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Are Unaccompanied Alien Children Really Getting a Fair Trial - An Overview of Asylum Law and Children

Keywords

Asylum, Children, Immigration Law, Repatriation, Victims

ARE UNACCOMPANIED ALIEN CHILDREN REALLY GETTING A FAIR TRIAL?

AN OVERVIEW OF ASYLUM LAW AND CHILDREN

Christine M. Gordon*

INTRODUCTION

Sudha is an 11-year old girl from India.¹ Her parents abused her, placed her in a home for unwanted children, and then gave her to a male stranger who accompanied her to the United States.² During immigration proceedings, her attorney argued that Sudha was a victim of child trafficking; her parents had sold her for child labor.³ Each year approximately 7,000 unaccompanied alien children, like Sudha, are detained by United States immigration officials.⁴

Alien children are classified as "unaccompanied children" when they arrive or are found in the United States alone and are under the age of 18.⁵ The average age of unaccompanied children held in immigration detention facilities is 15 years old, with some as young as 18 months old.⁶ A majority of the unaccompanied children in detention come from Latin America and are caught trying to cross the United States/Mexico border illegally.⁷ Many of these children are victims of poverty, abusive child labor practices, human trafficking, rape, forced prostitution, or armed conflict in their home countries and travel long distances to reach the United States in the hope that they can find a better life for themselves.⁸ In other instances, children are unaccompanied because they have been separated from their families

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1. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES 2 (1998), http://www.womenscommission.org/pdf/ins_child.pdf [hereinafter PROTECTING THE RIGHTS OF CHILDREN].

2. *Id.*

3. *Id.*

4. Press Release, Senator Feinstein, Senator Feinstein Introduces Legislation to Protect Unaccompanied Children in Immigration Custody (Jan. 24, 2005), <http://feinstein.senate.gov/05release/r-unaccompanied-child-into.htm>.

5. Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(g)(2) (2005); see also WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 5 (2002), http://www.womenscommission.org/pdf/ins_det.pdf [hereinafter PRISON GUARD OR PARENT].

6. David Oliver Relin, *Who Will Stand Up For Them?*, PARADE MAGAZINE, Aug. 4, 2002, at 4 [hereinafter *Who Will Stand Up For Them?*].

7. *Id.*

8. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 3-4.

during travel or have been abandoned by their parents.⁹ Upon arriving in the United States, parents are sometimes afraid of coming forward to "claim" their children, because they fear being deported.¹⁰ These unclaimed children are left to face United States immigration officials alone.¹¹

Currently in the United States, child asylum applicants face the same immigration procedures as adult asylum applicants.¹² United States immigration law does not afford child asylum seekers special treatment in determining their claims, does not appoint legal representation, and does not provide appropriate care for these children as they await determination of their claims.¹³ Age, level of education, and language skills affect not only a child's ability to communicate with immigration officials, but also his or her understanding of the United States' immigration process.¹⁴ International law has taken into account the special status of child asylum seekers. For example, the Office of the High Commissioner for Refugees has promulgated guidelines for dealing with unaccompanied alien children which state that the "best interests of the child" is the standard under which child asylum claims should be determined, has provided procedures for appointing guardians and counsel, and has asserted that the detention of such children should be prohibited.¹⁵ Despite such international guidance, the United States had not yet implemented legislation which takes these concerns into account. Without proper standards and safeguards, unaccompanied alien children in the United States face being deported to a country where their parents may no longer reside or do not want them and where their human rights will be violated.

This article focuses on issues related to the custody and detention of unaccompanied alien children seeking asylum and is broken into four sections: international refugee law, United States immigration law and the asylum process, current conditions of unaccompanied alien children, and developments in the United States law regarding unaccompanied alien children.

I. INTERNATIONAL REFUGEE LAW

A. Background—Role of the United Nations

Because United States law is influenced by international law, it is important to first review international refugee law and how it relates to children. This section will describe the role of the United Nations, the legal effects of international law, and the specific international laws that pertain to unaccompanied alien children seeking asylum.

9. PRISON GUARD OR PARENT, *supra* note 5, at 5; see also *Who Will Stand Up For Them?*, *supra* note 6, at 5.

10. *Who Will Stand Up For Them?*, *supra* note 6, at 5.

11. *Id.*

12. PRISON GUARD OR PARENT, *supra* note 5, at 5.

13. *Id.* at 5-6.

14. *Id.*

15. UNHCR, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM (1997), <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d4f91cf4> [hereinafter UNHCR GUIDELINES].

On October 24, 1945, 50 countries, including the United States, created the United Nations through ratification of its Charter.¹⁶ As set forth in the Charter, the purpose of the United Nations is to “maintain international peace and security; to develop friendly relations among nations; to cooperate in solving international economic, social, cultural and humanitarian problems and *in promoting respect for human rights and fundamental freedoms*; and to be a centre for harmonizing the actions of nations in attaining these ends”¹⁷ (emphasis added).

In promoting respect for human rights and fundamental freedoms, the United Nations has worked toward creating a comprehensive body of human rights law.¹⁸ The United Nations Charter and the Universal Declaration of Human Rights, adopted by the General Assembly in 1948, are the foundations of this body of law.¹⁹ General Assembly decisions have gradually established United Nations human rights laws as universal, indivisible and interrelated with the development and democracy of all nations.²⁰ Today human rights law encompasses specific standards for “women, children, disabled persons, minorities, migrant workers and other vulnerable groups.”²¹

B. Duties of Member States – Customary International Law

The United Nations, according to its charter, is charged with the codification and development of international law.²² The United Nations has developed a framework for promoting international peace, security, and economic and social development through over 500 conventions, treaties and standards.²³ The General Assembly is the main deliberative organ of the United Nations, which votes on those conventions, treaties, and standards.²⁴ Each member state to the United Nations has a representative, with one vote in the General Assembly.²⁵

“Any form of intentional agreement that formally creates legal obligations for the parties thereto is considered a treaty.”²⁶ Treaties are legally binding.²⁷ Several different terms are used to refer to treaties: conventions, covenants, protocols, charters, and statutes.²⁸ However, “convention” is the most commonly used term

16. UNITED NATIONS, BASIC FACTS ABOUT THE UNITED NATIONS, UNITED NATIONS: ORGANIZATION, <http://www.un.org/aboutun/basicfacts/unorg.htm>

17. *Id.*

18. UNITED NATIONS, BASIC FACTS ABOUT THE UNITED NATIONS, HUMAN RIGHTS, <http://www.un.org/aboutun/basicfacts/hrights.htm>

19. *Id.*

20. *Id.*

21. *Id.*

22. UNITED NATIONS, UN IN BRIEF, WHAT THE UN DOES FOR JUSTICE, HUMAN RIGHTS AND INTERNATIONAL LAW, <http://www.un.org/Overview/brief3.html>.

23. *Id.*

24. UN GENERAL ASSEMBLY, UNITED NATIONS, BACKGROUND INFORMATION, http://www.un.org/ga/59/ga_background.html.

25. *Id.*

26. UNICEF, CONVENTION ON THE RIGHTS OF THE CHILD: THE PROCESS: FROM SIGNATURE TO RATIFICATION, <http://www.unicef.org/crc/crc.htm> [hereinafter THE PROCESS: FROM SIGNATURE TO RATIFICATION].

27. *Id.*

28. *Id.*

for treaties in the human rights arena.²⁹ The importance of identifying a treaty is that some forms of international law are not legally binding.³⁰ For example, declarations only represent a moral commitment and therefore are not legally binding.³¹

Though member states do not have to adopt all of the necessary legislation foreseen by a convention prior to its ratification, member states are expected to be in compliance with a convention within a reasonable time after ratification.³² If a member state has not ratified or acceded to a convention, the convention is not formally binding upon that country.³³ However, the provisions of all conventions have an effect on all countries as they are part of international customary law and represent an international consensus on a certain topic.³⁴

If a member state signs a convention after it has been adopted by the General Assembly, this is treated as a "preliminary or general endorsement of the convention" and is not legally binding.³⁵ The signature is treated as "an indication that the country intends to undertake a careful examination of the treaty in good faith" prior to its ratification of the convention.³⁶ Though not legally binding, the signature does bind the member state "to refrain from acts that would defeat the objectives of the convention, or to take measures to undermine it."³⁷

C. International Law on the Rights of Unaccompanied Children

1. 1948 Universal Declaration of Human Rights

In 1948, the Universal Declaration of Human Rights set the stage for creating international standards of human rights and asylum law.³⁸ The Preamble of the declaration states that a world where "human beings shall enjoy freedom of speech and belief and *freedom from fear* and want has been proclaimed as the highest aspiration of the common people"³⁹ (emphasis added). The Preamble further states that the member states pledge to achieve "the promotion of universal respect for and observance of human rights and fundamental freedoms."⁴⁰ According to Article 2 of the declaration, "everyone is entitled to all the rights and freedoms set forth in [the] Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴¹

29. *Id.*

30. *Id.*

31. *Id.*

32. THE PROCESS: FROM SIGNATURE TO RATIFICATION, *supra* note 26.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. THE PROCESS: FROM SIGNATURE TO RATIFICATION, *supra* note 26.

38. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at pmbl. (1948), <http://www.un.org/Overview/rights.html>.

39. *Id.*

40. *Id.*

41. *Id.* at art. 2.

Several articles contained in the Universal Declaration of Human Rights pertain to asylum law. For example, Article 14 guarantees “everyone the right to seek and to enjoy in other countries asylum from persecution.”⁴² Article 3 establishes the right to life, liberty, and security of person.⁴³ Article 5 prohibits any person from being subjected to torture or cruel, inhuman, or degrading treatment or punishment.⁴⁴ Articles 18 and 19 guarantee the right to freedom of thought (conscience and religious) and the freedom of opinion and expression.⁴⁵

Of most importance to unaccompanied children, Article 25 proposes the concept that “motherhood and childhood are entitled to special care and assistance.”⁴⁶ The Universal Declaration of Human Rights demonstrates to the international community that as early as 1948, children were deemed to deserve special treatment. Furthermore, this international document that proposes special treatment for children, guarantees that all human beings have the right to seek asylum from persecution. As one of the founding members of the United Nations, the United States is morally bound to uphold the ideals of this declaration and protect the human rights of all individuals within its boundaries. This should include affording child asylum seekers special treatment.

2. 1951 Convention Relating to the Status of Refugees

The 1951 Convention Relating to the Status of Refugees affirms the Universal Declaration of Human Rights’ principle “that human beings shall enjoy fundamental rights and freedoms without discrimination.”⁴⁷ The 1951 convention went further to “assure refugees the widest possible exercise of these fundamental rights and freedoms.”⁴⁸

Under Article 1 of the convention, “refugee” was defined as any person who had been considered a refugee as a result of events occurring before January 1951 and who:

[O]wing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.⁴⁹

42. *Id.* at art. 14.

43. *Id.* at art. 3.

44. Universal Declaration of Human Rights, *supra* note 38, at art. 5.

45. *Id.* at arts. 18-19.

46. *Id.* at Art. 25.

47. Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954, http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.

48. *Id.* at pmbl.

49. *Id.* at art. 1.

This convention created the international standard for evaluating an asylum seeker's claim of persecution, a standard that continues to be used by the United States today.⁵⁰

Several other articles in the convention outline the rights of refugees as they seek asylum in member states. Article 16 of the convention guarantees refugees "free access to the courts of law . . . of all [c]ontracting [s]tates."⁵¹ This article also provides refugees the same treatment as a national in matters pertaining to access to the courts, such as legal assistance.⁵² Article 31 prohibits contracting states from imposing penalties on refugees "on account of their illegal entry or presence . . . provided [refugees] present themselves without delay to the authorities and show cause for their illegal entry or presence."⁵³ Without this provision, many asylum seekers would never have their claims heard. Article 33 also prohibits contracting states from "expel[ling] or return[ing] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁵⁴ This provision prohibits member states from returning an asylum seeker to a country in which they may face persecution.

Though much of the 1951 Convention Relating to the Status of Refugees was incorporated into the asylum provisions of the U.S. Immigration and Naturalization Act of 1952, the United States did not ratify the 1951 convention.⁵⁵ Canada ratified the convention on June 4, 1969.⁵⁶

3. 1967 Protocol Relating to the Status of Refugees

In 1967 the United Nations introduced the Protocol Relating to the Status of Refugees. The main purpose of the Protocol was to amend the definition of a refugee.⁵⁷ Under the 1951 convention, only refugees who had become refugees as a result of events occurring before January 1951 were protected.⁵⁸ The 1967 protocol omitted the words "as a result of events occurring before 1 January 1951" and the words "as a result of such events."⁵⁹ By omitting this language, the United Nations established asylum as a permanent and continuing form of protection for all people.

50. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (2005).

51. Convention Relating to the Status of Refugees, *supra* note 47, at art. 16.

52. *Id.*

53. *Id.* at art. 31.

54. *Id.* at art. 33.

55. United Nation Treaty Collection, Status of Multilateral Conventions Deposited with the Secretary-General, Convention Relating to the Status of Refugees, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/treaty2.asp>.

56. *Id.*

57. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223, *entered into force* Oct. 4, 1967, http://www.unhchr.ch/html/menu3/b/o_p_ref.htm.

58. *Id.*

59. *Id.*

The United States ratified the 1967 protocol on November 1, 1968.⁶⁰ However, the United States' ratification was accompanied by reservations relating to the taxation of non-resident refugees.⁶¹ Since Canada had ratified the 1951 convention, its ratification carried over to the 1967 protocol.⁶²

4. 1989 Convention on the Rights of the Child

In 1989 the United Nations adopted the Convention on the Rights of the Child⁶³. The convention recognized that children "by reason of [their] physical and mental immaturity, need special safeguards and care, including appropriate legal protection."⁶⁴ The 1989 convention lists and strengthens the importance of several other United Nations conventions and declarations addressing the special needs, rights, and protections that childhood requires.⁶⁵

Article 1 of the convention defines a child as "every human being below the age of eighteen years."⁶⁶ Perhaps the most important provision in the convention is Article 3 which created the "best interests of the child" standard.⁶⁷ International law requires that in *all* matters concerning children, the best interests of the child shall be the primary consideration.⁶⁸ This is a standard that the United States has not yet adopted in evaluating a child asylum seeker's claim.⁶⁹

Article 22 of the convention specifically outlines how state parties should treat unaccompanied child asylum seekers.⁷⁰ State parties are to "protect the child and trace the parents or other members of the family."⁷¹ If the child's family cannot be found, then the State Party is to provide for the child according to Article 20.⁷² Under Article 20, children who have been deprived of their family environment are entitled to special protection and assistance.⁷³ State parties are to ensure alternative care for these children such as foster placement, adoption, or placement in a suitable institution for the care of children.⁷⁴

60. United Nation Treaty Collection, Status of Multilateral Conventions Deposited with the Secretary-General, Protocol Relating to the Status of Refugees, www.unhcr.ch/html/menu3/b/treaty5.htm.

61. *Id.*

62. *Id.*

63. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), <http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>

64. *Id.* at pmb1.

65. *See id.*

66. *Id.* at art. 1.

67. *Id.* at art. 3, para. 1.

68. *Id.*

69. Memorandum from INS on Guidelines for Children's Asylum Claims, to Asylum Officer Corps (Dec. 10, 1998), available at http://uscis.gov/graphics/lawsregs/handbook/10a_ChldmGdlns.pdf [hereinafter INS Guidelines].

70. Convention on the Rights of the Child, *supra* note 63, at art. 22.

71. *Id.* at art. 22, para. 2.

72. *Id.* at art. 20.

73. *Id.*

74. *Id.*

Another important aspect of the 1989 convention relates to the rights of detained children. According to Article 37 "the arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time."⁷⁵ The provision further states that while in detention a child should be treated "in a manner which takes into account the needs of persons of his or her age."⁷⁶ In particular, unless it is in the child's best interest, the child should be separated from adults and have the right to maintain contact with his or her family through correspondence and visits.⁷⁷ Lastly, perhaps most importantly, Article 37 states that "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance."⁷⁸

Though the United States signed the 1989 convention on February 16, 1990, to date it has not yet ratified the convention.⁷⁹ In fact the United States and Somalia are the only two countries which have not ratified this convention.⁸⁰

D. International Guidelines for Unaccompanied Children

1. Canadian Guidelines

After the 1989 Convention on the Rights of the Child, Canada became the first government to publish its own guidelines for handling child refugee claims.⁸¹ Canada created the guidelines because the country's immigration legislation did not "set out specific procedures or criteria for dealing with the claims of children different from those applicable to adult refugee claimants."⁸² Canada felt that the procedures being followed by its Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD) for an adult claimant were not always suitable for a child claimant.⁸³

Canada's guidelines specifically apply to unaccompanied children and define children as persons under the age of 18.⁸⁴ The guidelines note that the "best interests of the child" principle is a principle recognized by the international community as a fundamental human right of a child.⁸⁵ The Canadian guidelines take into account the age and unaccompanied status of these children because Canadian officials feel that children warrant special attention while their claims are being determined.⁸⁶ The guidelines also take into account gender, cultural background and past experiences as factors that affect the best interests of a

75. Convention on the Rights of the Child, *supra* note 63, at art. 37.

76. *Id.*

77. *Id.*

78. *Id.*

79. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, www.unhchr.ch/pdf/report.pdf.

80. UNICEF, *Convention on the Rights of the Child*, www.unicef.org/crc/introduction.htm.

81. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 5.

82. IMMIGRATION & REFUGEE BOARD, GUIDELINE 3: CHILD REFUGEE CLAIMANTS, *available at* www.irb-cisr.gc.ca/en/about/guidelines/Child_e.htm [hereinafter CANADIAN GUIDELINES].

83. *Id.*

84. *Id.*

85. *Id.*; *see also* Convention on the Rights of the Child, *supra* note 63, at art. 3, para. 1.

86. CANADIAN GUIDELINES, *supra* note 82.

child.⁸⁷ As a consequence the “best interests of the child” principle is heavily utilized in the different stages leading to the determination of a child’s claim.⁸⁸

Under current Canadian law, once an unaccompanied child asylum seeker has been identified, the provincial authority responsible for protecting children is notified and put in charge of the child’s care pending determination of his or her claim.⁸⁹ To limit stress and trauma, child asylum claims are given scheduling and processing priority.⁹⁰ A CRDD panel and Refugee Claim Officer (RCO) are immediately assigned to the claim and the child’s representative is designated as soon as possible following the assignment of the CRDD panel.⁹¹ Prior to designating the representative, the provincial authorities responsible for protecting children will bring forth any relevant information that would affect the appointment of the representative.⁹² At the pre-hearing conference the representative is assigned (if one has not already been assigned), issues in the claim are identified, and evidence that will be presented is identified (the CRDD panel determines what evidence the child is able to provide and the best way to elicit that information).⁹³ In determining what evidence the child is able to provide the CRDD panel will consider the age, mental development of the child, the capacity of the child to recall past events, the amount of time that has elapsed since the events, and the capacity of the child to communicate.⁹⁴ Following the pre-hearing conference, a hearing will take place to determine the child’s asylum claim.⁹⁵

In addition to placing specific provincial authorities in charge of child asylum seekers, the Canadian guidelines are significant in that they guarantee that child asylum seekers do not face proceedings alone. The guidelines require the designation of a representative for all child claimants.⁹⁶ The role of the designated representative is not that of legal counsel, but rather that of a guardian that guarantees the child’s rights are always protected.⁹⁷ Child asylum seekers have a separate right to be represented by legal or other counsel.⁹⁸ In fact, the duties of the designated representative are to:

[R]etain counsel, instruct counsel or help the child instruct counsel, to make other decision with respect to the proceedings or help the child make those decisions, inform the child about the various stages and proceedings of the claim, assist in obtaining evidence in support of

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. CANADIAN GUIDELINES, *supra* note 82.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. CANADIAN GUIDELINES, *supra* note 82.

97. *Id.*

98. *Id.*

the claim, provide evidence and be a witness, and act in the best interests of the child.⁹⁹

In order for a person to be considered a representative for a child claimant, the person must be over 18 years old, must have an appreciation of the nature of the proceedings, must not be in a conflict of interest situation with the child, and must be willing and able to fulfill the duties of representative and to act in the best interest of the child.¹⁰⁰ Before the CRDD will designate a representative, they will inform the proposed representative of his duties and then make an assessment of the person's ability to fulfill those duties.¹⁰¹

Canada's guidelines take into account the important differences between child and adult asylum seekers. The guidelines guarantee the protection of child asylum seekers, specifically unaccompanied alien children, through guarantees of legal representation, designation of a representative, and the utilization of the "best interests of the child" standard in assessing the child's claim.¹⁰² However, the Canadian guidelines fail to address what happens to children while they await assignment of a representative and the conditions of detention.

2. UNHCR Guidelines

In February 1997, the Office of the United Nations High Commissioner for Refugees (UNHCR) published its Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum.¹⁰³ The UNHCR guidelines referred to the following as the main international standards with regards to unaccompanied children seeking asylum: the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, and the 1989 Convention on the Rights of the Child.¹⁰⁴ The guidelines define an unaccompanied child as "a person who is under the age of eighteen . . . and who is separated from both parents, and is not being cared for by an adult . . ."¹⁰⁵ The UNHCR felt that it was important for unaccompanied children to receive "effective protection and assistance in a systematic, comprehensive and integrated manner."¹⁰⁶ Not surprisingly, the basic guiding principle behind the UNHCR guidelines is the "best interests of the child."¹⁰⁷

The UNHCR guidelines state that because of their special vulnerabilities, unaccompanied children seeking asylum should be guaranteed access to all territories, should be provided with legal representation upon arrival to a territory, should have their claims examined in a manner appropriate for their age, and should have access to asylum procedures regardless of their age.¹⁰⁸ The guidelines

99. *Id.*

100. *Id.*

101. CANADIAN GUIDELINES, *supra* note 82.

102. *Id.*

103. UNHCR GUIDELINES, *supra* note 15.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. UNHCR GUIDELINES, *supra* note 15.

also state that in order to ensure that a child is properly treated as an unaccompanied child asylum seeker, port authorities should take necessary measures to ensure that they are identified promptly and on a priority basis upon entry.¹⁰⁹

The UNHCR feels that in order to ensure that the interests of a child are safeguarded and that his or her needs are appropriately met, a guardian or adviser should be appointed as soon as the unaccompanied child is identified.¹¹⁰ The guidelines suggest that an independent and formally accredited organization be identified or established in each country which would be responsible for appointing guardians or advisers as soon as the unaccompanied child is identified.¹¹¹ Such a guardian should have expertise in the field of childcare to ensure that the interests of the child are safeguarded and the child's needs are appropriately met.¹¹²

One of the most important aspects of the UNHCR guidelines concerns the interim care and protection of unaccompanied children seeking asylum.¹¹³ The UNHCR feels that children seeking asylum require special care and protection, especially if they are unaccompanied.¹¹⁴ While awaiting determination of their asylum claims, children's changes in residence should be kept to a minimum, siblings should be kept together, children who have adult relatives already living in the country of asylum should be allowed to stay with them pending determination of their status, and children living in foster homes should be kept under regular supervision by qualified person.¹¹⁵ The UNHCR also felt strongly that children, especially unaccompanied alien children should not be kept in detention.¹¹⁶ The guidelines do allow for limited detention of children, in accordance with the Convention on the Rights of the Child, but only as a "measure of last resort" and only for the "shortest appropriate period of time."¹¹⁷ For those children being detained in airports, immigration holding centers, or prison, the conditions of detention should not be prison-like.¹¹⁸ Lastly, if it is impossible to release the child from detention, then "special arrangements must be made for living quarters which are suitable for children."¹¹⁹ The UNHCR's primary objective with regard to custody is "care," not "detention."¹²⁰

The UNHCR guidelines are very similar to the Canadian guidelines. Both considered it essential for child asylum claims to be given priority and prompt decision, that children be represented by an adult who can protect the child's best

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. UNHCR GUIDELINES, *supra* note 15.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. UNHCR GUIDELINES, *supra* note 15.

119. *Id.*

120. *Id.*

interests, and that they be given access to a qualified legal representative.¹²¹ The UNHCR guidelines go one step further in the protection of unaccompanied child asylum seekers, in that they strongly advise against detention of these children and provide alternatives to jail-like conditions.¹²²

II. OVERVIEW OF UNITED STATES IMMIGRATION LAWS

As stated previously, it is of interest to review U.S. refugee law after reviewing international refugee law, as they are very similar. This section will briefly review the individual laws that affect unaccompanied children and the United States asylum process.

A. Immigration and Nationality Act of 1952

The Immigration and Nationality Act of 1952 (INA) was a compilation of U.S. immigration policies from as far back as 1790.¹²³ Since 1952 many new immigration laws have been passed and new provisions are continually being added to the original INA.¹²⁴ The main purpose of establishing the INA was to set forth guidelines and criteria for allowing aliens to become United States citizens.¹²⁵

In order for an alien to begin the process of becoming a citizen, he first must be inspected and admitted into the country.¹²⁶ According to the INA, aliens can be inspected for admission purposes at United States ports of entry or at any location within the country.¹²⁷ Admission requires a valid visa or valid immigration status in the United States.¹²⁸ Those aliens who are deemed inadmissible at a port of entry will be ordered removed unless they indicate an intention to apply for asylum to avoid immediate removal.¹²⁹ For those aliens who have been found within the United States without proper status, an immigration judge will determine their admissibility or deportability during removal proceedings.¹³⁰ Those aliens who wish to avoid deportation may also choose voluntary departure.¹³¹ Voluntary departure allows an alien to leave the United States at his or her own expense without incurring any penalties that would hinder when he or she may legally return to the United States.¹³²

121. *Id.*

122. *Id.*

123. U.S. CITIZENSHIP & IMMIGRATION SERVICES, IMMIGRATION AND NATURALIZATION ACT, at <http://uscis.gov/graphics/lawsregs/INA.htm>.

124. *Id.*

125. U.S. CITIZENSHIP & IMMIGRATION SERVICES, NATURALIZATION, at <http://uscis.gov/graphics/services/natz/index.htm>.

126. U.S. CITIZENSHIP & IMMIGRATION SERVICES, GENERAL NATURALIZATION REQUIREMENTS, at <http://uscis.gov/graphics/services/natz/general.htm>.

127. Immigration and Nationality Act § 235(a)(1), 8 U.S.C.A. § 1225(a)(1) (2005).

128. Immigration and Nationality Act § 212(a)(6-7), 8 U.S.C.A. § 1182(a)(6-7) (2005).

129. Immigration and Nationality Act § 235(b)(1)(A)(i), 8 U.S.C.A. § 1225(b)(1)(A)(i) (2005).

130. Immigration and Nationality Act § 240(a)(1), 8 U.S.C.A. § 1229a(a)(1) (2005).

131. Immigration and Nationality Act § 240B(a)(2)(A), 8 U.S.C.A. § 1229c(a)(2)(A) (2005).

132. *Id.* at (a)(1).

In addition to requiring that aliens been inspected for admissibility, the INA provides those aliens in removal proceedings the right to counsel.¹³³ However, aliens wishing to be represented by counsel during removal proceedings must do so at their own expense, counsel is not appointed by the government.¹³⁴ Of further importance, there is no provision in the INA that requires appointment of counsel to unaccompanied alien children.

B. Refugee Act of 1980

The Refugee Act of 1980 amended the INA by adding and defining the term “refugee” as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹³⁵

This addition established an asylum process to protect individuals who were physically present in the United States and held a “well-founded fear of persecution” in their home country.¹³⁶ It is important to note here that the definition of “refugee” used in the Refugee Act of 1980 is very similar to the definition used in the 1951 United Nations Convention Relating to the Status of Refugees.¹³⁷

The Refugee Act of 1980 also created the Office of Refugee Resettlement (ORR) under the Administration of Children and Families (ACF), an agency of the Department of Health and Human Services (HHS).¹³⁸ The goal of this office is to help refugees “achieve economic self-sufficiency and social adjustment” as they begin new lives in the United States.¹³⁹ Through the ORR’s Unaccompanied Refugee Minors Program, refugee children are placed in foster care, group care, independent living, or residential treatment facilities and receive the same benefits and services as United States children in foster care.¹⁴⁰ The ORR will be described in more detail later in this article.

133. Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C.A. § 1229a(b)(4)(A) (2005).

134. *Id.*

135. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 6; *see also* Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A)(2005).

136. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 6.

137. Convention Relating to the Status of Refugees, *supra* note 47, at art. 1.

138. Immigration and Nationality Act § 411(a), 8 U.S.C.A. § 1521(a)(2005).

139. ADMINISTRATION FOR CHILDREN & FAMILIES, OFFICE OF REFUGEE RESETTLEMENT, FACT SHEET, at <http://www.acf.hhs.gov/programs/orr/mission/factsheet.htm>

140. *Id.*

C. Illegal Immigration Reform and Immigration Responsibility Act of 1996

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the INA by adding a provision for expedited removal.¹⁴¹ Expedited removal only applies to aliens found at United States borders without the proper documentation.¹⁴² In order to avoid immediate deportation, an alien must either articulate that he wishes to apply for asylum or express a fear of persecution if returned to his home country.¹⁴³ In other words, even if an alien does not specifically indicate a desire to apply for asylum, the immigration official must treat an alien as an asylum seeker if the alien describes a situation that would meet the definition of persecution. However, the IIRIRA also established a policy of mandatory detention for aliens awaiting removal, criminal aliens, and asylum seekers.¹⁴⁴

The IIRIRA also requires all asylum applications to be submitted within a year of arrival to the United States.¹⁴⁵ The only exception to this requirement is if an alien can demonstrate a "material change in circumstances" since his or her arrival in the United States that would now make him or her an asylum applicant or if he or she can prove that "extraordinary circumstances" caused a delay in his or her filing for asylum.¹⁴⁶ "Extraordinary circumstances" include legal disability, for example status as an unaccompanied alien child.¹⁴⁷ As a general rule children are not exempt from the one year limit unless they have specifically been classified as an unaccompanied alien child.¹⁴⁸

D. Overview of the United States' Asylum Process

Asylum is a mechanism that allows aliens who are in the United States to remain and eventually adjust their status to that of a lawful permanent resident, provided they meet the definition of a refugee and are not barred from either applying for or being granted asylum.¹⁴⁹ As defined in the INA a refugee is:

[A]ny person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of

141. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 7; *see also* Immigration and Nationality Act § 235(b)(1)(B)(iii), 8 U.S.C.A. § 1225(b)(1)(B)(iii) (2005).

142. *Id.*

143. *Id.*

144. Immigration and Nationality Act § 235 (b)(1)(B)(iii)(IV), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV)(2005); *see also* Immigration and Nationality Act § 236, 8 U.S.C.A. § 1226 (2005).

145. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 6; *see also* Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C.A. § 1158(a)(2)(B)(2005).

146. *Id.*

147. *Id.*

148. *Id.*

149. U.S. CITIZENSHIP & IMMIGRATION SERVICES, WHAT IS ASYLUM?, *at* <http://uscis.gov/graphics/services/asylum/index.htm>.

persecution or a well-founded fear of persecution on account of race, religion, nationality membership in a particular social group, or political opinion.¹⁵⁰

Aliens may apply for asylum in one of two ways: affirmatively or defensively.¹⁵¹

1. Affirmative Asylum

The affirmative process begins with an alien who is physically present in the United States.¹⁵² Regardless of how the alien entered the country they may submit an asylum application to the Bureau of Citizenship and Immigration Services.¹⁵³ The IIRIRA requires aliens to submit the asylum application within a year of their arrival in the United States.¹⁵⁴ Affirmative applicants are usually not detained and are free to live in the United States pending determination of their asylum case.¹⁵⁵ Before the alien is interviewed by an asylum officer, the applicant's identity must be checked to ensure that there are no grounds for which the alien may be "inadmissible, deportable, or ineligible to apply for or be granted asylum."¹⁵⁶

No later than 43 days after the submission of the application, the alien meets with an asylum officer.¹⁵⁷ Only the asylum officer, the alien, and the alien's attorney are present during this interview, making it non-adversarial. This meeting normally takes place at one of the eight asylum offices in the United States.¹⁵⁸ The purpose of this interview is for the alien to prove his case of persecution to the asylum officer. If the asylum officer is not convinced that a well-founded fear of persecution exists, the application will not be recommended for asylum.¹⁵⁹ If the application is not recommended for asylum, the case is then referred to an immigration judge under the Executive Office for Immigration Review.¹⁶⁰ The alien then has 30 days from the completion of removal proceedings to appeal the immigration judge's decision.¹⁶¹ According to law, the final administrative adjudication of the asylum application, not including administrative appeal, should be completed within 180 days of the date the application was filed.¹⁶²

150. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (2005).

151. U.S. CITIZENSHIP & IMMIGRATION SERVICES, OBTAINING ASYLUM IN THE UNITED STATES: TWO PATHS TO ASYLUM, at <http://uscis.gov/graphics/services/asylum/paths.htm> [hereinafter TWO PATHS TO ASYLUM].

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Immigration and Nationality Act § 208(d)(5)(A)(i), 8 U.S.C.A. § 1158(d)(5)(A)(i) (2005).

157. Immigration and Nationality Act § 208(d)(5)(A)(ii), 8 U.S.C.A. § 1158(d)(5)(A)(ii) (2005); see also TWO PATHS TO ASYLUM, *supra* note 151.

158. TWO PATHS TO ASYLUM, *supra* note 151.

159. *Id.*

160. *Id.*

161. Immigration and Nationality Act § 208(d)(5)(A)(iv), 8 U.S.C.A. § 1158(d)(5)(A)(iv) (2005).

162. Immigration and Nationality Act § 208(d)(5)(A)(iii), 8 U.S.C.A. § 1158(d)(5)(A)(iii) (2005).

2. Defensive Asylum

Alternatively, an alien may apply for asylum defensively by way of appeal, as a defense at removal proceedings, or as a means of preventing expedited removal.¹⁶³ If the alien has applied affirmatively for asylum, the defensive process begins when the asylum officer fails to recommend the case for asylum and the applicant appeals to an immigration judge.¹⁶⁴ On the other hand, if an alien is undocumented or in violation of [his or her] status when apprehended in the United States, he or she will claim asylum as a defense at his or her removal hearing.¹⁶⁵

If an alien is caught trying to enter the United States without proper documentation, he or she will be faced with expedited removal unless an immigration officer finds that the alien has a "credible fear of persecution" if he or she is returned to his or her home country.¹⁶⁶ The screening done by the border/immigration officer is called "secondary inspection"; translators are usually not available and consultation with an attorney has not taken place.¹⁶⁷ If the border/immigration officer is convinced a credible fear of persecution exists, a second screening takes place with an asylum officer.¹⁶⁸ This interview usually takes place in an immigration detention center two to seven days after apprehension, if not at the port of entry.¹⁶⁹ If the asylum officer is not convinced that a credible fear of persecution exists, the alien continues to be detained while awaiting an immigration judge's final determination.¹⁷⁰ The immigration judges hear these cases in an adversarial proceeding, hearing claims from the applicant as well as the government (the Department of Homeland Security).¹⁷¹ If the immigration judge does not find the applicant eligible for asylum, they will try to determine if the applicant is eligible for any other form of relief before removal will be granted.¹⁷²

III. PLIGHT OF THE CHILDREN: CONDITIONS OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES

Having reviewed the basics of international and United States refugee law, this section focuses on those unaccompanied children who have been detained by immigration officials and the problems they currently face.

United States asylum law considers "every person under the age of 18" to be a child.¹⁷³ Despite their classification as children, United States immigration law assumes that unaccompanied alien children are capable of convincing immigration officials of their fears of persecution or even know to claim asylum. Currently,

163. TWO PATHS TO ASYLUM, *supra* note 151.

164. *Id.*

165. *Id.*

166. *Id.*

167. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 7.

168. *Id.*

169. *Id.*

170. *Id.*

171. TWO PATHS TO ASYLUM, *supra* note 151.

172. *Id.*

173. INS Guidelines, *supra* note 69, at 1.

unaccompanied child asylum seekers in the United States are not guaranteed legal representation and are held in prison-like detention facilities.¹⁷⁴

A. Legal Representation

At the age of 14 Isau fled Honduras and came to the United States to escape severe abuse at the hands of his stepfather and persecution by government death squads and youth gangs.¹⁷⁵ Upon his arrival in the United States, Isau was apprehended by the Immigration and Naturalization Service (INS) and placed in a children's shelter in Houston.¹⁷⁶ He was denied access to juvenile court which would have determined whether he was abused, abandoned, or neglected, and therefore eligible for long-term foster care, and appeared in immigration court without the assistance of counsel.¹⁷⁷

Legal representation is a major concern for unaccompanied alien children. Unaccompanied alien children, like Isau, apprehended in the United States without proper documentation face being returned to their home country either through voluntary departure or face removal proceedings.¹⁷⁸ After the passage of the IIRIRA, there was a lot of discussion concerning the expedited removal of children.¹⁷⁹ Issues arose concerning the children's ability to adequately communicate a fear of persecution to immigration officials.¹⁸⁰ Because immigrants do not have a right to counsel unless they attain it privately, there is no one to help an unaccompanied alien child when they first arrive in the United States. Taking into account the legal disability of unaccompanied alien children, the INS advised its officers that unaccompanied alien children were to be placed in regular removal proceedings, not expedited removal proceedings.¹⁸¹ This change eliminates the need for unaccompanied children to prove persecution immediately upon apprehension. However, without the assistance of legal counsel, there is no guarantee that children like Isau will have their claims, their stories, properly heard in removal proceedings.

Currently, there exists no system for appointing counsel or guardians ad litem to unaccompanied alien children. As a result, of those children who do know to claim asylum, less than half are represented by counsel in immigration proceedings.¹⁸² Children cannot afford counsel and must rely on available pro bono attorneys.¹⁸³ The United States provides aliens with the guarantees of the

174. See generally PRISON GUARD OR PARENT, *supra* note 5.

175. *Id.* at 1.

176. *Id.*

177. *Id.*

178. HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, LEGAL STANDARDS ¶ 4 (1998), <http://www.hrw.org/reports98/ins2/berks98d-01.htm#TopOfPage> [hereinafter DETAINED AND DEPRIVED OF RIGHTS LEGAL].

179. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1, at 7.

180. *Id.*

181. *Id.*

182. PRISON GUARD OR PARENT, *supra* note 5, at 2.

183. *Id.*

United States Constitution and affords them equal protection of the law.¹⁸⁴ The Fifth Amendment provides for due process protection of life, liberty and property.¹⁸⁵ As a consequence aliens have a right to due process in removal proceedings.¹⁸⁶ Adequate legal representation is a necessary aspect of due process. In fact the main reason asylum law exists is to protect the life, liberty and property of aliens.¹⁸⁷

Because of the serious consequences of removal proceedings, it would be reasonable for asylum seekers, especially unaccompanied alien children who are indigent, to be provided legal counsel. Appointment of counsel is a guaranteed right for child asylum seekers under international law and could even be construed as a constitutional right under United States law, but no law has yet been passed that affords even unaccompanied alien children this right.¹⁸⁸

B. Detention

Detention is a second area of concern for unaccompanied alien children. With the passage of the IIRIRA, detention became mandatory for asylum seekers awaiting final decisions on their cases.¹⁸⁹ Despite the fact that unaccompanied alien children are placed in detention for non-criminal reasons, there have been many accounts that these children are placed in facilities with the delinquent population, subjected to handcuffing and shackling, forced to wear prison uniforms, and locked in their cells.¹⁹⁰

Human Rights Watch conducted an investigation in 1997 of the INS' Arizona and California detention centers.¹⁹¹ The organization discovered that many children were held in jail-like conditions for long periods of time, not informed of their legal rights, prevented from obtaining legal representation, and unable to maintain contact with their families.¹⁹² Again in 1998, Human Rights Watch conducted a follow up investigation on Berks County Youth Center in Leesport, Pennsylvania.¹⁹³ During its visits in June and December of 1998, Human Rights Watch spoke with Xiao Ling.¹⁹⁴ Pending determination of her asylum claim, Xiao had been locked up in prison-like conditions with juveniles accused of murder, rape, and drug trafficking.¹⁹⁵ She was kept under constant supervision, not allowed

184. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §722 (1987).

185. U.S. CONST. amend. V.

186. Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C.A. § 1299a(b)(4)(A) (2005).

187. *See generally* Convention Relating to the Status of Refugees, *supra* note 47.

188. *See generally* Convention on Rights of Child, *supra* note 63.

189. DETAINED AND DEPRIVED OF RIGHTS LEGAL, *supra* note 178, at ¶ 10.

190. PRISON GUARD OR PARENT, *supra* note 5, at 2.

191. *Id.*

192. *Id.*

193. HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, SUMMARY AND RECOMMENDATIONS ¶ 4 (1998), http://www.hrw.org/reports98/ins2/berks98d.htm#P61_1500 [hereinafter DETAINED AND DEPRIVED OF RIGHTS SUMMARY].

194. *Id.* at ¶ 1.

195. *Id.*

to speak her own language, told not to laugh, and forced to ask permission to scratch her nose.¹⁹⁶

Not being allowed to speak one's language, laugh, or scratch one's nose are not acceptable conditions for a child. Furthermore, it is unsafe for asylum seeking children to be held with delinquents. The very conditions unaccompanied alien children must endure in the United States are in direct contravention with international law.¹⁹⁷ Children that are seeking asylum have already survived the dangerous task of reaching the United States and escaping abuse in their home country; they should not continue to be traumatized as they await the decision of their asylum claims.

C. Office of Refugee Resettlement

As stated previously, the Refugee Act of 1980, created the Office of Refugee Resettlement (ORR).¹⁹⁸ The Director of the ORR advises the Secretary of Health and Human Services (HHS), through the Assistant Secretary for Children and Families, on matters relating to refugee resettlement, immigration, and repatriation.¹⁹⁹ The ORR is responsible for planning, developing, and directing implementation for domestic refugee and entrant resettlement assistance programs.²⁰⁰

The ORR is also responsible for assisting refugee children.²⁰¹ Under its Unaccompanied Refugee Minors Program (URM), the ORR assists unaccompanied child refugees in developing appropriate skills to enter adulthood (economic and social self-sufficiency).²⁰² The ORR assists refugee children unaccompanied by a parent or other close adult relative until a month after their eighteenth birthday.²⁰³ This assistance includes foster care maintenance and health care, as well as English language training, career planning, and socialization and adjustment training.²⁰⁴ Additionally, the ORR is responsible for arranging placement for unaccompanied refugee children who have been accepted for admission to the United States and is responsible for their immediate care until their placement.²⁰⁵ The program accepts children under the age of 18, who have been granted refugee status overseas, were victims of trafficking, or were

196. *Id.*

197. See generally Convention on the Rights of the Child, *supra* note 63.

198. Immigration and Nationality Act § 411(a), 8 U.S.C.A. § 1521(a) (2005).

199. ADMINISTRATION FOR FAMILIES & CHILDREN, OFFICE OF REFUGEE RESETTLEMENT, WHO WE ARE, at <http://www.acf.hhs.gov/programs/orr/mission/functional.htm> [hereinafter WHO WE ARE].

200. *Id.*

201. Immigration and Nationality Act § 412(d), 8 U.S.C.A. § 1522(d) (2005).

202. ADMINISTRATION FOR FAMILIES & CHILDREN, OFFICE OF REFUGEE RESETTLEMENT, THE UNACCOMPANIED REFUGEE MINORS PROGRAM, at <http://www.acf.hhs.gov/programs/orr/programs/urm.htm> [hereinafter THE UNACCOMPANIED REFUGEE MINORS PROGRAM].

203. Immigration and Nationality Act § 412(d)(2)(B)(i), 8 U.S.C.A. § 1522(d)(2)(B)(i) (2005).

204. Immigration and Nationality Act § 412(d)(2)(A), 8 U.S.C.A. § 1522(d)(2)(A) (2005); see also, THE UNACCOMPANIED REFUGEE MINORS PROGRAM, *supra* note 202.

205. Immigration and Nationality Act § 412(d)(2)(B)(ii), 8 U.S.C.A. § 1522(d)(2)(B)(ii) (2005).

reclassified to refugee status upon arrival or granting of asylum.²⁰⁶ The Lutheran Immigration Refugee Services and the United States Catholic Conference are the two volunteer agencies that assist ORR in providing foster care placement and helping plan URM program services.²⁰⁷

Though charged with the care of refugee children, the ORR is only able to help those children that have been classified as refugees.²⁰⁸ An unaccompanied child seeking asylum will not be classified as a refugee until his or her claim of persecution has been determined by an immigration judge. Further, the ORR relies on non-profit organizations for assistance in carrying out its main obligations to refugee children and is not available in all 50 states.²⁰⁹ The Refugee Act of 1980 opened the door for unaccompanied child asylum seekers to be provided proper care once they had been granted refugee status.²¹⁰ The shortfall of the act is that it does not provide for the care or treatment of unaccompanied alien children pending determination of their asylum claims.

D. INS Interim Regulations

Until 1985 the Immigration and Naturalization Service (INS) had not established any policies governing the detention or release of unaccompanied alien children.²¹¹ *Flores v. Reno* was a class action suit, brought in 1985, which challenged the INS' policies on the detention, processing, and release of juveniles.²¹² The INS settled the case in 1997 and issued interim regulations and guidelines in 1998, based on the settlement agreement.²¹³ The interim regulations proposed a framework for the processing, release, and detention of juveniles in INS custody and were intended to revise 8 C.F.R. § 236.3.²¹⁴ The proposed changes provided for a general policy of placing detained juveniles in the least restrictive setting appropriate to the juvenile's age and special needs, based on the *Flores* agreement.²¹⁵

According to the interim regulations, juveniles who were arrested and not removed from the United States were to be provided adequate supervision to protect the juvenile from others and permit contact with family members who were arrested with the child.²¹⁶ Furthermore, unaccompanied juveniles were to be separated from unrelated adults.²¹⁷ Those facilities that did not allow for immediate separation from adults were supposed to provide separate facilities within 24 hours.²¹⁸ For temporary placement, juveniles could be placed in secure

206. THE UNACCOMPANIED REFUGEE MINORS PROGRAM, *supra* note 202.

207. *Id.*

208. *Id.*

209. *Id.*

210. *See infra* Part II.B.

211. DETAINED AND DEPRIVED OF RIGHTS LEGAL, *supra* note 178, at ¶ 11.

212. *Id.*

213. *Id.*

214. 63 Fed. Reg. 39,759 (1998).

215. *Id.* at 39,761.

216. *Id.* at 39,762.

217. *Id.*

218. *Id.*

facilities if a licensed facility was not available.²¹⁹ Within the secure facilities, non-delinquent juveniles were to be separate from delinquent offenders.²²⁰ For those juveniles who were to stay in custody pending their immigration status, the INS had between 3 and 5 days to place the child in a licensed facility.²²¹ A licensed program was defined as “any program, agency, or organization licensed by an appropriate state agency and contracted by the Service (INS) to provide residential, group, or foster care services for dependent juveniles.”²²² A secure facility was defined as “a state or county juvenile detention facility or a Service or Service-contract facility that has separate accommodations for juveniles.”²²³ Most importantly, the interim regulations proposed providing every juvenile placed in removal proceedings with a current list of pro bono counsel.²²⁴

The interim regulations also proposed new policies regarding notice and request for disposition, as well as voluntary departure. For children who were apprehended within the United States, as opposed to at a port of entry, and who were unaccompanied by a natural or lawful parents, the INS proposed giving them written notice of their rights.²²⁵ If the child was under the age of fourteen, the immigration officer was to read and explain the form to the child in a language he could understand.²²⁶ With regard to voluntary departure, Mexican and Canadian children unaccompanied by an adult and apprehended at an United States border were to be informed of their right to call a parent, close relative, friend, or an organization found on the list of pro bono counsel and then be presented with the voluntary departure form.²²⁷ All other unaccompanied alien children apprehended at the border were to be provided access to a telephone and were required to communicate with a parent, close relative, friend, or an organization found on the list of pro bono counsel prior to being given the voluntary departure form.²²⁸

In its current form, 8 C.F.R. § 236.3 only retains a few of the proposed regulations from the *Flores* agreement. Juveniles are defined as “aliens under the age of 18 years.”²²⁹ The provisions regarding Refusal to Release, Notice to Parent of Application for Relief, Voluntary Departure, and Notice and Request for Disposition were adopted from the *Flores* agreement.²³⁰ However, the provisions regarding the detention of juveniles were not.

Under 8 C.F.R. § 236.3, juveniles who have been detained and posted bond are to be released to the following persons: a parent, legal guardian or an adult

219. *Id.*

220. *Id.*

221. 63 Fed. Reg. 39,759, 39,762 (1998).

222. *Id.* at 39,761.

223. *Id.*

224. *Id.*

225. *Id.*; see also 8 C.F.R. § 236.3(h) (2005).

226. 63 Fed. Reg. 39,759, 39,761 (1998); see also 8 C.F.R. § 236.3(h) (2005).

227. 63 Fed. Reg. 39,759, 39,761 (1998); see also 8 C.F.R. § 236.3(g) (2005).

228. 63 Fed. Reg. 39,759, 39,761 (1998); see also 8 C.F.R. § 236.3(g) (2005).

229. 8 C.F.R. § 236.3(a) (2005).

230. 8 C.F.R. § 236.3(e)-(h) (2005).

relative.²³¹ However, the juvenile will not be released to a guardian if it is determined that detention of the juvenile is necessary to ensure his timely appearance before the INS or the immigration court or to ensure the juvenile's safety or that of others.²³² Where it has been determined that detention of a particular juvenile is necessary, the case will be referred to the juvenile coordinator who is responsible for finding suitable placement in a "facility designated for the occupancy of juveniles."²³³ Placement may be made in a juvenile facility contracted by the INS, by a state or local juvenile facility, or by other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.²³⁴ During the time the juvenile coordinator is looking for suitable placement "the juvenile may be temporarily held by Service authorities or placed in any Service detention facility having separate accommodations for juveniles."²³⁵ The provisions regarding Refusal to Release, Notice to Parent of Application for Relief, Voluntary Departure, and Notice and Request for Disposition were adopted from the *Flores* agreement.²³⁶

The current 8 C.F.R. § 236.3 provisions fail to state the special requirements of separating non-delinquents from delinquents, as well as fail to distinguish between secure facilities and foster care type facilities.²³⁷ The general policy of placing "each detained juvenile in the least restrictive setting appropriate to the juvenile's age and special needs" and "providing every juvenile placed in removal proceedings with a current list of pro bono counsel" did not remain in the final draft either.²³⁸ The interim regulations as codified in 8 C.F.R. § 236.3 continue to treat unaccompanied alien children as criminals, by placing them in jail-like conditions and failing to guarantee unaccompanied alien children access to counsel.

E. 1998 Guidelines

In addition to the interim regulations, the *Flores v. Reno* settlement produced an INS policy and procedural memoranda titled "Guidelines for Children's Asylum Claims."²³⁹ The guidelines were created to provide asylum officers "with background and guidance on adjudicating child asylum claims."²⁴⁰

Children are reluctant to talk about past experiences because they are afraid to relive the traumatic experiences, a task that is especially difficult when facing foreign authority figures.²⁴¹ As a result, the INS created these guidelines to prepare asylum officers for common issues that may arise during interviews and

231. 8 C.F.R. § 236.3(b)(1) (2005).

232. 8 C.F.R. § 236.3(b)(1)(iii) (2005).

233. 8 C.F.R. § 236.3(c) (2005).

234. *Id.*

235. 8 C.F.R. § 236.3(d) (2005).

236. 8 C.F.R. § 236.3(e)-(h) (2005).

237. 63 Fed. Reg. 39,759, 39,761-39,762 (1998); *see generally* 8 C.F.R. 236.3 (2005).

238. 63 Fed. Reg. 39,759, 39,761 (1998); *see generally* 8 C.F.R. 236.3 (2005).

239. PROTECTING THE RIGHTS OF CHILDREN, *supra* note 1.

240. INS Guidelines, *supra* note 69, at 1.

241. *Id.* at 7.

provide child-sensitive interview procedures.²⁴² The goal was to make children more comfortable during interviews with the asylum officers, to ultimately ensure that their claims were being properly heard.²⁴³ These guidelines apply to children under the age of 18 who were applying for asylum on their own, separate from a parent's asylum application (derivative application).²⁴⁴

Key aspects of the guidelines include having a trusted adult present during interviews, recognizing special interview considerations, promoting child-sensitive questioning and active listening techniques tailored to child's age, and taking into consideration special credibility issues.²⁴⁵ Having a trusted adult with the child at the asylum interview "may help the child psychologically."²⁴⁶ The trusted adult is not allowed to interfere with the interview process or coach the child during the interview; however the mere presence of the trusted adult may comfort the child.²⁴⁷

Though the asylum interview is "non-adversarial," a child may still be reluctant to talk to a stranger about embarrassing or emotional experiences and past trauma.²⁴⁸ The asylum officers are encouraged to build a rapport with the child before beginning the interview.²⁴⁹ After establishing a level of confidence with the child, the asylum officers are encouraged to tailor questioning during the interview to the "child's age, stage of language development, background, and level of sophistication."²⁵⁰ When listening to the child's answers, the asylum officer is encouraged to pay close attention to the "age-related or culturally related reasons for a child's choice of words" in evaluating the child's story.²⁵¹ Such questioning and listening techniques should help the asylum officer evaluate the child's credibility, but the officer should also take into account the child's psychiatric condition at the time of the interview.²⁵²

As unaccompanied child asylum seekers do not receive special treatment and are held to the adult standard of proving persecution, these guidelines are a step toward ensuring that the claims of children are given fair consideration. However, these guidelines only ensure that a minority of unaccompanied alien children, those who know or have been told to claim asylum, are heard.

IV. RECENT DEVELOPMENTS IN U.S. LAW

Previous sections of this article have reviewed current international and United States refugee law and the problems faced by unaccompanied children. This last section will focus on recent developments in the United States that have affected unaccompanied children seeking asylum.

242. *Id.* at 10-13.

243. *See Id.*

244. *Id.* at 16-17.

245. *See generally* INS Guidelines, *supra* note 69.

246. *Id.* at 6.

247. *Id.*

248. *Id.* at 6.

249. *Id.*

250. INS Guidelines, *supra* note 69, at 10.

251. *Id.*

252. *See id.* at 17.

A. Homeland Security Act

In December of 2002 the Homeland Security Act was passed in response to the attacks of September 11th.²⁵³ One important aspect of the Homeland Security Act was the dismantling of the INS (replaced by the Department of Homeland Security) and the transfer of responsibility for unaccompanied alien children from the INS to the Office of Refugee Resettlement (ORR).²⁵⁴ The Homeland Security Act defines an unaccompanied alien child as one who “has no lawful immigration status in the United States, has not attained 18 years of age, and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody.”²⁵⁵ There were concerns that the INS, as a law enforcement agency, was incapable of acting in the best interests of unaccompanied alien children and that a separate office outside of the INS was necessary to meet these needs.²⁵⁶

The ORR (previously discussed in this paper) is now organized into the Office of the Director and four divisions: The Division of Community Resettlement, The Division of Refugee Assistance, the Division of Budget, Policy and Data Analysis, and the Division of Unaccompanied Children's Services.²⁵⁷ The Division of Unaccompanied Children's Services was created by the Homeland Security Act to assume responsibility for the care and placement of unaccompanied alien children.²⁵⁸ The Division of Unaccompanied Children's Services consults with child welfare professionals, develops placement policies, and makes decisions and recommendations to ensure that children are receiving appropriate care.²⁵⁹ The Division of Unaccompanied Children's Services also oversees the Unaccompanied Alien Children Program.²⁶⁰ The goal of the Unaccompanied Alien Children Program is “to provide a safe and appropriate environment for children during the interim period between the child's transfer into an Unaccompanied Alien Children's (UAC) program and the child's release from custody by the ORR or removal from the United States by the Department of Homeland Security (DHS).”²⁶¹

The ORR is now responsible for coordinating and implementing the care and placement of children in federal custody (for immigration reasons), developing a plan on how to ensure independent counsel, overseeing the infrastructures and personnel of facilities where children reside, and conducting investigations and inspections of facilities where children reside.²⁶² The ORR is also responsible for

253. Homeland Security Act of 2002, 6 U.S.C. § 111 (2005).

254. *Id.* at § 279(a).

255. *Id.* at § 279(g).

256. PRISON GUARD OR PARENT, *supra* note 5, at 9.

257. WHO WE ARE, *supra* note 199.

258. *Id.*

259. *Id.*

260. ADMINISTRATION FOR CHILDREN & FAMILIES, OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED ALIEN CHILDREN, at <http://www.acf.hhs.gov/programs/orr/programs/uac.htm> [hereinafter UNACCOMPANIED ALIEN CHILDREN].

261. *Id.*

262. Homeland Security Act of 2002, 6 U.S.C. § 279 (b)(1)(A-L) (2005).

making all placement determinations for all unaccompanied alien children who are in federal custody by reason of their immigration status and ensuring that the children appear at their hearings, are protected from harm, and are placed in a setting in which they are not likely to pose a danger to themselves or others.²⁶³

The ORR created the Shelter Care Program because they were not allowed to release any child on his or her own recognizance if there was no parent or guardian available to take custody of the child.²⁶⁴ The Shelter Care Program provides temporary services for the interim period beginning when the child is placed in the program and ending when ORR releases the child from custody, transfers him to another facility, or the child is removed from the United States by the DHS.²⁶⁵ Some of the services the children receive are: shelter care, foster care or group care, family reunification, routine and emergency medical/dental care, counseling, case management, education, recreation, and visitation and contact with family members.²⁶⁶ The program targets unaccompanied alien children up to the age of 17.²⁶⁷

With the transfer of responsibility for unaccompanied alien children to the ORR, detention conditions should improve. Those children who will have to remain in custody pending their immigration case, will now have the benefit of foster care rather than jail. However, the Shelter Program only applies to children under the age of 17, allowing children 17 and older to remain in jail-like detention facilities. Furthermore, the Homeland Security Act fails to name any substantive guidelines for the care of detained unaccompanied alien children. The ORR has only been mandated to create guidelines and standards, but those standards have yet to be defined. As the next story illustrates, guidelines regarding custody and release of children to guardians, need to be clearly stated and not left to the discretion of DHS.

B. Edgar Chocoy's Story

Thousands of Latin American teens fleeing gangs and poverty in their home nations are being turned away from the United States each year.²⁶⁸ Teens fleeing to the United States trying to leave gang life, "face threats" if they are returned.²⁶⁹ This is the story of Edgar Chocoy.

Edgar never knew his father.²⁷⁰ When he was an infant Edgar's mother left him in the care of his grandparents so that she could find work in Los Angeles to support her family.²⁷¹ Edgar grew up in a rough part of Guatemala City.²⁷² He did

263. *Id.* at § 279(b)(2)(A).

264. *Id.* at § 279(b)(2)(B).

265. UNACCOMPANIED ALIEN CHILDREN, *supra* note 260.

266. *Id.*

267. *Id.*

268. Bruce Finley, *Bound for a Better Life, Deported to Despair*, DENVER POST, June 13, 2004, at 1A [hereinafter *Bound for a Better Life*].

269. *Id.*

270. Susan Ferriss, *Deadly Gang Life Haunts Latin Teens*, ATLANTA J. & CONST., June 6, 2004, at B2 [hereinafter *Deadly Gang Life*].

271. *Id.*

not start attending school until the age of 10.²⁷³ By the time he was 12, Edgar had been recruited into the Mara Salvatrucha gang in Guatemala City.²⁷⁴ "After two years of participating in beatings and robberies, Edgar grew to dislike gang life" and wanted to leave the gang.²⁷⁵ He had made friends with children from stable families with money and wanted a better life for himself.²⁷⁶ However, his Mara Salvatrucha family members did not want to let him go—"they beat, robbed, and threatened to kill Edgar and his family members if he left the gang."²⁷⁷ Desperate, in 2001 a 14 year old Edgar rode buses through Mexico and snuck into the United States to find his mother.²⁷⁸

But there was no fairy tale ending to Edgar's story. He found his mother in the Pico Union neighborhood of Los Angeles, but he also found the same gang problems he had hoped to leave behind in Guatemala.²⁷⁹ Edgar had tattoos from his old gang, which marked him as an enemy of a local gang.²⁸⁰ He sought protection from older boys from a different gang, but was ultimately arrested for possession of a firearm and cocaine.²⁸¹ The criminal courts were lenient with Edgar because of his age.²⁸² While on probation he started counseling; despite being arrested Edgar wanted to turn his life around.²⁸³ However, his efforts were cut short when a high school principal refused to enroll Edgar because of his tattoos.²⁸⁴ Edgar became depressed, skipped his probation meetings, his mother kicked him out, and he ultimately returned to the gang for a place to sleep.²⁸⁵ Edgar was arrested for violating his probation and immigration authorities transferred him to a detention center in Alamosa, Colorado.²⁸⁶ While at the youth facility in Alamosa, Edgar studied math and began a program to remove his gang tattoos.²⁸⁷

Edgar was finally taking proactive steps to straighten out his life, yet his hardest battle was yet to come. Edgar was now in the custody of the DHS and had to plead for his life to remain in the United States. Edgar's lawyer filed an application for asylum in an attempt to prevent Edgar from being deported to

272. Bruce Finley, *Deportee's Slaying Spurs Reform Push*, DENVER POST, April 8, 2004, at 1A [hereinafter *Deportee's Slaying*].

273. *Deadly Gang Life*, *supra* note 270.

274. *Deportee's Slaying*, *supra* note 272.

275. *Deadly Gang Life*, *supra* note 270.

276. *Id.*

277. *Deportee's Slaying*, *supra* note 272.

278. *Deadly Gang Life*, *supra* note 270.

279. *Id.*

280. *Id.*

281. Nicole Colson, Socialist Worker Online, *Victims of a witch-hunt* (Nov. 12, 2004), at http://www.socialistworker.org/2004-2/520/520_05_Witchhunt.shtml [hereinafter *Victims*]; see also *Deadly Gang Life*, *supra* note 270.

282. *Victims*, *supra* note 281.

283. *Deadly Gang Life*, *supra* note 270.

284. *Id.*; see also *Bound for a Better Life*, *supra* note 268.

285. *Deadly Gang Life*, *supra* note 270.

286. *Id.*

287. *Deportee's Slaying*, *supra* note 272.

Guatemala.²⁸⁸ Edgar's claim for asylum was based on the belief that he would be killed by his former gang members if he was returned to Guatemala.²⁸⁹ In his affidavit, Edgar wrote:

I am certain that if I had stayed in Guatemala, the members of the gang . . . would have killed me. I have seen them beat people up with baseball bats and rocks and shoot at them. I know they kill people. I know they torture people with rocks and baseball bats. I know that if I am returned to Guatemala, I will be tortured by them. I know that they will kill me if I am returned to Guatemala.²⁹⁰

Edgar's aunt who lived in Virginia and was a legal U.S. resident wanted custody of him.²⁹¹ Prior to Edgar's 2004 merits hearing to decide his asylum application, a teacher at the Alamosa detention center, a psychologist, and the ORR had all vouched for recommendation of his asylum application.²⁹² The ORR, in charge of the welfare of unaccompanied alien children, had even approved his release to his aunt.²⁹³ But it was the DHS that destroyed Edgar's chances of life in the United States. The DHS "recommended" that Edgar not be allowed to stay in the United States.²⁹⁴

The immigration judge that heard Edgar's asylum case found that "he told his story honestly and directly."²⁹⁵ But in the end that was not enough to grant him asylum in the United States. The court found that though Edgar had taken steps to do something with his life, "those steps came very late."²⁹⁶ His past gang relationships carried more weight than his recent attempts to straighten out his life.²⁹⁷ The DHS emphasized Edgar's gang activity upon arriving in Los Angeles.²⁹⁸ As a result, Edgar lost his asylum application on January 5, 2004.²⁹⁹ Edgar chose not to appeal his asylum case, telling his lawyer that he might commit suicide if he remained in detention.³⁰⁰ On March 10, 2004 he was deported to Guatemala.³⁰¹ On March 27, 2004, he was gunned down and killed by his former gang members.³⁰²

What is interesting about this case is that documentation shows that a January 2, 2004 letter from Health and Human Services (HHS) had cleared Edgar for

288. *Deadly Gang Life*, *supra* note 270.

289. *Id.*

290. *Victims*, *supra* note 281.

291. *Deadly Gang Life*, *supra* note 270.

292. *Id.*

293. *Id.*

294. *Victims*, *supra* note 281.

295. *Deadly Gang Life*, *supra* note 270.

296. *Id.*

297. *Id.*

298. *Deportee's Slaying*, *supra* note 272.

299. *Id.*

300. *Deadly Gang Life*, *supra* note 270.

301. *Deportee's Slaying*, *supra* note 272.

302. *Victims*, *supra* note 281.

release to the custody of his aunt in Virginia.³⁰³ DHS officials refused to release him and HHS ultimately reversed its decision to release Edgar into the custody of his aunt.³⁰⁴ The failure to release Edgar into the custody of his aunt prevented him from appealing his asylum case. While in detention, Edgar had been traumatized by gang members and as a result had tried to commit suicide by hanging himself with his own shoe laces.³⁰⁵ Edgar refused to appeal his case because "he just could not bear to be detained any longer."³⁰⁶

Edgar's Chocoy's story shows that though the Homeland Security Act took steps to protect unaccompanied alien children, by placing them in juvenile detention facilities, many problems still exist regarding the conditions of their custody pending immigration hearings. The psychological effect detention has on children alone, is enough to see that changes need to be made. It should also be noted that the lack of strict guidelines regarding the release of unaccompanied alien children to guardians also has a psychological effect on the children which ultimately affects the outcome of their immigration case. If Edgar had been released to his aunt, perhaps he would still be alive.

C. Unaccompanied Alien Child Protection Act

On September 27, 2000, Senator Dianne Feinstein from California introduced the Unaccompanied Alien Child Protection Act of 2000.³⁰⁷ The purpose of the bill was to establish an Office of Children's Services within the Department of Justice to coordinate and implement government actions involving unaccompanied alien children.³⁰⁸ The 2000 bill also proposed setting standards for the custody, release, and detention of unaccompanied children, improving policies for their permanent protection, and ensuring that their best interests were held paramount in immigration proceedings.³⁰⁹ The most important aspect of the bill was that the Office of Children's Services was not to be an office within the Immigration and Naturalization Service (INS).³¹⁰

In January of 2001 Senator Feinstein reintroduced the Unaccompanied Alien Child Protection Act.³¹¹ The 2001 bill continued to push for the establishment of an Office of Children's Services.³¹² As the 2001 bill was unsuccessful, Senator Feinstein renewed her fight in May of 2002.³¹³ Title III of the Immigration Reform accountability and Security Enhancement Act of 2002 proposed improving the administration and enforcement of immigration laws, enhancing the security of the

303. *Deportee's Slaying*, *supra* note 272.

304. *Id.*

305. *Id.*

306. *Id.*

307. Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. (2000).

308. *Id.*

309. *Id.*

310. *Id.* at § 101(a)(1).

311. Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001)

312. *Id.*

313. Immigration Reform, Accountability and Security Enhancement Act of 2002, S. 2444, 107th Cong. (2002)

United States, and establishing the Office of Children's Services within the Department of Justice.³¹⁴ However, before any progress could be made regarding the unaccompanied alien children, Congress was faced with the aftermath of September 11th. As a result of that tragic day, Congress passed the Homeland Security Act.³¹⁵ According to the provisions of the Homeland Security Act, responsibility for unaccompanied alien children had been transferred from the INS to the Office of Refuge Resettlement (ORR).³¹⁶ This was Senator Feinstein's first, though small, victory.

In May of 2003, Senator Feinstein continued to fight for the rights of unaccompanied alien children and introduced the Unaccompanied Alien Child Protection Act of 2003.³¹⁷ The purpose of this bill was simply to "provide for the protection of unaccompanied alien children."³¹⁸ The bill did not pass the Senate until October 11, 2004. The 2004 version of the bill was referred to the House Committee on the Judiciary.³¹⁹ The goal of the 2004 bill continued to be "to provide for the protection of unaccompanied alien children."³²⁰

Still unsuccessful in passing the Unaccompanied Alien Child Protection Act, Senator Feinstein introduced another version on January 24, 2005.³²¹ The 2005 bill retains the same definition of unaccompanied alien child as the Homeland Security Act, "children under the age of 18 with no lawful immigration status and no parent or legal guardian in the United States who is available to provide care and physical custody."³²² Proponents of the bill would like to further the protection of these children by creating procedures and guidelines for custody, release, and detention, assuring access to guardians ad litem and counsel, as well as strengthening policies and guidelines regarding the asylum claims of children.³²³

The 2005 bill requires that an unaccompanied alien child in the custody of the ORR shall be promptly placed with one of the following individuals or entities in the following order of preference: a parent; a legal guardian; an adult relative; an individual or entity designated by the parent or legal guardian; a state-licensed juvenile shelter, group home, or foster care program; or a qualified adult or entity seeking custody when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable alternative.³²⁴ No unaccompanied alien child shall be placed with a person or entity unless a valid suitability assessment has found that the person or entity is

314. *Id.*

315. Homeland Security Act of 2002, 6 U.S.C. § 111 (2005).

316. *Id.* at § 279(a).

317. Unaccompanied Alien Child Protection Act of 2003, S. 1129, 108th Cong. (2003).

318. *Id.*

319. Unaccompanied Alien Child Protection Act of 2004, S. 1129, 108th Cong. (2004).

320. *Id.*

321. Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005).

322. *Id.*, at § 2(a)(6); *see also* Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2).

323. *See* Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. §§ 101-304 (2005).

324. *Id.* at § 102(a)(1)(A-F).

capable of providing for the child's physical and mental well-being.³²⁵ With regard to the conditions for detention, the bill requires that the facility the child is placed in provides educational services, medical services, mental health care, access to telephones, access to legal services, access to interpreters, supervision by professionals trained in the care of children, recreational programs and activities, spiritual and religious needs, and dietary needs.³²⁶ The bill prohibits such facilities to shackle, handcuff, or restrain the children, submit the children to solitary confinement, or perform pat or strip searches.³²⁷

The guardian ad litem provision of the bill requires that only persons who are child welfare professionals, have received training in child welfare matters, and possess special training on the nature of problems encountered by unaccompanied alien children will be appointed.³²⁸ The role of the guardian ad litem is to conduct interviews with the child, investigate the facts and circumstances relevant to the child's presence in the United States, work with counsel to identify the child's eligibility for relief from removal or voluntary departure, develop recommendations on issues relative to the child's custody, detention, release, and repatriation, take reasonable steps to ensure that the best interests of the child are promoted and that the child understands the nature of the legal proceedings, and report factual findings related to the care and placement of the child during the pendency of the child's case.³²⁹ The act also ensures that all unaccompanied alien children in the custody of the ORR shall have access to competent counsel who will represent them in immigration proceedings or matters.³³⁰

The Unaccompanied Alien Child Protection Act of 2005 attempts to fill in the gaps left by the Homeland Security Act by ensuring that unaccompanied alien children have legal representation, are not held in prison-like conditions, and do not have to remain in custody pending their claims. However, the 2005 bill asks the Executive Office for Immigration Review to adopt the INS' 1998 Guidelines for Children's Asylum Claims.³³¹ This bill fails to establish new guidelines for child asylum claims. From the first introduction of the Unaccompanied Alien Child Protection Act, the bill has failed to establish a child standard of asylum, leaving children to be treated as adults in proving their claims of persecution.

CONCLUSION

This article has followed the development of refugee law in its efforts to protect children. Scared and alone, unaccompanied alien children face many obstacles when they reach the United States. To ensure that unaccompanied alien

325. *Id.* at § 102(a)(2).

326. *Id.* at § 103(a)(4)(A)(i-x).

327. *Id.* at § 103(b)(1-3).

328. Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong., § 201(a)(2)(A)(i-ii) (2005).

329. *Id.* at § 201(a)(3)(A-F).

330. *Id.* at § 202(a)(1).

331. *Id.* at § 401(a).

children receive due process in their asylum claims, special assistance and care must be provided to them. The United States has fallen behind in addressing these issues.

The goal of international law has been to ensure that the claims of unaccompanied alien children are properly heard, that they get a fair trial. Without proper legal representation no child's claim will ever be properly heard. Placing a child in prison-like conditions is psychologically similar to not having legal representation. A child that has not committed a crime will eventually give up if placed in oppressive and cruel conditions. Furthermore, not allowing a child to be released to a caring family member is also a form of psychological abuse. Such conditions do not promote respect for human rights and fundamental freedoms.

International law has addressed these issues, setting a benchmark for the United States to aspire to or surpass. As one of the founding members of the United Nations, the United States should be held to a higher standard with regards to promoting human rights and fundamental freedoms. The rest of the international community regards children as especially vulnerable human beings and affords them special treatment and assistance. The United States has failed to afford unaccompanied child asylum seekers special treatment or assistance, by continuing to hold children to the same standards as adults. The United States has also failed to ratify one of the most important international treaties with regards to protecting the rights of children. This failure is reflected in current U.S. policies toward unaccompanied alien children.

Even the United States' northern neighbor, Canada, has embraced the international ideals of affording children special care and assistance. Canada recognized the failures in its own immigration system, holding child asylum seekers to the same standards as adults, and instituted new policies and procedures in order to rectify this problem. Canada employs the international principle of "best interests of the child." A year after Canada published its newly revised guidelines, the INS published its own, making the United States the second government to publish such guidelines. However, the INS guidelines specifically stated that the "best interests of the child" principle would not be used. Now that the INS has been dismantled and the more child-friendly ORR is responsible for the care of unaccompanied children, the United States needs to pass laws in accordance with this change to ensure that all unaccompanied alien children under the age of 18 receive proper legal representation, a chance at release from custody, and proper care while in custody.

If the Unaccompanied Alien Child Protection Act of 2005 is passed, a majority of the current problems faced by unaccompanied alien children will be greatly improved. The following provisions are absolutely necessary in order for the Unaccompanied Alien Child Protection Act of 2005 to be effective in protecting the rights of unaccompanied children: providing every child with competent legal representation; creating an effective process by which children are released to family members pending determination of their claims; and preventing children from being held in prison-like conditions if there is no family members to take care of them.

Though the ORR is currently responsible for the care of unaccompanied alien children, the proposed legislation requires new government programs and policies that would greatly stretch ORR's current resources. The ORR relies on non-profit organizations to assist with its foster care programs. It may be necessary for Congress to create a new department or office in order to meet the requirements of the Unaccompanied Alien Child Protection Act of 2005. For example, the number of pro bono attorneys willing to help alien children is surely limited in every state. A program will need to be established to provide an adequate number of attorneys in every state and county where an unaccompanied alien child will be initially detained. In addition to providing legal representation, the Unaccompanied Alien Child Protection Act of 2005 provides for the appointment of guardians ad litem. Such a person will assist counsel, but will also act as the child's representative until a family member is found or legal counsel is appointed. The guardian ad litem will most likely be the most important advocate for the unaccompanied alien child. An office will have to be established in each state to facilitate the work of guardians ad litem, as well as ensure that every child is appointed a representative.

A second area that will affect change to the ORR is the detention and release of the unaccompanied alien children. The Unaccompanied Alien Child Protection Act of 2005 provides for the release of children to family members or other approved guardians. Prior to their release, an assessment test must be completed.³³² Guidelines for the assessment test need to be created and trained professionals will need to be employed to carry out the assessment tests. Again an office will need to be established to ensure that the assessment tests are uniform across the country and implemented properly. The Unaccompanied Alien Child Protection Act of 2005 also sets out new standards for those children that will have to be detained because they were not released to a guardian. These standards require facilities and personnel capable of providing education, medicine, mental health care, recreation, as well as meeting special spiritual and dietary needs. Such standards require more services than are currently available in immigration detention centers.

Lastly, the Unaccompanied Alien Child Protection Act of 2005 refers to the "best interests of the child" principle but only with regards to guardians ad litem. In order for the United States to truly come up to speed with the rest of the international community, the "best interests of the child" principle should be applied in the determination of an unaccompanied child's asylum claim. In order to effectively incorporate this principle, the United States needs to create a separate system for hearing the asylum claims of children and would require the creation of child-specific standards. However, in its current form the Unaccompanied Alien Child Protection Act of 2005 asks that the INS' Guidelines for Children's Asylum Claims be implemented by the Executive Office for Immigration Review.³³³ As stated previously, the INS guidelines specifically reject the "best interests of the child" principle.

332. *Id.* at § 102(a)(2).

333. *Id.* at § 202(a)(5).

Passing the Unaccompanied Alien Child Protection Act of 2005 is only the first step in adequately protecting the rights of unaccompanied alien children. Congress will need to establish the appropriate offices and departments to make the necessary changes possible. Congress will also need to consider new legislation that creates a separate standard for unaccompanied child asylum seekers.

