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Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States

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ABSTRACT

The number of unaccompanied minors seeking asylum has dramatically increased in recent years. The international response has been both varied and at times opposed to the best interests of unaccompanied minors. The United States has chosen to respond through changing unaccompanied minors' care and custody without addressing the need for changes in their substantive rights. However, it is necessary to broaden the interpretation of asylum standards to secure unaccompanied minors' legal rights as children who suffer persecution because they lack primary caregivers.

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I. INTRODUCTION

The U.N. High Commissioner for Refugees (UNHCR) is responsible for approximately 22.3 million of the approximately fifty million refugees or displaced persons in the world.[1] Almost ten

1. The international community defined Refugee in the 1951 Convention relating to the Status of Refugees, July 28, 1951, entered into force Apr. 22, 1954, 189 U.N.T.S. 137, and the 1967 Protocol relating to the Status of Refugees (Protocol), Jan. 31, entered into force Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, as a person "who 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

million of these people are children.[2] Unaccompanied minors comprise almost five percent of any given refugee population, thus approximately 500,000 children in total.[3] Half of all displaced persons seeking asylum are children.[4]

The number of unaccompanied minors seeking asylum has increased dramatically in industrialized countries in recent years. For example, in 1998 only two unaccompanied minors sought asylum in Ireland.[5] By 2003 the number had grown to 868.[6] Six times as many unaccompanied minors sought asylum in the United Kingdom in 2003 as in 1997.[7] The Netherlands experienced a similar increase from

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unable [or] unwilling to avail himself of the protection of that country." There are varying definitions of "unaccompanied minors" used in the international community. The United Nations defines unaccompanied minors as "children under 18 years of age who are separated from both parents and are not being cared for by an adult who by law or by custom is responsible to do so." U.N. GAOR 58th Sess., Agenda Item 114, at 3, U.N. Doc. A/58/299 (2003). The European Community also refers to unaccompanied minors as "separated children" to create a more inclusive picture that recognizes children may begin their flight with a primary caregiver or parent and subsequently become separated. *See* WENDY AYOTTE, SEPARATED CHILDREN IN EUROPE PROGRAMME, STATEMENT OF GOOD PRACTICE (2d ed. 2000) (explaining the inclusive nature of the term "separated children" as well as outlining a shared policy and commitment to best practice to realize the rights and best interests of separated children at national and European levels). The United States defines as unaccompanied minors "children under the age of 18 who seek admission to the United States and who are not accompanied by a parent or guardian." JEFF WEISS, U.S. DEP'T OF JUSTICE IMMIGRATION & NATURALIZATION SERV., GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS n.10, (1998), *available at* www.ilw.com/bellU.S.C.io/childr~1.pdf.

2. Bivan Saluseki, *Half of the Refugees in the World are Children Under 18 Years,* POST (Zambia), May 10, 2002.

3. Steven Hick, *The Political Economy of War-Affected Children,* 575 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 111 (2001); Human Rights Watch, *Forgotten Children of War, Sierra Leonean Refugee Children in Guinea, at* http://www.hrw.org/reports/1999 guinea (noting that numbers can be highly variable because a child may be taken in by extended family, improperly identified, or not identified at all due to logistical problems in registering a child with the UNHCR) [hereinafter *Forgotten Children of War*].

4. Hick, *supra* note 3, at 111.

5. *Experts Meet in Dublin to Discuss Child Asylum Seekers,* AGENCE FRANCE PRESSE, June 6, 2001 (noting the steady rise of unaccompanied minors seeking asylum from 2 in 1998 to 33 in 1999 and 304 in 2000); *see also* TRENDS IN UNACCOMPANIED AND SEPARATED CHILDREN SEEKING ASYLUM IN EUROPE, 2000, U.N. HIGH COMMISSIONER FOR REFUGEES (Nov. 2001), *available at* http://www.unhcr.ch [hereinafter *Trends*].

6. Nuala Haughey, *Applications for Refugee Status at an All-Time High,* IRISH TIMES, May 15, 2003, Home News at 3.

7. Matthew Hickley, *Asylum Children Reach Britain in Their Thousands,* DAILY MAIL, Oct. 24, 2003, at 2. In 1996, 623 sought asylum as compared to 3,343 in 1999. *See* Registration and Statistics Unit UNHCR (Geneva) UNACCOMPANIED MINORS IN EUROPE: A STATISTICAL SUMMARY (2000). In 2000, there were 2,735 reported unaccompanied minors in the UK. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, UNITED KINGDOM (2002); Michelle Nichols, *Tide of Tiny Refugees Now a Flood,* SCOTSMAN, Aug. 8, 2001, at 6; Helen Tither, *Record Numbers of Unaccompanied Refugee Children are*

1,562 in 1996 to 6,705 in 2000.[8] Overall asylum applications for unaccompanied minors in twenty-six European countries rose from 12,102 in 1998 to 16,112 in 2000.[9] U.S. estimates indicate that 5,000 unaccompanied minors are detained there, a fifty percent increase from 1997.[10] The United States does not provide statistics on how many unaccompanied minors apply for asylum each year.[11]

The dramatic increase in the number of unaccompanied minors has created two distinct issues for these children, as well as for immigration officers, judges, and advocates.[12] These groups are forced to wrestle, first, with the problems posed by unaccompanied minors' care and custody, and second, with the evaluation of any legal claims they might have.[13] How countries care for unaccompanied minors varies dramatically. Some countries automatically detain unaccompanied minors in jail-like facilities.[14] Others place them in national foster care systems without treating them differently than

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Arriving in Manchester Seeking Asylum, MANCHESTER EVENING NEWS, Oct. 25, 2002, at 32.

8. UNACCOMPANIED MINORS IN EUROPE: A STATISTICAL SUMMARY, *supra* note 7.

9. *Trends supra* note 5.

10. In 1997, there were approximately 2,500 unaccompanied minors in the United States. *Shift of Care for Immigrant Children Alone,* N.Y. TIMES, Nov. 27, 2002, at A16; *see also* David B. Caruso, *Detained Kids Treated Like Criminals,* HERALD NEWS, Dec. 3, 2003, at A1; Swanee Hunt, *Youngest Seekers of Asylum Oft Abused,* ROCKY MTN. NEWS, Sept. 14, 2003, at 7E. Detained unaccompanied minors are most likely to pursue immigration relief. The number of unaccompanied minors who arrive but are not detained in the United States and are therefore not eligible or unable present claims to remain is probably much greater. For example, Mexican consular authorities report that, in 2002 alone, 9,900 unaccompanied Mexican minors were returned to Mexico. Ginger Thompson, *Littlest Immigrants, Left in Hands of Smugglers,* N.Y. TIMES, Nov. 3, 2003, at A1.

11. Because the INS has not kept such records, it is difficult to know the number of detained children that have had successful asylum applications compared with those who were voluntarily or involuntarily deported. Judith Kumin, *David v. Goliath, at* www.unhcr.ch/children/david-goliath01.html; *see also* Amnesty International, *Unaccompanied Children in Immigration Detention,* June 18, 2003, *at* www.amnestyusa.org/refugee/children_detention.html (arguing that the INS has violated the law in not maintaining these records).

12. *See* Peter Margulies, *Children, Parents and Asylum,* 15 GEO. IMMIGR. L.J. 289, 306 (2001).

13. *Id.*

14. Belgium detained a five-year-old unaccompanied child in adult facilities and then shipped her alone to her country of origin. Belgium's policy is to detain children rather than place them in foster care. Tu Thanh Ha & Allan Freeman, *Five-Year-old Detained for 2 Months Sees Mother, Girl Held in Adult Centre in Belgium through Bureaucratic Bungling, Red Tape,* GLOBE & MAIL (Toronto), Oct. 24, 2002, at A3. Australia mandatorily detains all children seeking asylum. Amnesty International is challenging this policy in the Australian court system. *See* Press Release, Amnesty International, High Court Grants Amnesty International Leave to Intervene in Detained Children Case (Sept. 30, 2003) *at* http://www.amnesty.org.au/airesources/press-03-09-30.html.

they do their own citizens.[15] Countries generally handle refugees' legal claims similarly: the international response has come to focus on "contain[ing] the influx" of refugees by narrowing existing legal standards. As such, it has either become more difficult for unaccompanied minors to receive asylum, or they may be denied the ability to apply at all.[16] Because an unaccompanied minor faces difficulty in bringing and substantiating an asylum claim, only five percent of unaccompanied minors' applications for asylum are granted in developed countries.[17]

The United States addresses the influx of unaccompanied minors in a piecemeal fashion.[18] National attention focusing on the egregious conditions of unaccompanied minors in U.S. detention spurred legislation resulting in a recent decision to relocate an unaccompanied minor's care to the Office of Refugee Resettlement within the Department of Health and Human Services (DHHS).[19]

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15. [I]t is clear that large numbers of these children seek asylum in industrialized countries and that governments find it difficult to cope. They vacillate between stringent control measures, including locking children up in jail, x-raying them to assess their age or shipping them back to "safe" third countries, and serious efforts to care for youngsters in the spirit of Article 22 of the 1989 Convention on the Rights of the Child.

Kumin, *supra* note 11. In the United Kingdom, unaccompanied minors under 16 are afforded the same social services as any other juvenile. *UK: From Today, Tighter Home Office Rules Could Leave Thousands of Asylum Seekers Destitute,* GUARDIAN, Jan. 8, 2003, *available at* www.unhcr.ch; *see also* Alexandra Frean, *Asylum Minors "In Need of a Haven,"* TIMES (London), Jan. 10, 2003, at 14.

16. In the Netherlands, the Secretary of State for Justice said that minors who gave "misleading information" would be summarily denied a residence permit and would be sent back if their identity or country of origin were doubtful. *Netherlands Tightens Asylum Rules for Minors,* BBC Monitoring International Reports via NewsEdge Corporation, May 1, 2001 *available at* www.unhcr.ch. The Separated Children Seeking Asylum in Europe program links more stringent asylum standards for children to an increase in trafficking children. AYOTTE, *supra* note 1, at 38. Germany may deport a child or refuse entry completely, without processing the asylum application, for those under 16 if they do not have a legal representative. *Id.* at 65. *See also Spain and Morocco Abuse Child Migrants, Beatings, Summary Expulsions of Unaccompanied Children Commonplace, in* HUMAN RIGHTS, WATCH WORLD REPORT 2002 (detailing expulsion of Moroccan minors in violation of Spanish law).

17. Kumin, *supra* note 11; *see generally* Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States,* 1275 PRAC. L. INST. 1340 (2001) (discussing the process for filing asylum applications in the United States).

18. It should be noted that unsanctioned entry into the United States is a crime, 8 U.S.C. § 1325 (2004), and any unlawful entry will subject the person to deportation, 8 U.S.C. §§ 1251, 1252 (2004). The only difference for children is that they cannot be subjected to expedited deportation.

19. The Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135 (2004) (transferring the custody of unaccompanied minors from INS to the Office of Refugee Resettlement). *See also* Unaccompanied Alien Child Protection Act, S.121 107th Cong. (2002) (introducing provisions later incorporated into the Homeland Security Act) [hereinafter Kids Act]; Unaccompanied Alien Child Protection Act, S. 1129 108th Cong. (2003) (re-introducing previously unadopted provisions).

This change should improve the treatment of children while asylum applications are pending and "bring U.S. treatment of unaccompanied alien children into line with international standards."[20] However, the Homeland Security Act failed to incorporate provisions of the proposed legislation that would have begun to address the unaccompanied minors' substantive rights. The United States continues to evaluate the asylum claims of unaccompanied minors using the standards created explicitly for adult asylum seekers that are based on the 1951 Geneva Convention.[21] The United States also narrowly interprets the definition of "refugee" in contravention of international human rights norms.[22]

Although transferring unaccompanied minors' care and custody from the INS to the DHHS was part of the largest reorganization of the U.S. government in the last fifty years, reorganization is not a substitute for necessary substantive reforms.[23] With the political

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20. Press Release, Women's Commission for Refugee Women and Children, Children Caught up in Immigration Dragnet: Women's Commission Calls INS Actions Illegal, Dec. 20, 2002, *at* http://www.womenscommission.org/archive/02/press_releases/1220.html [hereinafter Women's Commission]; *Legislation That Would Establish an Office of Children's Services to Coordinate and Implement Laws for Unaccompanied Immigrant Children: Hearing before Senate Judiciary Committee Subcommittee on Immigration,* 107th Cong. (2002) (statement of Senator Kennedy, discussing what he hopes to accomplish through the Unaccompanied Alien Child Protection Act provisions of which were incorporated into the Homeland Security Act) [hereinafter Subcommittee on Immigration Hearing].

21. There is no specific mention of children in the Geneva Convention Relating to the Status of Refugees. REVISITING CHILDREN'S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 150 (Dierdre Fottrell ed., 2000). *See* Daniel J. Steinbock, *Interpreting the Refugee Definition,* 45 UCLA L. REV. 733, 736 (1998) (determining that the "refugee convention and the 1967 protocol are, in actual effect, two of the foremost international human rights instruments").

22. *See generally* Guy S. Goodwin-Gill, *Who to Protect, How . . . and the Future?* 9 INT'L J. REFUGEE L. 1 (1997) (arguing for a responsive definition that accommodates human rights violations); Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights,* 15 HARV. HUM. RTS. J. 155 (2002) (arguing that international norms are the benchmark for asylum law); Inna Nazarova, Comment, *Alienating "Human" From "Right": U.S. and UK Non-Compliance with Asylum Obligations under International Human Rights Law,* 25 FORDHAM INT'L L.J. 1335 (2002); Steinbock, *supra* note 21, at 739, 741 (arguing that because the option of referring disputes to the International Court of Justice has never been invoked by any state or party regarding the definition of the refugee, without "supranational harmonization" countries will craft the least generous definition of refugee so as to attract the least numbers, and recognizing that "as increasing numbers of asylum seekers have sought refugee within its terms, this open-ended aspect has put pressure on the refugee definition and has prompted a backlash among both governments and citizens of refugee receiving countries"); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale For Evolving Jurisprudence,* 52 DEPAUL L. REV. 777, 778 (2003) (noting that commentators feel that the U.S. position on gender claims is inconsistent with international norms).

23. This restructuring was in response to the tragedy of Sept. 11, 2001. Stanley Mailman & Stephen Yale-loehr, *Immigration in a Homeland Security Regime,* 228 N.Y.L.J., Dec. 23, 2002, at 3 (noting that immigration services and functions have

climate in the United States having changed after September 11, advocates have warned against "linking refugees and terrorism" thus subjecting refugees to further abuses.[24] Broadening the interpretation of asylum standards is necessary to secure unaccompanied minors' legal rights as children who suffer persecution, separate and distinct from persecuted adults. Expanding the interpretation of "refugee" explicitly to include unaccompanied minors as a social group capable of experiencing persecution would insulate them from possible negative repercussions and backlash against immigrants in general, address their unique needs and circumstances, and align U.S. law with international legal norms.[25]

Part II of this Note provides an overview of how unaccompanied minors reach the United States and recent changes in custody procedures aimed at ameliorating harsh detention conditions faced there. Part III discusses legal standards qualifying unaccompanied minors for lawful permanent resident status and the challenges they routinely face meeting those standards. Part IV examines the unique persecution that unaccompanied minor refugees and street children experience and argues that it is a reason for the United States to treat unaccompanied minors' asylum claims differently than those of adults and recognize unaccompanied minors as a social group persecuted because of their common characteristics.[26] Part V suggests that expanding the interpretation of refugee is the appropriate way to achieve U.S. compliance with international human rights norms and would be useful in establishing a more comprehensive approach to displaced children.

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consistently be transferred amongst federal agencies as the perception of immigration changed in U.S. history. Adjudication of immigration claims remain the responsibility of the Department of Justice). *See generally* Jeffrey Manns, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145 (2002).

24. *UN: Refugees Victims of Terrorism, Not Its Perpetrators*, M2 Presswire, Feb. 20, 2002. *See generally* Nazarova, *supra* note 22 (suggesting that the line between asylum seeker and terrorist is being blurred in the current climate in the United States); Women's Commission Press Release, *supra* note 20 (quoting Wendy A. Young, Director of Government Relations for the Women's Commission for Refugee Women and Children opposing the round up of unaccompanied minors in Los Angeles, noting that "[m]any [unaccompanied minors] have fled the very same repressive regimes that the United States has identified as rogue governments").

25. A similar argument for expanding the interpretation of membership in a particular social group was made on behalf women. *See generally* Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511 (1993); Musalo, *supra* note 22, at 807.

26. *See* Kristine K. Nogosek, Note, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 3 (2000) (arguing that U.S. legal standards, international law, and policy underlying asylum law call for different legal standards to be applied to juvenile asylum seekers).

II. CARE, CUSTODY, AND CONTROL OF UNACCOMPANIED MINORS IN THE UNITED STATES

A. *Displacement and Arrival in the United States.*

"[A]s a transnational phenomenon, refugee flight involves multiple sites and diverse agents of oppression, within, across, and between borders."[27] Children may begin their migration on their own initiative most likely fleeing war and civil unrest, forced recruitment as soldiers, child labor, prostitution, or life as a street child.[28] Some become separated from their parents in transit, as the family flees oppressive conditions. Others could be shipped by their parents to the United States.[29] Others are forcibly separated from their families and countries of origin in trafficking or smuggling schemes.[30]

Though there is no typical description of an unaccompanied minor, they tend to be young adults and many come from the same regions. The average unaccompanied minor in the United States is

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27. Bhabha, *supra* note 22, at 156.

28. *Shift of Care For Immigrant Children Alone,* N.Y. TIMES, Nov. 26, 2002, at A16. *See* Women's Commission for Refugee Women and Children, *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children,* at 4 (2002), *available at* http://www.womenscommission.org/reports/uc_children_in-INSdetention_05.02pdf [hereinafter *Prison Guard or Parent?*]. *See generally* U.N. HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM, *Executive Summary* (1997), *available at* http://www.unhcr.ch.

29. Much transnational migration of unaccompanied children is intentional, the result of a 'best interest' calculation by families. It may be motivated by desperation, the lack of tolerable local alternatives, as where children are sent to places of safety as refugees, given up for adoption, sold as child laborers or sex workers. Or it may be prompted by ambition and aspiration, where children are sent away to improve their life chances . . . . In either case, the assumption that home is the best place for a child is rejected by those making the decisions. Across classes and continents families have considered the dangers and hardships of separation, travel, and relocation to be justified by the desired goals of safety, education, family survival and prosperity.

Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children,* 7 U. CHI. L. SCH. ROUNDTABLE 269, 278-79 (2000). Somali parents have paid $15,000 for smugglers to take their children and then leave them at North American and European airports. *See Somali Children Dumped at Airports,* GLOBE & MAIL (Toronto), Jan. 17, 2003, at A11.

30. George Gedda, *Human Trafficking "Staggering,"* MORNING NEWS, July 13, 2001, at 5D. Secretary of State Colin Powell unveiled a State Department Report that said the majority of an estimated 70,000 people trafficked a year are "women and children who have been 'lured, coerced or abducted by criminals who trade in human misery.'" *Id.*; *see also* Peter Landesman, *The Girls Next Door,* N.Y. TIMES., Jan. 25, 2004 (Magazine), at 30, 32 (explaining the CIA estimates that "between 18,000 and 20,000 people are trafficked annually into the United States" and discussing victims abduction, sexual coercion, and lack of prosecutorial efforts in the United States).

fifteen years old, but some have been as young as eighteen months old.[31] Most unaccompanied minors in the United States are non-English speaking Latin American and Chinese youths.[32] Senator Edward Kennedy, co-sponsor of the Unaccompanied Alien Child Protection Act of 2001 (Kids Act), recognized that transnational migration of unaccompanied minors occurs for a variety of reasons. Kennedy stated that "some flee human rights abuses, others have been abused or abandoned by their parents or flee armed conflict or dangerous conditions in their home countries."[33] Though they have such diverse origins, unaccompanied minors are treated as a single group once they arrive in the United States.

B. *History of Custody and Control*

Before January 2003, when the INS apprehended unaccompanied minors in the United States, they retained sole custody and corresponding responsibility for their well-being.[34] The INS also initiated removal proceedings in the Executive Office for Immigration Review (EOIR).[35] This puts the INS in an awkward situation because it is both an unaccompanied minor's caretaker and their prosecutor.[36] This situation creates an inherent conflict of interest and prohibited the INS from making decisions regarding care and custody issues that served the best interest of the child.[37]

Unaccompanied minors are detained in a national network administered by the INS. Individual children could be transported to

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31. David Oliver Relin, *Who Will Stand up for Them?*, PARADE, Aug. 4, 2002, at 4.

32. Jorene Soto, *Elian's VIP Treatment and the Other Unaccompanied Minors: The Application of Education Rights in INS Detention Centers, in* 24 IN DEFENSE OF THE ALIEN 165, 176 (Lydio F. Tomasi ed., 2002).

33. Subcommittee on Immigration Hearing, *supra* note 20.

34. *Prison Guard or Parent?*, *supra* note 28. The EOIR and INS were both located within the Department of Justice, although they were distinct entities. Peggy Philbin, Acting Director of the EOIR described the EOIR as an "administrative hearing tribunal, hearing both trial and appellate immigration cases through the U.S. EOIR's primary function is to provide a uniform interpretation and application of immigration law." *Immigration Agencies Oversight: Hearing Before the House Committee on the Judiciary, Subcommittee on Immigration and Claims*, 107th Cong. (2001) (statement of Peggy Philbin, Acting Director, Exec. Office for Immigration Review).

35. Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 INTERPRETER RELEASES 1569, 1569 (2001).

36. *See* Rosa EHRENREICH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION & NATURALIZATION SERVICE 3 (1997); David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1013, 1015 (2002); Gregory Zhong & Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 612 (2000).

37. Zhong & Chen, *supra* note 36, at 612.

facilities wherever and whenever a bed became available, regardless of the distance from extended family or advocates assisting them.[38] Many children were held in detention for over three months and some have remained for as long as three years.[39] As a result, unaccompanied minors remained unfairly detained in harsh correctional facilities until their immigration status became resolved.[40]

The United States is one of a very few countries that detains children.[41] Most other countries adhere to the UNHCR guidelines which suggest alternatives to detention, such as placing unaccompanied minors in a country's child welfare programs and granting unaccompanied minors equivalent services to those provided its citizens.[42] Moreover, because the INS does not provide information about detained children, outside agencies have difficulty monitoring detention conditions.[43] Language barriers and the general lack of knowledge about U.S. immigration law compounds these difficulties in the detention facing unaccompanied minors.[44]

The inadequacy of facilities and procedures for the care and custody of unaccompanied minors was supposed to be resolved after *Reno v. Flores*.[45] At issue in *Flores* was the INS policy of releasing children only to a legal guardian or parent except in "unusual and

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38. Amnesty International, *supra* note 11, at 17-18.

39. *See, e.g., Illegal Guinea Immigrant Sues over Conditions in Detention*, N.Y. TIMES, Nov. 2, 2002, at A15; Press Release, Amnesty International USA, Amnesty International USA Applauds Decision to Release from Detention Mentally Disabled Orphan from Guinea (Dec. 24, 2003), *at* http://www.amnestyusa.org/countries/usa/document.do (discussing the conditions of Malik Jarno's 35 month-long detention prior to his release on Dec. 24, 2003; Press Release, U.S. Senator Dianne Feinstein, Feinstein Measure to Protect Unaccompanied Alien Minors Included in Bill to Form Department of Homeland Security (July 25, 2002), *at* http://feinstein.senate.gov/Release02/childrn4.htm (commenting that of the approximately 5,300 unaccompanied minors in the United States, "2,000 were detained by the INS in juvenile jails, imprisoned with violent offenders, for months or sometimes even years").

40. *Prison Guard or Parent?*, *supra* note 28, at 9 (citing the fear of abduction of the children as well as the possibility that they might not show up for their hearing as the primary reasons why INS needed to detain the children instead of placing them in less restrictive settings); Amnesty International, *supra* note 11, at 52-60.

41. Women's Commission Press Release, *supra* note 20.

42. *Cf.* EHRENREICH, *supra* note 36, at 2-3 ("In Britain, Canada, Denmark, and the Netherlands . . . unaccompanied children are placed in the custody of appropriate child welfare authorities . . .").

43. *Id.* at 5; *Asylum Policy: Hearing Before the Senate Committee on the Judiciary Subcommittee on Immigration*, 107th Cong. (2001) (statement of Wendy Young, Director of Government Relations Women's Commission for Refugee Women and Children, Detention and Asylum Project) [hereinafter Asylum Policy Hearing].

44. *Id.*

45. Reno v. Flores, 507 U.S. 292 (1993). For a discussion of the case and its aftermath, see Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 596-600 (1998).

extraordinary cases."[46] Since unaccompanied minors have neither parents or guardians, prior to *Flores*, they were often housed for long periods in juvenile detention facilities, or in facilities intended for adult criminals. Unlike traditional procedures typically followed in the treatment of domestic children, the INS did not determine if placement in less restrictive facilities was an option.[47] The INS agreed to settle the dispute at issue in *Flores* after the Court handed down this decision.[48] The settlement instituted nationwide procedures allowing unaccompanied minors to be released "to any adult who executes an agreement to care for the child and ensure[s] his or her presence at immigration proceedings."[49] The *Flores* settlement also allowed the INS to hold children in detention for only seventy-two hours, except in emergencies.[50]

The INS has asserted that it is in substantial compliance with *Flores* settlement. An INS spokesperson stated that "[t]he priority is to put [unaccompanied children] in the least restrictive facility, where we have space. When a juvenile is placed in juvenile hall, it is because it is the absolute only location left."[51] Unfortunately, over one third of these children are held in juvenile jails.[52] The settlement illustrated one of the ways the INS has sought through structural reorganization and not substantive reforms to improve an unaccompanied minor's condition. "In 2000, the INS transferred all of its children's programs to its Detention and Removal office."[53] This change has made it forty percent less likely that a child will be reunited with family.[54] Critics argue that "while such efforts might be well-meaning, they cannot work because the federal government's bias toward incarceration and deportation will always trump its responsibility to look out for a child's best interest."[55] Several hundred unaccompanied minors still remain in long-term detention.[56] Although the INS has maintained it

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46. *Flores*, 507 U.S. at 296.

47. Detention and Release of Juveniles, 53 Fed. Reg. 17449, 17449 (May 17, 1988) (stating that "the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released").

48. *Flores v. Meese*: Final Text of Settlement Establishing Minimum Standards and Conditions for Housing and Release of Juveniles in INS Custody, *at* http://www.centerforhumanrights.org/Detained_minors/FloresSettle.html.

49. EHRENREICH, *supra* note 36, at 24.

50. *Id.* at 25.

51. *See generally* Greg Moran, *INS Rapped in Handling of Illegal Children: Lack of Housing Space Sent Immigrant to Juvenile Hall*, SAN DIEGO UNION TRIB., Aug. 4, 2002, at B1.

52. *See id.*

53. Michael Petrocelli, *Senate Panel May Change Way INS Detains Young Immigrants*, HOUSTON CHRON., Mar. 3, 2002, at 10.

54. *Id.* (discussing statements made by Wendy Young of the Women's Commission for Refugee Women and Children).

55. *Id.*

56. Soto, *supra* note 32, at 165; *see also* Caruso, *supra* note 10.

was in substantial compliance with the *Flores* settlement, four years later in 2001 Human Rights Watch found that this has not prevented an "institutional bias" favoring law enforcement over the best interest of the child.[57] A 2001 Justice Department Report from the Inspector General criticized the INS for similar reasons.[58] Most recently, Amnesty International's national report confirmed that the detention of children in the United States violates standards of care for refugees and is "unconscionable."[59]

C. *Experiences of Children While in INS Detention Facilities*

Problems in the INS policies relating to unaccompanied minors are illustrated in the stories of those who have faced INS detention. For instance, Mekabou fled Liberia after his father was murdered. Unfortunately, he encountered more violence in the United States. He was apprehended by the immigration police who beat him.[60] Mekabou was then sent to adult prisons and only won asylum after a year and a half in detention.[61] Similarly, Malik Jarno was in detention for over three years.[62] Though the INS claims he is an adult, Jarno asserts he is a minor.[63] In custody, he has been housed with adults and allegedly severely beaten by immigration officials.[64] Jarno filed a civil rights claim against the INS and the Piedmont Regional Jail for his claimed "abuse and neglect."[65] Alfredo Lopez Sanchez spent eighteen months in detention and was transferred between eleven shelters, a jail, and a hotel before he was released.[66] Immigration officials thought he had an undocumented relative in the

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57. *Prison Guard or Parent?*, *supra* note 28, at 2.

58. Tanya Weinberg, *Teen's Ordeal in Federal Custody Ends in Freedom; Advocates Push Changes for Kids*, CHI. TRIB., Dec. 25, 2002.

59. Amnesty International, *'Why Am I Here?' Children in Immigration Detention*, June 18, 2003, *at* http://www.amnestyusa.org/refugee/children_detention.html. *See also* Michelle Mittelstadt, *U.S. Immigration's Treatment of Minors Abusive, Group Says Conditions Called 'Unconscionable' But Officials Cite Inspections*, DALLAS MORNING NEWS, June 19, 2003, at 16A (quoting William Schultz, head of Amnesty International USA).

60. John L. McCullough, *Welcome to JFK: Go Directly to Jail*, NEWSDAY, Sept. 11, 2001, at A38.

61. *Id.*

62. John Files, *Black Groups Seeking Asylum for a Teenager from Guinea*, N.Y. TIMES, Mar. 14, 2004, at A22.

63. *Id.*

64. *See Immigration Detainee Claims He Was Kicked by Jail Personnel*, LEGAL TIMES, Dec. 12, 2003, at 2.

65. *See id.*; Press Release, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Juvenile Asylum Seeker Abandoned for Eight Months in Immigration Detention and Assaulted by Prison Guards Files Civil Rights Lawsuit against INS Officials and Piedmont Regional Jail (Oct. 31, 2002) *at* http://www.washlaw.org/news/releases/103102.htm.

66. Weinberg, *supra* note 58.

United States and refused to release him to an acceptable sponsor.[67] After being neglected and abused by his father in Guatemala, his time in INS custody made him, in his own words, "just want . . . to die."[68] Edwin Larios Munoz fled Honduras after being abandoned, and feared that if he was homeless and living on the streets he would be killed.[69] Edwin told his story at Senate hearings on the Unaccompanied Alien Child Protection Act. [70] He discussed being locked up, beaten with sticks, crying, and having to reside next to criminals for almost six months while in INS custody.[71]

D. *Recent Developments: Change of Custody and Control*

Advocates claim the INS violated "hundreds, perhaps thousands" of other unaccompanied minors' rights.[72] Developing a consistent, coherent approach for these children's care and custody is essential. In the words of U.S. Senator Dianne Feinstein, "The INS has not done what it should have done up to this point. Therefore, my view is that the only way to handle this is to put it in legislation."[73] In January 2001, Feinstein introduced the Kids Act.[74] The Kids Act sought to find solutions to the procedural and substantive issues facing unaccompanied minors.[75] The Kids Act's primary focus was to insure respect of unaccompanied minors' human rights while they are in detention.[76]

The Kids Act would have addressed both procedural and substantive issues. It would have created a Special Office of Children's Services within the Department of Justice that "would [have been] responsible for ensuring that the children's needs are met and that their best interests are held paramount in all proceedings and actions involving them."[77] It would also have established minimum standards of custody,[78] and have provided trained guardians *ad litem* to children so that their needs in custody were

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67. *Id.*
68. *Id.*
69. Relin, *supra* note 31; *Children on the Doorstep,* BOSTON GLOBE, Apr. 6, 2002, at A14.
70. *Id.*
71. *Id.*
72. Weinberg, *supra* note 58.
73. Subcommittee on Immigration Hearing, *supra* note 20.
74. Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001).
75. *Id.;* The Kids Act however, was never designed to alter legal standards for the immigration courts. *See id.* § 101(d).
76. Subcommittee on Immigration Hearing, *supra* note 20.
77. Asylum Policy Hearing, *supra* note 43 (statement of Sen. Diane Feinstein); *see* Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001).
78. Unaccompanied Alien Child Protection At of 2001, S. 121, 107th Cong. (2001) at § 2(5).

met.[79] This guardian *ad litem* would also have made recommendations regarding their custody, detention, release, and removal based on the best interests of each child.[80] The Kids Act would also have assured legal representation, first through pro bono programs and then at the expense of the government, if other representation was not available.[81] Finally, the Act would have sought to ensure that INS adjudicators, immigration judges, and other personnel would have been trained on how to address children's needs in asylum claims.[82]

Essential parts of the Kids Act[83] aimed at protecting children from abuse within the INS detention system were passed via incorporation into the Homeland Security Act of 2002 (HSA).[84] The HSA authorized "the largest reorganization of the U.S. government in over fifty years."[85] Among other things, the Homeland Security Act transferred the care and custody of unaccompanied minors to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services when it was signed into law on November 25, 2002.[86]

The ORR has extensive experience in the child welfare area because it has resettled vulnerable and traumatized children for years.[87] Since 1975, ORR has resettled over 2.2 million refugees (adults and children).[88] ORR has resettled approximately 12,000 juveniles since 1980.[89] Advocates hope the ORR will improve conditions of detention, and hasten unaccompanied minors release to

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79. *Id.* at § 301; Nugent & Schulman, *supra* note 36, at 1570 (explaining that one of the most essential psychological, emotional, and developmental needs of a child is that of a primary caregiver).

80. *Id.*

81. *Id.* at § 302.

82. Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001) at § 402.

83. *Id.*

84. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; 6 U.S.C. §§ 101-1717 (2002). Section 462 transfers the custody of unaccompanied minors from INS to the Office of Refugee Resettlement.

85. Mailman & Yale-loehr, *supra* note 23.

86. *See Administration Issues Reorganization Plan for Homeland Security,* 79 No. 47 INTERPRETER RELEASES 1777, 1777 (2002).

87. *Immigration Senate Judiciary Committee Subcommittee on Immigration,* 106th Cong. (1999) (prepared testimony of Lavinia Limon, Director Office of Refugee Resettlement Administration for Children and Families, U.S. Dep't of Health and Human Services stating that the "major goal of the refugee and entrant assistance program is to help refugees achieve economic self-sufficiency and social adjustment within the shortest time possible following their arrival in the U.S.") [hereinafter Limon Testimony]; *see also* Office of Refugee Resettlement, Refugee Resettlement Program; Statement of Goals, Priorities and Guidelines for Unaccompanied Minor Refugee and Cuban/Haitian Entrant Programs, 52 Fed. Reg. 38147 (Oct. 14, 1987).

88. *See* Limon Testimony, *supra* note 87.

89. Frank Davies, *Migrant Kids' Care to Shift away from INS,* MIAMI HERALD, Dec, 15, 2002.

appropriate caregivers.[90] Alfred P. Carlton, Jr., president of the American Bar Association, referred positively to this change stating that "children who arrive at our borders alone and unprotected will no longer have their prosecutor serve as their caretaker."[91] Transferring unaccompanied minors' care to the ORR also eliminated some advocates' fear that the Department of Homeland Security, responsible for adult immigration enforcement, might over time "treat these [unaccompanied minors] as potential terrorists, regardless of the need to do so."[92] As such, it has removed the possibility of there being any conflict of interest on the part of one agency.

Additionally, the HSA recommended that ORR use the refugee child foster care system as a means to place unaccompanied minors until their status is resolved.[93] Refugee children have been placed through foster care, group care, independent living, or residential treatment.[94] Nguyen Van Hannah, head of ORR, said, "Our direction is to look into foster care as a major way to handle the children."[95] Lastly, the HSA required tracking unaccompanied minors so that advocates and attorneys could be informed of their status upon arrival.[96]

Several substantive rights and improvements in asylum proceedings that the Kids Act would have guaranteed were omitted from the HSA.[97] Senator Feinstein, sponsor of the Kids Act, spoke negatively about choosing reorganization over reform when she said, "the provisions to provide them the critical help they need were left

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90. *Id.* How successful this transfer is will ultimately depend on working out the details. As of July 2003, ORR had not negotiated a final agreement with DHS for the care and custody of unaccompanied minors. *See U.S. Senate Judiciary Comm. Holds Hearing on Homeland Security and Justice Department Nomination,* 108th Cong. (2003) (statement of Sen. Kennedy, asking why the "Office of Refugee Resettlement does not have the full cooperation of the Department of Homeland Security in negotiating a memorandum of understanding on their respective responsibilities for protecting unaccompanied children").

91. *Shift of Care, supra* note 28.

92. *Immigration: Senate Judiciary Committee Subcommittee on Immigration,* 108th Cong. (2002) (statement of Prof. Bill On Hing, University of California Davis School of Law, National Advisory Council National Asian Pacific American Legal Consortium).

93. Immigration and Nationality Act, INA § 412(d); *President Signs Homeland Security Measure,* 79 No. 46 INTERPRETER RELEASES 1733 (2002).

94. *See* Limon Testimony, *supra* note 87.

95. Sonia Nazario, *Many Refugee Kids Face Tough Times in INS Detention,* L.A. TIMES, Jan. 3, 2003, at A1.

96. 6 U.S.C. § 462.

97. *See generally* 6 U.S.C. §§ 101-1717. Although unfortunate, avoiding the issue of children's rights is not unprecedented. *See generally* Martha Minow, *What Ever Happened to Children's Rights,* 80 MINN. L. REV. 267 (1995) (discussing the history of children's rights in other spheres of the United States and internationally).

out."[98] These provisions included the right to a guardian *ad litem* to make a determination as to what was in the best interests of the child, government funded attorneys to represent those interests, the requirement that the best interest of an unaccompanied minor be paramount in the decision making process, as well as increased strength for special immigrant juvenile visas.[99] Training for judges and personnel administering unaccompanied minors' asylum claims was also omitted from the HSA. In response, Feinstein introduced a bill including many of the provisions omitted from the HSA.[100]

By not adopting any of the substantive provisions of the Kids Act, Congress chose to take its traditional "path of least resistance" by reorganizing rather than addressing substantive issues regarding the rights of unaccompanied minor children.[101] Since the HSA requires a study to facilitate the best way attorneys may be appointed,[102] the substantive issues remain to be addressed.

III. SYSTEMIC CHALLENGES: OBTAINING LAWFUL PERMANENT RESIDENCE

A. *Lawful Permanent Residence*

An unaccompanied minor may obtain lawful residence in the United States depending on why they left their country of origin. Unaccompanied minors may apply for lawful permanent residence if they qualify as (1) a special immigrant juvenile,[103] (2) a victim of trafficking under the Violence Protection Act of 2000,[104] or (3)

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98. Davies, *supra* note 89.

99. Unaccompanied Alien Child Protection Act of 2001, S. 121, §§ 2(3), 301, 302, 401.

100. Protection of Unaccompanied Alien Children, S. 1129, 108th Cong. (2003).

101. Manns, *supra* note 23, at 145. Positing that reorganizations could change agency culture and management responsibilities, but reorganization alone is not enough to address the substantive problems of the INS, Attorney General John Ashcroft said that for the past 30 years restructuring of the INS has focused on "Washington management rather than with national and international operations" whereas now it is restructuring "day-to-day enforcement and service activities." Transcript, *Atty. General Announces More Reforms to Immigration Service, INS Restructuring: The Next Steps Immigration and Naturalization Service*, U.S. Embassy (Tokyo, Japan), Apr. 17, 2002, *available at* http://usembassy.state.gov/tokyo/wwwhso0154.html (last visited Feb. 10, 2004).

102. Women's Commission Press Release, *supra* note 20.

103. Immigration and Nationality Act § 101(a)(27)(J)(iii), 8 U.S.C. § 1101(a)(27)(J)(iii) (2003).

104. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Immigration and Nationality Act 101(a)15(T), 8 U.S.C. § 1101(a)(15)(T) (2003).

because they have been granted asylum.[105] The first two legal remedies take into account unique circumstances that children might encounter in which they played no active role. The third applies the same standard to children as applied to adults seeking asylum and remains the only remedy for a children who have played an active role in their transnational migration into the United States.[106]

1. Victims of Trafficking

Under the Victims of Trafficking and Violence Protection act of 2000, if a child has been a victim of trafficking and suffered physical or mental abuse they would qualify for a U-visa and be allowed to remain in the United States.[107] If a child has suffered a "severe form of trafficking in persons,"[108] and can demonstrate that they would suffer "unusual and severe harm if they were removed from the United States"[109] the child would qualify for a T-Visa. This legislation offers protection to the estimated 45,000 to 50,000 women and children illegally trafficked into the United States.[110] After successfully applying for a T-visa, a child would obtain a nonimmigrant visa valid for three years and could later apply for permanent residency status.[111]

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105. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2003); Children who have journeyed to the United States to join "family members who are U.S. citizens or legal residents . . . may petition for 'adjustment of status' and permission to remain in the United States under the guardianship of their legally resident relative." EHRENREICH, *supra* note 36, at 12. Though these children technically meet the definition of unaccompanied minors, this Note does not include them within the analysis because they are not seeking to remain in the United States on their own.

106. *See generally* Thronson, *supra* note 36 (arguing that immigration law which treats children as adults silences children and perpetuates "discredited approaches to children's rights"); Nogosek, *supra* note 26 (providing a policy argument against applying the same standards to adults and children).

107. Victims of Trafficking and Violence Protection Act of 2000, *supra* note 104. *See also DOJ To Begin Issuing 'T' Visa Shortly*, 79 No. 5 INTERPRETER RELEASES 137, 138 (2002) (paraphrasing DOJ guidelines to define trafficking as "recruiting or transporting persons through force, fraud, or coercion for purpose of slavery or involuntary servitude").

108. The Attorney General makes this determination. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T) (2003).

109. *See also Prison Guard or Parent?*, *supra* note 28, at 8.

110. Once in the United States, trafficking victims have been used for forced prostitution, work on labor farms, or factories. *See DOJ To Begin Issuing 'T' Visa Shortly*, *supra* note 107; *see also* Landesman, *supra* note 30, at 32, 30-39, 66-72, 75 (estimating these numbers are about 20,000 lower, but providing a typical experience of a trafficking victim in the United states).

111. Nugent & Schulman, *supra* note 36, at 1590.

2. Special Immigrant Juveniles

Unaccompanied minors, in the custody of a state's juvenile system, who have been abused or neglected while in the custody of another country, can petition the Attorney General to allow an application for special immigrant status.[112] If an application is made, the state court must then find that the child has been abused and neglected, and that it is in the child's best interest to remain in the United States.[113] If so determined, the unaccompanied minor will be placed in the foster care system and may eventually become a lawful permanent resident.[114]

3. Children Seeking Asylum

Children fleeing persecution in their country of origin, or who are abused, can bring a claim for asylum if they have a "well founded fear of persecution based on race, religion, nationality, political opinion or membership of a particular social group."[115] "When an alien is seeking withholding of deportation, he bears the burden of demonstrating that it is 'more likely than not' that he will be persecuted or tortured upon his return to the country in question."[116] This standard is both objective and subjective. Applicants must prove both the objective reasonableness of their fear of persecution as well as that they have subjectively experienced this fear.[117] A ten percent possibility of persecution is sufficient to establish a well-founded fear.[118]

B. *Systemic Challenges*

Even if unaccompanied minors would satisfy these legal requirements, they often face difficulties that prevent them from obtaining lawful residency. The first challenge in meeting all of the above legal tests is that counsel is not appointed at the expense of the

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112. *See* Sheila Starkey, *Children's Issues in U.S. Immigration Law: An Overview*, Immigration Briefings, 97-05 (offering an overview of children in immigration law as well as a detailed procedures for obtaining special immigrant juvenile status); Vikram K. Badrinath, *Challenging the INS on State Court Juvenile Matters*, IMMIGRATION CURRENT AWARENESS NEWSLETTER, Sept. 16, 2002.

113. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2003).

114. Nugent & Schulman, *supra* note 36, at 1590.

115. 8 U.S.C. § 1253 (2003).

116. Fahim v. U.S. Attorney General, 278 F.3d 1216, 1218 (11th Cir. 2002).

117. INS v. Cardoza Fonseca, 480 U.S. 421, 430-31 (1987) (stating that requiring fear to be "well-founded" does not alter the obvious focus on the individual's subjective beliefs).

118. *Id.* at 440.

government, as it is in domestic criminal proceedings for children.[119] About eighty percent of unaccompanied minors wade through the complex process of obtaining lawful residency, outlined above, without representation.[120] Unaccompanied minors

> encounter a stressful situation in which they are forced to make critical decisions. Their interrogators are foreign and authoritarian. The environment is new and the culture completely different. The law is complex . . . . In short, it is obvious to the Court that the situation faced by unaccompanied minors is inherently coercive.[121]

Even if a child has a viable claim under the current standards, without representation it is likely the children will be deported to their country of origin.[122] Unaccompanied minors are fifty percent more likely to win their claims and get protection if they have an attorney.[123] Rud Luubers, U.N. High Commissioner for Refugees, said that a "renewed commitment from countries around the world was needed, to ensure that children had access to asylum procedures and that they were assisted by legal representatives."[124]

Responding to this "coercive" environment in 1998, the United States developed guidelines that provide advice on interviewing and processing an unaccompanied minor's claim for asylum.[125] Although the guidelines do not alter or provide substantive rights, they do recognize that during the asylum process a child may not be able to respond as an adult would and may need special interviewing procedures tailored to the child's developmental capacity.[126] However, as guidelines, they neither guarantee nor mandate judicial compliance with or training on the guidelines.[127]

The second challenge for unaccompanied minors is that if their claims are appealed to Article III courts, Article III courts do not uniformly apply or adhere to the guidelines implemented for the purpose of assisting unaccompanied minors in asylum proceedings. The guidelines specifically establish that an unaccompanied minor should be interviewed in a child sensitive manner and their testimony given sufficient credibility even if a child has some gaps of

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119. *See* Sharon Finkel, Note, *Voice of Justice Promoting Fairness Through Appointed Counsel for Immigrant Children,* 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1127 (2001) (arguing that even though children have a right to counsel children have been denied due process without counsel provided at the expense of the government).

120. Petrocelli, *supra* note 53.

121. Perez-Funez v. INS, 619 F. Supp. 656, 662 (D. Cal. 1985).

122. Nazario, *supra* note 95.

123. Subcommittee on Immigration Hearing, *supra* note 20.

124. Saluseki, *supra* note 2.

125. WEISS, *supra* note 1, at 1.

126. *Id.* at 10-13. *See generally* Nogosek, *supra* note 26 (noting that the guidelines assist unaccompanied minors in procedural protections without affecting their substantive rights or lack there of).

127. Wendy A. Young, *Refugee Children at Risk,* 28 HUM. RTS. 10, 11 (2001).

recollection.[128] Interviewing remains a recommendation and not a requirement. For example, in Elian Gonzalez's highly publicized case, no interview was conducted and the Eleventh Circuit held that an interview was not required.[129]

Additionally, "the guidelines recognize that children under the age of 18 may experience persecution differently from adults and may not present testimony with the same degree of precision as adults."[130] The guidelines, however, have not persuaded immigration judges to reevaluate their conceptions of children's testimony or of children as rights holders.[131] Immigration judges continue to deny asylum because of credibility issues[132] as well as disbelief that minors can hold political ideas for which they could be persecuted.[133] Applying the same asylum standard to children as to adults, without factoring in whether or not children have the developmental and psychological ability to prove they have been subjectively and objectively persecuted leads to denial of otherwise viable claims made by unaccompanied minors.

The third challenge that unaccompanied minors face is that immigration judges have a demanding docket requiring fast processing creating an almost insurmountable barrier for an unrepresented, unaccompanied minor to obtain asylum. EOIR has not systematically incorporated the guidelines into its adjudication,[134] and the reviewing body, the Board of Immigration Appeals (BIA) consists of nineteen judges responsible for processing 32,000 cases a year.[135] One immigration judge, speaking to the Human Rights Watch Child's Rights Project, stated:

> [A]ll the INS people in Washington care about are the numbers, so we're under a lot of pressure just to move things along

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128. WEISS, *supra* note 1, at 13-15.

129. Gonzalez v. Reno, 2000 U.S. App. LEXIS 7025 at 15 (11th Cir. Apr. 19, 2000) ("Plaintiff—although a young child—has expressed a wish that he not be returned to Cuba . . . . it appears that never have INS officials attempted to interview Plaintiff about his own wishes.").

130. *INS Issues New Guidelines for Children's Asylum Claims*, 76 No. 1 INTERPRETER RELEASES 1 (1999).

131. Thronson, *supra* note 36, at 995 ("[E]nduring images of children as passive objects or as property continue to influence decision makers").

132. Kahssai v. INS, 16 F.3d 323, 325 (9th Cir. 1994) (Reinhardt, J., concurring) (partially denying a seventeen year old's claim because her "credibility cannot be determined").

133. Civil v. INS, 140 F. 3d 52, 56 (1st Cir. 1998) (upholding the BIA's determination that a fifteen-year old could not hold political views that would cause an opposition group to persecute him).

134. Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Success, Failures and the Changes Ahead*, 14 GEO. IMMIGR. L.J. 589, 600 (2000); Bhabha, *supra* note 22, at 179.

135. Division of U.S. Studies and Migration Policy Institute, *Women Immigrants in the United States*, Event Summary, Sept. 9, 2002, *available at* http://wwics.si.edu/NEWS/digest/womimmig.htm.

> faster . . . . That's a problem for kids, who can't get counsel. There are ways to get around rules and it's in the judge's discretion to decide who's a 'responsible person.' In other judges' courtrooms, I just don't know what happens to these kids. There aren't enough lawyers for them . . . . The kids are scared . . . . Generally they don't know what the hell is going on.[136]

Recognizing that these guidelines have not been implemented across the board, on February 1, 2002, then-INS Commissioner Ziglar outlined reforms at the National Immigration Forum as part of a new initiative to "revise the 1998 guidelines on children's asylum claims to reflect recent development in law and policy; and providing supplemental training following publication of the guidelines." A year later, nothing has been accomplished regarding this, despite the dire need, and Ziglar has been replaced by an acting Commissioner.[137]

C. *Compounding the Challenges: The Homeland Security Act*

The HSA abolished the INS and transferred all of the INS's service functions to the Bureau of Citizenship and Immigration Services (BCIS), a department within the HSA. EOIR remained within the Department of Justice.[138] The EOIR is the only immigration body remaining under the Department of Justice supervised by the Attorney General. The effect of this transfer raises many concerns for advocates. Locating immigration services within the DHHS along with five other divisions raises three primary concerns: (1) that there will be competition for resources and resulting decrease of asylum seekers in the country; (2) that the mission of the new department aimed at keeping out terrorists will create a "paramilitary culture" at odds with assisting valid immigration services; and (3) that the nation's ability to both enforce immigration laws and prevent terrorist attacks would be diminished.[139]

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136. EHRENREICH, *supra* note 26, at 35-36.

137. Ziglar resigned on November 30, 2002 and Michael Garcia, chosen for his "enforcement orientation," was appointed Acting Commissioner. Austin T. Fragomen, Jr. & Steven C. Bell, *Immigration and Naturalization under the Homeland Security Act: An Analysis of What will replace the INS,* IMMIGR. BUS. NEWS & COMMENT, Jan. 1, 2003, *available at* 2003 WL 17059.

138. *See generally* Homeland Security Act of 2002, 6 U.S.C. §§ 101-1717 (2002).

139. *Immigration Role in the Homeland Security Department: House Committee on the Judiciary Subcommittee on Immigration Border Security and Claims,* 107th Cong. (2002) (statement of Kevin Appleby, Policy Director of the U.S. Conference of Catholic Bishops).

IV. SUBSTANTIVE CHALLENGES: OBTAINING ASYLUM

A. *Unaccompanied Minors' Experience Persecution Differently Than Adults*

Understanding how an unaccompanied minors experience persecution is essential to adjudicating their asylum claims. Notably left out of the Homeland Security Act was a proposal in the original Senate version that would have required a report on the "worldwide situation faced by unaccompanied refugee children."[140] An assessment of the problems faced by unaccompanied minors is needed to create understanding that these children are persecuted around the world because of their status as children without a protective guardian.[141] The following is a brief and incomplete description of the persecution of unaccompanied minors and their increased likelihood of persecution. Human rights research should be continued to document the continued persecution of unaccompanied minors.

1. Displaced Unaccompanied Minors

The general hardships minors face are compounded because they face them without legally responsible caregivers. Rud Luubers, U.N. High Commissioner for Refugees, has said that refugee children "are often exposed to armed conflict, and lack of access to food, water, shelter and basic health care. They are vulnerable to manipulation and forced military recruitment and they are often exposed to HIV/AIDS."[142] Study findings show that unaccompanied children are vulnerable specifically because they are not protected by an adult responsible for their care.[143] The U.N. General Assembly has said

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140. H.R. 5005, 107th Cong. (2002). Charlotte Stichter, *Homeland Security Meets Immigration: A Review of Recent Governmental Activity and Pending Legislation*, 10-02 IMMIGR. BRIEFINGS 1 (Oct. 2002).

141. *See* Jacqueline Bhabha, *"More Than Their Share of Sorrows:" International Migration Law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253, 266-67 (2003) (advancing the argument that the "paucity of human rights research and attention to child-specific violations in country reports or investigative documentation has obscured the extent to which children are . . . victims of persecutory acts" and is one of three reasons explaining why "refugee decision-making where children are the principle applicants is in its infancy"). If the United States does not commission its own study, it could refer to a seminal study by the international community: Graca Machel, *Impact of Armed Conflict on Children: A Critical Review of Progress Made and Obstacles Encountered in Increasing Protection for War-Affected Children*, Aug. 26, 1996, *available at* http://www.unicef.org/graca.

142. Saluseki, *supra* note 2.

143. *See Report of the U.N. High Commissioner for Refugees*, U.N. GAOR 53rd Sess., Agenda Item 108 at 2, U.N. Doc. A/53/325 (1998).

that unaccompanied refugee minors to be "among the most vulnerable refugees and the most at risk of neglect, violence, forced military recruitment and sexual assault and therefore require special assistance and care."[144] A recent study aimed at assessing the refugee child's concerns identified that separated children or unaccompanied children face: "a greater risk of sexual exploitation and abuse. . . ; a greater risk of military recruitment; a greater risk of child labor. . . ."[145]

Refugees "defy easy categorization because some face abuse and neglect at home, others face abuse and neglect in their own country while separated, yet others face persecution after they have become a refugee."[146] Children are displaced for reasons specific to their status as children: forced abduction in times of unrest, forced military recruitment, sexual abuse, and forced labor are examples of forms of refugee-producing phenomena which are either peculiarly meted out to children or which take on a dimension that can only be experienced by child refugees.[147]

Children have also been increasingly used as soldiers in the developing world. The study explains that military recruits may be as young as ten years old.[148] Boys are generally used in military activities, while girls are "recruited" for purposes of sexual slavery and forced labor.[149] In one instance, approximately one hundred boys were conscripted from a refugee camp into the Sudan People's Liberation Movement/Army which had a base near a UNHCR refugee camp.[150]

Young females are used for sexual slavery. Scholars have noted that girls are taken from refugee camps and "sold for sex to highly organized networks operating transnationally."[151] "Unaccompanied minors . . . face a particular risk of sexual exploitation, abuse and violence since they may not have a trusted adult to protect and assist them."[152] Fourteen-year-old Vietnamese girls were trafficked into

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144. *Assistance to Unaccompanied Refugee Minors,* U.N. GAOR 54th Sess., Agenda Item 111, U.N. Doc. A/RES/54/145 (2000).

145. Global Consultants on International Protection, *Refugee Children,* U.N. Doc. EC/GC/02/9, at ¶¶ 4, 10, 15 (2002). Sexual exploitation "[i]ncludes female infanticide; child marriage; female genital mutilation; . . . rape, sexual harassment and sexual exploitation for access to protection, goods and services." *Id.* at ¶ 10 n.11.

146. *Id.*

147. REVISITING CHILDREN'S RIGHTS, *supra* note 21, at 149 n.3.

148. *Id.* at 102-07.

149. *Id.*

150. EHRENREICH, *supra* note 36; HUMAN RIGHTS WATCH, CHILDREN IN SUDAN: SLAVES, STREET CHILDREN, AND CHILD SOLDIERS, *available at* http://www.hrw.org/reports/1995/Sudan.htm.

151. Bhabha, *supra* note 22, at 155.

152. UNHCR, *Guidelines for Prevention and Response: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons,* at 72 (2003), *available at* http://www.rhrc.org/pdf/gl_sgbv03.pdf.

Cambodia for sex and arrested for illegally entering Cambodia by the same officers who freed them from being sexual slaves.[153] Minors are specifically targeted for sexual exploitation because it is believed that they are "less likely to be infected with HIV."[154]

Unaccompanied minor refugee children also experience persecution different from that which adults suffer within newly formed care networks within refugee camps. For example, while in refugee camps, unaccompanied children band together to form groups usually headed by an older child.[155] In the newly formed unit the children are forced to work and are denied educational opportunities.[156] Many times an unaccompanied minor might be taken in by a stranger and suffer abuse, neglect, and exploitation by this caregiver.[157] Many caregivers are not related to the unaccompanied minors and are struggling economically.[158] These caretakers force the unaccompanied minors to work as cooks, in other forms of domestic labor, or in the marketplace, while their own children do not.[159] The unaccompanied minor is discriminated against in favor of the child for whom the foster parent is legally responsible.[160] Unaccompanied minors in a foster family unit complain of being given little food or eating only once a day while the other members of the new social unit eat twice.[161] Unaccompanied minors are often also physically and emotionally abused while the biological children of caretakers do not suffer similar abuses.[162] These unaccompanied minors suffer, "a kind of slavery . . . the child thinks she has to obey, that she can't go anywhere."[163] Although these children would likely qualify for special immigrant status, they should also be able to qualify for asylum because of their persecution based on being a child without anyone legally responsible for their care.

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153. Press Release, Human Rights Watch, Cambodia: Young Trafficking Victims Treates as Criminals (June 22, 2002) *at* http://www.hrw.org/press/2002/06/camtraff.htm.

154. Gedda, *supra* note 30. The State Department issued a report in response to legislation seeking to impose sanctions against countries that do not do enough to try and prevent trafficking and protect the victims. The report says that worldwide, many trafficking victims "are subjected to threats against their person and family, violence, horrific living conditions and dangerous workplaces." *Id.*

155. *Forgotten Children of War, supra* note 3.

156. Education is guaranteed to children through the Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess. Supp. No. 49, at 167, U.N.Doc. A/44/49 (1989).

157. *Forgotten Children of War, supra* note 3, at 10, 23.

158. *Id.* at 16.

159. *Id.* at 16, 21.

160. *Id.* at 21, 24.

161. *Id.* at 26.

162. *Id.* at 23, 25.

163. *Forgotten Children of War, supra* note 3, at 28.

According to the Convention on the Rights of the Child which secures "children separated from their parents . . . the same rights as other children,"[164] the UNHCR or the government where the refugee camp is located is responsible for their protection and assistance.[165]

> UNHCR is responsible for identifying separated children, monitoring their care, intervening if they are being abused or their needs are not being met . . . . [However] it may be very difficult to obtain reliable information about what goes on within families or communities . . . . [W]hen social workers do detect mistreatment . . . [they] have few resources at their disposal and have seldom been able to do more than provide occasional assistance to the child or the family.[166]

2. Unaccompanied Minor Street Children

Street children are also unaccompanied minors. Interestingly, many street children feel that other children within their street child group are "like a family."[167] In Spain, Moroccan migrant children are abused by Spanish police officers and then expelled to Morocco, where they are reported to be beaten again by the Moroccan police force and abandoned on the street.[168] Human Rights Watch published a report that details Spanish officials' abuse of unaccompanied minor children in an effort to force them to return to Morocco so that they will not drain welfare services which are guaranteed to them under Spanish law.[169] The Spanish government admits to failing to monitor the situation or remedy these abuses.[170] The children are in effect persecuted because of their very status as unaccompanied minors.

Street children also endure hardship in other countries. Guatemalan street children often experience violence including beatings and sexual assault by private security guards who report to the Interior Ministry.[171] These children are persecuted for their homeless status under the auspices of what the police deem to be "creating a public scandal."[172] "In December 1999, the Inter American

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164. Convention on the Rights of the Child, *supra* note 156.

165. *Id.*; *Forgotten Children of War*, *supra* note 3, at 28-29.

166. Convention on the Rights of the Child, *supra* note 156, at 167.

167. Thereza Penna Firme, *Meeting At-Risk Children Where They Get Together: An Alternative Concept of Community, in* JUSTICE FOR CHILDREN 96, 91, 92 (Stewart Asquith & Malcolm Hill eds., 1994) (interviewing a Brazilian street child and discussing the gap between statute and reality for these children who feel they are "like garbage blocking the way").

168. *Nowhere to Turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco*, 14 HUM. RTS. WATCH 1 (May 2002), *available at* http://www.hrw.org/reports/2002/ spain-morocco/spnmorc0502.pdf.

169. *Id.* Under Spanish law, unaccompanied minor children are theoretically granted the same welfare benefits as Spanish children.

170. *Id.*

171. Human Rights Watch, *Guatemala's Forgotten Children: Police Violence and Arbitrary Detention*, 1997 *available at* http://www.hrw.org/reports/1997/guat1/.

172. *Id.* Abstract.

Court of Human Rights ruled that two police officers were responsible for the 1990 deaths of five street youths and that the Guatemalan government had failed to protect the rights of the victims."[173] In Albania, children are exploited rather than protected by the police. "There are approximately 800 street children in Tirana. Trafficking in children for sex and, to a lesser degree, for begging rings was a serious problem . . . . Albania is a country of origin and a transit country for trafficking. Police corruption and involvement in trafficking was a problem."[174] Reports have been made of abuse of Brazilian, Colombian, Indian, Kenyan, Egyptian, and Sudanese street children.[175] Human Rights Watch notes in some countries the "notion of social cleansing" is applied to street children even when they are not distinguished as members of a particular racial, ethnic, or religious group. Branded as "anti-social" or demonstrating "anti-social behavior," street children are viewed with suspicion and fear by many who would simply like to see street children disappear.[176]

B. *Unaccompanied Minors' Experience of Persecution is Not Adequately Accounted for in Application of the U.S. Definition of "Refugee"*

International agreements granting protection to refugees in a host country were developed after World Wars I and II.[177] The international community sought to protect educated yet homeless Europeans and persons fleeing communism.[178] In the process, "special needs" refugees such as women, the elderly, children, and homosexuals were marginalized.[179] Some authors posit that asylum law and discourse have become biased in favor of "male, adult, heterosexual and able-bodied asylum seekers" because conventions were initially designed to protect them and have not been revised to reflect the changing circumstance of displaced persons.[180]

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173. HUMAN RIGHTS WATCH, WORLD REPORT 2001: EVENTS OF 2000 129.

174. U.S. Dep't of State, Country Reports on Human Rights Practices: Albania, March 31, 2003.

175. Human Rights Watch, *Promises Broken: Police Abuse and Arbitrary Detention of Street Children*, 1999, *at* http://www.hrw.org/campaigns/crp/promises/police.html.

176. *Id.*

177. Cipriani, *supra* note 25, at 511. *See generally* Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, App. I (1998) (providing a detailed history of the drafting of the refugee definition).

178. *See generally* Steinbock, *supra* note 177.

179. Cipriani, *supra* note 25 at 512 (arguing that women should be considered a social group within the refugee convention). Patricia Tuitt, *The State, the Family and the Child Refugee*, *in* REVISITING CHILDREN'S RIGHTS, *supra* note 21, at 149, 150-51 (discussing the marginalization of children).

180. Tuitt, *supra* note 179, at 151.

This failure to provide specific remedies for the problems unique to children during the original convention was not due to these problems being unknown.[181] Rather, children's rights were thought to be derivative of their parents' rights and as such received no explicit attention.[182] Even following the almost universal ratification of the 1989 Convention on the Rights of the Child, children's status remains derivative in the refugee context.[183] This trend is even magnified in the United States which has not ratified the convention.[184]

As derivative, "children are ascribed an essentially 'passive' role. This role significantly posits that something or someone other than the child was the real focus of harm or persecution."[185] Conceptions of children as derivative clearly places unaccompanied minors at a disadvantage because they have no parent from which to derive status and are not viewed as individual targets for persecution.[186] The UNHCR says "it may be difficult for an unaccompanied minor to establish refugee status using the same refugee criteria and procedures applied to adults. . . . UNHCR encourages countries to . . . determine the refugee status [of children] using the broadest possible interpretation."[187]

The nature of war has changed, and that has exaggerated the danger to unaccompanied minors.[188] Increasingly, children are

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181. Steinbock, *supra* note 21, at 767. Interestingly, at the Refugee Convention in 1950, the United States wanted categories of refugees that were "clearly enumerated" and "clearly and specifically determined," and included displaced persons and unaccompanied children as one of the four initially proposed enumerated groups of refugees. *Id.* at 767, 810-11. *See* Musalo, *supra* note 22, at 780 (discussing that interpretations based on the male paradigm result in the historic exclusion of others).

182. Margulies, *supra* note 12, at 290; Tuitt, *supra* note 179, at 149-50; Ann Laquer Estin, *Families and Children in International Law: An Introduction,* 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 289 (2002).

183. Bruce Abramson, *The Invisibility of Children and Adolescents: The Need to Monitor Our Rhetoric and Our Attitudes, in* MONITORING CHILDREN'S RIGHTS 393, 394 (Eugen Verhellen ed., 1996) (recognizing that even though the International Convention on the Rights of the Child creates children as rights holders, they are all to often invisible and "seen in the context of their families and community").

184. William Wesley Patton, *Children Are Invisible, Children Are Real: An Introduction to the Child Law Symposium,* 18 WHITTIER L. REV. 759, 759 (1997); Thronson, *supra* note 36, at 997.

185. REVISITING CHILDREN'S RIGHTS, *supra* note 21, at 153.

186. The family unit was recognized as a distinct social group in *Sanchez v. Trujillo,* 801 F.2d 1571, 1576 (9th Cir. 1986). If children are no longer part of the social group of family, they cannot claim that they are being persecuted because of their familial ties.

187. UNHCR, Report to the Executive Committee, EC/48/SC/CPR.28.

188. *Q&A, Into the Quicksand of Endless War,* N.Y. TIMES, Feb. 15, 2003, at A21. *See generally* OMER BARTOV, MIRRORS OF DESTRUCTION: WAR, GENOCIDE AND MODERN IDENTITY (2000) (explaining the phenomena of war in the modern day); Hick, *supra* note 3, at 106 ("The nature of armed conflict has changed since the rise of globalization and the end of the Cold War. Now wars predominantly take the lives of civilians, over half of whom are children.").

soldiers, casualties, and targets for crimes against humanity.[189] "Refugee children are in double jeopardy, because they are children and because they are refugees."[190] If a refugee child is in double jeopardy, an unaccompanied minor is in triple jeopardy: as a child, as a refugee, and as someone with no protector. Although they are subject to the same harsh conditions as are adults, their persecution does not end once the primary conflict or war is over. Rather, unaccompanied minors remain vulnerable to becoming victims of forced domestic labor, abuse, persecution, and denial of educational opportunities in their new care networks. They are targeted because of their status as children without the protection of a primary caregiver. Yet the same asylum standards created for adults are applied to children.[191]

In hearings on the Kids Act, Senator Kennedy said, "We have no system now that recognizes that these are . . . children first and . . . newcomers second."[192] Although age alone cannot be the defining figure for a persecuted group,[193] there is a "need to fashion a jurisprudence that is responsive to the specificity of child persecution, in a legal context in which age has not previously been considered a relevant factor."[194] As the Fourth Circuit states "in the absence of statutory intent to apply a different standard to a juvenile, . . . [the court] is not at liberty to substitute a different interpretation."[195] Congress, not the federal courts must therefore clearly express the intent that unaccompanied minors receive a different standard. Congress has begun the process of taking into account the circumstances of unaccompanied minors who have been trafficked or abused and neglected.[196] Yet, distinguishing these two groups from other types of unaccompanied minors has created a false dichotomy

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189. Gary B. Melton, *Is There a Place for Children in the New World Order, in* JUSTICE FOR CHILDREN 42 (1992) (noting that five percent of children were casualties in World War I as compared with 80 percent of children in modern conflicts). *See* Hick *supra* note 3, at 114, 118 (commenting on the "initiative of the Rome Statue of the International Criminal Court" to make "the violation of children's rights a war crime").

190. Nyorovai Whande, *General Issues Relating to Refugee Children, in* JUSTICE FOR CHILDREN, *supra* note 189, at 85 (1992).

191. *See* Cruz-Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (holding in "the absence of statutory intent to apply a different standard for a juvenile, and in light of the reasonable interpretation by the INS that the standard as stated takes into consideration the petitioner's age we are not at liberty to substitute a different interpretation"). *See generally* Nogosek, *supra* note 26 (arguing for a child sensitive legal standard in the United States because U.S. law has traditionally treated children differently from adults based on their status as children, humanitarian concerns and international law all support change).

192. Subcommittee on Immigration Hearing, *supra* note 20.

193. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576-77 (9th Cir. 1986).

194. Bhabha, *supra* note 22, at 176.

195. *Cruz-Diaz*, 86 F.3d at 331.

196. *See* discussion *supra* Part III(3)(A)(1) & (2) (describing new statutory relief).

between children who are coerced into coming to the United States unaccompanied, and those who actively participate in their transnational migration in search of a safe haven.[197] As Jacqueline Bhabha, Executive Director of Harvard University's Human Rights Studies, said unaccompanied minors' "needs converge at the point of arrival in the host state."[198]

V. PROPOSALS FOR CHANGE: OLD AND NEW

A. *Create New Visa Status for Unaccompanied Minors*

One solution for unaccompanied minors, not just unaccompanied minor refugee children, is to have Congress create a new non-immigrant visa based on their status as unaccompanied minors.[199] This solution may result in negative consequences such as separation of families over the long term. For example, if parents feel it is in their child's best interest to send him or her to the United States, upon arrival the child could be granted a non-immigrant visa. The United States should not encourage this separation and harm to the child by granting universal visas.[200] Children who are given visas for humanitarian reasons may still end up involved in smuggling, living as prostitutes, involved in crime, or murdered.[201] Abuse of a system aimed at assisting unaccompanied minors but not narrowly tailored could cause the idea of refugee protection to fall into disfavor.[202] Moreover, family reunification and unity has been a longstanding goal of immigration policy, and statutory provisions should not be created that would thwart this policy which is in the best interest of the child.[203]

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197. *See generally* Bhabha, *supra* note 22, at 175 (discussing problems created when one uses the consent and coercion language).

198. Bhabha, *supra* note 29, at 293.

199. AYOTTE, *supra* note 1, at 65. Interestingly, although there is no statutory provision enacted, in practice in Denmark, the courts have created such a defacto rule for children under 15 because it is felt that they cannot express fear of persecution.

200. *Somali Children Dumped at Airports, supra* note 29. For example, Somali parents have been reported to pay $15,000 to smugglers to abandon their children once they reach airports in Europe and North America. *See generally* Lucy Hannan, *A Gap in Their Hearts: The Experience of Separated Somali Children*, UN Office for the Coordination of Humanitarian Affairs (2003), *at* http://www.irinnews.org/webspecials/Somalichildren/pdf/Gap_In_Their_Hearts_final.pdf.

201. *Somali Children Dumped at Airports, supra* note 29.

202. Martin & Schoenholtz, *supra* note 134 at 589 (maintaining that any asylum system "must accomplish two principal goals. First, the system must protect those fearing persecution or serious danger . . . . Second, to maintain public support for that first goal, the asylum system must deter abuse").

203. This follows the Universal Declaration of Human Rights that the United States has signed which poses the family as the fundamental group unit of society and that "it is essential for authorities to assist children in locating and reuniting with

B. *Expand the Interpretation of Refugee to Include Unaccompanied Displaced Minors as a Specific Social Group*

Congress adopted the 1980 amendment to the definition of refugee without providing any meaningful guidance on interpreting or defining its terms. A refugee, as noted above, is someone who has a "well founded fear of persecution based on race, religion, nationality, political opinion, membership of a particular social group."[204] Race, religion, and nationality are relatively determinate. Defining what constitutes persecution and membership in a particular social group has posed significant challenges for courts.[205] There is no universal definition of social group or persecution.

No court has ruled that unaccompanied displaced minors constitute a particular social group capable of experiencing persecution because of their membership in this group. The guidelines do not mention the possibility that unaccompanied displaced minors could constitute a particular social group. Rather, the guidelines stipulate that age and generally harsh conditions suffered by many cannot define a particular social group.[206] However, unaccompanied minors experience persecution unique to their circumstances which the definition of refugee should be expanded to recognize.

1. Displaced Unaccompanied Minors Meet the Current Standard and Should Therefore Be Recognized as a Persecuted Social Group

Persecution must be due to one of the five enumerated grounds to be granted asylum, the last of which is membership in a particular social group. Courts have defined the term "social group" because it is not defined in the Act.[207] The First, Third, and Seventh Circuits follow a standard[208] based on a BIA decision, *Matter of Acosta*, which suggests that a social group must be based on a

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their family members." *IJ Grants Asylum to Guatemalan Street Child*, 79 No. 13 INTERPRETER RELEASES 440 (2002) (quoting the UNHCR 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum ¶¶ 9.4, 10.5).

204. 8 U.S.C. § 1101 (2003); *see also* discussion *supra* note 1.

205. Bhabha, *supra* note 22, at 167-68. *See generally* 65 Fed. Reg. 76588-01 (Dec. 7, 2000) (Proposed Rule) (quoting *Lwin v. INS* which states that "the legislative history behind the term . . . is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently" as the reason why guidance for the "for the resolution of novel issues" in recent withholding claims is required).

206. *See, e.g.*, Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985); Gomez v. INS, 947 F.2d, 664 (2d Cir. 1991).

207. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575-76 (9th Cir. 1986).

208. WEISS, *supra* note 1, at 23.

> shared characteristic that might be an innate one such as sex, color, or kinship ties. . . . The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. . . .whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[209]

The Ninth Circuit allows for a social group to be comprised of a "voluntary associational relationship or by an innate characteristic that is so fundamental to the identities or conscience of its members that members either cannot or should not be required to change it."[210] This standard parallels the UNHCR's definition of a social group. The UNHCR defines social group as "persons of similar background, habits or social status."[211] The Second Circuit defines a particular social group as one "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor or in the eyes of the outside world in general."[212]

As the INS guidelines illustrate, membership in a particular social group cannot be based on broad characteristics such as youth and gender.[213] Furthermore, the guidelines also state that, "the type of harm a child may suffer cannot serve to define the particular social group on account of which that particular harm is suffered."[214] The reason that these children are persecuted or targeted for military service is because they lack parents to protect them. Their vulnerability is a product of their lack of a primary caregiver. This characteristic distinguishes them from other youth and can serve to define them as a group. Unaccompanied minors largely lack the ability to change their circumstances. Although unaccompanied minors suffer similar types of harms, under either the voluntary association or innate characteristic standards, unaccompanied minors should be recognized as a social group capable of experiencing persecution.

Unaccompanied minors suffer persecution on account of their membership in a social group of children without primary caregivers to look out for their interests. The BIA has defined persecution to

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209. Matter of Acosta, 19 I. & N. Dec. at 223. *See also* Meguenine v. INS, 139 F.3d 25, 28 n.2 (1st Cir. 1998); Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998); Fatin v. INS, 12 F.3d 1233, 1237 (3d Cir. 1993).

210. Hernandez-Montiel v. INS, 225 F.3d 1084,.1093 (9th Cir. 2000) (expanding *Sanchez*).

211. UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1992); Bonilla v. INS 730 F.2d 562, 567 (9th Cir. 1984). Other circuits have recognized the UNHCR's guidance on interpreting the refugee definition. *See, e.g.*, Ananeh-Firempong v. INS, 766 F.2d 621, 621 (1st Cir. 1985).

212. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

213. *Id.*

214. WEISS, *supra* note 1, at 21.

include "threats to life, confinement, torture, and economic restrictions so severe that they constitute threat to life or freedom, . . . physical or mental harm . . . [and] discriminatory practices [that] can accumulate over time or increase in intensity so that they may rise to the level of persecution."[215] Persecution must be proved by objective facts that show that past persecution can be inferred or that there is a risk of future persecution.[216] After persecution has been objectively proven, the applicant must prove that they have actually been persecuted or fear persecution. Persecution need not consist of "country-wide civil strife and anarchy."[217] The BIA has stated that "Congress specifically rejected a definition of 'refugee' . . . that would have included 'displaced persons,' i.e., individuals who flee widespread conditions of indiscriminate violence resulting from civil war or military strife in a country."[218]

Unaccompanied minors in refugee camps generally become separated from their parents and displaced as a direct result of civil conflict. This said, the guidelines for unaccompanied minors point out that "[g]enerally harsh conditions shared by many other persons do not amount to persecution."[219] Consequently, the grave experience and existence of unaccompanied minors under their "generally harsh conditions" do not prove they have been either objectively or subjectively persecuted. However, individual unaccompanied minors suffer physical and mental abuse as well as receiving so little food that it could constitute a threat to their lives. The discrimination against unaccompanied minors as compared with the biological children of the caretakers rises to the level of persecution when they are denied educational opportunities and forced into domestic labor. Unaccompanied minors are also specifically targeted for military conscription because they are more malleable than adults and have no adult to protect them.

2. Street Children Recognized as a Specific Social Group of Unaccompanied Minors

Support for expanding the definition of refugee to encompass unaccompanied minors comes from a recent decision that a street child, if returned to his country of origin, would suffer persecution based on membership in a particular social group of street children. In November 2001, an unaccompanied minor street child was considered for the first time to be part of a particular social group of

215. *Id.* at 16.
216. Matter of Sanchez and Escobar, 19 I. & N. Dec. 276, 276 (B.I.A. 1985).
217. *Id.* at 276.
218. *Id.* at 280.
219. WEISS, *supra* note 1, at 16.

other unaccompanied minors and granted asylum.[220] The immigration judge relied on the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, not the U.S. government guidelines, to determine that "sensitivity to the age of the child might affect the analysis of his or her refugee status."[221] In this case, a sixteen-year-old native of Guatemala would become part of a group of "street children" if returned to Guatemala.[222] The immigration judge relied on Acosta's definition of a social group: a group which shares a "protected characteristic [of which] the prosecutor could become aware [ ], and that the persecutor has the means and inclination to persecute . . . to be defined on a case by case basis."[223] The judge concurrently applied the *Sanchez-Trujillo* definition of social group as "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."[224]

3. Displaced Unaccompanied Minors Are Similar to Unaccompanied Minor Street Children

Unaccompanied minors in refugee camps share characteristics and experience similar persecution to that of street children. Often times, unaccompanied minor refugee children band together to form new care groups in refugee camps led by an elder girl child for their protection and survival. The "characteristic" that unaccompanied minors share is their unaccompanied status in their home country which leaves them open to persecution. They face similar persecution to that of street children, such as physical and sexual abuse from which neither their government nor the UNHCR protects them. All these children should be considered a social group.

The definition of refugee should be explicitly expanded to include unaccompanied minor refugee children who suffer persecution, and have a well-founded fear of persecution at the hands of the new caretaker or an outside group that preys on children living together.[225] Membership in a particular social group was last expanded when the BIA recognized gender as a possible reason for persecution.[226] Expanding the interpretation to include unaccompanied minors would promote the purpose of the Refugee Convention.[227]

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220. *IJ Grants Asylum*, *supra* note 203 (reporting on an immigration judges' unpublished decision in *Matter of A-M-L*).

221. *Id.* at 441.

222. *Id.*

223. *Id.*

224. *Id.*

225. Tuitt, *supra* note 179, at 155.

226. Matter of Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996); Bhabha, *supra* note 22, at 157; Musalo, *supra* note 22.

227. Bhabha, *supra* note 22, at 176.

C. *Ratify the Convention on the Rights of the Child*

One last possibility that would grant unaccompanied minors more extensive rights within the refugee context is if the United States ratified the Convention on the Rights of the Child. One hundred and ninety state parties have explicitly recognized children's vulnerability by adopting the Convention on the Rights of the Child.[228] The United States has signed but has not ratified the convention, and until it becomes ratified it does not have the force of law.[229] The United States remains one of only three member states that have not ratified the Convention.[230] At the U.N. General Assembly Special Session on Children, supporters of the Convention, accused the United States of trying to marginalize the Convention and prevent it from becoming the "global standard" that the rest of the world recognizes for children's rights.[231]

If the United States does not ratify the Convention, it could theoretically be bound under the CRC if it has "acquired the status of customary international law" not contrary to domestic laws.[232] However, because so many non-optional provisions are contrary to domestic law, it is unlikely that the CRC would ever bind the United States if it does not ratify the convention itself.

The United States is unlikely to ratify the CRC because of numerous articles that face U.S. opposition.[233] Moreover, "contrasting obligations" within the CRC make it unlikely that even if ratified it would have the force to give children new substantive rights within the refugee convention.[234] Additionally, the committee who reviews

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228. Convention on the Rights of the Child, *supra* note 156; Jaap E. Doek, *The U.N. Convention on the Rights of the Child: Some Observations on Monitoring and the Social Context of Its Implementation*, 14 U. FLA. J.L. & PUB. POL'Y 125, 125- 26 (2003) (nothing that East Timor and Somalia have also not ratified this Convention).

229. Cynthia Price Cohen, *Monitoring the United Nations Convention on the Rights of the Child in a Non-Party State: the United States*, *in* MONITORING CHILDREN'S RIGHTS, *supra* note 183, at 475 n.1 (noting that the United States signed the Convention in response to a death bed letter to the President from James Grant, former Executive Director of UNICEF).

230. Doek, *supra* note 228, at 126.

231. Press Release, Human Rights Watch, Children's Summit Spotlights Government's Failures (May 7, 2002), *at* http://www.hrw.org/press/2002/05/unkids0507.htm.

232. Jacqueline Bhabha & Wendy A. Young, *Through A Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 No. 21 INTERPRETER RELEASES 757, 760 (1998).

233. Richard G. Wilkins et al., *Why the U.S. Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 419-24 (2003).

234. Bhabha explains that:

> [O]n the one hand there is the obligation to act in the best interest of the child, viewed here as an object of paternalistic, protective concern and intervention; on the other hand is the obligation to take note of the child's expression of his

compliance with the CRC criticizes many of the countries that have adopted it for failure to meet its standards.[235]

VI. CONCLUSION

Everyone wants to help children. No one ever answers the question of why so many children still suffer.[236] Advocates and politicians have taken the first steps towards alleviating unaccompanied minors' suffering in U.S. custody by changing their custodians. However, "reform lies in politicians' recognition that 'restructuring alone is not going to solve all the problems, [but rather] just begins the effort' of reexamining the assumptions, goals, and approaches of immigration policy."[237] It is important to reexamine the assumptions, approaches, and goals of immigration policy for unaccompanied minors. At the very least, unaccompanied minors deserve legal counsel and help with the research necessary to document their claims. Unaccompanied minors should be considered as children who experience different forms of persecution because of their unaccompanied status and not under the same standards applied to adult asylum seekers. Expanding the definition to include recognition of unaccompanied minors as a social group would protect their interests and align U.S. immigration law with international norms.

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or her views in the matters of concern, recognizing the child as agent and subject of independent rights and views.

Bhabha, *supra* note 22, at 178; *see also* Tuitt, *supra* note 179.

235. *See generally* REVISITING CHILDREN'S RIGHTS, *supra* note 21.

236. UNHCR, *Everyone Wants to Help Children, So Why Are So Many Still Suffering*, *at* http://www.unhcr.ch/children/cover01.html.

237. Manns, *supra* note 23, at 146. This question implicitly recognizes that children's welfare is intrinsically linked with the international economy and political effects of globalization. Hick, *supra* note 3.

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