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Separated Children Fleeing Persecution: A Comparative Study of Asylum Policies in the U.K. and the U.S.

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SEPARATED CHILDREN FLEEING PERSECUTION:
A COMPARATIVE STUDY OF ASYLUM POLICIES IN THE U.K AND
THE U.S.

AN HONORS THESIS
PRESENTED BY
SARAH M. HOWE

TO
THE DEPARTMENT OF GOVERNMENT
IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR
HONORS IN THE MAJOR FIELD

CONNECTICUT COLLEGE
NEW LONDON, CONNECTICUT
MAY 6, 2010

**Separated Children Fleeing Persecution:
A Comparative Study of Asylum Policies in the U.K. and the U.S.**

By
Sarah M. Howe

*To all the children who are forced to grow up too quickly,
Who have gone far too long without a reason for laughter,
 May the promise of peace lull you into gentle sleep,
And bring you dreams of days before innocence was lost.*

ACKNOWLEDGEMENTS

To all those who have selflessly given me love and support, I owe you my deepest thanks...

TRISTAN BORER

For the three years I have been fortunate enough to work with you, you have been relentless in your efforts to broaden my notions of right and wrong and deepen my understanding of the world around us. You have helped me to discover that there is always room for compassion, even in politics. Thank you for everything.

MOM & DAD

All of my life, you have told me I can be whatever I want to be. I haven't always made the right choices, but they were always mine to make. You have watched me grow older, and have given me the tools to grow wiser. Your endless support and love means the world to me. I love you.

MOHAMADOU DAOUDA & THE CHILDREN'S PANEL

Thank you for your willingness to take a young American girl under your wing and teach her all you knew. My time with you taught me so much and was truly unforgettable. Cheers.

AND...

To all of the people who give their all for the betterment of mankind. To those who wake up every morning to fight injustice, knowing that their hearts will be broken, but having faith that they can make a difference in the world. You are my inspiration and I am forever grateful.

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INTRODUCTION

“It might be difficult for some people to understand about refugee children. If they want to stay happy then they do not want to hear our story.”¹

N.R.² fled Afghanistan because his father and his uncle had an argument about a piece of land of which they shared ownership. N.R.’s uncle chose to enlist the help of the Taliban to gain full possession of the land. The Taliban attacked N.R.’s father in the field one day, but his father refused to cede his share. One night, the Taliban arrived at N.R.’s house and killed his parents and brother. N.R. managed to escape by crawling out of a window at the back of the house. After he escaped, N.R. fled to Iran where he stayed for eight months. He then crossed the border into Turkey, staying there for another month. N.R. crossed into France and then eventually the United Kingdom.

¹ Abdoul, a young man from Somalia, quoted in John Simmonds, “Telling the stories of unaccompanied asylum seeking and refugee children,” *Working with Unaccompanied Asylum Seeking Children: Issues for Policy and Practice*, Ed. Ravi K. S. Kohli and Fiona Mitchell, (New York: Palgrave Macmillan, 2007): 1.

² Only initials provided to protect confidentiality.

When he applied for asylum, N.R. claimed to be a minor, and gave a full statement of his reasons for fleeing Afghanistan, one of which was fear that the Taliban was still pursuing him. N.R.'s claim was refused. According to the U.K. Border Agency (UKBA), N.R. looked to be twenty years old so he was not entitled to any child protection. Additionally, the UKBA did not believe his claim to be valid because the Taliban had been overthrown in 2001. According to the UKBA, N.R.'s uncle and the Taliban did not have the motive nor the resources to pursue him, and besides he could go to Kabul and be safe there – a mere five hours from his home and everyone he knew. Furthermore, the UKBA claimed that N.R.'s story lacked credibility because his father would have just sold the land after the first attack, and a boy would not have been able to out-run the Taliban the night of the attack without getting caught or shot. N.R.'s very survival precluded him from gaining asylum.³

Humanitarian crises throughout the world have provoked the displacement of over 45 million people, half of whom are children.⁴ Many of these children become separated from their families due to chaos caused by violence, natural disasters, trafficking and other tragedies. These separated children then face the daunting task of surviving on their own, a feat even many adults have trouble accomplishing. Then, these children face a difficult choice: remain in their countries of origin and become part of the internally displaced population; or, cross an international border and face head-on a legal system which is all too often determined to keep them out. This was the case for N.R. in the

³ N.R., Personal interview at the Drop-In Centre at the British Refugee Council, Summer 2009.

⁴ Amy Hepburn, Jan Williamson, and Tanya Wolfram, "Separated Children: Care & Protection of Children in Emergencies," *Save the Children Federation, Inc.*, 2004, available at: http://www.savethechildren.org/publications/technical-resources/child-survival/SEPARATED_CHILDREN_CONTENTS.pdf [accessed 29 April 2010]

U.K., but is also the case for separated children around the world. Separated children are defined as “children under 18 years of age who are outside their country of origin and separated from both parents or their previous legal/customary primary caregiver.”⁵

However, separated children may be in the company of others, including siblings, family acquaintances, smugglers, or traffickers. Thus, all unaccompanied children are separated children, but not all separated children are unaccompanied. This thesis examines separated children seeking asylum from persecution in the U.K. and the U.S.

Separated children seeking asylum are located at the intersection of two very vulnerable populations – refugees and children- and as such deserve international attention and protection. Because these children are separated from their parents or guardians, their vulnerability is increased and the need for international protection becomes essential. Through a comparative analysis, this thesis investigates whether a country that has ratified the United Nations Convention on the Rights of the Child (CRC), offers more protection to separated children applying for asylum than the asylum laws of a country that has not. The U.K. ratified the CRC in 1991, two years after it was opened for signatures.⁶ The U.K. government’s long commitment to the CRC, as evidenced by its early ratification of the Convention, as well as its history of consistently being one of the receivers of the most separated children has made the U.K. an ideal country to use in this comparison. The options for a country that had not ratified the CRC, however, were extremely limited. Since November 2008, the only members of the

⁵ Separated Children in Europe Programme, *Statement of Good Practice*, Third Edition, 2004, available at: <http://www.unhcr.org/refworld/pdfid/415450694.pdf> [accessed 29 April 2010]

⁶ “Children’s Human Rights,” *Directgov*, available at: http://www.direct.gov.uk/en/Parents/ParentsRights/DG_4003313 [accessed 29 April 2010]

United Nations that have failed to ratify the CRC are the United States and Somalia.⁷

Given that the upheaval in Somalia makes it an unlikely destination for children seeking asylum, and that the United States exerts much more influence in the international arena,

I have designated the U.S. as the other country considered in this comparison. I

hypothesize that ratifying the CRC creates a dual protection mechanism when combined with the principles in the 1951 Convention Relating to the Status of Refugees and its

1967 Protocol (from now on the 1951 Convention), to which the U.S. and the U.K. both

adhere. Therefore, I theorize that ratification of the CRC is a significant factor in the level

of protection offered to separated children by a host country. In this comparison, I expect

that I will find that the U.K. offers protection to separated children that exceeds that

offered by the U.S., although the opening narrative suggests that this is not always the

case.

The first chapter provides an overview of the literature about regime theory, which is a useful tool when attempting to explain why states choose to act as they do.

Stephen Krasner defines regimes as “institutions possessing norms, decision rules, and procedures which facilitate a convergence of expectations.”⁸ Using the research of

Krasner and others, I apply the general principles of regime theory to the institutions

involved in the protection of separated children. In this chapter, I examine the CRC and

the 1951 Refugee Convention to identify the treaty obligations of signatory states. In this

section, I briefly explore the reasons behind the U.S. government’s refusal to ratify the

CRC. By placing this study within the framework of a child protection regime, I am able

⁷ UNICEF, *Convention on the Rights of the Child: Frequently Asked Questions*, available at: http://www.unicef.org/crc/index_30229.html [accessed 29 April 2010]

⁸ Stephen Krasner, “Structural causes and regime consequences: regimes as intervening variables,” *International Regimes*, Ed. Stephen D. Krasner, (Ithaca: Cornell University Press, 1983): 2.

to identify the many actors and various factors that contribute to the level of protection given to separated children.

In Chapter Two, I provide an overview of U.K. asylum law as it relates to separated children. I analyze the reservations the U.K. entered during its ratification of the CRC. I also include other relevant laws and policy, including the New Asylum Model. Using this framework, I establish the protection measures that are in place for separated children. I use specific case studies from my personal experience as an intern at the British Refugee Council to illustrate the various impacts of U.K. asylum law. In this chapter, I focus both on the law and the reality, and as such address problems facing separated children in the U.K., including the recent increase of age dispute cases, the detention of minors, third country regulations, and the low acceptance rates of separated children as refugees.

In Chapter Three, I provide a review of U.S. asylum laws and their compatibility with the 1951 Convention, and focus primarily on those that are directed toward separated children. I seek to identify aspects of U.S. law which result in reduced protection for separated children, especially in those areas which would be remedied by ratification of the CRC. I also consider issues relating to low acceptance of separated children as refugees, as well as problems associated with detention and the absence of sufficient monitoring mechanisms.

Lastly, in Chapter Four, I enter into an analysis of the U.K. and the U.S. asylum systems, at the end of which I determine if one is more conducive to ensuring the rights of separated children. I also assess the influence which the double protection offered by

the CRC and the 1951 Convention exerts on U.K. asylum laws, and whether ratification of the CRC would improve the asylum process in the US.

CHAPTER 1:

Protection Regimes and Separated Children

“The globe shrinks for those who own it, but for the displaced or dispossessed, the migrant or refugee, no distance is more awesome than the few feet across borders and frontiers.”⁹

What is Regime Theory?

Stephen Krasner defines international regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given area of international relations.”¹⁰ For Krasner, principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and

⁹ Homi Bhabha, cited in Charles Watters, *Refugee Children: Towards the Next Horizon* (New York: Routledge, 2007): 29.

¹⁰ Stephen D. Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables,” *International Regimes*, ed. Stephen D. Krasner (Ithaca: Cornell University Press, 1983): 2.

implementing collective choice.¹¹ Krasner also makes an important distinction between regimes and agreements: agreements are “one-shot” arrangements, whereas regimes serve to facilitate agreements.¹² Regime-governed behavior then, is based on more than short-term goals and interests, and usually entails a sense of obligation by adhering states. Yet how feasible is it to expect states to give priority to something other than their immediate interests? Can regimes really be effective? There are three basic views on the efficacy of regimes. First, realists believe that the concept of regime is misleading because it obscures basic economic and power relationships that drive state behavior.¹³ Scholars of this perspective argue that the world is made up of actors looking after their own self-interests, and it is these interests and power relationships that determine outcomes and behavior: regimes have no independent effect on state behavior.¹⁴ The second view is a functionalist one, which has many of the same tenets as the realist view, but proposes that regimes can have an impact when they serve to coordinate behavior among states. If this coordination leads to outcomes that are better than those that could have been achieved by states acting in isolation, then regimes can have a significant impact.¹⁵ The third view, constructivist, is that regimes are an integral part of the world system.¹⁶ In this argument, elites, rather than states, are the key actors in international relations. These elites act “within a communications net, embodying rules, norms, and principles, which transcends

¹¹ Ibid., 2.

¹² There are many examples of international regimes, often evolving from United Nations conventions, including the UN Convention on the Laws of the Sea, the Biological Weapons Convention, the Convention Relating to the Status of Refugees, and the Convention on the Rights of the Child – the last two are the focus of this thesis.

¹³ Krasner, 1.

¹⁴ Beth Elise Whitaker, “Funding the International Refugee Regime: Implications for Protection,” *Global Governance*, 14.2 (2008): 241.

¹⁵ Ibid., 241.

¹⁶ Ibid., 241.

national boundaries.”¹⁷ The emphasis for constructivists is the impact of ideas on the creation and perpetuation of regimes.

One question pertinent to both regime theory and this thesis is do countries have more respect for human rights because they have ratified international treaties? Or, have they ratified the international treaties to illustrate their respect for human rights? There are a small number of empirical studies that attempt to gauge whether ratification of human rights treaties makes a difference in reality. Eric Neumayer cites a study conducted by Oona Hathaway on whether human rights treaties make a difference in state behavior, which revealed several findings¹⁸: first, when she used the average human rights score of countries that have ratified a given treaty (she uses the Genocide Convention, the International Convention on Civil and Political Rights, the Convention Against Torture, and the 1952 Convention on the Political Rights of Women) with those that have not, ratifying countries had a better record of adherence and implementation than non-ratifying ones. However, in her subsequent tests that factor in other variables such as time passed since treaty ratification, and the type of government, Hathaway found no evidence of a connection between treaty ratification and better human rights performance. In fact, in some cases, ratification actually led to some countries having worse performance. Neumayer summarizes Hathaway’s observation by noting, “treaty ratification can deflect internal or external pressure for real change...countries with poor performance...may at times even step up violations in the belief that the nominal gesture of treaty ratification will shield them somewhat from pressure.”¹⁹ However, the evidence

¹⁷ Krasner, 9.

¹⁸ Eric Neumayer, “Do International Human Rights Treaties Improve Respect for Human Rights?” *The Journal of Conflict Resolution*, 49.6 (2005): 933.

¹⁹ *Ibid.*, 927.

did point to ratification being associated with a better human rights record when the ratifying country was fully democratic. This is primarily due to the level of open opposition allowed within a democratic state, which allows nongovernmental organizations, protest movements, political parties, or any other group to peacefully pressure the government to respect human rights.²⁰ Emilie M. Hafner-Burton and Kiyoteru Tsutsui conducted a similar study in which they had a two-prong hypothesis: first, governments are likely to ratify human rights treaties even when they are not prepared to comply with the provisions therein, which frequently serves to worsen human rights abuses; and secondly, despite the first part of the theory, human rights treaties increase the legitimacy of human rights principles and thus enable civil society to put pressure on governments to improve their human rights practices, regardless of whether those governments have ratified the treaties.²¹ The study used a sample of 153 states and six treaties: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the Convention Against Torture; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention on the Elimination of All Forms of Racial Discrimination. The data collected supported the original hypothesis: although the treaties lack the enforcement to ensure compliance by ratifying governments, the norms and principles enshrined by the treaties are given added legitimacy by the act of ratification, and thus provide leverage for nongovernmental actors to pressure noncompliant governments. Lastly, this study agreed with Hathaway's findings that

²⁰ Ibid., 930.

²¹ Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology*, 110.5 (March 2005): 1386.

democracies are better protectors of human rights.²² Therefore, as the United States and the United Kingdom are both highly democratic, based on these studies, one would expect that treaty ratification in both countries would increase respect and protection of the rights provided in the two regimes investigated: refugees and children.

The focus of this thesis is on the connection and overlap between the refugee regime and the children's rights regime. My hypothesis is that together, the two regimes (in theory) provide a dual protection mechanism to separated children, as is the case in the U.K. The U.S., on the other hand, has yet to ratify the Convention on the Rights of the Child (CRC), the key legislation of the children's rights regime, and therefore does not have as comprehensive protection mechanisms for separated children. In the following pages I provide an overview of the history, rules, and actors for each regime, and then conclude with how the two regimes can overlap and work together.

Why Use Regime Theory?

According to realism, the predominant international relations theory, the nature of the world system is characterized by anarchy in which there is no world government with the power to enforce international law. Yet, many states are party to numerous international treaties, and to varying extents, abide by them. One theory which tries to explain the willingness of states to cede some of their sovereignty in order to conform to international agreements is regime theory. The refugee regime, for example, has many provisions for the protection of persons crossing international borders due to fear of persecution. However, since enforcement of the regime comes down to states, the regime's efficacy can suffer when states choose not to comply. State adherence to regimes is largely dependent upon how states perceive the regimes advancing their

²² Ibid., 1401.

national interests. In this thesis, the focus is the intersection of the refugee regime and the children's rights regime. My hypothesis is that together, the two regimes (in theory) provide a dual protection mechanism to separated children, as is the case in the United Kingdom. Regime theory is useful in determining why states choose to comply or not comply with the laws within the regime. Thus, regime theory can provide insight into how to increase state compliance, and summarily increase protection for vulnerable groups, in this case, separated children.

The Refugee Regime

The international refugee regime is defined as:

The collection of conventions, treaties, intergovernmental and non-governmental agencies, precedent, and funding which governments have adopted and support to protect and assist those displaced from their country by persecution, or displaced by war in some regions of the world where agreements or practice have extended protection to persons displaced by the general devastation of war, even if they are not specifically targeted for persecution.²³

The regime is centered around the United Nations High Commissioner for Refugees (UNHCR), as well as the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. The regime is constantly evolving to become what it is today. Gil Loescher divides the history of the refugee regime into five main periods: the interwar period, the immediate post-Second World War era, the period of expansion into the Third World (late 1950s-1970s), the decade of the 1980s, and the post-Cold War era.²⁴

The contemporary refugee regime was born in the aftermath of World War II with the creation of the International Refugee Organization (IRO). Interestingly, the IRO

²³ Ibid., 1401.

²⁴ Charles B. Keely, "The International Refugee Regime(s): The End of the Cold War Matters," *International Migration Review*, 35.1, Special Issue: UNHCR at 50: Past, Present and Future of Refugee Assistance (Spring 2001): 303.

included as one of four categories of refugee unaccompanied children who were war orphans or whose parents had disappeared.²⁵ At this time, the international community hoped to use the IRO to prevent further destabilization of recovering European economies, as well as to “internationalize” the refugee problem by distributing both the refugees and their associated costs throughout much of the world. In 1950, the United Nations High Commissioner for Refugees (UNHCR) was established, and the following year the Convention Relating to the Status of Refugees was adopted. The Convention defines a refugee as:

A person who owing to a 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.²⁶

However, the original definition was limited to European refugees from World War II, and excluded suffering populations from other parts of the world. Member states hoped that the UNHCR would serve to coordinate action for refugees without infringing upon their national sovereignty, or their purses. As the world’s hegemon, and the country that survived World War II with most of its resources intact, the support of the United States became a necessary prerequisite for the success of the UNHCR. Unfortunately, U.S. decision makers were not yet willing to commit to an organization that they believed would make perpetual appeals for assistance to refugees who were not always of concern to U.S. foreign policy. Rather, the U.S. chose to channel its funds to refugees fleeing

²⁵ Gil Loescher, “The International Refugee Regime: Stretched to the Limit?” *Journal of International Affairs*, 47.2 (Winter 1994): 352-3.

²⁶ Jacqueline Bhabha, “Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-seekers,” *European Journal of Migration and Law*, 3 (2001): 283-4.

Communist countries, and established its own organizations to achieve this aim: the Intergovernmental Committee for European Migration and the U.S. Escapee Program. Therefore, the UNHCR's main duties consisted of merely providing legal protection to those not already resettled by the IRO. In 1956, however, the UNHCR was so successful in coordinating relief for refugees of the Hungarian Revolution, that the U.S. and other actors began to see the organization as a useful tool.²⁷

U.S. commitment to the UNHCR meant increased funding, and thus increased capabilities. Throughout the late 1950s and until the late 1970s, the UNHCR sought to provide material assistance to refugees and people in refugee-like situations that had resulted largely from decolonization and civil wars in the developing world. The changing nature of refugee-producing situations required that the definition of a refugee also change, so in 1967 a protocol to the 1951 Convention eliminated the time and location requirements from the definition.²⁸ The U.S., which had not signed the 1951 Convention, ratified the 1967 Protocol in 1968. Western governments, who were the only actors in the international refugee regime at this time, believed that addressing refugee situations through material assistance from the UNHCR could help remedy the instability that was spreading rampantly throughout the third world. In a way, states used the UNHCR in attempt to sidestep other responsibilities – by providing the UNHCR with money to use for aid in the developing world, states hoped that they could avoid the need to take responsibility for the destructive consequences of colonization.²⁹ Furthermore, while the UNHCR is capable of providing material assistance to refugees, it is the responsibility of states to implement the three durable solutions for refugees. Two of the

²⁷ Loescher, 357-8.

²⁸ *1967 Protocol Relating to the Status of Refugees*

²⁹ Loescher, 360-61.

durable solutions are voluntary repatriation and resettlement in a third country, defined as “the transfer of refugees from a state in which they have initially sought protection to a third state that has agreed to admit them with permanent-residence status.”³⁰ The last durable solution is integration in the country of first asylum (best known as political asylum), when a person who has been recognized by the host government as having fled from his home country due to fear of persecution,³¹ and has thus been granted protective status and permission to remain. The last of these, the granting of asylum, is the focus of this thesis. Many member states hoped, and still hope today, that channeling funds for the UNHCR to provide material assistance in the area of conflict would be sufficient to prevent vulnerable populations from needing to be resettled or from attempting to cross international borders to seek asylum. In practice, the UNHCR “has a very small role to play in national asylum systems and an even smaller role in migration management.”³² In this day and age, it appears that it is much easier for states to throw money at a distant crisis than to open one’s borders and abide by one’s obligations to create durable solutions.

As the Cold War escalated, refugee assistance became an integral part of western foreign policy: many western governments used the 1951 Convention as a tool of psychological warfare against their Communist opponents. In a sense, this tactic was used to “demonstrate the bankruptcy of a system from which people had to escape, often at great peril. When people voted with their feet, even at great cost, they went west...”³³ As

³⁰ UN High Commissioner for Refugees, *The State of the World’s Refugees: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006): 142.

³¹ Due to reasons of race, religion, nationality, membership of a particular social group or political opinion as defined by the 1951 Convention and the 1967 Protocol.

³² Liv Feijen, “The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe,” *Refugee Survey Quarterly*, 27.4 (2009): 64.

³³ Keely, 307.

a result, during the 1950's through the 70's, western governments extended refugee status and protection to asylum seekers quite freely.³⁴

During the 1980s, western states adopted more restrictive policies towards refugees. At the same time, conflict in much of the world was intensifying. Internal wars in Indochina, Afghanistan, Central America, the Horn of Africa and Southern Africa generated large numbers of refugees. Western policymakers preferred creating camps in the regions of conflict in order to keep the conflict from spilling over into other countries. However, according to Loescher, “the international community failed to devise comprehensive or long-term political solutions or to provide any alternatives to prolonged camp existence.”³⁵ The danger that is inherent in a camp situated in a conflict zone with only limited resources, can drive people to flee, sometimes to seek asylum in western states. As more and more people fled directly to western countries to apply for asylum or seek better economic opportunities, host governments began to make more restrictive interpretations of the 1951 Convention, in what Jerzy Sztucki terms “Convention fundamentalism.”³⁶ Western governments began to view asylum seekers as burdens and deemed their increased number an “asylum crisis.” Not surprisingly, many western governments now view repatriation as the optimal solution.³⁷ However, repatriation ceases to be a durable solution if it gives priority to the interests of the host

³⁴ Jerzy Sztucki, “Who is a Refugee? The Convention Definition: Universal or Obsolete?” *Refugee Rights and Realities: Evolving International Concepts and Regimes*, ed. Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999): 56.

³⁵ Loescher, 363.

³⁶ Sztucki, 69.

³⁷ Keely, 304.

country over those of the refugee – a truth many governments still fail to consider in their push to keep migrants out.³⁸

In 1991, the Cold War ended and new conflicts began. Increasingly, the motivation for violence concerned ethnic identity, and aggressors all too often used civilians as weapons and/or targets. However, there is a firm unwillingness on the part of states to expand the Convention definition to encompass other groups under the umbrella of a “refugee”, such as people fleeing generalized violence. As a result, the rate of recognition of asylum applicants in Western Europe fell from 42% in 1983 to 16% in 1996.³⁹ It is apparent that the Convention definition still lags behind the reality of many refugee situations today.

Although states have become increasingly strict in their interpretations of the 1951 Convention over the years, the international refugee regime is now truly international: 147 countries are party to one or both of the 1951 Convention and the 1967 Protocol.⁴⁰ Yet, new types of conflict have produced more categories of people than the Convention had in mind. Gender-based persecution is one of the most highly contested new categories, as many policymakers do not consider persecution based on one’s gender to qualify under “for reasons of race, religion, nationality, membership of a particular social group or political opinion”⁴¹, and women are often relegated to the private, rather than the public, sphere.⁴² Children also confront a similar problem – the closest category children would seem to fit under is that of a “social group”, but states have yet to recognize

³⁸ Sarah Howe, “The Three Durable Solutions in a Post-9/11 World,” Final Paper for Government 307: The Politics of Refugees, Professor Tristan Borer (May 2008): 4.

³⁹ Sztucki, 71.

⁴⁰ UN High Commissioner for Refugees, *States Parties to the 1951 Convention and its 1967 Protocol*, Basic Documents, Oct. 2008, available at: <http://www.unhcr.org/3b73b0d63.html> [accessed 6 Dec. 2009]

⁴¹ *1951 Convention*, article 1.

⁴² Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (New York: Routledge Press, 2006): 48.

children as a social group as a legitimate claim. Furthermore, any persecution resulting from race, religion, nationality, or political opinion is seen as stemming from parents or adult relatives, rather than from the child himself.⁴³ Therefore, it can be very difficult for a child to be granted refugee status in his or her own right.

The refugee regime also includes regional conventions and agreements that are oftentimes more comprehensive than the 1951 Convention. The Organization of African Unity Convention, for example, uses the refugee definition from the 1951 Convention, but adds on:

The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin and nationality.⁴⁴

Under this definition, a person fleeing from generalized violence is a refugee, without having to prove why she herself was individually persecuted. The 1984 Cartagena Declaration on Refugees, the regional agreement in Latin America, advocates expanding the 1951 Convention definition of refugee to include those who have fled from generalized violence and other human rights abuses that have interfered with their freedom and safety.⁴⁵ However, the desire to expand the definition of a refugee in Africa and Latin America has certainly not spread to western Europe or the United States, and thus fear based on violence or other violations of human rights is not in itself grounds for refugee status.

⁴³ Jacqueline Bhabha “‘More Than Their Share of Sorrows’: International Migration Law and the Rights of Children,” *St. Louis University Public Law Review*, 253 (2003): 22.

⁴⁴ *OAU Convention Governing the Specific Aspects of Refugee Problems*, article 1.

⁴⁵ *Cartegna Declaration on Refugees*

Asylum seekers, however, benefit from the most important principle/norm of the international refugee regime, the concept of *nonrefoulement*, or the right of an individual not to be returned to a place where he or she may experience persecution. The UNHCR noted in 2007 that *nonrefoulement* is one of the most fundamental provisions of the document, and summarily no country may enter any reservations⁴⁶ that would go against this stipulation. Arthur Helton claims that the principle of *nonrefoulement* has gained such legitimacy and importance that it is considered “to have become part of customary law, binding even on states which are not signatories to the refugee treaties.”⁴⁷ Unfortunately, many states use interdiction – intercepting migrants at sea before they can reach land - as a loophole, asserting that returning interdicted migrants to their place of origin is not contrary to *nonrefoulement*, since the migrants never crossed into the state’s territory, and have not been granted refugee status. The U.S. Supreme Court for instance, upheld in *Sale v. Haitian Centers Council, Inc.* that “...refugee screening procedures...do not apply outside the territory of the U.S.”⁴⁸ However, James Hathaway argues that jurisdiction alone, such as in territorial waters, is sufficient to require the duty of *nonrefoulement*.⁴⁹

Asylum seekers also are entitled to protection under Article 31 of the 1951

Convention which states:

⁴⁶ A reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Council of Europe, *Glossary on the Treaties*, available at: <http://conventions.coe.int/Treaty/EN/v3Glossary.asp>

⁴⁷ Arthur Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (Oxford: Oxford University Press, 2002): 123.

⁴⁸ “Detailed Information on the Coast Guard Migrant Interdiction Program Assessment,” Expectmore.gov, available at: <http://www.whitehouse.gov/omb/expectmore/detail/10002406.2004.html> [accessed 12 April 2010]

⁴⁹ James Hathaway, “Refugee Law is Not Immigration Law,” *World Refugee Survey* (Washington: U.S. Committee for Refugees, 2002): 42.

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.⁵⁰

Therefore, although the public tends to view asylum seekers and illegal migrants as one and the same, asylum seekers who enter a country without documentation are not supposed to be punished. Additionally, since the Universal Declaration of Human Rights grants everyone the right to seek asylum from persecution, asylum seekers cannot be illegal. The international refugee regime has come a long way since its birth over fifty years ago, but unfortunately in many cases, the law is more liberal than the practice.⁵¹

Although the 1951 Convention is silent on children, the prime refugee agency, the UNHCR, has been far from quiet. In 1994, the UNHCR issued *Refugee Children: Guidelines for Protection and Care*, which has an entire chapter devoted to unaccompanied children. These guidelines serve to draw attention to the growing trend of separated children in mixed migration flows, and have been used in both the U.K. and the U.S. to formulate policy for separated asylum seeking children. In 1997, the UNHCR produced *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*. The UNHCR asserts its opposition to interdicting unaccompanied children, arguing “Because of their vulnerability unaccompanied children seeking asylum should not be refused access to the territory.”⁵² Also found in this document are recommendations for the treatment of unaccompanied children throughout

⁵⁰ 1951 Convention, article 31.

⁵¹ Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (New York: Routledge, 2008): 256.

⁵² UN High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1 February 1997, available at: <http://www.unhcr.org/publ/PUBL/3d4f91cf4.pdf> [accessed 12 April 2010]

the asylum process including identification, guardianship, and implementing durable solutions. Also in 1997, the UNHCR entered into a joint initiative with Save the Children, called Separated Children in Europe Programme “to improve the situation of separated children through research, policy analysis and advocacy at the national and regional levels.”⁵³ Most of the statistics found in Chapter 2 are from data that the Separated Children in Europe Programme gathered and compiled. The UNHCR also began to change its terminology from “unaccompanied” to “separated” in recognition that many vulnerable children of concern to the UNHCR are in fact accompanied by either a relative, smuggler, or other adult, but are separated from their parent or legal guardian. Most recently, the UNHCR published *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* in December 2009. With these latest guidelines, the UNHCR attempts to make the asylum process child-sensitive both in terms of the procedure, and the substantive consideration of children’s applications. According to the introduction:

Although the definition of a refugee contained in Article 1(A) 2 of the 1951 Convention...applies to all individuals regardless of their age, it has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked all together.⁵⁴

⁵³ UN High Commissioner for Refugees, *Separated Children in Europe Program*, available at: <http://www.unhcr.org/refworld/publisher/SCEP.html> [accessed 12 April 2010]

⁵⁴ UN High Commissioner for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html> [accessed 12 April 2010]

It seems then, that the refugee regime, while it is historically adult-centric, is in the process of evolving to be more aware and sensitive to child asylum seekers, especially those who have been separated from their parents or legal guardians. However, UNHCR guidelines are not binding, and the responsibility remains with states to ensure that their laws and policy reflect the evolving international standards of protection for separated children seeking asylum.

The Children's Rights Regime

The children's rights regime has come to the fore of international human rights law within just the past few decades with the widespread ratification of the Convention on the Rights of the Child (CRC). The roots of the regime, and the CRC in particular, can be traced back to World War I. The war created a population of refugee children who had little or no access to aid or protection, primarily because there was a lack of organizations geared towards children. In 1923, Save the Children International Union was established, and drafted what became the 1924 Geneva Declaration on the Rights of the Child.⁵⁵ In this Declaration, the League of Nations affirmed that "mankind owes to the Child the best it has to give."⁵⁶ The Declaration had only five principles to ensure children's welfare: access to the means for development, sustenance, relief in times of distress, protection from exploitation, and socialization to serve others.

Children's rights were also considered in international conventions and documents following World War II when there was increased attention paid to human rights in general.⁵⁷ Both the International Covenant on Economic, Social, and Cultural

⁵⁵ Susan P. Limber and Malfrid Grude Flekkoy, "The U.N. Convention on the Rights of the Child: Its Relevance for Social Scientists," *Social Policy Report*, 9.2 (1995): 2.

⁵⁶ *1924 Geneva Declaration on the Rights of the Child*

⁵⁷ Limber and Flekkoy, 2.

Rights and the International Covenant of Civil and Political Rights conferred rights upon “every human being” and, in 1959 the United Nations ratified the 1959 United Nations Declaration of the Rights of the Child. This declaration, like its predecessor, was not legally-binding, but was the most comprehensive statement on children’s rights to date. The 1959 declaration was broader than the 1924 Declaration, but still largely emphasized welfare and protection, rather than treating children as autonomous actors.⁵⁸

Although the two world wars helped to spur the creation of the children’s rights regime, the increase in civil wars and violence against civilians (including the growing awareness of recruitment of children as child soldiers), in addition to the perception of widespread social breakdown, made the promotion of children’s rights an urgent task. Empowering children by giving them rights recognizes that children are morally equal to adults, which underscores the universal moral worth of all human beings, irrespective of their situation.⁵⁹ The child has become the symbol for a moral society, for as UNICEF said “we believe that insisting on the rights of children is one of the best ways of reasserting core humanitarian values.”⁶⁰ Therefore, world leaders drafted the CRC -- the first legally binding international instrument to incorporate the full range of human rights (civil, political, cultural, economic, and social) – thereby acknowledging that children too have human rights, as well as different protection needs from adults.

In preparation for 1979 being the Year of the Child, the Polish government suggested that the United Nations adopt a children’s rights convention. Poland took the lead and drafted a convention that contained ten articles, essentially the same as the 1959

⁵⁸ *1959 United Nations Declaration of the Rights of the Child*

⁵⁹ Vanessa Pupavac, “Misanthropy without Borders: The International Children’s Rights Regime,” *Disasters*, 25.2 (2001): 96.

⁶⁰ UNICEF, *Anti-war Agenda*, available at: <http://www.unicef.org/sowc96pk/antiwar1.htm> [accessed 29 April 2010]

Declaration, but with the inclusion of implementation provisions. Member states, NGOs and other U.N. bodies provided their feedback on the document, which Poland used to create a new draft with twice as many articles to ensure the protection of children. A Working Group was created to use Poland's draft as a starting point, and expand upon the provisions to create a comprehensive convention. The process took ten years, as the members of the Working Group agreed on each article by consensus, and input was gathered from other organizations, and children themselves.⁶¹ According to Norway's representative in the Working Group, Per Miljeteig-Olssen, "The drafting process turned out to be a global consciousness-raising process that would not have taken place without sufficient time to disseminate new ideas and elaborate the understanding of children's needs and interests."⁶² Upon completion of the draft, the United Nations adopted it on November 20, 1989 and opened it for signature in January 1990. The 1989 Convention on the Rights of the Child shifted the focus from "protection to autonomy, from nurturance to self-determination, from welfare to justice."⁶³ Today, 193 countries have ratified the CRC – the first legally binding convention for children's rights.⁶⁴ The CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."⁶⁵ In 54 articles and two optional protocols, the CRC spells out the basic rights that all children are entitled to, which Freeman divides into six categories: general rights (the right to life, prohibition against torture, freedom of expression, thought and religion), rights requiring protective

⁶¹ Limber, 3.

⁶² *Ibid.*, 3.

⁶³ Michael D. Freeman, "Introduction: rights, ideology and children," *The Ideologies of Children's Rights*, ed. Michael Freeman and Philip Veerman (Dordrecht: Martinus Nijhoff Publishers, 1992): 3.

⁶⁴ The U.S. and Somalia are the only two countries that have not ratified the CRC at this time.

⁶⁵ *Convention on the Rights of the Child*, article 1.

measures (protection from sexual and economic exploitation, prevention of drug abuse and neglect), rights concerning children's civil status (the right to acquire nationality, preserve one's identity, remain with one's parents, unless the best interests of the child dictate otherwise, and the right to be united with family), rights concerning development and welfare (the right to a reasonable standard of living, health and basic services, social security, education, and leisure) rights concerning children in special circumstances, i.e. handicapped children, refugee children, orphan children (prohibition of child soldiers, adoption regulations, rehabilitative care for children suffering from deprivation), and lastly, procedural considerations of how to implement the CRC.⁶⁶

The Committee on the Rights of the Child is the body that monitors implementation of and compliance with the CRC. Member states must submit regular reports to the Committee on how rights are being implemented – the first at two years after ratification, then once every five years thereafter. The Committee then provides states with its “concluding observations”, which consist of any concerns and recommendations. However, the Committee cannot be approached with individual complaints.

Article 22 (1) of the CRC is the most relevant to this thesis, as it states:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in enjoyment of applicable rights set forth in the present Convention and in other international human rights treaties or humanitarian instruments to which the said States are Parties.

⁶⁶ Michael D. Freeman, *The Moral Status of Children* (The Hague: Kluwer Law International, 1997): 55.

The second part of article 22 is also significant, as states agree to protect unaccompanied children as any other citizen child, regardless of his or her legal status. Other relevant articles of the CRC include Article 3 on acting in the best interests of the child; Article 10 on the right for a child to leave any country, including his own;⁶⁷ Article 12 on the child having the opportunity to express his or her views, particularly in judicial proceedings; Article 36 on protection from all forms of exploitation; and Article 37 on protection from torture and other cruel, inhuman, or degrading treatment or punishment and from unlawful or arbitrary deprivation of liberty. The CRC and its nearly universal membership demonstrate a clear commitment by the international community to advancing children's rights, but as Freeman notes, "it is only a beginning, and not even the end of the beginning."⁶⁸

In this thesis I argue that the CRC is a key variable in creating a dual protection mechanism for separated children seeking asylum. U.K. implementation of the CRC is examined in Chapter 2. Since the U.S. has not ratified the CRC,⁶⁹ the following section is a brief overview of how the CRC influences U.S. policy, and potential reasons why the U.S. has not ratified the CRC as of yet.

The U.S. and the UN Convention on the Rights of the Child

One of the most important aspects of the CRC is the "best interests of the child" principle. Although the U.S. has not ratified the CRC, the government often uses the provisions in the convention as guidelines for its own policies. The asylum officers' "Guidelines for Children's Asylum Claims" for example, states that the "best interests of

⁶⁷ Although a child has the right to leave a country, the right to enter another country is not guaranteed.

⁶⁸ Freeman, *The Moral Status of Children*, 47.

⁶⁹ The U.S. has obligations as a signatory of the CRC however, including not to enact any domestic legislation that would be contrary to the spirit and purpose of the Convention.

the child' principle is a useful measure for determining appropriate interview procedures for child asylum seekers."⁷⁰ The principle extends only as far as the actual asylum process, as the document goes on to assert "it does not play a role in determining substantive eligibility under the U.S. refugee definition."⁷¹ However, as mentioned above, the Guidelines do at least address some of the substantive issues related to separated children; and while they do not determine eligibility, they provide a framework for child-friendly interpretation of children's asylum claims.

Since the U.S. is willing, at least to a certain extent, to use the CRC, why has the government thus far refused to ratify it? In this section, I briefly outline the primary obstacles to U.S. ratification of the CRC, to help explain the absence of the dual protection mechanism for separated children seeking asylum in the U.S. Many critics argue that most of the provisions contained in the CRC are already present in U.S. domestic law. However, Roger Levesque argues "the values underlying the articles are fundamentally different for those underlying U.S. children's policy...[and] U.S. policy does not conform with the Convention's aspirations."⁷² The first, and perhaps most fundamental, difference between the CRC and U.S. policy is to whom rights are given. The CRC bestows rights directly on children, as opposed to U.S. law, which tends to prioritize and hence give rights to the parent or state. For example, the Immigration and Nationality Act defines a child as an "unmarried person under 21 years of age" that falls under one of six categories, all of which detail some sort of parental relationship

⁷⁰ Jeff Weiss, "INS Guidelines for Children's Asylum Claims," 10 Dec. 1998, available at: http://www.abanet.org/publicserv/immigration/ins_guidelines_for_children.pdf [accessed 25 Feb. 2010]

⁷¹ Ibid.

⁷² Roger J. R. Levesque, "International Children's Rights: Can They Make a Difference in American Family Policy?" *American Psychologist*, 51.12 (Dec. 1996): 1254.

(biological, adoptive, or step-parent).⁷³ Secondly, the ideology surrounding the concept of family varies greatly between the CRC and U.S. practice. The CRC allows for the creation of an “adolescent jurisprudence,”⁷⁴ such as giving children the right to privacy, as well as the “decision-making authority to exercise those rights,”⁷⁵ which is not present in U.S. law. Similarly, the CRC differs from U.S. policy in its views on the role of the state in family life. The CRC “envisioned a society that actively supports children and families,” whereas the U.S. Constitution envisioned a society that “protects family integrity by a principle of state noninterference.”⁷⁶ The religious right has latched onto this difference claiming, “the Convention would undermine parental rights and would grant children ‘a state-guaranteed license to rebel’.”⁷⁷ Surprisingly, there does not appear to be significant discourse in favor of ratifying the CRC to counter the negative claims of the conservatives. This is illustrated by the fact that although the U.S. was one of the chief contributors to the drafting of the CRC, and Madeline Albright signed the CRC on February 16, 1995 under the direction of President Clinton, the U.S. has made little, if any, progress towards ratification since that time.⁷⁸ As a result, the U.S. is able to pick and choose when it will use the CRC as a model or guide, like when the INS uses the CRC for procedural guidelines for separated children seeking asylum, but fails to utilize the document for substantive issues, as detailed in Chapter 3.

⁷³ Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: U.S. Report* (Cambridge: President and Fellows of Harvard College, 2006): 30.

⁷⁴ Levesque, 1254.

⁷⁵ *Ibid.*, 1254.

⁷⁶ *Ibid.*, 1254.

⁷⁷ Susan P. Limber and Brian L. Wilcox, “Application of the U.N. Convention on the Rights of the Child to the United States,” *American Psychologist*, 51.12 (Dec. 1996): 1246.

⁷⁸ *Ibid.*, 1246.

Separated Children: On the Move

The intersection between the refugee regime and the children's rights regime is now more critical than ever before, as the numbers of separated children seeking asylum have increased dramatically in recent years. Yet, since separated children had been largely invisible prior to this influx, many states have thus far failed in providing adequate protection measures to this group.⁷⁹ According to Jacqueline Bhabha, "the distinct impact of migration on children has been an afterthought. We have tended to think of international migration as a phenomenon which affects adults or families, and accordingly we have crafted immigration and refugee laws which reflect this adult-centric perspective."⁸⁰ As a result, separated children encounter problems unique to their demographic that many states have yet to address in their child protection measures. Frequently, these children simply slip through the cracks of state protection, and are left to survive on their own, or in the care of human traffickers.

The traditional view that the procedures in place for families are also applicable to separated children is based on two assumptions: first, that child asylum seekers only travel with their families, and second, that a child cannot present an independent claim for asylum, separate from the claim made by his family.⁸¹ The UNHCR and other international organizations have done much to contradict the first assumption, especially through the provision of hard data. For example, from 2000 to 2003, the proportion of separated children seeking asylum in the United Kingdom went from 3.5-4% up to 6 per

⁷⁹ Although in 1946 the IRO recognized that unaccompanied children who were war orphans or whose parents had disappeared as refugees, subsequent debates and conventions largely ignored this vulnerable group.

⁸⁰ Jacqueline Bhabha, "UN 'Vide Juridique'? – Migrant children: The rights and wrongs," *Realizing the Rights of the Child*, ed. Carole Bellamy and Jean Zermatten (Zurich: Ruffer and Rub, 2007): 206.

⁸¹ Bhabha "More than their share of sorrows," 22.

cent.⁸² To put this data into numbers, 2,800 separated children lodged asylum claims in the U.K. in 2003.⁸³ By 2006, this number had increased to 3,460.⁸⁴ Furthermore, the Inter-Governmental Consultations on migration, asylum and refugees⁸⁵ revealed figures that show a 57% increase in the number of separated children applying for asylum between January and March 2008 in selected western European countries.⁸⁶

Separated children travel for many reasons:

Some children travel alone, literally walking or riding enormous distances to cross borders; others are accompanied by unrelated adults, sometimes as benign escorts, but often as profiteering smugglers or traffickers. Some children are sold or handed over by their parents or adult relatives; others are separated from them by war or snatched by kidnappers.⁸⁷

Therefore, increasingly the assumption that children asylum seekers only travel with their families, is false. Moreover, sometimes children flee *because* of their families; that is, when their parents are dead, missing, or imprisoned children may be given assistance by friends or organizations to seek safety elsewhere. Or, parents might send children to seek asylum in an effort to protect them from any harm they might encounter if they stayed,

⁸² UN High Commissioner for Refugees, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries 2001-2003*, available at:

<http://www.unhcr.org/statistics/STATISTICS/40f646444.pdf> [accessed 6 Nov. 2009]

⁸³ Ibid.

⁸⁴ Separated Children in Europe Programme, *Statistics on Arrivals of Separated Children Seeking Asylum in Europe in 2006*, available at:

http://www.savethechildren.net/separated_children/other_resources/statistics/ [accessed 29 April 2010]

⁸⁵ The Inter-Governmental Consultations on migration, asylum and refugees is “an informal, non-decision making forum for intergovernmental exchange on policy debate on issues of relevance to the management of international migratory flows. The IGC brings together 17 participating states (Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom, and the United States of America) the United Nations High Commissioner for Refugees, the International Organization for Migration and the European Commission.” Available at: <http://www.igc.ch/> [accessed 12 April 2010]

⁸⁶ Feijen, 65.

⁸⁷ Jacqueline Bhabha, Mary Crock, Nadine Finch, and Susan Schmidt, *Seeking Asylum Alone – A Comparative Study: Unaccompanied and Separated Children in Australia, the UK, and the US* (Sydney: Themis Press, 2007): 17.

such as that noted in the quote above.⁸⁸ The growing number of separated children seeking asylum has also led to scholars, governments, and international organizations to question the second assumption of whether a child can make a legitimate claim for asylum independent of any family member. As a result, there is now a growing acceptance of persecution that is specific to children that can include: domestic violence, infanticide, under-aged recruitment into the armed forces, forced marriage, female genital mutilation, forced labor, prostitution, pornography, slavery, trafficking, exploitation in employment, and many more.⁸⁹ However, none of these child-specific forms of persecution qualify under the definition of a refugee in the 1951 Convention, and states use “Convention fundamentalism” in an effort to restrict the number of successful asylum claims.

Separated Children Applying for Asylum

Although child-specific persecution has gained widespread acceptance, separated children are still held to the same standard of proof as adults when applying for asylum. Since age in itself is not grounds for gaining refugee status, Bhabha illustrates instances in which age-specific persecution can qualify under one of the five categories in the 1951 Convention: race, religion, nationality, membership of a particular social group, or political opinion.⁹⁰

⁸⁸ Wendy Ayotte, *Supporting Unaccompanied Children in the Asylum Process* (London: Save the Children, 1998): 8.

⁸⁹ Curtis F. J. Doebbler, “Protecting Children in Conflict: An Unfinished Legal and Moral Agenda,” *Refugee Survey Quarterly*, 27.4 (Dec. 2008): 84.

⁹⁰ Jacqueline Bhabha and Wendy Young, “Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines,” *International Journal of Refugee Law*, 11.1 (1999): 108.

Race

Generally, a child seeking asylum on the basis of race is not so different from an adult seeking asylum for the same reason. For example, many countries with governments that persecute certain racial groups do so without regard to age. Racial persecution, however, can also be on account of a child's age if the government views their age group as being responsible for civil disorder. This was certainly the case for many black children living in the South African township of Soweto during the Soweto uprising in 1976.⁹¹

Nationality

Similar to when governments persecute what they consider to be troublesome groups of children due to their age and race, some governments also persecute children due to their age and nationality. This can occur when a child is born stateless or an alien, and is deemed ineligible to acquire the nationality of that country. Children in this situation oftentimes face discrimination and threats of expulsion. Additionally, Bhabha notes that the imposition of linguistic or cultural norms through an education system, or denying access to education altogether can amount to child-specific persecution in some circumstances. One example is all Kurdish children in Turkey being forced to have all their schooling in Turkish, effectively robbing them of their own culture.⁹²

Religion

A child can be targeted for religious persecution for either following (or being perceived as following) a certain religion, or refusing to follow the state-supported

⁹¹ Ibid., 108.

⁹² Ibid., 109.

religion, similar to an adult in the same situation.⁹³ However, the age of the child can make her more vulnerable, as is the case in Egypt with Coptic Christian girls, some as young as twelve years old, being kidnapped, raped, and forced to convert to Islam with little to no intervention by the Egyptian government.⁹⁴

Political Opinion

Although some question the age at which a child is truly capable of having his own political opinions, school children, adolescents, and college students have organized and participated in many national liberation and protest movements around the world. Bhabha cites the Muslim children in France who rallied together to protest the prohibition of the veil in French schools, as well as Indian and Pakistani child laborers who organized to protest their working conditions. A child may also suffer persecution because he is believed to hold a certain political opinion because of his family's beliefs, or his membership in a particular ethnic or religious group. There have been instances where children are targeted with the intent to prevent them from even having the chance to form the "wrong" political opinion, like the Salvadoran and Argentinean children of political opponents who were kidnapped and then put up for adoption to prevent any future potential involvement with leftist groups.⁹⁵

Membership in a Particular Social Group

Membership in a particular social group is perhaps the most ambiguous grounds for gaining asylum from persecution. The general consensus on the meaning of the category is:

⁹³ Ibid., 109.

⁹⁴ Julia Duin, "Coptic Girls Being Abducted," *The Washington Times*, 7 January 2010, available at: www.washingtontimes.com/news/2010/jan/07/duin-coptic-girls-being-abducted/ [accessed 24 January 2010]

⁹⁵ Bhabha and Young, "Not adults in miniature" 110-1.

Persecution directed towards an individual who is a member of a group sharing a common, immutable characteristic, immutable either because the members of the group cannot change it (as with sex, race, family ties, or past experience), or because the members of the group should not be required to change it because it is so fundamental to their being.⁹⁶

For many children, membership in their own families is the social group to which they belong, which is clearly an immutable characteristic. This is true for both accompanied and separated children seeking asylum, although separated children are likely to be the more vulnerable. Sadly, many separated children may also belong to the social group “children who have been traumatized by witnessing the persecution of their parent”,⁹⁷ as a child who has experienced the death of his parents, relatives, or fellow villagers may feel persecuted as a result. Many officials involved in asylum cases of separated children have realized that persecution of a parent may amount to direct persecution of the child.⁹⁸

The Vulnerability of Separated Children

Bhabha identifies three factors that are directly related to the vulnerability of separated children: first, children are disproportionately represented among the world’s poor. Second, separated children are significantly more likely to encounter abuse, exploitation, or neglect than their accompanied counterparts. Lastly, the insecurity that separated children feel as a result of being essentially “stateless” during their asylum determination period often leads to economic, social, and psychological dangers.⁹⁹ In “Un-‘Vide Jurisdique’?” Bhabha reflects on possible reasons why states and other official actors treat separated children in a way contrary to our natural assumption that these

⁹⁶ Ibid., 111.

⁹⁷ Ibid., 112.

⁹⁸ Ibid., 112.

⁹⁹ Jacqueline Bhabha “Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights?” *Human Rights Quarterly*, 31 (2009): 414.

children are vulnerable and deserve protection and compassion. Instead of being sympathetic to the plight of separated children, states all too often detain or deport them.

A study in the U.K. showed that separated children are five times more likely to be detained than adults.¹⁰⁰ There is also evidence that separated children are likely to experience longer delays in getting a decision on their asylum status.¹⁰¹ Oftentimes, as the director of Save the Children commented, “these children are assumed to be ‘bogus’ before they are assumed to be in need of help.”¹⁰² So, not only does there seem to be a bias against separated children applying for asylum, but many of these children then do not have access to legal assistance, and thus are at even more of a disadvantage to prove their case. Bhabha asks whether this treatment, which is at best neglect and at worst a cruel violation of human rights, is because separated children are a threat to our established systems of order? Here, Bhabha compares separated children seeking asylum to the street children of Rio de Janeiro or Guatemala City who instead of being protected, were shot by local police officers. These children were also viewed as a challenge to the system. Or, Bhabha wonders, does the heightened vulnerability of separated children, in combination with their position on the periphery, lead to minimal accountability or follow-up to abuse? Or, as a third option, could this treatment derive from the fact that separated children are often assumed to be “other” than “our children”?¹⁰³ Heightened anti-immigrant sentiment in both the U.S. and the U.K. has also played a role in the neglect or, at times, abuse of separated children.

¹⁰⁰ Bhabha, “Minors or Aliens?” p. 300.

¹⁰¹ Ibid., 312.

¹⁰² Ibid., 294.

¹⁰³ Bhabha, “Un ‘Vide Jurisdique,’” 209.

The following chapters delve deeper into additional legal instruments for the protection of separated children in the U.S. and the U.K. As the refugee regime and the children's rights regime overlap, it is important that separated children be treated and seen as children first, and a refugee or migrant second. However, states are often inconsistent when it comes to giving priority to one over the other, which helps to explain the gap between laws and reality.

CHAPTER 2:

Separated Children in the United Kingdom

“The words for applying for asylum in my language are translated as ‘giving up your hand’ [surrendering]. That was what I was told to do once I got to London. The picture I had was that I would surrender to someone with guns.”¹⁰⁴

The United Kingdom is an active member in the international human rights community, having ratified the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol,¹⁰⁵ the European Convention on Human Rights, and the United Nations Convention on the Rights of the Child (CRC).¹⁰⁶ The U.K. has implemented the 1951 Convention into domestic law through the Immigration Act 1971,

¹⁰⁴ A boy from Ethiopia quoted in Jacqueline Bhabha, Mary E. Crock, Nadine Finch, and Susan Schmidt, *Seeking Asylum Alone – A Comparative Study: Unaccompanied and Separated Children in Australia, the UK, and the US* (Themis Press, 2007): 76.

¹⁰⁵ The U.K government entered reservations to Articles 8, 9, 17, 24, and 25 of the 1951 Convention, and Article VII.4 of the 1967 Protocol. Available at: http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=UNTSO&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en#Participants and http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en

¹⁰⁶ The U.K has also ratified the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography on 20 Feb. 2009 and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict on 24 June 2003.

the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, and the Asylum and Immigration Act 2004. The United Nations High Commissioner for Refugees (UNHCR) began working with the U.K. Border Agency (UKBA – which works to secure borders and control immigration and asylum in the U.K.) to improve the asylum decision-making process through the Quality Initiative Project. As a result, the U.K. implemented the New Asylum Model (NAM) in 2007, which incorporated many of the UNHCR’s recommendations including higher standards for recruitment of asylum caseworkers, and more in-depth training for officials.¹⁰⁷ NAM also created new policy for separated children who seek asylum in the U.K., which is examined in further detail later in the chapter.

The definition of a refugee in the U.K. is the same as that of the 1951 Convention and “nothing in the Immigration Rules (within the meaning of the 1971 [Immigration] Act) shall lay down any practice which would be contrary to the [Refugee] Convention.”¹⁰⁸ The Nationality, Immigration, and Asylum Act 2002 prohibits the removal of an asylum seeking child in most cases (an exception to this is when a child is found to have claimed asylum in another European Union member state, in which case the child is returned to the country of first arrival). In 1994, the U.K. heeded the call by the UNHCR to give special attention to separated children,¹⁰⁹ in conjunction with working to fulfill its obligations under the CRC, and established the Children’s Panel of Advisers for Unaccompanied Refugee Children as part of the British Refugee Council.

¹⁰⁷ Duncan Trevan, “UNHCR Welcomes New UK Effort to Improve Asylum Screening,” *UNHCR News Stories*, 21 March 2007, available at: <http://www.unhcr.org/460151c04.html> [accessed 31 March 2010]

¹⁰⁸ Jacqueline Bhabha and Nadine Finch, *Seeking Asylum Alone: United Kingdom* (Cambridge: President and Fellows of Harvard College, 2006): 35.

¹⁰⁹ UN High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html> [accessed 31 March 2010]

Advisers help to ensure separated children's welfare, providing assistance and counsel in areas including immigration, education, health care, and social services. The U.K. also adopted a firm policy against detaining separated child asylum seekers (a contentious issue which is returned to later in the chapter). Perhaps most importantly, separated children are the responsibility of social services from the point of entry into the U.K. and onwards, rather than immigration or law enforcement agencies.¹¹⁰ However, although the U.K. government has taken strides to address the needs of separated children, the asylum system in the U.K. is still largely geared toward adult applicants. The advisers of the Children's Panel are not legal guardians, and as a result there is no one with clear legal responsibility for the children.¹¹¹ Furthermore, the ability of immigration officials to identify separated children as children is lacking, and many children slip through the cracks, i.e. they are never identified as separated, they disappear from care, or are misidentified as adults or illegal immigrants.

U.K. implementation of the CRC, on the other hand, has been inconsistent. The U.K. passed the Children Act 2004, which served to coordinate all the agencies that have responsibility for children. Additionally, the U.K. implemented the CRC with the Childcare Act 2006 and the Children's Plan for England of 2007. However, in a 2008 report the Committee on the Rights of the Child expressed its concern that the principles of the CRC are not always taken into account in domestic legislation, and "the State party

¹¹⁰ Jacqueline Bhabha, "Minors or aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers," *European Journal of Migration and Law*, 3 (2001) 300.

¹¹¹ Many European countries appoint legal guardians for separated children during the asylum process, but the UK has no guardianship system in place. Although the local authorities provide services to separated children, they do not act as legal guardians except in cases where children are at risk of serious harm (usually not the case for separated children). The absence of a legal guardian can create problems, such as when medical intervention is required, but the child is considered too young to give consent. Wendy Ayotte and Louise Williamson, *Separated Children in the U.K.: An Overview of the Current Situation* (London: Save the Children, 2000): 66.

has not incorporated the Convention into domestic law nor has ensured the compliance of all legislation affecting children with it.”¹¹² Other concerns in the report included that the Convention is not used regularly and consistently, separated children often face discrimination in the U.K (partly due to negative stereotyping by the media), the best interests of the child principle is not the primary consideration in U.K. law – especially immigration law,¹¹³ and separated children often do not have easy access to education.

However, the Committee on the Rights of the Child recognized the U.K.’s progress in instituting certain policy changes. Most notably, the U.K. withdrew its reservation to Article 22 of the CRC in 2008. The reservation had stated:

The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in, and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom and to the acquisition and possession of citizenship, as it may deem necessary from time to time.¹¹⁴

Simon Russell argues that with this reservation “the U.K. [was] saying that refugee children are not entitled to the same rights as resident children, simply because they are not resident.”¹¹⁵ This reservation was contrary to the spirit and purpose of the CRC and created the risk that the best interests of separated children who applied for asylum would be subordinated to immigration concerns. The UN Committee on the Rights of the Child

¹¹² Committee on the Rights of the Child, *Consideration of Reports submitted under Article 44 of the Convention, Concluding observations: the United Kingdom of Great Britain and Northern Ireland*, Forty-ninth session, 20 Oct. 2008, available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf> [accessed 31 March 2010]

¹¹³ One of the key issues in ensuring that asylum seekers receive the proper care and treatment is that asylum seekers are often mistakenly subsumed under the category of immigrants. Using asylum and immigration interchangeably can be very problematic, and can contribute to the perpetuation of false and negative ideas about asylum seekers. However, asylum policies are often included under the overarching category of immigration law, and thus it can be difficult to maintain the proper distinction. Therefore, for the purposes of this thesis, “immigration law” includes asylum law.

¹¹⁴ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 36-7.

¹¹⁵ Simon Russell, “Unaccompanied Refugee Children in the United Kingdom,” *International Journal of Refugee Law*, 11.1 (1999): 130.

twice cited the U.K. reservation as one of its chief concerns regarding U.K. compliance with the CRC, and made recommendations to the British government to include separated children in ongoing immigration reform to bring U.K. policies in line with the Convention.¹¹⁶ In response, the U.K. government undertook a six-month review of the reservation and its implications for immigrant and asylum seeking children. Once ministers became convinced that withdrawing the reservation would not “frustrate immigration control,” they agreed to sign the Convention on the Rights of the Child in its totality. This momentous step forward occurred the same week a British delegation went to the United Nations in Geneva to be questioned about British respect for children’s rights. International pressure from non-governmental organizations and human rights advocates, which had referred to the reservation as an “international embarrassment” that “dehumanizes migrant children,”¹¹⁷ coupled with the scrutiny and recommendations of the Committee on the Rights of the Child clearly influenced the U.K. government’s decision to withdraw the reservation. UNICEF Executive Director David Bull applauded the actions of the U.K. government, saying that the decision represents “an unambiguous commitment to full implementation of the CRC.”¹¹⁸ However, upon the withdrawal of the reservation, Phil Woolas, the Minister of Borders and Immigration said, “No additional changes to legislation, guidance, or practice are currently envisaged.”¹¹⁹ Therefore, it

¹¹⁶ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 37.

¹¹⁷ Mark Easton, “UK to Give up Child Rights Opt-outs,” *BBC News*, 19 Sept. 2008, available at: http://www.bbc.co.uk/blogs/thereporters/markeaston/2008/09/uk_to_give_up_child_rights_opt.html [accessed 3 March 2010]

¹¹⁸ UNICEF: U.K., “UK government withdraws reservation to UNCRC,” News Item, 22 Sept. 2008, available at: http://www.unicef.org.uk/press/news_detail_full_story.asp?news_id=1198 [accessed 3 March 2010]

¹¹⁹ Children’s Rights-Human Rights Joint Committee, “5 Asylum-seeking, refugee, and trafficked children,” Parliamentary Business, available at: <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/15708.htm> [accessed 2 April 2010]

remains to be seen whether the U.K. will make the necessary changes in domestic law to fully incorporate its commitment to the CRC.¹²⁰

Who Are These Children?

Separated children who apply for asylum in the U.K. come from all over the world. In 2005, 5,390 separated children applied for asylum in the U.K. Between October and December 2004, the top ten countries of origin were Iran, Afghanistan, Iraq, Somalia, Eritrea, Vietnam, the Democratic Republic of the Congo, Romania, Ethiopia and China respectively.¹²¹ However, statistics from 2003 illustrate that the top ten countries of origin vary greatly when it comes to female separated children from the overall statistics of that year. Interestingly, nine out of the ten top countries of origin for female applicants were African: Angola, Burundi, Cameroon, DRC, Eritrea, Ethiopia, Kenya, Rwanda, and Uganda. Vietnam ranks tenth for that year. Girls accounted for more than 50% of asylum applications from these countries, compared to only 33% in overall asylum applications.¹²² Child trafficking, female genital mutilation, and forced marriage are some of the known forms of persecution in these countries that likely account for the higher percentage of female applicants. Furthermore, evidence seems to show that the majority of asylum seekers arriving in Central or Western Europe have been smuggled or trafficked, which could account for the increase in the proportion of separated children in the overall asylum pool.¹²³ These statistics and trends have profound implications for

¹²⁰ In a positive development, Section 55 of the Borders, Citizen and Immigration Act went into effect in November 2009, and introduced a “statutory duty...to ensure that UKBA functions (and services carried out by third parties on UKBA’s behalf) *are discharged having a regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.*” This was the result of a push by the Children’s Panel and other NGOs to ensure that the UKBA be held to the same standards as all other agencies that work with vulnerable children to ensure the best interests of the child are protected.

¹²¹ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 25.

¹²² *Ibid.*, 25.

¹²³ JBhabha, “Minors or Aliens?” 289.

how the international community, and specifically the UKBA, should take age and gender into account during the asylum process. By identifying and following these trends, asylum officials can be trained to be more sensitive and aware of the types of persecution that exist in certain countries, and can also help norms evolve to accept these gender and child-specific forms of persecution as grounds for asylum. Host countries can better prepare themselves to offer appropriate social and psychological services, including accommodation solely for females, specialists trained in gender-based violence and abuse, and safeguards in place to keep girls from being targeted by their traffickers.

The majority of separated children who apply for asylum in the U.K. are between the age of 16 and 18 – accounting for 59% of asylum applications lodged by separated children in 2004. 28% of applications were by children aged 14 -15, 10% were under 14, and 3% were unknown.¹²⁴ However, this data does not include separated children whose age was disputed by the UKBA, a growing trend that is part and parcel of the “culture of disbelief”¹²⁵ in the UK, where officials tend to believe applicants claiming to be children are actually adults. Statistics from 2005 are revealing: of the 5,390 applications lodged by separated children, the UKBA disputed the age of 2,425 of them.¹²⁶ The large number of age dispute cases seems to suggest a violation of U.K. policy that children be given the benefit of the doubt except in cases when the applicant’s physical appearance *strongly* suggests he or she is an adult.¹²⁷ Previously, all age dispute cases were supposed to be

¹²⁴ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 23.

¹²⁵ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 13.

¹²⁶ Separated Children in Europe Programme, *Statistics on arrivals of separated children seeking asylum in Europe in 2005*, available at: http://www.savethechildren.net/separated_children/other_resources/statistics/ [accessed 29 April 2010]

¹²⁷ Heaven Crawley, “When is a Child Not a Child? Asylum Age Disputes and the Process of Age Assessment: Executive Summary,” *Immigration Law Practitioners’ Association*, May 2007, available at: <http://www.ilpa.org.uk/publications/Executive%20Summary%20Age%20Dispute.pdf> [accessed 2 April 2010]

referred to the Children's Panel of the Refugee Council. However, in 2009, the U.K. government terminated funding for the Children's Panel to work with age-dispute cases, claiming other support networks were in place, and thus the Panel can no longer afford to work with this group. The Children's Panel has said it is "desperately concerned" that separated children whose age is disputed will "fall through the gaps."¹²⁸

The Asylum Process

When separated children apply for asylum in the U.K., the process can take years before a decision is made. The New Asylum Model introduced in 2007, with much encouragement from the UNHCR, has sought to decrease the wait time for asylum decisions, especially for separated children. However, for one reason or another, the asylum process can be drawn out, and sometimes the pressure and uncertainty becomes too much for an asylum seekers to bear. One young Iranian who attempted to hack himself to death left a note saying, "You have to kill yourself in this country to prove that you would be killed in your own country."¹²⁹

Separated children are vulnerable before, during, and after the asylum process, and need advocates to act in their best interest. The U.K. therefore, funds the Refugee Council Children's Panel as a way to ensure that separated children have access to an independent organization which can act as a liaison between the child, the UKBA, his/her legal representative, social worker, and any other involved parties.¹³⁰ UKBA officials are supposed to refer separated children to the Refugee Council within 24 hours of lodging

¹²⁸ Gordon Carson, "Charity's Work with Age-Related Asylum Seekers Stopped," *Children & Young People Now*, 1 June 2009, available at: <http://www.cypnow.co.uk/news/ByDiscipline/Social-Care/910095/> [accessed 2 April 2010]

¹²⁹ Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (New York: Routledge, 2008): 13.

¹³⁰ Although, as already noted, this is limited to nonexistent for children whose age has been disputed.

their asylum application.¹³¹ The U.K. has sought to meet its obligations under the CRC through the Children's Panel.¹³² Although also influenced by the 1994 UNHCR Guidelines, the Refugee Council enshrines the principles of the CRC by allowing separated children greater opportunities for participation (Article 12), and by acting as a safeguard to the best interests of the child (Article 3). Perpetual budget cuts of the Children's Panel however, have put the Refugee Council, and thus U.K. commitment to the CRC, in jeopardy.

Arrival and Identification

The number of separated children who apply for asylum at the point of entry is markedly lower than the number who apply after already entering the UK. In 2008, 380 separated children applied for asylum at port of entry, compared to 3,905 who applied after entering.¹³³ Many of the children who apply after entry are smuggled in, typically in the back of a truck. Others make it through border control with a fake passport and an agent who claims to be a legal guardian. According to a study by the University of Kent, gender plays a role in the method of arrival – between February and May 2003, 39 age-disputed children claimed asylum at the port of entry, whereas 150 were discovered to have entered the U.K. clandestinely. Of the 39 who applied at entry, 72% were male and

¹³¹ Refugee Council, "Asylum process for unaccompanied children," *Support Pack for Advisers*, Spring 2007, available at: http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/practice/advice_guides/AsylumProcessUASC_Apr07.pdf [accessed 9 Feb. 2010]

¹³² Article 19 of the CRC provides for the establishment of social programs for children who have suffered from abuse. Additionally, Article 22 mandates states should cooperate with appropriate non-governmental organizations to protect and assist children seeking refugee status. Article 39 is also relevant as the Children's Panel plays a role in the recovery and reintegration of children who have been victims of abuse, maltreatment, neglect, torture, etc. Depending on the circumstances, other articles may also be significant.

¹³³ "Control of Immigration: Statistics United Kingdom 2008," *Home Office Statistical Bulletin*, Aug. 2009, available at: <http://www.homeoffice.gov.uk/rds/pdfs09/hosb1409.pdf> [accessed 29 April 2010]

28% female. All of the 150 who applied after entry, on the other hand, were male.¹³⁴ This discrepancy may be a result of the fact that males make up the majority of asylum seekers overall, but further research is necessary to determine what other factors also have an impact.

Bhabha's research points to two possible causes for the significant difference in the number of asylum applications lodged at port of entry versus after arrival. First, it is extremely difficult for separated children to meet the requirements to gain legal entry into the U.K., such as a student or work visa. Second, and related, separated children are often unable to obtain their own travel documents. In some countries, parental authorization is a pre-requisite for a passport – an impossible feat for children whose parents have been killed or imprisoned.¹³⁵ Therefore, it is likely that many separated children do not identify themselves at the port of entry, whether it be because they are hidden in the back of a truck, or because they are following the instructions of their smuggler. However, after they have made it into the country, the children may find themselves abandoned or in an exploitative situation and choose to seek asylum to get access to care and protection

The large number of separated children who apply for asylum after entering the U.K. undetected by immigration authorities hints at the much greater number of children who enter the country but never seek protection. Many of these children are unable to seek help because they have been trafficked, an abuse which often renders the victims invisible. As a result, gathering statistics on how many children have been trafficked into the U.K. is very difficult. The International Labor Organization has estimated that 1.2 million children are trafficked annually, internally and across international borders.

¹³⁴ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 28.

¹³⁵ *Ibid.*, 28.

Between 1998 and 2003, 250 cases of child trafficking were recorded in the U.K., but UNICEF estimates that there are hundreds more.¹³⁶ With human trafficking taking first place in the fastest growing criminal industry in the world, identification of separated children is key. The U.K. has set a good example in this regard, by creating training programs to help border officials identify children who are trafficked or otherwise vulnerable. These training programs, while certainly shaped by the CRC and the U.K.'s commitment to the welfare of all children under the Children's Act 1989 and 2004, seem primarily driven by efforts to fulfill its obligations under the Council of Europe Convention Against Trafficking in Human Beings.¹³⁷ There are many points of entry into the U.K., however, and success of these programs is dependent on vigilance and a firm commitment to protecting separated children.

Screening Interview

The first step after lodging an application for asylum is the screening process. In the U.K., the screening process for separated children is basically the same as the process used for adults. An exception to this is if the child is younger than ten years old, in which case the child is not formally screened. Instead, an official asks the child a few questions to learn the basic facts about his identity.¹³⁸ For children older than ten, the primary function of the screening process is to determine whether the U.K. is responsible for the child's welfare, or if the responsibility falls to another European Union member state under the Dublin II Regulation. Dublin II states that the member state responsible for

¹³⁶ UNICEF: U.K., *Child trafficking*, available at: http://www.unicef.org.uk/unicefuk/policies/policy_detail.asp?policy=7 [accessed 2 Feb. 2010]

¹³⁷ Home Office Border & Immigration Agency, *Better Outcomes: The Way Forward Improving the Care of Unaccompanied Asylum Seeking Children*, Jan. 2008, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/uasc/betteroutcomes.pdf?view=Binary> [accessed 2 April 2010]

¹³⁸ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 100.

processing the child's asylum claim is the one where the child's parent or legal guardian legally resides, if it is in the child's best interests. If no parent is present, or it is contrary to the child's best interests, the responsible member state is the one in which the child first applied for asylum.¹³⁹ To a certain extent, the goal of reducing "orbiting" asylum seekers, or asylum seekers who apply for asylum in multiple member states, is logical. However, not all member states offer the same level of protection to asylum seekers, which can be extremely harmful to separated children. For instance, Greece is notorious in the international community for the lack of protection available to separated children. As a result, several EU countries have refused to send separated children who first applied for asylum in Greece, back to that country.¹⁴⁰ However, the U.K. has not suspended Dublin II transfers to Greece, and children who are age-disputed are especially at risk of being transferred out of the country. This practice puts the U.K. at risk of violating several articles of the CRC, including Article 3 – "the best interests of the child shall be a primary consideration"; Article 6 – "state parties shall ensure to the maximum extent possible the survival and development of the child"; Article 19 – "state parties shall take all appropriate...measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation..."; and potentially others as the circumstances arise.

¹³⁹ Dublin II is somewhat sensitive to the plight of separated children in that they can only be returned to countries in which they have applied for asylum (as opposed to adult asylum seekers who can be sent back to the first country through which they traveled). However, the European Council on Refugees and Exiles is still critical of subjecting separated children to Dublin transfers stating, "the best interests of children will rarely be served by being uprooted and transferred back to a state where they have no ties or family members." ECRE, "The Dublin Regulation: Ten Recommendations for Reform," March 2007, available at: www.ecre.org/files/ECRE_10_Dublin_Recommendations.pdf [accessed 21 April 2010]

¹⁴⁰ Renata Goldirova, "Greece Under Fire over Refugee Treatment," *EUObserver*, 3 April 2008, available at: <http://euobserver.com/9/25910> [accessed 2 Feb. 2010]

Although the questions asked during the screening process of separated children are essentially the same as those posed to adult applicants, the UKBA has made strides in improving how the interviews are conducted. In 2004, for example, the UKBA began interviewing children in private rooms, rather than at the long row of counters in the public office where adults are interviewed.¹⁴¹ Additionally, separated children are supposed to be screened by specially trained officials, of which there are few. So, if a trained official cannot be found, another staff member conducts the interview, with instructions to follow the guidance in “Processing Applications from Children.”¹⁴² This guidance is a clear recognition by U.K. officials that children are not “adults in miniature”¹⁴³ and every effort must be made to ensure their best interests are protected through child-sensitive procedures. In all cases, interviews can only be conducted when a responsible adult is present.¹⁴⁴ Sometimes the responsible adult is a social worker, an adviser from the Refugee Council Children’s Panel, or a legal representative (funded by the Legal Services Commission). A translator is also present at the screening interview when necessary.

Besides determining whether the U.K. is responsible for the child, the screening interview also serves to determine the child’s identity (nationality, ethnicity, age, etc.). Many separated children tend to be under the impression that the screening interview is their full asylum interview, an understandable error since many children are not briefed about the asylum process or the protection they may be entitled to under the 1951

¹⁴¹ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 101.

¹⁴² *Ibid.*, 101.

¹⁴³ Jacqueline Bhabha and Wendy Young, “Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines,” *International Journal of Refugee Law*, 11.1 (1999): 84.

¹⁴⁴ The Immigration and Nationality Directorate defines a responsible adult as a, “legal representative or another adult who for the time being is taking responsibility for the child.” Some have argued that this definition is too broad, and thus an inadequate protection measure. Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 101.

Convention.¹⁴⁵ The official conducting the screening interview does ask questions about the child's journey to the U.K., but does not seek a detailed account of why the child is applying for asylum. Some separated children get frustrated and upset when this happens, because they believe that no one is willing to listen to what they have to say. Bhabha interviewed a girl from Rwanda who felt aggravated and hopeless during her screening interview:

They asked me how I came. Why I came. Did I know what asylum was? What did I eat on the plane? They were bullying me and didn't let me tell my story or give me room to explain why I was there. They just wanted to taunt me. I have seen a lot more than most 16 year olds have seen but they didn't want to hear my story. In fact once they started questioning you, they actually know already what they are going to do. From the first minute they've already decided whether you can stay or not. There's a lot of ignorance. They totally don't know what is going on in my country.¹⁴⁶

The frustration can also stem from the quality of the translator used during the interview. Many languages have different dialects, and a translator may misinterpret what the child is trying to say. During one interview, the screening official asked a boy from Afghanistan his age. He said he only knew his birthday using the Afghan calendar, so he told the translator his birth date. The translator scribbled numbers on a piece of paper, attempting to convert the child's age from the Afghan calendar. First, she claimed the boy was 23, but the official knew just by looking at him that this could not be true. On her second attempt, the translator determined that the boy must be 11 – another obvious mistake. Finally, the translator settled on 15 years of age, a number which the official hesitantly jotted down on the screening form.¹⁴⁷

¹⁴⁵ Ibid., 104.

¹⁴⁶ Bhabha and Finch, *Seeking Asylum Alone: UK*, p. 102.

¹⁴⁷ Sarah Howe, Personal account while acting as a responsible adult for a minor from Afghanistan during his screening interview. Summer 2009.

A translator making a mistake, or an official listening to only part of a child's story during the screening interview, can have a negative effect on the child's chances for gaining asylum. Although the screening interview is meant primarily to establish some basic facts concerning identity, any errors can call into question the child's credibility. One solicitor asserts, "Before screening interviews [were introduced] for children, we rarely got refusals based on credibility."¹⁴⁸ And, for most applicants, be they adults or children, credibility is at the core of an asylum decision (also true for asylum claims made in the U.S.). According to Bohmer and Shuman, "Legal authorities assume that normal people with normal memories can remember details consistently, and that, if the details they give differ, they are lying."¹⁴⁹ Given the "culture of disbelief" for separated children, inconsistency, even if it is through no fault of their own, can significantly undermine their asylum applications.

Statement of Evidence Form (SEF)

Separated children are also given a 27-page Statement of Evidence Form (SEF) at their screening interview, which they must return within 28 days – twice the amount of time given to adults. The SEF contains questions that indicate to the applicant and the legal representative the most important issues to be addressed. All children are entitled to free legal representation to help them fill out the form and submit optional witness statements.¹⁵⁰ Free access to legal representation ensures that the child has the right to participate in decisions regarding his welfare, as enshrined in Article 12 of the CRC. Without an advocate to speak on their behalf, children are too often left without a voice since many cannot adequately present their asylum case on their own. However, solicitors

¹⁴⁸ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 103.

¹⁴⁹ Bohmer and Shuman, 134.

¹⁵⁰ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 110.

and social workers have argued that 28 days is not nearly enough time to complete the SEF. First, the SEF is only provided in English, so interpreters must be arranged for most applicants. Additionally, the trauma that separated children have suffered can hinder their ability to go into details about their experiences and reasons for fleeing. One social worker explained:

Young people can give the basics quite quickly but to get some of the stories takes quite a long time. It takes support, sympathy, and being a good ear. One girl who was trafficked, [needed] six to seven appointments of three hours duration on top of time with us. A lot of them are so ashamed.¹⁵¹

However, there have been many cases when separated children do not have an adequate legal representative, or do not have legal representation at all.¹⁵² In these cases, separated children suffer from the negligence of others. For example, if the legal representative does not return the SEF by the deadline, the child's asylum claim is rejected on the basis of non-compliance, with no regard to the substance of the claim. In 2002, 665 (11%) of separated children's asylum claims were refused on non-compliance grounds.¹⁵³ Furthermore, research has shown that in most cases, the information on a child's SEF is not enough to ensure that the child is granted asylum. Supporting evidence and a well-focused argument, and thus a diligent legal representative, are key to the success of the claim.¹⁵⁴

First Reporting Event (FRE)

In 2007, the U.K. implemented the New Asylum Model (NAM) which introduced new procedures for handling asylum applications by separated children. One of the

¹⁵¹ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 105.

¹⁵² *Ibid.*, 104.

¹⁵³ *Ibid.*, 107.

¹⁵⁴ *Ibid.*, 106.

changes under NAM was the assignment of a caseworker to every asylum application to act as a point of contact for the applicant, his legal representative, and social worker. Ten days after a separated child applies for asylum, he attends his First Reporting Event to meet his caseworker. The caseworker then explains the asylum process to the child, and notifies him of his interview date. This process is one way to ensure that separated children are aware of the steps they must take during the asylum process, thereby reducing the stress that often occurs as a result of uncertainty, and upholding the best interests of the child principle. Currently the Legal Services Commission does not provide funding for legal representatives to attend the FRE.¹⁵⁵ Additionally, since the FRE is typically quite brief, there are instances when an FRE will proceed even without an interpreter present.¹⁵⁶ Although an FRE is less likely to have a significant affect on a child's asylum application, if the child is unable to understand the explanation of the asylum process, he is at a disadvantage. Furthermore, interviews with separated children reveal that confusion about what is expected of them can lead to extreme anxiety, fear, and temptation to abscond.¹⁵⁷ However, providing separated children with a point of contact during the asylum process does make the process more child-friendly, and the government more accountable.

¹⁵⁵ Refugee Council, "Asylum Process for Unaccompanied Children."

¹⁵⁶ Personal account while acting as a responsible adult for a minor from China during his FRE, Summer 2009.

¹⁵⁷ Personal account of conversations with several separated children who attended the Drop-In Centre at the Refugee Council Children's Panel, Summer 2009.

Substantive Interview

The New Asylum Model also introduced substantive asylum interviews for separated children who are over the age of twelve.¹⁵⁸ Previously, asylum decisions for separated children were based on the information contained in their SEF and other supporting evidence.¹⁵⁹ The UKBA seemed to agree with the 1994 UNHCR guidelines which made clear that a mandatory interview to determine refugee status could be very traumatic for a child, and that same year the U.K. government submitted its first report to the Committee on the Rights of the Child which stated, "...a child should only be interviewed if it is absolutely unavoidable."¹⁶⁰ Since the U.K. government implemented mandatory substantive interviews for separated children, officials have argued that the interviews may provide children with further opportunity to participate in the process – a key principle contained in the CRC. However, research shows that the IND uses the substantive interview primarily to call the applicant's credibility into question, rather than to delve deeper into the substance of the claim. As a result, many legal representatives and non-governmental organizations fear that forcing separated children to have an interview only serves to increase their trauma.¹⁶¹

The Appeal Process

Separated children can only appeal the refusal of their asylum claim if they are granted discretionary leave (described below) for a period of more than one year. This can be problematic, as the U.K. has a list of countries whose nationals are not

¹⁵⁸ "Children's Asylum Claims," *ILPA Information Sheet*, 5 April 2007, available at: <http://www.ilpa.org.uk/infoservice/Info%20sheet%20Children%27s%20Asylum%20Claims.pdf> [accessed 10 Feb. 2010]

¹⁵⁹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 119.

¹⁶⁰ Russell, 137.

¹⁶¹ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 112.

automatically provided with a right to appeal, and who can only be granted discretionary leave for one year. These countries include Albania, Bolivia, Brazil, Bulgaria, Ecuador, Jamaica, Macedonia, Moldova, Romania, Serbia and Montenegro (which includes Kosovo), South Africa, Sri Lanka, and Ukraine.¹⁶² Therefore, separated children from these countries, or others who have been only granted one year of discretionary leave, may not appeal the UKBA decision to reject their claim. Since the U.K. government is of the opinion that these countries are safe, it does not see returning children to these countries as a violation of its obligations under the refugee or children's rights regimes.

Separated children who are eligible and decide to appeal must meet with an adjudicator or immigration judge. In the past, separated children who wanted to appeal their asylum decision were often not considered eligible for funding from the Legal Services Commission. Fortunately, the Legal Services Commission has now decided to fund all appeals brought by separated children.¹⁶³ A responsible adult should also be present at the appeal.

From April 2004, adjudicators have been advised to make the appeal process more child-friendly, such as sitting around a table or moving the hearing into their chambers. This effort to reduce the stress and trauma for separated children during the appeal process seems to be driven by the CRC, since the focus is on the best interests and welfare of the child in regards to the procedure used. However, even if the setting is altered to seem less-threatening to children, the research of Bhabha et al shows that in most cases adjudicators do not adopt a child-centered framework when deciding on the

¹⁶² Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 124.

¹⁶³ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 163.

merits of the appeal.¹⁶⁴ Furthermore, although adjudicators are supposed to consider a child's age, maturity level, capacity and other relevant factors before allowing the child to give evidence, Bhabha's research shows that children as young as 13 are regularly permitted to give evidence at their hearings, and even highlighted one case where a 9 year old girl from Somalia was expected to give evidence.¹⁶⁵ Although a child should have the right to participate in decision-making processes that will have an affect on his life under Article 12 of the CRC, allowing a child to give evidence can in fact be harmful to his appeal. Adjudicators should be cognizant that a child may know less than an adult about the circumstances in the country of origin and the exact reasons for and methods of flight. When adjudicators do not take this into consideration, a child's testimony may appear unfounded or inconsistent, and therefore result in a negative decision. In one case, a boy from Afghanistan was appealing his denial of asylum. The boy had claimed that he fled to the U.K. because of threats from the Taliban. During the appeal, it became apparent that the adjudicator questioned the boy's credibility for several reasons: first, the adjudicator believed if the Taliban had truly been out to recruit the boy, the boy would not have been able to escape – so his survival and arrival in the U.K. made his case less credible. Second, the adjudicator believed it unlikely that the boy had not been in contact with his family since his arrival in the U.K., and did not even have a telephone number to reach them – despite the fact that as of 2007, only 8 out of 100 people in Afghanistan have access to a telephone.¹⁶⁶ Third, when the boy fled Afghanistan he left behind a brother, which the adjudicator did not believe he would have done if the Taliban was a

¹⁶⁴ Ibid., 164.

¹⁶⁵ Ibid., 165-6.

¹⁶⁶ "Donor pledges to ARTF cross \$2 billion mark," *Pajhwok Afghan News*, 1 May 2007, available at: <http://www.pajhwok.com/viewstory.asp?lng=eng&id=35607> [accessed 20 Feb. 2010]

real threat to their family. Then, the adjudicator proceeded to explain to the boy that Afghanistan had a functioning government, and non-governmental organizations were providing educational and health services, so the boy would be safe if he simply relocated to another region within Afghanistan. It did not seem to matter that relocation would mean being hours away from friends and family, and the boy would still not feel secure anywhere in a country where he had experienced such fear.¹⁶⁷

Bhabha looked at the period between 1 October 2003 and 22 November 2004, and found 2,145 separated children appealed against a refusal to grant asylum. During this period, 12.26% were successful in their appeals, and an additional 3.6% had their appeals allowed on human rights grounds.¹⁶⁸ UKBA statistics do not distinguish between appeals lodged by separated children and those by adults. However, in 2003 20% of 81,725 appeals were successful and in 2004 19% of 55,975 appeals were successful. From this sample, Bhabha posits that separated children are less likely to succeed in an appeal than adults.¹⁶⁹

A number of separated children succeed in an appeal on the basis of imputed political opinion based on the activities of a parent (although it can be quite difficult for a child to prove persecution based on his own political opinion since many officials do not believe a child is capable of forming his own political views). The traditional association between politics and men could help to explain why 26% of male separated children were successful in their appeals, compared to only 19% of female separated children.¹⁷⁰ Girl children often have claims that are based on child-specific forms of persecution, such as

¹⁶⁷ Personal account while observing an appeal hearing for a minor from Afghanistan at the Asylum and Immigration Tribunal at Hatton Cross, 13 July 2009.

¹⁶⁸ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 168.

¹⁶⁹ *Ibid.*, 168.

¹⁷⁰ *Ibid.*, 169.

child trafficking and forced marriage, which do not fit neatly into the 1951 Convention definition of a refugee – someone who is outside his country of origin and fears persecution based on race, religion, nationality, membership of a particular social group or political opinion.

Possible Outcomes

The initial decision about whether to grant a child’s asylum application is the responsibility of the child’s caseworker from the IND. Although these case workers are supposed to be politically neutral, the U.K. government and the IND in particular have made it clear that they have political targets for the number of asylum seekers that should be granted protection, and the number that should be removed.¹⁷¹ Widespread anti-immigrant sentiment is often incorrectly extended to asylum seekers, and officials are thus pressured to seek out inconsistencies in asylum claims, rather than giving applicants the benefit of the doubt. According to political writer Gaby Hinsliff, “Repeated references to abuse of the system and reducing asylum applications – which Tony Blair and then Home Secretary David Blunkett promised to do before the election – ‘tend to reinforce popular misconceptions that abuse is enormous in scale’, when it was only a small proportion of entrants.”¹⁷² Hinsliff also cites a review by Mary Coussey who found evidence that some asylum officers decide in advance to reject someone, and then seek justification for that refusal while they interview the applicant. Coussey also concluded that the media and rhetoric of certain politicians had an affect, stating “I do not doubt that

¹⁷¹ Ibid., 116.

¹⁷² Gaby Hinsliff, “Officers ‘Decide in Advance’ to Reject Asylum Seekers,” *The Observer*, 24 July 2005, available at: <http://www.guardian.co.uk/politics/2005/jul/24/immigration.immigrationpolicy> [accessed 2 April 2010]

this negative atmosphere can affect decision-making on individual cases, as it makes caution and suspicion more likely.”¹⁷³

Asylum caseworkers also feel the pressure when it comes to the short timeline allotted for reaching a decision on asylum applications from separated children. The IND aims to reach a decision on asylum claims by separated children within two months of the application being made. A positive potential effect of this two-month timeframe is that separated children are not left in limbo long. However, in practice children sometimes wait years before a decision is made.¹⁷⁴

Until April 2003, separated children whose asylum claims were refused, were generally given exceptional leave to remain until the age of 18. In 2003, exceptional leave to remain was replaced by two subcategories: Humanitarian Protection and discretionary leave. To be eligible for Humanitarian Protection, a person must “face in the country of return a serious risk to life or person arising from the death penalty; unlawful killing; or torture or inhuman or degrading treatment or punishment arising from the deliberate infliction of ill treatment.”¹⁷⁵ Those granted Humanitarian Protection are allowed to remain in the U.K. for five years, with the possibility to apply for indefinite leave to remain after that time. Discretionary leave may be granted purely as a result of the child’s minority status if no adequate care exists in the country of origin. Discretionary leave is also used if returning the child would violate another article of the European Convention on Human Rights, for example if return would result in inhuman or

¹⁷³ Ibid

¹⁷⁴ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 117.

¹⁷⁵ Home Office Border & Immigration Agency, “Humanitarian Protection,” *Asylum Policy Instructions*, available at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>
[accessed 29 April 2010]

degrading treatment, it would be a violation of Article 3. A child who is granted discretionary leave is given permission to remain in the U.K. for a period of up to three years. Now, separated children are most commonly given discretionary leave to remain for one to three years – depending on their country of origin - or until they are 17 and a half, whichever is the shorter period of time.¹⁷⁶ Just like with adult asylum seekers, refugee status is a rare outcome for asylum cases. Statistics show that the percentage of separated children who are granted asylum is consistently lower than the percent of adult applicants: in 2004, two per cent of separated children were granted asylum compared with three per cent of adults. The following year, five per cent of separated children were granted asylum compared to seven per cent of adults.¹⁷⁷ Refusal of an asylum application can happen for several reasons, the most common being non-compliance, third country involvement, and the substance of the claim itself.

Refusal of Claim

Due to Non-Compliance

As mentioned previously, separated children’s asylum claims may suffer from the (in)actions of others, like when a solicitor does not return the Statement of Evidence Form on time. Failing to show up for a screening interview can also result in a rejection of the claim based on non-compliance. Although in the past it used to be extremely difficult to schedule a new screening interview, or convince the IND to accept a child’s SEF past the deadline, recent IND policy asserts that asylum claims by separated children are only refused on non-compliance grounds where a separated child has “‘failed, without reasonable explanation, to make a prompt and full disclosure of material facts’ and ‘every

¹⁷⁶ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 176.

¹⁷⁷ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 127.

effort...to contact the child via social services or the child's legal representative [has failed]."¹⁷⁸ These guidelines seem to be primarily motivated by U.K. commitment to the CRC, since part of the introduction reads, "The U.K. is a signatory to the U.N. Convention on the Rights of the Child and [this] text includes key commitments that UKBA has to meet when handling asylum applications from children..."¹⁷⁹ From 2002 to 2005, the percentage of separated children refused each year due to non-compliance hovered around ten per cent.¹⁸⁰ Separated children are still entitled to appeal the refusal of their claim, but when the refusal is a result of non-compliance, applicants do not have any insight into the arguments the government will use in regard to the actual substance of their claim, making the appeal process much more difficult.¹⁸¹

Due to Third Country Involvement

Per the Dublin II Regulation, separated children who have applied for asylum in another European Union member country are the responsibility of the first country in which they applied. In such circumstances, the children are returned to the first country for their asylum claim to be processed. Given the U.K.'s geography, it is nearly impossible to arrive in the U.K. without first passing through another E.U. country, and sometimes separated children have applied for asylum elsewhere.

Due to Substantive Issues

Although the U.K. government has made progress in developing guidelines on dealing with asylum applications from separated children, only a very small number of

¹⁷⁸ Ibid, 129-30.

¹⁷⁹ Home Office Border & Immigration Agency, "Processing Asylum Applications from a Child," *Special Cases: Guidance*, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/> [accessed 29 April 2010]

¹⁸⁰ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 129.

¹⁸¹ Ibid., 130.

these children are granted asylum under the 1951 Convention. Many of the separated children experience severe anxiety after their asylum claims are refused. Bhabha includes an excerpt from a refusal letter sent to a boy from Sierra Leone who had claimed asylum after arriving in the U.K. because he had been abducted by a rebel group after his parents had been killed:

The Secretary of State for the Home Department is of the view that you were aware of the plot to overthrow the legitimate and democratic government of [your] country [and should not have participated in this unlawful activity]....He is [also] of the view that you did not stop to think that as a child you should not take part in such activities and neither should you be handling a gun.¹⁸²

After receiving this letter, the boy became very ill, and was subsequently diagnosed with posttraumatic stress disorder and referred for counseling.¹⁸³ Some, especially those who had been put in detention, attempt suicide when faced with the possibility of returning to their country of origin. One legal representative observed, “I have never seen a refusal letter that takes into account the age of the unaccompanied or separated child, even though in practice there is language in the letter which makes reference to age. They don’t take into account the child’s perception of the world.”¹⁸⁴ Clearly, the UKBA must do more to ensure that children feel safe and secure, even if their asylum claim is refused. If not, these children will be further traumatized, and arguably the U.K. will be in violation of the “best interests of the child” principle found in the CRC.

Refugee Status and Alternative Forms of Protection

Refugee Status

¹⁸² Ibid., 130.

¹⁸³ Ibid., 140.

¹⁸⁴ Ibid., 131.

Refugee status used to mean permission to stay in the U.K. indefinitely. Now, when a separated child is granted refugee status he is first granted five years to remain, and then is eligible to apply for indefinite leave to remain. In 2002, only 2% of separated children were granted refugee status after their initial claim. In 2005, this rose to 5%, but was still lower than the 7% of successful adult applicants.¹⁸⁵ Children recognized as refugees are the responsibility of the local authorities until they turn 18, when they are able to apply for welfare benefits and local authority housing. Child refugees also are eligible for a number of educational grants and loans, and essentially have the same entitlements as citizen children.¹⁸⁶

Humanitarian Protection

It is standard practice for a caseworker to consider Humanitarian Protection as an option if the child applicant does not qualify for asylum under the 1951 Convention. Humanitarian protection is for separated children who, if returned to their country of origin, “would face a serious risk to life or safety arising from a death penalty, unlawful killing or torture, or inhuman or degrading treatment or punishment.”¹⁸⁷ This status was implemented primarily as a way for the U.K. government to fulfill its obligations under Article 3 of the European Convention on Human Rights (ECHR), which prevents the extradition of any person to a country where they may be subject to torture or other cruel treatment. Humanitarian Protection is typically granted for a period of five years, after which time the child can apply for indefinite leave to remain. Those granted Humanitarian Protection status are entitled to work and have access to public funds.¹⁸⁸

¹⁸⁵ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 182.

¹⁸⁶ *Ibid.*, 182.

¹⁸⁷ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 131.

¹⁸⁸ Home Office Border & Immigration Agency, “Humanitarian Protection.”

Adults with Humanitarian Protection are entitled to family reunification. However, separated children do not have the same right.¹⁸⁹ In 2003, only .3 per cent of separated children who applied for asylum were granted Humanitarian Protection. The percentage rose to 1 per cent for 2004 and 2005.¹⁹⁰

Discretionary Leave to Remain

Discretionary leave to remain is the most common status granted to separated children, for one to three years or until they reach 17 and a half years of age – whichever is the shorter period of time. Discretionary leave is used when returning a child to his country of origin could result in a breach of the ECHR. Oftentimes, discretionary leave is granted solely because there are no adequate care or reception arrangements in place in the country of origin.¹⁹¹ The UKBA does not typically conduct individual investigations to ascertain the quality of care or reception, as it does not have the resources to do so. Rather, the UKBA uses discretionary leave to acknowledge that a child who has been motivated to flee to the UK by himself or in the company of an agent, or a child who has been trafficked, most likely does not have anyone who can provide sufficient protection at home. Bhabha argues however, that the UKBA's widespread use of discretionary leave is "a distraction to the asylum determination process."¹⁹² One of the key consequences of discretionary leave is that once the time granted is up, these children risk facing persecution by being sent back home. According to Bhabha, "This occurs without the

¹⁸⁹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 177.

¹⁹⁰ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 132.

¹⁹¹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 177.

¹⁹² Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 132.

Government having given serious consideration to the child's entitlement to protection under the Refugee Convention."¹⁹³

Another common problem with discretionary leave is how broadly the UKBA applies the status to asylum claims. In most notification letters, the reason for being awarded discretionary leave is not provided. Therefore, it can be unclear to the child and the legal representative whether discretionary leave was granted on compassionate grounds, or whether it was because of the child's age. The primary consequence of not distinguishing between these two reasons is the question of getting an extension: if it is compassionate grounds, then if the situation in the country of origin has not changed, the applicant can reasonably expect to apply for an extension of the time he is allowed to remain in the U.K. If however, discretionary leave is given due to the child's age, then the possibility of being given an extension is slim at best. In 2004, 73 per cent of separated children were granted discretionary leave compared to 8 per cent of adults. In 2005, it was 69 per cent of separated children and 10 per cent of adults.¹⁹⁴ These figures help to illustrate Bhabha's assertion that perhaps the widespread use of this status clouds the actual substantive issues of separated children's asylum claims. Yet, having a status that at least provides temporary protection to separated children is often better than nothing at all (as is often the case for separated children whose asylum claims are denied in the U.S.).

Care and Accommodation

Separated children asylum seekers in the U.K. are the responsibility of the local authorities, which are "under a duty to safeguard and promote the welfare of any child in

¹⁹³ Ibid., 132.

¹⁹⁴ Ibid., 133.

need and within their geographic jurisdiction irrespective of his or her immigration status.”¹⁹⁵ The type of accommodation provided for separated children varies by age and circumstances. If the child has adult relatives in the U.K., he may be allowed to live with them. Younger children (up to age 16) are typically placed in foster care when possible, and children aged 16 and over are often placed in semi-independent or independent accommodation, which can range from a hostel, dormitory-style living, or sharing a house with other similarly situated children. When a local authority has provided accommodation to a child for 13 weeks or more, it then has the responsibility to keep providing accommodation and some financial support once the child turns 18. This responsibility for care has the potential to last until the child is 24 years of age, if he is still in need of accommodation or assistance in making the transition to employment.¹⁹⁶

U.K. policy of placing separated children in care of local authorities is an approach that helps to ensure the children are provided with a roof over their heads and food in their stomachs. However, the local authorities do not have legal guardianship over separated children, except when they apply for parental responsibility due to child protection concerns – above and beyond the child’s status as a separated child asylum seeker.¹⁹⁷ Unfortunately, a lack of a legal guardian leaves a child without someone to act on his behalf, which is contrary to Article 22 of the CRC which states that separated children seeking asylum are entitled to “appropriate protection and humanitarian

¹⁹⁵ Ibid., 77.

¹⁹⁶ Ibid., 81.

¹⁹⁷ This may occur when a child has been rescued from a trafficker, but the local authority fears that the child is in danger of being harmed or abducted by the trafficker or another member of the trafficking ring. Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 90.

assistance” and “the same protection as any other child permanently or temporarily deprived of his or her family environment.”¹⁹⁸

Further Issues for Separated Children

Age Disputes

Age plays a key role in the asylum process and the protection offered to the applicants. Simmonds points out, “an unaccompanied child’s age no longer tells us when they were born and when to celebrate their birthday but whether they can stay in the United Kingdom, what and how much they should get of the state’s resources and whether they might be sent back to where they came from.”¹⁹⁹ Nearly half (45%) of the separated children who apply for asylum in the U.K. have their age disputed by the UKBA and/or local authorities.²⁰⁰ The UKBA believes that the increase of age-disputed cases in recent years is a reflection of adults trying to take advantage of the supposedly “more generous” asylum policies and support arrangements. Yet, there is strong evidence that the increase is more due to the prevailing culture of disbelief and scholars argue that “the decision to dispute age is often based on ill-informed assumptions about the appearance, behavior and roles of children in other cultures and contexts.”²⁰¹ Guidance for assessing the age of separated child applicants states “a claimant must be given the benefit of the doubt with regards to their age unless their physical appearance strongly suggests that they are aged eighteen and over.”²⁰² In practice, however, applicants are only very rarely given the benefit of the doubt. Even applicants who can provide some

¹⁹⁸ *Convention on the Rights of the Child*, article 22.

¹⁹⁹ John Simmonds, “Telling the Stories of Unaccompanied Asylum Seeking and Refugee Children,” *Working with Unaccompanied Asylum Seeking Children: Issues for Policy and Practice*, ed. Ravi K. S. Kohli and Fiona Mitchell (New York: Palgrave Macmillan, 2007): 2.

²⁰⁰ Crawley.

²⁰¹ *Ibid.*

²⁰² Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 57.

form of documentary evidence of their age experience difficulty in convincing the officials. Officials believe many original documents are falsified, and photocopies and faxes of originals are not accepted. In many instances, an official determines that a child applicant is adult on the sole basis of the child's appearance.²⁰³

When a child's age is disputed, he is treated as an adult and is referred to National Asylum Support Service (NASS) for accommodation and given an SEF to return within 14 days. The child is also given a letter that states his age has been disputed, and provides information on how to contact social services to challenge the determined age. In the past, the UKBA had to refer these age-disputed applicants to the Refugee Council Children's Panel, which could liaise with the local authorities and legal representatives to prove the child's minority. However, during the summer of 2009, the Panel lost its funding to work with age-disputed children. Now, age-disputed children are more vulnerable than ever, since many do not have the knowledge or resources to prove their age on their own.

Typically, age assessments are the responsibility of the local authority where the child is living.²⁰⁴ The guidance provided to social workers on how to assess a child's age emphasizes a holistic approach, taking into consideration the child's "demeanor, ability to interact with adults, cultural background, social history and family composition, life experiences, and educational history."²⁰⁵ Sometimes medical evidence is used (including dental x-rays), as well as the opinions provided by foster carers, staff in the Children's

²⁰³ Ibid., 58.

²⁰⁴ Although local authorities attempt to assess a child's age holistically, and sometimes with the involvement of doctors and other agencies, this is usually not possible for children who apply for asylum at the port of entry, and sometimes border officials make their own judgment on the applicant's age without referring them to social services.

²⁰⁵ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 61.

Panel, teachers, and legal representatives. However, there is no way to medically determine a child's exact age – the margin of error can be up to 5 years on either side.²⁰⁶ Furthermore, a medical age assessment can be traumatic for children who may not understand why the UKBA does not believe them, or who see the assessment as going against their beliefs. For one age-disputed Muslim child from Afghanistan, the doctor completing his assessment was a woman. Many followers of Islam believe that men must only be seen by male doctors. When the female doctor tried to look at the boy's genitalia as part of her assessment, the boy became so upset he stormed out of the office.²⁰⁷

Despite the guidance for local authorities, many social workers have little experience or expertise in assessing age. One social worker asserted that one boy was an adult because he had shown up at the interview with a teddy bear, and thus had “tried too hard to appear to be a minor.”²⁰⁸ Another social worker had been advised that in some African countries, children are taught not to look adults in the eye. When an African boy came in for his age assessment and looked her in the eye, she determined he must be an adult.²⁰⁹ The Immigration Law Practitioner's Association has determined that the current methods used for age assessments are high-risk, expensive, and “[do] not deliver high quality outcomes for the Home Office, social service departments, or separated asylum seeking children.”²¹⁰

Since local authorities are financially responsible for separated children, their objectivity in conducting age assessments has been called into question. Moreover, many social workers are under the impression that if the UKBA has disputed a child's age, they

²⁰⁶ Ibid., 61.

²⁰⁷ Refugee Council Children's Panel, *Case File of A.R.*

²⁰⁸ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 62.

²⁰⁹ Ibid., 62.

²¹⁰ Crawley.

must agree with that assessment.²¹¹ A child's social worker is sometimes the only person a child can trust, but when the responsibility of determining the child's age falls onto the local authority, the child can feel betrayed and confused. Not only can age assessments make a child feel as though their age is more important than the persecution they have suffered, but it can also significantly lengthen the asylum process and leave them without access to adequate care.

Detention

The U.K. government has a policy that children under the age of eighteen should only be put in detention in extreme circumstances while efforts are made to find alternative arrangements for their safety is made. However, widespread age disputes result in many children who the government believes to be adults being detained. Detention is inappropriate for any asylum seeker, but for children especially, and trauma caused by detention can cause serious long-term consequences.²¹² The UKBA does not keep statistics on how many age-disputed asylum seekers are detained, but between November 2002 and October 2003, the Refugee Council Children's Panel received 218 referrals of children detained at Oakington Immigration Reception Centre – only one of the facilities where age-disputed children are sent.²¹³ For some age-disputed children, their asylum claims were refused before they had a sufficient chance to prove their age, and they were deported back to their country of origin. Returning a child to the country of origin without ensuring adequate reception measures are in place is a violation of the CRC, and as such the U.K. must be vigilant in ensuring that all separated children are given a fair chance to prove their stated age.

²¹¹ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 60.

²¹² Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 93.

²¹³ Bhabha and Finch, *Seeking Asylum Alone: U.K.*, 68.

Separated children may also end up in detention for failing to show proper identification to an immigration officer, a criminal offense under section 2 of the Asylum and Immigration Act 2004. Many of these children are never told of the possibility of applying for asylum, and some are even advised to plead guilty in order to get a shorter sentence.²¹⁴ This helps to illustrate the need for increased training of immigration officers so that they can better recognize separated children for what they are: children in need of protection, not criminalization. Fortunately, better training programs are currently underway.

In addition to the psychological and emotional damage detention can inflict upon separated children, the basic logistics of detention can also have an effect. Many detention centers are located far from city centers, and are thus far removed from refugee organizations and other resources.²¹⁵ It can also be extremely difficult for a child to obtain legal representation when in detention, which is often crucial to a successful asylum application.

Interdiction

In order to travel to the U.K., most people are required to obtain a visa prior to travel. This in itself is a form of interdiction (although some refer to it as externalization) – direct action to prevent asylum seekers from reaching the territory – because people from many refugee-producing countries usually find it difficult, if not impossible, to obtain a visa. All carriers (airlines, railways, ships, etc.) are responsible for interdicting undocumented migrants, which can include asylum seekers, and are liable to fines if they

²¹⁴ Ibid., 73.

²¹⁵ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 93.

fail to do so.²¹⁶ In one case, a 14 year old Eritrean boy was fleeing Ethiopia in order to avoid forced conscription in the Ethiopian army. The airline attempted to return the boy to Ethiopia without allowing him the opportunity to apply for asylum.²¹⁷ As this case illustrates, interdiction does not generally discriminate between migrants and asylum seekers, and thus the practice can be a violation of Article 14 of the Universal Declaration of Human Rights (which enshrines the right to seek asylum), as well as violations of several articles of the CRC.

Conclusion

Because the U.K. has ratified both the 1951 Convention and the CRC, the original hypothesis of this thesis predicted that the U.K. provides a dual protection mechanism to separated children applying for asylum. However, U.K. asylum policy, particularly as it relates to separated children, is constantly in flux. In 1994, the Children's Panel at the Refugee Council was established to provide separated children with advice and support during the asylum process. More recently, in 2009 the U.K. reduced funding for the Children's Panel, so that it is no longer able to work with asylum seekers whose age is disputed (which is increasingly becoming commonplace). The U.K. is also party to the Dublin II Regulation, which can violate the best interests of the child principle, depending on the circumstances. Furthermore, with the implementation of the New Asylum Model in 2007, the UKBA began requiring all children over the age of 12 to undergo substantive interviews – a task that is often very traumatic and confusing for young asylum seekers. Perhaps the most critical trend highlighted in this chapter, is the

²¹⁶ Anthony H. Richmond, "Refugees and Asylum Seekers in Britain: U.K. Immigration & Asylum Act, 1999," *Refugee*, 19.1 (July 2000): 36.

²¹⁷ Children's Legal Centre, *Children or Refugees? A survey of West European policies on unaccompanied refugee children* (London: Children's Legal Centre, 1992): 59.

extraordinarily low approval rating for asylum seekers overall, and separated children in particular. In these instances, the U.K. actually moved backward in its protection for separated children – rather surprising behavior from a state that is a member of both the refugee and children’s rights regimes.

There are, however, also some positive aspects of the New Asylum Model. One of the aims of this change in asylum policy was to smooth the process for separated children, primarily by decreasing the time spent waiting for a decision, and by providing them with a caseworker who remains the main point of contact for them for the duration of the asylum process. Also, in 2008, the U.K. withdrew its reservation to Article 22 of the CRC, after heavy criticism from the international community and the Committee on the Rights of the Child. The U.K. has also stepped up efforts to have officials that are well-trained in identifying vulnerable children at entry points, as well as in interviewing children in a sensitive manner. Despite the fact that the UKBA grants very few separated children asylum, it does grant discretionary leave to the majority of them. This status is only a temporary measure, but can provide children with a safe haven while the situation in their country of origin improves, or until they are more capable of looking after themselves.

Much of the progress in the U.K. can actually be traced back to the influence of multiple regimes. This chapter highlights the European Convention on Human Rights and the Council of Europe Convention Against Trafficking in Human Beings as just a couple of examples of other influential regimes of which the U.K. is a member. That other regimes play a role in U.K. policy towards separated children is significant because it illustrates that not all regimes are as strong, or influential, as others. The relative strength

(or weakness) of the multiple regimes in the U.K. may help to explain why the U.K. has made progress in certain areas, but has regressed in others. This is returned to in further detail in Chapter 4.

CHAPTER 3:

Separated Children in the United States

*“These kids are run-aways or throw-aways.”*²¹⁸

The United States often claims to be one of the leading protectors of human rights around the world, and in the past the U.S. has been quite generous with monetary donations to humanitarian crises.²¹⁹ However, throwing money at distant problems is significantly different from creating durable solutions to cope with issues that cross over its borders, such as separated children. The U.S. has ratified the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees²²⁰, but unlike the United Kingdom,

²¹⁸ Immigration official cited in Jacqueline Bhabha, “Minors or aliens? Inconsistent state intervention and separated child asylum-seekers,” *European Journal of Migration and Law*, 3, (2001): 295.

²¹⁹ Global Humanitarian Assistance, *Humanitarian Donor Profile*, available at: <http://www.globalhumanitarianassistance.org/category/tags/humanitarian-donor-profile?page=1> [accessed 5 April 2010]

²²⁰ Hereafter referred to as the 1951 Convention.

the U.S. has yet to ratify the United Nations Convention on the Rights of the Child (CRC).

U.S. asylum law for separated children is primarily governed through the Refugee Act of 1980 (U.S. domestic implementation of the 1951 Convention), and is supplemented by the 1998 INS “Guidelines for Children’s Asylum Claims.” Until the 1920’s, anyone in reasonable health was allowed to immigrate to the U.S. (except for the Chinese who were excluded by a racist statute in 1882, and the Japanese by a separate treaty).²²¹ The Immigration Act of 1924, and several laws that followed, restricted immigration policy by instituting quotas for different nationalities. Since there was no differentiation between immigration and asylum at this time, those suffering from persecution could usually only be granted entry into the U.S. if the U.S. had accepted them for resettlement, or if they qualified under the quotas. Even in 1948 with the passing of the Displaced Persons Act, through which the U.S. committed to admit up to 200,000 refugees from World War II, the U.S. sidestepped its obligations by making it nearly impossible for Jews in Europe to obtain visas.²²² In 1952, the U.S. passed the Immigration and Nationality Act (INA), which is still considered to be the “basic body of immigration law.”²²³ It was not until 1980, when Congress passed the Refugee Act, that a system to adjudicate asylum claims was created. The Refugee Act incorporates most of the provisions of the 1951 Convention, including the definition of a “refugee” and the prohibition against *refoulement*. However, asylum during the Cold War was highly

²²¹ Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century*, (New York: Routledge, 2008): 11.

²²² *Ibid.*, 18.

²²³ U.S. Citizenship and Immigration Services, *Immigration and Nationality Act*, available at: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD> [accessed 5 April 2010]

political, as the State Department was more willing to grant asylum to those fleeing the Soviet Union, rather than to those from U.S.-supported regimes like Haiti and El Salvador.²²⁴ Since its creation, asylum policy in the U.S. and in many western countries has been an attempt at balancing national security and immigration concerns with the desire to “do something right.”²²⁵

Asylum law was tightened in 1996 under the Immigration Control and Fiscal Responsibility Act, which stipulates that an asylum seeker must make his claim within one year of entering the U.S. The 1996 Act places the burden of proof on asylum seekers to prove when they arrived in the U.S., which is nearly impossible for those applicants who enter clandestinely. If on the other hand, asylum seekers do have the appropriate proof, i.e. a passport or visa stamped with the date of arrival, then officials often consider them to be tourists, using asylum as an excuse to remain. Thus, the 1996 Act set up a paradox where “either he is a refugee and so he needs to flee fast and arrives without the appropriate papers, or he is a ‘real’ visitor with a visitor’s visa, so how can he be a refugee?”²²⁶ Fortunately, separated children are exempt from this one year deadline because they are included in the category of having a “legal disability.”²²⁷

The terrorist attack on September 11, 2001 has also affected asylum policies in the U.S. Now, “all political activists are suspected of being terrorists.”²²⁸ As a result, more asylum seekers spend extended periods of time in detention, as the U.S. government

²²⁴ Bohmer and Shuman, 19.

²²⁵ Ibid., 262.

²²⁶ Ibid., 64.

²²⁷ Jacqueline Bhabha, Mary E. Crock, Nadine Finch, and Susan Schmidt, *Seeking Asylum Alone – A Comparative Study: Unaccompanied and Separated Children in Australia, the UK, and the US* (Themis Press, 2007): 112.

²²⁸ Bohmer and Shuman, 258.

worries that terrorists may abuse the asylum system.²²⁹ Sadly, children are not exempt from this concern. In an effort to be better prepared in the case of a terrorist attack, the U.S. government underwent significant restructuring with the Homeland Security Act of 2002 which created the Department of Homeland Security (DHS). In 2003, DHS absorbed the Immigration and Naturalization Service (INS) and divided it into two new agencies: Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services (CIS). The changes also resulted in a newly-formed U.S. Customs and Border Protection (CBP), and transferred the responsibility of care and custody of “unaccompanied alien children” from the dissolved INS to the Office of Refugee Resettlement (ORR), part of the U.S. Department of Health and Human Services (HHS).²³⁰ Children’s rights advocates applauded this transfer, as under the previous system the INS was forced to act as a police officer, prosecutor, and guardian of separated children, which was undoubtedly a conflict of interest.²³¹ ORR is still working to remedy the typically punitive system it inherited from the INS to create more child-friendly options for care and accommodation, which is returned to later in the chapter.

The Homeland Security Act of 2002 is also relevant because it served to identify procedural guidelines for processing asylum claims by separated children. The act stipulates “the interests” of the child must be considered when making decisions related

²²⁹ Ibid., 259.

²³⁰ Now, the ORR is responsible for the care of separated children and the U.S. Citizenship and Immigration Services is responsible for the initial adjudication of separated children’s asylum claims. U.S. Citizenship and Immigration Services, *Questions and Answers: USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum*, available at: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b3b6040faa930210VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> [accessed 29 April 2010]

²³¹ Christopher Nugent, “Symposium on Children and Immigration: Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children,” *The Boston University Public Interest Law Journal* (Spring 2006): 222.

to the child's care and custody. This provision falls markedly short of the standards contained in the Convention on the Rights of the Child, which calls for the "best interests" of the child to be a *primary* consideration.²³² The enactment of the Homeland Security Act 2002 also had the effect that "at least four major government departments and 15 federal government agencies within those departments interact with unaccompanied and separated children in some way...there is little coordination or cooperation between the different agencies."²³³ Despite the confusion that results from numerous agencies interacting with separated children, transferring the responsibility of care of separated children to the ORR, an agency with a social service mandate,²³⁴ is a clear improvement in U.S. asylum policy. The William Wilberforce Trafficking Victims Protection Reauthorization Act 2008 (TVPRA) introduced the most recent changes to asylum law as it applies to separated children, including altering the procedure for children in the defensive process²³⁵ so that they initially meet with an asylum officer, rather than an immigration judge, which is returned to in more detail below.

²³² *Convention on the Rights of the Child*, article 3.

²³³ Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: U.S. Report* (Cambridge: President and Fellows of Harvard College, 2006): 40.

²³⁴ Exhibit 1 of the Flores Settlement Agreement established minimum standards of care for unaccompanied alien children, including: "Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items...Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease)...appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary... Educational services appropriate to the minor's level of development... At least one (1) individual counseling session per week conducted by trained social work staff..." available at: <http://centerforhumanrights.org/children/Document.2004-06-18.8124043749> [accessed 26 April 2010]

²³⁵ Previously, the U.S. had a defensive procedure and affirmative procedure for processing asylum claims. The affirmative procedure was reserved for children who presented themselves to authorities to claim asylum, and the defensive procedure was for children who applied for asylum only after being arrested.

Relevant Terminology in U.S. Law

Part of the difficulty of studying separated children seeking asylum in the U.S. is the direct result of inconsistent use of certain terms. The INA, for example, uses three terms: “child,” “minor,” and “juvenile.”²³⁶ A “child” is defined as an unmarried person under 21 years of age and who falls into one of six categories listed in the act, all of which presume some kind of relationship with a parent or legal guardian. Separated children, therefore, technically do not fit into the INA definition of a “child” since the definition does not consider children who must act on their own behalf. The term “minor” is used primarily as an adjective in the INA (such as “minor child”), and is used to describe children of various ages until age 21. Similarly, the INA uses the term “juvenile” without providing a definition. There are instances when “juvenile” is used to mean “an alien under the age of 18” yet in other legislation, as in the case of Special Immigrant Juvenile Status, a “juvenile” is someone who is under 21 years of age. Fortunately, the Homeland Security Act of 2002 attempted to create a single term to incorporate and define separated children: “unaccompanied alien child[ren].” However, as noted in the introduction of this thesis, not all separated children are unaccompanied. In fact, many separated children, who by definition have been separated from their parent or legal guardian, are accompanied by another relative (perhaps a sibling), a smuggler, family acquaintance, etc. The inconsistent and arbitrary use of these terms and definitions is an obstacle to the gathering of reliable data, since in practice different government agencies may use the same terms to mean different things.²³⁷ The lack of statistics and inconsistency of terminology has made it difficult to be consistent in language in this

²³⁶ Bhabha and Schmidt, *Seeking Asylum Alone: U.S.*, 30.

²³⁷ *Ibid.*, 32.

chapter. Therefore, I have chosen to use the terms as they appear in the sources – “unaccompanied” for children who are strictly alone, and “separated” for children who are separated from their parent or legal guardian, but may or may not be in the company of other adults (which could include a sibling, family acquaintance, smuggler, or trafficker).

U.S. Guidelines

Until the creation and adoption of the 1998 “Guidelines for Children’s Asylum Claims”, the U.S. asylum process largely ignored the needs of child asylum seekers.²³⁸ However, following the lead of both the Canadian and UNHCR guidelines, the U.S. drafted its own child-specific manual in 1998. The Guidelines paved the way for a separated child to have an adult (akin to a “responsible adult” in the U.K. system) other than the child’s lawyer participating in the asylum proceedings.²³⁹ Although this does not establish a guardianship system, it is a step in the right direction as “a trusted adult is a person who may bridge the gap between the child’s culture and the U.S. asylum system.”²⁴⁰ There is of course, no guarantee that a separated child will be able to find a trusted adult to assist him during the asylum process, especially without a guardianship system in place.

The Guidelines also provide notes on making sure that the asylum process is child-friendly in terms of the setting, the timeframe, the way questions are asked, how testimony should be evaluated (“from a child’s point of view”²⁴¹), and consideration of

²³⁸ Jacqueline Bhabha and Wendy Young, “Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines,” *International Journal of Refugee Law*, 11.1 (1999): 115.

²³⁹ In 2004, the Office of Refugee Resettlement provided funding for a pilot project, the Immigrant Child Advocacy Project, to provide guardians *ad litem* to separated children in the Chicago area. ICAP is currently working on implementing a national plan, which is expected to launch in 2010 or 2011. Available at: <http://www.immigrantchildadvocacy.org/ourwork.shtml> [accessed 16 March 2010]

²⁴⁰ Bhabha and Young, “Not adults in miniature,” 116.

²⁴¹ *Ibid.*, 120.

alternative forms of evidence.²⁴² It is worth mentioning that all asylum officers in the U.S. must attend two five-to six-week training sessions on asylum procedures, and only two hours of this training is devoted to children’s issues. The Guidelines themselves suggest a minimum of four hours of in-service training.²⁴³ Although the U.S. seems to be making strides in how it deals with children’s asylum claims, the minimal time allotted during training for child-specific issues seems to point to the low priority given to separated children.

Although not binding, the U.S. Guidelines go above and beyond the UNHCR and U.K. guidelines because they address some of the substantive issues related to separated children’s asylum claims. For example, the Guidelines state:

The harm a child fears or has suffered...may be *relatively less* than that of an adult and still qualify as persecution... The types of harm that may befall children are varied.... In addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as FGM, may under certain circumstances constitute persecution.²⁴⁴

So, even though the original hypothesis suggests that the U.S. is only a member of one regime, these Guidelines indicate that the one protection regime in the U.S. has the potential to be stronger than the two protection regimes in the U.K. However, despite this liberal understanding of how the fear of persecution may differ for a child as compared to an adult, the asylum process for separated children is still rigorous, intimidating, and “mysterious at best.”²⁴⁵

²⁴² Ibid., 119-20.

²⁴³ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 122.

²⁴⁴ Bhabha, “Minors or aliens?” 304.

²⁴⁵ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 107.

Who Are These Children?

Unlike the U.K., the U.S. does not keep statistics for separated child asylum seekers.²⁴⁶ One researcher on Bhabha's team who attempted to gather statistics and other information regarding separated children in the U.S. claimed, "Each federal government office has very little data available on the situation of children in general, or separated and unaccompanied children in particular...it is emblematic of the extent to which the plight of child asylum seekers has been overlooked."²⁴⁷ Efforts at gathering more information are also complicated by the sheer number of government agencies that have the potential to come into contact with separated children, but do not keep age-specific records, including the Coast Guard, Customs and Border Protection, Border Patrol, the Office of Refugee Resettlement, and the Executive Office for Immigration Review (also referred to as the Immigration Court or EOIR). The Asylum Office does collect data on separated children, but only deals with children who present themselves to authorities of their own accord, i.e. those who have not been apprehended by one of the aforementioned agencies. From the very limited statistics available – records from the Asylum Office²⁴⁸ (data collected only from children who applied in the affirmative process²⁴⁹), the number of children granted T-visas,²⁵⁰ the number of children granted Special Immigrant Juvenile Status (SIJS) - Bhabha estimates that during 2003 at least 8,000 separated children sought

²⁴⁶ Nor does the UNHCR collect data on separated children from the US, as it does for the UK and 27 other European countries.

²⁴⁷ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 28.

²⁴⁸ Part of the U.S. Citizenship and Immigration Services.

²⁴⁹ Data collected before the policy changed to have all separated children begin their asylum claims in the affirmative process.

²⁵⁰ T-visas are for victims of a "severe form of trafficking in persons" and three years after obtaining a T-visa, the victim can apply to be a permanent resident.

asylum in the U.S.²⁵¹ Despite this rough estimate, there is clearly a lack of adequate statistics which stems from an absence of sufficient reporting mechanisms. In turn, it becomes very difficult to hold the U.S. government accountable for its treatment of separated children.

In 2008, the top ten countries of origin for all asylum seekers in the U.S. were People's Republic of China (9,250), El Salvador (6,424), Guatemala (5,058), Haiti (3,326), Mexico (3,229), Colombia (1,140), Indonesia (1,000), India (974), Honduras (921), and Ethiopia (769). However, the top ten countries of origin for *successful* asylum applications reveal a different story: People's Republic of China (3,419), Colombia (531), Haiti (510), Iraq (408), Albania (320), Ethiopia (311), Venezuela (294), India (272), Guinea (238), and Russia (198).²⁵² Asylum seekers from Latin American countries, who make up the majority of asylum seekers in the U.S., typically do not have good odds for success. Of the 6,424 asylum seekers from El Salvador, for example, only 172 were granted asylum (about 2.6%). It is unclear whether these general statistics, which comprise both child and adult asylum applicants, mirror the countries of origin of separated children. Statistics do show, however, that 86% of separated children in ORR custody in 2005 were from Honduras, El Salvador, Guatemala, and Mexico.²⁵³

Although official statistics regarding the number of separated children who apply for asylum in the U.S. each year are not available²⁵⁴, Ross Bergeron, a spokesman from

²⁵¹ This estimate excludes the large number of Mexican children picked up and returned across the border by Customs and Border Patrol. Bhabha and Schmidt, *Seeking Asylum Alone: U.S.*, 17.

²⁵² U.S. Department of Justice, Executive Office for Immigration Review, and Office of Planning, Analysis, and Technology, *FY 2008 Asylum Statistics*, available at: <http://www.justice.gov/eoir/eoia/FY08AsyStats.pdf> [accessed 27 Feb. 2010]

²⁵³ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 40.

²⁵⁴ The statistics used in this thesis tend to be piecemeal, as they come from different agencies and research teams. These figures provide insight into the circumstances of separated children in the U.S., but do not give a holistic view.

the former INS, estimates the INS handles 4,000 unaccompanied minors per year.²⁵⁵ It is probable that this figure is actually much higher for separated children, as unaccompanied minors are only one category of separated children (other categories include children separate from their parent but accompanied by a smuggler, trafficker, other relative, or friend).

The Asylum Process

Arrival and Identification

Separated children who come to the U.S. are likely to come to the attention of the authorities only if they are completely alone.²⁵⁶ The agencies that tend to first come in contact with separated children, including the U.S. Coast Guard, Customs and Border Protection (which manages major ports of entry like airports and border entry sites), and the Office of Border Patrol (which monitors the territory between the official entry points) often lack adequate training in identifying separated children who are in the company of an adult, even if that adult is their trafficker. These agencies also do not have clear child-specific procedural guidelines in their mandates. Efforts by Bhabha et al failed to uncover (despite many attempts) any written policies to help officials from these agencies determine whether the accompanying adult is in fact someone other than a parent or legal guardian.²⁵⁷

Separated children apprehended by Border Patrol are supposed to be referred to the Office of Refugee Resettlement within 72 hours, after which their immigration or asylum case will proceed. However, a common and disturbing practice seems to be that children who first come into contact with CBP or Border Patrol are often pressured to

²⁵⁵ Bhabha, "Minors or Aliens?" p. 286.

²⁵⁶ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 77.

²⁵⁷ *Ibid.*, 77.

sign a “voluntary return” form. Moreover, in some districts, children are forced to pay for “voluntary return” themselves.²⁵⁸ If they are unable to do so, the U.S. government may issue a formal removal order for the government to cover the costs. A formal removal order then has the consequence of not allowing the child re-entry into the U.S. for a period of ten years. Fortunately, the TVPRA should bring this practice to a halt, since the Act provides that separated children are eligible for voluntary departure at no cost to them.

Affirmative versus Defensive Claims

For an asylum claim to be an affirmative claim, an asylum seeker must tell an immigration officer that he is seeking asylum, and prove that he does indeed have a “credible fear” of persecution before being permitted to lodge a full asylum claim. If the officer does not believe there is a credible fear, the asylum seeker is summarily deported. If, on the other hand, the asylum seeker proves he has a credible fear, then he is given an appointment for an individual interview with an asylum officer.²⁵⁹ An average of 524 children begin their asylum claims in the affirmative process each year.²⁶⁰ Fortunately, the Inspector’s Field Manual for the Border Patrol encourages border officials to “extend special treatment towards unaccompanied minors” and “take every precaution...to ensure the minor’s safety and wellbeing.”²⁶¹ These guidelines are commendable, but research indicates that “unaccompanied children...are relatively privileged in obtaining access but disadvantaged in the asylum determination system itself.”²⁶² Therefore, although border

²⁵⁸ Ibid., 78.

²⁵⁹ Ibid., 117.

²⁶⁰ Ibid., 126.

²⁶¹ Ibid., 108.

²⁶² Joyce Koo Dalrymple, “Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors,” *Boston College Third World Law Journal*, 26 (2006): 162.

officials are instructed to be sensitive to the vulnerabilities of separated children, this special treatment during the initial stages of the asylum process does not necessarily extend throughout the entire procedure, which is illustrated in further detail below.

In contrast, children wind up in the defensive process when they are arrested for immigration violations (upon entry or when already in the country), or once they have been denied asylum in the affirmative process. Prior to 2009, children who were forced to go through the defensive process had to endure “a series of adversarial court hearings before immigration judges.”²⁶³ In defensive proceedings, the child-friendly approach from the INS Children’s Guidelines seemed to be lost. Separated children were forced to attend a formal court hearing, which was often intimidating to them. Some child asylum hearings took place in courtrooms with handcuffed adult detainees present, and there are cases where even the children themselves were shackled.²⁶⁴ In December 2008, President George W. Bush signed the TVPRA, which changed the procedure for separated children in the defensive process. Now all separated children, even if they are in removal proceedings, initially meet with an asylum officer for an interview, rather than being forced in front of a judge in a courtroom.²⁶⁵ This change reflects a growing awareness of the needs of separated children, and the appropriate measures to take when processing their asylum claims. Ratification of the CRC then would seem to have little bearing on the new initial stages of the asylum process for separated children, since the changes seem to apply the best interests of the child principle regardless of non-ratification.

²⁶³ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 117.

²⁶⁴ Bhabha and Young, “Not adults in miniature,” 121.

²⁶⁵ Deborah Lee, Manoj Govindaiah, Angela Morrison, and David Thronson, “Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Reauthorization Act of 2008,” Practice Advisory, 19 Feb. 2009, available at: www.immigrantjustice.org/.../500-tvpra-practice-advisory.html [accessed 15 March 2010]

However, as mentioned previously, the U.S. does not have monitoring mechanisms in place to track separated children through the asylum process, and as such it is difficult to ascertain how the children fare under the new procedure.²⁶⁶ It is possible, for example, that changing the procedure for all separated children to meet with an asylum officer first, has led to asylum officers having a large backlog of cases. If so, it would not be surprising if the officers had neither the time nor the inclination to devote to the complexities of all their assigned children's asylum cases. If this were to be true, ratification of the CRC could influence policy, as the U.S. government would be expected to prioritize the children's cases, and perhaps recruit more staff to ensure the best interests of the children were being protected. However, more research is needed to determine whether this is truly a problem for separated children's asylum cases.

The 589 Form

All asylum seekers need to fill out the 589 form, which consists of 12 pages of fill-in-the-blank text. The U.S. does not provide free legal counsel to separated children, though pro bono representatives (if a child manages to find one) are allowed to attend hearings and offer assistance throughout the asylum process.²⁶⁷ Although most of the questions on the 589 appear to be straightforward to someone from the U.S. or other western countries, each question can be a "minefield for unwary applicants."²⁶⁸ For example, many applicants believe that the minimal space provided for answers is sufficient. However, in small print, there are instructions to attach additional pages if

²⁶⁶ Ratification of the CRC could lead to better statistics since the U.S. would be obligated to submit reports to the Committee on the Rights of the Child, which monitors the implementation of the CRC.

²⁶⁷ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 111.

²⁶⁸ Bohmer and Shuman, 40.

necessary, and an applicant with legal representation will most likely answer each question with several paragraphs, instead of merely a sentence.²⁶⁹

As in the U.K, legal representation is often critical to a successful outcome of an asylum claim in the U.S. Overall, only about 10% of separated children seeking asylum in the U.S. are represented during the adjudication process.²⁷⁰ From 1999 to 2004, 48% of separated children who applied for asylum with the help of a legal representative were granted asylum. For child applicants without legal assistance, on the other hand, successful outcomes decreased to 27%²⁷¹ (notably, the percentage of successful asylum applications is much higher than it is in the U.K, which is returned to in Chapter 4). However, statistics show that legal representation frequently varies significantly based on where the asylum claim is lodged and the countries of origin of the applicants: between 1999 and 2003 a mere 10% of child applicants in Miami, Florida were represented, whereas 47% of child applicants in the Washington D.C. area were represented. During the same period of time, only 6% of child applicants from Haiti were represented, while 30% of Somali and 71% of Chinese child applicants were represented.²⁷²

The following story illustrates the subjective nature of the asylum process and the often critical role of sound legal representation: two 17 year old boys, who were smuggled together from China, were arrested by agents of the former INS in Guam. Both boys testified in court against the smugglers, claiming that the smugglers had beaten and abused them during their long journey. One boy had the help of a lawyer, and was

²⁶⁹ Ibid., 43.

²⁷⁰ Bhabha, "Minors or aliens?" p. 302.

²⁷¹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 111.

²⁷² Ibid., 120.

granted asylum. The other boy, however, was unrepresented and lost his asylum claim.²⁷³ In another even more outrageous case, a one-and-a-half year old was not provided with legal representation at the asylum hearing.²⁷⁴ Although inconsistency in asylum adjudication proceedings is not unique to the U.S., the fact that two boys with the exact same story ended up with different outcomes, and that a baby can appear in court without representation by a lawyer, is indicative of flaws in the system which leaves separated children all the more vulnerable.

In a positive development, the U.S. Office of Refugee Resettlement entered into a pilot program in 2008 to better coordinate pro bono legal representation, and thus increase separated children's access to finding a qualified, free legal representative.²⁷⁵ The program was the result of the TVPRA, which also mandates that the Department of Health and Human Services "to the greatest extent practicable" is to provide separated children with pro bono legal counsel during removal proceedings.²⁷⁶ The language of the law leaves room for maneuver, so that if the HHS is constrained by a lack of financial or other resources, it is not a breach of the law as long as it was to the "greatest extent practicable." Since TVPRA has been implemented so recently, there is no research to determine the extent to which pro bono legal counsel is being provided for separated children.

²⁷³ Bhabha, "Minors or Aliens?" 293.

²⁷⁴ Presumably, the child was accompanied by a guardian or social worker, but no provisions were made to ensure that a lawyer was present to advocate for the child. Jacqueline Bhabha, "Emerging Research: Seeking asylum alone: Treatment of separated and trafficked children in need of refugee protection," *International Migration*, 42.1 (2004): 146.

²⁷⁵ Elaine M. Kelley, "ORR Programs for Vulnerable and Unaccompanied Children," *Office of Refugee Resettlement*, available at: [http://icpc.aphsa.org/home/Doc/KelleyICPCReviewingPractices .pdf](http://icpc.aphsa.org/home/Doc/KelleyICPCReviewingPractices.pdf) [accessed 15 March 2010]

²⁷⁶ Lee, Govindaiah, Morrison, and Thronson, "Update on Legal Relief Options."

Asylum Interview

In the affirmative process, the asylum interview is non-adversarial, and is used as a way for an asylum official to ask questions and get as much relevant information as possible. Separated children are allowed to have legal representation (if they can find and pay for it), but the lawyers' level of participation is determined by the officer conducting the interview.²⁷⁷ However, INS guidelines note that "children cannot be expected to discuss their claim with the same degree of accuracy and detail as adults, due to developmental and cultural reasons...children's testimony should be given a liberal 'benefit of the doubt'."²⁷⁸ Shockingly, separated children are often not provided with an interpreter during the asylum interview.²⁷⁹ Just as with legal representation, it is typically the responsibility of the child to find and compensate his own interpreter.²⁸⁰

Asylum Hearing

Prior to the enactment of the TVPRA, separated children in the defensive asylum process were forced to attend a formal asylum hearing. As mentioned previously, the child-friendly approach is usually lost in this setting, and children were frequently intimidated by the formality and unfamiliarity. One of the most prevalent issues that arose from asylum hearings is that the aggressiveness with which the judge posed questions made the child feel uncomfortable and disliked. When judges continued to probe on topics that were painful or confusing, many children took it personally and thought that the judge was attacking them. When this occurred, children were more likely

²⁷⁷ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 120.

²⁷⁸ Dalrymple, 156.

²⁷⁹ It is unclear how the asylum interview proceeds if an interpreter is not present, but Bhabha et al note that when an interpreter is not present, it can jeopardize the "fact finding processes at the heart of asylum interviews." Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 120.

²⁸⁰ *Ibid.*, 120.

to withdraw and be silent, which could negatively affect the outcome of their asylum application.²⁸¹

The TVPRA altered the asylum procedure for separated children in the defensive process, and now they are subject to the same type of interview described for the affirmative process. Given the more relaxed and less adversarial nature of an interview with an asylum officer, this is a welcome change in the asylum process. However, given how recent these changes are, there is an absence of literature on how these changes have been implemented, and any positive or negative consequences for separated children affected by the change in policy.

Appeal Process

Asylum applicants whose claims are denied can appeal to the 11-member Board of Immigration Appeals (BIA). Appeals can be based on either procedural or substantive issues. The appeal process is the same for adults as it is for children.

Possible Outcomes

Granting of Asylum and Alternative Forms Protection

Granting of Asylum

The U.S. provides several forms of protection for those applying for protection from persecution (including separated children). First, is through granting asylum to those deemed to be refugees under the 1951 Convention. Statistics for separated childrens' asylum claims are only available for children applying through the affirmative process, which is a very small minority of asylum applications by separated children (statistics are not available for children who apply under the old defensive process, after first being apprehended by the Coast Guard, ICE, Border Patrol, etc.). The overall rate of

²⁸¹ Ibid., 124.

successful asylum claims – between 30% and 40% between 2001 and 2003 – is much higher than the overall success rate in the United Kingdom (which is around 7%). For separated children in particular, 63% of asylum applications in the affirmative process were successful in 1999. However, the success rate fell to 31% in 2003.²⁸² Despite the fact that the U.S. grants asylum to a greater percentage of asylum seekers, Bill Frelick states, “With respect to noncitizens generally – and asylum seekers and refugees in particular – the U.S. bureaucracy has become a ‘culture of no’ ...”²⁸³ The above statistics indicate that separated children may not be as affected by the “culture of no,” which could mean the U.S. provides better protection to separated children than the U.K. This issue is returned to in Chapter 4. A year after a person is granted asylum, he may apply for permanent residency. Additionally, separated children who are successful in their asylum applications are entitled to social service benefits from the Office of Refugee Resettlement until age 21(examined in more detail below).

Alternative Forms of Protection

In addition to protection through asylum, there is also withholding of removal for those facing likely harm if returned, but who are designated as ineligible for asylum.²⁸⁴ The U.S. also offers relief and protection under the 1984 Torture Convention – a key protection for child soldiers and other asylum seekers who may not be covered under the 1951 Convention due to their own participation in atrocities and their status as war criminals. Protection is also offered to victims of trafficking through T-visas and U-

²⁸² Ibid., 158.

²⁸³ Bill Frelick, “U.S. Asylum and Refugee Law: A ‘culture of no,’” *The Future of Human Rights: U.S. Policy for a New Era*, ed. William F. Schulz, (Philadelphia: University of Pennsylvania Press, 2008): 215.

²⁸⁴ Separated children who are granted withholding of removal are not eligible for benefits from the Office of Refugee Resettlement, whereas children granted asylum typically receive benefits until age 21. Christopher Nugent, “Best Practices in Trial Advocacy For Unaccompanied Alien Children in Immigration Court Matters,” *American Bar Association*, Public Documents, available at: <http://new.abanet.org/child/PublicDocuments/legalrep-11.pdf> [accessed 17 March 2010]

visas.²⁸⁵ Lastly, the U.S. offers protection through a status called Special Immigrant Juvenile Status (SIJS), which was created in 1990 for children who have been abused, abandoned, and/or neglected by their parent(s) and who have sought refuge in the U.S. (the abuse can have occurred in the country of origin or after arrival in the U.S.).²⁸⁶ For a child to qualify for SIJS, he must already be under the jurisdiction of the juvenile court, eligible for long-term foster care, and had a court determine that it was not in his best interest to be returned to his country of origin.²⁸⁷ Since children intercepted at the border do not fall under the jurisdiction of U.S. juvenile court, in order to be eligible for SIJS the child must get consent from DHS to be transferred to juvenile court.²⁸⁸ The status allows these children to apply for permanent protection and residence in the U.S. However, applying for SIJS can be risky since if the application is refused, the child may be deported. Because SIJS does not require the child to meet the definition of a refugee under the 1951 Convention, and is a separate application from that of asylum, it is outside the scope of this thesis. Yet, SIJS is an innovative status that will hopefully be used to help to catch children that may fall through the cracks of the asylum process.

Ratification of the CRC would have a significant impact in regard to alternative forms of protection. Although the U.S. offers a wide variety of protection statuses to children who are bona fide refugees, or who have experienced other forms of human rights abuses such as trafficking, the U.S. has no obligation to protect children who do

²⁸⁵ T-visas are for victims of severe forms of trafficking. U-visas are for children who have suffered “substantial physical or mental abuse as a result of certain crimes in the U.S., such as rape, trafficking, incest, domestic violence, abusive sexual contact, prostitution, sexual exploitation, female circumcision, being held hostage, kidnapping and blackmail.” Bhabha and Schmidt, *Seeking Asylum Alone: U.S.*, 60.

²⁸⁶ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 64.

²⁸⁷ National Immigrant Justice Center, “Special Immigrant Juvenile Status in Illinois: A Guide for Pro Bono Attorneys,” June 2007, available at: <http://www.f2f.ca.gov/res/pdf/SpecialImmigrantJuvenile.pdf> [accessed 1 March 2010]

²⁸⁸ Dalrymple, 166.

not qualify under any of these statuses. The U.K. for example, grants a large majority of separated children the status of discretionary leave to remain, in recognition that even though separated children may not qualify for asylum, they are still vulnerable and that it would most likely be contrary to their best interests if they are returned home. The U.S., on the other hand, has no such obligation to separated children within its borders, and sends many back to the place they fled.

Care and Accommodation

Care of separated children applying for asylum in the U.S. typically rests initially with one of two agencies: Customs and Border Protection for children who enter the system at a port of entry, or Border Patrol for children who attempt to gain entry elsewhere along the border. In theory, both of these agencies should only retain custody of the children for 72 hours, and then transfer them to the Office of Refugee Resettlement. The ORR retains custody of children until they are removed from the U.S., are given into the care of relatives or other caregivers, or are granted asylum. Many advocates argue against the prevalent delays in transferring children to ORR custody, as more than 12% of children in custody were held for longer than five days.²⁸⁹ Additionally, if the ICE decides that the applicant is not a child, then ORR does not have jurisdiction.

Once in ORR custody, most separated children are placed in shelters or group homes. Children with special needs, including those who are pregnant or already parents, with acute medical needs, or serious mental health concerns may be eligible for long-term foster care. All of the placement arrangements are supposed to provide children with “classroom education, health care, recreation, vocational training, mental health services,

²⁸⁹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 80.

family reunification, access to legal services, and case management teams that use effective screening tools to assess children for mental health issues or to identify victims of labor or sex trafficking.”²⁹⁰

Further Issues for Separated Children

Interdiction

The U.S. Coast Guard actively interdicts many people at sea, rarely differentiating between economic migrants and asylum seekers. There is no clear procedure to identify separated children during interdiction at sea, and separated children who are interdicted are forced to undergo a pre-screening process to determine whether they have a credible fear of return before they are even allowed to apply for asylum (a process which they would be exempt from on land).²⁹¹ If the children *are* identified as being separated from their parents or legal guardians, the Coast Guard refers them to the Department of State or the Department of Homeland Security. However, there does not appear to be any definitive guidelines for how the Coast Guard should handle or identify separated children which creates the risk that only children who are picked up alone will be identified as separated/unaccompanied, neglecting those children who may be accompanied by relatives, friends, or traffickers and who are still in need of protection.²⁹²

In 2004, the United States Coast Guard interdicted 10,899 “would-be asylum-seekers” and economic migrants at sea, which includes children.²⁹³ UNHCR statistics compiled from the U.K. and 27 other industrialized European countries suggest that between 4% and 5% of all asylum applications received in these countries are lodged by

²⁹⁰ Kelley.

²⁹¹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 108.

²⁹² *Ibid.*, 107-8.

²⁹³ Bhabha and Schmidt, *Seeking Asylum Alone: U.S.*, 15.

separated children.²⁹⁴ If these data can be projected onto the U.S., then it is reasonable to estimate that the U.S. Coast Guard intercepted and returned approximately 500 separated children in 2004.²⁹⁵

The numbers for interceptions along land borders are even more alarming: in the fiscal year 2000, the U.S. Border Patrol apprehended and returned 94,823 Mexican minors along the southern border.²⁹⁶ Although this figure includes all children, not just those who are separated from their parents, it is a helpful indication of just how many children are involved in some sort of migration today. No doubt if the statistics included children from other Latin American countries, the numbers would be staggering.

One story about Jose, a seventeen-year-old boy from El Salvador, illustrates the disbelieving and dismissive attitude that many U.S. government officials have when dealing with people trying to cross the Mexican border:

I left El Salvador because I was frightened by gangs threatening to kill me for refusing to join them. My brother paid for us to take a bus from El Salvador to Guatemala, and then we walked and hitchhiked to Mexico...At the U.S.-Mexico border...my first impression when I ran into the officials was they thought I had robbed a bank or was a criminal. They yelled at me not to move and that made me very nervous...They didn't believe me when I said I was a minor. They said I was lying. After I was questioned, I was put into a truck and taken back to the border. No-one asked if I was afraid to return...²⁹⁷

The treatment of Jose by U.S. border officials is alarming. How many other children seek protection in the U.S. only to be sent back without ever having the opportunity to prove their well-founded fear?

²⁹⁴ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 32.

²⁹⁵ *Ibid.*, 34.

²⁹⁶ *Ibid.*, 34.

²⁹⁷ Jacqueline Bhabha, "UN 'Vide Juridique'? – Migrant children: The rights and wrongs," *Realizing the Rights of the Child* Ed. .Carole Bellamy and Jean Zermattern, (Ruffer and Rub, 2007): 207.

Expedited Removal

The U.S. engages in a practice of returning migrants, including asylum seekers, at the border if they are considered inadmissible due to any type of fraud or misrepresentation, like phony identification or other falsified documents. Carol Bohmer and Amy Shuman cite figures that reveal in 2003 “only about 3 percent of those placed in expedited removal were asylum seekers.”²⁹⁸ Yet, 3 percent is still 3 percent too many, since all people have the right to seek asylum, and those subjected to expedited removal are not given that opportunity. Separated children are only subject to expedited removal if they have previously been deported from the U.S. or if they have been accused of criminal activity.²⁹⁹ However, evidence shows that Border Patrol agents “are sometimes overly generous in classifying a child as accompanied, even when stated relationships are dubious or distant, so that the duly classified child can be subjected to expedited removal procedures.”³⁰⁰ Such action seems to show that keeping foreigners out, whether they are asylum seekers, economic migrants, or another migrant group, takes precedence over child protection. If however, the U.S. had ratified the Convention on the Rights of the Child, the “best interests” of the child principle would need to be applied, no matter the legal status of the child.

Detention

The U.S. engages in widespread detention of separated children, partly due to an INS policy that children can only be released to a legal guardian or parent, except in “unusual and extraordinary cases.”³⁰¹ According to a Human Rights Watch Children’s

²⁹⁸ Emphasis added, Bohmer and Shuman, p. 71.

²⁹⁹ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 108.

³⁰⁰ *Ibid.*, 79.

³⁰¹ Dalrymple, 158.

Project report, “Unlike adults detained by the [former] INS, unaccompanied children are not eligible for release after posting bond, and many of them remain in detention for months on end, bewildered and frightened, denied meaningful access to attorney and to their relatives.”³⁰² Several unaccompanied children filed a suit to challenge the policy of the former INS on the detention of separated children. The suit resulted in an agreement, which is called the Flores Agreement, which led to changes in nationwide detention procedures for children and included “two fundamental principles: (1) minors should be treated with ‘dignity, respect, and special concern for their particular vulnerability’ and (2) children should be held in the ‘least restrictive setting possible’ that is appropriate for their age and special needs.”³⁰³ However, the former INS, and now ICE, continues to violate the Flores Agreement by detaining children with juvenile offenders, using solitary confinement as punishment, and increasing the overall detention rates: the number of children detained by DHS increased from 4,615 in 2001, to 6,200 in 2005.³⁰⁴ However, representatives from ORR argue that placing children with juvenile offenders has decreased from 30% to 3% since it took over the responsibility of care and custody from the former INS.³⁰⁵ This can likely be attributed to ORR’s social welfare mandate and the fact that ICE does not have conflicting interests as the INS did when it was responsible for both policing and caring for separated children. Additionally, between 2003 and 2005, the number of juvenile detention centers in use decreased from 32 to 4 and ORR claims that most children are placed in foster care rather than secure detention facilities.³⁰⁶ So,

³⁰² Contained in footnote in Bhabha and Young, “Not adults in miniature,” 88.

³⁰³ Dalrymple, 158-9.

³⁰⁴ Ibid., 160.

³⁰⁵ Bhabha, Crock, Finch, and Schmidt, *Seeking Asylum Alone: A Comparative Study*, 94.

³⁰⁶ Linda A. Piwowarczyk, “Symposium on Children and Immigration: Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand,” *The Boston University Public Interest Law Journal* (Spring 2006): 274.

although more children are being detained, fewer of them are being put in facilities with other offenders. The government does not keep any of its own official statistics however, so it is difficult for researchers to find reliable and accurate figures.

ICE has also used detention of separated children as a way to lure their relatives, who may have questionable legal status, out of hiding. In one case, US authorities refused to release an eleven-year-old boy into the custody of his aunt – a permanent resident, in order to try to bait the boy’s mother who they suspected was working illegally in the U.S.³⁰⁷

Special Cases: Cuba and Haiti

Cuba

U.S. policy towards Cuba is almost always an exception to the rule. After Fidel Castro came to power, the U.S. admitted and granted refugee status to virtually all Cubans who reached American soil. However, the 1980 Mariel boatlift, during which 125,000 Cubans (including released criminals and mental health patients) arrived in Florida, changed the U.S. government’s perspective. The presence of “undesirables” in the boatlift altered the U.S. government’s perspective that all Cubans were refugees, and thus began a more aggressive policy of trying to prevent Cubans from reaching U.S. shores. Now, the U.S. has a “wet foot, dry foot” policy towards Cubans, where those intercepted at sea are returned, and those who reach land are taken in.³⁰⁸ The U.S. has also made special arrangements with the Cuban government that exempts separated

³⁰⁷ Bhabha, “Minors or aliens?” 304.

³⁰⁸ Bohmer and Shuman, 19

children from wet foot, dry foot policy, agreeing to return all unaccompanied children who do not “express a need for protection” to their adult guardians in Cuba.³⁰⁹

Haiti

As mentioned in the beginning of this chapter, citizens of U.S.-supported regimes are less likely to gain asylum (or even access to asylum) than citizens from other countries.³¹⁰ Yet, there is a long history of Haitians coming to the U.S. to seek asylum. In the 1980’s more than 20,000 Haitians were interdicted at sea by the U.S. Coast Guard.³¹¹ Although many have argued that interdiction can be tantamount to *refoulement*, in 1993 the U.S. Supreme Court upheld eight to one the “authority of the executive to *refoul* such migrants despite explicit commitments of the 1951 Refugee Convention and 1967 Protocol and the provisions of the 1980 Refugee Act.”³¹² Furthermore, according to the refugee organization Human Rights First:

While Cuban migrants are read a statement in Spanish notifying them that they may come forward and speak with a U.S. representative if they have any concerns and Chinese migrants are provided with a written questionnaire, Haitian and other migrants are not provided with any indication, written or oral, that they can express their fears about being returned. Even if a Haitian asylum seeker should voice a fear of persecution, the U.S. government does not require that translators be present on every interdicted boat so their fears may never be heard.³¹³

All too often, it is the children who suffer from U.S. officials’ refusal to believe that the Haitian children are anything but economic migrants, because they may be forced

³⁰⁹ Bhabha and Schmidt, *Seeking Asylum Alone: U.S.*, 69.

³¹⁰ Figures listed earlier in the chapter show that 510 Haitians were granted asylum out of a total of 3,326 who applied – or 15% - in 2008. As this section explains, however, these numbers do not take into account the large number of Haitians interdicted at sea by the U.S. Coast Guard who are never given the chance to apply for asylum.

³¹¹ “Asylum – U.S. Asylum and Refugee Practice: Cuba and Haiti,” *Encyclopedia of the New American Nation*, available at: <http://www.americanforeignrelations.com/A-D/Asylum-U-s-asylum-and-refugeepractice-cuba-and-haiti.html> [accessed 16 March 2010]

³¹² *Ibid.*

³¹³ Human Rights First, *Haitian Refugees and the U.S. Asylum System – Background*, available at: http://www.humanrightsfirst.org/asylum/asylum_04.aspx [accessed 16 March 2010]

to return to a life of fear and/or extreme poverty. An exceptionally violent military coup in 1991, followed by an equally violent period of military rule through 1994, led to a mass exodus of Haitians to the U.S. During this time, the U.S. government forcibly returned many separated children to Haiti “without any consideration of the fate awaiting them.”³¹⁴ A report that investigated U.S. policy towards Haitian separated children found that U.S. actions had extremely harsh consequences for the children. In one case, the U.S. repatriated one twelve year old girl, asserting her father was willing to support her back in Haiti. The report found that the girl’s father had actually died years ago, a fact which the girl had consistently stated to officials. The report also found several children who were returned to Port-au-Prince, who upon arrival had no reception and were left homeless.³¹⁵ It is possible that these children did not qualify for asylum in the U.S. under the refugee definition contained in the 1951 Convention, yet their vulnerability is apparent. Ratification of the CRC would no doubt have a significant impact on U.S. policy towards separated Haitian children, as the U.S. government would (theoretically) have to make the best interests of the child a primary consideration. These examples indicate that the best interests of the child would be violated by return in many instances.

Conclusion

Asylum policy in the U.S. seems to be ever-changing in response to immigration, economic, political, and national security concerns, which is especially evident in U.S. policy towards Cuba. As Bohmer and Shuman so aptly write, “The fear of being inundated by immigrants is mostly about being inundated by the ‘wrong’ immigrants.”³¹⁶ As a result, U.S. asylum policy is more concerned with “obstruct[ing] unworthy

³¹⁴ Bhabha “Minors or aliens?” 294.

³¹⁵ *Ibid.*, 294.

³¹⁶ Bohmer and Shuman, 260

applicants rather than...identify[ing] deserving ones.”³¹⁷ As asylum policy changes, usually by becoming stricter about who is allowed access to the asylum process, as well as in who is successful in their claims, separated children are left in a vulnerable state. The U.S. does grant asylum to a higher percentage of applicants than the U.K, which could be partially due to the history of the U.S. as a country built by people seeking freedom. However, the lack of child-specific statistics makes it impossible to determine whether this high percentage of successful asylum applications is true of separated child applicants. As Bhabha persistently notes, there is a “culture of disbelief” in regard to separated children seeking asylum, and asylum officials are often more critical of the children’s credibility than they are of adult applicants. Additionally, the U.S. practice of interdiction prevents thousands from ever having the chance to apply for a safe haven from persecution. Moreover, many asylum applicants, including separated children, are detained, sometimes in facilities that house criminal offenders.

Recently, the U.S. has made strides in providing protection to separated children who are able to make it into the country. The Children’s Guidelines inform how border and immigration officials should handle cases involving separated children. These guidelines are clearly informed by the Convention on the Rights of the Child, although they are applicable to procedural, rather than substantive, issues. Thus, the Guidelines have helped to make the asylum process more child-friendly, but do not provide as much guidance on being sensitive to the vulnerability of separated children when weighing the merits of their asylum claims. The guidelines are an acknowledgement that children are not just “adults in miniature”³¹⁸ and that different methods, techniques, and care are all

³¹⁷ Ibid., 264.

³¹⁸ Bhabha and Young, “Not adults in miniature,” 84.

needed for child applicants. Gaps in protection that existed despite the guidelines have been at least partially remedied by the Trafficking in Persons Reauthorization Act. Under the TVPRA, the Office of Refugee Resettlement is now obligated to do its utmost to provide free legal counsel to separated children during the asylum process. Furthermore, the TVPRA improved the asylum process itself, altering the procedure for children in the defensive process to be less adversarial and more child-friendly. The U.S. has also showed some degree of acceptance of international norms regarding children, by ratifying both the Optional Protocol to the CRC On the Sale of Children, Child Prostitution, and Child Pornography;³¹⁹ and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict³²⁰ in December 2002. This chapter indicates that the U.S. is in fact a member of both the refugee and children's rights regime, albeit to varying extents.

Despite progress in developing new laws and policies, asylum laws are often more liberal than actual practice. Without official monitoring mechanisms and holistic statistics, it is difficult to determine how and if the policies are being implemented, and to what extent they provide sufficient protection to separated children. Christopher Nugent argues that despite increased awareness and protection efforts by the U.S. government, “the children’s actual voices, experiences, and perspectives have rarely been directly consulted to explicitly inform and shape legislative proposals or larger policy decisions by the United States Congress or agencies charged with responsibilities over them.”³²¹ Were the U.S. to ratify the CRC, a higher priority would need to be placed on children’s participation to fulfill its obligations under Article 12. Ratification of the CRC, if done

³¹⁹ Ratification with one reservation.

³²⁰ Ratification with a declaration.

³²¹ Christopher Nugent, “Symposium on Children and Immigration,” 219-20.

with the aim of truly implementing its provisions, would most likely lead to a shift from “an inherently ‘alienating’ immigration paradigm to a child welfare and child-centered paradigm that gives primacy to the child’s perspectives, needs and involvement.”³²² A comprehensive comparison of U.S. and U.K. policies towards separated children, and the role of the CRC, follows in the next chapter.

³²² Ibid., 220.

CHAPTER 4:

The United Kingdom or the United States: Which is the Safer Haven?

“Efforts on behalf of refugee children fall short if they are perceived only as individuals to be fed, immunized or sheltered, rather than treated as participating members of their community.”³²³

Separated children seeking asylum are a particularly vulnerable group whose numbers have continued to increase over the past decade. This relatively new phenomena of separated children on the move has revealed gaps in asylum law, and has left the international community struggling to identify and implement necessary changes. Separated children seeking asylum qualify for protection under two key international regimes: the refugee regime and the children’s rights regime. Both regimes have implicit and explicit norms, principles and laws with which member states are expected to comply. Although there are several different perspectives on whether international treaties, and the regimes that stem from them, are effective, empirical evidence outlined

³²³ UN High Commissioner for Refugees, *UNHCR Policy on Refugee Children*, 6 August 1993, available at: <http://www.unhcr.org/refworld/docid/3f9e6a534.html> [accessed 9 April 2010]

in Chapter 1 indicates that treaty ratification in democratic societies can increase respect for human rights. Furthermore, when a treaty and its regime gain international legitimacy, member states and civil society can then exert pressure on both ratifying and non-ratifying states to comply with the principles therein. As a result, the refugee regime and the children's rights regime have the potential to be highly effective despite the relative lack of strict enforcing mechanisms, and may even be able to influence non-member states, including the United States which has not ratified the United Nations Convention on the Rights of the Child (CRC).

The refugee regime is centered on the 1951 Convention Relating to the Status of Refugees, its 1967 Protocol, and the United Nations High Commissioner for Refugees (UNHCR). With the passing of time, however, states have become ever more fundamentalist in their interpretations of the refugee definition contained in the 1951 Convention. As described in Chapters 2 and 3, anti-immigrant sentiment, which tends not to discriminate between economic migrants, asylum seekers, or refugees, as well as widespread xenophobia has led to efforts in both the U.K. and the U.S. to keep asylum seekers from crossing their borders, and to keep the number granted asylum down. Separated children are at risk of being denied protection by falling through the gaps in the law, being discriminated against due to their non-citizen status, or by simply not having the same ability as adults to advocate for themselves. The UNHCR has been diligent in recognizing the unique needs of separated children seeking asylum, and has produced many guidelines for how states should treat them throughout the duration of the asylum process. UNHCR efforts have increased awareness about this vulnerable group, and have led to the creation of the Separated Children in Europe Programme, which continuously

monitors the trends in demographics of separated children, as well as treatment provided to them by host governments.

Although there is a growing recognition of child-specific forms of persecution, which can include domestic violence, forced marriage, female genital mutilation, forced labor, trafficking, forced conscription, among others, most states are unwilling to broaden their interpretations of the definition of a refugee to incorporate these forms of persecution. It is at this point that overlap with the children's rights regime becomes crucial, so that children who are deemed ineligible for asylum, under strict interpretation, are still eligible for protection under other international laws. The key legislation of the children's rights regime, the CRC, which is monitored by the Committee on the Rights of the Child, stipulates that all children are entitled to certain rights. For separated children in particular, the CRC acts as a safeguard to ensure that their rights are not compromised as a result of their immigration status. Additionally, the CRC helps to ensure that separated children are not deprived of their liberty; are active participants in judicial proceedings; have access to education, health care, and other social services; have the same rights as citizen children; and that their best interests are a primary consideration in "all actions concerning children."³²⁴ The U.K., as a state party to the CRC, is thus obligated to implement this comprehensive set of rights for all children within its territory, whether the children are citizens or non-citizens. These rights must be applied before, during, and after the asylum process. Because the U.S., on the other hand, has not ratified the CRC, it is not bound by the same international laws to ensure the best interests of separated children are a primary consideration. Thus, the U.S. considers the asylum claims of separated children using the criteria and principles contained in the

³²⁴ *Convention on the Rights of the Child*, article 3.

framework of the refugee regime, but does not have to abide by the provisions of the CRC when doing so.

Dual Protection in the U.K.?

The U.K., as a member state of both the 1951 Refugee Convention and the CRC, in theory should have in place a dual protection system for separated children seeking asylum. The 1994 UNHCR Guidelines for refugee children, coupled with feedback from the Committee on the Rights of the Child, have helped to both draw attention to separated children seeking asylum and to shape U.K. asylum policy as it relates to this group. However, policy can often differ from the reality, so while theoretically one might assume that the dual protection mechanism does exist in the U.K., the evidence highlights that this is not always the case.

Perhaps the most important aspect of U.K. asylum policy for separated children is the immediate transfer of responsibility to social services, rather than any period with immigration or law enforcement agencies. Social services work to find adequate accommodation for separated children, and social workers help to ensure that the children have a voice in relevant decisions. Separated children are entitled to care from social services until the age of 18, and in some cases, until age 24. In addition to social workers, separated children also have the Refugee Council Children's Panel at their disposal, which was created in response to the 1994 UNHCR guidelines on refugee children. U.K. commitment to children's rights overall, and the CRC, no doubt was also a catalyst for the creation of the Children's Panel. The Panel advocates for separated children, often acting as a liaison between social services, the U.K. Border Agency (UKBA), lawyers, and other parties involved in the child's asylum case, or life in the U.K. in general.

Although no one on the Panel has the legal capacity to act as a guardian for separated children, the Panel's advisers are an important resource to protect the best interests of separated children. Additionally, the Children's Panel acts as an effective monitoring tool, making sure to track the number of children who utilize their services, and the number of children whose age was wrongfully disputed. The statistics and policy recommendations from the Children's Panel are frequently cited and heeded in changes to U.K. asylum policy.

In a significant improvement to policy relating to separated children, the U.K. recently withdrew its reservation to Article 22 pertaining to non-citizen children. Chapter 2 highlights that prior to the withdrawal of the reservation, the U.K. reserved the right to put immigration/asylum laws above its obligations under the CRC. This change resulted largely from pressure by the Committee on the Rights of the Child, as well as by the international community. However, further research is needed to investigate how and if this withdrawal has been implemented in U.K. policy and legislation. In another recent improvement, in 2009 a law was passed which mandated that the UKBA abide by statutory guidance to "safeguard and promote the welfare of children,"³²⁵ bringing the UKBA in line with all other U.K. agencies that work with children. This policy initiative, which clearly seeks to uphold the best interests of the child principle, is a clear acknowledgement that immigration and national security concerns cannot outweigh the welfare of children, a tremendous step in today's post-9/11 world.

³²⁵ Section 55 of the Borders, Citizenship, and Immigration Act, *Statutory guidance: Every child matters – Change for children*, Nov. 2009, available at: <http://ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/bci-act1/> [accessed 26 Feb. 2010]

The U.K. asylum process itself strives to be child-friendly. Separated children are given more time than adult applicants to submit their claim, have access to free legal representation, and meet with their case owner in private rooms (rather than in the main room where adults present their claims to officers behind a glass panel). Additionally, both border officials and asylum officers are trained to identify and be sensitive to separated children. This child-friendly procedure is much more conducive to child participation, a right guaranteed by Article 12 of the CRC. However, these policies are also influenced in large part by the U.K.'s membership in the European Union, and its commitment to the European Convention on Human Rights, the Council of Europe Convention Against Trafficking in Human Beings, and other regional human rights agreements. Therefore, although this thesis only examined two regimes, separated children in the U.K. are in fact protected by multiple regimes. The findings from this thesis indicate that the more regimes that are in place, the more comprehensive the protection. However, not all regimes have the same strength or capability to be effective, which is returned to below in the section "The U.K., U.S., and Protection Regimes."

Despite efforts to make the process child-friendly, children are still at a disadvantage compared to adult asylum seekers due to lack of knowledge about the asylum process and what is expected of them. Children over the age of 12 are now required to undergo substantive interviews which may allow for more input from children, but may also increase feelings of anxiety and trauma. Legal representation can often play a critical role in easing the asylum process for children, as well as bolstering their claims, but some children do not have the resources or skills to find lawyers well-trained in children's asylum law. Lack of access to adequate legal representation has been

a contributing factor to the high percentage of asylum claims by separated children being denied on non-compliance grounds.

One conflict between U.K. obligations under the refugee regime and the children's rights regime is it being party to the Dublin II Regulation. Since Dublin II mandates that the country responsible for processing a separated child's asylum claim is the country that the child first applied in, other host governments have the right to send the child back to the first country. The U.K. regularly sends separated children back to other European Union countries, regardless of whether that country has a relatively poor human rights record. Although some member states of Dublin II have suspended transfers of separated children to Greece, for example, the U.K. has not followed suit.³²⁶ Dublin transfers can violate the best interests of the child principle in Article 3 of the CRC, as well as potentially violate state obligation to ensure "to the maximum extent possible the survival and development of the child" under Article 6. Furthermore, Dublin transfers to countries with a lower respect for human rights can go against Article 22, which states that a child who is seeking refugee status is entitled to appropriate protection and humanitarian assistance. Although "appropriate" can be hard to determine, one can assume that a country with minimum respect for human rights and a less than satisfactory history with asylum seekers is not likely to meet the standards of "appropriate" protection.

When it comes to the outcome of asylum applications, one again sees a mix of positive and negative practice. In terms of numbers, U.K. grants asylum to a very small

³²⁶ The European Council on Refugees and Exiles cites problems for asylum seekers in Greece including "unacceptable conditions for asylum claimants in Greece, the obstacles to accessing fair determination procedure and the risk of other serious human rights violations." Renata Goldirova, "Greece under Fire over Refugee Treatment" *EUObserver*, 3 April 2008, available at: <http://euobserver.com/9/25910> [accessed 2 Feb. 2010]

percentage of applicants overall, and separated children have even weaker odds for success than adult applicants. However, the U.K. grants a large portion of separated children asylum seekers discretionary leave to remain. Discretionary leave is beneficial in the sense that it provides separated children with permission to live in the U.K. temporarily. However, the temporary nature of the status can also lead to anxiety for children who are fearful of being forced to return home – especially if what they considered as their “home” no longer exists in their country of origin.

Given the U.K.’s obligations under the CRC, age is a critical factor in determining to which benefits separated children are entitled. The care provided to these children by social services has the potential to be quite expensive, and the government is often unwilling to accept the stated age of asylum seekers claiming to be children. An asylum seeker over the age of 18 is not entitled to the same level of care as children, and can be more easily detained and summarily removed from the territory. As a result, nearly half of the separated children who apply for asylum in the U.K. each year have their age disputed. This process can be traumatic, invasive, and a waste of government funds.

The U.K. does for the most part abide by international norms and principles, by having a policy against detaining children under the age of 18. However, as mentioned above, widespread age disputes result in the detention of children who the U.K. government believes to be adults. In these instances, the government feels it does not have an obligation to ensure that these asylum seekers best interests are a primary consideration, since that standard does not apply to adults. The “culture of disbelief”³²⁷

³²⁷ Jacqueline Bhabha, Mary E. Crock, Nadine Finch, and Susan Schmidt, *Seeking Asylum Alone – A Comparative Study: Unaccompanied and Separated Children in Australia, the UK, and the US* (Themis Press, 2007): 13.

surrounding separated children undoubtedly puts their welfare in jeopardy, and is one of the most problematic aspects of the U.K. asylum system.

Protection in the U.S.

According to the hypothesis of this thesis, separated children who apply for asylum in the U.S. are not likely to be as well protected as those who apply in the U.K. due to the U.S. not having ratified the CRC. U.S. asylum policy for separated children, and all asylum seekers in general, is based on the 1967 Protocol to the 1951 Convention. For separated children specifically, the U.S. issued its own set of guidelines in 1998, which established a system to make the asylum process friendly and sensitive to them. An essential part of this policy is the guidance provided on how what qualifies as persecution may differ for a child from an adult. However, just as in the U.K., the persecution still must be based on one of the five components in the refugee definition: race, religion, nationality, membership of a particular social group, or political opinion. Moreover, the Homeland Security Act of 2002 created procedural guidelines that stipulated that the interests of the children must be considered in the decision-making process. The wording of this law indicates that U.S. law does not prioritize children to the same extent that international law does, specifically the CRC which requires that the children's *best* interests be a *primary* consideration. Furthermore, U.S. immigration and asylum law is oftentimes ambiguous and inconsistent in its references to children, minors, and juveniles. As a result, different agencies may have different ideas about whom the law pertains, which makes accurate data nearly impossible to come by.

An immense problem in U.S. asylum practice is the lack of training to identify separated children who may be in the company of someone else (in the best case, a

sibling or a friend, in the worst case a trafficker). Conversely, in the U.K., although many children still manage to slip by officials undetected, officials have undergone comprehensive new training programs which have been implemented to fulfill U.K. obligations under the New Asylum Model, the CRC, and the Council of Europe Convention against Trafficking in Human Beings (as noted in Chapter 2). The research of Bhabha et al indicates that it is primarily only children who are completely alone who come to the attention of the U.S. authorities – which neglects a large and potentially extremely vulnerable portion of separated children. This is partly a result of no child-specific guidelines in the mandates of some of the agencies that are likely to come into contact with these children, such as the U.S. Coast Guard or the Office of Border Patrol. Here, the interests of children are not even mentioned. As a result, separated children can easily escape detection or be denied the opportunity to apply for asylum. The U.S. Coast Guard policy of interdiction, as well as U.S. Border Patrol practice of returning migrants at the Mexican border, can be both neglectful of and harmful to separated children (especially those from Cuba and Haiti, with whom the U.S. has special relationships and policies). Thus, ratification of the CRC, which requires that the best interests be a primary consideration, would likely have a significant impact on the mandates of these agencies.

Within the last decade, there have been noteworthy improvements in U.S. asylum policy. First and foremost, with the restructuring of government agencies, which resulted in the creation of the Department of Homeland Security, separated children are now cared for by the Office of Refugee Resettlement. The ORR has a social service mandate, and as such is better suited to care for this vulnerable group (as compared to the former INS).

ORR custody has also led to a decrease in the number of separated children who are detained with criminal offenders. However, the widespread use of detention of separated children is still a pertinent issue for U.S. asylum policy. This practice would no doubt need to change if the U.S. ratified the CRC, as detention of separated children who have not committed a crime is in violation of several articles of the Convention.

The William Wilberforce Trafficking in Victims Protection Reauthorization Act led to another critical and positive change, which altered the process for children who apply for asylum in the defensive process; it is now the same as children who apply in the affirmative process. Now, separated children meet with an asylum officer in a more relaxed setting, rather than meeting a judge in a courtroom, which can feel hostile and frightening. Moreover, the TVPRA instituted changes to increase separated children's access to pro bono legal representation during removal proceedings. The TVPRA seems to be a response to growing international norms that separated children must be treated as children first, and migrants or asylum seekers second. So, although the U.S. has not ratified the CRC, its references to the Convention in policy guidelines, as well as its changes in legislation to protect separated children (like the TVPRA), indicate that the U.S. is at minimum influenced by the children's rights regime.

Overall, the U.S. grants asylum to a greater percentage of applicants than the U.K. does, as noted in Chapter 3. While this is certainly commendable, there is a notable lack of statistics on outcomes for separated children. Bhabha et al found considerable evidence from their research in the U.K. that a widespread "culture of disbelief" led to separated children having weaker odds of being granted asylum than adult applicants. Additionally, research indicates a culture of disbelief also exists in the U.S., which

Frelick terms the “culture of no.”³²⁸ However, given that the U.S. grants asylum to a much higher percentage of applicants overall, it seems likely that more separated children are granted asylum in the U.S. than in the U.K. Further research is needed, though, to determine whether this is truly the case.

The U.S. has created several innovative statuses to extend humanitarian protection to certain vulnerable groups, especially victims of human trafficking. The creation of Special Immigrant Juvenile Status in particular seems to reflect a growing awareness on the part of the U.S. government of the special needs of migrant children – be they economic migrants or asylum seekers. SIJS incorporates “best interests” considerations into U.S. immigration law, and requires collaboration between social services and federal immigration authorities.³²⁹ The willingness on the part of the U.S. government to broaden the criteria for who is eligible for permission to reside in the U.S. based on humanitarian ground is a positive development, and seems to outstrip the protection options available for child asylum seekers in the U.K. However, for the unfortunate children who are unable to prove that they qualify for any of these statuses, the U.S. is not under any obligation to ensure their best interests. Again, the CRC could be a critical tool in ensuring that these children are protected.

The U.K. and the U.S: A Comparison

From the research conducted for this thesis, it seems clear that separated children in the U.K. benefit from the dual protection offered by both the refugee regime and the children’s rights regime. However, despite the U.S. not yet ratifying the CRC, research indicates that the U.S. has elements of both regimes in its policies as well. So which is the

³²⁸ Bill Frelick, “U.S. Asylum and Refugee Law: A ‘culture of no,’” *The Future of Human Rights: U.S. Policy for a New Era*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2008): 215.

³²⁹ Bhabha, *Seeking Asylum Alone: A Comparative Study*, p. 178

safer haven? I conclude that the realities for separated children in each country make the answer to this question fairly complex. First, neither country has an ideal system in place to process and care for separated children seeking asylum. Second, this research indicates that separated children in the U.S. are more likely to have a favorable outcome of their asylum claims, but separated children in the U.K. benefit from an application process that better understands the needs of the child. Lastly, this thesis shows that there are more regimes than the two studied influencing U.K. policy toward separated children.

The U.K. and the U.S. are both still in the relatively beginning stages of creating an asylum process that is conducive to the needs of separated children. As a result, there are still gaps in law and practice in both countries that result in a lack of protection for these child asylum seekers. As noted in Chapter 2, the U.K. grants asylum to only a very small percentage of separated children, and children who appear older than their stated age are subject to being treated as an adult (including detention and removal proceedings). For its part, the U.S. practices interdiction at sea and along the Mexican border, making it impossible for some asylum seekers to even file a claim. Additionally, the U.S. engages in the detention of children, sometimes alongside criminal offenders. Even in the instances when the law is fairly liberal and comprehensive in its protection of separated children, the reality in both countries can often be much more negative and subject to bias. Many examples of the hardships separated children can face, including a culture of disbelief, low success rate, and lack of adequate legal representation, are highlighted in Chapters 2 and 3. Thus, the advantages of the asylum systems in both countries discussed in the next section should be considered as relative.

Both the U.K. and the U.S. have certain advantages and disadvantages for separated children who seek asylum. In the U.K., the asylum process and the care provided during the process, is often more child-friendly and comprehensive. Separated children seem to be more likely to be identified in the U.K. due to increased efforts to provide border and immigration officials with adequate training. Additionally, children have allocated caseworkers who provide consistency throughout the asylum process, children have more time to complete their asylum application than adult applicants, are entitled to social services until at least age 18 (and in some cases up to age 24), have access to the Refugee Council Children's Panel, and may be granted discretionary leave to remain if adequate care provisions do not exist in the country of origin. Moreover, the U.K.'s official policy against detaining children is much more conducive to guaranteeing children's rights than U.S. practice of routinely detaining separated children, which the U.S. would need to re-evaluate were it to ratify the CRC. Also, the U.S. requires asylum officers to consider merely the interests of the child, rather than the "best interests" mandated by the CRC. Yet, U.S. treatment of separated children seems to be improving. The restructuring of U.S. government agencies, which granted the Office of Refugee Resettlement the responsibility for separated children, was a drastic improvement and helped to ensure that separated children receive sufficient social services. The U.S. has also issued guidance on how persecution may differ for a child as compared to an adult. This willingness to expand upon the definition of persecution may be a contributing factor to the U.S.'s higher overall approval rate of asylum applications. Plus, the several other humanitarian forms of protection, including the Special Immigrant Juvenile Status, and the T- and U-visas, enable even more separated children to remain in the U.S.

Conversely, the U.K. grants asylum to very low percentage of asylum seekers, and to even fewer separated children. The U.K. does use discretionary leave to remain as a way of providing temporary protection, but this status can also be problematic due to its temporary nature and the tendency of asylum officers to use the status as a default rather than give serious consideration to separated children's asylum claims (as discussed in Chapter 2). Thus, the original hypothesis that the U.K. provides better protection to separated children may be partially correct in that children may have a more sensitive and less traumatic experience than children in the U.S. However, the U.S. grants asylum to a significantly higher percentage of applicants, providing a substantial level of protection that cannot be ignored.

This thesis also illustrates that the refugee regime and the children's rights regime are not the only regimes that influence U.K. policy toward separated children. U.K. membership in the European Union has led to the creation and perpetuation of a European human rights regime, primarily based on the European Convention on Human Rights (ECHR). As explained in Chapter 2, the status of Humanitarian Protection was created primarily as a tool for the U.K. to be compliant with Article 3 of the ECHR.³³⁰ Discretionary leave is another status the U.K. uses to fulfill its Article 3 obligations, and this preliminary research suggests that the ECHR is perhaps more influential than the refugee and children's rights regimes. This thesis notes in Chapter 2 that U.K. policy relating to separated children is also shaped by other regional conventions, including the Council of Europe Convention Against Trafficking in Human Beings and the Dublin II Regulation. The regional dimension to this regime distinguishes it from the two regimes

³³⁰ "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *European Convention on Human Rights*, article 3.

studied in this thesis, which are international in their reach, and is examined in further detail below.

The U.K, U.S., and Protection Regimes

The case studies of the U.K. and the U.S. in the wider context of regime theory are interesting because of the differences between the two. The U.K., on the one hand, is party to numerous international and regional human rights treaties and conventions. The U.K. seems to embody the functionalist approach described in Chapter 1, which emphasizes that the efficacy of regimes is dependent upon how well they serve to coordinate behavior among states. The European Union is still relatively new (having been established in 1993) and as such, various human rights conventions serve to coordinate behavior and integrate the region by member states committing to shared norms and values. This may help to explain why the ECHR and other regional regimes may be more effective than other, more international regimes (like the refugee and children's rights regimes) in the U.K. The U.K. has more incentive as an EU member to ratify treaties that other EU states have ratified, as well as abide by them so as to uphold the integrity of the EU. Furthermore, the EU has its own enforcement mechanism, the European Court of Human Rights, which might lead to the U.K. and other member states having more faith that all member states will abide by the laws and norms of the regime.

The U.S., on the other hand, appears to be more inclined to the constructivist approach, at least in regard to the CRC, which stresses the importance of elites in the perpetuation of regimes. President Clinton, for example, used his status as an elite to make the U.S. a signatory to the CRC (although he was not able to achieve ratification). Constructivists also emphasize the role of ideas in increasing the efficacy of regimes. As

this research shows, the U.S. is an active member in the children's rights regime, despite not having ratified the CRC. However, this research highlights several areas (detention, interdiction, ensuring the best interests even if asylum is denied, etc.) in which policy relating to separated children would need to change if the U.S. ratified the CRC. Yet, there is also evidence that indicates that in the U.S., the ideas, norms, and principles, of the CRC are becoming ever more ingrained and part of standard practice. Thus, ratification of the CRC may not be necessary to achieve the same standard of protection for separated children.

The case studies of the U.K. and the U.S. and the level of protection each provides to separated children suggest that it is not just the level of democracy that determines whether treaty ratification leads to better outcomes, but also the country's approach to them. The U.K. is highly democratic and has a functionalist approach to regimes and human rights treaties. As a result, treaty ratification is apt to lead to increased protection of human rights because it is in the U.K.'s best interest to act in a way that increases the efficacy the regimes, as well as overall effectiveness of the EU. The U.S., on the other hand, has a constructivist approach that focuses on the spread of ideas, which may mean that treaty ratification does not make a difference in and of itself.

By studying the U.K. and the U.S., this thesis also highlights three important facts about regimes: first, regimes are always in flux; second, regime membership is not always definitive or absolute; and third, not all regimes have the same influential capabilities – some are stronger than others. An example of the changing nature of regimes can be found in Chapter 2, which examines certain policy changes in the U.K. that may in fact be a step backwards for U.K. policy for separated children. For instance,

in the past, the UKBA had claimed that since interviews can be traumatic for children, they should only be conducted if it is “absolutely unavoidable.”³³¹ Yet, the New Asylum Model introduced in 2007 requires that all children over the age of 12 undergo substantive interviews. Conversely, the U.S. has made improvements in its policy, notably through transfer of responsibility of care of separated children to ORR. This change, combined with the 1998 Guidelines for Children’s Asylum Claims, the TVPRA, and other initiatives described in Chapter 3 have all helped to improve the protection regimes in place for separated children in the U.S. The evolution of regimes is interesting because this thesis points out that regimes can change both for the better, and for the worse. This is particularly true for the refugee regime, which was fairly liberal in its early stages, but has become much more rigid over time. Thus, simply because a regime introduces higher standards of protection, there is no guarantee that a state will abide by those standards indefinitely.

This thesis also illustrates that there is a broad spectrum when it comes to regime membership. To put it simply, a state does not become a member of a regime overnight. The original hypothesis predicted that the U.S. only has one protection regime for separated children: the refugee regime. Yet, research indicates that despite not having ratified the CRC, the U.S. is still a member of the children’s rights regime to some extent. The U.K., though, which according to the original hypothesis is a member of both the refugee and children’s rights regimes, is at times shown to be deficient in the protection offered to separated children. Therefore, treaty ratification (or lack thereof) does not automatically include (or preclude) a state from membership in a protection regime.

³³¹ Simon Russell, “Unaccompanied Refugee Children in the United Kingdom,” *International Journal of Refugee Law*, 11.1 (1999): 137.

The changing nature of regimes, coupled with the broad spectrum of regime membership, leads to some regimes being stronger than others. According to the original hypothesis, the U.K. should provide more protection to separated children than the U.S. since its two regimes outweigh the one regime in the U.S. However, this thesis shows that in some ways the refugee and children's rights regime are relatively weak in the U.K. (i.e. the low approval rate for children's asylum applications), whereas the refugee regime is relatively strong in the U.S. (i.e. the significantly higher approval rate for asylum applications). Do two weak regimes provide more protection than one strong regime? Again, the answer is complex. Both the U.K. and the U.S. excel in different areas, and fall short in others. The presence of additional regimes, like the European human rights regime in the U.K., can also make it difficult to determine the strength of individual regimes, as well as which regime is the primary driving force behind the behavior. More research is needed to pinpoint what factors contribute to making a regime strong or weak, and what ultimately determines a regime's ability to be effective.

Further Research

This thesis is the product of one year of research, and as such, much more research can and should be done on this topic. Specifically, further research is needed in the U.S. to gather more statistics on separated children. Although Bhabha et al made an attempt, unsuccessfully, to find these figures, scholars must be persistent in doing their best to spread awareness of the reality of separated children in the U.S. Without accurate statistics and empirical data, all that is left is the theoretical framework, which is often very different and not reflective of the experiences of separated children.

A key finding of this thesis is that the U.K. actually has multiple protection regimes that can influence its policies toward separated children. This thesis only focuses on two of these regimes: the children's rights regime and the refugee regime. It would be worthwhile to try to determine to what extent other regimes play a role in U.K. policy, as well as if some regimes are more significant than others. Such research could help identify specific aspects of regimes that make them more effective, and could help to shape other developing regimes and increase our overall knowledge of regime theory.

Another interesting issue that arises from this research is why the U.S. grants asylum to a larger percentage of applicants than the U.K. When asked in combination with the question above, one wonders why the U.K., which is a member of multiple protection regimes, grants protection to fewer people than the U.S. It is possible that the answer lies in the U.S.'s history as being founded by those fleeing persecution, or perhaps from its broad admission policies during the Cold War that never completely disappeared.

Lastly, further research is needed to uncover ways to address the reasons that cause children to flee on their own. To only focus on the receiving countries is to neglect the root causes of the problem. With a growing recognition of child-specific persecution, scholars, NGOs, and governments must work together to find durable solutions to protect children around the world. If the children are our future, we cannot afford to let them down.

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