

2004

## Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children

Rachel Bien

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

---

### Recommended Citation

Rachel Bien, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J. L. & Pol'y (2004).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol12/iss2/11>

## **NOTHING TO DECLARE BUT THEIR CHILDHOOD: REFORMING U.S. ASYLUM LAW TO PROTECT THE RIGHTS OF CHILDREN**

*Rachel Bien\**

### INTRODUCTION

Bernard Lukwago was fifteen years old when rebels with the Lord's Resistance Army (LRA) kicked in the door to his family home and murdered his parents.<sup>1</sup> The rebels tied Lukwago's hands with a rope and took him to their camp.<sup>2</sup> At the camp, armed rebels held Lukwago captive in a tent with other kidnapped children.<sup>3</sup> The rebels told him that if he tried to escape he would be killed.<sup>4</sup> Lukwago witnessed the rebels kill two children who had failed in

---

\* Brooklyn Law School Class of 2005; B.A., Brown University, 2000. The author would like to dedicate this note to Brooklyn Law School's Safe Harbor Clinic, which provides legal assistance to individuals seeking asylum in the United States. Special thanks to Professor Stacy Caplow for her guidance, support, and humor. Many thanks to the staff of the *Journal of Law and Policy* for their patience and encouragement.

<sup>1</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 164 (3d Cir. 2003). The Lord's Resistance Army is an organized rebel group that has waged a brutal war against the Ugandan government for seventeen years. Press Release, Human Rights Watch, Uganda: Sharp Decline in Human Rights (July 15, 2003), at <http://www.hrw.org/press/2003/07/uganda071503.htm>. Both sides have committed gross human rights abuses, including murder, torture, rape, recruitment of children, and arbitrary detention. *Id.*

<sup>2</sup> *Lukwago*, 329 F.3d at 164.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

their attempt to flee.<sup>5</sup> The rebels trained Lukwago to shoot a gun and threatened to kill him if he refused to follow their orders.<sup>6</sup> Once trained, the rebels forced Lukwago to fight alongside other children on the front line against government soldiers.<sup>7</sup> The rebels also forced Lukwago to accompany them on attacks against civilians.<sup>8</sup> During these attacks, Lukwago witnessed the rebels mutilate civilians by cutting their lips and fingers.<sup>9</sup>

Lukwago escaped from his captors while collecting firewood weeks after his capture.<sup>10</sup> Carrying a false passport, Lukwago arrived in the United States at New York's John F. Kennedy airport in November 2000.<sup>11</sup> He immediately applied for asylum, based on his past persecution by the LRA.<sup>12</sup> The Immigration and Naturalization Service (INS) detained Lukwago in prison for twenty-one months while his asylum claim wound its way through the system.<sup>13</sup> In August 2001, an immigration judge rejected

---

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Lukwago*, 329 F.3d at 164.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Lukwago*, 329 F.3d at 165. Under U.S. asylum law, persecution must be on account of one of five specified grounds: political opinion, religion, race, nationality, or membership in a particular social group. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2003). *See infra* Part I (discussing the grounds for obtaining asylum in the United States). Lukwago argued that he qualified as a refugee because he was persecuted on account of his membership in the particular social group of children from Northern Uganda who were abducted and enslaved by the LRA and oppose their involuntary servitude. *Lukwago*, 329 F.3d. at 167.

<sup>13</sup> The Immigration and Naturalization Service (INS) was reorganized in 2003 following the creation of the Department of Homeland Security (DHS). The U.S. Citizenship and Immigration Service (USCIS) assumed the INS's immigration service functions while its immigration enforcement functions were assumed by the Bureau of Immigration and Customs Enforcement (ICE). *See* DHS website, at [http://www.dhs.gov/dhspublic/theme\\_home4.jsp](http://www.dhs.gov/dhspublic/theme_home4.jsp) (last visited Mar. 7, 2004). The Executive Office of Immigration Review (EOIR), which remains under the authority of the Department of Justice, is responsible for immigration court proceedings before immigration judges as well as the Board

## CHILD ASYLUM SEEKERS

799

Lukwago's claim based on his finding that Lukwago's testimony was not credible.<sup>14</sup> Specifically, the immigration judge found Lukwago not credible due to his demeanor in the courtroom, citing his lack of eye contact.<sup>15</sup> The IJ also found suspicious Lukwago's

---

of Immigration Appeals (BIA). See EOIR website, at <http://www.usdoj.gov/eoir/background.htm> (last visited Dec. 2, 2003). This note will continue to refer to the USCIS as the INS. The INS transferred Lukwago from prison to prison a half a dozen times, usually without warning or explanation. Melissa Dribben, *Freeing a Former Child Soldier*, PHILA. INQUIRER, Aug. 4, 2002, (Magazine), available at <http://www.law.vill.edu/currentstudents/clinicsandexternships/docs/childsoldier.pdf> (last visited Apr. 8, 2004). In March 2002, following the immigration judge's denial of asylum, INS officers took Lukwago from his cell in the York County Prison, drove him to New York's John F. Kennedy airport, and put him on a flight to Madrid. *Id.* The authorities in Madrid, however, refused to accept Lukwago and put him on a return flight to New York. *Id.* He was then returned to the same jail cell in Pennsylvania, all within twenty-four hours. *Id.*

<sup>14</sup> *Lukwago*, 329 F.3d at 165. Because an applicant's credible testimony is sufficient to satisfy her burden of proof without other corroborating evidence, the applicant's credibility is a crucial factor in the immigration judge's determination of whether the applicant has successfully made a claim for asylum. Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 2-3 (1991) (explaining that the chaotic conditions that give rise to an applicant's flight from her country of origin often make it impossible for her to obtain corroborating evidence, and thus immigration judges frequently must evaluate asylum claims based solely on the applicant's written and oral testimony). See *infra* Part I.A. (discussing an applicant's burden of proof under U.S. asylum law). The immigration judge deciding Lukwago's case acknowledged that while "close observation of a witness testifying under oath is a useful tool in assessing credibility . . . [it is] fraught with peril since the interpreter may misinterpret a witness' mannerisms . . . which may or may not have any bearing on truthfulness." Melissa Dribben, *Freeing a Former Child Soldier*, PHILA. INQUIRER, Aug. 4, 2002 (Magazine), available at <http://www.law.vill.edu/currentstudents/clinicsandexternships/docs/childsoldier.pdf> (last visited Apr. 8, 2004).

<sup>15</sup> Melissa Dribben, *Freeing a Former Child Soldier*, PHILA. INQUIRER, Aug. 4, 2002 (Magazine) (citing the immigration judge's decision, which emphasized the fact that "during [Lukwago's] entire testimony . . . there was very little eye contact with the person asking the questions"), available at <http://www.law.vill.edu/currentstudents/clinicsandexternships/docs/childsoldier.pdf> (last visited Apr. 8, 2004). According to Dr. Susan Dicklich, an expert witness who appeared at Lukwago's asylum hearing, however, "[i]n Ugandan

response when asked how he felt upon witnessing his parents' murders; he said he had felt "nervous."<sup>16</sup>

Lukwago's lawyers appealed his case to the Board of Immigration Appeals (BIA), which rejected the immigration judge's reasons for questioning Lukwago's credibility.<sup>17</sup> Nonetheless, the BIA denied Lukwago's request for asylum.<sup>18</sup> Although the BIA acknowledged that the evidence established that the LRA "does harm children," it did not "demonstrate that [Lukwago] was targeted by the LRA because he was a child."<sup>19</sup> Thus, the BIA found that Lukwago had not shown that his mistreatment was on account of his membership in a particular social group, namely, children in Uganda.<sup>20</sup> Indeed, the BIA

---

culture, it is incredibly rude to look a person of authority directly in the eye." *Id.* Lukwago's reluctance to look the judge in the eye indicated his respect for the court. *Id.*

<sup>16</sup> Tina Moore, *Former Child Soldier Seeks Asylum from a More Defensive INS*, ASSOCIATED PRESS NEWSWIREs, Sept. 13, 2002, available at <http://www.westlaw.com>.

<sup>17</sup> *Lukwago*, 329 F.3d. at 165. The BIA is the highest administrative body for interpreting and applying U.S. immigration laws, with nationwide jurisdiction to hear appeals from decisions rendered by immigration judges. EOIR website, at <http://usdoj.gov/eoir/biainfo.htm> (last visited Feb. 1, 2004). BIA decisions are binding on all immigration judges and Department of Homeland Security officers, unless modified or overruled by the Attorney General or a federal court. *Id.*

<sup>18</sup> *Lukwago*, 329 F.3d at 166.

<sup>19</sup> *Id.*

<sup>20</sup> *Lukwago*, 329 F.3d. at 166-68 (noting that Lukwago's graphic testimony clearly established that the LRA's treatment of him amounted to persecution). See *infra* Part I.A (discussing the definition of "persecution" under U.S. asylum case law). The INS argued that Lukwago's forced military conscription did not constitute persecution. *Lukwago*, 329 F.3d at 168-69 (citing *M.A. v. U.S. I.N.S.*, 899 F.2d 304, 312 (4th Cir. 1990)) (holding that "a sovereign nation enjoys the right to enforce its laws of conscription, and that penalties for evasion are not considered persecution"). The Third Circuit distinguished government conscription from conscription by guerilla forces, finding that Lukwago did not violate a legitimate conscription requirement under Ugandan law, but was forcibly abducted by a guerilla organization that was mounting attacks against the established government. *Id.* at 169. Thus, the Third Circuit found that Lukwago's forced conscription, coupled with the physical and psychological abuse he endured, constituted persecution. *Id.* at 170. The Third Circuit,

## CHILD ASYLUM SEEKERS

801

questioned whether a group based on age could qualify as a particular social group.<sup>21</sup> As this case makes clear, U.S. asylum law reserves no special protection for children in Lukwago's position. The law treats his misfortune the same as that of any adult civilian caught up in the throws of war.

With hundreds, if not thousands, of children seeking asylum in the United States each year, this and many other cases involving children raise hard questions about whether the United States asylum system adequately recognizes and accounts for the special difficulties of child asylum-seekers.<sup>22</sup> These questions include

---

however, agreed with the BIA that Lukwago had been unable to demonstrate that his past persecution was on account of his status as a child. *Id.* at 173. The Third Circuit remanded the case to the BIA to reconsider Lukwago's claim that he feared future persecution by the LRA due to his membership in the particular social group consisting of escaped LRA child soldiers. *Id.* at 183. On August 25, 2003, the BIA granted Lukwago asylum based on the fact that while fighting his deportation, he spoke out publicly about his experience as a captured child soldier. David Caruso, *Ex-Child Soldier, 21, Is Granted Asylum*, Sept. 3, 2003, PHILA. INQUIRER, at B2. This publicity increased the likelihood that Lukwago would be a target of retaliation if he were forced to return to Uganda. *Id.* Although Lukwago was ultimately granted asylum, his case demonstrates the enormous hardships that children in the U.S. asylum system confront, including prolonged detention and limited access to legal counsel, which are compounded by the absence of psychological and social welfare services geared to children. *See infra* Part II.A & B (describing the treatment of child asylum-seekers in the United States and the need to increase procedural protections for children in the system).

<sup>21</sup> *Lukwago*, 329 F.3d at 171.

<sup>22</sup> Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 85 (1999). Throughout this note, the term "child" refers to an individual who is under the age of eighteen. The age of eighteen often serves as the dividing line separating childhood and adulthood for two primary reasons. First, the age of eighteen is widely recognized internationally as the age of legal majority. United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, 1994, at 8. Second, most individuals under the age of eighteen have not "fully developed the emotional maturity and judgment, nor achieved the social status, of adults that come with life experience." *Id.* Thus, in refugee situations, individuals under the age of eighteen require "special care and assistance" because they are still "developing their identities and learning essential skills" in the absence of the sense of security that normally characterizes childhood. *Id.* The United States currently

whether there are additional factors asylum adjudicators should consider when deciding whether to grant asylum to children; whether the asylum system should afford children special procedural protections; whether a different legal standard should apply to children's asylum claims or whether one standard should apply equally to adult and child claimants; and whether the United States owes a responsibility to children beyond that which it may owe adults.

This note attempts to highlight some of the deficiencies of current asylum practice as it pertains to children, describe how U.S. asylum policy may be moving towards greater recognition of the enormous procedural hardships faced by children in the U.S. asylum system, and propose some concrete solutions. Part I describes the historical foundations of U.S. asylum law, the substance of the law itself, and its application in practice. Part II highlights the international measures that have been taken to recognize the special status of child refugees. Part III examines the ways in which U.S. asylum policy currently responds to child refugees, including recent legislative proposals to afford children in the asylum system greater procedural protections, and suggests ways in which certain procedural protections should be expanded. Finally, Part IV discusses the failure of current U.S. asylum law to account properly for the forms of persecution unique to children and suggests ways to increase substantive protections for children.

#### I. THE HISTORICAL FOUNDATIONS OF U.S. ASYLUM POLICY

The enormous need for humanitarian action to assist the millions of people displaced by the Second World War spurred the international community to craft new standards for the protection of refugees.<sup>23</sup> These humanitarian principles, embodied in the 1951

---

does not track the number of children who apply for asylum in this country. Proposed legislation would, however, require the President to provide statistics on unaccompanied refugee children in an annual report to Congress. Unaccompanied Child Protection Act of 2003, S.1129, 108th Cong. § 402(a) (2003). See *infra* Part III.A (discussing the important procedural protections afforded by the proposed bill).

<sup>23</sup> Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO.

## CHILD ASYLUM SEEKERS

803

United Nations Convention Relating to the Status of Refugees (1951 Convention) and in its 1967 Protocol (1967 Protocol), impose on countries the obligation to protect any individual, outside her country of origin, found to have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>24</sup>

With the passage of the Refugee Act of 1980 (Refugee Act), the United States, for the first time, provided a comprehensive and continuing statutory framework for the admission of refugees into this country, and brought the United States into conformity with its obligations under the Refugee Convention.<sup>25</sup> The Refugee Act

---

IMMIGR. L.J. 443, 444 (1998) (describing how the first international refugee initiatives sought to address the plight of the nearly eight million people displaced as a direct result of World War II, of which one million either could not return or were unwilling to return to their homes). The United States lacked any statutory mechanism to admit individuals fleeing persecution during World War II and, thus, tragically failed to protect Jewish refugees attempting to escape Nazi persecution. KAREN MUSALO, REFUGEE LAW AND POLICY 64 (1997). In 1939, the United States refused to grant nine hundred German Jews safe haven, forcing their ship, the *St. Louis*, to return to Europe. *Id.* As a result, most of the nine hundred Jewish refugees were subsequently killed by the Nazis. *Id.*

<sup>24</sup> Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 137 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1(2), 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. In 1968, the United States acceded to the 1967 Protocol, thereby accepting the 1951 Convention. 1967 Protocol, *supra*, at 6257. The 1951 Convention and 1967 Protocol obligate state parties to cooperate with the United Nations High Commissioner for Refugees (UNHCR), whose primary responsibility is to supervise states' compliance with the provisions of the Convention. 1951 Convention, preamble, art. 35 (1); 1967 Protocol, art. II (1).

<sup>25</sup> The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980). *See* S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 9 (1979) (noting that the Refugee Act would “bring the United States into conformity with our international obligations under the [1951 Convention and 1967 Protocol]”). Prior to enactment of the Refugee Act, U.S. refugee law provided the Attorney General with discretion to withhold the deportation of any individual within the United States who would be subjected to persecution on account of political opinion, race, or religion. MUSALO, *supra* note 23, at 67. Outside the territory of the United States, only those individuals fleeing from communism or countries in the Middle East were eligible for



incorporated the definition of “refugee,” as codified by the Refugee Convention, into the Immigration and Nationality Act (INA), the basic body of U.S. immigration law.<sup>26</sup> Like the Refugee Convention, humanitarian principles are central to U.S. refugee policy under the Refugee Act.<sup>27</sup> The Refugee Act authorizes the United States Attorney General to admit refugees from places outside as well as inside the United States who meet the statutory definition of a refugee.<sup>28</sup>

*A. Proving Asylum Eligibility under U.S. Law*

In order to make a claim for asylum under the INA, an applicant has the burden of establishing that she meets the definition of a refugee.<sup>29</sup> The INA defines a refugee as a person outside her country of nationality, who is “unable or unwilling to [return to] 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.”<sup>30</sup> In

---

refugee status in the United States. *Id.*

<sup>26</sup> Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2003); 1951 Convention, *supra* note 24.

<sup>27</sup> U.S. Comm’n on Immigration Reform 1997 Report to Congress: Becoming an American: Immigration and Immigrant Policy 69-70, *available at* <http://www.utexas.edu/lbj/uscir/reports.html> (last visited Feb. 2, 2004). The U.S. Commission on Immigration Reform, a bi-partisan research commission mandated by the Immigration Act of 1990 to examine and make recommendations regarding the implementation and impact of U.S. immigration policy, stated that asylum and “[r]efugee admissions are based on human rights and humanitarian considerations, as one of the several elements of U.S. leadership in assisting the world’s persecuted.” *Id.*

<sup>28</sup> Immigration and Nationality Act § 207(c)(1) (2004). The Attorney General is responsible for promulgating regulations for asylum adjudication, which are published in the Code of Federal Regulations (CFR) under Title 8. Immigration and Nationality Act § 103(g)(2) (2004).

<sup>29</sup> Immigration and Nationality Act § 208. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (stating that the burden on the applicant is lower than the preponderance of the evidence standard and that, therefore, the applicant need not show that the situation in her country of origin would probably result in persecution, so long as she shows that persecution is a reasonable possibility).

<sup>30</sup> Immigration and Nationality Act § 101(a)(42)(A) (2004).

## CHILD ASYLUM SEEKERS

805

order to establish a well-founded fear, an applicant must provide subjective evidence that she actually fears return, as well as objective evidence that there is a reasonable basis for her fear.<sup>31</sup> An applicant may satisfy her burden of demonstrating her subjective fear by expressing her opinions, feelings, and experiences.<sup>32</sup> An applicant may satisfy the objective requirement through documentary evidence, if such evidence is available, or through her own persuasive and credible testimony.<sup>33</sup>

While the INA does not define persecution, U.S. courts have interpreted the term to involve “the infliction of suffering or harm upon those who differ . . . in a way that is regarded as offensive.”<sup>34</sup> Although persecution “does not require bodily harm or a threat to life or liberty,” it is a strong concept involving more than discrimination or harassment.<sup>35</sup> The persecutor need not be the

---

<sup>31</sup> *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) (finding that an applicant has established the objective component of a well-founded fear if she shows that a reasonable person in her circumstances would fear persecution); *In re Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1986) (defining the subjective component of a well-founded fear as a genuine apprehension or awareness of danger).

<sup>32</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987) (noting that the reference to “fear” in the Immigration and Nationality Act’s definition of a refugee requires an examination of the applicant’s subjective mental state); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999) (explaining that an applicant’s credible testimony that she genuinely fears persecution will satisfy her burden of proving a subjective fear).

<sup>33</sup> 8 C.F.R. § 208.13(a) (2004) (stating that an applicant’s credible testimony may be sufficient to meet the burden of proof without other corroborating evidence); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999) (noting that the applicant can satisfy the objective requirement through either “the production of specific documentary evidence or by credible and persuasive testimony”).

<sup>34</sup> *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (finding that the Iranian government’s enforcement of its strict dress and conduct rules did not rise to the level of persecution). *See also Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (defining persecution as “oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate”).

<sup>35</sup> *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (finding evidence that the applicant’s neighbors threw rocks at her house and stole and damaged her property due to her Indo-Fijian ethnicity insufficient to constitute persecution); *Fisher*, 79 F.3d at 961.

government as long as the government is unable or unwilling to control the persecuting individual or organization.<sup>36</sup>

A well-founded fear of persecution may be demonstrated by establishing either past persecution or a well-founded fear of future persecution.<sup>37</sup> Demonstration of past persecution creates a rebuttable presumption of a well-founded fear of future persecution.<sup>38</sup> Where the INS has successfully rebutted an applicant's past persecution claim, the applicant bears the burden of raising alternative facts to demonstrate a well-founded fear of future persecution.<sup>39</sup>

### *B. Recent Developments in U.S. Asylum Law*

In 1990, the INS created a new corps of asylum adjudicators specially trained in evaluating human rights conditions in foreign

---

<sup>36</sup> *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (finding that the actions of a terrorist group that the government is unable to control are not private acts outside the scope of the refugee definition); *In re Kasinga*, 1996 B.I.A. LEXIS 15, 25 (1996) (finding that the government's toleration of the practice of female genital mutilation indicates that it is unwilling to control the applicant's persecutors).

<sup>37</sup> 8 C.F.R. § 208.13(b) (2004).

<sup>38</sup> 8 C.F.R. § 208.13(b)(1). The INS may rebut the presumption by establishing a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(1)(i)(A). Any change in circumstance, not exclusively those related to country conditions, may be considered to contradict the applicant's asylum claim, "so long as those changes are fundamental in nature and go to the basis of the fear of persecution." Federal Register, 65 Fed. Reg. 76121, 76127 (Dec. 6, 2000) (to be codified at 8 C.F.R. pt. 208). In addition, an applicant who has established prima facie persecution may nonetheless be denied asylum if the INS can prove by a preponderance of the evidence that the applicant could have reasonably been expected to avoid future persecution by relocating to another part of his or her country of nationality. 8 C.F.R. § 208.13(b)(1)(i)(B).

<sup>39</sup> 8 C.F.R. § 208.13(b)(1) (2004). Upon a showing of past persecution, where the record demonstrates changed country conditions sufficient to overcome the well-founded fear presumption, the applicant bears the burden of demonstrating that she has a well-founded fear of persecution from any new sources. *In re N-M-A*, 22 I. & N. Dec. 312, 15 (B.I.A. 1998).

## CHILD ASYLUM SEEKERS

807

countries.<sup>40</sup> These asylum officers review the asylum applications of claimants who apply “affirmatively.”<sup>41</sup> Asylum officers may either grant an applicant asylum, or alternatively, refer the application to the Executive Office of Immigration Review (EOIR), commonly known as “immigration court,” for review by an immigration judge.<sup>42</sup> Applicants who apply affirmatively are not placed in detention during proceedings.<sup>43</sup>

An applicant must make a defensive asylum claim when the INS initiates removal proceedings against her.<sup>44</sup> Defensive claims are not heard by the asylum corps, but are under the exclusive jurisdiction of the EOIR.<sup>45</sup> Applicants who make defensive claims may be detained pending the immigration judge’s determination of their eligibility for asylum.<sup>46</sup>

---

<sup>40</sup> 8 C.F.R. § 208.1 (b) (2004). *See* U.S. Citizenship and Immigration Services (USCIS), History of the United States Asylum Corps, at <http://uscis.gov/graphics/services/asylum/history.htm#E> (last visited Dec. 2, 2003). The asylum corps works under the USCIS within the Department of Homeland Security. *Id.*

<sup>41</sup> 8 C.F.R. § 208.2 (a) (2004). Claimants, who apply affirmatively, voluntarily present themselves to the INS. *Id.* *See also* USCIS, Obtaining Asylum in the United States: Two Paths to Asylum, at <http://uscis.gov/graphics/services/asylum/paths.htm> (last visited Dec. 2, 2003).

<sup>42</sup> USCIS, Obtaining Asylum in the United States: Two Paths to Asylum, at <http://uscis.gov/graphics/services/asylum/paths.htm> (last visited Dec. 2, 2003).

<sup>43</sup> *Id.* These applicants often turn to family or friends, churches, mosques, and other charitable or community-based organizations for support and accommodation while they await the adjudication of their asylum claims. *See* CHRISTOPHER J. EINOLF, THE MERCY FACTORY 213-14 (2001).

<sup>44</sup> 8 C.F.R. § 208.2(b) (2004). *See* EOIR website, at <http://www.usdoj.gov/eoir/orginfo.htm> (last visited Feb. 7, 2004).

<sup>45</sup> 8 C.F.R. § 208.2(b) (2004). *See* EOIR website, at <http://www.usdoj.gov/eoir/orginfo.htm> (last visited Feb. 7, 2004).

<sup>46</sup> 8 C.F.R. § 236(a) (2004). The applicant may be released on a bond of at least \$1500 on certain conditions determined by the INS District Director. 8 C.F.R. § 236(a)(2)(A) and (a)(2)(B). There is no judicial review available to applicants who have been denied release. 8 C.F.R. § 236(e). There is disturbing evidence that the INS continues to detain many individuals who have been granted asylum while it pursues appeals of their decisions. HUMAN RIGHTS FIRST, IN LIBERTY’S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 31 (2004).

In addition, the Illegal Immigration Reform and Responsibility Act of 1996 mandated that the INS detain, and place in expedited removal proceedings, asylum applicants identified at U.S. ports of entry.<sup>47</sup> Those who indicate a fear of persecution during the expedited removal process receive a “credible fear” interview with an asylum officer.<sup>48</sup> At the interview, the applicant must establish that there is a “significant possibility” that she could establish eligibility for asylum.<sup>49</sup> If the asylum officer determines that the applicant has a credible fear of returning to her country of nationality, she refers the claim for ordinary removal proceedings before an immigration judge, at which time the applicant may raise her asylum claim.<sup>50</sup>

## II. INTERNATIONAL RECOGNITION OF THE SPECIAL LEGAL STATUS OF REFUGEE CHILDREN

Almost half of the twenty-one million refugees in the world are children under the age of eighteen.<sup>51</sup> As many as 20,000 children,

---

<sup>47</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No.104-208, § 302, 110 Stat. 3009, 3581 [hereinafter IIRAIRA]. See USCIS, Obtaining Asylum in the United States: Two Paths to Asylum, at <http://uscis.gov/graphics/services/asylum/paths.htm> (last visited Dec. 2, 2003).

<sup>48</sup> IIRAIRA, *supra* note 47, § 302; 8 C.F.R. § 208.30 (2004).

<sup>49</sup> IIRAIRA, *supra* note 47, § 302.

<sup>50</sup> *Id.*; 8 C.F.R. § 208.30(f) (2004). If the asylum officer determines that the applicant has not established a credible fear of persecution, the asylum officer must inform the applicant in writing and inquire whether the applicant wishes to appeal the decision to an immigration judge. 8 C.F.R. § 208.30(g)(1), (g)(2)(i) (2004). If the immigration judge concurs with the asylum officer’s negative decision, the case is referred to the INS for deportation. 8 C.F.R. § 208.30(g)(2)(iv)(A) (2004). The applicant cannot appeal the immigration judge’s decision. *Id.*

<sup>51</sup> Press release, UNHCR, Half of the Refugees in the World Are Children Under 18 Years (May 11, 2002), at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=NEWS&id=3cdf7d6428> (last visited Apr. 13, 2004). The United Nations General Assembly established the United Nations High Commission for Refugees (UNHCR) in 1950 to lead and coordinate international action to protect refugees and resolve refugee problems around the world. UNHCR website, at <http://www.unhcr.ch/cgi-bin/texis/vtx/basics> (last visited Feb. 7, 2004).

## CHILD ASYLUM SEEKERS

809

unaccompanied by parents or legal guardians, apply for asylum each year in North America, Europe, and Australia.<sup>52</sup> Children flee from some of the most atrocious abuses, including forced military conscription, female genital mutilation, forced marriage, child labor, sexual servitude, and domestic violence.<sup>53</sup> According to the U.N.'s 1996 Machel Report, a study documenting the effects of armed conflict on children, children are not merely innocent bystanders to war, but have become targets of genocide, forced military recruitment, sexual violence, torture, and exploitation.<sup>54</sup>

The 1989 Convention on the Rights of the Child (CRC)

---

<sup>52</sup> UNHCR, *The World of Children at a Glance*, at <http://www.unhcr.ch/children/glance.html> (last visited Dec. 2, 2003). UNHCR defines an unaccompanied child as a "person who is under the age of eighteen years . . . and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so." UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Feb. 1997 [hereinafter UNHCR Guidelines]. In many cases, children arrive unaccompanied because their parents have been killed, imprisoned, or have taken ill in their country of origin. WENDY AYOTTE & LOUISE WILLIAMSON, *SEPARATED CHILDREN IN THE U.K.: AN OVERVIEW OF THE CURRENT SITUATION* 16 (2001), available at <http://www.asylum.support.info/publications/refugeecouncil/seperated.htm> (last visited Apr. 8, 2004) (discussing why children arrive without parents or guardians). In other cases, it is the child herself who is at risk and it is her parents' decision to send her to another country for safety. *Id.* Most parents in developing countries do not have the resources to pay for their own travel costs in addition to their child's. *Id.*

<sup>53</sup> Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 86 (1999).

<sup>54</sup> *Report of the Expert of the Secretary-General on the Impact of Armed Conflict on Children*, U.N. GAOR, 51st Sess., Agenda Item 108, U.N. Doc. A/51/306 (1996) [hereinafter Machel Report]. The U.N. Committee on the Rights of the Child recommended that the Secretary General appoint Graca Machel, the former Minister of Education of Mozambique, as an independent expert to study the impact of armed conflict on children. Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 201 (1999). She presented her comprehensive study to the U.N. General Assembly in August 1996. *Id.* Consequently, the General Assembly recommended the appointment of a permanent Special Representative on the impact of armed conflict on children. *Id.*

represented the first international treaty to explicitly provide special protections for children's rights.<sup>55</sup> While international refugee law previously viewed a child's asylum claim as derivative of his or her parent's claim, the CRC obligates states to ensure that each child seeking refugee status, whether accompanied or unaccompanied by his or her parents, receives protection and humanitarian assistance.<sup>56</sup> Moreover, the "best interests of the child" must be a primary consideration of states in all actions concerning children, including those undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies.<sup>57</sup> The CRC applies to every

---

<sup>55</sup> Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 [hereinafter CRC].

<sup>56</sup> *Id.*, art. 22(1). See also Bhabha & Young, *supra* note 53, at 87 (noting that accompanied children have tended to be subsumed within their family's asylum application, and, thus, immigration and child welfare authorities have devoted little attention to refugee children as a distinct group). This note will refer to countries or nations as states.

<sup>57</sup> CRC, *supra* note 55, at art. 3(1). The drafting history of the CRC includes no specific definition of the "best interests of the child" standard. THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS 11 (PHILIP ALSTON, ED. 1994). However, the extensive usage of the standard in the domestic law of many states may have led the drafters to reasonably believe that states were already sufficiently familiar with the phrase and its application. *Id.* at 11. The particular language adopted sheds some light on the intention of the drafters with respect to the application of the best interest standard. *Id.* at 13. For instance, the requirement that the child's best interests be "a primary consideration" appears to "impose a burden of proof on those seeking to apply a non-child-centered" approach to demonstrate that the other interests at stake are equally, if not more, compelling. *Id.* The term "consideration" suggests a process that is genuinely deliberative, as opposed to merely formal. *Id.* Finally, although the CRC does not provide any definitive statement of how an individual child's best interests would be served in a given situation, the rights enumerated in the treaty serve as "signposts" to guide adjudicators and policymakers seeking to identify a child's best interests. *Id.* at 19. The American Bar Association's Standards of Practice for Lawyer's Representing a Child in Abuse and Neglect Cases state that where a lawyer is appointed to represent the "best interests" of the child, that determination "should be based on objective criteria addressing the child's specific needs and preferences, the goal of expeditious resolution of the case . . . and the use of the least restrictive/detrimental alternatives available." American Bar Association,

## CHILD ASYLUM SEEKERS

811

child within a state's jurisdiction and prohibits discrimination irrespective of the child's or her parent's birth or any other status.<sup>58</sup>

Over 190 countries have ratified the CRC, making it the most ratified human rights treaty in history.<sup>59</sup> Although the U.S. has not ratified the treaty, it is a signatory, and thus is obliged under international treaty law to refrain from acts which would defeat the object and purpose of the Convention.<sup>60</sup> The INS has

---

Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (1996), available at <http://www.abanet.org/child/childrep.html> (last visited Apr. 5, 2004).

<sup>58</sup> CRC, *supra* note 55, at art. 2(1).

<sup>59</sup> See UNHCR at <http://www.unhcr.ch> (last visited Feb. 4, 2004) (providing the complete list of States Parties to the Convention on the Rights of Children).

<sup>60</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331. The act of signing a treaty generally expresses a state's consent to be bound to the treaty, even though the further step of ratification is required for the treaty to enter into force with respect to that state. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 75 (2000). Thus, in the period prior to ratification, the signatory state is under an obligation to refrain from doing anything that would "affect its ability fully to comply with the treaty once it has entered into force" or "invalidate the basic purpose of the treaty." *Id.* at 94. See HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN INS CUSTODY, n.40, available at <http://www.hrw.org/reports98/ins2/berks98d-01.htm> (last visited Dec. 2, 2003) (documenting the INS's practice of detaining refugee children in centers for juvenile offenders, where they are subjected to strip-searches and other degrading treatment, in violation of the rights protected under the CRC). Other than the United States, Somalia is the only other U.N.-member state not to have ratified the CRC. *Id.* Prior to ratifying any treaty, the United States undertakes an extensive evaluation of its domestic laws and practices at both the federal and state level to determine how to bring them into compliance with the treaty. See United Nations Children's Fund (UNICEF), Convention on the Rights of the Child: Frequently Asked Questions, at <http://www.unicef.org/crc/crc.htm> (last visited Apr. 8, 2004). This evaluation can take several years, particularly in cases in which certain provisions of the treaty are viewed as controversial. *Id.* According to the United States Fund for UNICEF, one of 37 national committees set up to support the work of UNICEF, two factors have held up U.S. ratification of the CRC: "widespread misconceptions about the [CRC's] intent, provisions, and potential impact; and political opposition." United States Fund for UNICEF, Frequently Asked Questions, at <http://capwiz.com/unicefusa/issues/alert/?alertid=32697> (last visited Apr. 8, 2004). Opponents of the CRC argue that it intrudes upon the



acknowledged that the CRC serves as a significant source of guidance in developing U.S. policies for child asylum seekers.<sup>61</sup>

In 1997, the U.N. High Commissioner for Refugees proposed a set of children's asylum guidelines based on the CRC's international norms for the protection of children's rights.<sup>62</sup> The UNHCR Guidelines, like the CRC, underscore the importance of delivering effective protection and assistance to children in a systematic, comprehensive, and integrated way.<sup>63</sup> Although such a comprehensive approach would require close collaboration among a wide variety of government bodies, specialized agencies, and non-governmental groups, such collaboration would be possible because the "best interests" principle would provide clear guidance

---

parent-child relationship by, for example, recognizing a child's right to sue her parents and obtain an abortion. *Id.* In response, CRC supporters point to language in the CRC that repeatedly emphasizes the primacy and importance of the family in decisions concerning children. *Id.* In particular, article 5 obligates parties to the CRC "to respect the responsibilities, rights and duties of parents . . . to provide . . . appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." CRC, *supra* note 55, at art.5. Supporters also point out that the CRC does not explicitly require states to afford children the right to sue their parents, although there must be some mechanism in place to allow children to vindicate their rights, or obtain an abortion. United States Fund for UNICEF, Frequently Asked Questions, at <http://capwiz.com/unicefusa/issues/alert/?alertid=32697> (last visited Apr. 8, 2004). Due to these controversies, evaluation of the CRC has not been a priority of the U.S. Senate. *Id.*

<sup>61</sup> See *infra* Part III.A (discussing how the CRC, UNHCR guidelines, and other international human rights instruments provide important guidance to U.S. asylum policymakers).

<sup>62</sup> UNHCR guidelines, *supra* note 52. In enacting the Refugee Act, Congress rewrote U.S. immigration law to bring the United States in line with its international obligations under the Refugee Convention. MUSALO, *supra* note 24, at 57. Thus, because U.S. law is based on international law, UNHCR interpretations of international refugee law, while not binding on the U.S., are important tools for guiding U.S. refugee law. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-49 (1987) (citing the U.N. Handbook on Procedures and Criteria for Determining Refugee Status as a source in interpreting U.S. asylum and refugee law).

<sup>63</sup> UNHCR guidelines, *supra* note 52, § 1.4 (interpreting Article 22(1) of the CRC as requiring states to take a comprehensive and systematic approach to the protection of unaccompanied children).

## CHILD ASYLUM SEEKERS

813

to policymakers in all actions pertaining to children.<sup>64</sup> For example, the UNHCR Guidelines suggest that states appoint each child a legal representative, as well as a guardian or advisor with child welfare expertise, to ensure that the child's interests are safeguarded and her needs appropriately met.<sup>65</sup> The UNHCR Guidelines further urge states to not detain child applicants in prison-like conditions, establish an expedited procedure to process their claims, and take into account each child's stage of development and particular vulnerabilities when assessing her claim.<sup>66</sup> Perhaps most significantly, the UNHCR Guidelines call attention to the types of human rights abuses that may constitute persecution under the Refugee Convention for children, but not for adults.<sup>67</sup>

Before the UNHCR issued its guidelines, Canada and the United Kingdom, which also account for a high percentage of all asylum claims lodged in industrialized countries, had taken steps to ensure that their domestic asylum laws reflected their international commitments to meet the needs of child asylum seekers.<sup>68</sup> In 1996,

---

<sup>64</sup> *Id.*, § 1.5 (stating that policymakers should rely on the "best interests" principle to guide them in developing asylum policies for children).

<sup>65</sup> *Id.* §§ 4.2 & 5.7 (recommending that states provide children with a legal representative and establish an independent and formally accredited organization that will appoint each child a guardian or advisor).

<sup>66</sup> *Id.* § 7.6 (urging states not to detain children); § 7.7 (stating that detention should only be used as a measure of last resort and for the shortest appropriate period of time); §§ 8.1 & 8.5 (urging states to develop expedient proceedings for children that take into account their special needs and vulnerabilities); § 8.4 (suggesting that asylum adjudicators undergo training to familiarize them with the special situation of unaccompanied children); § 8.6 (suggesting that asylum adjudicators pay particular regard to a child's stage of development and limited knowledge of conditions in her country of origin in assessing her asylum claim).

<sup>67</sup> *Id.* § 8.7. The guidelines identify the following practices as constituting persecution under the Refugee Convention: military recruitment of children, their subjection to forced labor, the trafficking of children for prostitution and sexual exploitation, and the practice of female genital mutilation. *Id.* See *infra* Part IV.B (arguing for the need to reform U.S. asylum law to account for the forms of persecution unique to children).

<sup>68</sup> Protecting the Rights of Children: The Need for U.S. Children's Asylum Guidelines, Women's Commission for Refugee Women and Children,

Canada's Immigration and Refugee Board issued a set of innovative guidelines concerning child applicants.<sup>69</sup> The Canadian guidelines provide for the appointment of a "designated representative" to ensure the protection of the child's "best interests" throughout the asylum process.<sup>70</sup> In addition, they attempt to ease the burden on unaccompanied children by establishing a special procedure for their claims and an evidentiary standard sensitive to each child's level of maturity and development.<sup>71</sup>

---

December 1998, at 5-8. [hereinafter Women's Commission Report]. See UNHCR, *Asylum Applications Lodged in Industrialized Countries: Levels and Trends, 2000-2002*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics> (last visited Feb. 8, 2004) (stating that, in absolute terms, the United Kingdom was the largest asylum-seeker receiving country in the industrialized world in 2002, accounting for 19 percent of all asylum applications lodged, followed by the United States with 14 percent of all claims, and by Canada with 5.7 percent of all claims).

<sup>69</sup> Child Refugee Claimants: Procedural and Evidentiary Issues, available at [http://www.cisr.gc.ca/en/about/guidelines/child\\_e.htm](http://www.cisr.gc.ca/en/about/guidelines/child_e.htm) (last visited Feb. 8, 2004) [hereinafter Canadian Guidelines]. Canada's Immigration and Refugee Board is the federal agency tasked with adjudicating asylum claims. The Immigration and Refugee Board: What It Is and How It Works, at [http://www.cisr.gc.ca/en/researchpub/pub/pamphlet/index\\_e.htm](http://www.cisr.gc.ca/en/researchpub/pub/pamphlet/index_e.htm) (last visited Feb. 8, 2004). The Canadian Guidelines preceded the UNHCR guidelines and are less far-reaching. Bhabha & Young, *supra* note 53, at 90.

<sup>70</sup> Canadian Guidelines, *supra* note 69, at A.II (stating that the designated representative's duties include retaining counsel for the child, assisting the child to gather evidence for her claim, and acting as a witness for the child). Before designating a person to represent the child, the Guidelines require that the Convention Refugee Determination Division of the Canadian Refugee Board inform the proposed designated representative of her duties and conduct an assessment of the person's ability to fulfill those duties. *Id.* The Guidelines require that the designated representative possess "an appreciation of the nature of the proceedings," and suggest as factors for consideration the representative's "linguistic and cultural background, age, gender, and other personal characteristics." *Id.* In addition, the designated representative must not pose a conflict of interest situation with the child such that the representative would not act in the child's best interests. *Id.*

<sup>71</sup> *Id.* at Part B.I-II (noting that children are often unable to present evidence with the same degree of precision as adults and that, therefore, more weight should be given to the objective elements of the child's claim).

## CHILD ASYLUM SEEKERS

815

The United Kingdom has also taken steps to address the particular difficulties children face in the system.<sup>72</sup> In 1994, the United Kingdom's Home Office, the government department responsible for internal affairs, developed the Refugee Council Panel of Advisors for Unaccompanied Refugee Children (Children's Panel).<sup>73</sup> The Children's Panel was designed to provide advice, support, and advocacy to child applicants, independent of the U.K. Immigration and Nationality Department, to ensure that they receive fair and equal access to legal representation, care, and accommodation.<sup>74</sup> Although the advisors do not represent the children in asylum proceedings, they provide children with assistance in finding qualified legal counsel.<sup>75</sup> Moreover, the advisors are responsible for meeting the child's educational, housing, health care, and other social welfare needs throughout the

---

<sup>72</sup> Simon Russell, *Unaccompanied Refugee Children in the United Kingdom*, 11 INT'L J. REFUGEE L 126, 135 (1999) (arguing that the Children's Panel plays a vital role in the first stages of a child's asylum determination process).

<sup>73</sup> AYOTTE, *supra* note 52, at 3, 6-7 (2001) (analyzing the United Kingdom's response to unaccompanied children "against a European-wide framework of good-practice and recommending areas for improvement).

<sup>74</sup> U.K. Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Note, § 5.2, *available at* <http://www.ind.homeoffice.gov.uk> (last visited Feb. 8, 2004).

<sup>75</sup> AYOTTE, *supra* note 52, at 6-7 (stating that each child is assigned an advisor who plays a "comprehensive role in supporting the child in relation to any aspect of [her] situation as an [unaccompanied] child, including immigration and welfare matters"). Unaccompanied children applying for asylum in the United Kingdom are afforded aid to pay for their legal assistance. *Id.* at 23. Ayotte argues that the Children's Panel will be unable to meet the needs of the growing number of unaccompanied children arriving in the United Kingdom without an increase in its funding and resources. *Id.* Moreover, due to inadequate resources, advisors are only able to provide support to the child when she first arrives in the U.K., and thus do not play a continuing role in ensuring the child's interests are protected and her needs met. *Id.* See also Refugee Council website, *at* <http://www.refugeecouncil.org.uk/refugeecouncil/what/what002.htm> (last visited Feb. 8, 2004). The Refugee Council is a charitable organization that receives funding from the U.K. government, the European Commission, trusts, and its members. Refugee Council website, *at* <http://www.refugeecouncil.org.uk/refugeecouncil/therefugeecouncil.htm> (last visited Mar. 21, 2004).

asylum process.<sup>76</sup>

### III. CHILDREN IN THE U.S. ASYLUM SYSTEM

U.S. asylum policy has not traditionally differentiated between the claims of children and adults.<sup>77</sup> With increasing numbers of child asylum seekers entering the U.S. each year, however, the U.S. has become far more responsive to international and domestic pressure to expand the protections afforded to children.<sup>78</sup>

Every year, thousands of children enter the United States seeking protection from human rights abuses occurring in their countries of origin.<sup>79</sup> Many of these children enter unaccompanied by parents or guardians.<sup>80</sup> In 2002, U.S. authorities apprehended more than five thousand unaccompanied children attempting to enter the country without documentation.<sup>81</sup> Many of these children are victims of highly profitable child smuggling and trafficking rings.<sup>82</sup>

---

<sup>76</sup> AYOTTE, *supra* note 52, at 6-7.

<sup>77</sup> See Bhabha & Young, *supra* note 53, at 115.

<sup>78</sup> See *id.* See *infra* Part III.A (discussing recent positive changes in the procedural protections afforded to child asylum seekers).

<sup>79</sup> See Women's Commission Report, *supra* note 68, at 2.

<sup>80</sup> *Id.* The INS defines an unaccompanied minor as a child under the age of eighteen who seeks admission to the United States and who is not accompanied by a parent or guardian. See Immigration and Naturalization Service, Guidelines for Children's Asylum Claims, at 5, n.10 (December 10, 1998) [hereinafter INS Guidelines], available at [http://uscis.gov/graphics/lawsregs/handbook/10a\\_ChldrGdlns.pdf](http://uscis.gov/graphics/lawsregs/handbook/10a_ChldrGdlns.pdf) (last visited Apr. 8, 2004). See also AYOTTE, *supra* note 52, at 16 (discussing the reasons why children arrive unaccompanied).

<sup>81</sup> See Statements on Introduced Bills and Joint Resolutions, U.S. Senate, May 22, 2003, 149 CONG. REC. S7020 (Statement of Sen. Feinstein) (“[F]ive-thousand foreign-born children [who lack] parents or legal guardians to protect them are discovered in the United States each year in need of protection.”).

<sup>82</sup> See Ginger Thompson, *Littlest Immigrants, Left in Hands of Smugglers*, N.Y. TIMES, Nov. 3, 2003, at A1 (discussing how tightened security following the September 11<sup>th</sup> attacks has made it much harder for illegal immigrants to cross the U.S. border, forcing parents illegally living in the United States to either allow others to raise their children in their home country or hire smugglers to sneak their children into the United States).

## CHILD ASYLUM SEEKERS

817

Prior to 1997, the INS regularly detained children in prisons alongside juvenile delinquents and adult offenders.<sup>83</sup> As part of the settlement agreement reached in *Reno v. Flores*, a 1993 federal class-action suit challenging the INS's detention of unaccompanied minors in prison-like conditions, the INS agreed to place detained children "in the least restrictive setting" in light of the child's age and special needs.<sup>84</sup> The INS may detain children in juvenile correction facilities only if the child presents a risk of flight or has a criminal record.<sup>85</sup> Although INS detention practices have improved in some areas, many argue that the INS has made far too little progress in seeking out alternatives to detention, such as release to relatives and foster care.<sup>86</sup> Even after the *Flores*

---

<sup>83</sup> *Reno v. Flores*, 507 U.S. 292 (1993). See HUMAN RIGHTS WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE IMMIGRATION AND NATURALIZATION SERVICE, available at <http://www.hrw.org/reports/1997/uscrcks/> (last visited Mar. 21, 2004) (documenting the INS's practice of locking up unaccompanied children with convicted juvenile offenders, and sometimes with adult offenders, forcing them to wear prison uniforms, and providing them with minimal access to counseling, legal services, and information about their rights). See also CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, FAILED BY FEDERALISM: AD HOC POLICY-MAKING TOWARD DETAINED IMMIGRANT AND REFUGEE CHILDREN 17 (2001), available at [http://www.centerforhumanrights.org/Detained\\_minors/Minors\\_PolicyAnalysis.pdf](http://www.centerforhumanrights.org/Detained_minors/Minors_PolicyAnalysis.pdf) (last visited December 2, 2003) (documenting violations of the *Flores* settlement agreement in INS-contracted detention centers).

<sup>84</sup> Processing, Detention, and Release of Juveniles, 63 Fed. Reg. 39759, 39760 (proposed July 24, 1998) (to be codified at 8 C.F.R. pt. 236.3) (setting out interim regulations based on the *Flores* settlement agreement).

<sup>85</sup> *Id.* at 39,760 ("If a juvenile has committed a crime or a juvenile delinquent offense, has committed or threatened to commit violent acts, has engaged in disruptive behavior, is an escape risk, or is in danger, the [INS] may place him or her in a juvenile detention facility or a[n] [INS] facility having separate accommodations for juveniles."). "[I]solated offense[s] . . . not within a pattern of criminal activity and . . . not involv[ing] violence against a person or the use or carrying of a weapon" do not constitute offenses permitting detention in secure facilities. *Id.* at 39762. Petty offenses, such as shoplifting, joy riding, and disturbing the peace, are not considered offenses justifying secure detention. *Id.*

<sup>86</sup> Women's Commission Report, *supra* note 68, at 14 (noting that the INS has made some improvements by opening group shelters in some regions). AMNESTY INT'L, WHY AM I HERE?: CHILDREN IN IMMIGRATION DETENTION

settlement, nearly one-third of unaccompanied children remain housed in secure detention facilities designed for juvenile offenders.<sup>87</sup> In response to concern over the INS's perceived conflict of interest in serving concurrently as jailor, prosecutor, and caretaker of unaccompanied children, Congress recently transferred responsibility for the care and custody of child asylum seekers from the INS to the Office of Refugee Resettlement (ORR).<sup>88</sup>

---

(2003), available at [http://www.amnestyusa.org/refugee/children\\_detention.html](http://www.amnestyusa.org/refugee/children_detention.html) (last visited Feb. 8, 2004) (arguing that the INS has overused secure detention for unaccompanied children and failed to place many children in the "least restricted setting" required by the *Flores* settlement) [hereinafter AMNESTY REPORT]. According to the Center for Human Rights and Constitutional Law, a public interest legal foundation that promotes respect for the human and constitutional rights of immigrants and refugees, the INS detained 4736 unaccompanied children from 1999-2000. CTR. FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, FAILED BY FEDERALISM: AD HOC POLICY-MAKING TOWARD DETAINED IMMIGRANT AND REFUGEE CHILDREN 10 (2001), available at [http://www.centerforhumanrights.org/Detained\\_minors/Minors\\_PolicyAnalysis.pdf](http://www.centerforhumanrights.org/Detained_minors/Minors_PolicyAnalysis.pdf) (last visited Apr. 8, 2004). The average age of all children detained was approximately 15.26 years. *Id.* The average number of days spent in detention was 77.21 days. *Id.* at 11. Thirty-two percent of children spent time in secure lock-ups due to insufficient space at non-secure facilities. *Id.*

<sup>87</sup> AMNESTY REPORT, *supra* note 86, at 1. Only 17 percent of the secure facilities that responded to Amnesty International's inquiry reported that unaccompanied children are separated from juvenile offenders. *Id.* at 23-24. Nearly half reported that they house unaccompanied children in the same cell as juvenile offenders. *Id.* at 23-24. The majority of unaccompanied children detained in secure facilities are non-delinquent. *Id.* at 21. Unaccompanied children are often categorized as "escape risks" in order to justify housing them in secure facilities without an individual assessment of whether the risk is genuine. *Id.*

<sup>88</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, § 462 (2002). See *The Treatment of Children in INS Custody: Hearings Before the Senate Judiciary Subcommittee on Immigration*, available at [http://www.womenscommission.org/take\\_action/testimony.html](http://www.womenscommission.org/take_action/testimony.html) (last visited Feb. 17, 2004) (citing the fact that the INS frequently denied release from detention to children who had been granted asylum because the agency itself had decided to appeal the decision); Christopher Nugent and Steven Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, 80 No. 7 INTERPRETER RELEASES 233 (Feb. 19, 2003) (emphasizing that the transfer in responsibility from the INS, a law enforcement

*CHILD ASYLUM SEEKERS*

819

*A. Changes in the Procedural Protections Afforded to Child Asylum Seekers*

There are positive indications that U.S. refugee policy is moving toward a greater awareness of the particular procedural obstacles children face in the asylum system. On December 10, 1998, the INS issued guidelines providing asylum officers with child-sensitive interview procedures and training.<sup>89</sup>

The INS Guidelines set forth special procedures to remedy the particular difficulties that children face in applying for asylum, and accept the CRC's "best interests of the child" standard as a "useful measure" for determining appropriate interview techniques for child asylum seekers.<sup>90</sup> For example, the Guidelines call for training INS personnel in the unique needs of children asylum seekers, with the goal of creating a "child-friendly" asylum interview environment."<sup>91</sup> To this end, the Guidelines suggest several steps to assist in "building rapport" with children

---

agency, to the ORR, a human services agency, represents a positive step toward recognizing unaccompanied children's welfare and protection needs). *See* 149 CONG. REC. S7026 (May 22, 2003) (noting that the ORR, a human services agency within the Department of Health and Human Services, has "decades of experience working with foreign-born children").

<sup>89</sup> INS Guidelines, *supra* note 80. The INS Guidelines were issued on December 10th in honor of International Human Rights Day. Several academic institutions and non-profit organizations, including the Women's Commission for Refugee Women and Children, a non-profit organization that advocates for refugee women and children around the world, collaborated with the INS to develop the guidelines, which draw from many of the innovations proposed in the 1996 Canadian Guidelines as well as the 1997 UNHCR Guidelines. Further information about the Commission is available at <http://www.womenscommission.org>.

<sup>90</sup> INS Guidelines, *supra* note 80, at 2. The United States has signed, but not ratified, the CRC. *See U.S. Finally Agrees to Sign U.N. Accord for Children*, CHI. TRIBUNE., Feb. 12, 1995, available at 1995 WL 6165212. Nevertheless, the INS Guidelines affirm that the CRC and other international instruments "need not be ratified by the U.S. to provide guidance as a source of human rights norms." *Id.* at 2 n.1. *See supra* Part.II. In referring to the best interests of the child principle as a "useful measure," the INS is acknowledging the principle's relevance to its policies pertaining to children.

<sup>91</sup> INS Guidelines, *supra* note 80, at 5.



applicants.<sup>92</sup> For example, interviews begin with a discussion of “neutral topics,” such as career goals, school, pets, and hobbies, an explanation of what will happen during the asylum interview, and reassurance that the child is not expected to be able to answer all of the questions asked of her and that her answers will remain confidential.<sup>93</sup> In addition, the Guidelines suggest that officers “take the initiative” in actively evaluating whether the child understands the process by “watch[ing] for non-verbal clues, such as a puzzled look, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses.”<sup>94</sup>

Moreover, the Guidelines acknowledge that children “may be less forthcoming than adults . . . in order not to relive their trauma” and recognize that children “may not present their cases in the same way as adults.”<sup>95</sup> Thus, the asylum officer’s questions should be “tailored to the child’s age, stage of language development, background, and level of sophistication.”<sup>96</sup> While the burden of proof remains on the child to prove her asylum eligibility, the asylum officer must take the child’s “age, relative maturity, ability to recall events, and psychological make-up . . . into account when assessing the credibility of a claim and must . . . gather as much objective evidence as possible to evaluate the claim.”<sup>97</sup>

The INS Guidelines also stress the key role that children’s guardians can play in protecting the best interests of the child in the asylum process.<sup>98</sup> Guardians are commonly used in other areas of U.S. law to assist children. For example, federal law requires states to provide children who are the subject of abuse or neglect proceedings with a “guardian ad litem, who may be an attorney or

---

<sup>92</sup> *Id.* at 7.

<sup>93</sup> *Id.* at 8.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> INS Guidelines, *supra* note 80, at 5.

<sup>96</sup> *Id.* at 10.

<sup>97</sup> *Id.* at 17. Objective evidence may include country reports detailing the human rights situation or cultural practices in a child’s country of origin, an evaluation of a child’s medical or psychological condition, as well as other documentary evidence. *See* INS Guidelines, *supra* note 80, at 13.

<sup>98</sup> *Id.* at 5.

## CHILD ASYLUM SEEKERS

821

a court appointed special advocate (or both).”<sup>99</sup> These guardians are responsible for “obtain[ing] firsthand, a clear understanding of the situation and needs of the child and . . . mak[ing] recommendations to the court concerning the best interests of the child.”<sup>100</sup> The INS Guidelines envision that guardians would assist in “bridg[ing] the gap between the child’s culture and the U.S. asylum interview.”<sup>101</sup> The INS Guidelines refer to the guardian as a “trusted adult,” noting that “a child’s parent or relative [may be] a logical and appropriate support person.”<sup>102</sup>

Although the INS Guidelines affirm the significance of children’s guardians in the asylum process, they ultimately place no affirmative responsibility on the government to provide each child with a guardian.<sup>103</sup> Furthermore, although parents, friends, and other trusted adults often provide invaluable support to child applicants, child welfare professionals with expertise in the particular needs of children asylum seekers could provide a higher level of assistance.<sup>104</sup> The need for a corps of child welfare professionals is especially relevant for unaccompanied children, who often lack access to trusted adults.<sup>105</sup> Moreover, the INS

---

<sup>99</sup> See Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101 (1974) (requiring states to appoint a Guardian ad Litem in every abuse and neglect proceeding in order to receive federal funding and assistance).

<sup>100</sup> *Id.* at § 5106a(b)(2)(A)(ix).

<sup>101</sup> INS Guidelines, *supra* note 80, at 6.

<sup>102</sup> *Id.*

<sup>103</sup> See INS Guidelines, *supra* note 80, at 5, n.12 (“[T]here is no requirement that a child bring an adult to the interview either to serve as a support person, attorney, or accredited representative.”).

<sup>104</sup> UNHCR Guidelines, *supra* note 52, § 5.7 (encouraging the use of guardians who have “the necessary expertise in the field of child caring, so as to ensure that the interests of the child are safeguarded, and that the child’s legal, social, medical, and psychological needs are appropriately covered” during the asylum determination process).

<sup>105</sup> UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, at 43 (noting that unaccompanied children lack trusted adults to assist them by providing factual information to document their claims, supporting them emotionally, and explaining the asylum determination procedures). See INS Guidelines, *supra* note 80, at 17 (acknowledging that “a child who has filed a separate asylum application . . . [is] frequently without the support of familiar adults”).

Guidelines do not guarantee that child asylum seekers will receive legal counsel.<sup>106</sup> Presently, less than half of the children in INS custody have representation.<sup>107</sup>

In May 2003, Senator Diane Feinstein introduced bipartisan legislation in the U.S. Senate that would significantly expand services for children who arrive unaccompanied in the U.S.<sup>108</sup> Congresswoman Zoe Lofgren introduced an identical bill in the U.S. House of Representatives in October 2003.<sup>109</sup> The bill, titled the “Unaccompanied Alien Child Protection Act of 2003,” would require children under the age of eighteen in federal custody to be represented by counsel in immigration proceedings.<sup>110</sup> If pro bono representation is not available to a child, the bill mandates provision of government-funded legal representation.<sup>111</sup> The bill would also establish a pilot program to develop an independent corps of guardians *ad litem* with expertise in child welfare.<sup>112</sup> These guardians would serve to “ensure that the [child’s] best interests . . . are promoted . . . in [immigration] proceedings.”<sup>113</sup> Enactment of the bill would represent a major step towards treating child asylum seekers with the care and sensitivity they deserve.<sup>114</sup>

---

<sup>106</sup> See INS Guidelines, *supra* note 80.

<sup>107</sup> See 149 CONG. REC. S7026 (May 22, 2003) (noting that “statistics demonstrate that applications for asylum are four times more likely to be granted when represented by counsel”).

<sup>108</sup> Unaccompanied Alien Child Protection Act of 2003, S.1129, 108th Cong. (2003) (establishing a Guardian ad litem program, ensuring that unaccompanied minors have access to legal counsel, and calling upon the Department of Justice to adopt the INS Guidelines in its handling of children’s asylum claims before immigration judges and the BIA).

<sup>109</sup> Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108<sup>th</sup> Cong. (2003).

<sup>110</sup> *Id.* § 202(a)(1).

<sup>111</sup> *Id.* § 202(a)(3).

<sup>112</sup> *Id.* § 201(a)(3)(E).

<sup>113</sup> *Id.* *Supra* note 57 (discussing the “best interests of the child” standard).

<sup>114</sup> *The Treatment of Children in INS Custody: Hearings Before the Senate Judiciary Subcommittee on Immigration*, 107th Cong. (2002) (statement of Wendy Young) (noting that the proposed bill addresses many of the “significant procedural gaps in U.S. policy and practice [that] jeopardize the protection of [child refugees]”).

*CHILD ASYLUM SEEKERS*

823

The bill would redefine the government's priorities with respect to refugee children by making the protection of their interests central to all actions and proceedings.<sup>115</sup>

*B. Remaining Procedural Obstacles*

In 1996, spurred by a wave of anti-immigrant sentiment, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).<sup>116</sup> IIRAIRA placed a one-year filing deadline on all applicants, even those residing legally in the United States, to submit their asylum applications for adjudication.<sup>117</sup> The deadline may be overcome by showing that (a) circumstances materially affecting the applicant's eligibility for asylum have changed; or, (b) extraordinary circumstances led to the delay in filing.<sup>118</sup> While the one-year deadline may increase the

---

<sup>115</sup> 149 CONG. REC. S7026 (May 22, 2003) (“[I]n all proceedings and actions, the government should have as a high priority protecting the interests of [unaccompanied] children, most of whom are unable to understand the nature of the proceedings in which they are involved.”).

<sup>116</sup> IIRAIRA, *supra* note 47, § 604. See Conference Report on IIRAIRA (Sept. 25, 1996), Rep. Rohrabacher, “We are supposed to be watching out for our own people. When we allocate money for benefits, for service, SSI and unemployment benefits, it is supposed to benefit our citizens, the people that are paying taxes, who fought our wars.”

<sup>117</sup> IIRAIRA, *supra* note 47, § 604; Immigration and Nationality Act § 208 (a)(2)(B); 8 U.S.C. § 1158 (a)(2)(B) (2003) (requiring an asylum applicant to demonstrate by clear and convincing evidence that her application has been filed within one year of the date of her arrival in the United States).

<sup>118</sup> Immigration and Nationality Act § 208 (a)(2)(D) (2003); 8 C.F.R. § 208.4(a)(2) (2004). The regulations provide a non-exhaustive list of the types of changed circumstances that may qualify as exceptions to the one-year filing rule, including (a) changes in conditions in the applicant's country of nationality, (b) changes in applicable U.S. law, (c) changes in the applicant's personal circumstances, such as recent political activism or conversion from one religion to another, or (d) the ending of an applicant's dependent relationship to the principal applicant in a previous application. 8 C.F.R. § 208.4(a)(4)(i)(A), (B), and (C). The regulations also provide a list of circumstances that could be considered extraordinary, such as (a) serious illness, (b) legal disability, e.g., the applicant is an unaccompanied minor or suffered from mental impairment during the first year after arrival, (c) death or serious illness of a family member or legal representative, or (d) other circumstances, depending on the facts of the

efficiency of the system by weeding out applicants who lack bona fide asylum claims, it raises concerns that genuine refugees who inadvertently miss the deadline will be barred from gaining asylum.<sup>119</sup> These concerns are particularly relevant for children seeking asylum who may lack the maturity to understand the intricacies of U.S. asylum law and frequently do not have access to legal counsel.<sup>120</sup>

The INS regulations implementing IIRAIRA partly address these concerns by providing asylum adjudicators with the discretion to exempt unaccompanied children from the one-year deadline.<sup>121</sup> According to the regulations, in some cases, children lacking parental or caregiver accompaniment may suffer from a legal disability grave enough to invoke the extraordinary circumstances exception.<sup>122</sup> For example, the BIA found that a fifteen year-old unaccompanied child who was detained in INS custody during the one-year period immediately following his arrival in the United States established extraordinary circumstances that excused his failure to file for asylum before the expiration of the one-year deadline.<sup>123</sup>

Accompanied children, however, would not be permitted the

---

case, including severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization. 8 C.F.R. § 208.4(a)(5)(i), (ii), and (vi); INS, Asylum Officer Basic Training Course: One-Year Filing Deadline (March 15, 2001) at 16-17 (on file with author).

<sup>119</sup> Women's Commission Report, *supra* note 68, at 6.

<sup>120</sup> 149 CONG. REC. S7020 (May 22, 2003) ("Children . . . have incredible difficulty understanding the complexities of the immigration system . . . . [Despite this,] most children in immigration custody are overlooked and unrepresented.").

<sup>121</sup> 8 C.F.R. § 208.4 (a)(5)(ii). The proposed Unaccompanied Alien Child Protection Act would make this exemption mandatory for all unaccompanied minors. Unaccompanied Alien Child Protection Act of 2003, S.1129, 108th Cong. § 403(b) (2003).

<sup>122</sup> 8 C.F.R. § 208.4(a)(5)(ii).

<sup>123</sup> *In re* Y-C-, 23 I. & N. Dec. 286, 288 (BIA 2002) (finding that the detention of an unaccompanied child during the one-year period following his arrival in the United States constitutes extraordinary circumstances sufficient to overcome the one-year filing deadline).

## CHILD ASYLUM SEEKERS

825

same exemption, under the assumption that these children would derive their status from a parent's claim or would be aided by a parent in making an asylum claim.<sup>124</sup> This rationale, while true in many instances, fails to take into account that some children may have interests contrary to those of their parents.<sup>125</sup> For example, a child who has suffered severe abuse at the hands of an accompanying parent would have grounds for asylum while the accompanying parent would not.<sup>126</sup> In a situation where an abusive parent might wish to protect himself against potential criminal charges, or may simply wish to remain undetected by the INS, the accompanying parent may have an interest in *preventing* the child from applying for asylum.<sup>127</sup> In such a case, the child's failure to file before the expiration of the one-year deadline would result in grave consequences.

The INS regulations should provide asylum adjudicators with discretion to take into account the factors that prevent any child, whether accompanied or unaccompanied, from seeking asylum within the first year of her arrival before barring her claim for exceeding the deadline. In fact, the INS proposed a similar approach in its basic training course for asylum officers.<sup>128</sup> In addition to the list of "extraordinary" circumstances sufficient to overcome the one-year filing deadline in the CFR, the training course discusses additional circumstances, such as severe family opposition, language barriers, or profound difficulties in cultural adjustment, which may also constitute extraordinary

---

<sup>124</sup> Bhabha & Young, *supra* note 53, at 113 (arguing that no individualized determination procedure is envisaged with respect to accompanied children due to the principle of family unity, i.e., the children derive their refugee status from the head of the family).

<sup>125</sup> Bhabha & Young, *supra* note 53, at 114.

<sup>126</sup> *Id.* at 107. See *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (2001) (overturning the BIA's denial of asylum to a young woman from Mexico whose father subjected her and her family members to extreme physical abuse on account of her membership in the particular social group consisting of her immediate family).

<sup>127</sup> Women's Commission Report, *supra* note 68, at 7.

<sup>128</sup> INS, Asylum Officer Basic Training Course: One-Year Filing Deadline (March 15, 2001), at 16-17.

circumstances.<sup>129</sup> These additional considerations should be included in the CFR in order to afford immigration judges the same discretion as asylum officers to protect both accompanied and unaccompanied children from the harsh consequences of the one-year deadline.

#### IV. NEEDED CHANGES IN CHILDREN'S SUBSTANTIVE ELIGIBILITY FOR ASYLUM

In order to fully realize the INS Guidelines' admirable goal of protecting children in the U.S. asylum system, U.S. policymakers must consider whether children require a separate substantive legal standard that accounts for their status as children. In addition, U.S. policymakers must address the fact that U.S. asylum law often fails to acknowledge the specific forms of persecution unique to child applicants. Finally, the increasing subjection of children to forced conscription in armed conflicts around the world demands that policymakers evaluate whether the exclusion principle, which bars "persecutors of others" from receiving asylum protection, should be applied to former child soldiers seeking asylum.

##### *A. Applying a Separate Legal Standard to Children's Asylum Claims*

Although the INS Guidelines and the proposed bill expand the procedural protections for children who apply for asylum, they do not significantly alter a child's substantive eligibility under U.S. asylum law.<sup>130</sup> Thus, while directing asylum officers to take into account such factors as "the age, relative maturity, ability to recall events, and psychological make-up of the child . . . when assessing the credibility of a claim," the INS insists that the Guidelines "[do]

---

<sup>129</sup> *Id.*

<sup>130</sup> Kristine K. Nogosek, *It Takes A World To Raise A Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Asylees*, 24 *HAMLIN L. REV.* 1, 1 (2000) (arguing that the INS Guidelines do not afford children proper substantive protections under the Immigration and Nationality Act).

## CHILD ASYLUM SEEKERS

827

not create new law or alter existing law.”<sup>131</sup> A child must still meet the refugee definition, therefore, in order for these factors to have a positive bearing on her claim.<sup>132</sup> As a consequence, the INS Guidelines permit asylum officers very little discretion to ensure that these factors actually have an effect on the ultimate decision to grant or deny asylum to a child.<sup>133</sup>

Unlike other types of adjudications, asylum proceedings present special challenges for applicants.<sup>134</sup> In asylum proceedings, the applicant bears the burden of proof for establishing her eligibility for asylum.<sup>135</sup> In most cases, the events at issue occurred far away, making it very difficult for applicants to secure the witnesses, documents, and other evidence crucial to their claims.<sup>136</sup>

The U.N. High Commissioner for Refugees has proposed that adjudicators account for these evidentiary challenges by affording the applicant the “benefit of the doubt.”<sup>137</sup> This standard

---

<sup>131</sup> INS Guidelines, *supra* note 80, at 17.

<sup>132</sup> *Id.*

<sup>133</sup> *See id.* at 18 (“Regardless of how sympathetic the child’s claim may be, he or she cannot be granted asylum unless the [Immigration and Nationality Act’s refugee definition] is met. Consequently, the ‘best interests of the child’ principle, while useful to the interview process, does not replace or change the refugee definition in determining substantive eligibility.”). *See* Bhabha & Young, *supra* note 53, at 97 n.52 (arguing that the Guidelines’ limitation of the best interests principle to procedural and evidentiary questions, and not the legal analysis of a child’s claim, is contrary to the CRC’s obligation on states to “protect and assist”). The UNHCR guidelines, in contrast, require that the best interests principle guide substantive eligibility determinations, as well as procedural and evidentiary matters. *See supra* Part II (discussing the UNHCR Guidelines).

<sup>134</sup> *Id.*

<sup>135</sup> MUSALO, *supra* note 24, at 869. The applicant bears both the burden of production of evidence as well as the burden of persuasion of the adjudicator. *Id.*

<sup>136</sup> *Id.* Governments that engage in persecution often go to great lengths to cover-up their commission of human rights violations. *Id.* As a result, it is often extremely difficult for asylum applicants to gain access to proof of their persecution. *Id.*

<sup>137</sup> UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶¶ 196, 203-4 (1979). Some commentators have argued that Canada’s adjudication process incorporates the



recognizes that even after the applicant has made a “genuine effort” to corroborate her story there may still be a lack of evidence for some of her statements.<sup>138</sup> Moreover, the High Commissioner recommends that adjudicators play an active role in facilitating the applicant’s “genuine effort” by sharing the applicant’s duty to evaluate and ascertain all the relevant evidence.<sup>139</sup> Thus, although the burden of proof in principle remains with the applicant, the adjudicator also bears a responsibility to “use all the means at his disposal to produce the necessary evidence in support of the application.”<sup>140</sup>

This approach is especially relevant for child applicants, who often lack the maturity to understand their role in the adjudicatory process and for whom it may be more difficult to present evidence with the same degree of consistency and precision as adults. A standard that eases the child’s burden of production, applies evidentiary rules flexibly, and affords the child the benefit of the doubt with respect to questions of credibility could significantly increase the likelihood that a child genuinely deserving of refuge will be granted asylum. Moreover, this standard would bring U.S. asylum law in closer conformance with international human rights norms pertaining to children as well as U.S. child welfare laws, which adopt the best interests principle as the standard that should be applied in all actions concerning children.<sup>141</sup>

The policy that child applicants must meet the same substantive standard as adults cannot be reconciled with the INS Guidelines’ acknowledgement that, for child asylum seekers, “the balance between subjective fear and objective circumstances may

---

UNHCR’s “benefit of the doubt” standard. See Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L.REV. 1, 34 (1991) (noting that a favorable decision by only one member of a two-member panel is required for an applicant to be granted asylum in Canada).

<sup>138</sup> UNHCR, *supra* note 137, at ¶ 203.

<sup>139</sup> UNHCR, *supra* note 137, at ¶ 196.

<sup>140</sup> UNHCR, *supra* note 137, at ¶ 196.

<sup>141</sup> See *supra* Part II (discussing the best interests of the child standard under international law).

## CHILD ASYLUM SEEKERS

829

be more difficult for an adjudicator to assess.”<sup>142</sup> Children under sixteen years of age may “lack the maturity to form a well-founded fear of persecution . . . requiring the adjudicator to give more weight to objective factors.”<sup>143</sup> Furthermore, adherence to the adult standard would not permit adjudicators to afford child claimants a “liberal application of the benefit of the doubt,” even though the Guidelines suggest that this may be necessary in certain circumstances.<sup>144</sup> While the informal atmosphere of an asylum interview may provide sufficient opportunity for an asylum officer to meet the “challenging responsibility” of adjudicating a child’s claim, the INS Guidelines do not address the very different context of removal proceedings, which are far more formal and adversarial.<sup>145</sup>

In many areas of U.S. law, including tort, contract, and

---

<sup>142</sup> See *supra* Part III.A (discussing the rationale behind tailoring the asylum interview to the child’s age, maturity, background, and level of sophistication and the need for asylum officers to take these characteristics into account when adjudicating children’s claims).

<sup>143</sup> INS Guidelines, *supra* note 80, at 19.

<sup>144</sup> See *id.* at 20 (citing the need for asylum officers to afford a child applicant the benefit of the doubt where it is reasonable to believe the child’s parents possessed a well-founded fear of persecution prompting them to send the child outside the country, even though the precise circumstances of the child’s departure are not known).

<sup>145</sup> Bhabha & Young, *supra* note 53, at 121 (noting that the traditional courtroom environment was designed to inspire respect for the seriousness of the process, and, consequently, may intimidate children and prevent them from participating in the hearing). The removal proceedings are formal and adversarial particularly because they are conducted before a judge. *Id.* In some cases, detained child asylum seekers are brought before the immigration judge shackled and handcuffed. See Press Release, Amnesty International, First National Survey of Children in Immigration Detention Exposes Mistreatment, Lengthy Detentions, Legal Barriers (June 18, 2003), at <http://www.amnestyusa.org/news/2003/usa06182003.html>. The Unaccompanied Alien Child Protection Act of 2003 would require the EOIR to adopt the INS Guidelines in its handling of children’s asylum claims before immigration judges and the BIA. Unaccompanied Alien Child Protection Act of 2003, S.1129, 108th Cong. § 401(a) (2003). The bill also mandates that the Secretary of Homeland Security provide “periodic comprehensive training” on the Guidelines to all asylum officers, immigration judges, members of the BIA, and immigration officials who have contact with children. *Id.* § 401(b).

criminal law, a different legal standard is applied to children based on their status as a minor.<sup>146</sup> The U.S. Supreme Court has acknowledged the special status of children under U.S. law, stating:

Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults.<sup>147</sup>

Contract law and tort law afford children greater flexibility to protect them from the harsh penalties of the adult legal standard.<sup>148</sup> Underlying this grant of greater flexibility is the belief that children, due to their innate vulnerability and immaturity, should not be assumed to comprehend the impact and nature of their acts.<sup>149</sup> Criminal law provides children with a separate court system and procedures, with the ultimate goal of rehabilitating children, not punishing them.<sup>150</sup>

There is little, if any, evidence that the adoption of a more

---

<sup>146</sup> Kristine K. Nogosek, *It Takes A World To Raise A Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 *HAMLIN L. REV.* 1 (2000).

<sup>147</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (finding that youth must be considered a relevant mitigating factor in sentencing sixteen year-old to death).

<sup>148</sup> Nogosek, *supra* note 146, at 14-16 (noting that the modern trend in the area of contract law is to hold the contract voidable upon the child's option, and observing that under tort law, children are either completely immune from liability, or held to a more flexible legal standard of care that takes into account the child's level of intelligence, maturity, and experience).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 16 (noting that juvenile courts were based on the attitude that children were developmentally incomplete emotionally, morally, and cognitively, rendering them psychologically vulnerable). See LESLIE J. HARRIS, *CHILDREN, PARENTS AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS* 317 (2002) ("The [juvenile] court's process was conceived as informal, resembling the method by which parents deal with children in the home, rather than in terms of counsel, confrontation, and other characteristics of a criminal trial.")

*CHILD ASYLUM SEEKERS*

831

flexible standard for children would result in a dramatic surge in children's asylum claims in the United States.<sup>151</sup> Even if more children are granted asylum in the United States under this standard, the U.S. will have taken seriously its humanitarian obligations toward the international community by assuming a larger share of responsibility for children affected by war and abuse.

*B. Recognizing the Forms of Persecution Unique to Children*

Neither the INS Guidelines nor the proposed Unaccompanied Child Protection Act address the forms of persecution unique to child applicants.<sup>152</sup> For many child asylum seekers, the fact that they are children is central to their claim.<sup>153</sup> Examples of cases in which the persecution alleged only applies to children include infanticide, female genital mutilation, bonded child labor, child marriage, and the sale of children.<sup>154</sup> In other cases, behavior that might not rise to the level of persecution when targeted at adults may constitute persecution when children are the targets.<sup>155</sup> For example, whereas U.S. asylum law currently views military conscription as a right of sovereign states, and thus not as a form of persecution, this adult-centered approach is insensitive to the situations of children fleeing forced military or guerilla conscription.<sup>156</sup> Because children are more likely to be traumatized

---

<sup>151</sup> See Ruppel, *supra* note 14, at 34 (arguing that, in 1988, the Canadian government incorporated into its refugee adjudication process the policy of affording the benefit of the doubt to all asylum applicants). Moreover, in 2002, Canada incorporated the best interests of the child principle into its Immigration and Protection Act. *Concluding Observations on the Second Periodic Report of Canada*, U.N. Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.215 (2003). Despite these provisions, individual claims by children still only account for five percent of all asylum applications lodged in Canada. *Second Periodic Report of Canada*, U.N. Committee on the Rights of the Child, U.N. Doc. CRC/C/83/Add.6 (2003).

<sup>152</sup> Bhabha & Young, *supra* note 53, at 103.

<sup>153</sup> Bhabha & Young, *supra* note 53, at 101.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See *supra* text accompanying notes 2-9 (discussing Bernard Lukwago's

by hostile situations due to their age, lack of maturity, and vulnerability, particular behaviors that would not constitute persecution for an adult, such as aggressive police questioning, threats, or physical abuse, may produce lasting damage, physical, or psychological trauma in a child that amounts to persecution.<sup>157</sup>

Two recent cases involving the forced recruitment of children by military or guerilla forces reflect the difficulty courts face when confronted with such forms of persecution that do not fit neatly into current asylum doctrine. In *Cruz-Diaz v. I.N.S.*, Carlos Cruz-Diaz, a native of El Salvador who entered the U.S. illegally at the age of fifteen, sought reversal of the Bureau of Immigration Appeal's (BIA) decision to deny him asylum.<sup>158</sup> At his removal hearing, Cruz-Diaz testified that he feared persecution from the El Salvadorian army, which he believed had murdered members of his family, as well as guerillas from whom he had deserted.<sup>159</sup> Although the immigration judge found that Cruz-Diaz had proven his subjective fear of persecution, the judge denied his claim because under current asylum law, the army's "hunt" for Cruz-Diaz for fighting with the guerillas did not amount to persecution.<sup>160</sup> On appeal, Cruz-Diaz argued that the immigration judge erred by holding him to the same standard as an adult who had evaded military conscription.<sup>161</sup> The Fourth Circuit rejected this argument, finding no Congressional intent to apply a different standard to children's asylum claims.<sup>162</sup> Thus, it concluded that Cruz-Diaz was not entitled to special protection from the actions of the military on account of his youth, and the immigration judge appropriately treated his claim like that of "any other citizen of El Salvador who participated in or refused to participate in the

---

forced conscription and abuse by the LRA). Other situations in which children's fundamental human rights are at issue include deprivation of education, heightened vulnerability following civil upheaval, homelessness, prostitution, and trafficking. Bhabha & Young, *supra* note 53, at 102-03.

<sup>157</sup> Bhabha & Young, *supra* note 53, at 104.

<sup>158</sup> *Cruz-Diaz v. I.N.S.*, 86 F.3d 330 (4th Cir. 1996).

<sup>159</sup> *Id.* at 331.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 331.

## CHILD ASYLUM SEEKERS

833

activities of either the guerillas or the army.”<sup>163</sup>

The Fourth Circuit also denied asylum to Rafael Garcia-Garcia, who, like Cruz-Diaz, entered the U.S. illegally from El Salvador.<sup>164</sup> At his removal hearing, Garcia-Garcia testified that when he was sixteen years-old, guerillas came to his home and threatened to kill him unless he joined their forces.<sup>165</sup> After the guerillas forced him at gun-point to attack deserters with a baseball bat, Garcia-Garcia fled his captors while they were sleeping.<sup>166</sup> Upon hearing from his father that the guerillas had come to his home looking for him, he fled El Salvador, fearing retaliation.<sup>167</sup> Garcia-Garcia argued that his abduction and the violence he was forced to inflict on deserters constituted persecution, particularly in light of his age at the time.<sup>168</sup> The Fourth Circuit rejected Garcia-Garcia’s argument, refusing to find that the forced recruitment of a child amounts to persecution.<sup>169</sup>

These cases underscore the limitations of U.S. asylum policy, which fails to afford children substantive provisions that account for their status as children.<sup>170</sup> As the definition of persecution continues to evolve, U.S. policymakers must craft asylum policies that are flexible enough to accommodate the range of situations from which people seek asylum.<sup>171</sup> For example, in 1995, the INS

---

<sup>163</sup> *Id.* at 332.

<sup>164</sup> *Garcia-Garcia v. I.N.S.*, 1999 U.S. App. LEXIS 4778, at \*1 (4th Cir. Mar. 19, 1999).

<sup>165</sup> *Id.* at \*2.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at \*4.

<sup>169</sup> *Id.* See also, *Perez-Garcia v. I.N.S.*, 1997 U.S. App. LEXIS 28522 (2nd Cir.1997) (finding that the Guatemalan military’s beating of a seventeen year-old as a result of his refusal to join the army due to his status as a minor did not constitute persecution because a general requirement of military conscription is not persecution regardless of the “highhanded methods” employed by the Guatemalan military). See *infra* Part IV (discussing the justifications for reforming U.S. asylum policy to recognize the forced conscription of children as a form of persecution).

<sup>170</sup> Bhabha & Young, *supra* note 53, at 103.

<sup>171</sup> *Id.* The UNHCR handbook does not define the term persecution. Instead, it leaves its meaning open-ended in order to accommodate evolving

issued a memorandum recognizing that the refugee definition encompasses certain gender-related claims of women asylum seekers.<sup>172</sup> *In re Fauziya Kasinga*, a case involving female genital mutilation, became the first BIA precedent decision to grant asylum to a woman based on gender persecution.<sup>173</sup> In reaching its decision, the BIA carefully considered the context from which the claimant fled, her position within the society, and the social and political role of the practice of female genital mutilation within her culture.<sup>174</sup> With growing recognition that gender-based violence constitutes a human rights violation, asylum policymakers have reinterpreted the concept of persecution expansively to protect victims from such abuse.<sup>175</sup> Likewise, the concept of persecution

---

human rights norms. In response to changing social and political conditions in Africa, the Organization of African Unity extended the scope of the refugee definition under its 1969 refugee convention to all persons forced to flee across national borders due to “external aggression, occupation, foreign domination or events seriously disturbing public order . . .” Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, art. 1(2), 1001 U.N.T.S. 45. The Cartagena Declaration on Refugees, adopted by ten Latin American states in 1984, embraced the OAU’s expanded definition by extending protection to “persons who have fled their country [because of] generalized violence, foreign aggression, internal conflicts, [or] massive violations of human rights . . .” Cartagena Declaration on Refugees, Nov. 22, 1984, ¶ 3, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

<sup>172</sup> Considerations For Asylum Officers Adjudicating Asylum Claims from Women (1995) (noting that an applicant’s gender may bear on her claim in significant ways, for instance, she may have been subjected to a form of persecution that disproportionately affects women, suffered persecution on account of her gender, or due to her membership in a particular social group constituted by women), *available at* <http://www.uchastings.edu/cgrs/law/guidelines.html> (last visited Apr. 13, 2004). The memorandum identifies rape, and other forms of sexual violence, as well as the imposition of harsh rules on women, as examples of persecution primarily affecting women. *Id.*

<sup>173</sup> 21 I. & N. Dec. 357 (BIA 1996).

<sup>174</sup> Pamela Goldberg, *Asylum Law: Recent Developments on Gender Issues*, 8 BENDER’S IMMIGR. BULL. 1507, n.7 (Sept. 2003).

<sup>175</sup> Considerations For Asylum Officers Adjudicating Asylum Claims from Women (1995) (citing evolving international human rights standards pertaining to women as providing the basis for the INS’s new approach to gender-related asylum claims).

*CHILD ASYLUM SEEKERS*

835

must be expanded with regard to the forms of abuse child applicants commonly face in order to allow adjudicators to make meaningful distinctions between the claims of children and adults.

*C. The Exclusion Principle and Children*

The exclusion clause under the Refugee Convention, which bars certain categories of individuals from gaining asylum, does not distinguish between adults and children.<sup>176</sup> In the United States, the subject of a bar against asylum first surfaced in 1948, regarding concern that former Nazis and their collaborators could attempt to use U.S. refugee protections to gain asylum.<sup>177</sup> With the codification of the Refugee Convention's definition of "refugee" under the 1980 Refugee Act, U.S. refugee law adopted the Convention's exclusion from status as a refugee "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person" on account of their race, nationality, religion, political opinion, or membership in a particular social

---

<sup>176</sup> See 1951 Convention and 1967 Protocol, *supra* note 24, at art. 1F. Article 1F of the Refugee Convention provides as follows:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes of the United Nations.

*Id.*

<sup>177</sup> Creppy, *supra* note 23, at 444. The Displaced Persons Act was a U.S. immigration initiative created to assist in alleviating the problem of war refugees by temporarily raising quota limitations. *Id.* at 445. By deducting the increase in admitted refugees from future immigration numbers, the DPA facilitated the admission of over 400,000 displaced persons by 1951. *Id.* See The Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219. The DPA specifically excluded from the definition of a displaced person, "any . . . person who can be shown . . . to have assisted the enemy in persecuting civil populations of countries . . . or . . . to have voluntarily assisted the enemy forced since the outbreak of the second world war in their operations against the United Nations." *Id.*



group.<sup>178</sup> As military and guerilla leaders increasingly resort to forced conscription of children on a massive scale, however, the bright line that supposedly once separated persecutor from victim has blurred.<sup>179</sup>

There is both domestic and international consensus that the law should treat children who have committed criminal acts differently than adults.<sup>180</sup> Like other areas of U.S. refugee law, however, the exclusion clause does not distinguish children from adults.<sup>181</sup> The situation of forcibly conscripted former child soldiers provides a stark example of the consequences of applying the exclusion clause to child applicants.<sup>182</sup>

---

<sup>178</sup> Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2003).

<sup>179</sup> See Machel Report, *supra* note 54, at para. 34. According to the report, “Increasingly . . . adults are conscripting children as soldiers deliberately.” *Id.*

<sup>180</sup> See *supra* Part III.A (discussing how U.S. criminal law treats child offenders differently than adults); Rome Statute of the International Criminal Court, July 17, 1998, art. 2, 37 I.L.M. 999 (entered into force 2002) [hereinafter ICC Statute] (exempting crimes committed by children under age eighteen from the International Criminal Court’s jurisdiction).

<sup>181</sup> Michael Kingsley Nyinah, *Exclusion Under Article 1F: Some Reflections on Context, Principles, and Practice*, 12 INT’L. J. REFUGEE L. 295, 308 (2000) (arguing for the need to “narrowly fashion the parameters of [the] exclusion [principle] so as to take due cognizance of [children’s] special status”).

<sup>182</sup> There are approximately 300,000 children serving as soldiers in current armed conflicts around the world. See Human Rights Watch, *Stop the Use of Child Soldiers!*, at <http://www.hrw.org/campaigns/crp/index.htm> (last visited Dec. 1, 2003) (providing detailed information on the use of child soldiers). Human rights groups have documented the widespread use of child soldiers in Angola, Colombia, Lebanon, Liberia, Sudan, and Uganda. *Id.* Most are adolescents, although many are younger than ten years of age. Machel Report, *supra* note 54, at § 35. Many are abducted from their families and forced to follow orders upon threat of death. Human Rights Watch, *Stop the Use of Child Soldiers!*, at <http://www.hrw.org/campaigns/crp/index.htm> (last visited Dec. 1, 2003). Armed with AK-47s and M-16s, children are often positioned on the front lines of combat. *Id.* Some are forced to serve as human mine detectors or human shields. *Id.* Military and rebel forces often recruit young girls to serve as sex slaves. Machel Report, *supra* note 54, at § 45. In the civil war that ravaged Sierra Leone throughout the 1990s, rebel forces abducted thousands of children, some as young as five or six years-old, who witnessed and were forced to

## CHILD ASYLUM SEEKERS

837

Military and rebel recruiters prey upon children precisely because of their physical and psychological vulnerability.<sup>183</sup> Child soldiers are more obedient, less likely to question orders, and easier to manipulate than adult soldiers.<sup>184</sup> Furthermore, unlike their adult counterparts, children remain vulnerable even after hostilities have ceased.<sup>185</sup> Many rebels refuse to release child soldiers to their families after the hostilities are over, while those who are released or escape often have no living family members to whom they can return.<sup>186</sup> Some child soldiers fear retaliation by their former communities or former enemies for their perceived ties to the rebel forces.<sup>187</sup> Former child soldiers, denied an

---

commit atrocities against civilians, including amputations, rape, and murder. Human Rights Watch, *Stop the Use of Child Soldiers!*, at <http://www.hrw.org/campaigns/crp/index.htm> (last visited Dec. 1, 2003). In order to overcome their fear and resistance to fight, rebels forced children to ingest pure gunpowder, cocaine, and other drugs. *Id.* See also *CNN Presents: Return to Freetown* (CNN television broadcast, 2002). The filmmaker, Sourios Samura, interviewed Tamba and Sasko ten years after rebel forces abducted them from their families at ages eight and fifteen, respectively. *Id.* Tamba and Sasko described witnessing and participating in brutalities against innocent women and children. *Id.* While walking along a deserted battlefield, Tamba stopped at the place where he had participated in burning civilians alive. *Id.* When the filmmaker asked Tamba how he could have done such a horrendous act, the following exchange took place:

TAMBA: [The rebels] gave us gunpowder and we ate it. They put some medicine in it and that gave us the mind to be able to kill.

FILMMAKER: Didn't you feel bad?

TAMBA: No, because at the time the gunpowder was working on me.

FILMMAKER: Today you are here, you know that you burned some bodies here and you came back here today. Tell me, what does it look like Tamba?

TAMBA: May God forgive me.

*Id.*

<sup>183</sup> Human Rights Watch, *Stop the Use of Child Soldiers!*, at <http://www.hrw.org/campaigns/crp/index.htm> (last visited Dec. 1, 2003).

<sup>184</sup> Machel Report, *supra* note 54, § 34.

<sup>185</sup> *Id.* § 49.

<sup>186</sup> *Id.* § 52.

<sup>187</sup> *Id.*

education and the opportunity to learn civilian trades, are in tremendous need of assistance in gaining the skills necessary to reintegrate into peacetime society.<sup>188</sup>

In response to the recruitment of children in conflicts throughout the 1990s, human rights activists, child advocates, and international humanitarian organizations embarked on a massive campaign to combat the use of child soldiers under the age of eighteen.<sup>189</sup> Their advocacy culminated in the U.N. General Assembly's unanimous adoption of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.<sup>190</sup> Since its adoption in May 2000, more than one hundred nations have signed, and seventy nations have formally ratified the Protocol.<sup>191</sup> On December 23, 2002, the United States became the forty-fifth country to ratify the

---

<sup>188</sup> Human Rights Watch, *Stop the Use of Child Soldiers!*, at <http://www.hrw.org/campaigns/crp/index.htm> (last visited Dec. 1, 2003). See also Machel Report, *supra* note 54, para. 56 (stressing the importance of education in preparing former child soldiers to find employment, facilitating their acceptance at home, and providing them with a sense of meaning and identity).

<sup>189</sup> See Human Rights Watch, *The Child Soldiers Protocol*, available at <http://www.hrw.org/campaigns/crp/protocol.htm> (last visited Apr. 13, 2004). In 1998, six non-governmental organizations formed the Coalition to Stop the Use of Child Soldiers. Human Rights Watch, *Governments Urged to Stop the Use of Child Soldiers*, available at <http://www.hrw.org/press98/june/chil0701.htm> (last visited Apr. 13, 2004). Existing international standards allowed for the legal recruitment of children as young as fifteen, while defining a child as any person below the age of eighteen. *Id.* Among other goals, the Coalition sought to correct this inconsistency. *Id.*

<sup>190</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/RES/54/263, available at <http://www.unhchr.ch/html/menu2/6/protocolchild.htm> (last visited Apr. 13, 2004) [hereinafter *Child Soldiers Protocol*].

<sup>191</sup> See Coalition to Stop the Use of Child Soldiers website, at <http://www.child-soldiers.org> (providing updated information on the status of ratifications and signatures) (last visited Apr. 13, 2004). According to the Protocol, a country need only have signed the CRC to sign and ratify the Protocol. *Child Soldiers Protocol*, *supra* note 190, at art. 9.

## CHILD ASYLUM SEEKERS

839

Protocol.<sup>192</sup> The Child Soldiers Protocol establishes eighteen as the minimum age for forced recruitment and direct participation in hostilities.<sup>193</sup> While the Protocol does not speak directly to a state's obligations vis-à-vis refugees who are former child soldiers, it calls upon states to implement programs aimed at the "physical and psychosocial rehabilitation and social reintegration of children who are the victims of armed conflict."<sup>194</sup>

In Liberia and Sierra Leone, where children were abducted and forcibly conscripted on a massive scale, the UNHCR looked to the CRC and the Child Soldiers Protocol rather than to exclusion practice in developing its policies toward former child soldiers.<sup>195</sup> These policies recognize that forced conscription represents a serious violation of children's rights, and that children, due to their age, should not be held responsible as adult combatants.<sup>196</sup> For example, whereas adult former combatants may not seek asylum until they have been demobilized and placed under observation for a period of time in an internment camp, former child soldiers are not interned, live with other refugees in a refugee camp, and may apply for asylum.<sup>197</sup> The U.N.'s Machel study also emphasized that the use of child soldiers is a problem created by adults, which should be eradicated by adults.<sup>198</sup> In addition, the treaty

---

<sup>192</sup> Human Rights Watch, *Stop the Use of Child Soldiers!*, at <http://hrw.org/campaigns/crp/protocol.htm> (last visited Dec. 1, 2003).

<sup>193</sup> Child Soldiers Protocol, *supra* note 190, at art. 1. In addition to prohibiting states from recruiting children under the age of eighteen into their armed forces, states are also required to take "all feasible measures" to prevent nongovernmental armed groups, such as guerilla and rebel forces, from recruiting children. *Id.* art. 4(2). See Michael Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 A.J.I.L. 789, 793 (2000) (discussing the obligation on states parties to the Protocol to take "all feasible measures" to prevent the recruitment of children under the age of eighteen, including by the enactment of legislation to ensure that such recruitment is punishable as a criminal offense under their national law).

<sup>194</sup> Child Soldiers Protocol, *supra* note 190, at art. 6(3).

<sup>195</sup> Press Release, UNHCR, *Liberia's Child Soldiers Relive Lost Childhood in Sierra Leone* (Feb. 12, 2003) (on file with author).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Machel Report, *supra* note 54, at §§ 25 and 30.

establishing the International Criminal Court makes the recruitment of children under age fifteen a war crime.<sup>199</sup> Recognizing that child soldiers are victims first and foremost, the ICC statute shields children under the age of eighteen from prosecution.<sup>200</sup>

While there are important policy reasons for prohibiting individuals who voluntarily commit serious crimes from enjoying the benefits of asylum, these policies, which serve to prohibit former Nazis and other perpetrators of serious crimes from seeking refuge in this country, were not intended, nor should they be extended, to exclude children.<sup>201</sup> To apply the bar to former child soldiers like Bernard Lukwago would fly in the face of the positive work that U.S. policymakers and the international community have undertaken to address this pernicious form of child abuse.

#### CONCLUSION

The growing international consensus that child asylum seekers require special protections has important implications for U.S. asylum laws. Although the U.S. asylum system currently does not differentiate between adult and child applicants, the United States should build on recent proposals to afford greater procedural protections to child asylum seekers with substantive provisions that address the forms of persecution unique to children. With millions of children suffering from the consequences of armed conflicts around the world, the international community has a special legal and moral obligation to ensure that child asylum seekers receive adequate care and protection. As this record of violence makes clear, a world unwilling to protect children is one in which “children are slaughtered, raped, and maimed . . . exploited as soldiers . . . starved and exposed to extreme brutality.”<sup>202</sup> In short, it is a world devoid of the most basic of human values. The United States has an important role to play in ensuring that children who

---

<sup>199</sup> See ICC Statute, *supra* note 180.

<sup>200</sup> *Id.* art. 26.

<sup>201</sup> Nyinah, *supra* note 181, at 308.

<sup>202</sup> Machel Report, *supra* note 54, at § 3.

*CHILD ASYLUM SEEKERS*

841

escape such turmoil are properly protected.