above age 18 means that he or she can be placed in expedited removal. Second, it means the individual will be placed in an adult detention center, where he or she will be co-mingled with unrelated adults, some of whom may have criminal records.

Service providers in Harlingen, Texas have raised concerns that as many as two to three dozen minors a month are held in the Port Isabel Service Processing Center, a large adult detention center in a remote area of southern Texas, in which some detainees have criminal records. The INS Harlingen District defended its detention of young people in the facility by alleging that young adults often pose as juveniles in the hope that they can escape from the less secure children's centers. One officer asserted, "We have to be very careful, because some of these aliens we detain are criminals—not all of them—and we have to consider what's in the best interest of the community." The officer insisted that the dental exams are "comparable to a DNA test."³⁸ Clearly, dental experts disagree with this characterization. The INS must make the best interests of the child its primary consideration rather than some ambiguous, unsubstantiated community interest.

Along with access to legal counsel and a child's detention setting, the age determination process too can have devastating repercussions for a child's asylum claim.

VII. Conclusions and Recommendations

The INS should be congratulated for reaffirming the commitment of the United States to the protection of refugee children through the "Guidelines for Children's Asylum Claims." The Guidelines recognize the unique vulnerability of children and take important steps toward ensuring that children's needs are met. They establish for the first time legal, evidentiary, and procedural standards for the adjudication of children's asylum claims.

The Women's Commission also appreciates the spirit of collaboration the INS demonstrated in seeking out and considering the input of the Commission and other NGOs and experts as it developed the Children's Guidelines. By doing so, the INS was able to draw upon the expertise of agencies

and individuals versed in children's and refugee rights. This informal consultation process can serve as a model as the INS moves forward with implementation of the Children's Guidelines and as it undertakes additional asylum reforms in the future.

The Women's Commission offers the following recommendations for reinforcing the Children's Guidelines:

- **Strengthening the "trusted adult's" role:** The Children's Guidelines call for the appointment of a "trusted adult" to each child during the asylum adjudication process to ensure that the child's best interests are met. The INS should reinforce the Guidelines by developing a corps of professionals with child welfare expertise and familiarity with children asylum seekers' cultures. This corps should be lodged outside the INS with an appropriate NGO and/or in another branch of the Department of Justice.
- **Adequate Training:** The Children's Guidelines call for the training of asylum officers. The INS has indicated that it plans to train its officers under the Guidelines in early 1999. This show of commitment is commendable. Training should be regularly provided, and each newly hired asylum officer should be provided such training before he or she is allowed to consider a child's asylum case. In addition, NGOs and other refugee and children's rights experts should be included in the training, a step that has been endorsed by the INS.
- **Expanded Application:** The Children's Guidelines are crafted primarily with asylum officers in mind. Many other departments within the INS, however, also have contact with children, including Border Patrol, Detention and Deportation officers, and overseas refugee interviewers. The INS has indicated that other departments within the agency are interested in applying the guidelines to their own functions. The Women's Commission supports the widest possible distribution of the Guidelines within the INS and the provision of training for other relevant departments.
- **Adoption by the Executive Office for Immigration Review:** EOIR, the agency in which immigration judges sit, should adapt the Children's Guidelines to its own adjudication process, as many children's cases are decided by immigration judges rather than asylum officers. EOIR has used the Gender Guidelines in its own training efforts and has indicated an interest in doing the same with the Children's Guidelines. This step should be taken as soon as possible.

The Women's Commission offers the following recommendations for other INS programs that affect children:

- **Expedited Removal and the One-Year Filing Deadline:** The INS should formalize its exemption of children from expedited removal by issuing a regulation. If statutory authority to do so is needed, the INS should seek a legislative exemption for children. The INS should expand the exemption of children from both expedited removal and the one-year filing deadline to encompass all children, including those accompanied by an adult caregiver.
- **Legal Representation:** Legal representation is horribly lacking for children. It is unrealistic to expect that a child can successfully seek asylum without a lawyer. Maximum efforts should be made to ensure that every child in immigration proceedings is assisted by counsel. This includes locating children's detention centers near readily available sources of legal representation. The INS should also join NGOs in the call for government funding for legal representation for children. Finally, private foundations should increase their funding for asylum representation, with a special emphasis on children's representation.
- **Detention of Children:** The INS should immediately discontinue the use of juvenile correctional facilities to detain children who lack criminal convictions. The INS should continue to move forward with the development of appropriate shelters and foster care programs that offer a full range of culturally appropriate services to children asylum seekers. These efforts should be made in consultation with NGOs that have expertise in refugee and children's rights. Such consultations have taken place in the past and have recently resumed.
- **Age Identification:** The INS must discontinue its reliance on dental radiograph exams to identify children. These exams are known to be unreliable. The benefit of the doubt must be given to an individual who claims to be under age 18. Other forms of evidence of a young person's age should be considered. A review process for negative age determinations should be implemented and carried out by non-INS district staff.

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Endnotes

1. See “Slipping Through the Cracks,” Human Rights Watch (April 1997); *Flores v. Reno*, 113 S. Ct. 1429 (1993); *Flores v. Reno*, Stipulated Settlement Agreement, Case No. CV-85-4544-RJK(Px) (U.S. District Court, Central District, California).
2. The Women’s Commission wishes to acknowledge its collaboration with Jacqueline Bhabha, Director of the Center for International Studies at the University of Chicago, in analyzing the need for U.S. Children’s Guidelines. Ms. Bhabha co-authored with Wendy Young, Washington Liaison and Staff Attorney for the Women’s Commission, an article addressing this need, which informs much of the present report. “Through a Child’s Eyes: Protecting the Most Vulnerable of Asylum Seekers,” 75 Interpreter Releases, 757 (June 1, 1998).
3. Statement of Dennis McNamara, Director, Division of International Protection, United Nations High Commissioner for Refugees, “A Human Rights Approach to the Protection of Refugee Children,” London School of Economics (November 14, 1998).
4. “The Impact of Armed Conflict on Children,” United Nations (November 1996).
5. “The State of the World’s Children,” UNICEF (1996).
6. “The State of the World’s Refugees,” UNHCR (1995).
7. Human Rights Watch, “Slipping Through the Cracks,” page 2 (April 1997).
8. Statistics Provided by INS (December 1998). The INS has developed a separate computer data program, known as JAMS, in order to track data on children in its custody for more than 72 hours.
9. CRC, article 3.
10. In large part, the UNHCR Guidelines build upon the earlier 1994 “Guidelines on the Protection and Care of Refugee Children,” which focus primarily on the needs of children in refugee camp settings.
11. Interview with Geraldine Sadoway, Esq., Parkdale Legal Services, Toronto, Ontario.
12. Connelly, “A Report to The Refugee Council on the Panel of Advisers for Unaccompanied Refugee Children,” National Institute for Social Work, paragraph 1.1 (April 1995).
13. *Id.*, paragraphs 3.10-3.15.
14. *Id.*, paragraphs 5.3-5.5.
15. See, e.g., “Asylum: Approval Rates for Selected Applicants,” General Accounting Office (June 1987); *American Baptist Churches v. Thornburgh*, Civ. No. C-85-3255 RFP (U.S. District Court, Northern District, California, December 19, 1990) (outlining settlement agreement in which U.S. government agreed to readjudicate previously denied Guatemalan and Salvadoran asylum applications, conceding that denials had been politically motivated).
16. IIRIRA, section 604.
17. *Id.*
18. Lyon, “Fighting a Deadline on Fear: Asylum Practice Update as the One-Year Filing Deadline Approaches,” 75 Interpreter Releases 285 (March 2, 1998).
19. 8 Code of Federal Regulations, section 208.4(a)(5)(ii). See also Germain, “AILA’s Asylum Primer,” American Immigration Lawyers Association, page 121 (1998).
20. See “AILA’s Asylum Primer,” pages 69-85 (discussing statutory bars to asylum).
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23. “Women Refugee Claimants: Fearing Gender-Related Persecution, Guidelines Issued by the Chair Pursuant to Section 65(3) of the Immigration Act” (Ottawa, March 9, 1993).
24. “Considerations for Asylum Officers Adjudicating Asylum Claims from Women,” INS Memorandum from the Office of International Affairs (May 26, 1995); see also Kelly, “Guidelines for Women’s Asylum Claims,” 71 Interpreter Releases 813 (June 27, 1994).
25. See, e.g., *In re. Kasinga*, Int. Dec. 3278 (Board of Immigration Appeals, June 13, 1996) (granting asylum to Togolese woman who fled FGM and a forced marriage); see also “Liberty Denied,” Women’s Commission for Refugee Women and Children (April 1997) (highlighting Ms. Kassindja’s traumatic 16 months in INS detention). Note: when Ms. Kassindja’s arrived in the U.S., her name was mistakenly transcribed as Kasinga. This spelling was used in her asylum application. Once she was granted asylum, the correct spelling of Ms. Kassindja’s became known.
26. Interview with Geraldine Sadoway, Esq.
27. *Id.*
28. Interview with Roy Petty, Esq., Executive Director, American Immigration Law Foundation (December 1998).
29. Matter of [Name Withheld] (Immigration Judge, Chicago, March 13, 1998).
30. *Kahssai v. INS*, 16 F.3d 323 (Ninth Circuit 1994).

31. *Civil v. INS*, 1998 West Law 236309 (First Circuit 1998).
32. "Former 'Child Soldier' Tells of Nightmarish Life," LIRS Bulletin (Spring 1998); Interview with Susan Schmidt, Director of Children's Services, Lutheran Immigration and Refugee Service.
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37. Letter to Women's Commission for Refugee Women and Children from Herbert H. Frommer, DDS, New York University College of Dentistry (August 7, 1997) (stating that it is impossible to reach an exact judgment whether an individual is above or below the age of 18 based on dental radiographs); Letter to Women's Commission for Refugee Women and Children from Neil Serman, BDS, DDS, MS (Rad), Professor and Head of Division of Oral Radiology, Columbia University (July 21, 1997) (stating that there is great variation in age in molar eruption among young people).
38. Pinkerton, "Advocates Claim Minors being Held in Adult Detention Camp," Houston Chronicle (September 20, 1998); See also Letter from American Civil Liberties Union, American Immigration Law Foundation, Amnesty International (USA), Catholic Legal Immigration Network, Inc., Human Rights Watch, Lutheran Immigration and Refugee Service, and Women's Commission for Refugee Women and Children to Attorney General Janet Reno (May 15, 1998).