

2003

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#### **Recommended Citation**

Bhabha, Jacqueline (2003) "“More Than Their Share of Sorrows”: International Migration Law and the Rights of Children," *Saint Louis University Public Law Review*. Vol. 22 : No. 2 , Article 5.  
Available at: <https://scholarship.law.slu.edu/plr/vol22/iss2/5>

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**“MORE THAN THEIR SHARE OF SORROWS”: INTERNATIONAL  
MIGRATION LAW AND THE RIGHTS OF CHILDREN**

JACQUELINE BHABHA\*

“When hosts recall  
that *these* are orphans, that *I’ve* no support,  
they cringe and end by sending us away.  
With displaced children I displace myself  
To share with those who have more than their share  
Of sorrows.” (The Children of Heracles, by Euripides).

INTRODUCTION

International migration is generally conceived of as an activity of adults or families, crossing borders in search of employment, safety, or family reunification. Even among migration experts, recognition of the distinctive situation of children as international migrants typically comes as something of an afterthought. Insofar as attention turns to the problems of “vulnerable groups” of migrants, it tends to be directed to the needs of the disabled, the elderly or, most commonly, “women-and-children,” conceived of as a single, inseparable entity. Yet, it is only from a perspective that takes the adult male as norm that women and children merge as a group, “the other,”<sup>1</sup> united by an assumption of common dependency, and socio-political inferiority.

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\* Executive Director, University Committee on Human Rights Studies, Harvard University. This paper is an expanded version of a review of international norms prepared for the Berne Initiative on Existing International Migration Norms. This paper was prepared for the ILSA Conference 2002- The Protection of Children’s Rights Under International Law.

1. In terms of the scale of migration, women and children outnumber adult men. Of 150 million migrants worldwide, it is estimated by the International Labour Organization (ILO) that 36 to 42 million are migrant workers and 44 to 55 million are members of their families, *see* Roger Zegers de Beijl, *Combating Discrimination Against Migrant Workers: International Standards, National Legislation and Voluntary Measures –The Need for a Multi-pronged Strategy*, INTERNATIONAL LABOUR OFFICE at <http://www.ilo.org/public/english/protection/migrant/papers/disstrat/index.html> (last visited Jan. 30, 2003). Female-headed migrant households are less likely to have adult male family members accompanying than male. Among refugees, according to UNHCR, women and children together outnumber men in countries for which a gender and age demographic breakdown is available: 51% of the total refugee population is female, and the population under 18 ranges from 56% (in Africa) to 23% (in Europe). UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), POPULATION AND GEOGRAPHIC

In some contexts, a common approach is justifiable: where there is a family migration, where women and children travel as part of a male-headed household, their situation in relation to migration law and policy is usually comparable. As unaccompanied or separated migrants, however, be they relatives following to join resident family members, refugees, or trafficked persons, their circumstances and needs may differ significantly. Critically, whereas only a portion of women migrants have specific gender-based vulnerabilities,<sup>2</sup> all separated child migrants, whether or not their migration is linked to child-specific persecution or exploitation, have legal disabilities and special protection needs. It is therefore imperative that scholars, policy makers, and advocates consider the position of child migrants independently.

This is particularly true of a subset of child migrants – separated children who seek asylum. Until recently, their distinctive difficulties and needs were largely hidden from public view. Whereas considerable attention had been paid to the social welfare and tracing needs of child refugees living in camps or found internally displaced and separated from their families, the legal and procedural obstacles facing child asylum seekers were generally unacknowledged. It was assumed that children could be dealt with under the procedures directed at families – that where the head of household or parent was eligible for refugee protection, the child would be too; and that if protection was refused, arrangements for the family would include the children. This set of assumptions was based on two largely unquestioned premises: first, that child asylum seekers travelled with their families and could be subsumed within the family asylum application, and second, that children could have no independent claim to asylum in their own right over and above the family's claim.

In the past decade, both these assumptions have been challenged. Numerous cases, from Elian Gonzalez, to the Chinese boys unpacked from containers in Seattle, to the Afghan children in the Woomera detention center in Australia, have brought this fact to public attention. There are

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SECTION [HEREINAFTER UNHCR POPULATION UNIT], WOMEN, CHILDREN AND OLDER REFUGEES: THE SEX AND AGE DISTRIBUTION OF REFUGEE POPULATIONS WITH A SPECIAL EMPHASIS ON UNHCR POLICY PRIORITIES 3, (2001) *available at* <http://www.unhcr.ch>.

2. The long-standing assumption that female migrants are necessarily disadvantaged by comparison with their male counterparts is a reflection of a victim-based approach to gender, which may be both factually inaccurate and politically misguided. For example, female asylum applicants have a higher success rate than their male counterparts, THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS 7 (2000). For a critique of “victimization rhetoric” see Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International /Post-Colonial Feminist Legal Politics* 15 HARV. HUM. RTS. J. 1 (2002).

approximately 50,000 separated child asylum seekers in Europe;<sup>3</sup> the U.S. detains 5,000 such children annually, excluding the thousands repatriated across the Mexican border every year.<sup>4</sup>

Moreover, in the last two years, most developed states and the United Nations High Commissioner for Refugees (UNHCR) have started collecting child specific asylum statistics, which indicate that separated children are over-represented among the population of asylum seekers (by comparison with their proportion in the refugee population as a whole),<sup>5</sup> in contrast to women or accompanied children. The proportion, at least in Western Europe, is at least twice the expected ratio. According to UNHCR, for 1999, 2000 and 2001, separated children constituted approximately 4% of the total number of asylum seekers lodging claims in the European countries for which data was available.<sup>6</sup> In some countries, such as Hungary and the Netherlands, separated children accounted for a staggering 15% of all applications lodged during 2000;<sup>7</sup> in 2001 in the Netherlands, the proportion increased still further, to 18.3%.<sup>8</sup> It is increasingly apparent that a substantial and growing number of children cross borders, even continents, alone to seek asylum – they are not, therefore, part of a family application. The notion that general migration procedures suffice to cater for children's needs is unsustainable.

#### HISTORICAL BACKGROUND – INTERNATIONAL LAW AND CHILD MIGRANTS

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3. SANDY RUXTON, SEPARATED CHILDREN SEEKING ASYLUM IN EUROPE: A PROGRAMME OF ACTION 22 (2000), at <http://www.separated-children-europe-programme.org/Global/framed.asp?source=Documents/Eng/RuxtonReport/chapter2.pdf> (last visited April 30, 2003).

4. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 4 (2002) [hereinafter WCRWC, PRISON] available at [http://www.womenscommission.org/reports/uc\\_children\\_in\\_INS\\_detention\\_05.02.pdf](http://www.womenscommission.org/reports/uc_children_in_INS_detention_05.02.pdf).

5. UNHCR estimates that children constitute at least 50% of the world's refugee population, and that separated children constitute two to five percent of the population; one would therefore expect separated children to account for no more than 2.5% of the asylum seeking population. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 28 (1995). These statistical estimates are approximate.

6. UNHCR Population Data Unit, *Number of Asylum Applications Submitted by Unaccompanied or Separated Children, 2001*, SEPARATED CHILDREN IN EUROPE PROGRAMME, Sept. 27, 2002, at 3, at [http://www.separated-children-europe-programme.org/Global/Documents/Eng/Statistics/Provisional\\_Stats\\_2001.html](http://www.separated-children-europe-programme.org/Global/Documents/Eng/Statistics/Provisional_Stats_2001.html).

7. UNHCR DIVISION OF OPERATIONAL SUPPORT, TRENDS IN UNACCOMPANIED AND SEPARATED CHILDREN SEEKING ASYLUM IN EUROPE 2000 3 (2001), available at <http://www.unhcr.ch>. The Netherlands figures may overstate the proportion of separated children because all asylum seekers over 12 submit their own application for asylum, whether or not they are accompanied, Jos W. van Wetten et al., *Female Asylum-Seekers in the Netherlands: An Empirical Study*, 39(3) INT'L. MIGRATION 85, 88 (2001).

8. UNHCR Population Data Unit, *supra* note 6, at 2.

Contemporary neglect of child migrants is somewhat surprising given legal history. International law has long recognized the distinctive needs of some groups of child migrants. In 1924, acting on the principle that “mankind owes to the child the best it has to give,”<sup>9</sup> the League of Nations adopted the Declaration of the Rights of the Child. This was the first international human rights declaration adopted by any inter-governmental entity, preceding the Universal Declaration of Human Rights by nearly a quarter of a century.<sup>10</sup> Two of the five principles articulated by the 1924 Declaration define rights relevant to child migrants. Article 3, a precursor of attention to the special needs of refugee children, states, “The child must be *the first* to receive relief in times of distress.”<sup>11</sup> Article 4, reflecting the long-standing concern about child exploitation and trafficking, stipulates that “The child . . . must be protected against every form of exploitation.”<sup>12</sup> Both categories of child migrants, refugees and trafficked persons, have also been addressees of specific early international migration documents. The first in time were anti-trafficking treaties that focused on criminalizing the recruitment and transportation of young girls for prostitution. The 1910 International Convention for the Suppression of White Slave Traffic required state parties to punish anyone who hired, abducted, or enticed for immoral purposes any woman under the age of twenty-one;<sup>13</sup> the 1921 International Convention for the Suppression of the Traffic in Women and Children expanded the protective measures to children of either sex.<sup>14</sup> The scope of protections was further enlarged by the 1956 United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to

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9. Declaration of the Rights of the Child, League of Nations, at pmbl., Doc. A.127 1924 IV (1924) [hereinafter Geneva Declaration], reprinted in LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS 289 (1995).

10. GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 6 (1995).

11. Geneva Declaration, *supra* note 9, art. 3 (emphasis added). A notable feature of the Declaration is the absolute primacy afforded to the child’s need for protection and relief (‘the child must be the first’). This is modified in subsequent documents. Thus, the 1959 Declaration of the Rights of the Child stipulates that children shall be ‘among the first’ to receive protection and relief, a more realistic approach given the likely need for expert adult assistance, *see* VAN BUEREN, *supra* note 10, at 11.

12. Geneva Declaration, *supra* note 9, art. 4.

13. International Convention for the Suppression of the White Slave Traffic and Final Protocol, May 4 1910, 11 L.N.T.S. 83.

14. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39.

Slavery, which encompassed all forms of child exploitation, including labour exploitation, whether by parents or others.<sup>15</sup>

Child refugees have been the subject of international concern since the inception of an international refugee regime. The 1946 Constitution of the International Refugee Organization (precursor to the United Nations High Commissioner For Refugees), adopted in order to regularize the status of World War II refugees, included as one of four categories of persons defined as refugees a group of orphans under sixteen years old.<sup>16</sup> International recognition of the particular vulnerability of refugee children thus predates recognition of the distinctive difficulties of refugee women by about 40 years.<sup>17</sup> This contrasts interestingly with the approach of early international humanitarian law. The 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War expressly granted a general entitlement to special treatment in international armed conflicts to the wounded and sick, and to expectant mothers, but not to children.<sup>18</sup> It was not until the Geneva Protocol I of 1977 that the broad principle of children's entitlement to special treatment in such circumstances was codified.<sup>19</sup> The effort to afford protection to children, including child migrants, through legally binding conventions crystallized in the 1989 Convention on the Rights of the Child (CRC), the most

15. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3; Article 1(d) renders unlawful "Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour." *Id.*, art. 1(d), 266 U.N.T.S. at 41. For a full discussion of international anti-trafficking conventions, see Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65 (1998).

16. Constitution of the International Refugee Organization and Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persons, Dec. 15, 1946, annex 1, pt. 1, §A(4), 18 U.N.T.S. 283; see L. Holborn, *The United Nations and the Refugee Problem*, in THE YEARBOOK OF WORLD AFFAIRS 180-81 (1952).

17. Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11(1) INT'L. J. REFUGEE L. 85, 87 (1999).

18. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 16, 75 U.N.T.S. 287. The Convention does, however, provide for special treatment of children in a range of particular circumstances.

19. Protocol I Additional to the Geneva Convention of 12 August 1949, Relating To The Protection Of Victims Of International Armed Conflicts, June 8, 1977, art. 77(1), 1125 U.N.T.S. 3. An earlier attempt, in 1939, to incorporate into international law a Convention for the Protection of Children in the Event of International Conflict or Civil War was interrupted by the outbreak of World War II. GPI was preceded by the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, U.N. Doc. A/9631 (1974), which explicitly linked the plight of women and children in war situations. See JENNY KUPER, INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT 76-78, 108 (1997).

rapidly and widely ratified of all international human rights treaties.<sup>20</sup> “[A] critical milestone in the legal protection of children,”<sup>21</sup> it codified and expanded international, regional and bilateral agreements on child-specific rights and protection. Thanks to the CRC, children’s rights are afforded more comprehensive protection in international law than any other broad social group—thus, the legal framework for rights enforcement on behalf of child migrants usually exists. It is the political will and consensus required for effective implementation that lag far behind. Children have tended to be invisible as primary rights bearers in international law. As non-voting members of the polity, bearers of a denuded citizenship, they are particularly vulnerable to the neglect that marginal and disenfranchised groups are subjected to. Moreover, child migrants face the double jeopardy of dual minority status – determined by age *and* nationality. The challenge for advocates and policy makers is therefore to realize children’s migration rights in the absence of political power.

RELEVANT INTERNATIONAL LAW PRINCIPLES – NON-DISCRIMINATION AND  
THE RIGHT TO RESPECT FOR FAMILY LIFE.

Several general international law principles are particularly relevant as potential tools for the protection of child migrants from this double jeopardy. One of these is the cardinal non-discrimination principle. International law does not prohibit all distinctions between people, only those that are arbitrary, disproportionate, or unjustifiable.<sup>22</sup> Given the moral and legal imperative to treat all human beings, including children and non-citizens, as of equal worth,<sup>23</sup> the onus is on those who seek an exception to the equality principle to justify it. Article 2(1) of the CRC prohibits discrimination in relation to the rights set out in the Convention both between adults and children, and between different groups of children on the basis “of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion,

20. Convention on the Rights of the Child, Dec. 12, 1989, 1577 U.N.T.S. 43 [hereinafter CRC or Convention]. The Convention was adopted by consensus by the General Assembly on November 20, 1989; it entered into force in record time on September 2, 1990.

21. Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT’L. J. CHILD. RTS. 405, 405 (1995).

22. See *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6,306 (July 18) (dissenting opinion of Judge Tanaka; see also *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 1 Eur. Ct. H.R. 252, 254 (A/6) (1968)).

23. Universal Declaration of Human Rights UDHR, pmbl., G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR], available at <http://www.un.org/Overview/rights.html> (last visited Feb. 12, 2003); International Covenant on Civil and Political Rights, Dec. 19, 1966, pmbl., 999 U.N.T.S. 171, 173 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, pmbl., 993 U.N.T.S. 3, 5 [hereinafter ICESCR].

national, ethnic or social origin, property, disability, birth or other status."<sup>24</sup> This broad principle is taken to require states parties to the CRC not only to prevent discrimination, but also to take action to ensure the positive enjoyment by children of rights on a par with adults.<sup>25</sup>

Many current state practices with respect to migrant children violate these non-discrimination obligations. We can distinguish between adult/child and child/child discrimination. An example of discrimination between adults and children relates to the likelihood of being granted refugee status following an asylum application. While the evidence cited above indicates that separated children are not disadvantaged in terms of *access* to a forum where their asylum application can be presented (indeed they appear to be over-represented by comparison with adults), recent research suggests that, as a general rule, a considerably lower proportion of child asylum applicants (applying as principals rather than as dependents) receive refugee status than their adult counterparts. With the exceptions of Canada, where children are, like women, relatively advantaged,<sup>26</sup> and the U.K., where no consistent pattern is discernable,<sup>27</sup> the picture is consistent across developed states: separated child asylum seekers are much less likely to get asylum than adult applicants.<sup>28</sup> Moreover, children's cases are more likely to be left unresolved than their adult counterparts.<sup>29</sup> The well-documented U.S. situation, where children

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24. Similar language, though not limited to children, is contained in many other instruments; see e.g., U.N. CHARTER art. 1, para. 3, art. 55; UDHR, *supra* note 23; ICCPR, *supra* note 23, 999 U.N.T.S. at 5-6; ICESCR, *supra* note 23, 993 U.N.T.S. at 5; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, ETS No. 177, available at <http://conventions.coe.int/Treaty/en/Treaties/html/177.htm>. The prohibition on discrimination "irrespective of . . . national, ethnic or social origin" is generally understood to refer to ethnic origin rather than nationality. Nationality would therefore come within the rubric of "other status" by virtue of the *eiusdem generis* rule.

25. VAN BUEREN, *supra* note 10, at 40.

26. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), SEPARATED CHILDREN SEEKING ASYLUM IN CANADA 9 (2001), available at <http://www.unhcr.ch/>.

27. In 1999 in the U.K., children under 18 lodged 5% of asylum applications and received 13% of grants of refugee status. Jo Woodbridge et al., *Asylum Statistics United Kingdom 1999*, 17/00 HOME OFF. STAT. BULL. Tables 6.1, 6.2 (12 Oct. 2000). In 2000, however, children under 18 made 8% of asylum applications, but received only 5% of grants of refugee status. David Matz et al., *Asylum Statistics United Kingdom 2000*, 17/01 HOME OFF. STAT. BULL. Tables 5.1, 5.2 (25 Sept. 2001).

28. For Europe, several reports have suggested that separated children are rarely recognized as refugees. WENDY AYOTTE, SEPARATED CHILDREN COMING TO WESTERN EUROPE: WHY THEY TRAVEL AND HOW THEY ARRIVE 36 (2000); SECRETARIAT OF THE INTER-GOVERNMENTAL CONSULTATION ON ASYLUM, REFUGEE AND MIGRATION POLICES IN EUROPE, NORTH AMERICA, AND AUSTRALIA, REPORT ON UNACCOMPANIED MINORS: OVERVIEW OF POLICIES AND PRACTICES IN IGC PARTICIPATING STATES (1997) [hereinafter IGC REPORT].

29. RUXTON, *supra* note 3, at 71; IGC REPORT, *supra* note 28.

experience prolonged delays and uncertainty in the decision-making process, and where their cases are frequently not decided but relegated to a limbo of illegality and impermanence,<sup>30</sup> is typical of many countries. A sizeable proportion of separated children who apply for asylum become undocumented or illegal, vulnerable to removal proceedings when they turn 18. In some European states such as Greece and Italy, no procedure exists for separated children to apply for asylum, despite the very large numbers of arrivals.<sup>31</sup> Far from benefiting from their position of particular vulnerability, child asylum seekers experience discrimination and are at a disadvantage. Some of the substantive and procedural reforms required to address this discriminatory situation are addressed below.

A second category of discriminatory treatment exists where unwarranted distinctions are applied to different groups of child migrants. A noteworthy contemporary example is the imposition of selective exit restrictions on particular groups of separated child migrants seeking to leave their home countries. Young girls (and women) in countries where sex trafficking is a major policy concern have found their freedom of exit discriminatorily restricted in some cases. The United Nations Special Rapporteur on Violence Against Women has documented such practices in Nepal, Romania, Myanmar, and Poland, and argued against measures which place extra hurdles to migration in the way of one section of the population (advocating human rights interventions to address rights violations against sex workers and other vulnerable migrants in the course of their work instead of such discriminatory targeted exit blocks).<sup>32</sup> This is not to suggest that carefully tailored and administered exit restrictions are always unjustified. They may have clear merit in terms of the child's best interests in selected instances. A case in point is the situation where parents have entered into financial agreements to sell or "lease out" their child – for example, as a stooge in securing immigration as a family unit.<sup>33</sup> In such situations, the child's consent to the transaction is

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30. IGC REPORT, *supra* note 28; Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 NO. 39 INTERPRETER RELEASES 1569, 1569-70 (2001); WCRWC, *supra* note 4, at 6.

31. Personal communications with Maria Stavropoulou, Protection Officer, Office of the UNHCR in Athens, Greece and Giuseppe Lococo, Protection Officer, Office of the UNHCR in Rome, Italy (Oct. 2002).

32. Radhika Coomaraswamy, U.N. Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the General Perspective: Violence Against Women*, U.N. ESCOR, Commission on Human Rights, 56th Sess., at 17,22, U.N. Doc. E/CN.4/2000/68 (2000).

33. A notorious example is the case of the 3-year-old AIDS-stricken Thai boy rented out by his mother to smugglers to be used as a decoy in an immigrant smuggling scheme. Robert Jablon, *Judge Won't let Thai Boy Return*, AP ONLINE, June 5, 2001, available at 2001 WL 22109010.

usually not ascertainable, but a best interest judgment can legitimately be the basis for blocking an individual child's departure without waiting until the exploitative relationship comes to fruition. Securing the right balance between legitimate restrictions on free exit and unlawful discrimination in granting permission to leave one's own country requires careful case-based exercise of bureaucratic discretion, rather than the use of broad demographic categories to effect restrictive measures. Another example of discrimination between different groups of children is the recent proposal by the U.K. Home Secretary that children of asylum seekers be denied access to mainstream state schools because of his fear that domestic primary schools may be "swamped" by the large numbers of such children.<sup>34</sup> This policy violates the CRC requirement that states parties ensure that the right to education is achieved "on the basis of equal opportunity."<sup>35</sup>

A further example of discrimination between groups of children based on migration status is the impact of what one might call "denuded citizenship" on citizen children whose parents are not citizens. Whereas citizen children of citizen parents can enjoy the prospect of indefinite family life, and the company of their parents in their home country, irrespective of criminal offending by parents or other incidents of life, citizen children of alien parents cannot. If parents are forced to leave the country, the citizen child has to choose between going with the parent and "constructive deportation" from his or her home on the one hand, or staying at home but enduring long-term separation from a parent on the other. Thus, although citizenship guarantees the right of entry and residence within the home state to all citizens, for some children, this right may turn out to be illusory. In the U.S., for example, immunity from deportation and preferential access to family unity with immediate relatives distinguishes citizens from permanent resident aliens who, in many other respects, share the same welfare benefits.<sup>36</sup> For children, however, these cardinal attributes of citizenship are not available. Citizen children are not entitled to any preferred immigration status for their immediate relatives, until they reach majority and can demonstrate links of marriage or dependency.

Nor do citizen children have much scope for preventing the deportation of alien parents. The U.S. approach is particularly restrictive. It is governed by a series of legislative acts impinging on the relief available to aliens seeking to resist deportation from the U.S. These acts have become progressively

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34. "A toughening of the U.K.'s asylum and immigration policies will include measures to stop the 'swampun' of local schools," says British Home Secretary David Blunkett. *Blunkett Talks Tough on Asylum* (BBC television broadcast, Apr. 24, 2002).

35. CRC, *supra* note 20, art. 28(1).

36. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 166-67 (1998).

harsher, to the point where discretionary relief from deportation is virtually unavailable except in the most extreme and unusually compassionate circumstances. Only in this very limited subset of situations may consideration of the impact of removal of an alien parent on a citizen child prevent the removal from being carried out. A recent and welcome district court opinion introduced international law considerations into the decision making process to reverse the deportation of a criminal alien who had been resident in the U.S. since the age of seven, and who had a six-year-old citizen child;<sup>37</sup> however, it is unlikely to represent a new trend in U.S. practice. Other cases that exhibit very powerful negative equities affecting citizen children have not yielded outcomes that protect their family unity rights in their home country.

Take the case of a Mexican couple, who had lived continuously in the U.S. for 12 years prior to their deportation proceedings, with three U.S. citizen children who could not read or write Spanish, possessing substantial assets and strong credentials as an exemplary family. According to a majority court opinion later reversed, “any of us would be happy to see [these parents] gain citizenship,” yet they were denied suspension of deportation. It was held the children would not suffer extreme hardship, which was defined by the court as hardship which is “uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer.”<sup>38</sup> This situation, a reflection of domestic immigration control policies, is in tension with international legal norms regarding family unity. States adopt differing criteria and standards in balancing these two contradictory pressures, reflecting their own domestic legislative frameworks, policy agendas and approaches to the mandates of international human rights law. The French approach, for example, has been to allow undocumented parents of citizen children to stay, without regularizing their status. The children are thus allowed to enjoy their family life in their home country, while the parents become long-term irregulars or “sans papiers.”<sup>39</sup> Other states have taken more proactive approaches. The Irish, following a 1990 High Court case<sup>40</sup> which established that citizen children were entitled to the company, care and parenting of their parents in their home country, have granted residency rights to the

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37. *Beharry v. Reno*, 183 F.Supp.2d 584, 586-87, 593 (E.D.N.Y. 2002).

38. *Hernandez-Cordero v. Immigration & Naturalization Service*, 819 F.2d 558, 559, 563 (5th Cir. 1987) (en banc).

39. JOHANNA SIMEANT, *LA CAUSE DES SANS-PAPIERS* [The Cause of Those Without Papers] 137 (1998).

40. *Fajujonu v. Minister for Justice*, [1987] 2 I.R. 151 (Ir. H. Ct.), available at <http://www.bailii.org/ie/cases/IEHC/1987/2.html>.

undocumented parents of citizen children, though this right is currently under legal and political challenge.<sup>41</sup>

Turning from state practice to international norms, international law enshrines the family as "the natural and fundamental group unit of society;"<sup>42</sup> it protects the right to form a family<sup>43</sup> and to enjoy a shared family life,<sup>44</sup> it calls for the "widest possible protection and assistance" for the family,<sup>45</sup> and it prohibits arbitrary or unlawful interference with the family.<sup>46</sup> It considers the family to be "the natural environment for the growth and well-being of all its members and *particularly children*."<sup>47</sup> Taken together, these provisions constitute a strong international legal norm protecting the right to family unity. For children, the norm is particularly compelling. Article 9(1) CRC states: "States parties *shall ensure* that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation *is necessary for the best interests of the child*."<sup>48</sup> This rule applies to all children within the jurisdiction of a state party, including immigrant and refugee children residing within the state.<sup>49</sup> Even if the family could avoid separation by following the deportee, the state party has an obligation under the CRC, prior to expulsion of a family member, to consider whether such uprooting would in fact cause family separation because of the magnitude of practical adaptation difficulties: the child's views would have to be given due weight<sup>50</sup> and the child's best interests would have to be a primary consideration. Thus, under the CRC, the negation of family unity can only be justified by the private interest of a child.

The CRC approach contrasts with the approach of other international human rights conventions, which allow interference with a child's family life

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41. I am grateful to Dug Cubie of the Irish Refugee Council for information about this situation.

42. ICCPR, *supra* note 23, art. 23, 999 U.N.T.S. at 179.

43. UDHR, *supra* note 23, art. 16.

44. ABRAHM, FAMILY UNITY 407.

45. ICESCR, *supra* note 23, art. 10(1), 993 U.N.T.S. at 7.

46. CRC, *supra* note 20, art. 16, 1577 U.N.T.S. at 49; UDHR, *supra* note 23, art. 12; ICCPR, *supra* note 23, art. 17; European Convention for the Protection of Human Rights and Fundamental Freedoms, May 18, 1954, art. 8, 213 U.N.T.S. 221, 230 [hereinafter ECHR]; American Convention on Human Rights, Nov. 22, 1969, art. 11(2), 1144 U.N.T.S. 123, 148.

47. CRC, *supra* note 20, pmb., 1577 U.N.T.S. at 44-47 (emphasis added).

48. *Id.* art. 9(1), 1577 U.N.T.S. at 47 (emphasis added).

49. ABRAHM, *supra* note 44, at 416-17. The following paragraphs draw extensively from this article.

50. CRC, *supra* note 20, arts. 9(2), 12, 1577 U.N.T.S. at 47-48.

in a broader range of circumstances justified by public interest.<sup>51</sup> Thus, the International Covenant on Civil and Political Rights (ICCPR) prohibits only “arbitrary or unlawful” interference with family life; the Human Rights Committee, the body that oversees implementation of the Covenant, has determined that this provision protects children’s right to family unity, despite state immigration control laws in a range of circumstances.<sup>52</sup> The European Convention on Human Rights permits interference with a child’s right to respect for his or her private or family life only when such interference is (a) in accordance with the law (i.e., is both lawful and legitimate) and (b) “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others.”<sup>53</sup> Both citizen<sup>54</sup> and alien<sup>55</sup> children living with their parents, as well as children with ties to non-custodial divorced parents,<sup>56</sup> have benefited from this widely used provision. However, the implementation of immigration laws is considered a legitimate goal aimed at promoting the economic well-being of the receiving country. The critical question in cases involving challenges by deportable alien parents of citizen children has been whether the test of necessity has been met. Taken together, these international law protections of the child’s right not to be separated from his/her family place a heavy burden on states to justify contrary measures. But, in practice, they have not been consistently translated into an effective child’s right not to be separated from his or her family. It is a strange paradox of modern public policy that children are considered to have a fundamental right to family life, and yet have no legally enforceable right, unlike their adult counterparts, to resist family separation where a family is divided by national borders.

To summarize, many invidious distinctions between children and adults historically have been justified in terms of their dependency and their need for “protection.” Such distinctions can constitute a form of discrimination and should be prohibited since they are not in the best interests of the child. Perhaps the most striking contemporary example of this phenomenon is the

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51. ICCPR, *supra* note 23, art. 17(1), 999 U.N.T.S. at 177; ECHR, *supra* note 46, art. 17(1), 213 U.N.T.S. at 234.

52. ICCPR, *supra* note 23, at gen. comment 15(7); *id.* at gen. comment 19(5); *Winata v. Australia*, Communications No. 930/2000, para. 8, UN Human Rights Committee, UN Doc. CCPR/C/72/D/930/2000 (2001) (holding that proposed removal of parents of 13-year-old Australian would violate the Convention).

53. ECHR, *supra* note 46, art. 8, 213 U.N.T.S. at 230.

54. *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) at 6 (1992).

55. *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) at 6 (1991).

56. *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) at 6 (1988).

U.S.<sup>57</sup> and Canadian<sup>58</sup> governments' justification of the incarceration of particular groups of separated child asylum seekers in terms of their need for protection from the predatory reach of traffickers.<sup>59</sup> In practice, it is clear that such child migrant detention policies overall violate a range of international legal norms. According to UNHCR, separated<sup>60</sup> children seeking asylum should never be detained.<sup>61</sup> Far from protecting children, such measures violate their right to enjoyment of health.<sup>62</sup> According to the United Nations Special Rapporteur on the human rights of migrants, current practice in the U.S. and Australia,<sup>63</sup> where separated children seeking asylum are separated

57. See generally HUMAN RIGHTS WATCH CHILDREN'S RIGHTS PROJECT [hereinafter HRW], *SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE* (1997).

58. See Gao (Litigation Guardian of) v. Canada (Minister of Citizenship & Immigration), 7 IMM. L. R. (3d) 21, para. 8 (A judge reviewing the detention for over 6 months of 12 Chinese children by the Canadian authorities commented that "that almost all of them have lost weight and become increasingly withdrawn and timid. They have been visited by a doctor only once, and this doctor did not speak any of the languages spoken by the minors.").

59. Jacqueline Bhabha, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers*, 3 EUR. J. MIGRATION AND L. 283, 300 (2001).

60. Children outside their country without their families have in the past generally been termed "unaccompanied children." However, many such children are not in fact literally "unaccompanied," at least not for their entire journey or stay; they may be escorted by family acquaintances, co-villagers, paid smugglers or traffickers working within criminal networks. Accordingly, following a growing trend initiated by the Separated Children in Europe Programme, the term "separated" is preferred throughout this text. See RUXTON, *supra* note 3.

61. OFFICE OF THE UNHCR, *GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM* para. 7.6 (1997) available at <http://www.sce.gla.ac.uk/Global/Documents/Eng/Legislation/RelevantActs.htm>.

62. CRC, *supra* note 20, arts. 24-25; UDHR, *supra* note 23, art. 25; ICESCR, *supra* note 23, art. 12, 993 U.N.T.S. at 8; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, art. 5, 660 U.N.T.S. 195, 222 (entered into force Jan. 4, 1969) [hereinafter ICERD]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", *adopted* Nov. 17, 1988, art. 10, O.A.S. Treaty Series 69, [hereinafter ACHR]; see also African Charter on Human and Peoples' Rights, June 27, 1981, art. 16, 21 I.L.M. 58, 1520 U.N.T.S. 217, 248-49 (entered into force Oct. 21, 1986). [hereinafter African Charter]; International Convention on the Protection of the Rights of All Migrant Workers and Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A, art. 28, U.N. Doc. A/45/49 (1991) [hereinafter ICMW] (discussing the right to emergency medical care); see e.g., Cynthia Banham, *Experts Fight To Free Traumatized Woomera Children*, SYDNEY MORNING HERALD, Sept. 28, 2002, at 1, available at 2002 WL 26031371 (expressing concerns about psychological well-being of detained child asylum seekers).

63. See HRW, *SLIPPING*, *supra* note 57, at 13-15; HRW, *Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service*, Dec. 1998, at <http://www.hrw.org/reports98/ins2/berks98d.htm> (last visited Feb. 11, 2003); Cynthia Banham, et al., *Videos of Refugee Testing 'on black market'*, SYDNEY MORNING HERALD, July 23, 2002, at 1,

from their parents,<sup>64</sup> or, as in the U.S., subjected to prolonged and punitive imprisonment in harsh and degrading conditions, including the use of handcuffs and shackles, is not only inhumane but illegal.<sup>65</sup> Yet, despite widespread condemnation, such practices persist – a sobering reflection of the limited impact of international law on domestic practice, where the political benefits of anti-immigrant measures outweigh the costs of legal non-compliance.

#### RECOGNIZING THE NEED FOR CHILD-SPECIFIC REFUGEE PROTECTION

There is no lower age limit to the well-established international right to claim asylum or resist refoulement to a persecuting or torturing country.<sup>66</sup> This follows from the general non-discrimination principle outlined above and is clear from the generality of the CSR refugee definition and from the relevant paragraphs of the UNHCR handbook.<sup>67</sup> Any of the five grounds enumerated in

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*available at* 2002 WL 23874623 (despite widespread criticism, the Australian federal government has refused to change its migrant child detention policy: according to Prime Minister John Howard, “it’s not a policy we like having to implement but in the face of attempts by people to come to this country illegally there is really no alternative”); *see also* Russell Skelton, *The Case of a Bashed Boy and Three Missing Guards*, THE AGE, Oct. 5, 2002, at 1, *available at* 2002 WL 100803763 (three security guards at the Woomera Detention center accused of assaulting and “bashing” a 13-year-old separated Afghan asylum seeker). Some other states have time and age limits on detention of child asylum seekers (e.g., Belgium; *see* ICG REPORT, *supra* note 28, at 88), yet others prohibit detention of such children (though disputes about age may result in significant numbers of children being detained); AMNESTY INTERNATIONAL, MOST VULNERABLE OF ALL: THE TREATMENT OF UNACCOMPANIED CHILDREN IN THE UK 61 (1999).

64. *See* HRW, *Detained*, *supra* note 63, at para. 7; *see also* Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 INTERPRETER RELEASES 1569, 1570 (2001).

65. *See Specific Groups and Individuals: Migrant Workers*, U.N. ESCOR, 57th Sess., Agenda Item 14(a), addendum 1, at 22, U.N. doc. E/CN.4/2001/83/Add.1 (Dec. 2000).

66. *See* UDHR, *supra* note 23, art. 14; Convention Relating to the Status of Refugees, July 28, 1951, arts. 32-33, 19 U.S.T. 6223, 6276, 189 U.N.T.S. 150, 174-76 [hereinafter CSR]; *see also* ICCPR, *supra* note 23, art. 13; *see also* Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3 (1), 1465 U.N.T.S. 85, 114 [hereinafter CAT]; *see also* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. 1, paras. 1-2, 1001 U.N.T.S. 45, 47; *see also* Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Inter-Am. C.H.R., OAS/Ser.L/V/II.66, doc. 10, rev. 1, art. III, para. 3 (1984).

67. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER ON REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, paras. 213-19, U.N. doc. HCR/IP/4/Eng/Rev.1 (1979) [hereinafter UNHCR HANDBOOK].

the CSR refugee definition can apply to a child.<sup>68</sup> However, in practice, until very recently, children rarely benefited from the expansive generality of the refugee definition, and in many jurisdictions, this is still the case. Refugee decision-making where children are the principle applicants is in its infancy.

Several reasons can be advanced to explain this. First, the notorious invisibility of children in international law applies to refugee law in particular – children have simply not been thought of as appropriate subjects of asylum applications or refugee status grants. This approach has characterized the behaviour of refugee advocates and decision makers alike. Advocates do not tend to think of asylum as an appropriate remedy for protection – they turn instead to welfare measures and to humanitarian or subsidiary forms of immigration protection. Decision makers, be they immigration officials or judges, similarly tend not to consider separated children as persecutees and appropriate candidates for refugee status, but rather as casualties of devastated or malfunctioning familial situations – the province of social work rather than law. This approach is particularly evident in Europe – less so in North America.

Second, the bifurcation of expertise among professionals, between migration experts with no child-specific competence on the one hand, and children's rights experts with no knowledge of international or migration law on the other, has militated against the development of child-specific refugee law. Migration experts (apart from a few specialists) have felt uncomfortable taking instructions from separated child applicants, in the absence of guardians or adults capable of providing appropriate input; and child rights experts have not appreciated the importance of securing long-term legal protections for residency status, preferring to concentrate on the pressing welfare issues at hand.

Third, the paucity of human rights research and attention to child-specific violations in country reports or investigative documentation has obscured the extent to which children are both active political agents and victims of persecutory acts. As a result of this combination of factors, even when compelling child asylum cases have appeared, they have tended to be routinely dealt with under humanitarian and social welfare provisions, instead of through a formal refugee status determination procedure.

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68. See CSR, *supra* note 66, art. 1(a), 189 U.N.T.S. at 152 (defining a refugee 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; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events] is unable or, owing to such fear, is unwilling to return to it").

As indicated earlier, this is still the situation in many developed states. Informality and indeterminacy characterize the majority of outcomes in separated child asylum cases. In Italy and Greece, for example, where thousands of separated Albanian and Kosovan children have arrived over the past few years, no formal asylum procedure exists for children, and not a single child has been granted refugee status. Though children are not removed or deported during their minority, once they turn 18, they risk removal because they do not have a legal status. Many states have adopted inconsistent policies towards separated children, veering between concern for them as particularly vulnerable migrants, and hostility to them as peculiarly unpredictable illegal aliens.<sup>69</sup> Such policies frequently violate CRC obligations, particularly the “best interests” principle and the un rebuttable obligation to promote family unity. Adult assessments of what constitutes a child’s best interests may conflict with the child’s right to have his or her expressed views taken into account.<sup>70</sup>

However, the situation is not uniformly bleak. Substantive and procedural guidelines addressing issues facing separated child asylum seekers have been developed at various levels; international,<sup>71</sup> regional<sup>72</sup> and national.<sup>73</sup>

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69. See Bhabha, *supra* note 59, at 299-324.

70. See CRC, *supra* note 20, art.12 (for example, a welfare professional may consider a separated child asylum seeker best off if they returned to his or her home even though the child may oppose such action).

71. UNHCR HANDBOOK, *supra* note 67, paras. 213-219 (devoting paragraphs 213-219 to “unaccompanied minors”); UNHCR Exec. Comm., *General Conclusion on International Protection*, para. (m), No. 41 (XXXVII) (1986), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/excom>. Since 1986, the situation of refugee children has been accorded special attention, see UNHCR Exec. Comm., *Refugee Children*, para. (u), No. 47 (XXXVIII)(1986), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/excom>; UNHCR, *REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE* chp. III (1994), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect>; UNHCR, *GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM* 1-21 (Feb. 1997), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect>.

72. *Council Resolution 97/C 221/03 of 26 June 1997 on Unaccompanied Minors Who are Nationals of Third Countries*, Council Resolution, para. 2, 1997 O.J. (C 221), available at <http://europa.eu.int/scadplus/printversion/en/lvb/133041.htm> (last visited Feb. 7, 2003); See Alison Hunter, *Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom*, 3 *EURO. J. MIGRATION AND L.* 383, 393 (2001); see also David Pearl & Carole Lyons, *The Treatment by the European Union of Unaccompanied Minors in FAMILIES ACROSS FRONTIERS* 435-48 (Nigel Lowe and Gillian Douglas eds., 1996).

73. IMMIGRATION AND REFUGEE BOARD [hereinafter IRB], CANADA GUIDELINE 3: CHILD REFUGEE CLAIMANTS: PROCEDURAL AND EVIDENTIARY ISSUES 3, §§ A, B (Sept. 30, 1996). The first child-specific national guidelines for separated children seeking asylum were promulgated by Canada; these were limited to procedural and evidentiary issues. See also *Incorporating Refugee Protection Safeguards into Interception Measures*, Regional Workshop,

Moreover, some welcome signs of change are evident in the last five years. Recent jurisprudential developments in several states have expanded the meaning of "persecution," the pivotal threshold concept in the refugee definition, and the ground of "membership in a particular social group," the most expansive of the five grounds, to encompass various child-specific forms of persecution. The U.S. jurisprudence is the richest in this regard. Recent examples of successful asylum claims by separated children include cases based on child abuse, child sale and trafficking, vulnerabilities arising out of being a street child, a member of a gang, or behaviours which, while not rising to the threshold needed for an adult, result in persecution for a child (e.g., witnessing death of close relatives). In addition, children have been granted refugee status because of their fear of persecution arising out of onerous smuggling debts, threatened prosecution for debt default by a parent,<sup>74</sup> and because they have fled from a forced marriage arranged by parents trying to secure remuneration.<sup>75</sup>

These developments are the product of domestic pressure and activism. The situation in the United States is instructive: the expansion of child-specific refugee determination is a result of concerted advocacy by immigration and child rights experts, concerns of a small group of rights-oriented immigration judges, and progressive developments within the INS which resulted in the promulgation of child specific asylum guidelines. International norms played an important indirect part in these developments, since both the CRC and the CSR were invoked in the advocacy and the decision-making. But the international framework did not produce these results. Clearly, neither the CSR nor the CRC offer an adequate system of international protection in the absence of vigorous domestic pressure. The absence of specialist international bodies overseeing state practice (including the absence of a CRC special protocol on child refugees and the absence of an international court to implement the CSR) has impeded progress and the lacuna in legal

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Ottawa, Canada, 2nd mtg., para. 9, UNHCR Doc. EC/GC/01/13 (May 31, 2001); Geraldine Sadoway, *Canada's Treatment of Separated Refugee Children*, 3 EURO. J. MIGRATION AND L. 366 (2001); U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 18 (December 10, 1998). In 1998 the U.S. issued Guidelines for Children's Asylum Claims which also included substantive legal standards expanding the concept of 'persecution' to include child specific situations; see, Bhabha & Young, *supra* note 17, at 89; see also Unaccompanied Alien Child Protection Act of 2001, H.R. 1904, 107th Cong. (2001). Considerable U.S. public concern relating to the treatment of separated child migrants, particularly following the Elian Gonzalez case, resulted in congressional moves to legislate a wide range of desirable policy changes and culminated in the Unaccompanied Alien Child Protection Act of 2001. At the time of this writing, this bill is being incorporated (in as yet unresolved form) into the new homeland security legislation before Congress.

74. *Chen v. Ashcroft*, 289 F.3d 1113, 1114 (9th Cir. 2002).

75. Bhabha, *supra* note 59, at 283.

responsibility for decisions affecting refugee children is a serious gap in protection. Because of weak international supervision, domestic political pressures are paramount.

#### SMUGGLING AND TRAFFICKING

International norms relating to abusive child migration practices have a long history.<sup>76</sup> Recent concern has focused on two aspects: criminalization of the practices themselves, and protection of the victims.<sup>77</sup> Children (along with women) have been a distinct focus of attention because of their particular vulnerability to exploitation, and their need for special protection.<sup>78</sup> In general, these measures have starkly failed to prevent proliferation or protect intended beneficiaries; the carefully integrated, transnational scope of the illegal networks contrasts with ineffective interstate attempts at collaboration. Implementation, rather than elaboration of further norms, thus remains the critical challenge.<sup>79</sup> Though smuggling and trafficking are both part of the expanding illegal global migration business, they are conceptually and legally distinct. From the viewpoint of states, they are closely linked as variants of this business, threats to effective state immigration control. It is this perspective, rather than a rights-based concern to eradicate violations against

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76. *Id.*

77. CRC, *supra* note 20, arts. 11, 34-35.

78. ICMW, *supra* note 62; European Social Charter (Revised), May 3, 1996, 36 I.L.M. 31 (1997) [hereinafter Revised European Social Charter]; African Charter, *supra* note 62, art.7; Hague Convention Conference on Private International Law: Final Act of the 17th Session, Including the Convention of Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993 reprinted in 32 I.L.M. 1134 [hereinafter Hague Convention on Adoption]; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207), available at <http://www.ilo.org/public/english/standards/ipec/ratification/convention/text.htm>; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 263, U.N. GAOR, 54th Sess., U.N. Doc. A/54/RES/263 (2002) available at <http://www.unchr.ch/html/menu2/dopchild.htm>. Trade organizations, such as the WTO, have conspicuously failed to address the question of abusive international trade in human services, including exploitative child labour. For a detailed account see Jacqueline Bhabha, *Lone Travelers: Rights Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269-94 (2000); see also Communication from the Commission to the Council and the European Parliament, Combating Trafficking in Human Beings and Combating the Sexual Exploitation of Children and Child Pornography: Proposal for a Council Framework Decision from the Commission of the European Communities, COM(2000)854-2 [hereinafter Combating Human Trafficking].

79. *Child Traffickers Executed in China*, XINHUA, THE ASSOCIATED PRESS, April 26, 2000, at 1 available at <http://www.friends-partners.org/partners/stop-traffic/1999/0815.html>. Some states, e.g., China, have implemented draconian punitive measures including executions against traffickers.

victims, that is responsible for the notable increase in state attention to the practices. From the viewpoint of migrants, however, smuggling and trafficking are not equivalent, indeed they may be diametrically opposed: one a lifeline, the other a life sentence.

A measure of definitional clarity and consensus, following decades of doctrinal wrangling, has been achieved through the adoption by the United Nations General Assembly of two protocols to the United Nations Convention Against Transnational Organized Crime.<sup>80</sup> Reports of the United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, have also focused international attention on exploitative child migration.<sup>81</sup> The Smuggling Protocol defines and establishes as a criminal offence the smuggling of migrants;<sup>82</sup> endangering the lives or safety of migrants is an aggravating circumstance. The Protocol encourages states parties to facilitate the speedy return to their country of origin of smuggled

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80. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime, U.N. Doc. A/55/383 (2000) reprinted in 40 I.L.M. 335, 384 [hereinafter Smuggling Protocol]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supp. the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/53/383 (2000), reprinted in 40 I.L.M. 335, 351 [hereinafter Trafficking Protocol]. As of July 2002, the Smuggling Protocol had 101 signatories and 11 parties. The Trafficking Protocol had 104 signatories and 12 parties. Both Protocols need 40 parties to come into force.

81. *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1991/51 (1991); *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1992/55 (1992) and *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1992/55/Add.1 (1992); *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1993/67 (1993); *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1993/67/Add. 1 (1993); *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, 50th Sess., Agenda Item 22, U.N. Doc. E/CN.4/1994/84 (1994) [hereinafter 1994 SR Report on Sale of Children] and *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1994/84/Add. 1 (1994) (visit to Nepal); *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1997/95/Add. 1 (1997) (visit to the Czech Republic) and *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1997/95/Add. 2 (1997) (mission to the U.S. on issue of commercial sexual exploitation of children); *UN Special Rapporteur on Sale of Children, Child prostitution, and Child Pornography*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/1997/71 at 49-145 (1997).

82. Smuggling Protocol, *supra* note 80, art. III (defining smuggling as "the procurement, in order to obtain directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a natural or a permanent resident.").

persons. No explicit mention is made of the rights of child refugees or other child victims of human rights violations, though, according to the Protocol, smuggled persons, including children, are not to be prosecuted for their unauthorised mode of entry. Children are significantly implicated in smuggling operations as refugees seeking asylum<sup>83</sup> and as separated family members seeking reunification.<sup>84</sup> United States migration experts report that it is increasingly common for undocumented workers to pay smugglers to assist with family reunification inside the U.S. Thus, in August 2002, the INS announced that it had unearthed a Central American child smuggling ring, estimated to have smuggled 100 children a month into the U.S., and allegedly specializing in the reunification of children with their undocumented resident parents.<sup>85</sup> The growing difficulty of border crossing fuels this exploitative industry. Though relevant international refugee and family unity protections apply to these attempts by children to secure access to asylum or family reunification, in practice many states violate these provision, by detaining such children or expelling them without allowing access to due process procedures mandated by international law. Advocates report that INS officers regularly use the detention of such children as a bait to lure undocumented parents, prior to arresting them as they attempt to make contact with their newly arrived children.<sup>86</sup>

Children are disproportionately implicated in trafficking because of their particular vulnerability to exploitation for sex, (servicing paedophile proclivities or as a presumed hedge against HIV/AIDS), for abusive adoption,<sup>87</sup> or as slave labourers.<sup>88</sup> International law prohibits all forms of

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83. John Morrison & Beth Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?*, NEW ISSUES IN REFUGEE RESEARCH, Working Paper No. 24 (2001), available at <http://www.unhcr.ch/refworld/pubs/pubon.htm>.

84. Ginger Thompson, *Guatemala Intercepts 49 Children Illegally Bound for U.S.*, N.Y. TIMES, April 8, 2002, at A2. "Guatemalan authorities intercepted some 49 children, from toddlers to teenagers, who were being illegally transported from El Salvador to the United States, in . . . a highly organized smuggling network . . . American officials said most of the children were being transported to the United States to be reunited with parents."

85. Edward Hegstrom, *A Risky Border Business: INS Reports a Growing Number of Illegal Workers Are Paying Smugglers to Bring Their Families to the U.S.*, HOUS. CHRON., August 19, 2002, at A1.

86. WCRWC, PRISON, *supra* note 4, at 21-22.

87. Numerous baby smuggling rings illegally selling to unwitting adopters have been uncovered. See e.g. David M. Halbfinger, *U.S. Accuses 3 of Smuggling Mexican Babies*, N.Y. TIMES, May 28, 1999, at A1 (describing the sale of at least 17 Mexican infants for a minimum of \$20,000 each to unwitting New York adopters); 1994 SR Report on Sale of Children, *supra* note 81.

88. See Maria Leon, *Children Smuggled Into U.S. for Adoption, Prostitution*, EFE NEWS SERVICE, June 28, 2002, at 1, at [http://www.freetheslaves.net/hispanic\\_children\\_smuggled.htm](http://www.freetheslaves.net/hispanic_children_smuggled.htm) (stating that a UNICEF report identified Mexico as the main source of infants and children

child exploitation.<sup>89</sup> The Trafficking Protocol defines and criminalizes trafficking in persons, especially women and children.<sup>90</sup> By contrast with earlier treaties,<sup>91</sup> it includes not just coercion, but abuse of authority, as a component of trafficking, providing a more comprehensive range of illicit purposes of trafficking and broader enforcement and (non-mandatory) protective measures.

One clear goal of the Protocol is to substitute protection for criminalization of trafficked persons.<sup>92</sup> This includes an option for states parties to permit such persons to remain on the territory permanently. Several special victim protection provisions are particularly relevant to children, including legal assistance, counseling services, and the availability of shelter and medical help. The rights of child refugees and victims of human rights violations are specifically protected.<sup>93</sup> However, state practice routinely violates international protective provisions. For example, a report released at the time of this writing by the United Nations Special Rapporteurs on Arbitrary Detention and on the Sale Of Children, Child Prostitution And Child Pornography criticized the Guatemalan government for jailing foreign girls after rescuing them from traffickers.<sup>94</sup> In addition to these international developments, a wide range of

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trafficked into the U.S. to be given illicit adoptions or handed to prostitution rings and noting a CIA study indicating that 50,000 women and children were smuggled into the U.S. in 1999 for the purposes of prostitution or illegal adoption). *See also* 1994 SR Report on Sale of Children, *supra* note 81, at 53, 100-113; *Sale of Children, Child Prostitution, and Child Pornography*, U.N. GAOR, 50th Sess., Agenda Item 22, at 49-50, U.N. Doc. A/50/456 (1995) (citing reports, many difficult to substantiate, of child trafficking for the sale of their organs).

89. CRC, *supra* note 20, art. 36; ICESCR, *supra* note 23, art. 10, 993 U.N.T.S. at 7.

90. Trafficking Protocol, *supra* note 80, art. 3(a) (defining trafficking in persons as “the recruitment, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”).

91. Though the problem of child trafficking has long been of international concern, earlier treaties failed to distinguish between and cover all forms of trafficking: slavery was the predominate concern. The CRC established an all-embracing binding prohibition on child trafficking for the first time.

92. The terminology of “trafficked person” is preferable to the more common “victim of trafficking,” or “illegal” or “irregular trafficked migrant.” Human rights advocates have stressed the importance of the human rights of such persons, rather than on their victim status.

93. UNCHR has called for international collaboration to prevent the exposure of refugee children to trafficking. U.N. Doc. A/AC/96/702.

94. Casa Alianza, *UN Concerned for Treatment of Detained Trafficked Girls in Guatemala*, July 15, 2002, at <http://www.casa-alianza.org/EN/lastminute/07162002-1.shtml>.

anti-trafficking regional,<sup>95</sup> bilateral,<sup>96</sup> and national measures exists; many, but not all, include some human rights safeguards. The recent proliferation of such measures reflects the perception that commercially assisted immigration is an aspect of the darker side of globalization that has so far eluded state control.

However, the failure to address immigration pressure in a more constructive or realistic manner, and the reluctance of trafficked persons to rely on official protection, has limited the efficacy of trafficking control measures. An example of a recent measure with very limited impact to date is the U.S. Victims of Trafficking and Violence Protection Act of 2000.<sup>97</sup> This statute provides two new forms of protection. Victims of a range of criminal acts who, as a result, have suffered substantial physical or mental abuse are eligible for a “U” visa if they assist with criminal investigations; moreover, victims of severe forms of trafficking may also be eligible for a “T” visa if they can demonstrate that removal from the U.S. would cause “unusual and severe harm.” However, if they are younger than 15, they have to comply with requests for assistance with criminal prosecutions as well. Sex workers who have agreed to resort to commercially-assisted travel to works but who are then victims of human rights abuses, are not covered by the legislation. The requirement that beneficiaries cooperate with criminal prosecutors also restricts the scope for protective intervention, since the risk of retaliation by criminal trafficking networks acts as a powerful deterrent to cooperation.

#### CONCLUSION

International law addresses the particular rights and needs of children more comprehensively than it does those of any other general demographic group. The best interest principle, the obligation to promote family unity, and the prohibition on coercion or exploitation are universally acknowledged planks of the international normative framework. They apply to all children, whether they are citizens, aliens, or refugees. And yet, as rights bearers, children remain in a peculiarly disempowered, ambiguous position. As citizens, they occupy a denuded status, where cardinal attributes of citizenship such as the enjoyment of indefinite, permanent residence on the home territory, are not in practice assured. Constructive deportation is a common occurrence, as immigration control policies directed at alien parents trump family unity entitlements of citizen children – a striking asymmetry with the position of

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95. Revised European Social Charter, *supra* note 78, art. 7; Combating Human Trafficking, *supra* note 78; African Charter, *supra* note 62.

96. *People Smuggling Pact*, THE DAILY TELEGRAPH (Sydney), July 7, 2001, at 14 (reporting an agreement between Thailand and Australia to combat people-smuggling).

97. Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (2000).

citizen adults. As aliens, whether asylum seekers, smuggled or trafficked persons, or dependents seeking family reunification, child migrants are equally disadvantaged by comparison with their adult counterparts. Paradoxically, despite the expressed concern about their enhanced need for protective intervention, they have less access to formal legal procedures that lead to permanent status, less scope for articulating their views, less chance of securing an appropriate, child-centered perspective to impinge on decision making.

These disadvantages produce a janus-faced attitude to children in the international migration context: concern over particular vulnerability and need for protection combines with suspicion and hostility towards their unregulated, uncontrolled status – compassion for deprivation merges into suspicion of delinquency. The proliferation of these attitudes, clearly visible in the punitive detention policies of states such as the U.S. and Australia towards separated child asylum seekers, or the draconian approach of Latin American states towards child victims of sexual trafficking, is a consequence of two enduring defects in the international migration system as it impinges on children: the absence of supervisory jurisdiction regulating state compliance with the plethora of international norms protecting children in the migration context, and the continuing political invisibility of children within their own states. Children need to become a central focus of migration policy, not an afterthought, and active participants in contestation over rights not invisible dependent variables, if the promise of the ambitious normative regime is to be concretized in practice.