2007

Alone and Ignored: Unaccompanied Alien Children Seeking Asylum in the United States, Canada and Australia

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Ani E. Ajemian

Abstract:

The United States, Canada and Australia have enacted asylum legislation comporting with the 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees. Each of these three countries has also signed onto the United Nations Convention on the Rights of the Child, although only Canada has completed ratification. The asylum legislation in place applies equally to child applicants, yet under a standard meant for adults. This misapplication requires children to articulate their claim as intelligently as an adult, seek their own counsel, and often be detained with adults and sometimes criminals in the interim. It is the opinion of this author that the asylum laws for children of the three countries of focus are gravely inadequate in handling unaccompanied children seeking asylum. Compliance with the Convention on the Rights of the Child requires the implementation of child oriented asylum legislation using the “best interests of the child” principle as the basis for review. To place unaccompanied alien children seeking asylum on equal footing and in consideration of their nature as children, this principle must be applied.

I. Introduction

Imagine that you are suddenly orphaned by political violence. You are twelve years old and have mild retardation. A friend ultimately secures a ticket and immigration documents to fly you to the United States for refuge. Upon arrival, you are arrested for bearing a fake passport. You are interrogated alone in a language you do not speak or understand. You find yourself locked up in an adult jail with criminal convicts, waiting 8 months for an administrative immigration hearing on your claim to asylum. The immigration court denies you asylum, and you remain in jail while you appeal your case. You spend your first three years in the United States shuffled from jail to jail. You are finally released to a refugee shelter, and a new asylum hearing is ordered. This extraordinary step is the result of international media coverage and over seventy members of Congress, numerous public interest organizations, and thousands of citizens appealing to immigration authorities on your behalf. You then undergo the longest asylum trial in U.S. history,
with dozens of witnesses from four continents supporting you. That was the tragic reality of Malik Jarno, an orphan from Guinea.¹

Today, children under eighteen make up roughly half of the world’s refugee population.² Unaccompanied children, or those children arriving without family or guardianship, are estimated to make up approximately 3 to 5% of the world’s refugee population.³ While one would like to believe that the story of Malik Jamo is unique, it is unfortunately a fair and reasonable representation of what most unaccompanied children face in a variety of countries in which they seek refuge from political persecution, war, or the like.⁴ The United States,

⁴ See Christine Gordon, Are Unaccompanied Alien Children Really Getting a Fair Trial? 33 Denv. J. Int'l L. & Pol'y 641, 641-673 (2005). Alien children are classified as “unaccompanied children” when they arrive or are found in the United States alone and are under the age of 18. Id. These children may also be described as “separated children.” Id. The average age of unaccompanied children held in immigration detention facilities is 15 years old, with some as young as 18 months old. Id. Many of these children are victims of poverty, abusive child labor practices, human trafficking, rape, forced prostitution, or armed conflict in their home countries and travel long distances to reach the United States in the hope that they can find a better life for themselves. Id. In other instances, children are unaccompanied because they have been separated from their families during travel or have been abandoned by their parents. Id. Upon arriving in the United States, parents are sometimes afraid of coming forward to claim their children because they fear being deported. Id. These unclaimed children are left to face immigration officials alone. Id.
Australia and Canada are just a few of many countries that share inherent deficiencies in their asylum-seeking systems due to bureaucratic defects, poor management, racist stereotyping and an overall lack of prioritization. While each country juggles their own immensely complicated immigration concerns, this paper will attempt to show that there is a consistent lack of attention given to the special needs of unaccompanied children seeking asylum in all three. The legal structure of each of these countries of focus are just a few of many warranting detailed attention, but are of importance considering each has periodically received some of the greatest numbers of refugees worldwide. Although each of these countries of focus have formulated its own unique way of receiving and handling asylees, all have consistently failed to address the needs of unaccompanied children within their legislation.

This paper attempts to provide an overview of the approach taken by Canada, the United States and Australia to children who arrive and seek asylum alone. The discussion of each country’s asylum policy revolves around their interpretation and implementation of the 1951 Convention Relating to the Status of Refugees (“Convention”), the 1967 Protocol Relating to the Status of Refugees (“Protocol”), and the United Nations Convention on the Rights of Children.

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5 See Catherine Dauvergne, *Evaluating Canada’s New Immigration and Refugee Protection Act in its Global Context*, 41 Alberta L. Rev. 725 (December 2003). Although Canada has implemented the Convention on the Rights of the Child, many inconsistencies exist in the manner in which they handle unaccompanied children. *Id.*

Australia has an unfortunate detention policy which includes detaining children, both unaccompanied and not, and while the United States does not have an affirmative detention policy for children, failures in the system have left many children to a similar fate. *Id.*

6 The United States, Canada and Australia have distinct immigration laws, yet are comparable on their face for being a regular destination for asylees. Because of their differences they pose an interesting opportunity for comparison.

7 See Gordon, *supra* note 4 at 645-8. While other international law exists relating to children’s issues, these documents perhaps provide the most specialized and powerful protections available. *Id.* The 1951 Convention
(CRC)\(^8\). These documents were designed to protect persons who need to remain abroad as a result of fear of persecution based on civil or political status.\(^9\) This paper ultimately argues that the policy of each country of focus comes up terribly short when it comes to the needs of unaccompanied children seeking asylum in light of the Convention, Protocol and CRC.\(^{10}\)

affirms the Universal Declaration of Human Rights’ principle “that human beings shall enjoy fundamental rights and freedoms without discrimination,” and went further to “assure refugees the widest possible exercise of these fundamental rights and freedoms.” \textit{Id.} The 1967 Protocol Relating amended the definition of a refugee, building on the 1951 Convention, to establish asylum as a permanent and continuing form of protection for all people. \textit{Id.} Another author comments on the CRC as a “critical milestone” in children’s rights, yet lacking in effectiveness due to “the absence of a duty on States to provide asylum for unaccompanied child refugees.” \textit{See} Maria Bucci, \textit{Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States}, 30 New Eng. J. on Crim. & Civ. Confinement 275, 275-304 (2004), \textit{infra}.\(^8\) U.N. Convention on the Rights of the Child (CRC), Nov. 20, 1989, 28 I.L.M. 1448 (1989). The Preamble of the CRC states, “The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” \textit{Id.} The CRC requires special considerations for children in consideration of their special needs as children. In addition to requiring appropriate medical and emotional care, the CRC prohibits the detention of children except in situations of last resort, and requires the best interest of the child to be taken into account, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” \textit{Id.}\(^9\) \textit{See} Bridgette Carr, \textit{We Don’t Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well Founded Fear Analysis for Child Refugee Applicants}, 33 Pepp. L. Rev. 535, 535-573 (2006). Bridgette Carr analyzes the inadequacies of the present US system as it applies to children, focusing on the problems associated with eliciting an expression of subjective fear from children. \textit{Id.} She discusses the need to acknowledge a child’s different methods of expressing fear, or the silence produced by subjective fear itself, that may lead immigration officers to come to incorrect conclusions. \textit{Id.}\(^{10}\) For purposes of this paper the terms “refugee” and “asylee” may be used interchangeably; the difference typically being whether the applicant is seeking protection from another country while still residing in her home state (refugee
To appropriately discuss and compare the course of action taken by the United States, Canada and Australia concerning unaccompanied children, this paper discusses how each nation’s laws are built to handle this slight yet extraordinarily vulnerable category of refugee, focusing on how they are initially received and screened by immigration officers, with particular focus as to any domestic detention policy. There exist a number of issues related to child asylum seekers that deserve equal time and focus, including but not limited to family reunification; psychological trauma; racial stereotyping; the special needs and risks concerning young girls; the role of children’s rights in legislative policy; and the conditions of those countries from which status), or, from within the country to which she has fled (asylum). In the United States, immigration law defines an asylee as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 208(a) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1158(a), gives the Attorney General discretion to allow political asylum to any alien the Attorney General determines to be a “refugee” within the meaning of section 101(a)(42)(A) of the Act. To establish eligibility on the basis of a “well-founded fear of persecution,” the alien's fear of persecution must be both subjectively genuine and objectively reasonable. *Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1178 (9th Cir. 1991).

11 See Mona Pare, *Why have street children disappeared? – The role of international human rights law in protecting vulnerable groups*, International Journal of Children’s Rights, Vol.1 No.1 (March 2003). The subject of children’s rights is of great debate. *Id.* While it would seem that providing children with those rights that ideally are applied to adults as well, the other side of the argument is that giving these “rights” imposes an irresponsible burden on individuals not yet equipped to handle. *Id.* Mona Pare argues that street children should be identified as an independent population, and allowed to live on the streets without interference. *Id.* The danger of this argument lies in confusing the casual factors that brought these children to live on the streets with a choice to live on streets. *Id.* Children’s rights as a movement may have good intentions, but it is the opinion of this author that this movement is
children are fleeing.\textsuperscript{12} It is impractical and would be an injustice to the breadth of these subjects to assume this paper could discuss each in its entirety. Rather, this article provides a broad overview of the issues unaccompanied children face, the asylum policies of the three countries of focus, and those issues that appear to be consistent amongst them.

II. Why They Leave

A variety of factors and the nature of the experience a child undergoes will determine why and in what condition she flees her home country.\textsuperscript{13} The reasons why separated children

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{12} Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, (ESCOR), Hum. Rts. Comm., 58\textsuperscript{th} Sess., U.N. Doc. E/CN.4/2004/9 (2004). A sad number of dangers exist for children living in nearly every area of the world. \textit{Id.} Those most extreme, just to name a few, include the likelihood of abduction to be used as soldiers, being trafficked from country to country for the sex industry, and living on the streets in an effort to escape indescribable abuse at home. \textit{Id.} While one would like to believe these situations exist in isolated locations, they are prevalent from Uganda to the United States. \textit{Id.} The sex trade of children in particular is a problem of growing concern. \textit{Id.}

\item \textsuperscript{13} See Human Rights Watch, \textit{The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda}, Africa Human Rights Watch Children's Rights Project (September 2001). Uganda poses a terrifying example of children being exposed to the worst kind of human rights atrocities of the twenty-first century. \textit{Id.} The Lord’s Resistance Army, a rebel group in opposition to the sitting government has made common practice of kidnapping local children and indoctrinating them as soldiers. \textit{Id.} As one boy described, “One boy tried to escape, but he was caught. They made him eat a mouthful of red pepper, and five people were beating him. His hands were tied, and then they made us, the other new captives, kill him with a stick. I felt sick. I knew this boy from before. We were from the same village. I refused to kill him and they told me they would shoot me. They pointed a gun at me, so I had to do it. The boy was asking me, "Why are you doing this?" I said I had no choice. After we killed him, they
\end{enumerate}
\end{footnotesize}
leave their home countries are complex and numerous, and, again, deserve a level of attention beyond the scope of this paper. A recent study sponsored by European members of the Save the Children Alliance examined 218 case studies of separated children who had traveled to Western Europe, citing these reasons:

“…violent death of parent(s), sometimes in front of child; detention and torture of child; armed conflicts that target child civilians; genocide; forced recruitment of children into armed forces, some under 10 years of age; trafficking of children for the purposes of prostitution under brutal conditions; persecution of child’s ethnic group; denial of education due to the child’s ethnic identity; political activities of the child or child’s family members resulting in persecution; rape and sexual assault; abuse and/or abandonment by parents; poverty and complete lack of opportunity.”

The Save the Children study found that in many cases the children’s parents were dead, missing, imprisoned or ill, or had themselves fled their country, leaving the child in the care of family or friends. In other cases, it was the child who was particularly at risk, and the parents therefore decided to send the child to safety. Some children, left entirely alone, manage to travel abroad through their own courage and ingenuity. Finally, many children are brought to other countries by traffickers for sexual or labor exploitation who organize their travel arrangements.

made us smear his blood on our arms. I felt dizzy. There was another dead body nearby, and I could smell the body. I felt so sick. They said we had to do this so we would not fear death and so we would not try to escape.” Id.

14 See Separated Children Seeking Asylum in Canada, supra note 3 at 7.

15 Separated Children in Europe Program: “Statement of Good Practice,” Save the Children and UNHCR, October 2000; see also Separated Children Seeking Asylum in Canada, supra note 3 at 7.

16 See Separated Children Seeking Asylum in Canada, supra note 3 at 7.

17 Id.

18 Id.

19 Amy McDoy, UN Report: Children “Playing Sex for Money”: A Brief History of the World’s Battle Against the Commercial Sexual Exploitation of Children, 18 N.Y.L. Sch. J. Hum. Rts. 499, 499-505 (Summer 2000). Since the entry into force of the CRC, the commercial sexual exploitation of children has been an ongoing battle for
Upon their arrival, unaccompanied children are then faced with the often complex and confusing immigration system of their host state. Yet handling the legalities of their case is just one challenge of many they will face. Most, if not all, of these children have just experienced some traumatic event targeted at destroying their life or wellbeing, often leaving psychological complications such as PTSD or anxiety disorders. Many will not speak the language of their host state and are not always guaranteed an interpreter. Unaccompanied children are also handling the weight of being alone, often resulting in great emotional distress from their respective experience of abandonment or separation.

III. Unaccompanied Children and Asylum Defined

Asylum seekers must first be defined as a special group with special needs, and separate from that of the general immigrant population. Unlike some of the reasons immigrants chose to leave their home state, asylees are forced to leave for their personal safety or the safety of their developing and industrialized countries, multi-national and national non-governmental organizations, and the United Nations. Id. In 1999, the United Nations Deputy Secretary-General estimated that over 30 million children were trafficked each year, in many instances for sexual exploitation, by traffickers who went relatively unpunished. Id. For the past twelve years, recognizing the serious and sometimes insidious nature of these offenses, international organizations have struggled to identify the causes and solutions of the problem while attempting to precisely categorize these offenses. Id. This struggle has resulted in a separate movement within children's rights organizations to address the commercial sexual exploitation of children, and the growth of an arsenal of international and state specific weapons designed to combat this growing crisis. Id.

See Carr, supra note 8 at 545. Brigitte Carr further bolstered her argument for ridding the U.S. system of the “subjective fear” test requisite to asylum claims, in consideration that a traumatized child may not be able to express their state of mind to the satisfaction of an immigration officer. Id.

family, and may be in danger of ongoing persecution for political opinion or belief.\textsuperscript{22} Because of the unstable nature of an asylee’s departure, they often arrive without legitimate papers or any papers are all, have few if no connections to their host state, and may arrive penniless.\textsuperscript{23}

In February 1997, the Office of the United Nations High Commissioner for Refugees (UNHCR) published its Guidelines on Policies and Procedures in dealing with unaccompanied children seeking asylum.\textsuperscript{24} These guidelines referred to the Convention, Protocol and CRC as the defining international law in this regard.\textsuperscript{25} By definition, the language of the Convention is broad in describing a refugee. Article I of the Convention describes those owed protection:

\begin{quote}
\ldots owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{26}
\end{quote}

\textsuperscript{22} See Gordon, \textit{supra} note 4 at 623. Gordon also lists reasons why children flee their home country as including sex trafficking, child labor practices, rape and forced prostitution, to name a few. \textit{Id.}

\textsuperscript{23} See Bucci, \textit{supra} note 7 at 275. Bucci discusses the dire circumstances child asylees flee in attempting to find safety in a new country. \textit{Id.} In particular, she discusses the psychological implications in dealing with immigrant children and the trauma they are most likely living with. \textit{Id.}

\textsuperscript{24} See Gordon, \textit{supra} note 4 at 649. The UNHCR guidelines state that because of their special vulnerabilities, unaccompanied children seeking asylum should be guaranteed access to all territories, should be provided with legal representation upon arrival to a territory, should have their claims examined in a manner appropriate for their age, and should have access to asylum procedures regardless of their age. \textit{Id.} The guidelines also provide that unaccompanied children be treated as such, and that port authorities should take necessary measures to ensure that they are identified promptly and on a priority basis upon entry. \textit{Id.}

\textsuperscript{25} \textit{Id.}

While at first glance this definition may appear to apply to a broad range of individuals seeking asylum, in actuality it is a difficult hurdle to overcome. The dominant international interpretation of the phrase “well-founded fear” has restricted the Convention in such a way as to require, at a minimum, an expression of fear by the refugee applicant. In addition, Canada, the United States and Australia have restricted the ability of the Convention to be applied universally by requiring persons seeking protection to fulfill both an objective risk plus a subjective apprehension element under the well-founded fear analysis. The difficulties and sometimes inability of child asylum applicants to satisfy the subjective apprehension element of the well-founded fear analysis has been recognized implicitly and explicitly through administrative guidelines in Canada and the United States, giving child asylum applicants a procedural exemption from the subjective apprehension requirement. One legal authority argues that this procedural exemption will not be enough until it is strengthened and formalized into a singular objective test by the UNHCR and across all jurisdictions that are signatories of the Convention and the Protocol. This argument is correct: in order to implement the most humane and practical guidelines dealing with child asylum seekers, there must be a streamlined approach that

27 See Carr, supra note 8 at 536.

28 Id.

29 See Gordon, supra note 4 at 655. In the United States, an asylum officer will meet with an applicant no later than 43 days after the submission of the application. Id. The purpose of this interview is for the alien to prove his case of persecution to the asylum officer. Id. If the asylum officer is not convinced that a well-founded fear of persecution exists, the application will not be recommended for asylum. Id. If the application is not recommended for asylum, the case is then referred to an immigration judge under the Executive Office for Immigration Review. Id.

30 See Carr, supra note 8 at 538.

31 Id.
recognizes the added psychological, financial and cultural difficulties a child faces in meeting a
difficult standard which is, by and large, designed for adults. Therefore, it is the opinion of this
author that the personal and subjective difficulties children face must be taken into account to
ensure they are given the same chances as their adult counterparts in seeking asylum.

IV. The United States

According to the UNHCR’s Asylum Levels and Trends in Industrialized Countries, the
United States received the second greatest number of asylum-seeking applicants in 2005,
receiving 37,500 applications or 16% of all applications submitted. Each year, roughly 5,000
of these asylum seekers are children unaccompanied by a legal guardian.

The law of asylum in the United States is principally derived from the Convention and
the Protocol. To meet the criteria and win asylum, an individual must show that he/she: (1)
meets the statutory definition of “refugee”; (2) is not barred from asylum; and (3) merits a grant
of asylum in the exercise of the adjudicator’s discretion. The definition itself, codified in the

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32 See Bucci, supra note 23 at 275-304. A number of authors have considered added psychological complications to
consider with child asylum applicants. Id. For example, it is not uncommon for children to develop Post Traumatic
Stress Disorder (PTSD) after experiencing a traumatic event. Id. Many child refugees suffer from this disorder
because they are fleeing from traumatic events such as war and political violence. Id. A child with PTSD often
exhibits symptoms such as confusion and difficulty remembering events, all of which can complicate the applicant
review process. Id.

33 U.N. Human Rights Commission (UNHCR), Population Data Unit/PGDS, Division of Operational Support,

34 Id.

35 Anwen Hughes, Asylum and Withholding of Removal – A Brief Overview of the Substantive Law, 1535 PLI/Corp

36 Id.
Immigration and Nationality Act (INA), 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 account of race, religion, nationality, membership in a particular social group, or political opinion.”37 The INA fails to clearly define persecution, perhaps because of the unfortunate reality that because persecution covers such a broad range of harm, threats of harm, and various measures that may constitute persecution in their cumulative effect, formulating a definition may not be a useful exercise.38 Claimants can also demonstrate that due to past persecution in their home state, that they now suffer a reasonably well founded fear of persecution in the future.39 Because children are not included in consideration of those special forms of persecution applicable only to them, they must establish their persecution on account of one of the five enumerated grounds like any adult.40

What’s more, immigration law could possibly be one of the most complicated, expensive and time intensive areas of U.S. policy. In U.S. immigration law, a “child” is defined in relation to a parent; thus the law does not recognize the child without a parent.41 To be a “child,” one must establish a recognized type of parent-child relationship such as birth in wedlock, creation of stepchild relationship, bona fide relationship with a natural father, or adoption.42 This approach leaves the most vulnerable kind of applicant, and most likely in need of the most assistance, with an impossible burden. While most children apply for asylum through their parents or legal

37 See Dalrymple, supra note 2 at 133.
38 See Hughes, supra note 35 at 294.
39 Id.
40 See Dalrymple, supra note 2 at 133-135.
41 Id.
42 Id.
guardian as an extension of the overriding case, unaccompanied children are forced to navigate a confusing legal system designed primarily for adults. Children are required to meet the same legal standard as their adult counterparts, and if unaccompanied by an adult in the process, they are left to depend upon the kindness of non profit groups and social services for support or are left to removal proceedings.

Because asylee children have no right to government appointed counsel or guardians ad litem, most go unrepresented in removal proceedings. While the United States incorporated much of the Convention, which provides guidance on handling unaccompanied children, into its asylum provisions, ratification is still yet to occur. Amnesty International notes that the U.S.

43 Id.

44 See Bucci, supra note 23 at 275-304. While the CRC and the 14th amendment presumably apply to unaccompanied children because due process is granted to “persons” rather than just “citizens” of the United States, refugee children are often not protected due to technical requirements provided by the United States “Entry Doctrine.” Id. The Entry Doctrine creates a loophole that often denies refugee children legal protections due to its strict language. Id. For example, if the INS finds that a refugee has not “entered” the U.S. under the technical language of the doctrine, then that refugee may be detained and subject to exclusion proceedings where due process guarantees are not recognized. Id.


46 See Gordon, supra note 4 at 670-672. This Convention created the international standard for evaluating an asylum seeker’s claim of persecution, a standard that continues to be used in the U.S. today. Id. The Convention provides protections for refugees including “free access to the courts of law…” in addition to other positive requirements. Id. While the U.S. has modeled its asylum laws after the Convention, its failure to ratify allows for avoidance of some of its main principles. Id. It is the opinion of this author that without ratification the U.S. is sending a message to the international community that it will not subject itself to international standards on the most minimal level for protecting a highly vulnerable refugee group. Id.
Immigration Court does not have a designated set of special procedures for handling cases of unaccompanied minors and questions whether initiatives have gone far enough to ensure that court personnel are trained in dealing with issues of special relevance to children, including credibility determinations, child sensitive questioning and listening, and the presence of a trusted adult in the courtroom.\textsuperscript{47} In proceedings where a child is lucky enough to find representation, usually through a \textit{pro bono} attorney, the child is “four times as likely to be granted asylum by an Immigration Judge.”\textsuperscript{48}

In addition, another inconclusive and ongoing debate in the U.S. is on the requirement that children show a well founded fear of persecution in the same manner as adults.\textsuperscript{49} One reputable author theorizes that by requiring children, including infants, to demonstrate their subjective apprehension to a decision maker creates a barrier to effective protection that many children are unable to surmount.\textsuperscript{50} While some procedural exemptions have been included in U.S. administrative policy for children in this regard, one author stresses that this procedural exemption is inconsistent and needs to be strengthened and formalized into a singular objective.


\textsuperscript{48}See Lopez, supra note 45 at 607. This fact paints a powerful picture as to how efficient representation can make a tremendous difference for an asylum-seeking child. \textit{Id.} Knowing that such a difference can be made by providing equal opportunity to representation under the law provides just one more argument for full ratification of the Convention and CRC in the U.S. and greater attention to the needs of unaccompanied children. \textit{Id.}

\textsuperscript{49}See Carr, supra note 8 at 553.

\textsuperscript{50}Id.
risk test. Also, because the subjective apprehension analysis is utilized by the United States, Canada, the United Kingdom, Australia, Ireland and Hong Kong, a streamlined approach may be best implemented by the UNHCR and across all jurisdictions that are signatories to the Convention and Protocol.

This present approach in the U.S. also ignores those dangers children flee that are special to them because of their age and respective positions in their home state’s culture and society. As previously discussed, children face dangers relevant only to them: recruitment as child soldiers, child marriage, bonded labor, child sex trafficking and persecution by police forces when pushed onto the streets for reasons of abuse or poverty, to name just a few. Based on this short list alone, a powerful argument can be made that children, unaccompanied minors in particular, who experience child-specific persecution could constitute a particular social group under U.S. asylum laws. In some cases, the very fact that the applicant is a child is an essential basis of the child’s asylum claim.

U.S. policy also has its fair share of problems in regards to detention practices. In 1984, the Western Regional Office of the INS (now the Department of Homeland Security)

51 Id.

52 Id.

53 U.N. Committee on the Rights of the Child (UNCRC), Fortieth Session, Consideration of Reports Submitted by States Parties under Article 44 of the Convention (November 2005). Article 44 of the CRC requires state parties to submit reports on the status of ratification/implementation of the CRC. Id. Upon consideration of these reports, the 2005, Fortieth Session discusses the most dangerous issues facing children today, including bonded labor, sexual exploitation, and living on the streets. Id.

54 See Dalrymple, supra note 2 at 135-136.

55 See Lopez, supra note 45 at 608.
(hereinafter, “DHS”) changed its regional policy, mandating that unaccompanied alien children in deportation proceedings would only be released to a parent or guardian unless “unusual and extraordinary” circumstances warranted release to another adult.\textsuperscript{56} This policy was challenged in 1985 by a class action suit, \textit{Flores v. Meese}, representing a class “consisting of aliens under the age of 18 who were detained by the INS Western Region because a parent or legal guardian failed to personally appear to take custody of them.”\textsuperscript{57} After much adjudication, the resulting “Flores Agreement” required that INS treat “all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.”\textsuperscript{58} Specifically, the Flores agreement required the INS to “place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.”\textsuperscript{59}

Although the United States has made recent changes as to its detention policies regarding asylee children, these changes are hardly expansive enough to meet international standards or that of the Flores Agreement.\textsuperscript{60} In 2001 the United States is estimated to have detained about

\begin{itemize}
\item \textsuperscript{56} Devon Corneal, \textit{On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?}, 109 Penn. St. L.Rev. 609, 609-656 (2004). One problem presented by this policy is that often parents or guardians may fail to claim their children in fear of being deported themselves. \textit{Id.} This added complication increases the risk of a child being forced to maneuver the immigration system alone. \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} See Corneal, \textit{supra} note 56 at 644-645.
\end{itemize}
20,000 persons in some form of immigration detention, one third of which were asylum seekers. This author suggests that this deficiency in the system is again representative of the missing link within U.S. asylum law and those policies that apply to the needs of children. In fact, children seem to bear the worst aspects of this shortcoming in U.S. law. Presently, it is DHS policy to detain unaccompanied juveniles who enter the U.S. illegally. Priority is placed on releasing children to parents, legal guardian or adult relative, already in the U.S.. Where no such arrangement can be met, DHS must release the child to a responsible adult designated by the parent or legal guardian in a sworn affidavit or to a licensed child-care facility such as foster care or a boarding home. Nonetheless, in 2000, authorities detained nearly 4,700 unaccompanied children arriving at U.S. borders without appropriate documentation.

61 See The Castan Centre for HR Law, Monash University, Detention, Children and Asylum Seekers: A Comparative study, available at: http://www.hreoc.gov.au/Human_Rights/children_detention/submissions/castan.html. The fact that such a large number of asylum seekers are so readily detained is extremely problematic. Id. In addition, the argument is made in this article that for children, this type kind of procedural imprisonment, due to the lack of an appropriate alternative, is traumatic. Id.

62 See Detention, Children and Asylum Seekers: A Comparative Study, supra note 61. It is not uncommon for children (and adults) to enter the United States with illegal documentation. Id. Often illegal documentation is produced and given to fleeing individuals so they may escape quickly to safety. Id. While it is understandable that United States policy can not condone entering the country on the basis of illegal documentation, the theme of this article is that children require separate and special consideration separate from their adult counterparts. Id. A child entering a host country with documentation in hand provided by an older relative to help them escape danger should hardly be treated as a criminal in their efforts to find safety. Id.

63 See Corneal supra note 56 at 641.

64 See Detention, Children and Asylum Seekers: A Comparative Study, supra note 62.

65 Id.
To research the issues related to juveniles in immigration detention, Amnesty International ("AI") sent a questionnaire in December 2002 to 115 facilities in the U.S. that reportedly have been used by immigration authorities to house unaccompanied children, requesting information on the policies, procedures and conditions of detention.\textsuperscript{67} AI also visited three detention facilities housing unaccompanied minors.\textsuperscript{68} As a result of this research, AI found that unaccompanied children caught in the U.S. immigration system are routinely deprived of their rights.\textsuperscript{69} AI found that unaccompanied children in the U.S. are not only detained, but often are held in facilities that routinely fail to adhere to both international and domestic standards.\textsuperscript{70} Only seventeen percent of the secure facilities responding to AI's survey reported that they house unaccompanied children separately from the juvenile offender population.\textsuperscript{71} Nearly half (48\%) of the secure facilities reported that they house unaccompanied minors in the same cells as the juvenile offenders.\textsuperscript{72} Moreover, many children spend months or even years in detention -- even though relatives or other appropriate adults are willing to take care of them, an arrangement that is permissible and even preferable according to U.S. standards governing the treatment of unaccompanied minors.\textsuperscript{73} These standards' criteria are ignored, as immigration authorities often fail to ensure the timely release of children.\textsuperscript{74}

\textsuperscript{67} See Unaccompanied Children in Immigration Detention, \textit{supra} note 47.

\textsuperscript{68} Id.

\textsuperscript{69} Id.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} Id.
It is important to note that these children are held in detention for administrative reasons, not as punishment for criminal behavior. They are not charged with any crime, but are often held for months or even years in punitive conditions pending resolution of their immigration status. Unaccompanied children have little choice in the decisions that lead to these predicaments, but they do have special rights that are guaranteed under international laws and standards. The Homeland Security Act, passed on March 1, 2003 by the U.S. Congress, has created an opportunity to change the way that unaccompanied children are treated. The INS has ceased to exist and the newly created Department of Homeland Security (DHS) has assumed many of its responsibilities. Furthermore, some critical functions relating to the care, custody

75 See Unaccompanied Children in Immigration Detention, supra note 47.
76 Id.
77 Adam Lopatka, An Introduction to the United Nations Convention on the Rights of the Child, Transnational Law Review. In adopting the Convention, the U.N. General Assembly was convinced that it would function as a standard-setting instrument in the field of human rights by contributing to the protection of children's rights and the assurance of their well-being. Id. The General Assembly was profoundly concerned that the situation of children in many parts of the world remains critical as a result of inadequate social conditions, natural disasters, armed conflicts, exploitation, illiteracy, hunger, and disability. Id. The General Assembly was convinced that these conditions called for urgent and effective national and international action. Id. While the CRC provides extensive rights and protections for children in terms of legal representation and protections from violence, it is ineffective without ratification. Id. The first step that may be necessary for the United States to take in bettering their laws dealing with unaccompanied children is to ratify the CRC and begin the process of bringing their system into compliance. Id.
78 See Unaccompanied Children in Immigration Detention, supra note 47.
79 See Gordon, supra note 4 at 664. One important aspect of the Homeland Security Act was the dismantling of the INS and the transfer of responsibility for unaccompanied alien children from the INS to the Office of the Refuse
and treatment of unaccompanied children have now been assigned to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services. However, these changes have not yet directly impacted the experiences of children in immigration detention as they move through an immigration system that is now arguably more complex. For a fair chance to be provided for child asylum cases, the best results are achieved when both an attorney and a non-attorney representative are available to assist the child in her application for asylum and in any government proceeding involving the asylum claim. However, immigration court proceedings do not statutorily mandate the appointment of a guardian ad litem or any other type of personal representative to accompany a child in these cases. According to Amnesty International, less than half of juveniles receive legal counsel in immigration proceedings.

Resettlement (ORR). Id. While a transfer over to new management provides an opportunity for positive change, it has yet to be seen via newly enacted ORR guidelines. Id.

80 Id. The ORR is now responsible for coordinating and implementing the care and placement of children in federal custody, developing a plan on how to ensure independent counsel, overseeing the infrastructures and personnel of facilities where children reside, and conducting investigations and inspections of facilities where children reside. Id. The ORR is also responsible for making safe and appropriate placements for unaccompanied children. Id. While ideally this group should be able to bring about a number of positive reforms for unaccompanied alien children in the U.S., their policies are not yet in full implementation or clear design. Id.

81 See Unaccompanied Children in Immigration Detention, supra note 47.

82 See Lopez, supra note 45 at 662.

83 Id. It will be important to analyze the newly enacted ORR regulations in full effect to see if this problem of non-mandatory representation is corrected. Id. It is the opinion of this author that this failure in the U.S. system creates an even graver challenge for unaccompanied alien children. Id.

There is some progress being made in this regard. Pending in the House is the Unaccompanied Alien Child Protection Act (UACPA), which builds on the INS Guidelines to further the best interests of the child.\textsuperscript{85} Most notably the UACPA provides representation for unaccompanied minors by requiring legal counsel and establishing a guardian \textit{ad litem} pilot program.\textsuperscript{86} Considering that about eighty percent of unaccompanied juveniles apprehended by DHS do not have adult assistance of any kind, by either legal representation or a guardian \textit{ad litem}, the proposed benefits of the UACPA would provide a much needed service.\textsuperscript{87}

The question remains: what happens to those children when the system fails them and they are left with no remedy? If an applicant is denied asylum by an Immigration Judge, he or she is not eligible for asylum unless she can show changed circumstances materially affecting her eligibility for asylum under INA § 208(a)(2)(C) and (D).\textsuperscript{88} A person may also be barred from asylum if it is determined that she may be removed pursuant to a bilateral or multilateral

\textsuperscript{85} See Dalrymple, \textit{supra} note 2 at 153.

\textsuperscript{86} See Gordon, \textit{supra} note 4 at 668-672. After six failed attempts, Senator Dianne Feinstein of California again introduced the Unaccompanied Alien Child Protection Act (UACPA) to “provide for the protection of unaccompanied alien children” on January 24, 2005. \textit{Id.} Her battle has raged every year since 2000 with no success. \textit{Id.}

\textsuperscript{87} \textit{Id.} While the 2005 UACPA seeks to fill the gaps left by the Homeland Security Act by ensuring that unaccompanied alien children have legal representation, are not held in prison-like conditions, and do not have to remain in custody pending their claims, the bill unfortunately does not live up to its good intentions. \textit{Id.} The bill asks the Executive Office for Immigration Review to adopt the INS’ 1998 Guidelines for Children’s Asylum Claims, failing to establish new guidelines to correct these already existing problems. \textit{Id.} While on its face, the UACPA tackles the many failures in U.S. law dealing with unaccompanied children, the bill still leaves children to be treated as adults in proving their claims of persecution. \textit{Id.}

\textsuperscript{88} See Hughes, \textit{supra} note 35 at 307.
agreement to a “safe third country,” where the person would not face persecution and would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection under INA § 208(a)(2)(A).\(^9\) Currently, the U.S. has such an agreement with Canada and no other country.\(^{90}\) Most children in this situation are obviously hard pressed for an acceptable solution.

The question then turns to what happens to those children who are unaccompanied with no guardian to go to upon their return. There appears to be no remedy built into the system to deal with these lost youngsters, except perhaps by applying for special immigrant juvenile status (“SIJS”).\(^91\) SIJS is the only provision in immigration law to make the best interests of the child an eligibility requirement.\(^92\) 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, with the purpose to alleviate hardship for many dependent alien juveniles.\(^93\) To be eligible for SIJS, the minor first must have been declared dependant on a juvenile court or been placed in the care of a child welfare agency.\(^94\) Second, the child must be deemed eligible for long-term foster care due to abuse, neglect, or abandonment.\(^95\) Third, a court

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\(^9\) Id.

\(^90\) Id.

\(^91\) See Dalrymple, *supra* note 2 at 164-167.

\(^92\) Id.

\(^93\) Id.

\(^94\) See Dalrymple, *supra* note 2 at 164-167. Ideally, there are child welfare agencies available for unaccompanied children seeking asylum, and in need of social services. *Id.*

\(^95\) Id.
must find that it is not in the child’s best interest to be returned to his or her home country.\textsuperscript{96}

While this opportunity for legal status appears an appropriate solution to the unaccompanied child problem, it is still fairly narrow in its application and fails to take into account a number of child-specific harms no less deserving of protection.\textsuperscript{97}

V. Australia

While Australia has a growing influx of immigrants, they reportedly received only one percent of all asylum requests made in 2005.\textsuperscript{98} The origins of people seeking asylum in Australia are diverse.\textsuperscript{99} For example, the five major countries of origin for "onshore" applicants for refugee status in 1999-2000 were Iraq (18.5%), Afghanistan (14.0%), the People's Republic of China (6.8%), the Philippines (6.4%), and India (5.3%).\textsuperscript{100} There has been an increase in the number of families coming to Australia as a direct result of the introduction of a three year temporary protection visa ("TPV") in 1999, which does not allow family reunion.\textsuperscript{101} Like the

\begin{quote}
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{99} Mitchell M. Smith, Asylum Seekers in Australia, MJA, 2001; 175: 587-589. Smith asserts that there appears to be a growing trend for recipient Western countries to adopt policies aimed at deterring would-be asylum seekers, policies that make it "as difficult and unpleasant as possible to remain in these countries if one is an asylum seeker". Id. Measures include offering minimal assistance, increased use of detention, temporary protection as an alternative to refugee status, and limited entitlements for those awarded this time-limited protection. Id.
\textsuperscript{100} Id.
\textsuperscript{101} See Detention, Children and Asylum Seekers: a comparative study, supra note 62. Furthermore, article 10 of the CRC states, in part, “In accordance with the obligation of States Parties under article 9, paragraph 1, applications by
United States and Canada, Australia provides protection for asylum seekers who meet the United Nations definition of a refugee, as defined in the 1952 Convention and 1967 Protocol relating to the Status of Refugees. 102

Unlike the United States and Canada, Australia has no specific legislation or any publicly available policy guidelines in place for unaccompanied children. 103 The process for seeking asylum is focused primarily around seeking a TPV for unlawful arrivals who are found to meet the definition of a refugee, or a Permanent Protection Visa (“PPV”) for lawful arrivals. 104 For those individuals provided a TPV, they then can apply for a Bridging Visa (“BVE”) to obtain a PPV. 105 The process is the same for adults and children. 106 All applications are assessed on an individual basis, and if successful, the applicant is granted the appropriate protection visa. 107

Australia is most unique, however, for being the only country to mandatorily detain refugee applicants who are unlawfully in the country. 108 While detainees form only a small proportion of the total refugee caseload in Australia (the majority arrive lawfully), their status

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104 See Mandatory Detention of Asylum Seekers, supra note 102.

105 Id.

106 Id.

107 See Mandatory Detention of Asylum Seekers, supra note 102.

108 See HREOC Report, supra note 103.
and they way their applications are processed have attracted widespread attention.\(^\text{109}\) Australia instituted its policy of mandatory detention in 1992 for all asylum seekers who arrive in the country without proper travel documents seeking refugee status.\(^\text{110}\) Detention is immediate, automatic and indefinite in its duration, sometimes lasting years.\(^\text{111}\) Asylum seekers, children and adults, are held in detention until they are either accepted as refugees or deported.\(^\text{112}\)

The second major difference can be seen in the nature of the problem.\(^\text{113}\) In Australia most children in detention have come with their families and they include a substantial number of very young children.\(^\text{114}\) The forced migration of whole families, including children, to Australia is a recent phenomenon which is a direct result of the TPV application process, which does not allow family reunion, leading to an increase in the number of whole families coming to seek asylum together.\(^\text{115}\) This phenomenon greatly contrasts with other countries’ legislation, where there is at least some recognition of asylum seekers coming alone or separated from their families, coupled with the opportunity to reunite the family upon completion of a successful

\(^{109}\) Id.

\(^{110}\) Simon Evans, *Constitutional Development, Australia*, 4 INTLJCL 517 (July 2006). Under the Migration Act 1958, non citizens who enter or remain in Australia without the necessary visa must be detained by officers of the executive until they are granted a visa or are removed from Australia. *Id.* The mandatory detention regime was introduced in 1992 to act, in part, as a deterrent to asylum seekers who arrive in Australia by boat without visas and make applications for protection under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. *Id.*

\(^{111}\) Id.

\(^{112}\) Id.


\(^{114}\) Id.

\(^{115}\) Id.
application. In addition, Australia’s policy ignores a present global trend to send the youngest members of families away to give them a chance to survive in a new country – often in situations where the parents are no longer alive.\textsuperscript{116} Therefore, while there is also an increase in such unaccompanied child asylum seekers in Australia, the policies do not distinguish the needs of the two groups, accompanied and unaccompanied child asylum seekers.\textsuperscript{117}

The conditions of Australian detention centers are reportedly prison-like, and have drawn concerns from groups such as Amnesty International ("AI"), the UN Working Group on Arbitrary Detention ("WGAD") and the Office of the UN High Commissioner for Human Rights ("OHCRC").\textsuperscript{118} AI has expressed grave concerns about the effects of arbitrary, ongoing detention on detainees, particularly on children.\textsuperscript{119} Having already survived traumatic experiences, the effects of being isolated in sometimes remote, harsh environments can further accentuate any mental despair or fear a child may be experiencing, especially if unaccompanied by any parent or guardian.\textsuperscript{120} As of May 2005, AI estimates that at least 150 people have been detained for more than three years in immigration detention by the Australian Government.\textsuperscript{121} This figure includes those detained in Australia’s immigration facilities on Nauru, of which there are 54 including 48 adults and six children.\textsuperscript{122} The total number of persons detained by Australia

\textsuperscript{116} See Detention, Children and Asylum Seekers: a comparative study, \textit{supra} note 62.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} See Mandatory Detention of Asylum Seekers – fact sheet, \textit{supra} note 102.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}


\textsuperscript{122} \textit{Id.}
rises to at least 200 when those detained for more than 18 months but less than three years are included. Dr. Annie Sparrow, a physician working in the Woomera Detention Centre, expressed her concerns on the effects of the Australian detention centers on children:

“There are no facilities and there are no services provided to actually support the refugees either medically or psychologically, or in recreation and this all has a very profound effect on their mental and physical health. I saw a 16-year-old who attempted to hang himself, I saw a 14-year-old girl who cut her wrists and I saw another 14-year-old boy who tried to choke himself.”

In May 2002, the WGAD and the OHCRC sent delegations to investigate conditions of detention and the legal regime governing the detention of asylum-seekers without trial or judicial oversight. In July 2002, the UN High Commissioner for Human Rights delegate described the detention regime as “offensive to human dignity” and reported “serious concern” about the human rights situation of people in immigration detention, particularly children and unaccompanied minors. In November 2002, the national Human Rights and Equal Opportunity Commission (“HREOC”) found that Australia had breached its international human rights obligations by transferring six asylum-seekers from immigration detention to prisons, where they were arbitrarily detained without charge alongside convicted felons.

The current mandatory detention regime was unsuccessfully challenged in 1992 in Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs. The High

123 Id.
124 See Australia: Detention regime in breach of international human rights, supra note 121.
125 Id.
126 Id.
127 Id.
128 See Evans, supra note 110. The mandatory detention policy in Australia has been challenged without much success, even in matters of child welfare. Id. The predecessor of the current mandatory detention regime was
Court held that the Commonwealth's legislative power with respect to aliens and immigration supported laws that gave the executive the power to detain aliens in custody for the purposes of investigating and deciding on their applications for visas and for the purposes of expelling or deporting them. Disturbingly enough, Australia’s courts have yet to waver on the validity of mandating detention in situations concerning children, even though they claim to uphold the “best interests of the child” standard.

Perhaps in response to the international outcry regarding Australia’s detention policies, they recently enacted the Migration Amendment (Detention Arrangements) Bill in 2005, to reform outdated and problematic immigration legislation. In part, the Migration Amendment states that a minor shall be detained only “as a last resort,” and where detention of a child is required, to take place “in the community, under a residence determination.” In consideration

unsuccessfully challenged in 1992 in Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs. Id. The High Court held that the Commonwealth's legislative power with respect to aliens and immigration supported laws that gave the executive the power to detain aliens in custody for the purposes of investigating and deciding on their applications for visas and for the purposes of expelling or deporting them. Id. If detention was limited to these purposes, it was non punitive and did not breach the separation-of-powers doctrine. Id.

129 Id.

130 Id. The High Court unanimously held in Re Woolley that the regime validly applied to children. And a 6-1 majority in Behrooz held that the conditions in which a person is held in immigration detention do not affect the lawfulness of that detention and are irrelevant to a charge of escaping from detention. Id.


132 ChilOut, Community Detention for Families in Australia, available at: http://www.chilout.org/information/community_detention.html. Children Out Of Detention (ChilOut) is a group of parents and citizens formed in 2001 to oppose the mandatory detention of children in Australian immigration detention centers. Id.
of community detention requirements, the Migration Amendment allows the Minister, acting personally, to specify alternative detention arrangements. This is notable considering the previous policy required a person in immigration detention to be held in secured arrangements regardless of their age, health, behavior, or likelihood to abscond. Whether the Migration Amendment has made any effect is yet to be determined by future study, yet it is noteworthy that the government is attempting some reform.

VI. Canada

Canada receives a comparatively small proportion of the world’s refugees, yet is unique in their legal approach for asylum seekers, and perhaps the most advanced by comparison. In the year 2000, Canada resettled just over 10,000 refugees from more than two dozen countries, of whom only a handful were separated children. Also in the year 2000, around 36,000 people applied for asylum in Canada, largely from China, yet statistical data as to what percentage was children is lacking. Based on claims finalized in 2000, the top ten countries of separated children varied from China (87), Sri Lanka (43), DR Congo (25), India (23), Mexico (17), Somalia (18), Guinea (13), Colombia (11), Pakistan (10) and El Salvador/Iran/Honduras/Hungary (7 each). In the year 2000, 93% of refugee claimants were found in just three provinces: British Columbia (12%), Ontario (46%) and Quebec (35%). By

133 Id.
134 Id.
135 See Separated Children Seeking Asylum in Canada, supra note 3 at 3.
136 Id.
137 Id.
138 See Separated Children Seeking Asylum in Canada, supra note 3 at 11.
139 Id.
2005, Canada was receiving a much smaller number of asylees, coming just after Germany (20,400) and just before Sweden (12,400). Overall, the UNHCR reports that in 2005 the number of asylum applicants in Canada dropped dramatically to 13,900.

In general, Canada has a strong track record for adopting international policy focused on the protection of children. In 1991, along with most westernized countries, Canada ratified The Convention on the Rights of the Child. In the year 2000, Canada ratified the International Labor Organization’s 1999 Convention on the Worst Forms of Child Labor, and then in June was the first country to sign the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. In 2002, Canada’s new Immigration and Refugee Protection Act came into effect. However, Canada has not as of yet signed the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography due to jurisdictionary complications between provinces and territories.

This last fact leads into perhaps the most notable aspect of Canada’s asylum laws. In contrast to the United States, Canada’s provinces have a great deal of power relative to the federal government, with jurisdiction over many public services such as healthcare, education,

\[\text{\underline{140 Id.}}\]

\[\text{\underline{141 See Asylum Levels and Trends in Industrialized Countries, supra note 98.}}\]

\[\text{\underline{142 See Gordon, supra note 4 at 671-673. Canada has embraced international ideals of affording children special care and assistance in contrast to its neighbor to the south. Id. By recognizing the failings in its laws and adopting the “best interests of the child” standard, Canada has new policies on the books so children will not be held to the same standard as adults in seeking asylum. Id.}}\]

\[\text{\underline{143 Id.}}\]

\[\text{\underline{144 Id.}}\]

\[\text{\underline{145 See Separated Children Seeking Asylum in Canada, supra note 3 at 14.}}\]
welfare and intra-provincial transportation.\textsuperscript{146} Because of this system of separated powers, Canada holds varying regulations on asylum seekers from province to province.\textsuperscript{147} While laws varying from province to province provide some degree of originality and a means for comparison on new and inventive legal methodology, it also allows for a lack of streamlined guidelines.\textsuperscript{148} Thus, there are no specific guidelines in Canada to assist officials in identifying separated asylum-seeking children, or in providing appropriate care.\textsuperscript{149} Going along with these phenomena is a lack of specific training for immigration officials on how to handle fleeing children.\textsuperscript{150} With regional variations, it is unclear as to which procedures and standards are applied, or what assessments have been made as to the treatment and care of children.\textsuperscript{151}

Canada’s inherent legal inconsistencies provide a number of varying procedures on dealing with separated children upon their arrival. UNHCR’s 1997 \textit{Guidelines} state that a separated child seeking asylum should not be refused access to the territory, and specific identification procedures should be in place at the point of entry to determine whether or not a

\begin{footnotesize}

\footnote{\textsuperscript{147} See \textit{Separated Children Seeking Asylum in Canada}, \textit{supra} note 3 at 60-65.}

\footnote{\textsuperscript{148} \textit{Id}.}

\footnote{\textsuperscript{149} Canada’s guidelines are in fact very proactive on handling issues concerning unaccompanied asylum seekers. All the good intentions in the world are useless in this regard, however, if there is not active participation at the border to identify these children as unaccompanied.}

\footnote{\textsuperscript{150} See Gordon, \textit{supra} note 4 at 656. Guidelines have been carefully laid out by the CRC as to how unaccompanied children are to be treated upon their arrival. \textit{Id}. Canada has in fact implemented a number of procedures related to their ratification of the CRC, to bring them into compliance with these requirements. \textit{Id}. However, when there are varying procedures from province to province, there is greater room for error in implementation. \textit{Id}.}

\footnote{\textsuperscript{151} \textit{Id}.}
child is accompanied by a parent or other competent caregiver.\textsuperscript{152} When a child arrives in Canada, it is standard procedure for the authorities to determine first if the child will be admitted to the refugee determination procedure, and also whether the child is separated and therefore in need of particular attention.\textsuperscript{153} However, the only applicable instructions in the Canada Immigration Port of Entry (“POE”) Manual appear to be those entitled: “Our Missing Children Programme,” requiring “young children accompanied or alone, who arouse concern about the purpose of their trip to Canada or their welfare in Canada,” to be referred to a Senior Immigration Officer.\textsuperscript{154} According to Canadian officials most children arrive either with an adult or with the name of a contact, and very few come alone.\textsuperscript{155} Citizenship and Immigration Canada (“CIC”) instructs officers greeting children accompanied by a non-parent adult to establish the nature of the relationship, remaining aware of situations that may not be in the best interests of the child, such as those involving trafficking.\textsuperscript{156} Along with this, Immigration Officers have a

\textsuperscript{152} Paragraph 5.3 of UNHCR’s 1997 Guidelines states: “Where available, persons specially trained or who have otherwise the necessary experience or skills for dealing with children should assist in the identification.” \textit{Id.} While this guideline supports the position that children need special kinds of attention and care, the language in this guideline allows for too much room for exception, and not nearly enough regulatory requirement. \textit{Id.}

\textsuperscript{153} \textit{See} Separated Children Seeking Asylum in Canada, \textit{supra} note 3 at 30-42.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} Alice Leuchtag, \textit{Human Rights Sex Trafficking and Prostitution}, Humanist, Vol. 63, No.1 (Jan. – Feb. 2003). Sex traffickers will often have false documentation for those children they are trafficking into a country. \textit{Id.} While immigration officers take great care to identify illegal entry papers, over burdened, unprepared or even those borders with the best training and facilities will not always be able to catch all falsified documentation. \textit{Id.}
duty to report to child welfare authorities those children who may be in need of protective services.\textsuperscript{157}

While these policies are in place, they are inconsistently implemented. UNICEF strongly suggests in “Care of Children in Emergency Situations: Implications for International Standards,” that a new international document needs to be drafted to include comprehensive and detailed provisions on how to care for children in a variety of emergency situations.\textsuperscript{158} In British Columbia, the Migrant Services Team of Children and Family Development (“MCFD”) have been mandated to care for separated children, as has the Service d’Aide aux Refugies et Immigrants de Montreal Metropolitain (“SARIMM”) in Quebec.\textsuperscript{159} However, the group in Ontario assigned to this task, the Children’s Aid Society (“CAS”), limits its services to children under 16, leaving a percentage of the separated children population without appropriate services.\textsuperscript{160} In addition, without guidance, there is no methodology for interviewing children upon their arrival and therefore better understanding their situation or relationship with an accompanying adult.\textsuperscript{161}

Upon their arrival, UNHCR’s 1997 \textit{Guidelines on Asylum Seeking Children} as well as UNHCR’s \textit{Detention Guidelines} state that as a rule, children should not be detained.\textsuperscript{162} Building on this, Article 37 of the CRC requires that detention should be used only as a last resort, for the

\textsuperscript{157} See Separated Children Seeking Asylum in Canada, \textit{supra} note 3 at 16.


\textsuperscript{159} See Separated Children Seeking Asylum in Canada, \textit{supra} note 3 at 16.

\textsuperscript{160} \textit{Id}.

\textsuperscript{161} \textit{Id}.

\textsuperscript{162} \textit{Id}.
shortest period of time, that detained children should be held separately from adults, and have the right to prompt access to legal and other appropriate assistance. Upon ratification of the CRC, Canada entered a reservation to Article 37, stating: “Canada reserves the right not to detain children separately from adults where this is not appropriate or feasible.” The outcome of this reservation is that grounds for detention are identical for children and adults, although all alternatives are required to be considered before detention is ordered, and if so for the shortest period possible. Statistics demonstrating just how many children are detained in Canada are lacking, although their stays reportedly range from one to 30 days.

Detention conditions also range from province to province. In Ontario, the facility called “Celebrity Inn,” is a considerably bleak, quiet, environment without play facilities and with little allowable freedom of movement than in comparable institutions. In Quebec, the “Laval Centre for the Prevention of Immigration,” a former penitentiary, has more space, freedom to move, language and psychiatric services, limited educational services, and cultural training for the staff. Yet despite the policy of last resort, there do not appear to be many alternatives to detention for those children arriving without legal identification or via illegal means.

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163 See CRC, supra note 8.
164 Id.
165 See Separated Children Seeking Asylum in Canada, supra note 3 at 19.
166 Id.
167 Id.
168 Id.
169 See Gordon, supra note 4 at 654. The UNHCR feel strongly that children, especially unaccompanied alien children, should not be kept in detention. Id. The guidelines do allow for the limited detention of children, in accordance with the Convention of the Rights of the Child, but only as a “measure of last resort” and only for the “shortest appropriate period of time.” Id. For those children being detained in airports, immigration holding
Detention even stretches to those children who arrive as a result of trafficking, as described in one case in Ontario where two groups of Chinese girls were apprehended as they were being smuggled across the Ontario/U.S. border. Partly because of a lack of beds, some of the 17 girls were held in correctional facilities until pressured to be moved to Celebrity Inn by UNHCR and Family Services Advocacy. These girls were eventually released after extended detainment, and some are believed to have found their way to New York.

For those children lucky enough to be eligible for refugee claims, they then face the challenge of retaining good legal representation. The benefit of a working claim is the child claimant is then provided access to education and emergency health and mental care. This care is lacking, however, in that the appropriate mental health these children may desperately need is not covered beyond one visit to a psychiatrist or psychologist. Each province does provide varying degrees of free legal aid by the hour or in lump sums. However, the question centers, or prison, the conditions of detention should not be prison-like. Id. The UNHCR’s primary objective with regard to custody is “care,” not “detention.” Id.

170 See Separated Children Seeking Asylum in Canada, supra note 3 at 23.
171 Id. While this paper does not get into the specific needs of certain classifications of asylees, young girls face a number of additional risks when traveling and maneuvering the legal system alone. Id.
172 Id.
173 See Gordon, supra note 4 at 665. One of the most important aspects of the UNHCR guidelines concerns the interim care and protection of unaccompanied children in the process of seeking asylum. Id. Canadian guidelines also require that unaccompanied children do not have to go through the process alone, making sure they are provided representation. Id.
174 See Separated Children Seeking Asylum in Canada, supra note 3 at 27.
175 Id.
is raised again as to those children in need of long term service beyond the minimal coverage provincial services provide.\textsuperscript{176}

Finally, what happens to those children whose claims fail? UNHCR’s 1997 \textit{Guidelines} outline procedures to follow if a separated child who is found not to be in need of protection is to be returned to the country of origin.\textsuperscript{177} Children are not to be returned to their country of origin if it is not in their best interest, or if a suitable care-taker can not be identified to take on the child’s care.\textsuperscript{178} But again, CIC does not appear to have reliable data on removals of separated children.\textsuperscript{179} The CIC assumes that the overwhelming majority of those children removed to their country of origin are accompanied by family members, but this is a presumption without proof or supporting data.\textsuperscript{180}

\textbf{VII. Summary and Conclusion}

An inherent tension exists between immigration and child welfare concerns in each country discussed.\textsuperscript{181} The current asylum laws jeopardize the protection of thousands of children who have fled poverty, hardship, and persecution. Unaccompanied children are especially vulnerable to a broad array of human rights violations as children and refugees without an adult

\textsuperscript{176} See Bucci, \textit{supra} note 23 at 283-285. Minimal coverage standards are often not enough to meet the burden of the psychological and other health concerns an unaccompanied child is handling upon their arrival. \textit{Id.} As previously discussed, post traumatic stress disorder is one of many serious psychological conditions unaccompanied children may be suffering with. \textit{Id.}

\textsuperscript{177} See Separated Children Seeking Asylum in Canada, \textit{supra} note 3 at 28.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} See Separated Children Seeking Asylum in Canada, \textit{supra} note 3 at 62.
Without proper representation, unaccompanied children are lost in a system they do not understand, often without even understanding the language.

Although Canada appears to have the most innovative approach by comparison to the United States and Australia in handling unaccompanied children, this does not mean their approach is comprehensive enough. Clear national standard and guidelines for practice concerning asylee children are needed. These guidelines should cover all actions, from identification at the port of entry to settlement or removal, to ensure that account is taken of the particular vulnerability of separated children, and that Canadian practice is in line with international standards. The United States should work to implement the UACPA, and ensure that children are recognized in the system as having unique vulnerabilities and therefore require separate legal standards to shield them from the severity of adult laws. Australia most desperately needs to immediately reform their detention policies, and discontinue their apparent treatment of child asylees as criminals. All countries should work to implement the provisions of the CRC.

Each of these countries’ immigration policies are formulated with the intent to control immigration, handle fraudulent claims, and in fact deter asylum seekers from seeking refuge on their territory. If comprehensive reform is too difficult to immediately implement in these

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182 Id.

183 See Gordon, supra note 4 at 664.

184 A variety of sources agree that in order to have comprehensive guidelines in place to address the issues unaccompanied children face when seeking asylum, there must be some form of international consensus. 

185 See Gordon, supra note 4 at 641-673.

countries, at the very least, what is necessary is a change in approach to include the best interests of the child in asylum applications. Attention and focus on the trauma these children experience as children is essential to their evaluation. By replacing the current criteria with a program that includes the best interests of the child and recognizes their special needs as children, unaccompanied minors may finally attain the legal support they have long needed and deserved.\textsuperscript{187}

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