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SEEKING ASYLUM ALONE: USING THE BEST INTERESTS OF THE CHILD PRINCIPLE TO PROTECT UNACCOMPANIED MINORS

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Abstract: Every year about five thousand children under the age of eighteen enter the United States without legal guardians. These children must meet the same substantive standards as adults in order to gain asylum. As children, they face unique difficulties because they may not understand the persecutor's intent and may not be able to explain their experiences as persecution on account of one of the five enumerated asylum grounds. Furthermore, they must navigate a confusing legal system designed primarily for adults with limited English skills and without the assistance of government-appointed attorneys or guardian ad litem. This Note argues that the only way to ensure that unaccompanied children are not deported into dangerous situations is to consider the best interests of the child in their asylum determination. This reform can be based on the criteria for the special immigrant juvenile status, which locates the best interests determination in juvenile courts while retaining some decision-making powers in the Department of Homeland Security.

INTRODUCTION

"When I go to my aunt's house, or wherever I'm going to live, they'll find me," sixteen-year-old Edgar Chocoy told his immigration judge.¹ He fled to the United States from Guatemala two years prior because gang members beat him, robbed him, and threatened to kill him and his relatives if he left the gang.² Edgar Chocoy's grandparents raised him in Guatemala City, where at the age of ten he was re-

* Symposium Editor, *BOSTON COLLEGE THIRD WORLD LAW JOURNAL* (2005–2006). The author wishes to thank her husband for his support and encouragement.

¹ Susan Ferriss, *Gangs Thriving in Central America; Youth Caught in a Poverty-Induced Criminal Culture*, *AUSTIN AMERICAN-STATESMAN*, June 6, 2004, at A17.

² Bruce Finley, *Bound for Better Life, Deported to Despair*, *DENV. POST*, June 13, 2004, at A1 [hereinafter Finley, *Better Life*]. He wanted to leave the gang because he grew tired of the crimes the gangs committed. Ferriss, *supra* note 1, at A16.

cruited by a gang.³ A psychiatric evaluation found that Chocoy had been so traumatized by gangsters that he tried to commit suicide while in detention.⁴ Despite Chocoy's prediction that gang members would murder him if he returned, the judge denied his asylum case and sent him back to Guatemala City on March 10, 2004.⁵ Seventeen days after he was deported, he ventured outside for the first time since his return to Guatemala, and a gang member shot him in the back of the neck.⁶ The police never investigated.⁷

Chocoy is not alone: his story underscores a defect in U.S. asylum law that fails to recognize the unique needs of children fleeing perse-

³ Ferriss, *supra* note 1, at A16. Chocoy's father abandoned him, and his mother came to the United States as an undocumented worker when he was an infant. *Id.* After he arrived in the U.S., he soon discovered that the same gangs that infested his barrio in Guatemala also plagued his mother's Pico Union neighborhood. *Id.* Because his tattoos marked him as an enemy of a local gang, he sought the rival gang for protection, which led him to trouble with the law. *Id.* Ironically, the gangs in Guatemala, El Salvador, and Honduras were originally formed in Los Angeles. Alistair Bell, *U.S. Gang Violence Explodes in Central America*, REUTERS NEWS, April 6, 2004. Gang members have flooded Central America since Congress passed a law eight years ago that required noncitizens who were sentenced to more than a year in prison to be deported after serving their sentences. *Id.*

⁴ Bruce Finley, *Deportee's Slaying Spurs Reform Push: Advocates Say Teen's Fear of Gangs Unheeded*, DENV. POST, April 8, 2004 at A1. Chocoy did not appeal his deportation order because he told his attorney that he might commit suicide if he were locked up much longer. *Id.* Many immigrant children ask to be deported because they suffer feelings of extreme isolation and depression. Jennifer Vergara, *Immigration Detention Unjust, Says Conference Speaker*, TIDINGS ONLINE, Mar. 30, 2001, <http://www.the-tidings.com/2001/0330/immigration.htm>. Malik Jarno, a twelve-year-old orphan with mild retardation, was detained for three years in adult detention centers. Christopher Nugent, *Protecting Unaccompanied Immigrant and Refugee Children in the United States*, 32 HUM. RTS. MAG. 9, 9 (2005) available at <http://www.abanet.org/irr/hr/winter05/immigrant.html>. After authorities arrested Jarno for using a false passport, they forgot about his case and failed to take him before an immigration judge for eight months. *Id.* Due to political unrest, his parents were killed and his village destroyed in Guinea. Press Release, Lutheran Immigration and Refugee Service, *Malik Jarno Deserves American Sanctuary* (Apr. 22, 2004), <http://www.lirs.org/News/NewsReleases/20040422MalikJarno.htm>. If sent back to Africa, he likely would have been abused and mistreated; there are few services for the mentally challenged in Guinea. *Id.* Jarno's asylum case was denied, but he finally won on appeal after the longest asylum trial in U.S. history. Nugent, *supra*, at 9.

⁵ Finley, *Better Life*, *supra* note 2, at A1. Isau Diego's case is similar to Chocoy's; he was targeted by youth gangs when he lived on the streets after fleeing an abusive parent. *Testimony on the Unaccompanied Alien Child Protection Act: Hearing before the S. Comm. on the Judiciary, Subcomm. on Immigration*, 107th Cong. 34 (2002) (statement of Wendy Young, Director of Government Relations and U.S. Programs, Women's Comm'n Refugee Women & Children), available at http://judiciary.senate.gov/print_testimony.cfm?id=172&wit_id [hereinafter *Hearing*]. His asylum claim was also denied. *Id.* After he filed an appeal, INS unlawfully deported him back to Honduras while his appeal was pending. *Id.* His attorney has been unable to locate the boy in Honduras. *Id.*

⁶ Finley, *Better Life*, *supra* note 2, at A1.

⁷ *Id.*

cution in their home countries.⁸ Children under eighteen make up about half of the world's refugee population.⁹ Of these children refugees, approximately two to five percent are unaccompanied by a parent or guardian.¹⁰ Each year about five thousand children under the age of eighteen enter the United States without legal guardians, and are forced to navigate a confusing legal system designed primarily for adults.¹¹ Unaccompanied children are arguably the most vulnerable population fleeing persecution because, not only are they children and refugees, but they also have no primary caretaker.¹²

The United States continues to assess children's claims for asylum using the legal standard created for adult asylum seekers.¹³ Asylum seekers must meet the legal standard contained in the definition of a "refugee."¹⁴ The U.S. Refugee Act of 1980 incorporated the definition of "refugee" from the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol, neither of which specifically addressed the needs of children.¹⁵ The 1980 Act is codified in the Immigration and Nationality Act (INA), which defines a "refugee" as a person who is "unable or unwilling . . . [to return to their] country because of persecution or a well-founded fear of persecution on ac-

⁸ Jacqueline Bhabha & Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 NO. 21 INTERPRETER RELEASES 757, 757. Children face administrative and adversarial removal proceeding that pit children who have limited English language skills against trained trial attorneys. Nugent, *supra* note 4, at 9. The children must meet the same standard of proof as adults and have no right to a government-appointed counsel or guardian ad litem. *Id.*

⁹ WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES 3 (1998), available at <http://www.womenscomm'n.org/reports/index.html#guidelines> [hereinafter WOMEN'S COMM'N]. According to a world refugee survey conducted by the U.S. Commission for Refugees in 2002, there were over 14.9 million refugees worldwide in 2001. THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 797 (5th ed. 2003).

¹⁰ See AMNESTY INTERNATIONAL U.S.A., "WHY AM I HERE?" CHILDREN IN IMMIGRATION DETENTION 7 (2003), available at http://www.amnestyusa.org/refugee/usa_children_summary.html; Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. OF TRANSNAT'L L. 861, 862 (2004).

¹¹ 77 CONG. REC. S7019 (2003) (statement of Sen. Feinstein). According to the Separated Children in Europe Project, a joint initiative of the International Save the Children Alliance and the United Nations High Commissioner for Refugees, more than 25,000 separated children are in Europe at any given time. Jacqueline Bhabha, *Seeking Asylum Alone: Treatment of Refugee and Trafficked Children in Need of Refugee Protection*, 42 INT'L MIGRATION 141, 142 (2001) [hereinafter Bhabha, *Seeking Asylum Alone*].

¹² Seugling, *supra* note 10, at 888.

¹³ See, e.g., 77 CONG. REC. S7019 (2003) (statement of Sen. Feinstein).

¹⁴ INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2000).

¹⁵ WOMEN'S COMM'N, *supra* note 9, at 4-5.

count of race, religion, nationality, membership in a particular social group, or political opinion."¹⁶ Since age is not included as a protected basis for persecution, a child must establish that his or her persecution is on account of one of the five enumerated grounds.¹⁷

Children are especially vulnerable to a broad array of human rights violations that fall outside the ambit of the five categories for protection.¹⁸ Children as young as six years old are forced to work as bonded laborers or prostitutes.¹⁹ Too often, police kill or torture street children.²⁰ Military groups recruit or kidnap children as young as seven or eight to serve as soldiers.²¹ For unaccompanied children,

¹⁶ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000).

¹⁷ Bhabha & Young, *supra* note 8, at 761. The Second Circuit noted that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular (social) group.” *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). A child’s persecution can only fall under one of the established grounds when they face similar circumstances as adults in regards to race, nationality, religion, and political opinion. *See* Bhabha & Young, *supra* note 8, at 764–65. For example, if they refuse to participate in a state-supported religious practice, they may be persecuted on account of their religion. *Id.* at 764. Children, whether or not they are capable of holding a political opinion, may have a political opinion imputed to them especially when they are members of a given family. *Id.* at 765. In seeking asylum, children face an additional hurdle because the adult adjudicator may not believe that the child is mature enough to form a religious or political opinion. *See* Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (noting that threats facing children are trivialized).

¹⁸ Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (stating that child abuse, child selling, child trafficking, and other forms of child-specific persecution are not considered protected under the five enumerated grounds); *see* Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL’Y REV. 159, 162 (1990) (noting that most children’s experiences do not fit neatly within the specialized grounds for asylum).

¹⁹ Human Rights Watch, *Children’s Rights*, <http://www.hrw.org/children> (last visited Jan. 19, 2006).

²⁰ *Id.* In the case of *In re Martinez*, the Board of Immigration Appeals (BIA) noted that the Honduran police often torture and kill street children. A# 76–312–250 (Bd. of Immigration Appeals 1999), *cited in* Annette Lopez, Note, *Creating Hope for Child Victims of Domestic Violence in Political Asylum Law*, 35 U. MIAMI INTER-AM. L. REV. 603, 610 (2004). The BIA found that an abused and abandoned child who was in danger of becoming a street child if returned to Honduras had a well-founded fear of persecution. *Id.* Similarly, an immigration judge granted asylum to a Guatemalan child based on membership in a particular social group of Guatemalan “street children” who have a well-founded fear of suffering persecution such as physical and sexual abuse by government authorities. *Matter of A-M-L* (Phoenix, Ariz. 2001), *cited in* *IJ Grants Asylum to Guatemalan Street Child*, 79 INTERPRETER RELEASES 440, 440 (2002).

²¹ Human Rights Watch, *supra* note 19. In the case of a fifteen-year-old Salvadoran boy who was conscripted to fight with the guerrillas, the immigration judge denied asylum even though he found the boy credible and to have a subjective fear of persecution. *See Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996). The BIA and Fourth Circuit affirmed the immigration judge’s denial, holding that the boy’s conscription, flight from the guerrillas and the army, and fear of retribution from both groups did not establish a political

their persecution does not end when the primary conflict or war is over.²² Rather, children without the protection of a primary caregiver remain particularly vulnerable to forced domestic labor, abuse, and other kinds of persecution.²³

These various forms of child-specific persecution can fall under three broad groups where the government of the child's home country: (1) directly participates in the abuse of the child;²⁴ (2) acquiesces in cultural or social practices that can rise to the level of persecution;²⁵ or (3) fails adequately to protect children from adult caretakers who inflict harm.²⁶ Some advocates argue that in all three categories, the child is persecuted because of his or her membership in a particular social group.²⁷ This argument only succeeds if the child is a member of a group that shares a "common immutable characteristic," and he or she was persecuted on account of that membership.²⁸ Some

opinion. *Id.* They noted that the same objective standard—whether a reasonable person in similar circumstances would fear persecution on account of his political beliefs—should apply to the boy and did not tailor the standard to his age. *Id.* In an unpublished decision, the Fourth Circuit also denied asylum to Garcia-Garcia, an El Salvadoran boy who was abducted by guerillas and forced at gun-point to beat another person with a baseball bat. *Garcia-Garcia v. INS*, 173 F.3d 850, 1999 WL 150822, at *1 (4th Cir. 1999). The court also applied the same standard for juveniles as for adults and held that Garcia-Garcia did not suffer past persecution within the meaning of the INA. *Id.* at *2.

²² Seugling, *supra* note 10, at 888.

²³ *Id.* For example, Cambodian resistance groups recruited unaccompanied children in Thai border refugee camps. Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 173 (1989). Unaccompanied Cuban children were subjected to sexual and psychological abuse in a refugee compound within the United States in 1980. *Id.*

²⁴ Bhabha & Young, *supra* note 8, at 766. The government participates in the abuse of a child when they conscript child soldiers or treat the second child as a "non-person" in violation of a one child per family policy. *Id.*

²⁵ *Id.* Examples of this second category include child marriage, sati, female genital mutilation, and involuntary child abandonment. *Id.*

²⁶ *Id.* Cases of child abuse, incest, sale, bonded labor, abandonment, trafficking or smuggling for prostitution or forced labor fall in this third category. *Id.* In *Aguirre-Cervantes v. INS*, the Ninth Circuit held that a Mexican applicant who was beaten by her father was eligible for asylum. 242 F.3d 1169, 1172 (9th Cir. 2001). The court found that she was persecuted on account of her membership in her immediate family, which was a "particular social group." *Id.* at 1175–78. This case opened the possibility that child victims of domestic violence in their homelands may be eligible for asylum, where the government is unable to control the persecutor. Lopez, *supra* note 20, at 604.

²⁷ Bhabha & Young, *supra* note 8, at 766.

²⁸ See *Matter of Acosta*, 19 I&N Dec. 211, 233 (Bd. of Immigration Appeals 1985) (stating that the "common, immutable characteristic" must be "an innate one such as sex . . . or in some circumstances it might be a shared past experience . . . [I]t must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."). In *Matter of Acosta*, the

argue that unaccompanied minors who experience child-specific persecution could constitute a particular social group; thus, allowing these children to gain asylum.²⁹ The law, however, does not provide for asylum on the social group grounds if the type of harm serves to define the particular social group.³⁰ Also, in order to meet the qualifications for asylum, the particular social group defined must be a sufficiently narrow segment of the population.³¹

This Note contends that the only way to ensure that unaccompanied children are not deported into harmful situations is to consider the best interests of the child in their asylum applications.³² Part I discusses why unaccompanied minors have been largely neglected in U.S. immigration law and asylum law. Part II examines the principle of the best interests of the child and why it should be applied to unaccompanied minors seeking asylum in this country. Part III discusses the current treatment of unaccompanied minors in the United States. Part IV recommends substantive reforms, modeled after the Special Immigrant Juvenile Status (SIJS) law, that would implement the best interests principle for unaccompanied minors seeking asylum.³³ The SIJS is a federal law that helps abused, abandoned, and neglected children gain lawful immigration status if they can establish that it is not in their best inter-

court also noted that it would determine what particular kind of group characteristic will qualify on a case-by-case basis. *Id.* The group's common characteristic must be sufficiently distinct from the general population. Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 23 (1998), available at http://uscis.gov/graphics/lawsregs/handbook/10a_ChldrnGdlns.pdf [hereinafter INS GUIDELINES].

²⁹ Seugling, *supra* note 10, at 891.

³⁰ INS GUIDELINES, *supra* note 28, at 23.

³¹ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (a particular social group does not "encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance"). The Ninth Circuit affirmed the BIA's finding that urban, working class males of military age did not constitute a particular social group because it is overly broad. *Id.* at 1577.

³² See Danuta Villarreal, Comment, *To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum Seekers*, 26 Hous. J. INT'L L. 743, 777 (2004) (stating that the current substantive standards leave many unaccompanied children without protection and that the government should address this problem using the best interests principle). To determine the best interests of the child in domestic family law cases, courts consider the parents' interest for family integrity, the state's interest to protect the minor, and the child's interest for safety and for a stable family environment. In *Re Juvenile Appeal*, 455 A.2d 1313, 1319 (Conn. 1983) (describing the three competing interests and noting that while the parent and the state each have only one interest, the child has two distinct and often contradictory interests).

³³ See discussion *infra* Part IV (explaining the eligibility requirements and protections of the SIJS law).

est to be returned to their country of origin.³⁴ With a program mirroring the SIJS law, unaccompanied minors may finally attain the proper legal assistance they have long needed and deserved.

I. UNACCOMPANIED MINORS: THE NEGLECTED STEP-CHILD OF IMMIGRATION AND ASYLUM LAW

In an immigration law framework that traditionally affords children no independent rights from their parents, unaccompanied minors are greatly disadvantaged in seeking asylum.³⁵ Since children do not have recognized rights of their own in immigration law, by default, unaccompanied minors are treated as adults and must meet the same substantive legal standards as adults.³⁶ Because no significant political force has traditionally spoken on their behalf, some argue, unaccompanied children have been an unrepresented, cloutless body in the political process.³⁷ A traditional focus upon adults minimizes children's issues so that substantive legal reforms for these children have not occurred.³⁸ In sum, unaccompanied minors remain a largely neglected group in immigration and asylum law.³⁹

A. No "Child"-hood for Minors Without a Parent

In U.S. immigration law, a "child" is defined in relation to a parent; thus the law does not recognize a child without a parent.⁴⁰ To be

³⁴ See INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J) (2000).

³⁵ See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L. J. 979, 991, 1003 (2002) (discussing how immigration law reinforces conceptions of children that inhibit their recognition as legal persons and how unaccompanied children must struggle to overcome that bias).

³⁶ See Kristine K. Nogosek, Note, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 2 (2000) (describing other areas of American jurisprudence where children are not required to meet the same legal standards as adults).

³⁷ Jacqueline Bhabha, *Demography and Rights: Women, Children and Access to Asylum*, 16 INT'L J. OF REFUGEE L. 227, 241 (2004) [hereinafter Bhabha, *Demography & Rights*]. Recently, organizations and networks have started to advocate for immigrant children, including the British Refugee Council's Children's Section, the Separated Children in Europe project and organizations in the United States and Canada. *Id.*

³⁸ See Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (stating that some argue that there is a normative assumption that refugees are adults, and asylum officials do not adequately consider children's circumstances).

³⁹ See Thronson, *supra* note 35, at 991, 1003.

⁴⁰ See INA § 101(b)(1); 8 U.S.C. § 1101(b)(1) (2000). The INA restricts the definition of "child" to "an unmarried person under twenty-one years of age" who has a particular kind of relationship with a parent. *Id.* For purposes of international law, the Convention on Children's Rights stipulates that a child is anyone under 18 years old unless under the

a “child,” one must establish a recognized type of parent-child relationship such as birth in wedlock, creation of a stepchild relationship, bona fide relationship with a natural father, or adoption.⁴¹ In family-sponsored immigration, a child can only immigrate on the basis of a parent-child relationship as a beneficiary or derivative of the parent.⁴² As a beneficiary, a child must have a parent who is a legal permanent resident or citizen to sponsor her application.⁴³ She would have no right to force the filing of the petition on her behalf.⁴⁴ As a derivative, she can enter the United States only if her parent’s petition to come to the country is granted.⁴⁵ Conceptions of children as beneficiaries or derivatives place them in a passive role, objectify them as family possessions, and mitigate their independent legal status.⁴⁶

Unaccompanied minors, on the other hand, are disadvantaged because they have no parent from which to gain legal status.⁴⁷ Persons under 18, who arrive unaccompanied in the United States, are not technically children since a “child” can only exist in relation to a parent according to the Immigration Nationality Act.⁴⁸ Instead, the government inconsistently substitutes the phrase unaccompanied “minors” or “juveniles” for the term “child” when referring to separated children.⁴⁹ Unaccompanied minors not only face a setback in terms

law applicable to the child, majority is attained earlier. Convention on the Rights of the Child, Nov. 20, 1989, art. 1, 1577 U.N.T.S. 3, 46 [hereinafter CRC]. The Flores Agreement, which resulted from a class action case that challenged the detention and release of unaccompanied minors in INS custody, also defines a child as under 18. Bhabha & Young, *supra* note 8, at 759; see *Flores v. Reno*, 507 U.S. 292, 294 (1993); *Hearing*, *supra* note 5, at 38 (statement of Wendy Young). Professor Bhabha notes that children between 18 and 21 deserve special consideration under U.S. asylum law, particularly in cases where their asylum claim is based on persecution that occurred before they were 18 years old. Bhabha & Young, *supra* note 8, at 759.

⁴¹ INA § 101(b)(1); 8 U.S.C. § 1101(b)(1).

⁴² Thronson, *supra* note 35, at 993–94.

⁴³ See INA §§ 201(b)(2)(A)(i), 203(a); 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2000).

⁴⁴ Thronson, *supra* note 35, at 994.

⁴⁵ INA § 203(d); 8 U.S.C. § 1153(d) (2000); Thronson, *supra* note 35, at 993. Not only are derivatives available for family-sponsored immigrants, but derivative status for spouses and children are also recognized in the diversity visa lottery, employment-based petitions, and asylees and refugees applications. See *id.*

⁴⁶ Thronson, *supra* note 35, at 991–92.

⁴⁷ *Id.*

⁴⁸ *Id.* at 997; see INA § 101(b)(1); 8 U.S.C. § 1101(b)(1) (2000) (defining the term “child”).

⁴⁹ See *Flores*, 570 U.S. at 294 (using the term “juveniles”); Administration for Children and Families, The Unaccompanied Refugee Minors Program, <http://www2.acf.dhhs.gov/programs/orr/programs/urm.htm> (last visited Jan. 19, 2006) (using the term “minors”). But see Unaccompanied Alien Child Act of 2005, S. 119, 109th Cong. (2005) (using the term “child”). The inconsistent employment of these terms sharply contrasts with the

of their marginalized place within the immigration law framework, but they also experience unique hurdles to gaining asylum because of adult misperceptions.⁵⁰

1. The Unique Vulnerabilities of Being a Minor

The assumption that refugees are normally adults greatly disadvantages children seeking asylum.⁵¹ By not distinguishing unaccompanied minors from adults, the law gives no consideration to children's unique difficulties in satisfying the same legal standards.⁵² These minors, who usually have limited English skills, are not provided with government-appointed counsel and often cannot explain their experiences as persecution on account of one of the five enumerated asylum grounds.⁵³ This "on account of" nexus is often more difficult for unaccompanied minors to satisfy because children may not understand the persecutor's intent, and furthermore, they may lack a complete understanding of the situation itself.⁵⁴ Additionally, they are not viewed as mature

thoroughness with which "child" is defined and used in other circumstances. See Thronson, *supra* note 35, at 997. For the purposes of this article, I will use the term unaccompanied minors, separated children, and unaccompanied children interchangeably.

⁵⁰ See Thronson, *supra* note 35, at 991, 1003; Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (noting that while age is neutral on its face, children are discriminated against because their circumstances are often trivialized).

⁵¹ Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143.

⁵² Thronson, *supra* note 35, at 1002. A smuggling ring brought an eighteen-month-old baby into the United States and abandoned her at the Miami airport in May 2000. Wendy A. Young, *Refugee Children at Risk*, 28 HUM. RTS. MAG. 10, 10 (2001) available at <http://www.abanet.org/irr/hr/winter01/young.html>. She stayed in an institutional shelter operated under contract with INS, and appeared at her initial hearing before an immigration judge without the assistance of either a lawyer or a guardian ad litem. *Id.* The immigration judge asked an INS attorney to represent the child, creating a conflict of interest. *Id.* In the end, a pro bono legal services program took her case. *Id.*

⁵³ See Nugent, *supra* note 4, at 9. When asked why they fled, children will often answer in general terms, saying because of the situation or because of the war. Olivas, *supra* note 18, at 162. Without further questioning or counseling, their statements will not meet the requirements for a well-founded fear of persecution. *Id.* Even probing may not help if a child has limited knowledge of conditions in their native country. Villarreal, *supra* note 32, at 764. Additionally, children applicants may be less willing or able to talk about why they left their home country because doing so would cause them to relive painful experiences. INS GUIDELINES, *supra* note 28, at 5.

⁵⁴ INS GUIDELINES, *supra* note 28, at 21. The "on account of" nexus describes the close link required between the allegedly persecuting act of the government and the precise basis or motive for the oppression, which must be on account of race, religion, nationality, membership in a particular social group, or political opinion to serve as a valid foundation for asylum. ALENIKOFF, *supra* note 9, at 885. The BIA noted, "An asylum seeker is not obligated to show conclusively why persecution has occurred or may occur." Matter of V-T-S-, 21 I&N Dec. 792, 796 (Bd. of Immigration Appeals 1997).

enough to have their own political or religious opinions, for which they would be persecuted.⁵⁵ Even children who are political activists in their own right or members of targeted families find that their persecution is not taken seriously.⁵⁶ Where the “on account of” nexus is established, the applicant must still demonstrate that the government was unable or unwilling to protect her from the alleged persecutor.⁵⁷ This requirement assumes that the child had the ability to seek protection from government officials.⁵⁸

To establish that a fear is well-founded, an asylum applicant must show that his or her fear is both subjectively genuine and objectively reasonable.⁵⁹ These two elements are different for children than for adults; what may amount to persecution when applied to children, might only be considered discrimination or harassment when directed at adults.⁶⁰ Therefore, the adult adjudicator must: (1) take into account the subjective impact of disturbing events on a child (which is likely to be far greater); and (2) determine what is objectively reasonable for a “reasonable” child of the applicant’s age, experience, maturity, and cultural background.⁶¹

A child, for instance, is more likely to be frightened by unfamiliar situations and believe improbable threats.⁶² Witnessing the serious harm or death of a close relative may rise to the level of persecution for a child insofar as it causes deep disturbance in her.⁶³ This discrepancy in a child’s experience, versus that of an adult, is due to the child’s height-

⁵⁵ See Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (noting that threats facing children are trivialized). On the other hand, some unaccompanied minors are viewed with suspicion and hostility, as delinquent street children and gang members, which also hurts their chances of gaining asylum. Bhabha, *Demography & Rights*, *supra* note 37, at 240–41.

⁵⁶ Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143.

⁵⁷ See *Matter of Villalta*, 20 I&N Dec. 142, 147 (Bd. of Immigration Appeals 1990) (finding that the El Salvador government was unable to control the paramilitary “Death Squads”).

⁵⁸ Villarreal, *supra* note 32, at 766. The INS Guidelines state that children who do not seek protection do not undermine their cases, but instead the adjudicator must examine what, if any, means they had of seeking help and give special attention to government efforts to address the persecution in question. INS GUIDELINES, *supra* note 28, at 26.

⁵⁹ See INS GUIDELINES, *supra* note 28, at 19.

⁶⁰ Bhabha & Young, *supra* note 8, at 762, 767. Issues of culture, gender, trauma, the absence of a caregiver, malnutrition and physical and mental disabilities are only some factors that may affect a child’s development, which can significantly impact the applicant’s testimony. *Id.* at 771.

⁶¹ *Id.* at 767.

⁶² *Id.* at 762.

⁶³ *Id.*

ened sensitivity and dependence.⁶⁴ Furthermore, traumatic events may affect unaccompanied minors more profoundly than other children because they cannot turn to those they usually depend on for support and, thus, likely experience intensified and often unmitigated emotional and psychological distress.⁶⁵

2. The Dearth of Children's Advocacy Groups

Child advocacy groups are beginning to place political pressure on Congress for greater protections for unaccompanied minors.⁶⁶ Professor Jacqueline Bhabha suggests that, until recently, unaccompanied minors had no political force to address children's rights in a comprehensive way.⁶⁷ Traditionally, children's rights advocates have been divided along domestic and international lines.⁶⁸ On the domestic front, children's rights activists focus on issues of abandonment, abuse, neglect, and juvenile delinquency.⁶⁹ On the international front, advocates focus on issues such as child war casualties, smuggling, abusive adoption practices, and sex trafficking, but do not address these issues when they arise in child asylum applications in the United States.⁷⁰ In Europe and America, networks and organizations are beginning to bridge this divide between the field of child welfare and immigration, but more

⁶⁴ *Id.* at 762–63. Bhabha notes that children are more likely to be emotionally distressed by hostile situations due to their age, lack of maturity, and vulnerability. *Id.* at 762. Furthermore, forced separation of parents may constitute persecution because of the child's particular need for protection and assistance. *Id.* at 763.

⁶⁵ Nogosek, *supra* note 36, at 11. Nogosek cites a 1991 survey by Neil Boothby of 500 displaced Mozambique children who had witnessed murder or abuse, had themselves experienced abuse, or were abducted to be a child laborer or soldier. *Id.* If the trauma is extreme, such as witnessing the death of a parent, then, Boothby notes, that a child may experience permanent psychological damage. *Id.* He observed that children who experience a loss of hope for the future may experience a chronic reaction that is similar to post-traumatic stress disorder. *Id.*

⁶⁶ Bhabha, *Demography & Rights*, *supra* note 37, at 241. The INS Guidelines and legislative actions are largely a result of the efforts of networks in the United States. *Id.* Bhabha also attributes the small but growing number of affirmative decisions in children's asylum cases to the work of these coalitions. *Id.*

⁶⁷ *Id.* Martha Minow attributes the failure of children's rights initiatives in part to children not having the right to vote and not having a lobbying group to speak on their behalf. Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 288–89 (1995).

⁶⁸ Bhabha, *Demography & Rights*, *supra* note 37, at 241. Moreover, child welfare law and immigration law experts occupy separate legal spheres. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

needs to be done to campaign for the best interests of the unaccompanied minors seeking asylum.⁷¹

II. THE BEST INTERESTS PRINCIPLE

The best interests of the child principle is the overarching doctrine in both U.S. family law practice and international human rights norms, as the law has evolved to reflect the status of the child as a person.⁷² Historically, children were treated essentially as the property of their parents; they lacked any articulated rights and relied on adults to vindicate their interests.⁷³ During the first half of the twentieth century, the state began to pass laws that ensured the protection and welfare of the child, restricting parents' unilateral control over their children.⁷⁴ By the midpoint of the twentieth century, most states in this country had adopted the best interests standard for custody disputes.⁷⁵ Finally, in the latter part of the twentieth century, the emerging view conceptualized children as legal persons with independent

⁷¹ See *id.* Some advocacy groups encountered by the author during her research include Save the Children, Lutheran Immigration and Refugee Services, the United States Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children. See, e.g., Save the Children Home Page, <http://www.savethechildren.org> (last visited Oct. 16, 2005); Lutheran Immigration and Refugee Services Home Page, <http://www.lirs.org> (last visited Oct. 16, 2005); United States Conference of Catholic Bishops Home Page, <http://www.usccb.org> (last visited Oct. 16, 2005); Women's Commission for Refugee Women and Children Home Page, <http://www.womenscommission.org> (last visited Oct. 16, 2005).

⁷² See Barbara Bennett Woodhouse, *The Status of Children: A Story of Emerging Rights*, in CROSS CURRENTS: FAMILY LAW & POLICY IN THE U.S. & ENGLAND 435, 436, 439 (Sanford N. Katz et al. eds., 2000) (discussing how the child is seen as the person whose rights and liberties are primary).

⁷³ Thronson, *supra* note 35, at 981–82; see *Parham v. J.R.*, 442 U.S. 584, 620 (1972) (holding that a child need not be given notice or an evidentiary hearing before his parents decide to commit him to an institution based on the assumption that parents act in their child's best interest); *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (exempting Amish children from compulsory school attendance by deferring to their parents' freedom of religion and right to control the upbringing of their children as weighed against the state's interest in universal education).

⁷⁴ Woodhouse, *supra* note 72, at 424–25. For example, state laws required that all children receive primary education, vaccinations, and restricted child labor. *Id.* By the end of World War II, cases firmly established that the state has a compelling interest to ensure the child's welfare. *Id.* at 425. Increasingly, parents are not viewed as property owners but as fiduciaries, who have a duty to protect and guide their children as they move toward adulthood. See Thronson, *supra* note 35, at 984.

⁷⁵ Woodhouse, *supra* note 72, at 425. These changes reflected a growing understanding of child development, including the emotional and psychological needs of the child. *Id.*

rights and interests; they are agents rather than objects of the law.⁷⁶ Now parental powers are no longer seen as rights in and of themselves, but as a means to advance children's welfare, which is consistent with the human rights and children's rights movements occurring worldwide.⁷⁷ The United Nations Convention on the Rights of the Child (CRC or the Convention) best encapsulates the view of children's rights as international human rights.⁷⁸ With the best interests of the child as its primary objective, the CRC has gained acceptance around the globe.⁷⁹

A. *The Application of the Best Interests Principle in America*

In the United States, family law courts consider the best interests of the child in divorce or adoption custody proceedings and in parental termination hearings where the child has been abused or neglected.⁸⁰ To determine the best interests of the child, courts unequally balance the following factors: (1) the parent's interest for family integrity; (2) the state's interest to protect the minor; and (3) the child's interest in safety and a stable family environment.⁸¹ By considering the circumstances of each case, the court determines which interests should predominate.⁸² There is a presumption that absent a

⁷⁶ *Id.* Now, under the "mature minor doctrine," credence is given to the child's expressed wishes when he or she is found "capable of appreciating the nature and importance of the decision." Leslie A. Fithian, *Forcible Repatriation of Minors: The Competing Rights of Parent and Child*, 37 STAN. L. REV. 187, 202 (1984); see also *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (finding that a judge can bypass parental consent for a minor's abortion if the minor is deemed mature and well-informed enough to make her own decision). Statutes frequently specify when mature minors' views may be heard in custody proceedings. See DOUGLAS E. ABRAMS ET. AL., CHILDREN & THE LAW: DOCTRINE, POLICY, & PRACTICE 87 (2d ed. 2003). Statutes also usually allow older children to consent to medical care for sexually transmitted diseases, pregnancy, drug and alcohol abuse and some other medical conditions without parental approval. *Id.*

⁷⁷ Woodhouse, *supra* note 72, at 439.

⁷⁸ See CRC, *supra* note at 40, at art. 3, 1577 U.N.T.S. at 46; Thronson, *supra* note 35, at 988.

⁷⁹ See discussion *infra* Part II.B.1.

⁸⁰ See Jenina Mella, *Termination of Parental Rights Based on Abuse or Neglect*, in 9 CAUSES OF ACTION 483, § 11 (2d ed. 2005) (regarding the best interests of the child as the legal center of all child custody and placement decisions).

⁸¹ *In re Juvenile Appeal*, 455 A.2d 1313, 1319 (Conn. 1983) (describing the three competing interests and noting that while the parent and the state each have only one interest, the child has two distinct and often contradictory interests).

⁸² Elizabeth P. Miller, Note, *DeBoer v. Schmidt and Twigg v. Mays: Does the "Best Interests of the Child" Standard Protect the Best Interests of the Child?*, 20 J. OF CONTEMP. L. 497, 508-09 (1994). While all courts recognize the importance of the best interests principle, the competing interests are not weighed equally; most subordinate the child and state's interests to

finding of abuse or neglect, parents act in the best interests of their children.⁸³ Only when parents abuse their authority can the state intervene to protect the child's welfare under the doctrine of *parens patriae*.⁸⁴ Some state family law statutes consider the best interests of the child only after a showing of parental unfitness; others consider the best interests of the child concurrently with parental rights.⁸⁵

Based on the judge's broad observation of the people and circumstances in the child's life, he weighs the opposing interests in an active, highly discretionary process.⁸⁶ Critics argue that the best inter-

the parent's fundamental right to the control, care, and custody of their children. *Id.* at 504. The Supreme Court has traditionally given greatest weight to biological parents whose rights have been deemed fundamental. *See* *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (finding that a state law requiring students to attend public schools violated the liberty of parents to direct the upbringing of their children); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that a statute that prohibited the teaching of any language other than English violated the right of parents to make decisions for their children). *But see* *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (recognizing that the state can interfere with a parent's right to make decisions for his or her child if those decisions violate child labor laws). Because parental rights are considered fundamental, state impingement of this right is subject to strict scrutiny, and must serve a compelling state interest. *See* *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (explaining that termination of parental rights is a unique kind of deprivation; thus the state must show a powerful countervailing interest, that of protection).

⁸³ *Parham*, 442 U.S. at 620 (finding that parents can commit their child to an institution based on the assumption that they act in their child's best interest without giving notice to their child); *see* *Yoder*, 406 U.S. at 235–36 (deferring to the parents' freedom of religion and right to control the upbringing of their children in exempting Amish children from a compulsory school attendance).

⁸⁴ Fithian, *supra* note 76, at 200–01. *Parens patriae* gives the state authority to protect or promote a particular child's welfare. ABRAMS, *supra* note 76, at 18. This differs from the state's police power, which is its inherent power to promote the public health, safety, and welfare generally. *Id.*

⁸⁵ Miller, *supra* note 82, at 508. In *Santosky v. Kramer*, the Supreme Court held that a state could only permanently terminate parental rights upon showing "clear and convincing evidence" of parental neglect or unfitness. 445 U.S. 745, 747–48 (1982).

⁸⁶ *See* *In Interest of Brandon S.S.*, 507 N.W.2d 94, 107 (Wisc. 1993) (stating that the determination depends on the court's "first-hand observation and experience with the persons involved"). In evaluating the child's circumstances, states vary in the factors they consider. Miller, *supra* note 82, at 509. Usually, states consider the child's past abuse or neglect, the child's future possibilities of gaining nurture and support from his or her parents, and the child's desires. Mella, *supra* note 80, at 503. Some states explicitly list multiple factors, while others states direct courts to consider the best interests of the child without further direction. Miller, *supra* note 82, at 509; *see, e.g., In re S.A.W., Jr.*, 131 S.W.3d 704, 708 (Tex. App. 2004) (noting that the following factors should be considered in a best interest determination to terminate parental rights: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger of the child now and in the future; (4) the parental abilities of those seeking custody; (5) the programs available to assist those individuals or by the agency seeking custody; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed

ests of the child standard is arbitrary, vague, and overreaching.⁸⁷ A Wisconsin Supreme Court opinion noted that it is no wonder that the standard often “means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents, and still something different to disinterested observers.”⁸⁸ The court’s tendency “is to apply intuition in deciding that a child would be ‘better’ with one set of parents than with another and then express this intuitive feeling in terms of the legal standard of being in the ‘best interests of the child.’”⁸⁹ Some argue that the standard is not suitable at all in custodial placements because courts lack the capacity to discern which option is in a child’s best interest.⁹⁰ These criticisms, however, largely refer to divorce or adoption context, rather than to parental termination proceedings where the child has been abused or neglected.⁹¹

There is little dispute concerning the state’s authority to remove a child from a dangerous setting where the parent severely abused the child.⁹² Unaccompanied minors who establish that they face the risk of serious injury or death if returned to their home country are simi-

placement; (8) the acts or omissions of the parent which may indicate the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions of the parent).

⁸⁷ Miller, *supra* note 82, at 509; see Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science in a Flawed System*, 6 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1, 1 (2005), available at http://www.psychologicalscience.org/pdf/pspi/pspi6_1_1.pdf (stating that the best interests of the child is a vague rule that puts judges in the position of performing an impossible task).

⁸⁸ State *ex rel.* Lewis v. Lutheran Social Servs., 207 N.W.2d 826, 831 (Wis. 1973).

⁸⁹ *Id.*

⁹⁰ Woodhouse, *supra* note 72, at 433–34 (listing various critiques of the best interests principle). Despite these criticisms, some form of the best interests of the child standard lies at the center of all placement and custody proceedings. Mella, *supra* note 80, at 502.

⁹¹ See Woodhouse, *supra* note 72, at 434. Other criticisms of the best interests principle also apply only in the divorce or adoption context. See *id.* These criticisms include: feminists asserting that the standard favors fathers by overvaluing men’s more peripheral role in child-rearing; others countering that the vague standard continues to discriminate against fathers in favor of women; some arguing that the therapeutic approach uncritically favors joint involvement which limits the custodial parent’s autonomy; and others expressing that the child’s interest should not be prioritized over the interests of the other family members. *Id.*

⁹² See, e.g., *In re C. Children*, 583 N.Y.S.2d 499, 500 (N.Y. App. Div. 1992) (finding that a child whom the mother punished by striking her face with belt buckle was an “abused child,” which thereby terminates the parent’s rights); *In re S.T.*, 928 P.2d 393 (Utah Ct. App. 1996) (terminating parental rights for appellants, who over seven years made no substantial effort to change their unhealthy and unsanitary living conditions to provide their children with basic necessities and stability); *People in Interest of T.G.*, 578 N.W.2d 921, 924 (S.D. 1998) (holding that a mother’s parental rights should be terminated even though she was not the abuser, because despite knowing that the stepfather sexually abused her daughters, she ignored it and failed to protect her girls).

lar to U.S. citizen children who face the risk of harm if returned to abusive parents.⁹³ Although the source of the harm may differ, unaccompanied minors, like abused and neglected children, also suffer a lack of safety and protection as demonstrated by their experiences as child soldiers, laborers, and prostitutes, among other things.⁹⁴

The main issue in parental termination hearings is determining when the mistreatment rises to the level of abuse or neglect that warrants permanent removal, making the child eligible for adoption.⁹⁵ Similarly, the main issue in the case of unaccompanied minors should be a determination by the Department of Homeland Security (DHS) regarding whether the child fears or suffered harm in his or her home country.⁹⁶ In making this finding, DHS should examine whether the government of the child's home country was unwilling or unable to protect the child, relying on objective evidence of government laws and enforcement.⁹⁷ The child should not be required to demonstrate that she suffered harm "on account of" one of the five grounds because of the difficulties of fitting child-specific persecution within the ambit of those categories.⁹⁸ If DHS is satisfied that the child establishes the requisite harm, then it should grant asylum if an independent body, like a juvenile court, decides it is in the child's best interest not to return to his or her home country.⁹⁹

⁹³ See Interview with Sanford N. Katz, The Darold and Juliet Libby Professor of Family Law, Boston College Law School, in Newton, Mass. (Mar. 18, 2005) (observing that unaccompanied children and abused and neglected children both face an issue of safety).

⁹⁴ See *id.*

⁹⁵ Compare *In re C. Children*, 583 N.Y.S.2d at 500 (noting that abuse consists of a *substantial risk* of physical injury which would likely cause serious or protracted disfigurement, or protracted impairment of his physical or emotional health) (emphasis added), and *Raboin v. N. D. Dep't of Human Servs.*, 552 N.W.2d 329, 334 (N.D. 1996) (stating that *actual* serious physical harm or traumatic injury is required for a finding of abuse) (emphasis added).

⁹⁶ See INS GUIDELINES, *supra* note 28, at 26 (noting that the child must establish that the government was unable or unwilling to prevent the harm). In some situations the government is the persecutor. *Id.* at 25.

⁹⁷ See *id.* at 26 (recognizing that children may not have had the ability to seek government protection, thus recommending that adjudicators consider government efforts to protect children).

⁹⁸ See Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (stating that child-specific persecution is not protected under the five enumerated grounds).

⁹⁹ See discussion *infra* Part VI; Thronson, *supra* note 35, at 1014 (explaining that juvenile courts could make this determination as it does in the case of special immigrant juveniles).

B. *The International Acceptance of the Best Interests Principle*

In determining whether to apply the best interests principle for unaccompanied minors, international law is particularly instructive.¹⁰⁰ The European Union has already adopted a resolution on unaccompanied minors, which regards the best interest of the child as a primary consideration.¹⁰¹ In order to bolster America's role as an international human rights leader, the United States should follow suit and take greater measures to protect the most vulnerable children of the world.¹⁰²

1. The Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child, the most widely ratified human rights treaty, 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.*”¹⁰³ Therefore, according to the CRC, the best interests standard is not only relevant when determining procedural questions but also when considering substantive issues pertinent to child asylum claims.¹⁰⁴ Furthermore, the CRC states in Article 22 that a child seeking refugee status shall receive appropriate protection and humanitar-

¹⁰⁰ See Claire L. Workman, Note, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 242 (2004) (advocating for incorporating a “child’s views” approach because it adheres to international law).

¹⁰¹ Council Resolution 97/C, 221/03, preamble, 1997 O.J. (C 221) 23.

¹⁰² See Amnesty Int’l USA, Letter to a U.S. Senator Supporting Convention on the Rights of the Child, http://www.amnestyusa.org/children/crn_sampleprint.html. (last visited Jan. 20, 2005) [hereinafter Amnesty Int’l USA] (ratifying the CRC would enhance America’s role as international human rights leader).

¹⁰³ CRC, *supra* note 40, at art. 3, 1577 U.N.T.S. at 46 (emphasis added); WOMEN’S COMM’N, *supra* note 9, at 5. The first legal step in promoting the rights of the child occurred in 1924 with the first Declaration of the Rights of the Child. Youth Action Course on the United Nations & Human Rights, <http://www.unac.org/yac/childrensrighsconvention.htm> (last visited Jan. 11, 2006) [hereinafter YAC, Convention]. In 1948, the second Declaration of the Rights of the Child built upon the first by “recognizing that Mankind owes to the child the best that it has to give” *Id.* A more detailed Declaration followed in 1959. *Id.* Whereas declarations are statements of moral and ethical intent and are nonbinding, conventions or covenants are legally binding. *Id.* In 1978, Poland proposed a draft of the CRC, which would become the first legally binding instrument regarding children’s rights. *Id.* The United Nations subsequently revised and adopted it as the Convention of the Rights of the Child on November 1989 and entered it into force in September 1990. *Id.*

¹⁰⁴ See CRC, *supra* note 40, at art. 3, 1577 U.N.T.S. at 46.

ian assistance, and enjoy the rights set forth in the Convention and other international human rights instruments.¹⁰⁵

The Convention formally recognizes children's rights as human rights because they are fundamental rights inherent to the human dignity of all people, regardless of age.¹⁰⁶ This notion means that children are rights-holders, whose views must be taken into consideration.¹⁰⁷ For this purpose, Article 12(2) states that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body . . ."¹⁰⁸ Parents and the community are fiduciaries, entrusted with helping the child exercise her rights rather than substituting their voice for the child's.¹⁰⁹ Therefore, this "views of the child" approach turns children from passive objects of the law into active agents.¹¹⁰

The United States signed the Convention in February 1995, but has not yet ratified it.¹¹¹ Because the United States extensively scrutinizes international treaties to assess their constitutionality before ratification, the process can take decades, which could be true for the CRC given its controversial nature.¹¹² Its political opponents argue

¹⁰⁵ *Id.* at art. 22, 1577 U.N.T.S. at 51.

¹⁰⁶ *Id.* at Preamble, 1577 U.N.T.S. at 44, 45 (bearing in mind that the United Nations Charter reaffirmed the fundamental human rights, dignity, and worth of the human person, and recognizing that the Universal Declaration of Human Rights proclaimed that everyone is entitled to all the rights and freedoms set forth without distinction of any kind). In light of the international nature of immigration and the necessity of international human rights norms to the interpretation of certain aspects of immigration law, Professor Thronson argues that "any workable framework for children's rights in immigration law must account for the idea of children's rights as human rights represented by the Convention [on the Rights of the Child]." Thronson, *supra* note 35, at 988.

¹⁰⁷ See CRC, *supra* note 40, at art. 12(1), 1577 U.N.T.S. at 48 ("State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.").

¹⁰⁸ *Id.* at art. 12(2), 1577 U.N.T.S. at 48.

¹⁰⁹ See Thronson, *supra* note 35, at 989.

¹¹⁰ See *id.*

¹¹¹ See Amnesty Int'l USA, *supra* note 102. The United States is one of only two countries that has failed to ratify the CRC. WOMEN'S COMM'N, *supra* note 9, at 5. The only other country that has failed to endorse the CRC is Somalia, which lacks an internationally recognized government. *Id.* The United States is bound not to act against the treaty's purpose while the decision to ratify is pending. Workman, *supra* note 100, at 235.

¹¹² UNICEF, Convention on the Rights of a Child: Frequently Asked Questions, http://www.unicef.org/crc/index_30229.html (last visited Jan. 11, 2006) [hereinafter UNICEF, Convention]; Amnesty International U.S.A., Children's Rights: Convention on the Rights of the Child, http://www.amnestyusa.org/children/crn_faq.html (last visited Jan. 19, 2006). Unlike many nations that implement treaties incrementally, the United

that the Convention impedes parental rights by giving the government too much responsibility for the well-being of the child.¹¹³ They also portray the CRC as threatening national and state sovereignty by dictating how to raise children.¹¹⁴ Yet, the larger debate surrounding the rights of parents vis á vis the government is inapplicable to unaccompanied children because they lack an adult guardian and are in need of state protection.¹¹⁵ Therefore, regardless of the ratification question, the United States should adhere to the CRC's "best interests of the child" and the "views of the child" principles in the specific instance of unaccompanied children seeking asylum.¹¹⁶

2. United Nations High Commissioner for Refugees Guidelines

In 1997, the United Nations High Commissioner for Refugees (UNHCR) issued guidelines based on the CRC's international principles on children's rights.¹¹⁷ The UNHCR's "Guidelines on Dealing with Unaccompanied Children Seeking Asylum" stipulate that "the basic guiding principle in any child care and protection action is the principle of the best interests of the child."¹¹⁸ It notes that if a child is not granted

States first attempts to ensure that all federal and/or states laws satisfy the standards of the treaty. *Id.* The United States ratified the Convention on the Prevention and Punishment of the Crime of Genocide after a thirty-year process and signed the Convention on the Elimination of All Forms of Discrimination Against Women more than twenty years ago but has yet to ratify it. *Id.* Furthermore, the United States usually considers only one human rights treaty at a time. UNICEF, Convention. The question remains whether the CRC is or will be considered customary international law. WOMEN'S COMM'N, *supra* note 9, at 5. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

¹¹³ Nogosek, *supra* note 36, at 19. *See* CRC, *supra* note 40, at art. 2, 1577 U.N.T.S. at 46 (noting that State Parties shall ensure the rights of the child).

¹¹⁴ Amensty Int'l USA, *supra* note 102.

¹¹⁵ *See id.* (providing a few of the issues in the debate).

¹¹⁶ *See* Villarreal, *supra* note 32, at 777 (explaining how the CRC's best interests principle should be implemented in legislation, regulation, and adjudication of unaccompanied minors' asylum applications).

¹¹⁷ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM 4 (1997), available at <http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5S5BY7?OpenDocument> [hereinafter UNHCR GUIDELINES]; *see also* Rachel Bien, Note, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797, 812 (2004).

¹¹⁸ UNHCR GUIDELINES, *supra* note 117, at 1. The UNHCR Guidelines, unlike the CRC, does not consider the "views of the child." *See* CRC, *supra* note 40, at art. 12(1), 1577 U.N.T.S. at 48 (stating the CRC's consideration of the child's views); Workman, *supra* note 100, at 240.

asylum, then an assessment of the solution that is in the best interests of the child should follow as soon as practicable.¹¹⁹ The UNHCR Guidelines also highlight human rights abuses that may constitute persecution for children, but not for adults.¹²⁰ These situations include “the recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking of children for prostitution and sexual exploitation and the practice of female genital mutilation.”¹²¹

Neither the CRC nor the UNHCR Guidelines require that the child’s best interests be the only determining criterion, but instead mandate that the decision makers consider the child’s perspective by identifying the child’s best interest as “the primary consideration” or “the basic guiding principle.”¹²² Mandating that the child’s voice be highly valued decreases the likelihood that the best interests standard will devolve into a vehicle for adults’ opinions.¹²³ Listening to the child’s voice may prevent adult illusions about children from prejudicing the asylum process and force adults to face the painful reality of

¹¹⁹ UNHCR GUIDELINES, *supra* note 117, at 3. Other provisions that UNHCR Guidelines recommend include appointing legal representation and a guardian or advisor with child welfare expertise to safeguard the child’s interests. *Id.* §§ 4.2, 5.7. It further prohibits their detention in prison-like conditions, establishes an expedited procedure to process their claims, and takes into account each child’s stage of development and particular vulnerabilities when assessing his or her claim. *Id.* §§ 7.6, 8.1, 8.5, 8.6.

¹²⁰ *Id.* § 8.7.

¹²¹ *Id.* This approach would recognize persecution that is unique to child applicants, which may be central to the child’s asylum claim. *See* Bien, *supra* note 117, at 831. Many advocates argue that child-specific persecution should be acknowledged as a ground for protection. *See* Bhabha & Young, *supra* note 8, at 766 (noting that children who experience certain kinds of child-specific persecution suffer harm because of their membership in a particular social group).

¹²² *See* CRC, *supra* note 40, at art. 3, 1577 U.N.T.S. at 46; UNHCR GUIDELINES, *supra* note 117, at 1. As Professor Woodhouse comments, “[a]sking the child question[s], listening to children’s authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide. They are strategies to insure that children’s authentic voices are heard and acknowledged by adults who make decisions.” Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1840 (1993) [hereinafter Woodhouse, *Child-Centered*].

¹²³ Thronson, *supra* note 35, at 989. One scholar notes that because the CRC does not list any factors in determining the child’s best interests, adjudicators may interfere with the application of the best interests test by employing their own value judgments. Villarreal, *supra* note 32, at 758. Professor Woodhouse asserts that the child-centered perspective is less about the parents’ rights versus the child’s rights, and more about recognizing the adults’ responsibility and children’s needs. Woodhouse, *Child-Centered*, *supra* note 122, at 1815, 1864.

the child's experience.¹²⁴ Some countries, such as Canada and the United Kingdom, provide avenues to listen to the child's voice.¹²⁵

3. Canada & the United Kingdom

Canada and the United Kingdom took steps to ensure that their asylum laws more closely reflected the international standards even before the UNHCR Guidelines were issued.¹²⁶ Of all asylum claims filed worldwide, a high percentage were lodged in both countries.¹²⁷ In 1996, Canada's Immigration and Refugee Board, the federal agency charged with asylum claims, issued progressive guidelines concerning child applicants.¹²⁸ It provides for the appointment of a "designated representative" for every child refugee claimant, whether accompanied or unaccompanied, whose duty is to act in the best interests of the child.¹²⁹ Instead of designating a representative, the United Kingdom established the Refugee Council Panel of Advisors for Unaccompanied Refugee Children in 1994.¹³⁰ Independent of the U.K. Immigration and Nationality Department, this children's panel provides advice and

¹²⁴ See Woodhouse, *Child-Centered*, *supra* note 122, at 1837 (explaining how listening to the child's voice entails setting aside adult illusions and confronting children's realities).

¹²⁵ See Bien, *supra* note 117, at 813–15. See generally IMMIGRATION & REFUGEE BOARD, CHILD REFUGEE CLAIMANTS: PROCEDURAL AND EVIDENTIARY ISSUES (1996), available at http://www.irb-cisr.gc.ca/en/about/guidelines/child_e.htm [hereinafter CANADA GUIDELINES]; U.K. IMMIGRANT AND NATIONALITY DIRECTORATE, UNACCOMPANIED CHILDREN § 352 (1990), available at http://www.ind.homeoffice.gov.uk/ind/en/home/laws__policy/immigration_rules/part_11.html [hereinafter UK POLICIES].

¹²⁶ WOMEN'S COMM'N, *supra* note 9, at 5, 6.

¹²⁷ UNHCR, ASYLUM LEVELS & TRENDS IN INDUSTRIALIZED COUNTRIES, 2004, at 8, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=search> (listing that the UK had 10 percent, Canada had 6 percent, and the United States had 13 percent of all asylum seekers in 2004).

¹²⁸ Bien, *supra* note 117, at 813–14.

¹²⁹ CANADA GUIDELINES, *supra* note 125, at A(II). Before finalizing the designation, a panel informs him or her of the various duties of the designated representative and assesses his or her ability to fulfill those duties. *Id.* While an adult friend or relative is often the designated representative in Canada, the UNHCR's Guidelines go further by recommending guardians who have expertise in child welfare. See UNHCR GUIDELINES, *supra* note 117, at 2 (stating that the guardian should have the "necessary expertise in the field of childcaring, so as to ensure that the interests of the child are safeguarded and that his/her needs are appropriately met."); CANADA GUIDELINES, *supra* note 125, at A(II) (requiring only that the person have an appreciation of the nature of the proceedings, not have a conflict of interest, and be willing and able to fulfill the duties of the designated representative).

¹³⁰ Bien, *supra* note 117, at 815. Advisors with expertise in education, social services, probation, health, and legal work are included on the panel. Bhabha & Young, *supra* note 8, at 769.

support to child applicants to ensure that they receive legal representation, care, and accommodation.¹³¹

Canada's guidelines also establish a panel that considers the child's maturity and development both at the time of the hearing and at the time of the detrimental events in order to determine the best way to elicit evidence from the child.¹³² Further, where a child has difficulty testifying in front of decisionmakers, videotaped evidence or expert testimony can replace the child's direct testimony.¹³³ The guidelines also stipulate that consideration should be given to selecting the person who is best able to question the child.¹³⁴ In assessing the evidence, the adjudicators take into account the child's ability to recall the past given her age, gender, cultural background, post-traumatic stress, or other circumstances.¹³⁵

Likewise, in the United Kingdom, an adult representative or guardian should attend immigration interviews.¹³⁶ According to the U.K. Immigrant and Nationality Directorate, the interviewer should be sensitive to the child's feelings of inhibition or alarm, allow the child to express herself in her own way and at her own speed, and stop the interview when the applicant appears tired or distressed.¹³⁷ The U.K. laws state that asylum should not be denied solely because the child does not understand the situation or has not formed a well-founded fear of persecution due to the child's lack of maturity.¹³⁸

¹³¹ Bhabha & Young, *supra* note 8, at 769. The advisors help children locate legal counsel, and are responsible for the child's education, shelter, health care, and other welfare needs throughout the asylum process. Bien, *supra* note 117, at 815-16. The advisors establish rapport with the child and accompany her to interviews. Bhabha & Young, *supra* note 8, at 769.

¹³² CANADA GUIDELINES, *supra* note 125, at A(III) (6), B(I).

¹³³ *Id.* at B(I) (5). This approach is used in child abuse cases in the U.S. criminal justice system. Bhabha & Young, *supra* note 8, at 772.

¹³⁴ CANADA GUIDELINES, *supra* note 125, at B(I) (4). In addition, the guidelines suggest using an informal interview room rather than a courtroom, and allowing adults whom the child trusts to attend the hearing whether or not he or she is the designated representative. *Id.* at B(I) (3).

¹³⁵ *Id.* at B(II) (1).

¹³⁶ UK POLICIES, *supra* note 125, § 352.

¹³⁷ *Id.* According to child welfare experts, repeated questioning or cross-examination negatively affects reliability and consistency in children's responses. Bhabha & Young, *supra* note 8, at 771.

¹³⁸ UK POLICIES, *supra* note 125, § 351. Adjudicators pay close attention to the welfare of the child throughout the process. *Id.*

III. THE CURRENT APPROACH IN THE UNITED STATES

The Department of Homeland Security has acknowledged the importance of the best interests principle and made great strides to incorporate this standard procedurally through the INS Guidelines and the Unaccompanied Alien Child Protection Act (UACPA), which has passed the Senate and is pending approval in the House.¹³⁹ The United States, however, has stopped short of making substantive changes to the law.¹⁴⁰ Since procedural improvements only provide children fairer access to the asylum system, unaccompanied children are still marginalized in the legal proceedings.¹⁴¹ This disparate treatment of unaccompanied minors may be explained by the conflicting policy objectives regarding humanitarian values versus economic, national security, and political concerns in the admission of immigrants.¹⁴²

Certainly, the use of the best interests principle in admitting unaccompanied children is part of a wider policy debate over refugee admissions.¹⁴³ Admitting a growing number of asylum applicants conflicts with an increasing public awareness of finite national resources and unsatisfied domestic needs.¹⁴⁴ Given the economic, ethnic, and political resistance to admission, countries limit their intake of immigrants to “politically tolerable levels.”¹⁴⁵ In the United States, national security concerns since September 11 often overshadow the human

¹³⁹ See INS GUIDELINES, *supra* note 28, at 2. See generally Unaccompanied Alien Child Protection Act of 2005, S. 119, H.R. 1172, 109th Cong. (2005). Senator Dianne Feinstein reintroduced the UACPA in the Senate on January 24, 2005, and Representative Zoe Lofgren reintroduced the bill in the House on March 8, 2005. See 151 CONG. REC. E. S303 (2005) (statement of Sen. Feinstein); 151 CONG. REC. E. 383 (2005) (statement of Rep. Lofgren). The bill was first introduced in the Senate on May 22, 2003, and in the House on October 21, 2003, but it never passed the House. See generally S. 1129, H.R. 3361; 77 CONG. REC. S7019 (statement of Sen. Feinstein).

¹⁴⁰ See INS GUIDELINES, *supra* note 28, at 2.

¹⁴¹ See Bhabha, *Demography & Rights*, *supra* note 37, at 243.

¹⁴² See Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, in IMMIGRATION CONTROLS: THE SEARCH FOR WORKABLE POLICIES IN GERMANY & THE UNITED STATES 117 (Kay Haillbrønner et al. eds., 1998) (stating that as the world refugee population has increased, refugee-receiving countries balance humanitarian values against economic, social, law enforcement, and political concerns) [hereinafter Legomsky, *The New Techniques*].

¹⁴³ See Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 620 (2000) (discussing the competing values that all receiving nations must balance in determining whether to admit refugees) [hereinafter Legomsky, *Bill of Rights*].

¹⁴⁴ Legomsky, *The New Techniques*, *supra* note 142, at 117.

¹⁴⁵ Legomsky, *Bill of Rights*, *supra* note 143, at 620.

rights of noncitizens, which could have a detrimental effect on unaccompanied minors.¹⁴⁶

Security and enforcement concerns usually clash with the best interests of the unaccompanied minor.¹⁴⁷ Many children are less able to express their views or bring best interests considerations to the attention of adjudicators, where they experience harsh immigration measures such as threats of removal or indefinite detention.¹⁴⁸ These conflicting policy objectives may help explain why the United States has been reluctant to extend the best interests principle to substantive asylum law.¹⁴⁹ As enforcement concerns increasingly dominate the political agenda, the United States must ensure that the interests of unaccompanied minors are not marginalized.¹⁵⁰ The INS Guidelines for Children's Asylum Claims and the Unaccompanied Child Protection

¹⁴⁶ See Daniel Kanstroom, *Legal Lines in Shifting Sand: Immigration Law & Human Rights in the Wake of September 11th*, 25 B.C. THIRD WORLD L.J. 1, 5 (2005) (stating that the use of immigration control for security purposes does not relate to immigration policy directly); Jessica G. Taverna, Note, *Did the Government Finally Get It Right? An Analysis of the Former INS, the Office of Refugee Resettlement & Unaccompanied Minor Aliens' Due Process Rights*, 12 WM. & MARY BILL RTS. J. 939, 977 (2004) (noting that DHS's emphasis on national security and law enforcement, as reflected in the US PATRIOT Act's allowance of detaining noncitizens indefinitely, will undermine the best interests of the child in regard to their detention status).

¹⁴⁷ Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 282 (2000) [hereinafter Bhabha, *Lone Travelers*].

¹⁴⁸ *Id.*; see also HEAVEN CRAWLEY & TRINE LESTER, SAVE THE CHILDREN UK, NO PLACE FOR A CHILD: CHILDREN IN UK IMMIGRATION DETENTION: IMPACTS, ALTERNATIVES AND SAFEGUARDS 22 (2005), available at http://www.savethechildren.org.uk/temp/scuk/cache/cmsat_tach/2442_no%20place%20for%20a%20child.pdf (discussing the combination of negative detention impacts on children which can result in difficulties in presenting clear accounts). Detained children experience negative mental and physical symptoms such as depression, lack of appetite, persistent coughs, and other sicknesses. See *id.* at 24.

¹⁴⁹ See *id.* Some attribute this restrictive application of the best interests principle to the uncertain scope of liberties of aliens and children. See Gail Q. Goeke, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221, 233-34 (1995) (referring to the holding in *Flores v. Reno*, which limited the best interests of the child consideration for unaccompanied minors detained by INS). Goeke discusses the interplay of judicial self-restraint, deference to the political branches in immigration matters, and the uncertain scope of liberties of aliens and children to explain the court's refusal to accord a fundamental liberty interest of freedom to unaccompanied minors in detention. *Id.* Judicial deference in immigration matters is frequently referred to as the plenary power doctrine. See Nogosek, *supra* note 36, at 7. The doctrine originated in 1889 with *Chae Chan Ping v. United States*, which announced that Congress's authority to regulate immigration through legislation is inherent in U.S. sovereignty. 130 U.S. 581, 603-04, 609 (1889).

¹⁵⁰ See Bhabha, *Lone Travelers*, *supra* note 147, at 282. The growing numbers of unaccompanied minors arriving in the United States should alert policy makers that this is not a marginal issue. See *id.*

Act are two instruments that advance the best interests of the child in procedural matters domestically.¹⁵¹

A. INS Guidelines for Children's Asylum Claims

The Guidelines for Children's Asylum Claims, issued by the INS in 1998, bring the United States a step closer to the international best interests of the child standard by providing greater procedural protections.¹⁵² The INS Guidelines, however, explicitly disregarded the principle in substantive asylum law, stating, "the internationally recognized 'best interests of the child' principle is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition."¹⁵³ It emphasizes that "regardless of how sympathetic the child's asylum claim may be," the best interests principle does not alter the refugee definition that children must meet.¹⁵⁴

The INS Guidelines incorporate special procedural protections for children to create a "child-friendly asylum interview environment."¹⁵⁵ It recognizes that children "may not present their cases in the same way as adults" and suggests interviewing techniques that "seek to ensure that the applicant feels comfortable and free to discuss the claim."¹⁵⁶ Moreover, the INS Guidelines note that children cannot be expected to dis-

¹⁵¹ See generally INS GUIDELINES, *supra* note 28; S. 119, 109th Cong. (2005).

¹⁵² INS GUIDELINES, *supra* note 28, at 2, 18. The Women's Commission for Refugee Women & Children recommends widely distributing the Guidelines to anyone who comes in contact with children, including border patrol, detention and deportation officers, and overseas refugee interviewers. WOMEN'S COMM'N, *supra* note 9, at 15. The Commission also calls on the Executive Office for Immigration Review (EOIR), the agency in which immigration judges sit, to adopt these Guidelines. *Id.* Currently, the Guidelines are primarily designed for asylum officers in the Department of Homeland Security. *Id.*

¹⁵³ INS GUIDELINES, *supra* note 28, at 2. There are two limited exceptions in which unaccompanied minor asylum seekers are treated differently than adults. WOMEN'S COMM'N, *supra* note 9, at 6-7. First, unaccompanied minors are exempted from the one-year filing deadline because they are deemed to have a "legal disability," which is a recognized exception to the filing deadline. *Id.* at 6. Second, an August 1997 INS memorandum stated that unaccompanied minors should not be placed in expedited removal unless the minor commits an aggravated felony in the presence of the agency's officer, has been convicted of an aggravated felony, or has been ordered removed from the United States before. *Id.* at 7. Expedited removal is when an inspection officer at a port of entry sends an individual back to her homeland immediately if she does not have proper documentation and cannot articulate a desire to apply for asylum or fear of return. *Id.*

¹⁵⁴ INS GUIDELINES, *supra* note 28, at 18.

¹⁵⁵ *Id.* at 5.

¹⁵⁶ *Id.*

cuss their claim with the same degree of accuracy and detail as adults, due to developmental and cultural reasons.¹⁵⁷ While the burden still remains on the child to establish her claim for asylum, the INS Guidelines follow the UNHCR's recommendation that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution.¹⁵⁸ Furthermore, the Asylum Officer must gather as much objective evidence as possible to evaluate the child's claim.¹⁵⁹

Unlike Canada and the United Kingdom, however, the United States does not require a designated representative or a panel of advisors.¹⁶⁰ Without the appointment of a guardian ad litem, the child's perspective may not be heard because the triangle of the adjudicator, child's attorney, and trial attorney does not create space for the child's own voice.¹⁶¹ In the United States, guardian ad litem are frequently mandated in domestic abuse or neglect proceedings and other areas of family law.¹⁶² The INS Guidelines do allow a "trusted adult" to attend the child's asylum interview, noting that the presence of this adult may help the child psychologically.¹⁶³ While this adult may help the child explain his or her claim, the adult may not interfere with the interview process or coach the child during the interview.¹⁶⁴

¹⁵⁷ *Id.* at 13.

¹⁵⁸ *Id.* at 26. See U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1, at II(C)(2)(219) (1992), available at <http://www.asylumsupport.info/publications/unhcr/handbook.pdf>.

¹⁵⁹ INS GUIDELINES, *supra* note 28, at 17. The INS Guidelines note that the balance between subjective fear and objective circumstances may be difficult to assess for children because of the difficulty in measuring the minor's maturity, which is the rationale for giving more weight to objective factors. *Id.* at 19.

¹⁶⁰ See *id.* at 5 n.12 (stating "there is no requirement that a child bring an adult to the interview either to serve as a support person, attorney, or accredited representative"); Bhabha & Young, *supra* note 8, at 768-69.

¹⁶¹ Bhabha & Young, *supra* note 8, at 772.

¹⁶² ABRAMS, *supra* note 76, at 248; TEX. FAM. CODE ANN. § 107.011(a) (Vernon 2004) (stating that appointment of a guardian ad litem is mandatory in parental termination hearings); see, e.g., State *ex rel.* Perman v. District Court, 690 P.2d 419, 422 (Mont. 1984) (noting that the court shall appoint a guardian ad litem for an incompetent person not otherwise represented in an action).

¹⁶³ INS GUIDELINES, *supra* note 28, at 5-6. A trusted adult provides moral support for the child and may help to bridge the gap between the child's culture and the U.S. asylum interview. *Id.* Usually a child's parent or relative is the support person, but for unaccompanied minors another adult can serve as the support person at the Asylum Officer's discretion. *Id.* at 6.

¹⁶⁴ *Id.*

Moreover, the INS Guidelines do not require legal counsel or provide court-appointed counsel for unaccompanied minors, leaving less than half of all children in DHS custody without attorneys.¹⁶⁵ Yet, given the complexity of asylum proceedings, asylum seekers are about five times more likely to win their cases if they have representation.¹⁶⁶ For children, gaining asylum without representation is even more doubtful because of their inability to understand the proceedings.¹⁶⁷ Without informed assistance, children's due process rights cannot be guaranteed.¹⁶⁸

B. *The Unaccompanied Alien Child Protection Act*

The Unaccompanied Alien Child Protection Act (UACPA), which has passed the U.S. Senate and is pending in the House, builds upon the INS Guidelines and furthers the best interests of the child.¹⁶⁹ Most notably the UACPA provides representation for unaccompanied minors by requiring legal counsel and establishing a guardian ad litem pilot program.¹⁷⁰ The guardian ad litem's duty would be to "take reasonable steps to ensure that the best interests of the child are promoted" in immigration proceedings.¹⁷¹ About eighty percent of unaccompanied juveniles apprehended by DHS do not have adult assistance of any kind, either legal representation or a guardian ad litem.¹⁷²

¹⁶⁵ See *id.* at 5 n.12; Bien, *supra* note 117, at 822.

¹⁶⁶ *Hearing, supra* note 5, at 47–48 (statement of Wendy Young).

¹⁶⁷ *Id.* at 48. Moreover, most lack basic English skills and are frightened and depressed from being separated from their families. *Id.* at 51 (statement of Andrew Morton, Attorney, Latham & Watkins). Given the high stakes of asylum cases, this lack of representation is especially disturbing. See *id.* Furthermore, immigration judges may choose to continue the case rather than issue a final order to an unrepresented minor; thus, these children are detained for longer periods of time. *Id.* at 53. This protracted detainment has both emotional costs on the child and financial costs for taxpayers, as daily rates for detention run up to \$250. See *id.* Providing attorneys to unaccompanied minors would speed adjudications and save money in the long run. See *id.*

¹⁶⁸ *Id.* at 52.

¹⁶⁹ See generally S. 119, 109th Cong. (2005).

¹⁷⁰ S. 119 §§ 201, 202.

¹⁷¹ S. 119 § 201(a)(3)(E). UACPA mandates the EOIR to adopt standards for legal representation modeled after the INS Guidelines. S. 119 § 202(5).

¹⁷² *Hearing, supra* note 5, at 52 (statement of Andrew Morton). In non-immigration proceedings in the United States, children regularly obtain appointed legal counsel in delinquency charges, civil suits, and abuse and neglect allegations. *Id.* To ensure a fair hearing, many states mandate the appointment of counsel, recognizing that children are not equipped to represent themselves. *Id.* In the case of *In re Gault*, the Court found that where a child faces a loss of liberty he or she must be afforded appropriate due process protections, including the right to counsel. 387 U.S. 1, 36, 41 (1967). Since immigration proceedings are not considered criminal in nature, noncitizens facing deportation do not

Furthermore, the UACPA calls upon the Department of Justice to adopt the INS Guidelines in its handling of children's asylum claims before immigration judges and the Board of Immigration Appeals.¹⁷³ Currently, immigration judges are not required to follow the Guidelines in their adjudications.¹⁷⁴ Additionally, immigration officials and personnel who come in contact with children are not required to receive training in children's special needs and circumstances; the UACPA would make this training mandatory.¹⁷⁵

In addition, the UACPA incorporates provisions that would bring detention practices and policies more in line with the Flores Agreement, the settlement that instituted nationwide detention procedures for children after *Flores v. Reno*.¹⁷⁶ The class action suit in *Flores* challenged the INS policy of releasing children only to a legal guardian or parent except in unusual and extraordinary cases.¹⁷⁷ The class of unaccompanied children, who brought the suit, contended that the Constitution and immigration laws require them to be released into the custody of "responsible adults."¹⁷⁸ Since unaccompanied minors do not have parents or legal guardians, they are housed for long periods in juvenile or adult detention facilities.¹⁷⁹ The Flores Agreement recognized two fundamental principles: (1) minors should be treated with "dignity, respect, and special concern for their particular vulner-

have the right to court appointed counsel. *See Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893) (An "order of deportation is not a punishment for crime," and therefore, "the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.").

¹⁷³ S. 119 § 401. Currently, the INS Guidelines are not binding, but rather recommendations. INS GUIDELINES, *supra* note 28, at 1.

¹⁷⁴ *Hearing, supra* note 5, at 65 (statement of Julianne Duncan, Director of Children's Services, United States Conference on Catholic Bishops).

¹⁷⁵ S. 119 § 401(b); *Hearing, supra* note 5, at 65 (statement of Julianne Duncan).

¹⁷⁶ *See Flores v. Reno*, 507 U.S. 292, 294 (1997); *Hearing, supra* note 5, at 38 (statement of Wendy Young).

¹⁷⁷ *Flores*, 507 U.S. at 292, 296.

¹⁷⁸ *Id.* at 294.

¹⁷⁹ Seugling, *supra* note 10, at 870-71. The Supreme Court ruled in favor of the INS on several issues in *Flores v. Reno*, but the parties to the lawsuit were able to negotiate a settlement on other key issues, including the detention, release, and treatment of minors in INS custody. Young, *supra* note 52, at 10. The Office of Inspector General found that majority of secure facilities used by INS did not segregate INS-detained children from delinquent youth; the Flores Agreement forbids this commingling. US DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *Unaccompanied Juveniles in INS Custody*, (2001) available at <http://www.usdoj.gov/oig/reports/INS/e0109/chapter1.htm> [hereinafter *Unaccompanied Juveniles*].

ability,” and (2) children should be held in the “least restrictive setting possible” that is appropriate for their age and special needs.¹⁸⁰

Human rights groups and the Department of Justice Inspector General criticized the former INS for continued violations of the Flores Agreement.¹⁸¹ According to a 2003 Amnesty International report, forty-eight percent of facilities surveyed admitted to housing immigrant children alongside juvenile offenders, and fifty-seven percent of those facilities said that they use solitary confinement to discipline children.¹⁸² Although DHS has made progress since the Flores Agreement, the growth in the number of children arriving in the United States threatens to undermine its efforts due to the agency’s failure to commit the resources necessary to keep pace with this growth.¹⁸³ The number

¹⁸⁰ Young, *supra* note 52, at 10. When appropriate, the Flores Agreement provides for the release of a child from detention to an individual or entity willing to ensure the child’s safety and appearance in immigration court. *Hearing, supra* note 5, at 38 (statement of Wendy Young). The UACPA incorporates the Flores Agreement’s prompt release policy. *See* S. 119, at § 102(a)(1) (listing the order of preference for the child’s prompt placement as a parent, legal guardian, adult relative, entity designated by a parent, a state-licensed juvenile shelter, group home or foster care program, or a qualified adult or entity seeking custody of a child).

¹⁸¹ *Unaccompanied Juveniles, supra* note 179 (noting that various groups reported alleged children’s rights violations at detention facilities in Arizona, California, and Pennsylvania). Because of lack of shelter bed space to accommodate the number of children, the agency often resorts to detaining children in juvenile correctional facilities. Young, *supra* note 52, at 10. Furthermore, DHS deportation officers often base these determinations on law enforcement concerns. *Id.* The agency has an inherent conflict of interest in acting as the children’s caregiver, since its primary function is law enforcement. *See id.* To worsen matters, in 2000, DHS consolidated its children’s programs, including operation of the shelters, under its Detention and Removal branch. *See* Seugling, *supra* note 10, at 871.

¹⁸² AMNESTY INTERNATIONAL U.S.A., *supra* note 10, at 24, 32. The DHS detained 4136 unaccompanied children for more than seventy-two hours, placing one-third of them in juvenile detention centers and a large majority of others in DHS shelter care during Fiscal Year 2000. *Id.* at 1. DHS shelter care is known as “soft detention,” where children wear street clothes, have educational classes and are not locked in a cell; nonetheless, their activities are closely monitored and they are only occasionally allowed off the premises with shelter staff. *Hearing, supra* note 5, at 40 (statement of Wendy Young). The Women’s Commission for Refugees and Children notes that many children who have been incorrectly identified as adults are placed in adult detention centers. *Id.* at 46. The Commission states that the DHS should stop using dental radiograph exams as the sole means of identifying children’s age because of the unreliability of these tests. WOMEN’S COMM’N, *supra* note 9, at 16. Instead, the applicant should be given the benefit of the doubt if he or she claims to be under 18, and other age identifying evidence should be considered. *Id.* A review process should be implemented for negative age determinations. *Id.*

¹⁸³ *See* Young, *supra* note 52, at 11. DHS increased the number of available beds in non-secure facilities for juveniles from 130 to 500 from FY 1997 to FY 2001, and has grants to open more shelter care facilities for unaccompanied juveniles. *Hearing, supra* note 5, at 17 (statement of Stuart Anderson, Executive Associate Commissioner, INS). At any given

of children detained by DHS has increased from 4,615 to 6,200 from 2001 to 2005.¹⁸⁴

In compliance with the Flores Agreement, the UACPA mandates that children not be placed in adult detention facilities or with other delinquent children unless the unaccompanied minor exhibits criminal behavior or is determined to be dangerous.¹⁸⁵ It establishes clear guidelines for detention alternatives such as shelter care, foster care, and other child custody arrangements.¹⁸⁶ The UACPA also prohibits the “unreasonable use” of shackling, handcuffing, solitary confinement, and pat or strip searches, which may violate a child’s sense of dignity and respect.¹⁸⁷

time, about 475 unaccompanied minors are in INS custody; their ages range from six months to 17 years old. *Id.* at 63 (statement of Julianne Duncan).

¹⁸⁴ Nugent, *supra* note 4, at 9. The number of unaccompanied child detainees in the United States more than doubled from 2375 in 1997 to 5385 in 2001. AMNESTY INTERNATIONAL U.S.A., *supra* note 10, at 1. Regardless of the quality of care provided, a Save the Children UK study finds that detention has damaging physical, mental health, and educational implications on children. CRAWLEY & LESTER, *supra* note 148, at 19, 24. Exacerbated by the lack of information associated with the asylum and detention process, children experience depression, behavioral changes, confusion, and retraumatization. *Id.* at 24. Being detained often leads children to abandon their claims, even if they face harm by returning to their home country. *Id.* at 22.

¹⁸⁵ S. 119, 109th Cong. § 103(a) (2005). The Flores Agreement only permits children to be housed in secure settings, i.e., juvenile jails in certain circumstances, such as when 1) a child is deemed a flight risk, 2) there has been an emergency influx of children, 3) a child’s safety is at risk, or 4) a child is chargeable, has been charged, or has been convicted of a crime. Young, *supra* note 52, at 10.

¹⁸⁶ S. 119 § 103. The child care provider must be licensed by an appropriate state agency to provide residential, child welfare, or foster care services. *Id.* § 103(a)(3). Section 462 of the Homeland Security Act of 2002 provided for the transfer of the care and placement of unaccompanied children from the now abolished INS to the Department of Health and Human Services Office of Refugee Resettlement, but did not indicate a time frame for the transfer of custody. 77 CONG. REC. S7019–20 (2003) (statement of Sen. Feinstein). Therefore, the children could be detained indefinitely in the Immigration and Customs Enforcement. Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States*, 23 LAW & INEQ. 117, 138 (2005). The UACPA rectifies this by specifying that the child shall be transferred to the Office of Refugee Resettlement no later than 72 hours after a determination is made that such child is an unaccompanied minor. S. 119 § 101(b)(3)(A). Prior to 2002, the INS Detention and Removal branch was responsible for children’s programs, which presented a conflict of interest. *Hearing, supra* note 5, at 36 (statement of Wendy Young). While this agency was charged with the protection of unaccompanied minors, it is also responsible for their apprehension, detention, and removal. *Id.*

¹⁸⁷ S. 119 § 103(b). Children are sometimes handcuffed and shackled during transport, when they go to on-site medical facilities, or when they misbehave. *Hearing, supra* note 5, at 43 (statement of Wendy Young). At a Senate hearing on UACPA, Edwin Larios Munoz, who fled Honduras after being abandoned, testified about his detention experience in a jail for juvenile criminals. *Hearing, supra* note 5, at 27 (statement of Edwin Larios

While the UACPA makes significant progress, Congress can greatly improve the UACPA by implementing a few changes.¹⁸⁸ For example, the UACPA should provide for judicial review of placement decisions, so minors, who currently have no recourse, can challenge harmful placements.¹⁸⁹ In addition, the UACPA charges the DHS Secretary and Office of Refugee Resettlement (ORR) Director with promulgating regulations to provide for the educational, mental and physical health, and spiritual needs of detained children.¹⁹⁰ Codification of these standards is crucial to protecting these children's needs; yet rather than making them mandatory, enacting these regulations is left to the discretion of the DHS Secretary and ORR Director.¹⁹¹ Furthermore, the UACPA only specifies areas that should be addressed, but does not provide a minimum standard for these services.¹⁹²

C. *The Need to Apply the Best Interests Principle Comprehensively*

The INS Guidelines and UACPA would help children attain fairer access to the asylum system and ensure that they are treated with greater respect.¹⁹³ It is the asylum determination system itself, however, rather than the area of access where unaccompanied children are most disadvantaged.¹⁹⁴

Munoz). He stated that the officers treated him as a criminal, and hit him with sticks and sprayed him with pepper spray when they thought he was not obeying orders. *Id.* at 28. He said, "I lost weight and was usually sick at this jail since I could not eat the food . . . and the jail constantly smelled like urine. I cried a lot in the cell, wondering why everything was turning out so bad for me in the United States and wondering if I would ever be free." *Id.* Munoz also hated wearing shackles to immigration court and was embarrassed by the strip down searches. *Id.*

¹⁸⁸ See Georgopoulos, *supra* note 186, at 150–51.

¹⁸⁹ *Id.* DHS deportation officers, who are primarily concerned with law enforcement, usually make such placement decisions; thus, judicial review by objective decisionmakers is needed. Young, *supra* note 52, at 11.

¹⁹⁰ S. 119, 109th Cong. § 103(a)(4)(A) (2005). The UACPA also gives detained children access to telephones, legal services and interpreters. *Id.* As of 2002, many of the juvenile detention centers did not have access to translation assistance, phones, or religious services in their chosen faiths. Hearing, *supra* note 5, at 43–44 (statement of Wendy Young). Furthermore, many of the facilities used by DHS only provide education programs in English. *Id.* at 44.

¹⁹¹ Georgopoulos, *supra* note 186, at 148.

¹⁹² *Id.*

¹⁹³ See generally INS GUIDELINES, *supra* note 28 (providing greater procedural protections, such as creating a child-sensitive interviewing environment, help children speak more freely about their claims); S. 119 § 202 (providing children with attorneys will help them navigate a confusing asylum system with greater legal knowledge).

¹⁹⁴ See Bhabha, *Demography & Rights*, *supra* note 37, at 243.

Professor Bhadha contrasts the distinct hurdles faced by unaccompanied children in gaining asylum to that faced by female asylum seekers.¹⁹⁵ She notes that women are disadvantaged in attaining access, but advantaged once within the system.¹⁹⁶ Once they apply for asylum, women have a relative advantage in securing asylum due to a gradual awareness over the last two decades of the specificity of women's rights in general and gender-based persecution in particular.¹⁹⁷ Unaccompanied children, on the other hand, are relatively privileged in obtaining access but disadvantaged in the asylum determination system itself.¹⁹⁸ Child-specific persecution has not been acknowledged as grounds for persecution in the asylum determination.¹⁹⁹ Bhadha partially attributes unaccompanied children's relative disadvantage in asylum grants to a bifurcated view of children.²⁰⁰ On the one hand they are vulnerable and in need of care; on the other hand they are viewed with suspicion and hostility as delinquent street children and gang members.²⁰¹ Children are also detained longer than the general population, because immigration judges hesitate to issue final removal orders to unaccompanied children and often continue their cases multiple times.²⁰²

Therefore, by stopping short of reforming the substantive criteria for asylum, the INS Guidelines and UACPA still disadvantage unaccompanied children and ignore their best interests in the actual asylum

¹⁹⁵ *Id.* at 239–40.

¹⁹⁶ *See id.* She attributes women's disadvantage in accessing the system to the criminalization of migration and women's low socio-economic status given the cost of securing commercial assistance. *Id.* at 238.

¹⁹⁷ *Id.* at 239.

¹⁹⁸ *Id.* at 242. Unaccompanied children are over-represented in the asylum system. According to UNHCR, they account for four percent of the total number of asylum applications lodged in seventeen European countries for which data was available, but they only account for less than 2.5 percent of the total refugee and asylum seeking population. *Id.* at 233–34. In Hungary and the Netherlands, they accounted for 15 percent of all the applications filed in 2000. *Id.* at 234. In the United Kingdom, the number of unaccompanied children seeking asylum grew from two percent in 1995 to eight percent in 2000. *Id.* The United States does not keep a record of how many unaccompanied minors apply for asylum. Seugling, *supra* note 10, at 864.

¹⁹⁹ *See* Seugling, *supra* note 10, at 891.

²⁰⁰ Bhadha, *Demography & Rights*, *supra* note 37, at 240–41.

²⁰¹ *Id.*

²⁰² *Hearing*, *supra* note 5, at 50–51 (statement of Andrew Morton). Malik Jarno, the twelve-year-old orphan who was recently granted asylum, was detained for three years in adult detention centers. Nugent, *supra* note 4, at 9. Isau Diego, who fled from an abusive parent and a life on the streets of Honduras, spent two years in detention before being deported, including more than a year in secure detention. *Hearing*, *supra* note 5, at 34 (statement of Wendy Young).

determination.²⁰³ For example, the INS Guidelines and the UACPA would not have made a difference for Edgar Chocoy, since gang violence on a former member does not fall within the scope of one of the enumerated grounds.²⁰⁴ If his best interests were considered as a criteria for asylum, however, Chocoy's life may have been saved.²⁰⁵ Thus, by restricting the best interests principle to the area of access, the INS Guidelines and UACPA do not ensure that unaccompanied children are kept safe from dangerous situations.²⁰⁶

The best interests standard should be applied substantively because offering sanctuary to children who reasonably fear persecution furthers U.S. humanitarian and foreign policy.²⁰⁷ By accepting a greater share of the world's most vulnerable children, the United States can improve its public image among other nations.²⁰⁸ Additionally, given the increasing importance of international law, any framework for determining child asylum claims should consider the provisions of human rights instruments.²⁰⁹ Therefore, the United States should abide by the CRC's best interests principle in reforming its asylum law for unaccompanied minors, even when other policy goals, such as immigration control, dominate.²¹⁰

²⁰³ See Bhabha, *Demography & Rights*, *supra* note 37, at 243 ("Separated children need to have the specificity of their persecution acknowledged, as falling within the refugee definition, so that being inducted as a child soldier, threatened with imprisonment or physical abuse because of familial political affiliations, beaten as a street child, refused treatment as an autistic child, or sold as a child sex worker or domestic labourer are acknowledged as potential aspects of persecution.")

²⁰⁴ See Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (noting that child abuse, child selling, child trafficking, and other forms of child-specific persecution are not considered protected under the five enumerated grounds).

²⁰⁵ See Villarreal, *supra* note 32, at 777 (stating that the current substantive standards leave many unaccompanied children without protection and that the government should address this problem using the best interests principle).

²⁰⁶ See Bhabha, *Demography & Rights*, *supra* note 37, at 243.

²⁰⁷ Steinbock, *supra* note 23, at 188.

²⁰⁸ *Id.* at 188-89 (noting that there are instances where children may not gain asylum under the enumerated grounds but nonetheless deserve sanctuary in the United States in light of international norms, and citing the example of child soldiers because international protocols condemn recruitment of children under 15); *see id.* at 170 (discussing foreign policy objective that may be relieving asylum countries of the burden of caring for children).

²⁰⁹ See discussion, *supra* Part II.B.1. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (noting that Justice Kennedy cited to a case decided in the European Court of Human Rights in his majority opinion because he thought there was nothing to suggest that government interest in proscribing sodomy was more compelling in this country than in others).

²¹⁰ See Bhabha, *Lone Travelers*, *supra* note 147, at 281. The CRC states that child refugees under the CRC should be afforded "protection and humanitarian assistance in the

IV. IMPLEMENTING THE BEST INTERESTS PRINCIPLE IN SUBSTANTIVE REFORMS FOR UNACCOMPANIED MINORS SEEKING ASYLUM

The United States should consider the best interests of the unaccompanied minor seeking asylum similarly to how it currently determines eligibility for the special immigrant juvenile status (SIJS).²¹¹ The purpose of the SIJS provision is to alleviate hardship for many dependent alien juveniles by giving them the opportunity to apply for special immigrant classification and lawful permanent resident status, with the possibility of becoming U.S. citizens.²¹² To be eligible for SIJS, the minor first must have been declared dependent on a juvenile court or been placed in the care of a child welfare agency.²¹³ Second, the child must be deemed eligible for long-term foster care due to abuse, neglect, or abandonment.²¹⁴ Third, a court must find that it is not in the child's best interest to be returned to his or her home country.²¹⁵ This opportunity for legal status should not be limited to this narrow category of children who qualify for SIJS because unaccompanied minors who suffer other child-specific harms are no less deserving of protection.²¹⁶

enjoyment of applicable rights set forth in the present Convention" CRC, *supra* note 40, at art. 22(1), 1577 U.N.T.S. at 51.

²¹¹ See Thronson, *supra* note 35, at 1015 (noting that the SIJS only helps a narrow population of children and urging that the best interests principle be used in all decisions regarding immigrant children). In many areas of American jurisprudence, including tort, contract, and criminal law, a different legal standard applies to children because of their age. Nogosek, *supra* note 36, at 14. In tort and contract law, children are provided with substantive protections that are designed to shield them from the severity of adult legal standards. *Id.* In criminal law, child defendants benefit from a separate court system, designed with the goal of rehabilitating minors. *Id.* In *Eddings v. Oklahoma*, the U.S. Supreme Court stated: "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults." 455 U.S. 104, 115–16 (1982) (finding that youth must be considered a relevant mitigating factor in determining capital punishment for a sixteen year old); see also *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (holding that execution of children under 18 at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments).

²¹² Special Immigrant Status Rule, 58 Fed. Reg. 42,843, 42,844 (Aug. 12, 1993).

²¹³ INA § 101(a)(27)(J)(i); 8 U.S.C. § 1101(a)(27)(J)(i) (2000).

²¹⁴ *Id.* To qualify for long-term foster care, a court must determine that family reunification is no longer a viable option. Thronson, *supra* note 35, at 1006.

²¹⁵ INA § 101(a)(27)(J)(ii); 8 U.S.C. § 1101(a)(27)(J)(ii) (2000).

²¹⁶ See Thronson, *supra* note 35, at 1015; Bhabha, *Lone Travelers*, *supra* note 147, at 281 (stating that state intervention should not be limited to circumstances of child exploitation or neglect). Also there is little, if any, evidence that applying a more flexible standard for children would result in a dramatic surge in children's asylum claims in the United States. Bien, *supra* note 117, at 830–31.

The special immigrant juvenile status is the only provision in immigration law to make the best interests of the child an eligibility requirement.²¹⁷ The SIJS creates a unique hybrid system of state and federal collaboration, where child welfare experts make the best interests determinations and DHS officials decide immigration matters, such as the applicability of grounds of inadmissibility and waivers.²¹⁸ The special immigrant juvenile status therefore incorporates the best interests principle into immigration law for the first time and allows those who are better qualified about child welfare issues to make that determination.²¹⁹ Like the SIJS adjudication, a juvenile court or other independent body with child welfare expertise, not DHS, should make the best interests finding in the case of unaccompanied children asylum seekers.²²⁰

An INS memorandum regarding the SIJS states that evidence is required to show that removing the child from the United State would not be in the child's best interests, but it does not specify what kind of documentation would suffice.²²¹ Social workers, probation officers, or others writing reports to the court should discuss their efforts to determine the conditions for the child in the home country, the conditions for the child in the United States, and the basis for their recommendation that it is not in the child's best interest to return to her home country.²²² The plain language of the statute requires an administrative or judicial determination that it would not be in the best interest to return the child to her previous country, but not direct evidence about the conditions in the home country itself.²²³ Thus, it is unclear whether the country conditions and home studies on parents

²¹⁷ Thronson, *supra* note 35, at 1004; see INA § 101(a)(27)(J)(ii); 8 U.S.C. § 1101(a)(27)(J)(ii) (stating that a determination must be made on whether it would be in the alien's best interest to be returned to his or her previous country).

²¹⁸ See INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); Thronson, *supra* note 35, at 1004, 1008.

²¹⁹ See Thronson, *supra* note 35, at 1004.

²²⁰ See *id.*

²²¹ Memorandum from Thomas E. Cook, Acting Assistant Commissioner Adjudications Division, to the Regional, District, and Service Center Directors and Regional and District Counsel (July 9, 1999), available at <http://uscis.gov/graphics/lawsregs/handbook/AdjMem0135Pub.pdf> [hereinafter SIJS Memorandum].

²²² SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN UNDER JUVENILE COURT JURISDICTION 18 (2005), available at <http://www.ilrc.org/resources/sijs/2005%20SIJS%20manual%20complete.pdf> [hereinafter ILRC MANUAL].

²²³ See INA § 101(a)(27)(J)(ii); 8 U.S.C. § 1101(a)(27)(J)(ii) (2000); see also 8 C.F.R. § 204.11(c)(6) (2005) (repeating the statutory language that a court or administrative body must have made the finding).

or other potential caretakers in the country of origin should be submitted to meet DHS demands.²²⁴

While the SIJS law makes significant strides in treating children more humanely, child advocates argue that a 1997 amendment removes too much power from juvenile courts.²²⁵ The amendment required the Attorney General's consent to the SIJS proceeding in juvenile court for children who are in DHS custody.²²⁶ Children who are apprehended at the border, therefore, must obtain DHS consent to the jurisdiction of juvenile court, while those who are already in the United States do not have to obtain consent.²²⁷ According to an INS memorandum to its regional and district directors, this consent "should be given if (1) the juvenile would be eligible for SIJS if a dependency order is issued, and (2) in the judgment of the district director, the dependency proceeding would be in the best interests of the juvenile."²²⁸ Child advocates criticize this approach because it allows DHS to prejudge precisely the issue that the statute places before the juvenile court—the best interests of the child.²²⁹ Nevertheless, the design of the SIJS law recognizes, at least in theory, that there is a critical difference between DHS and the juvenile court.²³⁰ With some additional safeguards to ensure that DHS does not circumvent the

²²⁴ ILRC MANUAL, *supra* note 222, at 18.

²²⁵ Department of Justice Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2460 (1997) (statute codified as amended at INA § 101(a)(27)(J)(iii); 8 U.S.C. § 1101(a)(27)(J)(iii) (2000)); *see, e.g.*, Katherine Porter, Note, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 442 (2001).

²²⁶ § 113, 111 Stat. at 2460 (codified as amended at INA § 101(a)(27)(J)(iii); 8 U.S.C. § 1101(a)(27)(J)(iii)). A juvenile court's dependency order is invalid if it does not first obtain the Attorney General's consent to the jurisdiction. SIJS Memorandum, *supra* note 221. For children not in DHS custody, the DHS has little discretion after the juvenile court issues a dependency order. *Id.* Consent must be given if the juvenile court makes the required findings. *Id.*

²²⁷ Thronson, *supra* note 35, at 1005.

²²⁸ SIJS Memorandum, *supra* note 221. Furthermore, while the SIJS has been codified for over a decade, authorities have yet to promulgate regulations that would direct DHS on when consent to access state dependency proceedings is mandatory. Nugent, *supra* note 4, at 11. According to advocates, many abused, abandoned, and neglected children in ORR care still do not receive DHS consent because no binding regulations have been passed. *Id.*

²²⁹ *See* Thronson, *supra* note 35, at 1010; Porter, *supra* note 225, at 442. Advocates recommend that, at a minimum, the consent function should be transferred from DHS Immigration and Customs Enforcement to DHS Citizenship and Immigration Services, since the latter has expertise in immigration benefits adjudication. Nugent, *supra* note 4, at 11.

²³⁰ Thronson, *supra* note 35, at 1009.

design, the SIJS can meaningfully balance the best interests of the child and the need for immigration control.²³¹

The SIJS law serves as a model for reform of the United States asylum law for unaccompanied children by using the best interests principle as the main criteria instead of requiring that the child's harm fall within the scope of the five enumerated grounds for asylum.²³² The unaccompanied child asylum seeker would have to demonstrate that 1) it is in her best interests not to return to her country of origin, and 2) she fears or suffered harm that the government in her home country was unwilling or unable to prevent.²³³ This two-prong decision-making process before an independent body with child welfare expertise and DHS, respectively, remedies the difficulty of applying the traditional refugee definition to unaccompanied children.²³⁴ It also locates the best interests determination in an independent body, removing a potential conflict of interest in asking DHS to consider the children's interest while carrying out its law enforcement or adjudicatory functions.²³⁵

CONCLUSION

Current American asylum law jeopardizes the protection of thousands of children who have fled poverty, hardship, and persecution to arrive in this country.²³⁶ These unaccompanied children are especially vulnerable to a broad array of human rights violations as children and refugees without an adult caretaker.²³⁷ While other areas of U.S. jurisprudence recognize that children have unique vulnerabilities and

²³¹ See *id.* at 1008 (discussing the "workable balance" of the statute). The UACPA makes improvements to the SIJS classification. See generally S. 119, 109th Cong. § 301 (2005). First, it would make the juvenile court's dependency declaration binding on the Secretary of DHS. S. 119 § 301(a)(i). Second, the bill would not require the AG's consent for children in DHS custody to start the SIJS proceedings; instead, the bill would allow the ORR to certify that a minor's application for SIJS is valid. See S. 119 § 301(a)(iii).

²³² See Thronson, *supra* note 35, at 1015 (stating that reforms to safeguard the best interests principle in the SIJS law are not sufficient; the best interests principle should be applied to a wider population of unaccompanied children).

²³³ See discussion *supra* Part II.A. DHS could also deny the unaccompanied minor asylum if she falls under one of the grounds of inadmissibility. See generally INA § 212; 8 U.S.C.A. § 1182 (2000) (listing the grounds of inadmissibility).

²³⁴ See Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (noting that child abuse, child selling, child trafficking, and other forms of child-specific persecution are not considered protected under the five enumerated grounds).

²³⁵ See Thronson, *supra* note 35, at 1015 (discussing the DHS's conflict of interest in making the best interests determination).

²³⁶ Nugent, *supra* note 4, at 9.

²³⁷ See Seugling, *supra* note 10, at 888.

provide separate legal standards to shield them from the severity of adult laws, asylum law makes no such distinctions between children and adults.²³⁸ Children are forced to meet the same evidentiary and legal standards as adults.²³⁹ In an asylum system designed primarily for adults, unaccompanied children experience difficulty meeting the specialized categories for gaining asylum.²⁴⁰ Moreover, without representation or a guardian ad litem, children are pitted against a trial attorney in an unfamiliar language, where the stakes are sometimes a matter of life or death.²⁴¹

The human rights and children's rights movements have advanced the best interests of the child both domestically and abroad, as demonstrated by American family law jurisprudence and the widespread acceptance of the CRC globally.²⁴² While the United States has taken steps to acknowledge the interests of unaccompanied minors through the INS Guidelines and UACPA, it has restricted best interests considerations to procedural matters. Thus, unaccompanied children are still marginalized in the actual legal determination.²⁴³ To ensure that unaccompanied children are not deported into harmful situations, the United States must consider the best interests of the child in their asylum applications.²⁴⁴ By replacing the current criteria with a program that mirrors the SIJS law, unaccompanied minors may finally attain the legal support they have long-since needed and deserved.²⁴⁵

²³⁸ Nogosek, *supra* note 36, at 14.

²³⁹ INS GUIDELINES, *supra* note 28, at 2.

²⁴⁰ See Bhabha, *Seeking Asylum Alone*, *supra* note 11, at 143 (noting that many forms of child-specific persecution are not considered protected under the five enumerated grounds); Olivas, *supra* note 18, at 162 (stating that most children's experiences do not fit neatly within the specialized grounds for asylum).

²⁴¹ Nugent, *supra* note 4, at 9.

²⁴² See Woodhouse, *supra* note 72, at 436, 439; see discussion *supra* Part II.

²⁴³ Bhabha, *Demography & Rights*, *supra* note 37, at 243.

²⁴⁴ See Villarreal, *supra* note 32, at 777.

²⁴⁵ See discussion *supra* Part IV.