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Daniela Ruiz-Ferreyra
ruizferr@seattleu.edu

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Stolen Childhoods: A Chance at Survival Through Asylum in the United States

Daniela Ruiz Ferreyra

I. INTRODUCTION

I interviewed a fifteen-year-old girl some years ago; I carry her story with me to this day.¹ For months, MS 13 gang members followed her to and from school, harassing her when she refused to join the gang. Then one day, they came to her house. She witnessed MS 13 kill her father in front of her eyes as retribution for refusing to join the gang. She would die if she stayed. That is the same truth that many children in Honduras, El Salvador, and Guatemala live with. They look to the United States as a beacon of freedom and a last opportunity to survive. The engraved poem on the Statute of Liberty, “[g]ive me your tired, your poor, your huddled masses yearning to breathe free,”² exclaimed to the world’s most vulnerable that the United States is a place of hope and safety. The United States promises freedom and equal access to the protection of the laws to any person within its jurisprudence.³

However, while the United States may appear to be a nation welcoming of immigrants, I argue that upon closer inspection the current immigration system hinders immigrants’ access to justice. The United States immigration system is particularly ill-suited to manage claims from unaccompanied children. An unaccompanied child (“UAC”) is a child under the age of 18 who has no lawful immigration status in the United States and has neither a parent nor a legal guardian in the United States who

¹ This account is from my work as an intern with ACAI, an implementing agency in Costa Rica for the United Nations High Commissioner for Refugees.

² EMMA LAZARUS, *THE NEW COLOSSUS* (1883) (Inscription on the Statute of Liberty).

³ U.S. CONST. amend. XIV, § 1.

is able to provide care and physical custody.⁴ The immigration system hinders UACs' access to justice because UACs have no legal right to counsel and because their asylum claims can go unheard or are decided arbitrarily.⁵

During 2014, over sixty thousand UACs crossed the border, revealing the United States Immigration System as largely inadequate and ill-prepared to accommodate immigration, asylum, and refugee claims by such an unprecedented quantity of UACs.⁶ In fact, President Obama declared a humanitarian crisis and issued an executive order so that all detainees would receive adequate assistance.⁷

I argue that the future of UACs in the United States is linked to the immigration system, and as such, it depends, unequivocally, on the public perception of the immigration system. To illustrate, the 2016 presidential election highlighted the divisiveness throughout the United States regarding

⁴ 6 U.S.C. §279(g)(2).

⁵ 8 U.S.C. §1362; *Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court*, AMERICAN IMMIGRATION COUNCIL (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/children_in_immigration_court_0.pdf [<https://perma.cc/4YL2-QJ5W>]; Litigation is pending on whether children in immigration proceedings should be guaranteed the right to an attorney. *F.L.B. v. Lynch*, No. C14-1026 TSZ, 2016 U.S. Dist. LEXIS 82653 (W.D. Wash. June 24, 2016) https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/flb_v_lynch_9th_circuit_opinion.pdf [<https://perma.cc/9KJ9-476Z>].

⁶ As many as 68,541 minors were apprehended during the 2014 fiscal year, in comparison to 24,403 during 2012 and 38,759 during 2013. United States Border Patrol, Southwest Border Apprehensions, Unaccompanied Children (FY12-16) (Sept. 14, 2016, 4:31 PM), <https://www.cbp.gov/sites/default/files/u6069/UAC%20August.jpg> [<https://perma.cc/ZPZ2-XTMA>] [hereinafter Southwest Border Apprehensions].

⁷ President Obama was forced to undertake executive action to remedy the situation nationally, as well as partner with Central America and Mexico to target the "root of the issue" through advertising and awareness campaigns about the dangers associated with migration. Press Release, The White House, Office of Press Secretary, Fact Sheet: Unaccompanied Children from Central America (June 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america> [<https://perma.cc/499U-96C4>].

immigration issues.⁸ Most voters think of immigrants as primarily economic migrants, rather than asylum seekers.⁹ And, although to some extent, a percentage of UACs are escaping violence and persecution from their countries of origin.¹⁰

I argue that while some UACs may have legitimate asylum claims, the United States is not required, under any international or national legal obligation, to grant UACs asylum due to generalized violence and persecution. Instead, UACs face an uphill battle to attain asylum status in the United States. First, they must establish an asylum claim even though they do not speak the language, have no access to counsel, and risk deportation.¹¹ Next, once UACs have successfully filed an asylum claim,

⁸ A very divisive campaign between Secretary of State Hillary Clinton and Donald Trump where one of the main issues was illegal immigration, and Trump's infamous wall. Katie Zezima and Matthew Callahan, *Donald Trump vs. Hillary Clinton on the issues*, WASHINGTON POST: POLITICS (Sept. 23, 2016), <https://www.washingtonpost.com/graphics/politics/political-issues/> (last visited on Apr. 3, 2017). [<https://perma.cc/W6DT-NR64>]

⁹ *Most Voters Want to Send Latest Illegal Immigrants Home ASAP*, RASMUSSEN REPORTS (July 17, 2014), http://www.rasmussenreports.com/public_content/politics/general_politics/july_2014/most_voters_want_to_send_latest_illegal_immigrants_home_asap [<https://perma.cc/32U8-4GBC>].

¹⁰ An economic migrant is a person moved exclusively by economic considerations; an economic migrant is not a refugee. Various UNHCR reports indicate that individuals from the Northern Triangle are fleeing due to startling degrees of violence, not primarily economic reasons. *Claims from Central America*, UNHCR, THE UN REFUGEE AGENCY (2017), <http://www.unhcr.org/en-us/claims-from-central-america.html> [<https://perma.cc/42AP-98Y7>]; UNHCR: THE UN REFUGEE AGENCY, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS: UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, (Dec. 2011), <http://www.unhcr.org/3d58e13b4.pdf> [hereinafter UNHCR Handbook]. [<https://perma.cc/P4X3-PBBU>].

¹¹ *Questions and Answers: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27I%20Ops/Asylum/ra-qanda-determine-jurisdiction-uac.pdf> [<https://perma.cc/UV9B-4LVR>] [hereinafter Questions and Answers]; David S. Cloud, *Minor Children Applying for Asylum by Themselves*, U.S. CITIZENSHIP AND

they must show that any claims of persecution are substantiated, and the claim must be found credible.¹²

Recent events regarding UACs shed light on the legal issue behind outcomes in asylum applications. The United States undertook obligations to welcome refugees and hear their claims when it chose to join the international refugee regime by ratifying the 1967 Protocol Relating to the Status of Refugees.¹³ While the United States has undertaken moral and national legal obligations to asylum seekers and refugees, I argue that it has failed in providing the necessary legal redress to UACs seeking asylum. Particularly, the United States has failed in meeting its obligations to UACs arriving in the United States from Honduras, Guatemala, and El Salvador (the Northern Triangle). Therefore, the current immigration system in the United States is ill-equipped to process and assess asylum claims by UACs because the United States has failed to adopt and apply the “best interests of the child” standard. And, the current immigration system fails to mitigate inconsistencies in asylum decisions due to confirmation and implicit biases, as well as the lack of *stare decisis* in immigration court decisions.

This article focuses on asylum claims made by UACs fleeing from the Northern Triangle in Central America. Particularly, this article addresses the effect that the complex immigration system, bias, and inconsistent asylum decisions have on asylum claims made by UACs. This article advocates for the creation of a new administrative agency to manage exclusively asylum claims. Also, this article calls for the United States to ratify the Convention on the Rights of the Child (“CRC”) and to apply the “best interests of the

IMMIGRATION SERVICES (2016), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> [https://perma.cc/6AZB-R3NB.]

¹² See Questions and Answers, *supra* note 11; See Cloud, *supra* note 11.

¹³ By ratifying the 1967 Protocol, the United States effectively joined the international regime dedicated to refugee protections. The United States ratified the 1967 Protocol on Nov. 01, 1968. Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

child” standard to asylum claims brought by all children.. By ratifying the Convention on the Rights of the Child, the United States ensures that children’s claims of persecution will not be minimized under a “generalized violence” category, and that they will be afforded all the rights and protections available to other asylum-seekers and refugees. Furthermore, it advocates for UACs to have equal protection under the laws and equal application of the law by ensuring access to representation. Ultimately, this article proposes ways in which the United States may live up to its reputation across the world as a nation built by, and welcoming of, immigrants. I further propose mechanisms to strengthen the United States’ perception as a nation that values democracy and as a nation that possesses an independent judiciary grounded on the principle of *stare decisis*.

The first section will discuss the relevant international treaties that the United States has ratified that are specific to asylum claims. The next section will address solutions to the existing problems of bias and an inadequate immigration system for UACs in the United States. The section will also discuss the Convention on the Rights of the Child and the ramifications that its adoption will have on the United States legal system, particularly on asylum claims. In this section, I explore three additional issues: a right to counsel, legal interpretation of current asylum law, and the doctrine of *stare decisis* in immigration adjudicative proceedings.

II. RELEVANT INTERNATIONAL OBLIGATIONS OWED TO REFUGEES

The United States is party to multiple international agreements and treaties regarding its obligations to refugees and asylum seekers under international law. Based on these international treaties, the United States is obligated to respect refugees and asylum-seekers in the United States and to ensure that they are given the opportunity make their claims.¹⁴

¹⁴ The 1951 Convention Relating to the Status of Refugees, the 1957 Hague Amendments to the Convention, and the 1967 Protocol Relating to the Status of Refugees impose on the United States the obligation to respect and adjudicate asylum claims.

The United States is a part of the following international instruments: the 1951 Geneva Convention Relating to the Status of Refugees (“the Convention”), the 1957 Hague amendments to the convention (“the 1957 Amendments”), and the 1967 Protocol Relating to the Status of Refugees (“the 1967 Protocol”).¹⁵ The United States joined the international refugee regime by ratifying the 1967 Protocol.¹⁶ Through ratification, the country bound itself to respect articles 2 through 34 of the Convention.¹⁷ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), to which the United States is a party, is also relevant in the adjudication of asylum claims.¹⁸ The United States is also a member of the Organization of American States, the UN regional body encompassing many of the fundamental values enumerated in the Convention.¹⁹

Convention Relating to the International Status of Refugees, art. 3, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

¹⁵ The United States ratified the 1967 Protocol on Nov. 01, 1968. Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; The Convention entered into force Apr. 22, 1958. 1951 Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150.

¹⁶ The United States ratified the 1967 Protocol on Nov. 01, 1968. 1967 Protocol, *supra* note 15.

¹⁷ The Convention entered into force Apr. 22, 1958. 1951 Convention, *supra* note 15.

¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was ratified in October 1994 and entered into force on November 20, 1994. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [Hereinafter CAT] (<http://www.state.gov/documents/organization/100296.pdf>). [<https://perma.cc/WW3W-S57G>].

¹⁹ While the United States is a member of the Organization of American States (OAS), it has not ratified the American Convention on Human Rights and is therefore not required to uphold the tenants of the international instrument. The OAS commission monitoring regional human rights concerns, Inter-American Commission on Human Rights, cannot require the United States to uphold tenants requiring the right to grant asylum and non-refoulement because the United States has not ratified the American Declaration of Human Rights and is therefore not under the jurisdiction of the Inter-American Court of Human Rights. American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143. (http://www.oas.org/dil/treaties_B-

Although customary international law does not recognize a right to asylum, it does establish a moral obligation to provide an opportunity for asylum.²⁰ Moreover, the United States Constitution grants treaties to which the United States is a party equivalent status to the supreme law of the land under Article IV (2).²¹ Thus, based on precedent, treaties that do not need congressional approval are directly applicable by the courts as United States law, known as self-executing treaties.²² In fact, the effect is that treaties have the status of enforceable federal law and will prevail over conflicting state laws, but not necessarily over conflicting federal law.²³

32_American_Convention_on_Human_Rights_sign.htm [<https://perma.cc/S4TG-BWF7>]; http://www.oas.org/en/member_states/default.asp) [hereinafter American Convention on Human Rights] [<https://perma.cc/YQH7-VYPC>].

²⁰ Interpretation of Article 14. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²¹ “The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. IV, § 2.

²² The doctrine of self-executing treaties is a judge-made doctrine. Self-executing treaties are treaties that may be applied directly in U.S. courts without need for implementing legislation by Congress. Courts look to what the intent of the government was when ratifying the treaty to determine if the treaty is the type that can be invoked as U.S. law without legislation by Congress. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 139 (2nd ed. 2008); LOUIS HENKIN, SARAH CLEVELAND, LAURENCE NEUMAN, DIAN ORENTLICHER, *HUMAN RIGHTS* 928-937 (2nd ed. 2009).

²³ See *Ware v. Hylton*, 3 U.S. 199 (1796) (where the Supreme Court ruled that a Virginia Statute was unconstitutional because it was in conflict with the Treaty of Paris of 1783); *Asakura v. Seattle*, 265 U.S. 332 (1924) (where a city ordinance was found unconstitutional because it violated a 1911 Treaty of Friendship, Commerce and Navigation between Japan and the United States); *Fujii v. California*, 242 P.2d 617, 621 (Cal. 1951) (the court held that a treaty lacking required legislative implementation does not prevail over conflicting state law, where a state law barring certain aliens from owning land was upheld against conflicting provisions of the U.N. Charter because such rules were not intended to become rules of this country upon ratification of the Charter.); See generally *Whitney v. Robertson*, 124 U.S. 190 (1888); *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988); *Breard v. Greene*, 523 U.S. 371 (1998) (treaties and federal law are equivalent in status, when both address the same issue courts will interpret each to avoid outright conflicts; however, when treaties and federal law conflict, the general rule is that the last in time prevails).

International tenets that the United States has adopted have a direct effect on the way in which asylum or refugee claims relating to UACs are adjudicated. Particularly, the United States uses tenets from the Convention and the 1967 Protocol to shape the domestic law that is applied to any asylum claim.²⁴ International tenets translated to domestic law specifically relating to asylum claims by UACs are the Refugee Act of 1980 and the Trafficking Victims Protection Reauthorization Act (TVPRA).²⁵

A. Convention and Protocol Relating to the Status of Refugees (1951)

The United States adopted and ratified the United Nations Convention Relating to the Status of Refugees (1951)²⁶ and the United Nations Protocol Relating to the Status of Refugees (1968).²⁷ The Convention defines a person qualifying for asylum as:

any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.²⁸

While the United States adopted these international treaties, that by itself does not immediately place obligations upon it.²⁹ As such, until the United

²⁴ See Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L LAW. 1 (1997).

²⁵ See Fitzpatrick, *supra* note 24 at 1; see William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 7101, 122 Stat. 5044 (2008).

²⁶ 1951 Convention, *supra* note 14, art. 1(A)(2).

²⁷ *Id.*; see 1967 Protocol, *supra* note 14.

²⁸ 1951 Convention, *supra* note 14, art. 1(A)(2).

²⁹ The doctrine of self-executing treaties is a judge made doctrine. Self-executing treaties are treaties that may be applied directly in U.S. courts without need for implementing legislation by Congress. Courts look to what the intent of the government was when ratifying the treaty to determine if the treaty is the type that can be invoked as U.S. law without legislation by Congress. See U.S. CONST. art. IV, § 2.; see *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 357 (1829).

States adopts international norms into its law through legislative action, it does not have an affirmative duty to grant asylum when it is sought.³⁰

Nonetheless, among some of the international law principles that the United States has adopted is the principle of non-refoulement.³¹ Non-refoulement is the fundamental cornerstone behind asylum and refugee protections under international law. This concept prevents a country from removing an individual seeking asylum and deporting such an individual back to their country of origin when fear of persecution exists.³² Non-refoulement requires the nation to provide temporary protection to an asylum-seeker. The policy behind non-refoulement is that if a person seeks protection from past persecution in their country of origin, he or she cannot be expected to maintain contact with individuals or with the country he or she is accusing of persecution.³³ Therefore, the country where asylum is being sought cannot contact the embassy or remove the individual to his or her country of origin because doing so is contrary to the policy behind offering international protections from persecution.³⁴

Similarly, under United States immigration law, an individual may not be removed to a country where his or her life or freedom would be threatened.³⁵ The United States requires a stay of removal proceedings for any person who would be persecuted in his or her country of origin.³⁶ The

³⁰ Granting asylum requires legislative approval, so it is not the type of self-executing treaty that can be immediately enforced by U.S. courts. *See Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 357 (1829).

³¹ 2001 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (Dec. 18, 2001). The Declaration was welcomed by the UN General Assembly. G.A. Res. 57/187.

³² *Note on Non-Refoulement (Submitted by the High Commissioner, THE UN REFUGEE AGENCY)* (Aug. 23, 1977), http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html#_ftnref1 [hereinafter *Note on Non-Refoulement*] [<https://perma.cc/BL7T-77GN>].

³³ *Id.*

³⁴ *Id.*

³⁵ 8 U.S.C. § 1231(b)(3); 1951 Convention, *supra* note 14, art. 33.

³⁶ *Id.*

principle of non-refoulement includes a duty to provide fair and efficient procedures to determine the validity of any asylum claim.³⁷ Therefore, while the contracting state has an obligation to provide the right to grant asylum, which entails the principle of non-refoulement and fair and efficient procedures for assessing asylum claims, the contracting states do not have an official obligation to provide asylum to refugees.³⁸ In fact, the contracting states can exercise discretion in determining their responsibilities to refugees.³⁹

For guidance in determining the basic principles the states must follow, the U.N. High Commissioner for Refugees (UNHCR) created and issued the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (the Handbook).⁴⁰ The Handbook characterizes adequate procedures for requesting asylum, such as those offering fair and efficient protection possibilities that are “both genuinely available” and effective to the individual concerned.⁴¹ The United States, as a contracting party, is expected to review the procedures in the Handbook and to comply with the basic principles outlined.⁴² The United States ideally would comply by applying the principles in practice while assessing asylum claims.⁴³

B. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)

The Convention Against Torture and other Cruel and Inhuman Punishment (CAT) outlines the United States’ non-refoulement obligation

³⁷ *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, UNHCR (May 31, 2001), <http://www.refworld.org/docid/3b36f2fca.html> [https://perma.cc/55YG-R36E].

³⁸ See 1951 Convention, *supra* note 14, art. 33.

³⁹ *Id.*

⁴⁰ See generally UNHCR Handbook, *supra* note 10.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

to asylum-seekers.⁴⁴ In 1994, the United States accepted the treaty's obligations with its ratification.⁴⁵ Article 3 of the CAT delineates the United States' non-refoulement obligation.⁴⁶ Under Article 3 of the CAT the signatory party acknowledges an obligation to not "expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁴⁷ Furthermore, Article 3 establishes that "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" to determine whether there are grounds for non-refoulement.⁴⁸ In its initial report submitted by the United States to the Committee Against Torture, the United States recognized its obligation not to expel, return, or extradite a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture.⁴⁹

The international non-refoulement provision of Article 3 is incorporated into United States jurisprudence through section 241(b)(3) of the Immigration and Nationality Act (INA).⁵⁰ Unlike the CAT non-refoulement

⁴⁴ See CAT, *supra* note 18, art. 3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ UN High Commissioner for Refugees, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNHCR (Feb 9, 2000), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2F28%2FAdd.5&Lang=en [hereinafter CAT Report] [<https://perma.cc/ZF4P-RGXU>].

⁵⁰ The Department of State and the Department of Justice are the agencies charged with Article 3 duties. The Immigration and Naturalization Service (INS), an agency within the Department of Justice, was responsible for ensuring compliance in the context of removal (formerly deportation or exclusion) of aliens illegally present in the United States until 2001. Now the U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP), handle the responsibilities of the INS under the Department of Homeland Security. Generally,

provision, under INA §241(b)(3), the United States does not have to consider the current state of human rights violations in the country of origin.⁵¹ While the CAT is narrower than the Article 33 provision in the Convention, it still provides more protections from refoulement to asylum-seekers than current national law.⁵²

National law fails to take into account “the risk of cruel, inhuman or degrading treatment,” focusing only on whether the person’s life would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵³ Moreover, in comparison to the Article 33 provision of the Convention and Article 3 of CAT, the national non-refoulement obligation does not mention whether the protection applies if the acts are inflicted with the “consent or acquiescence of a public official or other person acting in an official capacity.”⁵⁴ The national non-refoulement provision also does not mention whether there is a difference if the perpetrators are private parties.⁵⁵ Drawing a distinction on when non-refoulement protections apply based on the actor perpetrating the harm can limit protections available to asylum-seekers fleeing persecution or torture caused by parties not affiliated or sanctioned by the government, like criminal gangs or other non-state actors.⁵⁶ This is often the case with

expulsions and returns are governed by the substantive and procedural rules set forth in the Immigration and Nationality Act (INA). See CAT Report, *supra* note 49.

⁵¹ Aoife Duffy, *Expulsion to Face Torture? Nonrefoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 380 (2008).

⁵² *Id.* at 380.

⁵³ Duffy, *supra* note 51 (the CAT non-refoulement protections can be applied to anyone); CAT Report, *supra* note 49 (non-withholding removal procedures apply only to those that do not have a criminal conviction); see 1951 Convention, *supra* note 14, art. 33.

⁵⁴ *Id.*

⁵⁵ See CAT, *supra* note 18.

⁵⁶ Noting that while most agents of persecution are “authorities of a country,” “the refugee definition [recognizes] both State and non-State actors of persecution”. See UNHCR Handbook, *supra* note 10.

UACs fleeing widespread gang violence in the Northern Triangle.⁵⁷ Although UACs may be escaping conditions of torture or persecution, by definition, the non-refoulement protections may not apply because the torture or persecution is not being inflicted by a party non-affiliated with the government.⁵⁸

C. The United Nations High Commissioner for Refugees

The United Nations High Commissioner for Refugees (UNHCR) is a useful resource to contracting parties to the Convention, under which a party can find ways to comply with the Convention. In particular, under Article 35 of the Convention, as a contracting party, the United States can cooperate with the Office of the UNHCR to ensure that refugee and asylum provisions in United States law conform with the standards set out in the Convention.⁵⁹

However, requiring cooperation is not equivalent to creating authority. While the UNHCR has no enforcement authority over the contracting states, it can still provide recommendations, request information from contracting parties regarding the condition of refugees and asylum-seekers, and it can implement the 1951 provisions.⁶⁰ Thus, the UNHCR effectively has the power to act as moral authority and can use its “diplomatic and capacity-building skills to persuade states to recognize and fulfill their core legal

⁵⁷The governments in Honduras, Guatemala, and El Salvador do not sanction gang related deaths. So, gang-related violence, is in effect committed by non-state actors. See Robert Muggah, *It's official: San Salvador is the murder capital of the world*, LA TIMES, (Sept. 16, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0302-muggah-el-salvador-crime-20160302-story.html> [<https://perma.cc?LAL6-JCP6>].

⁵⁸ *Id.*

⁵⁹ The United Nations has requested that contracting parties cooperate with the UNHRC in implementing provisions from the Convention. See 1951 Convention, *supra* note 14, art. 35(1).

⁶⁰ *Id.* at art. 35(2).

obligations” under the Convention.⁶¹ Even if the UNHCR cannot exercise mandating authority over states, many times the moral authority exercised over contracting parties is enough to compel action.⁶² Specifically, when a majority of countries comply with the UNHCR recommendations, the non-complying countries may be pressured into compliance.⁶³ Therefore, the United States, as a contracting party, is bound by the UNHCR’s guidance with respect to the provisions in the Convention and its implementation in United States jurisprudence.⁶⁴

D. United States Immigration Law Overview

The influence of international law on United States national law is apparent through its adoption of international norms into domestic law. Specifically, the United States’ requirements to satisfy an asylum claim are the same as the requirements set out in the provisions of the 1951 Convention.⁶⁵ United States Citizenship and Immigration Services (USCIS) has jurisdiction over the initial adjudication of asylum applications filed by UACs.⁶⁶

In order for a UAC to qualify for asylum, the applicant must satisfy the Immigration and Nationality Act of 1942’s definition of a refugee,

⁶¹ ALEXANDER BETTS, ET AL., *THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): THE POLITICS & PRACTICE OF REFUGEE PROTECTION* 149 (Routledge, 2nd ed. 2012) (commenting on the UNHCR’s lack of enforcement authority).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 149; 1951 Convention, *supra* note 14, at art. 35(2).

⁶⁵ See INA §101(42)(a) (1952); see also 1951 Convention, *supra* note 14, at art. 1(A)(2).

⁶⁶ The Immigration and Naturalization Service (INS), a unit within the Department of Justice, had the responsibility of many aspects of government authority over immigration until the September 11, 2001 attacks. Questions and Answers, *supra* note 11; CASS, DIVER, BEERMAN, FREEMAN, *ADMINISTRATIVE LAW, CASES AND MATERIALS*, 264 (7TH ED. 2016).

irrespective of age.⁶⁷ To qualify, the foreign individual must satisfy four separate elements created by §101(42)(A). The term refugee means:

- (1) the applicant must have a “fear of persecution;
- (2) the fear must be “well-founded”;
- (3) the persecution feared must be “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and
- (4) the applicant must be unable or unwilling to return to his country of nationality because of persecution or his well-founded fear of future persecution.⁶⁸

Nevertheless, under United States law, asylum and refugee grants are discretionary, so meeting the criteria may not be enough or may not guarantee a formal grant of asylum.⁶⁹

Next, in every application the child must file his or her own claims and bears the burden of proving all four elements.⁷⁰ Under the TVPRA, USCIS has original jurisdiction over any asylum claims filed by UACs.⁷¹ Essentially, the TVPRA allows UACs the opportunity to have their claim heard before an asylum officer in a non-adversarial setting.⁷² The TVPRA allows UACs to have an affirmative interview with asylum officers, rather

⁶⁷ DEPARTMENT OF HOMELAND SECURITY: OBTAINING ASYLUM IN THE UNITED STATES, <https://www.uscis.gov/humanitarian/refugees- asylum/ asylum/obtaining-asylum-united-states> [<https://perma.cc/95KY-ZZ5Z>].

⁶⁸ INA §101(42)(a) (1952).

⁶⁹ See Jacob Oakes, Comment, *U.S. Immigration Policy: Enforcement & Deportation Trump Fair Hearings--Systematic Violations of International Non-Refoulement Obligations Regarding Refugees*, 41 N.C.J. INT'L L. & COM. REG. 833, 847. (2016).

⁷⁰ *Asylum Officer Basic Training Course Guidelines for Children's Asylum Claims*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2009), https://cliniclegal.org/sites/default/files/AOBTC_Lesson_29_Guidelines_for_Childrens_Asylum_Claims_0.pdf [<https://perma.cc/N66T-DGG7>] [hereinafter *Asylum Officer Basic Training Course Guidelines*].

⁷¹ TVPRA §235(d)(7) states that “an asylum officer . . . shall have initial jurisdiction over an asylum application filed by an unaccompanied alien child.” See TVPRA §235(d)(7); see Questions and Answers, *supra* note 11, at 1.

⁷² See Questions and Answers, *supra* note 11.

than with an immigration judge on first instance.⁷³ The child's testimony, along with other evidence, is analyzed to determine if the claims are credible.⁷⁴ The "best interest of the child" standard is not used to determine whether a valid legal claim for asylum exists.⁷⁵

Once UACs complete their interviews with their asylum officers, they may have to appear before a judge.⁷⁶ If a child receives a Notice of a Hearing they must appear before an immigration judge.⁷⁷ At this point in the process, to prevent removal to his or her country of origin, the UAC must prove to the court that more likely than not that there is a well-founded fear of future persecution based on the five protected grounds.⁷⁸

I argue that federal regulations can affect the interpretation of the asylum requirements. First, federal regulations stipulate that there is no well-founded fear where there is a safe, reasonable internal relocation alternative available. However, the requirement that children relocate can be avoided under the argument that it is never reasonable for a child to relocate on his or her own.⁷⁹ Courts have interpreted persecution to include "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom."⁸⁰ The threshold of harm is generally lower for children than it is for adults.⁸¹ The level of harm inflicted should

⁷³ *Id.*

⁷⁴ See *Asylum Officer Basic Training Course Guidelines*, *supra* note 70, at 34. See *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012).

⁷⁵ See *Asylum Officer Basic Training Course Guidelines*, *supra* note 70, at 8.

⁷⁶ *Id.*

⁷⁷ Questions and Answers, *supra* note 11.

⁷⁸ See Oakes, *supra* note 69, at 847.

⁷⁹ Julie Marzouk, *Ethical and Effective Representation of Unaccompanied Immigrant Minors in Domestic Violence-based Asylum Cases*, 22 CLINICAL L. REV. 395, 407 (2016).

⁸⁰ *Id.*

⁸¹ *Kholavskiy v. Mukasey*, 540 F.3d 555, 570 (7th Cir. 2008) ("We have stated that, in the adjudication of asylum claims, age 'may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution'") (quoting *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004)). See also *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007) ("[The I.J. did not take

be viewed from the perspective of a child.⁸² Second, once an applicant has shown past-persecution, there is a presumption of well-founded fear of future persecution.⁸³ As such, the next step is to prove a protected ground that initiated the persecution. The protected grounds can be actual or imputed.⁸⁴

Third, the UAC must show a nexus exists between the persecution and the protected ground.⁸⁵ He or she must show that the persecution occurred principally on account of a protected ground; there may be mixed motives, but the protected ground must constitute at least one central reason why the persecution ultimately occurred.⁸⁶

Fourth, UACs must show that the government of his or her country of nationality is unable and unwilling to control or prosecute their persecutors.⁸⁷ Also, because there is no derivative status for asylum among siblings, each child must individually present a theory of persecution to an immigration judge or officer, and each must individually articulate factual support for his or her legally sufficient theory of persecution.⁸⁸

Finally, many times, UACs must file asylum applications and satisfy the burden of proof on their own because, unlike the criminal system, the immigration system does not provide immigrants with legal representation

into consideration the age of the brothers in 1982. The legal error infected her conclusion that the brothers failed to meet their burden of proof as to whether they were subjected to past persecution”).

⁸² *Id.*

⁸³ *Kholyavskiy v. Mukasey*, 540 F.3d 555, 570 (7th Cir. 2008). (noting that minors are not required to show that relocation in their country of origin is available).

⁸⁴ A protected ground means showing a persecution or well-founded fear of persecution on account of race, gender, nationality, membership in a particular social group, or political opinion. See *Children's Asylum: Legal Theories and Volunteer Opportunities*, IMMIGRATION ADVOCATES NETWORK (Sept. 2016).

⁸⁵ INA §101(42)(a) (1952).

⁸⁶ *Kholyavskiy v. Mukasey*, 540 F.3d 555, 570 (7th Cir. 2008).

⁸⁷ *Marzouk*, *supra* note 79, at 416.

⁸⁸ *Id.* at 406.

at the expense of the government.⁸⁹ Immigrants are permitted to retain counsel, but only at their own expense.⁹⁰

In conclusion, the ill-equipped immigration system leads to severely unfair decisions. The lack of counsel and the United States' failure to adopt and apply the "best interests of the child" standard results in an asylum application process that re-victimizes UACs seeking legal status. Most minors who escape their homes in search of safety arrive to find a complex immigration system that is unable and unwilling to manage claims made by thousands of UACs each year. In addition, I argue that the United States processes UAC claims with bias derived from the current political atmosphere, unfriendly immigration laws, and the immigration crisis. I propose that children face greater obstacles in establishing the validity of their claims in comparison to adults because of their age, trauma, and unique experiences. I argue that children face greater difficulty in establishing asylum claims because they enter the country unaccompanied by responsible adults and often are left alone to defend themselves against experienced trial attorneys.

III. ADDRESSING BIAS IN THE INCONSISTENT APPLICATION OF §101(42)(A)

The current immigration system leads to inconsistent results regarding which claims are granted the opportunity to be adjudicated, which are found to be credible, and which are denied. This is a pervasive problem affecting UAC asylum claims because a minor should not be expected to represent themselves before an immigration judge and litigate against experienced attorneys.

⁸⁹ See generally Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

⁹⁰ See generally Renata Robertson, *The right to court appointed counsel in removal proceedings: An end to wrongful detention and deportation of U.S. citizens*, 15 SCHOLAR 567 (2013).

Moreover, the inconsistencies in asylum decisions can arise at the initial stage (when determining whether a specific UAC can apply for asylum), to the final stage (immigration court). For instance, UACs arriving at the border from Latin American countries have been denied the ability to make any asylum claim, contrary to international and national law.⁹¹ Specifically, a report by the American Immigration Council (AIC) revealed that UACs were told that “the United States doesn’t do asylum,” “it is not doing asylum today,” or that “the United States doesn’t give Mexicans [sic] asylum.”⁹² Implicit and confirmation bias evidenced through these type of interactions creates an environment where Customs and Border Protection Agents (“CBP Agents”) may negligently fail to detect and report otherwise viable claims for asylum.⁹³

Interactions between CBP Agents and UACs from the Northern Triangle reveals that bias is deeply entrenched in the immigration system, making the immigration system considerably ill-suited to process and accommodate claims made by minors.⁹⁴ UACs oftentimes receive inadequate treatment

⁹¹ Denying asylum to any individual requesting it is contrary to the Article 33 provisions of the Convention and Article 3 of CAT. See CAT, *supra* note 18, at art. 3; 1951 Convention, *supra* note 14, at art. 33.

⁹² See Sara Campos, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, AMERICAN IMMIGRATION COUNCIL (May 21, 2014), <https://www.americanimmigrationcouncil.org/research/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context> [https://perma.cc/U9UA-ALAF].

⁹³ See generally *American Exile: Rapid Deportations that Bypass the Courtroom*, AMERICAN CIVIL LIBERTIES UNION, (Dec. 2014), https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval_0.pdf. [https://perma.cc/P4W9-RZT6] [hereinafter ACLU Report]. See *You Don't Have Rights Here: US Border Screening and Returns of Central Americans to Risk of Serious Harm*, HUMAN RIGHTS WATCH (Oct. 16, 2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk> [https://perma.cc/2LQD-QZ6D] [hereinafter *You don't have rights here*]; Campos, *supra* note 92.

⁹⁴ See *US: Surge in Detention of Child Migrants*, HUMAN RIGHTS WATCH (June 25, 2014), <https://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants> [https://perma.cc/2NXN-JY65] [hereinafter *Surge in Detention of Child Migrants*]; See *You don't have rights here*, *supra* note 93; Campos, *supra* note 92.

that further victimizes them.⁹⁵ Upon detention, they are processed by CBP Agents who are not equipped to interact with victims of trauma, trafficking, or abuse.⁹⁶ Later in the process, unaccompanied children are not guaranteed the right to an attorney and face litigating before Immigration Court *pro se*.⁹⁷

Next, unable to navigate the immigration system independently and, oftentimes, unable to articulate the human rights abuses they have suffered in their country of origin, leaves UACs one recourse: asylum. However, the narrow interpretation of the asylum law requirements is legally challenging and logistically daunting for children with no legal experience nor representation.⁹⁸

Lastly, another factor affecting UAC claims for asylum is the lack of consistency and uniformity in adjudication decisions.⁹⁹ While the inconsistencies in case decisions may not be due to bias *per se*, I propose that inconsistencies in how courts decide cases indirectly affects and reinforces how UACs receive the immigration statuses and legal remedies they need.

Therefore, the current immigration system infrastructure is ill-suited to assess the claims of unaccompanied children because it is overburdened, inefficient, and it limits the amount of legal remedies available to children.

⁹⁵ See generally ACLU Report, *supra* note 93; *You don't have rights here*, *supra* note 93; Campos, *supra* note 92.

⁹⁶ *Id.*

⁹⁷ 8 U.S.C. §1232(c)(5) (2018), (“The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge”).

⁹⁸ Marzouk, *supra* note 79, at 406.

⁹⁹ See generally *Refugee Roulette*, *supra* note 89.

Immigration law also places the burden of proof on children who are unexperienced in the law and puts children in a position where they cannot address the procedural requirements required for a successful asylum claim.

A. Ratifying the Convention on the Rights of the Child

1. The Convention on the Rights of the Child

The United States of America is the only country that has not ratified the Convention on the Rights of the Child (CRC).¹⁰⁰ Generally, the CRC establishes the civil, political, economic, social, and cultural rights of every child.¹⁰¹ It provides that every child has the right to have their voice heard, as well as the rights to legal protections, survival, and education.¹⁰² The key component of the Convention on the Rights of the Child is that it proposes using the “best interests of the child” as a standard against which governments can measure initiatives and regulations to ensure that every child reaches his or her full potential. This standard also ensures that each child has their basic needs are met.¹⁰³ While the United States already has programs that provide multiple protections to children, it does not use the “best interests of the child” standard in asylum determinations.¹⁰⁴ Policy advocates and law-makers should adopt the “best interests of the child” standard as the primary consideration when making decisions that affect children.

A criticism of the “best interests of the child” standard may be that it would make asylum requirements more lenient. This claim is not the case, however, because children already face a higher burden of proof in establishing their asylum claims than adults due to their age, trauma, lack of

¹⁰⁰ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org> (last visited Apr. 12, 2017) [<https://perma.cc/3PGE-AP5Q>].

¹⁰¹ See *generally* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child].

¹⁰² *Id.*

¹⁰³ *Id.* at art. 3.

¹⁰⁴ See *Asylum Officer Basic Training Course Guidelines*, *supra* note 70.

trust, or fear of re-victimization.¹⁰⁵ Additionally, ratifying the Convention on the Rights of the Child would provide children in detention centers the fundamental human right to legal representation. Lastly, ratifying the Convention on the Rights of the Child would bring the United States up to the same standards as the rest of the world, reaffirming the United States' commitment to being a leader in human rights protections.

2. Effect of Ratifying the Convention on the Rights of the Child

United States immigration law systematically ignores the plight of children affected by violence in their country of origin and at risk of torture or death upon returning to that country. During immigration proceedings, United States immigration laws fail to protect child asylum applicants because they continue to assess children's claims for asylum using a legal standard created for adults.¹⁰⁶

Unlike adults, children are subject to a different array of human rights violations and can be persecuted for a plethora of other reasons. For example, in the Northern Triangle, children are subject to persecution exclusively because of their age, while adults face no such violence.¹⁰⁷ Children are systematically targeted by two gangs, the Mara Salvatrucha and MS 18.¹⁰⁸ The gangs threaten children with death, harm to their families, and violence in general if they do not join the gang.¹⁰⁹ Gang violence in the Northern Triangle is so pervasive that children who refuse to

¹⁰⁵ UNHCR Handbook, *supra* note 10, at 169.

¹⁰⁶ Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 133 (2006), <http://lawdigitalcommons.bc.edu/twlj/vol26/iss1/9> [<https://perma.cc/78J7-43VJ>].

¹⁰⁷ Generally, this information is derived from my experience interviewing over 100 individuals who escaped gang violence in the Northern Triangle. A consultant for the United Nations High Commissioner for Refugees has also collected over 600 individuals in the Northern Triangle. Elizabeth Kennedy, *Interviews/entrevistas*, WORDPRESS (2016), <https://elizabethkennedy.com/interviewsentrevistas> [<https://perma.cc/3W2M-MZXY>].

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

join the gang must drop out of school, remain hidden within their homes, or ultimately leave the country to avoid being victimized.¹¹⁰

Nonetheless, the United States Refugee Act of 1980 makes no distinction between claims by adults and those by children.¹¹¹ I argue that because children are subject to different types of abuses, the standard used to prove such abuses should be different from that currently in place. The best way to remedy the systemic and procedural failures of the United States immigration system is to require the United States to ratify the Convention on the Rights of the Child.

Currently, despite undergoing substantially different traumatic experiences and difficulties, asylum law gives no consideration to a child's unique position in satisfying the same legal requirements as an adult.¹¹² The age of the child should be a determinant factor in asylum cases. Children, particularly those who have been victims of violence, cannot provide adult-like accounts of their experiences due to fear, trauma, or stage of development.¹¹³ Young children, in particular, may not be able to discern which information is important to their case and which is not; moreover, they may not be able to convey relevant information to adults questioning them.¹¹⁴ In addition, children may not be able to meet the evidentiary requirements to establish the elements of asylum due to mental and emotional vulnerability and fear.¹¹⁵ I propose that the only way to remedy the unique procedural challenges children face is by ratifying the Convention on the Rights of the Child.

Ratification of the Convention on the Rights of the Child will ensure that children are not deported back to dangerous conditions in their country of

¹¹⁰ *Id.*

¹¹¹ Olga Byrne, *Unaccompanied Children in the United States: A Literature Review*, 14, VERA INSTITUTE OF JUSTICE (2008).

¹¹² Dalrymple, *supra* note 106 at 139.

¹¹³ UNHCR Handbook, *supra* note 10, at 169, paragraph 72.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

origin. The Convention on the Rights of Child (“CRC”) is an international treaty that imposes upon member States the responsibility to ensure that all children are guaranteed basic human rights.¹¹⁶ Among the human rights advocated for are the right to education, and benefiting from special protection measures and legal assistance.¹¹⁷ Particularly, Article 3 of the CRC requires that the “best interests of the child” be the primary consideration in all actions concerning children undertaken by courts of law, administrative authorities, or legislative bodies.¹¹⁸ The Convention on the Rights of the Child would supplement the international obligations in place set by other treaties the United States has entered into.

Furthermore, Article 22 of the CRC requires member states to provide children seeking refugee status “appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international and human rights or humanitarian instruments to which the States are Parties.”¹¹⁹ In addition to the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol and the Convention Against Torture, the Convention on the Rights of the Child would create a higher standard of protections for children in the United States.¹²⁰

Through the Convention on the Rights of the Child, the United States shall have to make the best interests of the child a primary consideration in all legal proceedings involving children.¹²¹ The “best interests of the child” standard will provide a better standard to be used in court proceedings in which a child is a named party.¹²² Following my solution, the United States

¹¹⁶ See Convention on the Rights of the Child, *supra* note 101.

¹¹⁷ See *Id.*; *Convention on Rights of the Child – Frequently Asked Questions*, UNICEF (last visited Apr. 12, 2017) [<https://perma.cc/UV66-HQWL>].

¹¹⁸ Convention on the Rights of the Child, *supra* note 101, art. 3.

¹¹⁹ *Id.* at art. 22.

¹²⁰ *A Guide to Children Arriving at the Border: Laws, Policies, and Response*, AMERICAN IMMIGRATION COUNCIL (June 26, 2015) [<https://perma.cc/5B6J-5VFE>].

¹²¹ Convention on the Rights of the Child, *supra* note 101, art. 3.

¹²² Dalrymple, *supra* note 106, at 139.

would have to resolve asylum claims under the “best interests of the child” standard. For instance, under the “best interests of the child” standard, the United States immigration system would be required to handle asylum claims by children differently and separately from those from adults. It would have to guarantee counsel, interpret and apply asylum law under a best interest of the child lens, and require *stare decisis* in immigration court decisions involving child-applicants.

B. Changes to the United States Customs and Border Protection Agency

Implementing a change to the Border Patrol Manual requiring cultural competency training will address the presence of confirmation and implicit bias in asylum claims made by unaccompanied children from the Northern Triangle. Additional changes should apply the “best interests of the child” standard to the apprehension and detention process. This bias is exemplified through the arbitrary treatment UACs from Latin America experience at the border and through differences in adjudication of their claims.¹²³ Thus, to directly address the bias in the arbitrary application of §101(42)(A), the federal government must create a new agency to manage asylum claims exclusively, from the first step in the process to the final adjudicative hearing.

First, to eliminate bias at the beginning of any asylum proceeding, the actors in the first stage of contact with unaccompanied minors must be able to conduct their jobs free from bias. The current immigration system is plagued with stories of Customs and Border Protection agents committing egregious human rights abuses towards migrants, particularly unaccompanied children detained at the U.S.-Mexico border.¹²⁴ The only way to address the fractured immigration system is to implement systemic

¹²³ See generally *Refugee Roulette*, *supra* note 89; ACLU Report, *supra* note 93; *You don't have rights here*, *supra* note 93; Campos, *supra* note 93.

¹²⁴ See generally ACLU Report, *supra* note 93; *You Don't Have Rights Here*, *supra* note 93; Campos, *supra* note 92.

change to the apprehension and detention procedures. For instance, the U.S. Customs and Border Control Inspector's Field Manual must be updated to include sanctions for conduct that does not comply with the standard set for handling apprehensions at the border. Sanctions could include reassignment, suspension, or dismissal, depending on the gravity of the conduct. Additionally, Customs and Border Protection Officers must be required to satisfactorily complete psychological and cultural competency trainings. The trainings should be educational in nature, and the focus should be around self-awareness and they should provide a toolkit for addressing, diffusing, and eliminating personal biases from a professional setting.

The Immigration and Nationality Act codifies the Custom and Border Protection officer duties when detaining individuals in the Inspector's Field Manual.¹²⁵ Their duties include: creating a factual record of the detention; recording detainees' statements; reading detainees their rights; and reading the charges against detainees.¹²⁶ The officer must also provide access to an interpreter if needed for effective communication purposes.¹²⁷ The officer must then conduct an interview in which they ask if the detainee has any fear of returning to his or her home country or if he or she will be harmed upon return.¹²⁸ The issue is that officers do not consistently or routinely follow the code of conduct outlined in the manual for apprehensions.¹²⁹

In order to avoid systemic violations and eliminate abuses of power, the Inspector's Field Manual should be updated to require sanctions for failure

¹²⁵ See 8 C.F.R. § 235.3 (2017); *Inspector's Field Manual*, U.S. CUSTOMS AND BORDER PATROL, 17 (2006), <http://bit.ly/1zhH7c4> [<https://perma.cc/4R7X-5A9M>] [hereinafter *Inspector's Field Manual*].

¹²⁶ *Inspector's Field Manual*, *supra* note 125.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ U.S. COMM'N ON INT'L & RELIGIOUS FREEDOM, EXECUTIVE SUMMARY, STUDY: ASYLUM SEEKERS IN EXPEDITED REMOVAL 3 (2005), http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/execsum.pdf [<https://perma.cc/AL4X-6NHB>].

to comply with these duties. For each violation, an officer should be subject to disciplinary action. Once an officer has two disciplinary actions on record, the employee should be suspended without pay for a period proportionate to the violation. If an officer has three disciplinary actions on file, the officer should be subject to dismissal.

Next, to ensure that officers' actions during apprehensions are not biased or prejudiced toward a particular ethnic group, officers should be required to satisfactorily complete cultural competency and psychological trainings.

While many migrants apprehended at the border are adults or economic migrants, some are fleeing persecution and may be as young as twelve years old.¹³⁰ Children experience traumatic situations differently than adults;¹³¹ thus, they require more specialized treatment during apprehension. Training officers to approach and converse with children that have survived violence, torture, or trauma will enable officers to empathize with unaccompanied minors who are escaping persecution. Additional trainings will also reduce instances of implicit or confirmation biases, which can cause officers to assume all UACs are economic migrants. Furthermore, cultural competency training will allow officers to have more effective interactions with individuals detained at the border because the officers will be able to conduct apprehensions in a less adversarial and confrontational manner. This would make unaccompanied minors who have experienced persecution more willing to share their fears of potential harm upon return to their countries of origin.

Finally, employing the "best interests of the child" standard to the apprehension and detention process requires creating a separate independent agency to process and assess the validity of asylum claims made by UACs

¹³⁰ *Yearbook of Immigration Statistics*, DEP'T OF HOMELAND SECURITY 3 (Dec. 15, 2016), <https://www.dhs.gov/immigration-statistics/yearbook> [<https://perma.cc/9G7M-KC9Q>] [hereinafter *Yearbook of Immigration Statistics*].

¹³¹ UNHCR Handbook, *supra* note 10, at 169, paragraph 72.

exclusively. Customs and Border Protection officers are the wrong agency to screen children for signs of abuse, particularly after being involved in their apprehension.

The Department of Homeland Security will implement the new agency, and the new agency will focus solely on assessing claims for asylum, vetting the applicants, and determining credibility for asylum. The “best interests of the child” standard enforces the children’s fundamental rights designated in the Convention of the Rights of the Child.¹³² The only way to respect and ensure the child’s rights is through the creation of an agency dedicated solely to assessing the claims of the nearly 46,000 unaccompanied children apprehended yearly.¹³³ The proposed agency will address the issue of implicit and confirmation biases by preventing bias from emerging in asylum proceedings in the first place. The agency structure will prevent CBP Agents from processing children they detained. Insulating children from processing by the CBP Agents who detained them will protect their claims from being adjudicated on any grounds beyond merit, such as country of origin. Additionally, having an independent agency process minors and assess their asylum claims provides judges an independent report and recommendation to consider when determining the validity of any one claim.

Professional personnel will serve in various capacities in the agency to address asylum claims made exclusively by UACs. An attorney would act as director of the agency. Attorneys, asylum officers, psychologists, and administrative support personnel would make up the staff. Attorneys and

¹³² Some fundamental rights involved include protection against all forms of discrimination; protection in the court system; survival and development of the child; protection from all forms of physical or mental violence; freedom from torture or other cruel, inhuman or degrading treatment or punishment; etc. *See generally* Convention on the Rights of the Child, *supra* note 101.

¹³³ *U.S. Border Patrol Southwest Border Apprehensions by Sector FY 2018: Unaccompanied Alien Children Apprehensions by Country*, U.S. CUSTOMS AND BORDER PROT. (March 8, 2017), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions#> [<https://perma.cc/7ZG4-QAVY>].

asylum officers will handle the processing, screening, and interviews of all unaccompanied children detained to determine what relief, if any, is available to them based on U.S. immigration law. Attorneys will also assess the validity of any asylum claims made by child detainees using country reports, government actions, violence statistics, and United Nations publications. The attorney will draft a memorandum on whether there is a credible fear of persecution and file the memo with the immigration judge who will hear each case. Psychologists will work with children who are detained to determine if they have been abused or are victims of persecution.

The staff of the agency would have the experience and training necessary to evaluate the claims made by these children. If a child does not present a credible fear of persecution and no other relief is available to the child, their cases will be handed to Customs and Border Protection to commence deportation proceedings. However, if a child has a credible fear of persecution, staff psychologists will work with the child so that he or she may engage in open discourse about his or her experiences and be able to more accurately articulate why her or she left his or her country of origin. In this way, the agency will focus on providing a level of assistance to children with credible fears of persecution that satisfies international obligations the United States has towards asylum and refugee claimants and prevents re-victimization of children. As a result, the agency will be helpful in providing an additional unbiased legal opinion of a child's claim for asylum.

Furthermore, an additional agency dedicated to processing unaccompanied minors and handling their asylum claims will help create a more efficient immigration system. If claims made by UACs were exclusively reviewed by an independent agency, it would remove approximately 40,000 individuals per year from the processing and detainment process that Customs and Border Patrol Agents typically handle. By removing a vast number of individuals from Custom and Border

Protection, officers will be able to spend more time patrolling the border or engaging in other responsibilities. The immigration court system will also benefit from the creation of another agency because the additional level of screening conducted by attorneys will adequately place children in the immigration category that best fits their situation, thus ultimately decreasing the over-burdened dockets in immigration court.

The agency will receive funds allocated towards Customs and Border Protection and from the United States federal government. The agency also has the option of receiving funds from the United Nations High Commissioner for Refugees (UNHCR) if the agency acts as an implementing agency for the UNHCR.¹³⁴

Currently, a similar agency exists in San Jose, Costa Rica.¹³⁵ The agency manages claims by migrants from all over the world asking for refugee status in Costa Rica; attorneys there conduct preliminary interviews to determine whether the applicant qualifies for refugee status and then make a recommendation to immigration officers.¹³⁶ The agency in Costa Rica acts as a non-governmental organization with no binding authority on the immigration system. However, if the proposed agency created in the United States were to be implemented by the Department of Homeland Security it would be bound to act in accordance with U.S. law and its intelligible principle.¹³⁷

¹³⁴ UNHCR/ACNUR, <http://www.acnur.org/donde-trabaja/america/costa-rica/> (last visited Apr. 12, 2017) [<https://perma.cc/PA5C-RWRW>].

¹³⁵ *Mission Statement*, ASOCIACION DE CONSULTORES Y ASESORES INTERNACIONALES (2016), <http://www.acai.cr/sitioweb/sites/default/files/publicaciones/ResenaACAI.pdf> [<https://perma.cc/3WZ8-S7GE>].

¹³⁶ *Id.*

¹³⁷ The agency could be created by the Department of Homeland Security with an intelligible principle to manage claims by unaccompanied children under United States law. For a discussion on intelligible principles, see RONALD A CASS ET AL., ADMIN. LAW, CASES AND MATERIALS 264 (7TH ED. 2016).

C. Right to Counsel

The current apprehension, detention, and interrogation process, from the initial interview to adjudication in court, is not designed to manage claims by children litigating pro-se. In immigration proceedings, children do not have the right to a court appointed attorney.¹³⁸ Children with no legal background or experience cannot be expected to litigate pro-se in adversarial immigration settings. They may be unable to establish the elements required under the asylum statute or articulate belonging to one of the five protected categories as is required under the law, depriving them of legal redress.¹³⁹ Another issue is that children litigating pro-se may not be able to meet the evidentiary requirements necessary to establish the elements of asylum due to their young age, mental and emotional vulnerability, and fear.¹⁴⁰ Children, particularly those who have been victims of violence, cannot provide adult-like accounts of their experiences due to fear, trauma, or their stage of development.¹⁴¹ Young children in particular may not be able to discern information that is important to their case and what is not, which affects the testimony they may offer at an interview.¹⁴²

¹³⁸ 8 U.S.C. §1362; Fernanda Santos, *It's Children Against Federal Lawyers in Immigration Court*, NEW YORK TIMES, (Aug. 20, 2016), (...aliens in civil administrative removal proceedings have the privilege of being represented by retained counsel, but do not possess either a constitutional or statutory right to appointed counsel at taxpayer expense); Ahilan Arulanantham, *Immigrant Children Do Not Have the Right to an Attorney Unless They Can Pay, Rules Appeals Court*, ACLU (Feb. 6, 2018); *Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court*, AMERICAN IMMIGRATION COUNCIL (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/children_in_immigration_court_0.pdf [<https://perma.cc/95R6-P663>]; (most children are placed in deportation proceedings before an immigration judge, where they will carry the legal burden of proving that they should be allowed to remain in the United States. The government does not guarantee them the right to a lawyer, even if they are alone (i.e., without a parent) and/or unable to hire one. As a result, many children must navigate the complicated immigration system without legal representation).

¹³⁹ Marzouk, *supra* note 79, at 411.

¹⁴⁰ UNHCR Handbook, *supra* note 10, at 169.

¹⁴¹ *Id.*

¹⁴² *Id.*

In contrast, applying the “best interests of the child” standard would require that children have legal representation. Particularly based on Article 12(2) of the Convention for the Rights of the Child, “for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”¹⁴³ Implementing the best interests of the child standard in immigration proceedings requires a shift in the immigration system from largely focusing on enforcement measures to focusing on humanitarian measures.¹⁴⁴

The “best interests of the child” standard is not a foreign concept to the United States, as the United States has used it in other proceedings involving children. In fact, it is the principle doctrine in family law.¹⁴⁵ The court defers to a “best interests of the child” standard for custody disputes, divorce and adoption proceedings, and in parental termination hearings.¹⁴⁶ There is the presumption that “absent a finding of abuse or neglect, parents act in the best interests of their children.”¹⁴⁷ While criticism regarding the “best interests of the child” standard is that it is arbitrary, vague, and overreaching, the court weighs the factors in the child’s life to determine which set of parents or circumstances the child would be better off living with.¹⁴⁸ Therefore, the “best interests of the child” standard, as used today in family law, accurately represents the “best interests of the child” standard envisioned by the Convention of the Rights of the Child, where children’s

¹⁴³ Convention on the Rights of the Child, *supra* note 101, art. 12.

¹⁴⁴ *A Guide to Children Arriving at the Border: Laws, Policies, and Responses*, AMERICAN IMMIGRATION COUNCIL (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [<https://perma.cc/85VS-QR9C>].

¹⁴⁵ Dalrymple, *supra* note 106, at 142.

¹⁴⁶ *Id.* at 143.

¹⁴⁷ *Id.* at 143-44.

¹⁴⁸ *Id.* at 145.

rights are fundamental rights and, as such, children's voices should be heard and their interests accurately represented.¹⁴⁹

Requiring a right to counsel for unaccompanied children would eliminate bias from the trial stage of the asylum process because children would be able to adequately present claims for asylum. Therefore, judges would be able to determine asylum status based on the factual merits of the case when both parties, the United States and the child, are represented by legal counsel. Furthermore, it would create a hearing that is more traditional in nature, where both parties are represented by legal counsel, rather than one where the child is merely questioned by the Department of Homeland Security and by the judge. An attorney would act as a barrier between the child, who may not be able to articulate his or her fears of persecution, and the Department of Homeland Security. Thus, children with credible fears of persecution will have a fair chance at having their case for asylum heard through a traditional adversarial system.

The right to counsel will be implemented simultaneously as the United States ratifies the Convention for the Rights of the Child. The United States Congress may oppose guaranteeing a right to counsel for unaccompanied children because the United States would enter into international obligations that require it to provide counsel to children who are non-citizens. While Congress will likely object to using taxpayer money to fund attorneys for unaccompanied children, the additional cost of providing counsel for unaccompanied minors will likely be offset by a more effective immigration system with an additional level of screening to determine which children will be attending a hearing for asylum at an earlier stage.

Moreover, there are various means through which to ensure legal representation to unaccompanied children, such as through incentivizing serving as a pro-bono attorney. Attorneys who represent unaccompanied

¹⁴⁹ See Convention on the Rights of the Child, *supra* note 101.

minors could be granted pro-bono hours or Continuing Legal Education Credits for their work.

The creation of an independent agency with the sole mission of vetting asylum claims will create a more efficient immigration system where claims are finalized faster. Also, having a specialized agency with an intelligible principle of determining the validity of asylum claims will streamline the system because claims without legal redress available will be transferred to Customs and Border Protection for deportation earlier in the process. Additionally, Customs and Border Protection officers would not have to conduct interviews or vet the asylum claims, giving them more time to work on improving border security.

As shown above, ensuring the right to counsel for unaccompanied minors guarantees that their fundamental right to be heard in a court of law and adequately represented under the Convention of the Rights of the Child will be upheld.

1. Local and National response systems already in place

Washington State is leading the fight to ensure that undocumented immigrants in general have access to legal representation. Seattle will soon create a legal defense fund for immigrants facing deportation.¹⁵⁰ Seattle plans to fund the legal defense fund by providing local organizations already advocating for immigrant rights with a \$1 million-dollar fund.¹⁵¹ The money would come from the city's general fund.¹⁵² The fund will function similar to the legal defense funds already in place in major cities like Los Angeles, San Francisco, and New York.¹⁵³

¹⁵⁰ David Beekman, *Seattle wants \$1M legal-defense fund for immigrants facing deportation*, SEATTLE TIMES (Mar. 30, 2017, 12:56 PM), <http://www.seattletimes.com/seattle-news/politics/seattle-wants-1m-legal-defense-fund-for-immigrants-facing-deportation> [https://perma.cc/T65J-72A8].

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Octavio Blanco, *New York to provide lawyers for immigrants facing deportation*, CNN (Apr. 13, 2017), <http://money.cnn.com/2017/04/13/news/economy/new-york->

Furthermore, the American Bar Association is also at the forefront of ensuring that unaccompanied children have access to representation.¹⁵⁴ The American Bar Association created the Working Group on Unaccompanied Minor Immigrants with the goal to find as much pro bono legal representation for as many children as possible.¹⁵⁵ However, the thousands of unaccompanied children entering our country every day create an ever-growing burden on attorneys available for this work.¹⁵⁶

D. Legal Interpretation of §101(42)(A) is too Narrow

Current immigration law poses various legal challenges to unaccompanied children seeking to acquire lawful status in the United States, particularly for children seeking asylum status. The narrow interpretation of asylum law requirements, qualifying into one of the five protected grounds for asylum, is legally challenging and logistically daunting.¹⁵⁷ While UACs from the Northern Triangle generally may seek asylum under two grounds, belonging to a particularized social group or political opinion, the courts' limited interpretation of these two protected grounds may leave children with viable asylum claims without redress. For instance, under the membership in a particularized social group category,

immigrant-legal-defense-fund/ [https://perma.cc/28BN-7DZE]; Doreen McCallister, *LA Legal Defense Fund Created to Aid Immigrants Facing Deportation*, NPR (Dec. 20, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/20/506256417/la-legal-defense-fund-created-to-aid-immigrants-facing-deportation> [https://perma.cc/UJ4C-KJP9]; SFILDC, <http://sfildc.org> (last visited April 13, 2017) [https://perma.cc/34T8-HQCG].

¹⁵⁴ AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/probono_public_service/projects_awards/unaccompanied_minors/working_group.html (last visited Apr. 13, 2017) [https://perma.cc/9PCD-CQNQ].

¹⁵⁵ *Id.*

¹⁵⁶ The number of unaccompanied children coming to the US has started to increase once more. *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION (October 18, 2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [https://perma.cc/9DD9-FDPK].

¹⁵⁷ Marzouk, *supra* note 79, at 406.

children must prove that the group is “1) composed of members who share a common immutable characteristic, 2) defined with particularity, and 3) socially distinct within the society in question.”¹⁵⁸ Children representing themselves pro-se may be unable to establish the requirements or fail to frame the group as required under the law, depriving them of legal redress.¹⁵⁹

Another issue is the narrow interpretation of the asylum statute: “any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁶⁰ Unaccompanied children from Honduras, Guatemala, or El Salvador seeking asylum are likely escaping from gang related violence.¹⁶¹ Either they or their families are being targeted or threatened by gang members, or are escaping forced recruitment.¹⁶² For example, MS 18 and Mara Salvatrucha, the major gangs in the Northern Triangle, target teenage children, and threaten to harm their families or kill them if they do not join the gang.¹⁶³ The children, seeing no other alternative, choose to leave their homes in search of safety in a foreign land.¹⁶⁴ Unfortunately, because age is not an immutable characteristic, children are oftentimes unsuccessful in claiming a fear of persecution based on a particularized social group or any of the other five enumerated grounds.

¹⁵⁸ *Id.* at 410; 8 U.S.C. § 1101(a) (27) (J)(i) (2012); 8 C.F.R. § 204.11 (2015); *see* Orellana-Monson v. Holder, 686 F.3d 511 (5th Cir. 2012).

¹⁵⁹ Marzouk, *supra* note 79, at 411.

¹⁶⁰ 1951 Convention, *supra* note 14.

¹⁶¹ *See generally* ACLU Report, *supra* note 93; Bruce Finely, *Bound for Better Life, Deported to Despair*, BRUCE FINELY STORIES (Jun. 13, 2004), <http://brucefinley.com/migration/bound-for-better-life-deported-to-despair/> [https://perma.cc/NBU8-UHEE].

¹⁶² *See generally* ACLU Report, *supra* note 93.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Because the risk of harm these children face is increasing, it is imperative that the asylum requirements be interpreted more broadly to provide safety for children who would face persecution or death upon their return home. Children specifically targeted because of their age should be considered a particularized social group because they would not otherwise find asylum under any other protected grounds. In particular, children are not viewed as old enough to have their own political or religious opinions for which they would be persecuted due to their age.¹⁶⁵

Moreover, well-founded fear is different for adults than it is for children. Children, as a result of their age, environment, and dependence on others have a heightened sensitivity that leads to a discrepancy in the perception of fear in children in comparison to adults.¹⁶⁶ For instance, a child might have a harder time adjusting to the death of a relative than an adult would and might be more fearful of threats of violence than adults would, particularly when exposed to a pervasive cycle of violence.¹⁶⁷ The current interpretation of the statute also assumes that the child was able to seek protection from government officials.¹⁶⁸ However, in countries like Honduras, El Salvador, and Guatemala, where gang violence is so pervasive that the government has stopped seeking to control gangs, children cannot seek aid from government officials.¹⁶⁹ Furthermore, the UNHCR has recommended in its guidelines to consider the subjective fear a child would have under the circumstances in determining eligibility for asylum status.¹⁷⁰ United States immigration law should be interpreted more broadly to consider the

¹⁶⁵ Dalrymple, *supra* note 90, at 140.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 141.

¹⁶⁸ *Id.* at 140.

¹⁶⁹ See Robert Muggah, *It's official: San Salvador is the murder capital of the world*, LA TIMES, (Sept. 16, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-0302-muggah-el-salvador-crime-20160302-story.html> [<https://perma.cc/9K6B-KSNG>].

¹⁷⁰ UNHCR Handbook, *supra* note 7, at 169.

experiences a child faces and the different impact those experiences would have in comparison to an adult.¹⁷¹

Therefore, under the “best interests of the child” standard, a different legal interpretation of the asylum statute is required to give the child primary consideration in determining his or her asylum claim.

E. Immigration Court, Immigration Judges, and Inconsistencies

A 2016 report to Congressional Committees from the United States Government Accountability Office (GOA) indicates that there are inconsistencies in outcomes of asylum applications across immigration courts and judges.¹⁷² The GOA estimated that the affirmative and defensive asylum grants would vary by 47 and 58 percentage points for the same applicant whose case was heard by a different immigration judge.¹⁷³

Similarly, in an article published by the Stanford Law Review, the authors conducted a study analyzing inconsistencies in asylum decisions in 133,000 decisions involving nationals from eleven countries rendered by 884 asylum officers over a seven-year period, 140,000 decisions of 225 immigration judges over four-and-a-half years, 126,000 decisions by the Board of Immigration Appeals over a six-year period, and 4214 decisions from U.S. courts of appeal from 2004-2005.¹⁷⁴ The authors found that asylum decisions vary greatly depending on the geographical location of the court, the amount of training that asylum officers had, the judge’s work experience prior to appointment, and the gender of the judge.¹⁷⁵

The data suggests that the disparity in asylum decisions is tied to geography, not to bias in the judicial setting.¹⁷⁶ However, awareness of

¹⁷¹ *Id.*

¹⁷² See *Asylum, Variation Exists in Outcomes of Applications Across Immigration Courts and Judges*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (2016), <http://www.gao.gov/assets/690/680976.pdf> [<https://perma.cc/5QGP-R67K>].

¹⁷³ *Id.*

¹⁷⁴ See generally Ramji-Nogales et al., *supra* note 75, at 295.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

confirmation bias in other components of the immigration infrastructure will aid unaccompanied minors going through the system. Knowledge of the presence of possible unconscious and cognitive biases in the system will protect unaccompanied minors who have experienced a form of violence, torture, or persecution in their countries of origin because their claims are more likely to be heard and determined using a platform suited for children. Advocacy and knowledge dispersion of possible bias only adds another factor for judicial officers to consider in their decisions. It also addresses criticism suggesting arbitrary decisions are due to factors outside the legal framework. For these reasons, conforming to the principle of *stare decisis* will eliminate any differences in decision making due to geography and the type of migrants that cross each border, ultimately, creating a more uniform legal system.

2. The Doctrine of Stare Decisis is Necessary

The lack of uniformity in asylum decisions across circuits is detrimental to UAC asylum claims.¹⁷⁷ Consistency, particularly under the doctrine of *stare decisis*, is important to asylum adjudications because immigration decisions should be made by a de-politicized court.¹⁷⁸ Inconsistency can also affect efficiency.¹⁷⁹ Inconsistent decisions lead to uncertainty in the strength of claims. For instance, where minimal evidence of persecution was enough for a grant of asylum in one court, but not enough in another court, parties are less likely to be able to predict the outcome of their specific case.¹⁸⁰ Therefore, immigration court dockets would likely be less crowded if the doctrine of *stare decisis* were applied in immigration proceedings.¹⁸¹ For example, *stare decisis* is applied when the second adjudicator to any decision has to replicate the reasoning of the court that

¹⁷⁷ See Fitzpatrick, *supra* note 19, at 3.

¹⁷⁸ See generally Ramji-Nogales et al., *supra* note 75, at 254.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

has previously adjudicated a case with similar facts.¹⁸² Finally, the doctrine of *stare decisis* will not only allow for greater predictability in the court system, but will also support the presumption that all judicial decisions, even inconsistent ones, are fair and just.¹⁸³ In fact, the doctrine of *stare decisis* is precisely what allows for progress in law through judicial determinations.

III. CONCLUSION

All the children from the Northern Triangle share a common grievance: a childhood plagued with gangs, threats, and death. A childhood unimaginable in most parts of the United States. In most cases, children from the Northern Triangle seeking asylum in the United States do not attempt to game the system or sneak into the United States under false pretenses. Children simply want a last chance to survive. Therefore, eliminating bias in asylum claims made by minors is not only about fairness, but is also of paramount importance in giving children access to legal recourse and a fighting chance in escaping their extreme conditions.

The asylum system in the United States is failing to protect these children. The UNHCR has emphasized a critical need to enhance mechanisms that ensure these children are identified, screened, and provided access to the international protection they so desperately need and deserve. A child fearing for their life should not have international protections denied based on an outdated procedure and overwhelmed immigration courts. Rather, the immigration system should adapt to accept, understand, and adjudicate asylum claims based on these children's needs. Some solutions to mitigate the effect of bias in immigration proceedings include changing the CBP Agents manual and training techniques, creating a new agency tasked exclusively with processing asylum claims by UACs, and implementing the doctrine of *stare decisis* into judicial proceedings.

¹⁸² *Id.*

¹⁸³ *See id.*

Ultimately, the question now is not whether UAC asylum claims are infected with inadequacies, but rather how many and what to do about them. Therefore, the United States must adopt the Convention on the Rights of the Child to guarantee UACs a fighting chance in an immigration system not meant for them.