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Hernandez-Ortiz v. Gonzales: Creating Unsound Rules for Adjudicating Asylum Claims in the Ninth Circuit

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I. Introduction

United States asylum law has developed out of several international agreements to which the United States is a party.\(^1\) More specifically, the United States has incorporated into its domestic legislation the refugee requirements set forth in the United Nations Convention Relating to the Status of Refugees ("Refugee Convention") and the United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol").\(^2\) In order to be


\(^2\) See Refugee Convention, supra note 1, at 150 (requiring member nations to adopt legislation to protect displaced persons from "events occurring before 1 January 1951" who fear persecution based on their race, religion, nationality, membership in a particular social group, or political opinion); Refugee Protocol, supra note 1, at 268 (expanding the coverage of the UN Convention relating to the Status of Refugees from persons displaced as a result of World War II to all persons who meet the refugee requirements, regardless of the Convention’s previous January 1, 1951 deadline); Immigration and Nationality
eligible for asylum in the United States, an applicant must demonstrate that he or she is a “refugee” within the meaning of the Refugee Convention. The Refugee Convention accords refugee status to people who adequately demonstrate that they have been or will be persecuted on account of their race, religion, nationality, membership in a particular social group, or


3 See INA (Westlaw through 2007) §§ 101(a)(42), 208(b)(1)(A), 8 U.S.C. § 1101(a)(42), 1158(b)(1)(A) (requiring asylum applicants to establish first and foremost that they are a refugee); Refugee Convention, supra note 1, art. 1(2) (defining “refugee” as a person who has a well-founded fear of being persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion); see also Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (as codified in scattered sections of 8 U.S.C.) [hereinafter Refugee Act] (codifying the Refugee Convention’s definition of “refugee” into US asylum law); H.R. Conf. Rep. 96-781, 1980 U.S.C.C.A.N. 160 (demonstrating Congress’s intent to adopt the definition of “refugee” in the Refugee Convention).
political opinion. However, over time new and varying asylum claims have arisen, which the Refugee Convention’s language does not always explicitly address. These new asylum claims require new guidelines and laws to assist courts in their adjudication.

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4 See Refugee Convention, supra note 1, art. 1(2)(recognizing the multiple grounds upon which people were persecuted during World War II and finding that they should be accorded protection from such persecution).


A recent decision in the Ninth Circuit Court of Appeals, Hernandez-Ortiz v. Gonzales, involving persecution of petitioners’ family, which occurred during petitioners’ childhood, is an example of an asylum claim that does not fit neatly into the language of the Refugee Convention, requiring the Ninth Circuit to look to other sources of law in

refugee status receive appropriate protection and humanitarian assistance and that the government affords them all the rights set forth in the Convention as well as other international human rights and humanitarian instruments); Memorandum from Jeff Weiss, Office of International Affairs, to all INS Asylum Officers, File No. 120/11.26, Guidelines for Children’s Asylum Claims (Dec. 10 1998), available at http://www.asylumlaw.org/docs/united_states/guidelines/children.pdf (last visited Sept. 8, 2007) [hereinafter Child Asylum Guidelines](suggesting strategies and tactics for better dealing with child asylum claimants during asylum proceedings); Phyllis Coven, U.S. Dep't of Justice, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (1995) [hereinafter Asylum Gender Guidelines] (providing guidelines to immigration officials for adjudicating gender-based asylum claims).
interpreting the petitioners’ asylum claim and, consequently, creating a new rule to govern similar claims in the future.\footnote{See Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1043-46 (9th Cir. 2007) (adjudicating an asylum claim in which petitioners were claiming that persecution that happened to their family while they were children qualified them as refugees).}

This Note argues that the new rule in \textit{Hernandez-Ortiz} is unsound because it conflicts with the firmly-established definition of “refugee” in the Refugee Convention, is not required by the United Nations Convention on the Rights of the Child (“CRC”), is unsupported by the Department of Homeland Security’s (“DHS”) Child Asylum Guidelines, and is inconsistent with the Ninth Circuit’s own precedent regarding persecution of children. Part II of this Note lays out the current law regarding refugees in general and child refugees in particular. Part II also explains the Ninth Circuit’s decision in \textit{Hernandez-Ortiz}. Part III(A) of this Note argues that \textit{Hernandez-Ortiz} is an unsound rule in that it ignores the language in the Refugee Convention requiring persecution to be both on account of one of the five enumerated grounds and suffered by the asylum applicant personally. Part III(B) of this Note contends that the language in the United Nation’s Convention on the Rights of the Child (“CRC”) does not oblige the court to make such a rule. Part
III(C) of this Note further asserts that the Hernandez-Ortiz rule is inconsistent with Ninth Circuit precedent requiring the applicant himself, and not a friend or family member, to suffer persecution. Part IV of this Note concludes that the best way to remedy this unsound rule is to remand this decision to the Board of Immigration Appeals (“BIA”) to interpret the laws in the first instance that the Hernandez-Ortiz court relies upon and recommends that the United States fully ratify the CRC and the international community create a child refugee convention.

II. Background

The Refugee Convention is the main body of international law governing refugees. 8 It sets forth the requirements that individuals must meet in order to be considered refugees 9 and,  

8 See Refugee Protocol, supra note 1, (extending the Refugee Convention, which covered only those refugees displaced by World War II, to apply to all people who meet the definition of refugee set forth in Article 1 of the Refugee Convention).

9 See Refugee Convention, supra note 1, art. 1(A)(2) (setting forth the definition of a refugee, which, if satisfied, qualifies an individual for protection under the Refugee Convention).
thus, be eligible for asylum.\textsuperscript{10} In a decision out of the Ninth Circuit, Hernandez-Ortiz v. Gonzales,\textsuperscript{11} the court created a new rule regarding the adjudication of child asylum applications,\textsuperscript{12} implicating the Refugee Convention’s definition of “refugee” as well as other domestic and international laws and policies regarding refugees.\textsuperscript{13}

A. Overview of Asylum Law and Children’s Asylum Claims

\textsuperscript{10} See INA (Westlaw through 2007) § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (finding that those who meet the definition of “refugee” within the meaning of INA § 101(a)(42)(A) are eligible for asylum in the United States).

\textsuperscript{11} 496 F.3d 1042 (9th Cir. 2007).

\textsuperscript{12} See id. at 1046 (explaining that the court is adopting a new rule for the Ninth Circuit requiring special considerations for child persecution claims).

\textsuperscript{13} See CRC, supra note 6, arts. 3, 22; Child Asylum Guidelines, supra note 6, 16-27.
Under the Refugee Convention, an applicant must satisfy four elements in order to qualify as a "refugee" and be eligible for asylum. The alien must have: (1) a fear of persecution; (2) which is well founded; (3) on account of race, religion, nationality, membership in a particular social group, or political opinion). In the INA, Congress adopts the definition of "refugee" stated in the Refugee Convention. Id. See INA (Westlaw through 2007) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (utilizing, though not precisely tracking, the language defining a refugee in the Refugee Convention including the requirement that a refugee must suffer persecution on account of one of the same five protected grounds). In 1968 the United States acceded to the 1967 Refugee Protocol, thereby accepting the Refugee Convention. Refugee Protocol, supra note 3; INA (Westlaw through 2007) § 101(a)(42), 8 U.S.C. § 1101(a)(42); See INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) (explaining Congress’s intent to bring United States refugee law into conformance with the Refugee Protocol); Refugee Act, supra note 3, § 201 (codifying previously informal asylum procedures by allowing non-citizens already present in the United States to apply for asylum under the INA).
nationality, membership in a particular social group, or political opinion; and (4) be unable or unwilling to return to his or her country of nationality or last habitual residence because of past persecution or a well-founded fear of future persecution.\textsuperscript{15}

Furthermore, the Refugee Convention does not explicitly define what acts constitute “persecution.”\textsuperscript{16} In the United States, however, the BIA\textsuperscript{17} has found that the term “clearly

\textsuperscript{15} See Refugee Convention, supra note 1, art. 1 (delineating the requisite grounds for refugee status).

\textsuperscript{16} See id. (defining other terms such as “the country of his nationality” and “events occurring before I January 1951” but leaving the term “persecution” undefined); H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4700, 4702, 4704 (rejecting the idea to include a definition of “persecution” in the INA and deciding, instead, that the meaning was well-established in administrative decisions and prior case law).

\textsuperscript{17} See 8 C.F.R. § 1003.1 (creating the BIA, which has never been recognized by statute, and is charged with reviewing appeals of immigration judge decisions finding non-citizens removable from the United States). The BIA is an administrative agency created by the Attorney General’s regulations. Id.
contemplates” that the infliction of harm or suffering upon an individual must be “in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”¹⁸

Moreover, the Refugee Convention generally does not distinguish between adults and children regarding the statutory requirements for asylum eligibility.¹⁹

¹⁸ In re Acosta, 19 I. & N. Dec. 211, 223 (BIA 1985) (finding this construction consistent with the international interpretation of “refugee” in the Refugee Protocol). The Ninth Circuit has also adopted the definition of “persecution” as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.” See Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000); Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999); Korablina v. INS, 158 F.3d 1038, 1043 (9th Cir. 1998); Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc); Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995); Desir v. Ilchert, 8409 F.2d 723, 726 (9th Cir. 1988); Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

¹⁹ See Refugee Convention, supra note 1, art. 1 (applying refugee status to any person who falls under the terms of Section A without any mention of age or maturity).
However, in November 1989, the United Nations passed the CRC, which addresses, among other things, child refugees.\textsuperscript{20} The CRC establishes the policy of prioritizing “the best interest of the child” in “all actions concerning children, whether undertaken by private social welfare institutions, courts of law, administrative authorities, or legislative bodies.”\textsuperscript{21} The CRC, thus, requires all ratifying countries to conform their asylum processes to the “best interest of the child” principle.\textsuperscript{22} Therefore, although the United States has not fully ratified the CRC,\textsuperscript{23} it is a signatory, obliging the United States to refrain

\begin{footnotesize}
\begin{enumerate}
\item See CRC, supra note 6, art. 22 (requiring member nations to cooperate with the UN and other non-governmental organizations to protect and assist children seeking asylum).
\item See id. art. 3 (stating that ensuring the best interest of the child includes ensuring the child’s protection and care necessary for his or her well-being and taking into account the rights and duties of those legally responsible for the child).
\item See id. arts. 3, 22 (requiring state parties to prioritize the “best interest of the child” in dealing with children who seek refugee status both in terms of procedural treatment and substantive adjudication of asylum claims).
\end{enumerate}
\end{footnotesize}
from acts contrary to the object and purpose of the CRC.\textsuperscript{24} Additionally, the United States has recognized the CRC, along with several other international instruments regarding the protection of children, in developing its own policies for dealing with child asylum claimants.\textsuperscript{25}

\textsuperscript{24} Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 115 U.N.T.S. 331 [hereinafter Vienna Convention] (explaining that the act of signing a treaty is an expression of a state’s consent to be bound by the treaty even though ratification is still required before the treaty can enter into force with respect to that state).

\textsuperscript{25} See Child Asylum Guidelines, supra note 6, at 2-4 (referencing the Universal Declaration of Human Rights, Conclusion Nos. 47 and 59 of the Executive Committee of the Office of the United Nations High Commissioner for Refugees, United Nations High Commissioner of Refugees “Policy of Refugee Children,” and the Canadian Immigration and Refugee Board’s “Child Refugee Claimants: Procedural and Evidentiary Issues” and explaining
The CRC mandates that member states accord children seeking refugee status full protection under the CRC, including prioritizing the “best interest of the child” principle in all actions concerning children,\(^26\) as well as ensuring the “enjoyment of applicable rights . . . in other international human rights or humanitarian instruments to which the said States are Parties.”\(^27\) Thus, though not one of the over 190 countries to ratify the CRC,\(^28\) the United States has expressed a commitment to protecting the rights of child refugees through both its ratification of the Refugee Convention and the implementation of that they were instrumental in the Child Asylum Guidelines’ development).

\(^{26}\) See CRC, supra note 6, art. 3 (requiring member states to prioritize the “best interest of the child” in all public and private institutions including courts of law and administrative and legislative bodies).

\(^{27}\) See id. art. 22 (applying the requirement of other humanitarian conventions, such as the Refugee Convention, to CRC member states).

\(^{28}\) See CRC Ratification List, supra note 23 (enumerating the countries which have ratified the CRC, of which the United States is not a part).
its own set of guidelines ("Child Asylum Guidelines")\(^{29}\) to address the adjudication of children’s asylum claims.\(^{30}\) These

\(^{29}\) See Child Asylum Guidelines, supra note 6, at 17-18 (explaining that while the “best interest of the child” principle does not factor into a child’s substantive eligibility for asylum, the principle is useful in instructing asylum officers in structuring child-friendly asylum procedures).

\(^{30}\) See Child Asylum Guidelines, supra note 6, at 2 (recognizing that the unique vulnerability and circumstances of children require INS to issue guidelines to enhance asylum officers’ ability to be more responsive to the relevant and unique substantive and procedural aspects of child asylum claims); see also Memorandum from Chief Immigration Judge Michael J. Creppy to all Immigration Judges, Court Administrators, Judicial Law Clerks and Immigration Court Staff (Sept. 16, 2004), available at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm (follow “07-01” link) (last visited Sept. 8, 2007) (providing guidelines to immigration judges and immigration court personnel regarding child asylum claimants). These Child Asylum Guidelines are internal Department of Homeland Security Memoranda and have no binding effect on the Attorney General. Id. Cf. In re R-A-, 22 I. & N. Dec. 906(BIA 1999; AG 2001) (holding that INS Gender
Child Asylum Guidelines set forth instructions for asylum officers in conducting interviews with child asylum claimants.\textsuperscript{31}

Regarding the substantive eligibility of child asylum-seekers, the Child Asylum Guidelines refer to the “best interest

\textsuperscript{31} See Child Asylum Guidelines, \textit{supra} note 6, at 8 (advising asylum officer to conduct a “rapport building” period discussing neutral topics with children); \textit{id.} at 8-10 (instructing asylum officers to give explanatory opening statements, allowing the child to ask questions, admit to not knowing answers, and where the asylum officer ensures the child of the confidentiality of the interview); \textit{id.} at 10-12 (instructing officers to avoid legalese, use simple language, active listening, and attempt to determine the child’s sense of numbers and time); \textit{id.} at 13-15 (pointing out that credibility determinations for children can be exceedingly more difficult than in the case of adults and asylum officers may rely upon other factors such as country conditions and testimony from people close to the child in such cases).
of the child” principle from the CRC, stating that, although useful for structuring the appropriate interviewing procedures for child applicants, it does not affect determinations of substantive eligibility for asylum under the U.S. definition of “refugee.” Rather, the standards set forth in the Child Asylum

32 See CRC, supra note 6, art. 3 (requiring all state parties to make decisions regarding child asylum claimants with the “best interest of the child” as their primary consideration).

33 See Child Asylum Guidelines, supra note 6, at 2, 5, 19 (listing factors that can be considered when assessing a child’s substantive eligibility for asylum including: (1) the recognition of the fact that children can have a valid asylum claim even where their parents do not; (2) that children may be held to a lower standard of harm; (3) where children may lack the maturity to satisfy the subjective “well-founded fear” requirement, officers should accord more weight to objective circumstances of applicant’s departure from his country of origin; and (4) that certain forms of persecution are specific to children, such as forced labor and infanticide, and are not always applicable to adults). Moreover, the Child Asylum Guidelines further distinguish child asylum claims from those of adults by doing away with the malicious intent of persecutors requirement for child claimants and recognizing that, in the
Guidelines, and not the CRC, are determinative in adjudicating a child’s asylum claim.\textsuperscript{34}

\textbf{B. Hernandez-Ortiz v. Gonzales: The Ninth Circuit’s New Rule for Asylum Cases Involving Past-Persecution of Minors}

On August 8, 2007, the Ninth Circuit Court of Appeals announced a new rule for asylum cases involving minors.\textsuperscript{35} The case of children, the persecutors may believe they are acting for the child’s own good. \textsuperscript{Id.} at 21. The Child Asylum Guidelines also do not consider a child’s age as preventing him from holding a political opinion. \textsuperscript{Id.} at 22. In addition, they instruct asylum officers to consider that non-governmental actors often carry out persecution of children and, therefore, children should not be required to seek the same degree of governmental protection as adults. \textsuperscript{Id.} at 25-26. However, the Child Asylum Guidelines do not extend these same considerations to the “social group” category, explicitly stating the young do not constitute a particular social group under the definition of “refugee” in the INA. \textsuperscript{Id.} at 24-25.

\textsuperscript{34} See Child Asylum Guidelines, supra note 6, at 2 (declining to amend interpretation of the INA to create special considerations for the substantive adjudication of child asylum claims).

\textsuperscript{35} See Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1046 (9th Cir. 2007) (articulating that, although new to the Ninth Circuit,
case, *Hernandez-Ortiz v. Gonzales*, involved two brothers, Guillermo and Florentino Hernandez-Ortiz, who fled Guatemala in 1991 and applied for asylum in the United States.\(^3^6\) The Hernandez-Ortiz brothers based their claim for asylum on persecution of their father and brother, which occurred in 1982 in Gracias a Dios, Guatemala, when Guillermo was nine and Florentino was seven.\(^3^7\)

In deciding whether the events of 1982 rose to the level of harm to constitute past-persecution under the INA,\(^3^8\) the Ninth Circuit held that “injuries to a family must be considered in an asylum case where the events that form the basis of the past case law in three sister circuits, Department of Homeland Security policy, and common sense support this rule).

\(^{36}\) See *id.* at 1043-44 (basing their asylum claims, filed in 1997 and 1998, on events which occurred roughly sixteen years earlier).

\(^{37}\) See *id.* at 1044 (explaining that Guatemalan guerillas had beaten their father for not telling them his son, Humberto’s, whereabouts and that the guerillas later killed Humberto while the boys were at a refugee camp in Mexico).

\(^{38}\) See *id.* at 1046 (finding that the immigration judge did not adequately take into account the brothers’ age in assessing past persecution).
persecution claim were perceived when the petitioner was a minor."  

This new rule of law effectively states that asylum applicants can demonstrate persecution of a child by conduct that is less than that which would be persecution of an adult, and that courts must also consider harms to the family. The Ninth Circuit justified this new legal rule relying on the Child Asylum Guidelines, which suggest that the standard for what constitutes persecution of a child may be less than that for an adult. In addition, the Ninth Circuit also looked to case law in the Second, Sixth, and Seventh Circuit Courts of Appeals to

\[39\text{ Id. at 1045-46.}\]

\[40\text{ See id. (finding that common sense supports the proposition that a child’s reaction to injuries to his family is different than that of an adult and, thus, should be more fully considered when assessing child’s asylum claims).}\]

\[41\text{ See id. at 1045 (finding that the Child Asylum Guidelines make age a “critical factor,” which bears heavily on the determination of whether a child holds a well-founded fear of future persecution); see also Child Asylum Guidelines, supra note 6, at 15-16 (explicating that, while the same definition of “refugee” applies to children and adults alike, asylum officers should be sensitive to the child’s age and his/her age “may affect the analysis of his or her refugee status”).}\]
support this rule.\textsuperscript{42} In the Sixth Circuit the court relied on Abay v. Ashcroft,\textsuperscript{43} which the Ninth Circuit read as overturning an immigration judge’s denial of asylum on the basis of age, reasoning that “a nine-year-old applicant has not adequately expressed a fear of future persecution.”\textsuperscript{44} Additionally, in the Seventh Circuit, the court in Hernandez-Ortiz relied on Liu v. Ashcroft,\textsuperscript{45} which contains dicta that “age can be a critical factor in the adjudication of asylum claims and may bear heavily on” the question of the applicant’s persecution.\textsuperscript{46} Finally, in

\textsuperscript{42} See Hernandez-Ortiz, 496 F.3d at 1045 (relying on Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004); Liu v. Ashcroft, 380 F.3d 307 (7th Cir. 2004); and Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006)).
\textsuperscript{43} 368 F.3d 634 (6th Cir. 2004).
\textsuperscript{44} Hernandez-Ortiz, 496 F.3d at 1045.
\textsuperscript{45} 380 F.3d 307 (7th Cir. 2004).
\textsuperscript{46} See Liu, 380 F.3d at 314 (recognizing that other courts have overturned decisions in which the immigration judge did not consider adequately the applicant’s age in assessing the applicant’s persecution claim); Hernandez-Ortiz, 496 F.3d at 1045 (relying on Liu to support the assertion that other courts use age as a determinative factor in assessing asylum eligibility).
the Second Circuit the court relied on Jorge-Tzoc v. Gonzales, 47 which held that an immigration judge is required to address the harms the child’s “family incurred cumulatively and from the perspective of a small child.” 48 Thus, the Ninth Circuit concluded, this new rule was vindicated by three sister circuits, 49 in accordance with the Child Asylum Guidelines, 50 and reflected a “common sense proposition” requiring immigration judges to look at the events from the perspective of a child, and “measure the degree of their injuries by their impact on children of their age.” 51

47 435 F.3d 146 (2d Cir. 2006).
48 Jorge-Tzoc, 435 F.3d 146, 150 (2d Cir. 2006); see Hernandez-Ortiz, 496 F.3d at 1045 (explaining that in Jorge-Tzoc the immigration judge erred in not considering harm to the petitioner’s family from the perspective of a small child).
49 See Hernandez-Ortiz, 496 F.3d at 1046 (finding that the Second, Sixth, and Seventh Circuits all have case law which supports their new rule).
50 See id. (reasoning that the Child Asylum Guidelines support a rule that allows for a lower standard for demonstrating persecution for child asylum applicants).
51 See id. (rationalizing this new rule as reasonably requiring a lower standard for persecution for children who are often less
C. Behavior Constituting “Past-Persecution”: Ninth Circuit Precedent

The Ninth Circuit requires that, for an applicant to be eligible for asylum, he must demonstrate both (1) a subjectively genuine, well-founded fear of persecution, and (2) that this well-founded fear of persecution is objectively reasonable. In order to demonstrate that a subjective fear of persecution is objectively reasonable, the Ninth Circuit requires asylum applicants either to demonstrate (1) past persecution (which then gives rise to a rebuttable presumption of future articulate, subject to unique forms of persecution, and may be more sensitive than adults regarding different forms of persecutory treatment).


\[53\] See Duarte de Guinac, 178 F.3d at 1159 (finding that, not only must an alien actually fear persecution, but that a rational person in the position of the alien would find this fear reasonable) (citations omitted).
persecution),\textsuperscript{54} or (2) a “good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.”\textsuperscript{55} In determining what constitutes past persecution, the Ninth Circuit held that the applicant himself must demonstrate that he personally suffered harm.\textsuperscript{56} Where the applicant has never suffered physical harm, harm to friends and family is not always sufficient to compel the conclusion that the applicant had a well-founded fear of persecution.\textsuperscript{57}

The Ninth Circuit further codified the requirement that the applicant must personally suffer past persecution, finding past persecution exists where persecutors personally kidnapped the claimant and she received threatening phone calls against her

\textsuperscript{54} See 8 C.F.R. § 1208.13(b)(1) (explaining that establishing sufficiently past persecution creates a presumption of a well-founded fear of future persecution).

\textsuperscript{55} Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir. 2003) (citing Duarte de Guinac, 197 F.3d at 1159 (citations omitted)).

\textsuperscript{56} See \textit{Nagoulko}, 333 F.3d at 1016 (citing \textit{Duarte de Guinac}, 179 F.3d at 1162).

\textsuperscript{57} See \textit{id.} at 1017 (finding the fact that petitioner was never physically harmed as significant in determining that he suffered no past persecution).
family, and not where a six-year-old boy saw Guatemalan guerillas beat his father, but suffered no physical harm himself. Indeed, the Ninth Circuit explicitly held, “watching one’s father beaten may be a horrific experience for a young child - but not all horrific experiences translate into persecution. The assault was a single incident, remote in time. It was [not] directed at the petitioner . . . he himself was never attacked . . . .” Therefore, Ninth Circuit precedent prior to Hernandez-Ortiz required an asylum applicant to personally experience persecution.

58 See Rios v. Ashcroft, 287 F.3d 895, 900 (9th Cir. 2002) (reasoning that repeated death threats and severe wounding requiring hospitalization for a month were a sufficient basis for finding past persecution).

59 See Rodriguez-Ramirez v. Ashcroft, 398 F.3d 120, 123 (9th Cir. 2005) (finding isolated violence against a family member insufficient to establish past persecution).

60 Id. at 124.
III. Analysis

The Ninth Circuit’s new rule in Hernandez-Ortiz is unsound because neither international refugee law\textsuperscript{61} nor international law regarding the treatment of refugee children support its overly-broad language.\textsuperscript{62} Furthermore, this rule is inconsistent with domestic policy regarding child asylum claims.\textsuperscript{63} Additionally, it is in conflict with Ninth Circuit precedent regarding persecution of children.\textsuperscript{64}

\textsuperscript{61} See Refugee Convention, supra note 1, art. 1(A)(2) (requiring asylum applicants to personally suffer persecution on account one of the five protected grounds listed in the Convention).

\textsuperscript{62} See CRC, supra note 6, art. 22 (requiring member states to afford children all the rights and protections available under international human rights law, while seeking refugee status in a member state).

\textsuperscript{63} See Child Asylum Guidelines, supra note 6, at 18 (demanding that children meet the same substantive eligibility requirements for asylum as adults including personally suffering persecution on account of one of the five protected grounds).

\textsuperscript{64} See discussion infra Part III(C) (delineating Ninth Circuit case law regarding past-persecution prior to Hernandez-Ortiz and finding it requires the applicant personally to suffer persecution).
A. The Ninth Circuit’s New Rule in Hernandez-Ortiz is Unsound Because it Overlooks the Refugee Convention’s Requirement that Persecution be “on Account of” a Recognized Category and that the Applicant Personally Suffer Persecution.

Under the Refugee Convention, to qualify for asylum an applicant claiming past-persecution must demonstrate that he himself suffered persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion.65 The court’s holding in Hernandez-Ortiz, however, conflicts with this requirement insofar as it requires neither that the individual claiming asylum personally suffer past persecution, nor that this persecution be “on account of” one of the enumerated grounds.66 Rather, the court held that the adjudicator must consider injuries to the family in an asylum case where the events that form the basis of the past persecution claim were perceived when petitioner was a child.67

65 See Refugee Convention, supra note 6, art. 1(A)(2) (granting refugee status to “any person” who suffers persecution on account of a protected ground).
66 See Hernandez-Ortiz, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (finding that the lower standard for persecution of children articulated in the Child Asylum Guidelines justifies this lax interpretation of the Refugee Convention).
67 Id. at 1046.
Thus, contrary to the Refugee Convention’s requirement that the asylum applicant must have undergone persecution himself in order to qualify for relief, the new rule in Hernandez-Ortiz seemingly allows immigration judges to consider persecution of an applicant’s family as establishing past persecution, even if the applicant himself never directly experienced any persecution.

Furthermore, in articulating its new rule of law in Hernandez-Ortiz, the court found that adjudicators may consider harms to family members to be persecution of a child without regard to whether these harms were directed at the child on account of his race, religion, nationality, membership in a particular social group, or political opinion. (emphasis added).

See Refugee Convention, supra note 1, art. 33(1) (“No Contracting State shall expel or return a refugee . . . where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.” (emphasis added)).

See Hernandez-Ortiz, 496 F.3d at 1045-46 (concluding that, since the child is part of the family, injury to the family is apt to create lasting personal trauma to the child).
particular social group, or political opinion.\textsuperscript{70} This rule, thus, goes explicitly against the language of the Refugee Convention in which eligibility for asylum hinges explicitly on persecution based on one’s “race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{71}

The Ninth Circuit’s broad understanding of what constitutes persecution is problematic because it undermines the more exact definition in the Refugee Convention.\textsuperscript{72} Because refugee status constitutes a privileged form of migration,\textsuperscript{73} a more precise definition is necessary in order to prevent the number of

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70 \textit{See id.} at 1045-46 (failing to address petitioner’s claim in reference to any of the five protected grounds in the Refugee Convention).

71 Refugee Convention, \textit{supra} note 1, art. 1(A)(2).

72 \textit{See id.} art. 1 (limiting specifically the types of persecution warranting refugee status to those which are based on race, religion, nationality, membership in a particular social group, or political opinion).

73 \textit{See Aristide R. Zolberg et al., Escape from Violence: Conflict and the Refugee Crisis in the Developing World,} 269-72 (Oxford Univ. Press) (1989) (explaining that refugee status, unlike economic migrants, can only be given to a limited number of people).
\end{flushright}
refugees from multiplying endlessly.\textsuperscript{74} Therefore, by ignoring the “on account of” and personal-suffering-of-persecution requirements in the Refugee Convention, the Hernandez-Ortiz rule subverts this important limiting purpose of the refugee definition in the Refugee Convention, which recognizes the uniquely compelling situation of refugees as opposed to other migrants.\textsuperscript{75}

In addition, the court’s new rule requires immigration judges to look at the events from the perspective of a child and to assess the severity of their impact on children of that age.\textsuperscript{76}

\textsuperscript{74} See id. (pointing out that in developing a universal definition of “refugee” it is important to limit the number of prospective beneficiaries with the central ranking principle being “immediacy and degree of life-threatening violence”).

\textsuperscript{75} See David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247, 1275 (1990) (distinguishing refugees from immigrants and illegal migrants, explaining that refugees are not drawn but driven to a country).

\textsuperscript{76} See Hernandez-Ortiz, 496 F.3d 1042, 1046 (9th Cir. 2007) (finding that a failure to assess events from the perspective of a child constituted a legal error warranting remand of an immigration judge’s decision to deny an asylum application).
Although it may be reasonable to hold children to a lower standard of persecution in assessing their asylum claims given their unique situation, this consideration is neither supported

77 See Child Asylum Guidelines, supra note 6, at 1-2 (explaining that children’s unique and vulnerable circumstances require asylum officers to provide child-sensitive procedures and analysis). See generally Jacqueline Bhabha & Wendy A. Young, Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers, 75 Interpreter Releases 757 (1998) (discussing the necessity of child specific guidelines because the specific circumstances of children make it more difficult for them to meet the same asylum standards as adults); Joyce Koo Dalrymple, Seeking Asylum Alone: Using the Best Interest of the Child Principle to Protect Unaccompanied Minors, 36 B.C. Third World L.J. 131 (2006)(urging the Department of Homeland Security to develop a special “immigrant juvenile status” for accompanied children seeking asylum in order to help them navigate the confusing legal system designed primarily for adults); Danutella Villarreal, To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum Seekers, 26 Hous. J. Int’l L. 743, 744 (2004) (pointing out that children are subject to forms of persecution not applicable to adults, to which asylum officers should give special
by the language of the Refugee Convention\textsuperscript{78} nor within the Ninth Circuit’s power to interpret into the Refugee Convention.\textsuperscript{79}

B. The International Obligations Set Forth in the CRC in No Way Require the Ninth Circuit to Adopt the Hernandez-Ortiz Rule.

The CRC entered into force on September 2, 1990 for the purpose of extending particular care to children under international law because of their “physical and mental immaturity.”\textsuperscript{80} Even in light of this commitment, however, consideration); Rachel Bien, Nothing to Declare but their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children, 12 \textit{J.L. & Pol’y} 797 (2004)(arguing that the United States should afford greater procedural protections to child asylum seekers).

\textsuperscript{78} See Refugee Convention, supra note 1, art. 1(A).

\textsuperscript{79} See INS v. Ventura, 537 U.S. 12, 17 (2002) (holding that the BIA is responsible for interpreting laws in the first instance in light of its own expertise); see also Brief for Writ of Certiorari, Gonzales v. Tchoukhrova, 127 S.Ct. 57 (No. 05-1401) (demonstrating that the Ninth Circuit has a recurring history of inventing new rules for the first time on review, which the BIA did not initially vet).

\textsuperscript{80} See CRC, supra note 6, pmbl. (articulating the internationally recognized need for a Convention protecting the rights of
neither the CRC nor the Child Asylum Guidelines necessitate the Ninth Circuit’s requirement in Hernandez-Ortiz v. Gonzales\textsuperscript{81} that immigration judges must consider persecution of a child’s family from the perspective of a child of that age.\textsuperscript{82} The CRC does not

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children, recognizing that children live in difficult conditions in all countries and governments should afford them an environment that ensures their growth and well-being).
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\textsuperscript{81} See Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (finding that the Child Asylum Guidelines did, in fact, support an immigration judge’s consideration of the persecution of a family from the perspective of the child at the age at which he was when the persecution occurred).

\textsuperscript{82} See CRC, supra note 6, art. 3(3) (requiring state parties to ensure that institutions, services, and facilities charged with the care and protection of children conform with established safety and health standards); Child Asylum Guidelines, supra note 6, at 5-17 (delineating child-friendly procedural considerations for asylum officers in structuring asylum interviews and requiring asylum officers to take into account a child’s “age, maturity, ability to recall events, and psychological make-up” in assessing their asylum claim).
explicitly define “the best interest of the child” principle. The language in the CRC only explicitly requires member states to afford child asylum seekers all the procedural and human rights protections available in a country while they are detained there pending their asylum application. It is difficult to see how these requirements correspond to the circumstances in Hernandez-Ortiz, which concerns the asylum applications of two adults whose family experienced persecution.

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83 See CRC, supra note 6, art. 3(1) (explaining only that state parties must observe this principle in all actions concerning children without elaborating or listing what factors to consider); see also Michael Freeman, Article 3: The Best Interest of the Child, in A Commentary on the United Nations Convention on the Rights of the Child 25, 27-31 (Andre Alen, Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans, and Mieke Verheyde eds., 2007) (discussing the lack of a definition of the “best interest of the child” principle in the CRC and suggesting that this concept is too subjective and value-laden to reach any definitive consensus on a definition).

84 See CRC, supra note 6, arts. 3, 22 (requiring member states to ensure the protection of child refugees in accordance with existing human rights and humanitarian law).
when they were children.\textsuperscript{85} Rather, both the CRC and the Child Asylum Guidelines are meant to address the well-being and protection of children during the asylum process.\textsuperscript{86} Additionally, the Hernandez-Ortiz brothers were adults at the

\textsuperscript{85} See Hernandez-Ortiz, 496 F.3d at 1044 (explaining that petitioners were two adult males whose father and brother had experienced persecution at the hands of the Guatemalan army when the boys were children, though neither of them ever directly witnessed this persecution first-hand).

\textsuperscript{86} See CRC, supra note 6, art. 22 (requiring member states to ensure that child refugees receive “appropriate protection and humanitarian assistance”); Child Asylum Guidelines, supra note 6, at 5, 17 (emphasizing the importance of a child-friendly asylum interview environment and explaining that asylum officers should give special consideration to children when they are recounting any previously experienced persecution). Indeed, the Child Asylum Guidelines are meant specifically for interviews of children, not adults, recounting their experiences as children, as evidenced by their strong emphasis on children’s vulnerability and limited maturity affecting their ability to sufficiently convey their experiences of persecution. Id. at 16-17.
time they filed their asylum applications, making the applicability of the CRC and Child Asylum Guidelines, which were meant to deal with child asylum applicants, to their persecution claims moot.

C. The Hernandez-Ortiz Rule Accords Neither with Ninth Circuit Precedent Regarding Past Persecution nor the Case Law or Child Asylum Guidelines the Court Cites as Justifying the Rule.

The new rule of law in Hernandez-Ortiz not only conflicts with the statutory language of the Refugee Convention, it also

87 See Hernandez-Ortiz, 496 F.3d at 1043-44 (explaining that the brothers were roughly twenty-four and twenty-two years of age at the time they filed their asylum applications).

88 See CRC, supra note 6, art. 22 (explaining that the CRC is meant to protect children refugees whether accompanied or unaccompanied by adults); Child Asylum Guidelines, supra note 6, at 16-17 (explaining that the Child Asylum Guidelines are instructive in highlighting the unique circumstances children face in seeking asylum).

89 Compare Refugee Convention, supra note 1, art. 1(A)(2) (explaining that to qualify as a refugee one must demonstrate persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion), with Hernandez-Ortiz, 496 F.3d at 1045-46 (finding that persecution to the family of an applicant, which occurred while
does not accord with Ninth Circuit precedent regarding requirements for demonstrating past persecution.\(^90\) In previous case law the Ninth Circuit has found that in order to establish sufficiently past persecution, an applicant must demonstrate that he himself experienced persecution,\(^91\) and not merely that a close friend or family member suffered persecution.\(^92\) Thus, by now requiring immigration judges to take into account the persecution of an applicant’s family members, even if the applicant was a child, sufficient to establish past persecution regardless of the fact that it was not on account of race, religion, nationality, membership in a particular social group, or political opinion).

\(^90\) See Rodriguez-Ramirez v. Ashcroft, 398 F.3d 120, 123 (9th Cir. 2005); Nagoulko v. INS, 333 F.3d 1012, 1016-17 (9th Cir. 2003).

\(^91\) See Nagoulko, 333 F.3d at 1016-17 (holding that petitioner failed to establish past persecution because he himself had never suffered any significant physical violence).

\(^92\) See Rodriguez-Ramirez, 398 F.3d at 124 (finding that, while watching a family member be beaten maybe horrific, if the witness suffered no actual personal physical harm the experience does not rise to the level of persecution).
applicant himself experienced no persecution,\(^93\) this new rule flies in the face of the Ninth Circuit’s own precedent.

In addition to being in conflict with Ninth Circuit precedent, neither the cases which the court in Hernandez-Ortiz cites nor the Child Asylum Guidelines, support the court’s assertion that adjudicators should consider harm to families when the persecution occurred at the time when the applicant was a minor.\(^94\) The court’s reliance on Abay v. Ashcroft\(^95\) in the Sixth Circuit is misplaced because the court in that case merely held that when a nine-year-old child seeks asylum, an immigration judge should take into account that children are less articulate than adults in assessing the objective

\(^{93}\) See Hernandez-Ortiz, 496 F.3d at 1045-46 (finding in this case that neither boy witnessed their father’s beating nor their brother’s murder and, further, neither boy suffered any direct physical harm themselves).

\(^{94}\) See Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006); Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004); Liu v. Ashcroft, 380 F.3d 307 (7th Cir. 2004); Child Asylum Guidelines, supra note 6, at 16-27.

\(^{95}\) 368 F.3d 634 (6th Cir. 2004).
reasonableness of a child’s fear of future persecution.\textsuperscript{96} Insofar as the court in Abay addresses the issue of finding persecution as a result of harms to one’s family, the court found that this is only relevant in instances where “a parent and protector is faced with exposing her child to the clear risk of [subjection] against her will to . . . a form of physical torture.”\textsuperscript{97} Abay says nothing about considering harms to family members as constituting past persecution when that harm occurred when the applicant was a child.\textsuperscript{98}

Similarly, the court’s reliance on Liu v. Ashcroft\textsuperscript{99} in the Seventh Circuit is also misplaced. In Liu, the court explained

\textsuperscript{96} See Abay, 368 F.3d at 640 (recognizing that, as the Child Asylum Guidelines point out, children under sixteen may lack maturity to articulate a well-founded fear, requiring the adjudicator to rely more on objective factors and give a liberal benefit of the doubt to evaluating a child’s alleged fear of persecution).

\textsuperscript{97} Id. at 642.

\textsuperscript{98} See id. (granting asylum to petitioner’s daughter not because of the mother’s past persecution but because of the mother’s inability to protect her daughter from future persecution if removed to Ethiopia).

\textsuperscript{99} 380 F.3d 307, 314 (7th Cir. 2004).
in dicta that “age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted.”

The court in Liu, thus, merely acknowledged the Child Asylum Guidelines’ suggestion to take age into account when assessing a child’s asylum claim. The court speaks neither about requiring adjudicators to consider harms to the family nor requiring adjudicators to consider these harms from the perspective of a small child, as the rule in Hernandez-Ortiz requires.

The only case which the Hernandez-Ortiz court cites that supports its new rule is Jorge-Tzoc v. Gonzales, in which the Second Circuit held that an immigration judge is required to address the harms of the child’s “family incurred cumulatively

\footnote{\text{id.}}

\footnote{See \text{id.} (acknowledging that age can be a critical factor in assessing a child’s asylum claim bearing heavily on the question of establishing a well-founded fear of persecution).}

\footnote{See Hernandez-Ortiz, 496 F.3d 1042, 1046 (9th Cir. 2007) (stating that adjudicators must consider injuries to the family in an asylum case “where the events that form the basis of the past persecution claim were perceived when petitioner was a child”).}

\footnote{435 F.3d 146, 150 (2d Cir. 2006).}
from the perspective of a small child.” ¹⁰⁴ However, unlike the rule from Hernandez-Ortiz, in Jorge-Tzoc the court explicitly stated that the harms done to the family were on account of one of the five grounds enumerated in the Refugee Convention and INA.¹⁰⁵ Therefore, although Jorge-Tzoc supports the Hernandez-Ortiz rule insofar as it allows for adjudicators to consider harms to a child’s family from the child’s perspective, it,

¹⁰⁴ See id. (finding that an immigration judge’s failure to take into account the harms to petitioner’s family from the perspective of a small child necessitated vacatur of the finding that petitioner failed to establish past persecution).

¹⁰⁵ See Jorge-Tzoc, 435 F.3d at 150 (finding that petitioner “offered substantial evidence of a pervasive campaign carried out by the army against Mayans in the area in which he lived”); INA (Westlaw through 2007) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (limiting eligibility for asylum to those who have suffered persecution on account of race, religion, nationality, membership in a particular social group, or political opinion); Refugee Convention, supra note 1, art. 1(A)(2) (stipulating that, as a preliminary matter, a person must establish persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in order to qualify as a “refugee” under the Refugee Convention).
unlike Hernandez-Ortiz, still requires persecution to be on account of one of the five enumerated grounds.

Furthermore, the Child Asylum Guidelines may speak to a lower standard for persecution for children, but they say nothing about harm to families.\textsuperscript{106} Thus, the Hernandez-Ortiz court’s reliance on the Child Asylum Guidelines to justify the validity of their rule is at best based only on a loose and general reading of their provisions, and, at worst, largely unsupported in the document’s text.\textsuperscript{107} Additionally, the Child Asylum Guidelines explicitly state that children must still meet the “on account of” requirement, stating, “[r]egardless of the nature or degree of harm the child suffered, that harm must

\textsuperscript{106} See Child Asylum Guidelines, supra note 6, at 17-18 (requiring a child applicant to meet the definition of refugee under Section 101(a)(42) of the INA as interpreted by the BIA and Federal court precedent, and highlighting that these guidelines do not change or replace the refugee definition).

\textsuperscript{107} See id. at 16-27 (focusing analysis specifically on children who file separate asylum applications with no familial support and highlighting that sensitivity should be given to children’s claims regarding their development, limited knowledge, and special vulnerability but mentioning nothing about harms to the family as a relevant consideration).
still nonetheless be tied to a protected ground.”  
Therefore, not only is this new rule largely unsupported by the Child Asylum Guidelines, it also explicitly ignores the requirement that child applicants must still establish persecution based on one of the five enumerated grounds in the Refugee Convention.

IV. Recommendations

The Ninth Circuit’s rule in Hernandez-Ortiz is not consistent with international and United States refugee law. To remedy this, the BIA, in its expertise, should examine this rule in light of the Refugee Convention, INA, and CRC to

108 See id. at 21-22 (emphasizing that no matter how compelling a child’s account of persecution may be, the child is ineligible for asylum if he cannot tie his account of persecution to one of the protected grounds in INA § 101(a)(42)(A)).

109 See discussion infra Parts III(A)-(B) (explaining how the Hernandez-Ortiz rule conflicts with Refugee Convention’s “on account of” requirement and the requirement that the applicant personally suffer persecution; additionally, the CRC’s “best interest of the child” requirement does not require such a broad and sweeping rule).

110 See INS v. Ventura, 537 U.S. 12, 16-17 (2002) (finding that Congress entrusted the BIA to make basic asylum eligibility determinations).
determine whether it is consistent with these various legal instruments. Additionally, the Hernandez-Ortiz rule is instructive in elucidating the shortcomings of both United States and international legal instruments in adequately adjudicating children’s asylum claims.\textsuperscript{111} To better protect child refugees the United States should fully ratify the CRC and the international community should develop a convention specifically for child refugees.

A. The Supreme Court Should Remand Hernandez-Ortiz Rule to the BIA for Consideration in the First Instance

Because the BIA did not properly vet the Ninth Circuit’s new rule of law in Hernandez-Ortiz,\textsuperscript{112} the Supreme Court should remand the decision to the BIA for an initial interpretation of the Refugee Convention and Child Asylum Guidelines in this

\textsuperscript{111} See discussion infra Part IV(B) (contending that the uniquely vulnerable position of child refugees requires more elaborate protections tailored specifically to their needs).

\textsuperscript{112} See Ventura, 537 U.S. at 16-17 (holding that, in the immigration context, courts of appeals should remand a case to the BIA for decision on issues that the INA places primarily in its hands because the BIA can bring its expertise to bear upon the matter, evaluate evidence, make an initial determination, and, through informed analysis, help courts determine whether their decisions exceed the scope of the law).
context.\textsuperscript{113} For this to occur, the government should petition the Supreme Court for certiorari.\textsuperscript{114} Should the Supreme Court grant this petition,\textsuperscript{115} it should remand the case to the BIA.\textsuperscript{116}

If remanded from the Supreme Court, the BIA should examine the Hernandez-Ortiz rule in light of the language of the Refugee Convention and the Child Asylum Guidelines. In determining whether the Hernandez-Ortiz rule complies with the language of the Refugee Convention, the BIA should find that the Refugee Convention clearly and unambiguously requires any form of persecution warranting a grant of asylum to be on account of

\textsuperscript{113} See id. at 16 (explaining that in such circumstances “a judicial judgment cannot be made to do service for an administrative judgment” and it is not in the province of the courts to intrude on a domain Congress has exclusively entrusted to an administrative agency).

\textsuperscript{114} See Sup. Ct. R. 13 (finding a petition for certiorari timely when any United States court of appeals files it with the Clerk and is seeking review of that court’s decision).

\textsuperscript{115} See Sup. Ct. R. 10 (stating that granting writs of certiorari is a matter of judicial discretion).

\textsuperscript{116} See Ventura, 537 U.S. at 116–17 (holding that the BIA is responsible for interpreting statutes in the first instance in light of its own expertise).
race, religion, nationality, membership in a particular social group, or political opinion. 117 Furthermore, the Child Asylum Guidelines do not relax the “on account of” requirement for

117 See Refugee Convention, supra note 1, art. 1(A)(2) (delineating the criteria for refugee status as being anyone 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). Note that in 2005, the REAL ID Act added the language “at least one central reason” to the INA, meaning that the sole motive for persecution need not be based on one of the five enumerated grounds, but must be one part of the persecutor’s motives. REAL ID Act § 101(a)(3), Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). Thus, while the INA, in implementing the language of the Refugee Convention, recognizes that there may be many motives for one instance of persecution, it still requires that an asylum applicant establish that at least one of these motives was based on a protected ground. INA (Westlaw through 2007) § 101(a)(42), 8 U.S.C. § 1101(a)(42).
Therefore, insofar as the Hernandez-Ortiz rule does not require past persecution of an applicant or the applicant’s family, which occurred when the applicant was a child, to be at least in part on account of race, religion, nationality, membership in a particular social group, or political opinion, the BIA should find it in conflict with the requirements of the Refugee Convention and, thus, should invalidate it.

B. The United States Should Fully Ratify the Convention on the Rights of the Child

The protections afforded children asylum seekers in the United States under the Refugee Convention and Child Asylum Guidelines are inadequate to address the myriad problems that face children seeking asylum in the United States.\(^{119}\)

\(^{118}\) See Child Asylum Guidelines, supra note 6, at 17-18 (requiring child applicants to meet the definition of refugee contained in INA § 101(a)(42) and emphasizing that, “no matter how sympathetic the child’s claim may be,” the child must meet all the statutory requirements to qualify for asylum).

\(^{119}\) See Bien, supra note 77, at 826-27 (faulting the Child Asylum Guidelines for not significantly altering a child’s substantive eligibility for asylum, and permitting asylum officers very limited discretion in ensuring that a child’s age, maturity, ability to recall events, and psychological makeup have an
Specifically, the Refugee Convention and Child Asylum Guidelines fail to address child-specific forms of persecution and, additionally, they do not adequately address how these affect a child’s substantive eligibility for asylum.\textsuperscript{120} Ratifying the CRC effect on their decision to grant or deny asylum); Refugee Convention, \textit{supra} note 1 (failing to specify any special considerations for children in terms adjudicating their persecution claims). \textit{See generally} Bhabha & Young, \textit{supra} note 77, at 758 (pointing out that U.S. asylum law’s failure to recognize that children are different is an anomaly in U.S. law where, in other contexts such as family and criminal law, children are held to different standards than adults).

\textsuperscript{120} \textit{See} Bien, \textit{supra} note 77, at 831 (explaining how the Child Asylum Guidelines fail to address forms of persecution unique to child applicants such as infanticide, female genital mutilation, bonded child labor, child marriage, the sale of children, and child military conscription, and explaining that while these may not rise to the level of persecution for adults, adjudicators could very well consider these acts persecution when children are the targets); \textit{see also} Child Asylum Guidelines, \textit{supra} note 6, at 18-20 (explaining that the same definition of refugee applies to children and adults and fails to mention any child-specific forms of persecution in its instructions to asylum

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and implementing its “best interest of the child” principle into domestic legislation, regulation, and adjudication of substantive issues regarding child asylum seekers can remedy these problems by requiring adjudicators to take into account these various forms of child-specific persecution in their substantive analysis of children’s asylum claims.¹²¹

¹²¹ See Villarreal, supra note 77, at 755 (arguing that implementing “best interest of the child principle” in U.S. legislation would oblige asylum officials to “carefully solicit and diligently consider” children’s testimony and to be especially cautious in filtering a child’s experience through their own value system). Indeed, several cases in the United States demonstrate the limitations of current U.S. policy in affording children substantive provisions, which take into account their status as children. See, e.g., Cruz-Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (holding a child to the same standard as an adult in his attempt to evade military conscription and finding that a guerillas hunting a fifteen-year-old to make him fight in the army did not amount to
Furthermore, because the CRC is the most ratified human rights treaty in history,\textsuperscript{122} adopting the “best interest of the child” principle would bring the United States into conformance with the majority of countries regarding treatment of child refugees. Moreover, both the United Kingdom and Canada—countries that also account for a high percentage of all asylum claims in the industrialized world—have implemented the “best interest of the child” principle into their domestic legislation with much success.\textsuperscript{123} In Canada, the Child Refugee Claimants: persecution); Garcia-Garcia v. INS, 1999 U.S. App. LEXIS 4778, at 4 (4th Cir. Mar. 19, 1999) (refusing to recognize that forced recruitment of a child amounted to persecution).

\textsuperscript{122} See CRC Ratification List, \textsuperscript{supra} note 23 (providing a complete list of states which are parties to the CRC).

\textsuperscript{123} See Bien, \textsuperscript{supra} note 77, 813-16 (stating that both Canada and the United Kingdom have conformed their domestic asylum law to reflect their international commitments under the CRC); Child Refugee Claimants: Procedural and Evidentiary Issues, available at http://www.cISR.gc.ca/en/about/guidelines/childe/htm (last visited Sept. 29, 2007) [hereinafter Canadian Child Asylum Guidelines] (providing for the appointment of representatives to ensure the protection of best interest of the child throughout the asylum process and establishing special procedures for child
Procedural and Evidentiary Issues ("Canadian Child Asylum Guidelines") govern the adjudication of Children’s asylum claims, stating that the “best interest of the child” is to be the primary consideration at all stages of the immigration process,\textsuperscript{124} and do not bind adjudicators by the technical rules of evidence, allowing them to be more sensitive in their asylum claims and evidentiary standards that are sensitive to the individual child’s level of maturity and development); U.K. Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Note, 5.2, available at http://www.ind.homeoffice.gov.uk (last visited Oct. 5, 2007) [hereinafter UK Child Asylum Guidelines] (ensuring that all of children’s legal, educational, and social welfare needs are met throughout the asylum process and providing children with assistance in finding qualified legal counsel).

\textsuperscript{124} See Canadian Child Asylum Guidelines, supra note 123, § III (compelling Canadian immigration officials to adopt certain procedures that reflect the best interest of the child such as giving children’s claims scheduling and processing priority, as well as assessing all relevant factors regarding a child’s ability to articulate their experiences and the perception of those experiences from the child’s perspective).
assessments of a child’s evidence of persecution.\textsuperscript{125} In the United Kingdom the law states that adjudicators should not deny asylum solely on the grounds of a child’s inability to understand his or her situation or to form a well-founded fear of persecution due to his or her lack of maturity.\textsuperscript{126} Additionally, the United States has little to lose from ratifying the CRC and implementing the “best interest of the child” principle into domestic asylum policy because there is no evidence that such changes would create a dramatic surge in child asylum claims.\textsuperscript{127} Indeed, a comprehensive implementation

\textsuperscript{125} See id. § II (requiring sensitivity to a child’s potential inability to express a subjective fear of persecution and to consider possible inferences that could tie together gaps in a child’s oral testimony).

\textsuperscript{126} See Dalrymple, supra note 77, at 151-52 (directing immigration officials to allow children claiming asylum to express themselves in their own way and to conclude the interview should the applicant appear fatigued or distressed); see also UK Child Asylum Guidelines, supra note 123, § 351 (requiring adjudicators to be very attentive to the child’s welfare throughout the entire immigration process).

\textsuperscript{127} See Bien, supra note 77, at 830-31 n.151 (finding that despite incorporating the “best interest of the child” principle
of this principle into substantive United States asylum law will allow the United States to further its humanitarian and foreign policies and improve its public image among other nations.\(^{128}\)

**C. The Unique Circumstances of Child Refugees Require the United Nations to Create a Convention Specifically for Child Refugees.**

Child refugees are among the most vulnerable groups of people\(^{129}\) and should have a body of law devoted to the specific

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\(^{128}\) See Dalrymple, supra note 77, at 163 (explaining that applying the “best interest of the child” principle to the substantive adjudication of children’s asylum claims will permit the United States to accept a greater share of the world’s most vulnerable children). Dalrymple suggests that applying eligibility standards used to determine special immigrant juvenile status (“SIJS”)—which is the only provision in immigration law to make the best interest of the child an eligibility requirement—to the eligibility determinations for child asylum would remedy the problem of applying the traditional refugee definition to children. Id. at 164-67.

\(^{129}\) See Bhabha & Young, supra note 77, at 758 (explaining that, increasingly, children are becoming targets of human rights
protections and considerations that their uniquely vulnerable position requires. The current international instruments dealing with the rights of children and of refugees are inadequate to fully protect child asylum seekers. The CRC does not do enough to address the situation of child refugees as it only devotes one section to them specifically and does not mention any of the unique problems facing child refugees. 

 abuses such as genocide, forced military conscription, gender-based violence, torture, and exploitation).

 See Refugee Convention, supra note 1, art. 1 (failing to specify how the definition of “refugee” may have different substantive requirements in the case of children); CRC, supra note 6, arts. 3, 22 (imposing predominantly procedural responsibilities on member states in adjudicating asylum claims without enough reference to the substantive adjudication of those claims). But see Bhabha & Young, supra note 77, at 760 (arguing that, properly applied, the principles in the CRC place requirements on the substantive adjudication of children’s asylum claims).

 See Villarreal, supra note 77, at 758 (explaining that the lack of well-defined criteria in the CRC for the “best interest of the child” principle is a significant shortcoming of the CRC).

 130 See Refugee Convention, supra note 1, art. 1 (failing to specify how the definition of “refugee” may have different substantive requirements in the case of children); CRC, supra note 6, arts. 3, 22 (imposing predominantly procedural responsibilities on member states in adjudicating asylum claims without enough reference to the substantive adjudication of those claims). But see Bhabha & Young, supra note 77, at 760 (arguing that, properly applied, the principles in the CRC place requirements on the substantive adjudication of children’s asylum claims).

 131 See Villarreal, supra note 77, at 758 (explaining that the lack of well-defined criteria in the CRC for the “best interest of the child” principle is a significant shortcoming of the CRC).
Additionally, the Refugee Convention does not address children’s substantive eligibility for asylum at all.\textsuperscript{132} Thus, what is necessary is a United Nations convention dealing specifically with child refugees. This would aid the protection of child refugees by combining the emphasis on the rights of children found in the CRC and the importance of protecting refugees found in the Refugee Convention.\textsuperscript{133}

In drafting language for the Refugee Convention, the United Nations should incorporate aspects of US Child Asylum Guidelines,\textsuperscript{134} Canadian Child Asylum Guidelines,\textsuperscript{135} UK Child

\textsuperscript{132} See Refugee Convention, supra note 1, arts. 1, 22 (failing to acknowledge that children may require different substantive considerations in determining their refugee status and providing no criteria for assessing child-specific forms of persecution).

\textsuperscript{133} See Refugee Convention, supra note 1, art. 33 (forbidding contracting states from returning a refugee to a place where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion).

\textsuperscript{134} See Child Asylum Guidelines, supra note 6, at 5-16 (providing asylum officers with procedural considerations in interviewing child asylum applicants including the presence of a trusted adult, using asylum officers experienced in dealing with
Asylum Guidelines,\textsuperscript{136} and the UNHCR Guidelines.\textsuperscript{137} Not only would children, using an interpreter with whom the child feels comfortable and fully understands, using child-sensitive questioning and active listening techniques, and having cross-cultural sensitivity to the child’s background and culture.\textsuperscript{135} See Canadian Child Asylum Guidelines, \textit{supra} note 123, §§ A(III), B(I) (entitling child asylum claimants to expedited processing of their claims, a designated representative to guide the child through the asylum proceedings, and providing detailed guidelines for assessing the evidence presented in a child’s asylum case).\textsuperscript{136} See UK Child Asylum Guidelines, \textit{supra} note 123 (allowing for child-sensitive screening procedures and instructing officers to take into consideration a child’s age and maturity in assessing their asylum application).\textsuperscript{137} See Office of the United Nations High Commission for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (Feb. 1997) [hereinafter UNHCR Guidelines] (stating that children’s asylum applications should be given priority due to children’s vulnerability and special needs and highlighting the importance of considering child-specific forms of persecution which the Refugee Convention does not cover).
this codify these various guidelines into mandatory legal requirements, but it would also have the benefit of utilizing workable standards that countries have already found instructive in dealing with child asylum claims. For example, each set of Guidelines recommends similar procedures for interviewing child refugees, such as allowing a trusted adult or designated representative to accompany the child,\textsuperscript{138} suggesting an expedited processing of a child’s asylum claim,\textsuperscript{139} and providing general

\textsuperscript{138} See Child Asylum Guidelines, supra note 6, at 5 (advising asylum officers to allow a trusted adult into the asylum proceedings with the child); Canadian Child Asylum Guidelines, supra note 123, § A(II) (requiring a designated representative, in addition to legal counsel, for all child claimants to accompany them to all proceedings of the refugee claim); UNHCR Guidelines, supra note 137, ¶ 5.7 (requesting that each country appoint a guardian or advisor to each child refugee with expertise in childcare).

\textsuperscript{139} See Child Asylum Guidelines, supra note 6, at 6 (suggesting that children’s cases get “high priority” in scheduling in certain circumstances); Canadian Child Asylum Guidelines, supra note 123, § A(III) (instructing officials to identify that children’s claims as soon as possible and give scheduling and processing priority); UK Child Asylum Guidelines, supra note 123
considerations to asylum officers in making the asylum interview more child-friendly.\textsuperscript{140} In addition, all but the United States (providing a Panel of Advisors to accompany and offer non-legal assistance to child applicants in navigating the immigration process and stating that a child’s vulnerability requires screening officers to identify young applicants and deal with them as a priority); UNHCR Guidelines, supra note 137, ¶ 5.4 (stating that child asylum claims should be processed expeditiously).

\textsuperscript{140} See Child Asylum Guidelines, supra note 6, at 7-16 (stating that asylum officers should attempt to build a rapport with the child allowing them to feel more comfortable talking about the sensitive subject of persecution and to be understanding that children may be mistrustful and timid in such a foreign environment); Canadian Child Asylum Guidelines, supra note 123, § B(I) (suggesting that, in considering a child’s testimony, the immigration panel should explain the process to the child as much as possible taking into account his or her age, allow the child to testify in an informal setting, question the child with sensitivity to the elicited type of evidence, and be aware that children may have difficulty testifying in front of a decision-maker despite an informal setting); UK Child Asylum Guidelines, supra note 123 (requiring a senior case worker to interview
provide specific criteria for applying the “best interest of the child” principle to a child’s substantive eligibility for asylum.\textsuperscript{141} Thus, a child refugee convention should incorporate children applicants, stating that a trusted adult must accompany the child, and instructing case workers to employ child sensitive and child appropriate questioning techniques); UNHCR Guidelines, supra note 137, ¶ 5.14-5.15 (requesting that officials inform children of the proceedings in an age-appropriate manner and elicit and consider all of the child’s views and wishes).

\textsuperscript{141} See Child Asylum Guidelines, supra note 6, at 18 (stating that the “best interest of the child” principle “does not replace or change the refugee definition in determining substantive eligibility); Canadian Child Asylum Guidelines, supra note 123, § A(I) (stating that, although the child must satisfy all the elements of the Refugee Convention, the Convention Refugee Determination Division should give primary consideration to the “best interest of the child” principle); UK Child Asylum Guidelines, supra note 123, (requiring “child-specific” factors to be taken into account when considering various aspects of a child’s asylum application); UNHCR Guidelines, supra note 137, ¶ 1.5 (embracing the CRC’s “best interest of the child” principle).
both the procedural and substantive requirements found in these individual guidelines, creating a binding obligation on member states to comprehensively implement the “best interest of the child” principle uniformly into their domestic asylum law.

V. Conclusion

In conclusion, although the Ninth Circuit’s rule in Hernandez-Ortiz goes beyond the current international legal standard recognized for child refugees, it is instructive in highlighting the United States’ lack of adequate standards for assessing how a child’s unique vulnerabilities affect his or her substantive eligibility for asylum. In signing the CRC, the United States has obligated itself to refrain from actions that are not in the best interest of the child, even if it has not fully ratified the CRC or implemented it into domestic legislation.\(^\text{142}\) Additionally, apart from ratifying the CRC, the international community should do even more to protect the rights of child refugees by creating a convention that contains adequate safeguards to protect this uniquely vulnerable group of refugees.

\(^{142}\) Vienna Convention, supra note 24, art. 18(a) (requiring states that sign on to a treaty to refrain from actions contrary to the aim and purpose of that treaty).