

Saint Louis University Public Law Review

Volume 22
Number 2 *The Protection of Children's Rights
Under International Law (Volume XXII, No. 2)*

Article 7

2003

Separated Children in Mass Migration: Causes and Cures

Daniel J. Steinbock
University of Toledo College of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

Recommended Citation

Steinbock, Daniel J. (2003) "Separated Children in Mass Migration: Causes and Cures," *Saint Louis University Public Law Review*: Vol. 22 : No. 2 , Article 7.

Available at: <https://scholarship.law.slu.edu/plr/vol22/iss2/7>

This Children as Refugees and Displaced Persons is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

SEPARATED CHILDREN IN MASS MIGRATION: CAUSES AND CURES

DANIEL J. STEINBOCK*

I. INTRODUCTION

Any effort to enhance and enforce the rights of children must take account of the millions of refugee children, and especially the tens of thousands separated from their normal caregivers. This brief article aims to give an overview of the legal and policy issues raised by these separated children in mass refugee crises, focusing on the interaction between child welfare concerns and their status as refugees. What makes the plight of the refugee children particularly difficult is the variety and complexity of the reasons for family separation, as well as the obstacles to satisfactory long-term placement posed by the refugee crises they have experienced.

About 45% of all refugees are under the age of 18.¹ Including individuals who have found sanctuary in a foreign country, and those who have been displaced within their own nation, there are approximately 50 million people uprooted in the world.² The United Nations High Commissioner for Refugees (UNHCR) cares for approximately 22 million of them.³ These figures mean that more than 22 million children are displaced worldwide and that approximately 10 million of those considered refugees by UNHCR are

* Harold A. Anderson, Professor of Law and Values, University of Toledo College of Law, B.A., J.D., Yale University. This article is an expanded version of my presentation at the International Law Students Conference on the Rights of the Child, at St. Louis University Law School, November 1, 2002. The article draws on my previous writings, particularly UNCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS AND REFUGEE MOVEMENTS (1988) (with E. Ressler and N. Boothby), *Unaccompanied Refugee Children in Host Country Foster Families*, 8 INT'L J. REFUGEE L. 6 (1996), and *The Admission of Unaccompanied Children Into the United States*, 7 YALE L. & POL'Y REV. 137 (1989). The author thanks the faculty, students, and staff at the St. Louis University School of Law for their hospitality.

1. *Refugee Children*, Global Consultation On International Protections, UNCHR, para. 1, U.N. Doc.CE/GC/02/9 (April 25, 2002), at <http://www.unhcr.ch/prexcom/globalcon.html> (on file with the St. Louis University Public Law Review).

2. The United Nations High Commissioner for Refugees (UNHCR), *The World of Children at a Glance*, at www.unhcr.ch/children/glance.html (last visited Feb. 11, 2003).

3. *Id.*

children. Refugee statistics are never exact and are always in flux, but by any measure these are enormous numbers.

Most refugee children flee and remain with a parent or parents, a close relative, or another adult serving in law or fact as their guardian. While these children are immeasurably better off than children without families, the presence of adult caregivers does not completely mitigate all the deprivations of refugee existence. Persecution, war, civil strife, and the forced migration that often follows, have disastrous effects on children's physical, psychological and nutritional well-being. Many displaced children are confined with their families in refugee camps. Debilitating as the camps are for adults, they have an even more detrimental effects on the young. One U.N. report noted:

Refugee children are restricted in their freedom of movement and grow up dependent upon care and maintenance support, often living in poor conditions with little to keep them occupied. The situation and limited day-to-day occupations of parents and the refugee community have changed, leaving children disoriented and without traditional role models. The normal processes of socialization and development of children are impeded or blocked. . . . Extended residence in a camp leads to extremes of behaviour in children, who become either passive and submissive, or aggressive and violent. . . . There have been reports of vandalism, drug addiction, rape, assault, robberies and other offenses by refugee youth. Refugee children sometimes face serious adaptation problems when they finally leave the camp.⁴

II. PARENT-CHILD SEPARATION

According to UNHCR, between two and five percent of the child refugee population are "separated" or "unaccompanied" children: those under eighteen years who are separated from both parents or from their previous legal or customary primary caregiver.⁵ Applying this frequency to the numbers above, between 200,000 and 500,000 of UNHCR's count and between 450,000 and 1.125 million of the total displaced population are separated children. This, of course, is a very rough estimate, but it suggests that unaccompanied children

4. Guideline on Refugee Children 1988, paras. 159-60, *in* INTERNATIONAL DOCUMENTS ON CHILDREN 383 (Gerladine Van Bueren, ed., 1993).

5. In international usage, the terms "separated" and "unaccompanied" have somewhat different meanings, but are used interchangeably here. "Unaccompanied children" refers to children who are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible for doing so. "Separated children" are defined as children under 18 years who are separated from both parents or from their previous legal or customary primary caregiver. Refugee Children, *supra* note 4, paras. 4-5. The term "separated children" is now preferred in order to make clear that children currently with an extended family member who was not the previous primary caregiver will benefit from efforts to trace and reunite them with that previous caregiver. *Id.*

are an important component of any refugee situation. History also demonstrates this fact, for the problem of unaccompanied children in times of war or persecution is as old as humankind. Moses was set adrift in the bulrushes as an infant to escape an edict of death to all first-born sons. The story of unaccompanied children mirrors the twentieth century's history of wars, revolutions, mass population movements, and natural disasters. From the Armenian massacre of 1915, through the Kosovo crisis of 1999, to the aftermath of the Siena Leone civil war of today, children have been lost or separated from parents and other family members during social upheavals. World War II alone probably produced over a million unaccompanied children. Overall, no exact account exists of the number of children left without families by the conflicts of the past century, but it is most certainly in the millions.

Refugee children disconnected from their usual caregivers suffer from two separate dilemmas: family separation and displacement. Either predicament is serious enough in itself, but the interaction of these two disabilities vastly increases the dangers. Unaccompanied children are at risk of deprivation of basic needs, physical violations, sexual abuse, trade in children, and other kinds of exploitation. The combination of the generally vulnerable status of children and the particular dangers for children without caregivers gives rise to an issue that has received special attention for much of the last 80 years. As early as 1924, the League of Nations Declaration of the Rights of the Child proclaimed, "the child must be the first to receive relief in times of distress" and "the orphan and the waif must be sheltered and succored."⁶

It is important to recognize that child-family separations occur for a variety of reasons. Not all unaccompanied children are "orphans" — those whose mother and father are both deceased — and not all have been separated against the will of both parents and children. Some separations, of course, are not chosen by either adults or children. Children who are *orphaned*, *abducted*, and *lost* are among this latter group. Children have been *abducted* (forcibly and illegally removed from their parents—often for political reasons) a number of times in recent years, including during the Greek Civil War of the late 1940's and under the Khmer Rouge regime in Cambodia between 1975 and 1979. In virtually all emergencies, children have become *lost*, accidentally separated from their parents while fleeing from danger, because they were already separated when the crisis occurred, or for other reasons. Other children have left their families without consent as *runaways*, a voluntary separation by the child but against the wishes of the parents. Some of the unaccompanied Vietnamese, Laotian, and Cambodian children of recent years fall within this

6. League of Nations Declarations on the Rights of the Child 1924, in INTERNATIONAL DOCUMENTS ON CHILDREN, *supra* note 4, at 3.

last category. Finally, some children had already been *removed* from their parents before they were forced to flee.

Other parent-child separations are voluntary on the parents' part, although their decision may be induced by the crisis conditions. Unaccompanied children in these situations include those *abandoned*, whose parents have deserted them with no intention of reunion, and *surrendered*, whose parents have given up parental rights, usually to allow adoption by others. Faced with the danger, destitution, social upheaval, and uncertainty of war, natural disaster or population movement, or the aftermath of rape, some parents have given up their children in these ways in recent years. Other parents have *entrusted* their children to other adults or agencies, intending to reclaim the children when circumstances permitted. During the Korean War of the early 1950's and the Vietnamese conflict in the 1960's and 70's, for example, it was not uncommon for impoverished parents to leave their children at orphanages for a time. In a number of wars, parents have sent children away in organized evacuations. More than 20,000 Basque children were sent abroad during the Spanish Civil War, mostly to France, the Soviet Union, and the United Kingdom. Approximately 67,000 Finnish children went to Sweden between 1940-44, and 10,000 Biafran children were moved, mostly to neighboring African countries, during the Nigerian Civil War of 1969-70. In many evacuations, the family separations were intended to be temporary, but some children never returned. Finally, there are *independent* unaccompanied children, who have voluntarily left with their parents' consent, often to seek better conditions elsewhere. Some of the Vietnamese boat children, particularly adolescents, fell into this category, as do many of the unaccompanied child asylum seekers currently in Europe and North America.

CAUSES OF PARENT/CHILD SEPARATIONS

Involuntary Separation: Against the Will of the Parents

Orphaned – A child whose parents are both dead.

Lost – A child unintentionally separated from the parents.

Abducted – A child involuntarily and illegally taken from the parents.

Runaway – A child who intentionally left the parents without their consent.

Removed – A child removed from the parents as a result of legal suspension or loss of parental rights.

Voluntary Separation: With the Parents' Consent

Abandoned – A child whose parents have deserted the child with no intention of reunion.

Entrusted – A child voluntarily placed in the care of another adult or institution by the parents, who intend to reclaim the child.

Surrendered – A child whose parents have permanently given up their parental rights.

Independent – A child voluntarily living apart from his or her parents with their consent.

These categories are organized according to the intent of the parents at the time of separation. The child's desire to live with the parents is not always the same as the parents' wishes to be with the child. Moreover, either party's intent can change. In other words, a child can move from one category to another. Most importantly, the prospects for family reunion and other placement decisions will vary depending on the family situation and cause of separation reflected in these categories.

III. DISPLACEMENT

There are almost as many varieties of displacement as there are of family separation. The most important distinction from the point of law and institutional assistance is between internal and cross-border displacement. If a refugee flees within his or her own country, as most do, questions of migration and refugee law do not come into play, and the refugee is usually left to that country's own legal and institutional resources. However, the conditions that produce forced migration and family separation are also likely to interfere with the social structures (e.g., extended family) and governmental agencies that would ordinarily care for separated children.

Refugees who cross borders can end up in adjacent countries or more distant lands. The arrival of a large population in a host country within a narrow timeframe is commonly called a "mass migration." Such refugees are most likely to seek sanctuary in adjacent countries, if only because of the difficulty and expense of traveling further. This was the case with mass migration in the past few decades from Cambodia, Afghanistan, Sudan, Somali, Rwanda, Kosovo, Sierra Leone, Cuba, and Haiti. Faced with a mass refugee influx, most countries find it impossible to screen individuals for the "well-founded fear of persecution" that formal refugee status requires. Instead, the migrants may be given a *de facto* refugee status and allowed to stay, though they are often confined to camps, hostels, or other delimited areas. When putative refugees arrive in smaller numbers, they often face more individualized questions of entitlement to asylum or some other legal right to remain in the host country. For unaccompanied child asylum seekers in this situation, there are also issues of detention, placement, legal representation, and application of the refugee standard to the facts of their cases.⁷

In mass migrations, the issues posed by separated children most commonly involve their identification and placement. Separated children can find themselves in several possible situations: 1) taken in by local families somewhere along their route; 2) attached to refugee adults in the refugee camp;

7. See Jacqueline Bhabha and Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INTL. J. REFUGEE L. 84 (1999).

3) living on their own or in groups of children in the refugee camp; 4) identified by relief workers and placed in children's centers (orphanages), group homes, or with refugee foster families; or 5) recruited or compelled to join a military element among the refugees. The major question is what camp authorities or outside interveners should do with them.

IV. CURES

Seldom is there a total "cure" for the situation of separated children, in the sense of reunion with primary caregivers in the country or location from which they have fled, though this does happen. Most often, all that can be done is to ameliorate, to the extent possible, both their separated and their displaced statuses.

Parent-child separation in wars and refugee movements is an issue for which an ounce of prevention truly is worth a pound of cure. On the displacement side of the problem, the obvious form of prevention is avoidance of the persecution, civil strife, war, or other crises that cause people to flee their homes – the so-called "root causes" of refugee movements. This often is impossible, but even in times of trouble there are several measures that can be taken to reduce the incidence of family separation. These include protecting the integrity of families, including foster families, guarding against illegal abductions and separations, and providing assistance to families vulnerable to parent-child separation, especially single-parent families. Once families have reached a refugee camp, administrators should avoid relief practices that may inadvertently encourage family separation; e.g., substantially better conditions for unaccompanied children in children's centers, orphanages, feeding programs, or other forms of treatment. Otherwise, there is a risk of actually encouraging parents to give up their children in order to assure them these benefits.

In the middle of the twentieth century, evacuating children from war areas was not uncommon and took place in the Spanish Civil War, during the Finnish-Soviet conflict of the 1940s, within and from Great Britain in World War II and in the Nigerian Civil War in the late 1960s. Thousands of Cuban children were sent to the United States after 1960. Organized evacuation is a problematic practice, but if it takes place at all, at least one parent should accompany the child in order to minimize family disruption.

Not all parent-child separations during crises can be prevented, of course, especially those caused by the death of the child's parents. For children who do become separated from their primary caregivers, both international law

(particularly the Convention on the Rights of the Child)⁸ and international practice now address the main child welfare issues. These include identification of separated children, interim care and protection,⁹ tracing¹⁰ (the process of locating the child's relatives), family reunion,¹¹ and the establishment of alternative long-term placements for those children who cannot be reunited with their families.¹² With respect to the last issue – alternative long-term care – there is a subsidiary question of whether this should be sought in the country of asylum, the country of origin, or other “third” countries.¹³ Who should decide the child's placement and what role the child him or herself should play in the decision are also vexing questions.

Here, as elsewhere, children's best interests can come up against their status as refugees, which may impede or distort the optimal child welfare solution. Ordinarily, UNHCR looks for “durable solutions” to refugee status in repatriation, local settlement, or resettlement to another country. A durable solution to displacement involves immigration, refugee, and asylum law. Given the importance placed by international law on the child's growth and development and his or her best interests, the choice of durable solutions should be made in the child's best interests and the other bodies of law should yield to this principle.

For children facing persecution in their homeland, it is certainly not in their best interests to repatriate, and refugee and asylum law, properly applied, would bar that outcome. There may be other circumstances, as well, when it would not be in a child's best interest to return to the country of origin. For children living in refugee camps, is it in a child's best interest to be placed with refugee foster families? Would the child be better off with the local asylum country's families? These decisions depend very much on the facts of the particular situation.

In theory, resettlement of unaccompanied children is also a possibility, but in reality it cannot be a solution for more than a small fraction of separated children. Worldwide, approximately 100,000 refugees of all ages are resettled each year, mainly in the developed countries. The United States takes about 70,000 of this total. There are many demands on refugee resettlement, and, while unaccompanied children probably have a special claim, they cannot and should not receive all of the available slots. Resettlement of separated children

8. The Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990, [hereinafter CRC].

9. *Id.* art. 22(1)-(2).

10. *Id.* art. 22(2).

11. *Id.* arts. 3(2), 8, 10(2).

12. *Id.* art. 20.

13. CRC, *supra* note 8, art. 21(b).

should focus, therefore, on particularly pressing cases: 1) to facilitate reunion with parents or more distant relatives; 2) to ensure that children in the care of a family being resettled will stay with that family; 3) to assure an adequate placement or protection from exceptional danger; and 4) to assist unaccompanied children who are exposed to greater risk or deprivation than other children or the general refugee population. Even then, not all who fall within these groups are likely to be accommodated.

Immigration and refugee law can potentially come into conflict with both parental rights and what is best for the particular child. For example, the child may want to stay in a country while the parents want the child to leave with them,¹⁴ or a parent may want the child to return to his or her country of origin, but a relative may want the child to stay in a potential country of asylum.¹⁵ These examples raise classic issues of parental rights versus the rights of the child or other relatives, albeit where immigration or asylum opportunities may be motivating the conflict. Although these instances can garner broad public attention, they are actually quite rare.

Because immigration law often acts as a barrier to international population movement, it can interfere with beneficial family reunion. The best interests of the child might dictate family reunion, for example, but the child (or other family member) might not qualify for permanent admission to the country of the potential reunion. For this reason, the CRC directs that immigration applications to reconnect a child with his or her family be dealt with in a “positive, humane and expeditious manner.”¹⁶

Children in intractable refugee situations pose the most significant conflict between children’s best interests and legal and political conditions. Here, the best interests of the children would usually dictate living outside a refugee camp, but the absence of any real solution for the refugee situation makes this impossible. For unaccompanied refugee children, this is a reality that often makes most responses to their plight only second-best solutions.

V. CONCLUSION

Given that the CRC demands that the child shall have “as far as possible, the right to know and be cared for by his or her parents,”¹⁷ and that “States Parties shall ensure that a child shall not be separated from his or her parents

14. *In re* Walter Polovchak, 454 N.E. 2d 258, 259 (1983).

15. Elian Gonzalez is the most notorious example. For a summary of the litigation over his fate, see Bernard H. Oxman & David Abraham, *International Decisions, Asylum—Right of Parent to Represent Child—Effect of Parent’s Residence in Cuba—Administrative Law—Judicial Review of Immigration Decision*, 95 AM. J. INTL. L. 204 (2001).

16. CRC, *supra* note 8, art. 10(1).

17. *Id.* art. 7(1).

against their will,”¹⁸ the very existence of unaccompanied refugee children represents a failure of rights protection. Unfortunately, separated children are likely to be present in all mass refugee movements. In recent years there has been substantial attention given to this fact, and additional — and more thoughtful — assistance has been given. We should continue to do what we can to discourage family separations, to care for those who do become separated, and to remedy their family separation and their displacement to the extent possible, recognizing as we do that we are often remedying effects rather than eliminating causes.

18. *Id.* art. 9(1).