**REFUGEE CHILDREN'S RIGHTS: THE IMPACT OF THE UNITED NATIONS
CONVENTION ON THE RIGHTS OF THE CHILD ON CANADIAN AND
AMERICAN ASYLUM POLICY**

By: Jennifer Wrye

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ABSTRACT

The thesis compares the impact of ratification of the United Nations Convention on the Rights of the Child (CRC) on child refugee policy in Canada, a signatory country to the Convention, and the United States, a non-signatory country to the Convention. I examine the impact the CRC has had on both domestic legislation and judicial interpretations of children's rights. In examining both countries' laws, it is evident that endorsement of this human rights instrument has improved domestic refugee protections legislatively. However, judicial interpretations of child asylum seekers' rights in both countries vary widely. Notably, in Canadian court cases children's rights are often explicitly stated, even if at times disregarded. In American court cases, children's rights are generally omitted from analysis altogether. Thus, in both countries, problematic and relative conceptions of childhood and children's rights are reflected in judicial decisions. Still, it is argued that ratification does not necessarily mean minor asylum seekers will be protected; however, it is an essential step toward the realization of refugee children's rights.

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INTRODUCTION

Millions of children around the world experience assaults on their bodies and minds each day. Children are recruited and killed in wars, physically and sexually abused by family members or other adults, displaced by territorial conflict or natural disasters, tortured, imprisoned, subjected to practices that put their health at risk, abandoned or orphaned, and denied basic subsistence entitlements to the point of causing their death. These forms of mistreatment and persecution are an enormous problem today even as most of the world recognizes its moral obligation to children's development, safety and protection. Indeed, the United Nations Convention for the Rights of the Child (CRC) has near universal endorsement.¹ Still, children suffer terribly.

Children are more vulnerable to the destructive effects of persecution because they experience such suffering as children. Like most adults who flee persecutory experiences, most children never make it to another country to claim asylum. Far likelier, children will be displaced to refugee camps, where it is estimated approximately 6 million children reside at any given time (Sadoway, 1997:107). The growing instability of many regions of the world continues to produce inordinate numbers of refugees, including child refugees, and increasing numbers of children make their way to North America to claim refuge from persecution. Moreover, a mounting number of these children are arriving unaccompanied by parents or other adults who by law or custom are

responsible for their welfare. Thus, Canadian and American immigration authorities have been forced to respond to these particular children's needs and entitlements in a way previously unimagined under immigration and refugee law. Above all, American and Canadian authorities are beginning to realize that children are deserving of special care and attention in the asylum process and while their claims are pending. However, the protection of children's rights varies across countries and is related to the construction of national immigration and asylum law, and national law governing childhood. Still, the CRC provides suggestions as to which rights all children within a particular jurisdiction are deserving.

Research Question

This thesis is a comparative exploration of the ways in which Canada and the United States have responded to the United Nations Convention on the Rights of the Child (CRC) with respect to child refugee claimants, especially those unaccompanied by parents or guardians when the asylum claim is made. Because Canada is a signatory to the Convention, and the United States is not, this thesis compares the two countries' refugee legislation, examining whether endorsement of this agreement makes a difference to the way the claims are handled.² Generally, ratification of an international human rights instrument is perceived as an important and beneficial step toward the fulfillment of human rights protection. Heyns and Viljoen (2001:486) argue that although the influence of the treaty system and international human rights protections are widespread, even among countries which have not yet ratified a particular agreement, international human rights mechanisms have greatest impact where treaty norms have willingly been

made part of domestic law. Kent (1997) agrees that children's rights are best fulfilled once international human rights standards are integrated into domestic law. He further observes that: "national governments, not international organizations, are the primary agents for the realization of human rights. The international human rights instruments are concerned primarily with the responsibilities of states to their own people, not to people elsewhere" (439). Kent's qualification of states' responsibilities to the realization of human rights protections raises key questions about states' obligations to unaccompanied minor asylum seekers who have no legal status in the country of possible asylum. Their relationship to the country of asylum is tenuous because they are requesting protection, but have no standing or lawful claim to national protections beyond what the state voluntarily confers until asylum is granted. This thesis will therefore contrast states' responses, specifically looking at two issues: first, whether ratification of the CRC provides enhanced protection of children's rights in national refugee legislation; and second, whether ratification increases the protection of refugee children's rights as conceptualized by the national judiciary.

Methodological Considerations and Chapter Organization

This thesis attempts to evaluate Canadian and American legal protections for unaccompanied minor asylum seekers by comparing both legislative and judicial expressions of children's rights. As with all legal mechanisms, both countries' refugee laws are complex and still evolving. Thus, while this thesis attempts to explain the major existent legal instruments affecting child refugee claimants, a great deal of material has

been excluded. The important methodological matters include not only what was considered in this thesis, but also the limitations and boundaries of this research.

In terms of the legislative provisions affecting child refugees, I largely limited my analysis to issues concerning the asylum determination process, mainly because this thesis examines how an international human rights treaty is manifest in the national law of two countries, one of which has not yet ratified the agreement. I have included some important discussion of how children are treated while their claims are pending, but focused on children who are detained by immigration authorities. Compared with the United States, separated minor asylum seekers are less likely to be detained by Canadian immigration authorities. Certainly the plight of these children in both countries warrants greater investigation. However, I limited my discussion of these circumstances for three major reasons. First, a detailed exploration of the varying circumstances surrounding custody and release is far too complicated given that it is the Canadian provinces and American states who are charged with child welfare responsibilities. To fully understand the difference, I would have had to carry out an analysis that compares up to 63 different jurisdictions.³ Secondly, in both countries, but the U.S. in particular, child welfare agencies are reluctant to become involved with children lacking immigration status. Nevertheless, regional variation within states still remains an issue, even in federally administered care and protection (Espinoza, 1996). Finally, since I am analyzing major trends in national refugee legislation, a detailed discussion of child refugee claimants' welfare is beyond the scope of my thesis question, even if analytically useful.

A significant portion of this thesis is based on a review of court cases involving unaccompanied minor asylum seekers or children's rights in immigration and refugee

law. This thesis does not examine all asylum decisions concerning children; rather, I have non-randomly chosen only a purposive selection of about 25 cases for both countries. A primary restriction of this study is that I have only engaged with judicial decisions between 1997 and 2003. I limited my study to these years because there were a sufficient number of cases during this period to limit the time. I did not attempt to compare decisions toward unaccompanied minors before the CRC was drafted internationally or recognized as an important human rights instrument in Canada or the United States, even though it could certainly have been enlightening to contrast children's asylum cases decided both before and after. This undertaking is, however, beyond the scope of my research question.

Despite the limited time span of my study, there were still a large number of asylum decisions involving unaccompanied minor children. This meant that I had to restrict my data significantly. Before doing so, I assembled court cases from both countries and classified them according to one of two typologies: similarities in the type of persecution feared or similarities in the 'nexus' with a Convention ground.⁴ I then reviewed the cases and identified trends about the way in which child asylum seekers were regarded by adjudicators or judges. Since I observed that there were contradictory constructions of childhood, I also classified the larger collection of asylum decisions according to whether they were positive or negative and then employed several criteria to decide which cases to include and which to exclude.

First, I tried to incorporate cases that were precedential or were referenced in other decisions. This feature is important because the cases represent either the development or interpretation of current laws toward refugee children and establish the

limitations of refugee law as it pertains to future child asylum seekers. I also decided to include cases that were highly publicized, which I believed was important because of the subsequent attention they generated.

Finally, given that I identified a number of often inconsistent tendencies in asylum law toward unaccompanied minor asylum seekers, it was important for me to discuss a range of cases. I am most interested in cases in which the minority status of the child claimant was essential to the asylum application. As will be discussed, many children are successful when they base their claims on persecution stemming from traditional and well-established Convention refugee grounds such as race or religion, for example. It is when the persecution is either child-specific or has a particularly detrimental impact on children, or when the nexus to the Convention is less obvious, that children may face difficulties. Thus, I tried to examine children's rights as they pertain to claims in which persecution has a particular effect on children, or when they base their claim on their membership in the particular social group, children. This nexus to the Convention refugee definition is critical to the development of judicial interpretations of asylum law that are attentive to children's needs. Accordingly, in choosing cases that were illustrative of trends, it was significant to select both cases where the minority of the asylum seeker was discussed as well as cases where the minority of the asylum seeker was conspicuously absent from the way in which persecution or the 'on account of' element of the refugee definition were conceptualized. In both instances, the courts have advanced a message about the place of refugee children in law. Overall then, it is important to state that this thesis is not an exhaustive assessment of all refugee law in the United States and Canada affecting unaccompanied minors. Instead, it is an examination

of how the CRC and children's rights have been taken up in refugee law and judicial decisions of these two countries. In sum, I wanted to include a range of issues. I wanted the decisions to include children of both genders. I wanted the cases to be both positive and negative. I wanted the cases to include or lack a discussion of children's rights to see what the differences were. Yet, due to time and space constraints, these cases were the best representations of these themes.

In chapter two I discuss important theoretical and analytical debates affecting child refugee claimants. I examine the varying political and economic conditions that produce different childhoods, and scrutinize the precarious place of children within both the private and public sphere, paying attention to how such positioning relies on discourses of racial, class, and gender inequality. I claim that many child refugee claimants are excluded from childhood because of their races, nationalities, ages, or life experiences, and that this process of adultification has important consequences for what protections and sympathies they extract. I argue that these inequalities are also important to contemporary immigration and refugee policy, which includes and excludes persons from citizenship entitlements on the basis of perceived desirability. I also examine the tensions between state's sovereign power over domestic governance and their ascendance to intergovernmental policy coordination and international human rights treaties. While states are assumed to be the primary body through which law is established, international agreements are eroding the power of national governments. Human rights mechanisms ought to have an important role in national policy; however, current trends of neoliberal global economic expansion are most influential to an understanding of the social construction of citizenship and valued citizens, an issue that lies at the heart of arguments

supporting (or opposing) national immigration and refugee management more generally. At the same time, racialization and the ‘othering’ of nonwhite populations has always played an important role in the creation of a North American imaginary, although economic productivity is becoming increasingly relevant in debates about immigration and even refugee policy. Thus, I point out that child refugee claimants are often viewed as unattractive immigrants because of their youth and lack of economic resources. However, they are also constructed as non-children because their childhoods are discernible from the Western constructions of childhood.

Chapter three examines the international and domestic legislation of interest to this thesis. I first discuss the place of children’s rights in the international treaty system, and provide an analysis of the specific human rights protections espoused by the CRC. I also examine which rights children may require, yet which are absent from the Convention. I then provide a discussion of national refugee policy in both Canada and the United States, highlighting the different legislative protections reserved for minors. I argue that under Canadian refugee law, child asylum seekers have a greater series of protections than under U.S. refugee law, even though the legal directive in the U.S. is much stronger than in Canada.

In chapter four I examine Canadian judicial decisions affecting unaccompanied minor asylum seekers. First, I scrutinize the way in which children’s best interests have been interpreted by the Supreme Court of Canada and examine the implications such a conceptualization has had for the articulation of children’s rights in asylum proceedings. I then track various asylum decisions, focusing on three case typologies: judgments in which the credibility or behaviour of the designated representative (DR) interferes with

the child's claim; judgments in which the minor asylum seeker claimed asylum because of domestic abuse or abandonment; and judgments that involved the trafficking or smuggling of children. I reveal a great deal of variation between the way in which judges and adjudicators interpret asylum law in regard to refugee claimants under 18 years of age, focusing on the adult-centricity of the process. In some instances, children are denied the opportunity to participate in their own hearings, or the evidence provided by adults is preferred over the evidence provided by children. In other cases, the court or tribunal disregards the specificity of children's experiences of persecution, and even uses children's rights mechanisms as a justification for denying refugee protection by ignoring the childhood of the applicant. Finally, I provide an analysis of two decisions in which children's rights are appropriately referenced and treated as primary considerations. It is argued that ratification of the CRC has had an impact, albeit limited, on the Canadian judiciary's response to unaccompanied minor asylum seekers.

In chapter five I investigate American judicial decisions affecting unaccompanied minor asylum seekers, and compare U.S. responses to Canadian responses. In this chapter I argue that the judiciary does not properly attend to children's rights because the rights of children as they are set out in the CRC are rarely, if ever, explored. Again, I will examine relevant precedential law that has an impact on the rights unaccompanied minor asylum seekers are afforded, examining how the judiciary evaluates foreign nationals' rights generally, as well as the rights of U.S. citizen or permanent resident children. I then discuss judicial decisions dealing with children's removability from the U.S., noting that children are either forced to participate as adults or are denied the right to participation altogether. Thus, minor refugee claimants are treated either as fully

capable adults, subject to the same legal standards, or as unqualified children who make little claim to adult protection. This characterization is best illustrated in my discussion of the Elian Gonzalez case, in which the 6 year-old boy was denied the chance to claim asylum because of his age. Finally, I outline some constructive American asylum cases in which children's rights are better attended to, and provide a discussion of the varying ways in which children's rights and the CRC are tackled by judicial and quasi-judicial bodies.

Lastly, I provide a general discussion of the impact the CRC has in both systems. Chiefly, I argue that while ratification of the CRC is not a guarantor of refugee children's rights, it is an important step toward ensuring that refugee children benefit from international children's rights protections.

Preceding a discussion of what gaps are evident in judicial responses to the CRC, it is essential to understand how children's rights have been conceptualized and protected in Canadian and American law. Before doing so, I will discuss important theoretical and analytical issues that provide the context for reading asylum-seeking children's place in refugee law.

CHAPTER ONE

DISCOURSES OF INCLUSION AND EXCLUSION: CHILDREN'S RIGHTS, GLOBALIZATION, CITIZENSHIP AND IMMIGRATION

In this chapter I will explore major analytical and policy issues which are important to an interpretation of legislative and judicial responses to unaccompanied minor asylum seekers. Minor refugee claimants are situated in an ambiguous position in relation to the country of potential asylum. As both children with universal, transnational human rights and as aliens without access to nationally-based rights, interesting questions are raised about states' obligations to them. As this chapter will show, there are competing discourses which can account for the inconsistency in state intervention toward minor asylum seekers. At the same time as they make claim to widely accepted human rights protections, neoliberal economic coordination and the North American obsession with border control and security undermines these safeguards. Moreover, the state valorization of certain migrants, and therefore, certain types of ideal citizens, also adversely affects refugee children, who, because of their youth, lack of resources, and racial/national difference, are generally viewed unfavourably. The idealization of certain types of citizens is not a new feature of either Canadian or American immigration or refugee policy. However, the growing complexity of a neoliberal, globalized world, as well as tensions in the supremacy of the state to act as the primary body of domestic

governance, further complicate citizenship entitlements as well as nationally-based protections. Deep-rooted dichotomies that privilege certain groups over others especially marginalize separated child refugee claimants. In particular, the theoretical contributions of postcolonial writers provide powerful tools for understanding the how the 'othering' process of racialization, in conjunction with other social relations, affects refugees so forcefully. Racial or national difference, as well as Western constructions of romanticized childhood, often marks minor asylum seekers as beyond or outside of childhood, and therefore outside of child-specific protection. This insight is essential to understanding the way in which most refugee children are situated in a strange and often contradictory place by virtue of the many competing discourses that are at work.

Constructions of Children and Childhood in a Globalized World

Since at least the 1960s in North America, feminist scholars have analyzed the origins of women's continued inequality with men. Expanding their analyses of gender inequality, especially in the 1980s to include racial and class-based oppression, they have persistently identified the many androcentric, white, first world, heterosexist, and middle class biases evident in international and domestic laws, customs, values, and visions (Arat-Koc, 1999a). In doing so, they have rightly critiqued the assumed universal subject, which excludes women, as well as people of 'colour,' the economically disadvantaged, and children, among 'others'. Moreover, they have also identified the family and the private sphere as an important site for social analysis. In particular, feminists have called into question the notion of the supposedly political public sphere and the apolitical private sphere, observing that the family is frequently an oppressive

institution for women. Mandell observes that the “interplay between ideological constructions of women and social constructions of family” have important implications in relation to citizenship rights (2001:194). In other words, by accepting the family as a partial source of women’s oppression, feminists have revealed how the maintenance and policing of the private sphere serves particular interests and that women’s relegation to the private sphere has been used as a justificatory tool for denying them social and political inclusion.

These arguments are important for understanding children’s social position, since they have figured prominently in debates over gendered power relations. Children’s inclusion in such analyses is understandable in part because of women’s responsibility for child-rearing and domestic activities, in part because the problems that affect women in the private sphere often impact children as well, and in part because women and children have a similar history of being considered possessions of the male breadwinner in the traditional patriarchal family of Canada and the United States. In many instances, feminists’ analyses of women and children have helped improve children’s situation. Feminists’ writing on the public/private divide and institutionalized oppression have shown the connection between women and young peoples’ vulnerability to persecution. At the same time, they have shown how both groups have had difficulty relating their experiences of persecution to the traditional refugee definition because refugee law has generally separated the public and private spheres and distinguished between public/state and private/non-state actors. As Helleiner, Caputo and Downe (2001) point out, feminist analyses of sexism have provided important analytical tools for the deconstruction of adultism.

However, these similar experiences have meant an unreflexive use of the term ‘women and children’ in feminist, and also much non-feminist policy analysis, writing practically commonplace. This expression is problematic because it fails to capture children’s individuality, agency, and the unique nature of their oppressions and experiences. Instead, the incorporation of children into the category of ‘women and children’ homogenizes the way in which all young people experience their families and their worlds, and ignores the conflict that may exist between children, parents or other adults (Mayall, 2000).⁵ It also overlooks the reality that women’s improved social situation has not translated into improved citizenship rights for children. Instead, as Roche reveals, children have experienced multiple ‘exclusions’ from the public world – invariably in the name of their welfare (1999:481). In this sense then, children are not yet rights-bearing subjects; rather they remain, invisible ‘pre-citizens’ who are understood as objects in relation to women or the family, and subject to parental and/or state control (Stasiulis, 2002b:509). This view of children as lacking ‘adult’ traits has been used as a rationalization for denying them a claim to individual freedoms, political participation, and other citizenship opportunities.

A growing number of theorists and child activists are challenging traditional conceptions of childhood (James and Prout, 1997; Stephens, 1995; Roche, 1999; Freeman, 1998). Of greatest importance, scholars are destabilizing the notion that childhood is a physiological fact rather than social construct emerging within specific historical and social periods (James and Prout, 1997). According to the former, traditional view, childhood is an ahistorical, natural, and universal experience of immaturity and irrationality – a time of becoming and emergence. Children here are

conceived as innocent, apolitical pre-people who act outside of the adult world.

Childhood researchers, however, stress that children are not pre-adults or precursors to society, but social actors who are not only part of, but who also shape, society and social relations (Caputo, 2001:180).

The recognition that children influence contemporary cultural life is an important affront to traditional conceptions of childhood. While competing models of childhood co-exist, some views of children predominate. Jenks (1996) claims that childhood is a shifting construct, whose meaning must be understood in relation to a particular time and space. And Hendrick's (1997) research on British concepts of childhood beginning in the 17th Century reveals that attitudes toward children constantly developed. Yet ideas of 'the child' lay in the fact that, rather than being abandoned over time, old images remained as fragments and were incorporated into later ideas about childhood.

Moreover, Jo Boyden (1997) has outlined the consequences of the export of a specifically European/Western conception of childhood to the South through colonial, imperial, and global expansion. She argues that this model of childhood, which is now becoming a mainstay of international and domestic policy, is not only inappropriate for describing the lives of Southern, largely impoverished childhoods, it provokes a number of severe consequences. Notably, the construction of children as being either endangered or endangering usually results in harmful or imbalanced state intervention. As Boyden (1997:202) elaborates, while 'delinquent' children who work or play on the streets usually have frequent encounters with law enforcement, budgetary constraints mean that welfare agencies in the South can only respond to "the most public and extreme of cases, such as the infant abandoned on a rubbish heap, alongside the road or in a doorway, of

the child living on the streets; problems within the home are largely ignored.” Thus, some of the difficulties children experience are invisible, and differences in children’s classes or genders are homogenized and eclipsed by narrow discourses and representations.

The importance of context-based analyses of childhood, and conceptions of childhood, are a critical issue for sociological and feminist child researchers. For Sharon Stephens (1995), this means attending to the political and economic conditions under globalization in which children are produced and themselves engage. More precisely, Stephens argues that Western conceptions of childhood can no longer account for all children or all children’s experiences, if they ever could. Instead, children must be theorized with an understanding of the complexity of their different social lives under late capitalism. The notion that childhood is being lost or stolen is of particular interest to Stephens because of the association between absentee childhood and globalized, postmodern, political and economic changes that have profound implications for children. In her view, social changes are not stealing the innocence of children, *per se*, but are certainly putting more pressure on children and how childhood is conceived. Thus, in her view, the effects of globalization and capitalist restructuring, such as the increasingly uneven distribution of wealth and resources, as well as necessity of family members to participate in the new labour markets, must be taken into consideration in how it shapes children and childhoods.

While Stephen’s analysis is instructive because it highlights the importance of understanding children’s lived conditions, *representations* of children under such a system are also important. Himani Bannerji’s (1993) discussion of the importance of

visibility in othering processes is interesting in light of Stephen's assessment of the relationship between globalized (post)modernity and contemporary representations of international childhood. In relation to South Asian women in Canada, Bannerji insists that the 'other' is identified by sight. However, she suggests that 'visibility' does not imply just being seen, since everybody is visible. Instead, she argues that visibility implies being more noticeable because of a peculiarity or difference. Applied to what Stephens identifies as the explosion of media coverage of children in Southern/Third World countries whose childhoods are plagued by famine, disease, and violence, it becomes clear that these differing childhoods are important to the recreation of a normative private Western childhood, such that childhood is conceptualized as either overly protected or adultified/exploited. The attention that particularly severe and visible forms of abuse receive by both authorities in developing nations and Western representations of Southern children reinforces the notion that most children live one particular way. Refugee children are interestingly affected by both Western/First World apolitical notions of childhood and by Southern/Third World conceptions of children as prematurely adult (worldlier, more accustomed to harsh treatment, in less need of adult protection, etc). Their racial and experiential difference is still salient because they are seen as being in less need of protection than Western children, at the same time as they attempt to make claim to what are supposed to be universal children's rights. As Bannerji's analysis suggests, the variability of access to certain definitions of childhood is shaped by racialized discourses, globalization, and conceptions of childhood. However, the tension among globalization, human rights paradigms and the power of the

state also plays a critical role in the way in which refugee children are treated in asylum legislation and by the judiciary.

Globalization, Human Rights, and State Power

Globalization has had an important impact on constructions of childhood and children's lives. It has also powerfully changed the constitution of national structures of governance. While the term is becoming increasingly ambiguous and contested, it generally refers to a myriad of phenomena, encompassing the movement of capital, people, information, and technology across international borders. Commonly associated with economic restructuring, globalization encompasses a political element as well, which has generated a heated debate as to whether the power of the state is being undermined. According to McBride, globalization entails "the erosion of nation-states as the key unit in which political decisions are made; the leakage of sovereignty to supranational organizations on the one hand and to subnational units on the other hand; and, sometimes, to the emergence of neo-liberalism as a global ideology" (2001:21). Neoliberalism involves widespread economic restructuring in which a more limited role for the state, governmental fiscal restraint, the free market and market-oriented values, and individual self-reliance are affirmed (Mann, 2002; Arat-Koc, 1999b: 34). Therefore, political and economic aspects of globalization are difficult to separate.

Processes of neoliberal globalization create uncertainty about the nature and intensity of states' governing power, particularly in the realm of immigration and refugee policy. Knutilla and Kubik (2000:145) remark that historically, the state has played an active and interventionist role in shaping social relations. Central to this debate is the

question of the legitimacy of states' sovereignty, or what Fowler and Bunck refer to as "the just and legal sanctity of the state" to govern within a particular territorial boundary (1995:157). On the one hand, many theorists point out that globalization is not a new phenomenon and that states retain their power and authority by consenting to transnational agreements (Basok, 1996). Conversely, others argue that globalization has eliminated the state as the primary body of governance. According to this position, globalization is viewed as a phenomenon that undermines the autonomy and legitimacy of the state because interdependence has left states with little control over their own domestic policies.

Undeniably, both perspectives have merits. To some extent, this can be attributed to the fact that globalization emerges as a contradiction since states attempt to reconcile two opposing forces: cross-state integration and state autonomy (Bromley, 2002:136). The resulting ambiguity of the state's position is captured by Castells, who claims: "...the nation-state, as historically created in the Modern Age, seems to be losing its power, although, and this is essential, *not its influence*" (1997:243; emphasis in original). Thus, globalization engenders confusion and indeterminacy with respect to nation-state governance, especially since it continues to unfold unevenly.

Neoliberal globalization has generated a great deal of concern because it appears to undermine the state's ability to protect its populace. Yet another example of globalized intergovernmentalism that challenges the state under modern globalization comes in the form of international human rights models. Indeed, Bhabha (1999) claims:

Universal norms and enforceable minimum standards enshrined in international conventions provide mechanisms for curbing state power, for transcending the particularisms of nationality and place, and for impinging on state structures to enforce internationally

binding rights....In fact, it is the interface between globalization and human rights that challenges state autonomy most forcefully, providing mechanisms for effective global mobilization and implementation of rights (14-15).

Unlike neoliberal capitalist restructuring, human rights paradigms theoretically assume that human security is the primary responsibility of all states. For Jacobson (1996:2-3), this means the state, independent of borders and citizenship, is becoming “less a sovereign agent and more an institutional forum of a larger international and constitutional order based on human rights.” Paradoxically then, intergovernmentalism and the deterioration of state power to international forces both undermine and strengthen the state’s ability to protect people, particularly those who are marginalized.

The international human rights instruments of notable importance to this thesis are the Convention on the Status of Refugees (CSR), and especially, the United Nations Convention on the Rights of the Child (CRC). While the former is an agreement that compels third countries to protect individuals against (persecutory) human rights abuses by other states, the CRC, in its claim to universality and inalienability, guarantees that all children enjoy basic human rights entitlements. The broad interpretation of human rights standards as they are enshrined in CRC will not be elaborated until the next chapter. However, it is worth mentioning that the CRC emphasizes that these basic rights apply to “all children within the nation’s jurisdiction” (Articles 2 & 22, respectively). As both children and asylum seekers, young refugees make legitimate claims to human rights protection beyond the national level. Hence, children are theoretically afforded a great deal of supra- or trans-national protection, even if the CSR encompasses only limited security and human rights issues.⁶

Unfortunately the gap between the objectives of the CRC and actual implementation of children's human rights into national policy leaves much to be desired. Despite challenging state sovereignty, human rights must also be understood in light of aspects of globalization that undermine human security. Sadoway argues (2001), for example, that by criminalizing border transgressors through the enactment of laws that favour stronger (national) boundaries, separated child refugees are then *further* susceptible to human rights abuses, therefore broadening concerns about their fate. Thus, even if Anker's (2002) assertion that the human rights paradigm is gradually becoming stronger in domestic refugee law, this does not necessarily mean better human rights protections are being entrenched into national law more generally. As Bromley (2002:76) persuasively argues, the privileging of states' sovereignty has proven to be a significant obstacle to the attainment of universal human rights standards such that "when state interests and international laws conflict, state sovereignty is privileged over the state's international obligations." Consequently, the problem with the human rights system is that policy-makers are able to ignore human rights obligations when other priorities take precedence.

Some discrepancy between the values of CRC and the way it has been implemented is to be expected given the diverging and often conflicting interests at stake and the tension between the neoliberal and human rights frameworks. Unfortunately, the asylum process seems to be privileging the former, even if the message of the latter is becoming stronger, which has particularly adverse effects for asylum-seeking children (Kent, 1997). This paradox of human rights integration and neoliberal exclusion requires

a deeper investigation of the way in which national immigration and refugee policies have been developed.

Globalization, Regionalization, Immigration Coordination and Border Security

There are several competing interpretations of the meaning of globalization to immigration regulation. Moreover, the complexity of these differing explanations is exacerbated in comparisons between immigration and refugee management. Even though immigration and refugee laws are intimately connected, they are not the same. As will be discussed briefly in the next chapter there is one fundamental difference between refugee and immigration policy, which is true in most nations: immigration selection is more self-interested on the part of selecting states, whereas refugee determination is based on more widely shared humanitarian aims and obligations. In other words, under ‘regular’ immigration processes, potential migrants must meet certain criteria - requiring fluency in the official languages, and having post-secondary education, certain vocational skills and experience, and so on (Abu-Laban and Gabriel, 2002). However, asylum seekers need only show that they have experienced or fear persecution in their country of nationality to secure residency status (Arat-Koc, 1999b).⁷ Ultimately, this means that asylum and immigration policies are affected by, and interact differently with, processes of globalization.

The centrality of neoliberal ideologies in recent immigration policy has been well documented. Abu-Laban (1998) argues that economic self-sufficiency is becoming an ever-important feature in immigration policies. Although this has been evident since the late 1960s, she points out that the importance of “productivist” economic self-sufficiency

of immigrants is steadily becoming more apparent (205). However, Pélèrin (1999) argues that economic factors in migration policy are much more central than most theorists assume. In her view, conventional analyses that characterize migration policy as reacting to economic objectives or other internal/external pressures fail to fully appreciate that coordinated migration policies are enacted to foster neoliberal regional integration through state restructuring. Accordingly, Pélèrin contends that in spite of other issues, the impetus toward coordination and integration precedes migration regulation, and coordinated migration policy is the vehicle through which liberalized policy is advanced.⁸

Pélèrin's claim has important implications for understanding the plight of refugee claimants arriving in Canada and the United States. As mentioned, the international refugee system is designed to provide surrogate state protection to individuals.⁹ In this sense, refugee protection is designed to be remedial, but more importantly, external to states' interests. However, the refugee system has not historically been secondary to other national affairs; rather, it has always been an instrument for political gain. Accepting refugees is a political act, as granting asylum is viewed negatively by the refugee's country of nationality because it suggests that the refugee's home state has failed to fulfill its obligations to its citizens.¹⁰ Thus, ideological and political factors enter into refugee admission and refusal decisions, such that refugee-accepting countries will grant protection to people from countries they are ideologically and economically separated from, and will routinely deny protection to people from countries that have been given foreign aid or are needed for other reasons. As a result, Whitaker (2003) notes that Canada and the United States have historically accepted right-wing refugees from left-wing communist countries such as Cuba or Russia, and at the same time have

denied protection to left-wing claimants from right-wing regimes such as Columbia. More recently, some Afghani and Iraqi refugees and non-status residents are being forcibly repatriated or denied asylum since both countries are now considered by the U.S. and Canada to have been 'liberated'.¹¹

The increasing importance of regional coordination only exacerbates this longstanding problem. Indeed, earlier judgments were made in light of other diplomatic interests, although the decision-making ability was still in the hands of the nation's determination body. Harmonization and coordination present challenges to refugee decision-making bodies' ability to hear claims because, in their effort to coordinate, governments may enact certain migration and refugee policies that usurp this control. One example is the approval of the 'safe third country' agreement between Canada and the U.S. less than one year ago, which requires most asylum seekers to make a claim in the country where they first arrive. In essence, this accord prevents refugees from accessing desired territory, and may even result in refoulement because of the different ways in which the refugee law had developed in Canada and the U.S. (Bhabha, 1999).¹² Even if Canada and the U.S. have always shared interests in such realms as foreign affairs, which were reflected by a similar trend of asylum decisions, this agreement now prevents officials from making independent determinations since asylum seekers cannot even access the national mechanisms. Stated otherwise, in some sense the sovereignty/autonomy of the refugee determination system still exists because refugee determinations are made nationally. Yet it would be a mistake to ignore the socio-political climate in which sovereignty is asserted, since the coordination of the region has deeply affected these national responsibilities. And although unaccompanied children are

exempt from the safe third country agreement, it remains analytically important to this thesis because it is indicative of the general climate toward all refugees, including children.¹³ This climate involves not only a heightened awareness of foreign affairs interests, it also involves an obsession with controlled and coordinated borders.

The drive toward coordination in the Americas, or at least between Canada and the United States, is important to the way in which borders are controlled. Traditionally, immigration and border protection policies have been analyzed as national endeavours, undertaken by the state in defense of territorial sovereignty. Restrictions on immigration remain largely national, or at least state-centric. Even Pélletier (1999) recognizes that integration in the Americas, or at minimum, between Canada and the United States, is limited by states' reluctance to surrender decision-making power over national security. However, this does not mean states have been unwilling to jointly coordinate security. As Whitaker (2002) explains, economic coordination in the Americas requires new approaches to border security since globalization entails an interplay between contradictions in which the aspects of globalization valued by neoliberalism, such as transnational capitalism, global commerce, and legal migration are overshadowed by underground, illicit counterparts. Accordingly, he reasons that since the threats to national security are borderless, then the question needs to be reconsidered as: "...how to police not national territory but what Castells aptly dubbed the 'space of flows'" (29)? The space of flows for Pélletier is the space in which capitalist liberalization is undertaken. Thus, the need for responsive coordinated security is necessary for regional economic coordination, as one of the crucial considerations is how to protect territory without compromising economic relations.

The safe third country agreement also has important implications for border security. Many scholars argue that the safe third country agreement has been a Canadian-driven initiative because Canada receives such a large number of refugee applicants from the United States, and the U.S. relatively few from Canada. The United States has resisted its implementation for many years because the treaty quickly adds thousands more to its already strained asylum system. However, the safe third country law is now being realized because it ensures Canada will comply with U.S.-driven projects, notably, in the realm of security. While the Canadian tradeoff for the safe-third agreement has yet to be seen, a few suggestions, such as a security perimeter or a North American missile defense system, have been examined. In this manner, regional economic and security coordination require cooperation between Canada and the U.S., and the ability to balance competing interests, most notably, the need to integrate without undermining either economic prosperity or national security.

The contradiction of globalization is that it frees up the flows of capital, goods and services while maintaining old and establishing new barriers against the movement of people. Certainly the most explicit rationale for ongoing immigration control is that flows of people, if unrestricted, threaten, or at least exploit, the national population. Increasingly, states' responses have been to criminalize the space of flows. However, interesting theoretical and analytical questions are raised when what is flowing across borders are children. Orellana et. al (2002) claim that the literature on migration, border fortification, and security generally construct images of adults. Moreover, even work on migrant children tends to focus on patterns of settlement and assimilation (2002, 573). Bhabha (2001) agrees that child migrants are commonly ignored in the policy-making

agenda. This is obvious in recent policy developments that privilege border fortification, neoliberal economic self-sufficiency, and national security over human security. The question then is what are the consequences of such policies for child asylum seekers? Are they regulated in the same way as adult migrants? More importantly, how are children and children's rights regarded in a climate of commodification and criminalization, and how are immigration and refugee policies related to conceptions of citizenship?

Citizenship Discourses and the Ambiguous Status of Child Refugees

The emphasis on immigrants' ability to contribute to the economy is an ever-increasing ideal of citizenship under neoliberal forms of governance. This means that the neoliberal admiration of the market citizen has weighty implications for contemporary understandings of belonging in North America. Regrettably, both governments' desire for 'contributing' citizens seems to be limited to migrants' immediate ability to contribute economically, and not to future and potential economic, social, community, humanitarian, or intellectual input. Thus, the market citizen ideal is an unattainable standard for almost all children and puts unfair pressure on refugee children, who are supposed to be the beneficiaries of the immigration and refugee system, not economic contributors.

Children have always had a complex and contradictory relationship to citizenship, even if this relationship has differed according to other factors. Rather than being absolute rights conferred by the state, citizenship entitlements in Canada and the United States are more properly conceived as privileges linked to race, class, gender, age,

sexuality, or ability. Accordingly, Canadian and American citizenship is deeply rooted in power structures that benefit some and disadvantage others. Contemporary studies of citizenship attempt to identify these privileging power structures. In one of the first efforts to do so, T.H. Marshall's classic text (1948) advances a view of citizenship that draws on the former notion of citizenship rights and social inclusion. He defines citizenship in terms of three important elements: civil, political, and social aspects. This conception favours a view of citizenship that promotes characteristics of citizenship as rights – the right of the citizen to personal liberties, the right of the citizen to participate in the political process, and the right of the citizen to economic welfare and to engage in the social customs and traditions of the society, respectively. Bhabha's (1999) critique of citizenship is an interesting contrast to this conception of citizenship as privileges to be attained. Whereas Marshall sees citizenship in terms of citizens' legitimate claims for certain kinds of participation, Bhabha maintains that this bestowal system inherently excludes – that "exclusion from citizenship is an essential feature of the project of constructing citizenship itself" (16). Therefore, whether citizenship is conceived in terms of legal positions, individual rights, identities, responsibilities, or state obligations, ultimately citizenship is a system of segregation that differentiates those included in the definition of citizen from those who are excluded.

Some recent work has attempted to connect these different notions of citizenship. Brodie (2002) identifies three interesting characteristics of citizenship: what rights come with being recognized as a citizen, who is or can become a citizen, and what the relationship is between the state, the economy, and civil society. This final characteristic is an important feature of citizenship narratives because it defines the obligations of the

citizen and the state. Specifically, it provides legitimation for the state's defensive action on behalf of civil society. Certainly, the state has a long record of selectively deploying certain discourses to justify contradictory notions of inclusion and exclusion. As mentioned, states have bestowed citizenship privileges selectively - many groups and classes of people have been traditionally denied citizenship rights and privileges, independent of immigration or citizenship status.

There is a long-standing history of this exclusion in both Canada and the United States. In both countries, wide-scale social purity movements that fetishized a fleeting notion of 'fitness' excused heightened state involvement in people's lives. In Chunn's (2002) view, fitness was a gendered, racialized, and class-based concept that was designed to separate morally, mentally and physically upright citizens from the wicked and immoral. In doing so, fitness narratives became entrenched into law, thereby constructing citizenship through the separation of good citizens from unfit ones, and deviant but salvageable individuals from the incorrigible and/or inherently unfit (Menzies, 2002). Fitness then, became a system of regulation, disproportionately deployed to control women, racial minorities, children and the working class, which used, and at the same time, reinforced, prevailing notions of citizenship.

This notion of fitness has a specific place in the history of citizenship for children and youth. Although children, as stated, have not been recognized as full persons who enjoy participation rights, the state has always invested in the protection of children because of their future 'potential' as citizens. Feminist arguments outlining the regulation of women as mothers and bearers of the nation illuminate the urgent view that children also need to be regulated as the future of the nation. Understood in terms of the

celebrated past of children as pre-people, the policing of the unfit was defensible to ensure that children develop into proper, moral citizens (Mayall, 2000). However, such control has a paradoxical character since immorality has been linked to innate qualities as well as to inadequate living conditions (Sangster, 2002). This latter contention fostered the belief that involvement with the unfit could corrupt otherwise proper citizens. At the same time, it highlights a history of citizenship that raises interesting questions concerning which children were protected and which were policed as pre-citizens. In her study of delinquent children, Sangster (2002) notes that even pre-citizenship (childhood) is paradoxically defined. Indeed, this contradictory definition of citizenship recognizes that “*by virtue of their youth...children have been both ‘outsiders’ to full, respectable citizenship, but because of their youth, they were seen simultaneously as potential, malleable ‘insiders’ to a future citizenship*” (337, italics in original). Thus, children’s relationship to and negotiation of citizenship depends on the various discourses applied to them.

In much the same manner that delinquent youths’ variable experiences with the state demonstrate the unevenness of (pre)citizenship initiatives, the experiences of orphaned children are also instructive for understanding the pre-citizenship status of separated refugee children. The historical construction of wardship provides some fascinating clues about how child citizenship has been taken up by the state. Since citizenship has been defined differently according to class, race, and gender, the regulation of children is often linked to the regulation of families. Even if these orphan children had different reasons for coming under the protection of the state, they shared a common fate insofar as they lacked adult guardians who might intervene on their behalf.

Instead, their lives were directly shaped by state initiatives concerning both protection and management. While Adamoski (2002) does not deny the importance of philanthropic attitudes governing children under the care of the state, he argues that custodial intervention was also a practice of nation building. He claims that work placements “exploited class and gender structures to inform the experiences of prospective male and female citizens, creating social and moral citizens, respectively” (321). In this sense then, orphaned children in work placements engaged with the world as children; yet, also seemingly as adults by virtue of their employment and imposed autonomy.

This understanding of the ‘adultified’ child is prominent in present-day dealings with child refugee claimants. Although today’s ‘elder child’ exists in a world that is familiar with children’s welfare and children’s rights, it is clear that these longstanding views of childhood continue to inform adults’ interaction with children. Panter-Brick contends that abandoned or parentless children are constructed as *both* miniature adults and vulnerable children in need of protection (2000:10-13). The following chapter will outline some of the problems with the CRC’s vision of children’s rights and point out that there are many children who are denied basic rights and entitlements because they fail to conform to the conventional, adult-centred vision of childhood. Thus, although Jacobson has argued that transnational citizenship and human rights across borders are replacing nationally based citizenship rights, other social hierarchies continue to define the terms of inclusion and exclusion for children. To be sure, one of the most important contributions to this view has come from critical race and postcolonial writers, who have linked age and gender-based oppression with processes of colonization and racism.

Child Refugee Claimants and the Imperial Gaze

To borrow from Razack's term (1998), the imperial gaze is central to the way in which child refugee claimants' asylum cases have been decided. My forthcoming analysis of refugee decisions will examine the extent to which adjudicators have developed the notion of childhood as a universal concept rather than one that recognizes the way in which individual children interact with and experience their worlds. Stasiulis argues that many children have been denied refugee protection because of the use of "liberal notions of volition and choice to define persons under the age of 18 yet in their teens as non-children, or as 'elder minors' sufficiently removed from a 'tender age' so as not to require or benefit from the international protections that are now available to children" (2002b:521). In these instances, the 'best interests of the child' article has been taken up by the judiciary; however, in spite of this article, other reasoning has been advanced to deny that some children are truly children.

Processes which adultify certain children have deep roots in Western thought. As critical race and postcolonial theorists argue (Said, 1978; Gould, 1993; McClintock, 1995; Mohanty, 1997; Schiebinger, 1993), traditionally Non-European/black/dark 'others' have been characterized as embodying deviation, difference, and excess. They were thought to inhabit an anachronistic space, and were constructed as "prehistoric, atavistic, and irrational, inherently out of place in the historical time of modernity" (McClintock, 1995:40). Such messages about the chaos, violence, and irrationality of the South have been disseminated through allegories of race, which were an important subtext of colonial discourse that remain prominent in the Western imaginary today. Schiebinger (157-161) notes that dark bodies, and African 'Negroes' in particular, were

often animalized or infantilized in scientific writing that compared their mental and physical capacities with both apes and European children. Indeed, McClintock (1995:51) argues that the white male child, because of his assumed feral nature, served as an appropriate measure against which a host of inferior groups, including white women, Africans, Jews, the Irish, and even prostitutes, criminals, the insane, and the unemployed, could be measured. Interestingly, McClintock remarks that a generally recognized measure of the 'average Negro's' intelligence was thought to be the equivalent of a 10 year-old European child.

This raises interesting questions about the place of African and other racialized children in European theories of racial difference. Schiebinger (1993:160) claims that racialized females in general were of little analytical or scientific interest and were considered a sexual subset of their race; and unique female traits only served to confirm their racial standing. Notably, she points out that racialized women were categorically excluded from European femininity. Since both European children and racialized adults were considered to be biological throwbacks to European men, and women were a subset of their racial group, non-European children seemingly had no place in this scheme. However, as Frederick Douglass has explained in his autobiography, beyond the dependent stage of infancy, black children were treated as adults, forced to work and subject to punishment. Thus, the adultification of 'othered' children is a counterpart to the infantilization of 'othered' adults, both of whom are seen as different from the Western/European adult male norm.

Bhabha (2001) agrees that in many instances, child refugee claimants are viewed as 'really much older' than Canadian or American children because of their experiences.

However, she notes that refugee cases involving children serve other interests as well. She argues that by creating a dichotomy of innocence/experience in children, adjudicators are painting a dichotomous picture of the civility of Western states and the primitiveness of the Third World (Bhabha, 2000). Although children must make a claim that coincides with the enumerated grounds of the Refugee Convention, after being considered 'genuine' refugees, arbitrators highlight the failure of refugee-'producing' countries to protect these innocents from exploitation and abuse. In doing so, the West becomes a protector of human and children's rights, without any acknowledgment of children's problems here.

There are three interrelated consequences to these decisions. First, the West uses human rights discourses as rhetoric for reasserting its own moral superiority, thereby recasting Southern countries as corrupt, immoral, and disordered (Razack, 1998). At the same time, specific human rights are privileged while others are ignored. So civil and political rights are celebrated and protected, while social and economic rights are largely overlooked. In other words, in claiming that the refugee definition protects human rights, even though only limited aspects of it, the nature and shape of the human rights framework becomes narrowed. Thus, access to affordable food, housing, and health care are no longer basic human rights, or at least lacking these entitlements is not considered persecutory. Finally, as Jefferess shows (2002), the fixation on sensationalized human rights abuses abroad deflects attention from the West's complicity in human rights abuses overseas and in their own states. His contention draws out the invisible imperialist subtext of human rights discourses, which operate discursively, ideologically, as well as practically.

Although children's mistreatment in the asylum system is disconcerting, many feminists note that such behaviour toward refugees is not confined to child claimants. Instead, they maintain that there are many similarities between the way in which children and adult women are treated in the asylum system. Oswin (2001) contends that such notions of innocence and experience are routine in the asylum system, particularly in gender-based persecution cases. Again, adjudicators attempt to construct asylum seekers either as 'genuine' political refugees in need of protection from their hyper-patriarchal nations of origin or as 'economic' refugees who are abusers of the system. In doing so, they have created a simplified picture of these legal subjects as either passive, dependent, vulnerable victims or as cheats (352). She notes that this is so deeply entrenched, that women asylum seekers who do not embellish their victimization *as* women are often denied protection and deported. The significance of these trends lies in the fact that protection and participation are constructed to be mutually exclusive, which forces naturalized constructs onto women and children without paying attention to context-based investigations. It divides the private and public spheres, thereby undermining the way in which both groups require much needed protection from human rights abuses in the private sphere, although not to the exclusion of protection from traditional (or now 'masculine'/'adult') public sphere persecution.

Conclusion

This chapter has outlined some of the major analytical issues affecting separated child asylum seekers. I have argued that the emphasis on neoliberal economic coordination has made immigration and refugee policy more, not less, restrictive. I argued that the idealization of the market citizen to the detriment of human rights

protection is a key feature of Canadian and American national policy. Moreover, I pointed out that human rights discourses, as they are employed in the West, privilege certain rights to the exclusion of others. New and old dichotomies such as citizen/alien, adult/child, White/Raced, Westerner/non-Westerner, threat/ally, and contributor/burden, remain strong in contemporary American and Canadian citizenship discourses and marginalize separated child refugee claimants. Unfortunately, this means children who do not act like children ‘should,’ are rarely given the ‘benefit of the doubt’ (really, their enshrined human rights) and are therefore treated like adults. As the following chapters will show, this has a great deal to do with the racist construction of ‘others’ that remain forceful in the legal system, a point made convincingly by theorists who adopt a postcolonial framework of analysis. As mentioned, adults and children from non-Western countries have been racialized. Historically, racialized adults have been denied citizenship rights because they were believed to be childlike. For racialized children, exactly the opposite has occurred – they were and are seen to be so unlike children in the West, that they do not require the child-specific protection. The following chapters will further investigate some of these themes in judicial decisions. First, however, I will explore the legislative provisions that exist for children seeking asylum in Canada and the United States.

CHAPTER TWO

DOMESTIC AND INTERNATIONAL POLICY: CHILDREN'S RIGHTS AND REFUGEE LAW

An understanding of the similarities and differences between Canadian and American refugee policy toward unaccompanied minor asylum seekers requires some investigation of the relevant national and international legal instruments to which child refugees make legitimate claim. This thesis will provide only a snapshot of the complicated network of children's legal entitlements, focusing primarily on the way in which their rights and welfare are protected under immigration and refugee law, and the gaps in such protection.¹⁴ Such a consideration will include a brief discussion of national children's programmes within the immigration and refugee system (for example, laws concerning guardianship and the provision of welfare benefits for child refugee). However, the focus of the chapter will be to determine the extent to which Canadian and American refugee policies have each integrated the United Nations Convention on the Rights of the Child (CRC).

As will be noted, even though Canada is a signatory to the Convention and the United States is not, the Convention has not been fully integrated or wholly absent from either respective countries' domestic policies. The U.S, for instance, was the second country in the world to publish guidelines for the adjudication of child asylum seekers,

which focused primarily on children who are separated from their parents or guardians upon entry to the country.¹⁵ By doing so, and as will be elaborated, the U.S. government drew heavily on notions of children's rights as they are set out in the Convention. Still, there are many discernible differences between the two asylum procedures. Thus, I will first provide a summary of the Convention; its origins, the major principles it spells out, as well as the matters that were inevitably not included in the final draft. I will then discuss the Canadian and American policies with regard to asylum seekers, highlighting the distinct conditions set out for minors. I will describe the similarities and differences between both countries' refugee policies, noting the way in which the Convention has manifested itself in both legislative frameworks, and provide a brief discussion of the continuing problems child asylum seekers face under these two countries' refugee laws.

The United Nations Convention on the Rights of the Child

States' concern for children's rights did not begin with the adoption of United Nations Convention on the Rights of the Child (herein, CRC). And the Convention was not the first international document outlining nations' responsibilities toward children. The CRC echoes earlier concerns that international politics and agreements should address the protection of children (Franklin, 2002a). Child-specific declarations about the rights of children had been adopted by both the League of Nations in the Geneva Declaration on the Rights of the Child in 1924 and by the United Nations in the Declaration on the Rights of the Child in 1959. Additionally, specific provisions relating to children have been explicitly included in several other human rights Conventions and Covenants, including the International Covenant on Civil and Political Rights (CCPR, in

particular articles 23 and 24), and in the International Covenant on Economic, Social and Cultural Rights (ICESR, in particular article 10). These origins are duly noted in the Preamble to the Convention and are important to the way in which the Convention was framed.

The CRC is the most widely ratified of all international agreement, lacking ratification from only two countries – Somalia and the United States.¹⁶ It was unanimously adopted by the General Assembly of the United Nations on November 20, 1989, and came into force generally on September 2, 1990. Johnson attributes its universal endorsement in part to the widespread cooperation between numerous governmental and non-governmental bodies, observing:

[It]...was the product of 10 years of negotiation among government delegations, inter-governmental organizations and non-governmental organizations (NGOs) from every part of the world. All provisions had to be adopted by consensus, meaning that at any time a single determined delegation could effectively exercise a veto power over a proposal. In spite of this constraint, the draft convention was...completed by its target date – 1988, so that it would be adopted by the UN General Assembly in 1989, the 10th anniversary of the International Year of the Child and the 30th anniversary of the UN Declaration on the Rights of the Child... (1992:95).

Despite the successful collaboration, the CRC did not originate within a collegial climate. Rather, it was created in an atmosphere of competition and skepticism, and its wide-ranging scope can surprisingly be attributed to the cold war rivalry, even if the political climate and the East-West tensions, which existed during the early drafting period, began to diminish by the ratification date (Price Cohen, 1992:62).

The first sign of a new children's rights treaty appeared in the late 1970s when Poland introduced the first version of the Convention. As Ayotte notes, "the Polish draft focused on economic, social and cultural rights to which the communist countries

accorded priority” (2001b:5). Throughout the consultation period, the Convention changed to reflect various nations’ interests and growing involvement. Of particular importance to this thesis is the major role the United States played in the negotiations. While there have been conflicting accounts of the political motivations of the U.S. government, a committed opponent of communism, their delegation participated actively throughout the ten year period and introduced the civil and political rights contained in Articles 12 through 16. Ayotte claims that this effort was designed to “make it less appealing to the draft’s sponsors and political allies” (2001b:5). On the contrary, Price Cohen argues that even if such measures were a politically motivated response to threat of communist encroachment in the United Nations, they should also be interpreted as an expression of Americans’ appreciation for individual rights, as well as a reflection of the mounting support for children’s rights in the American public, government, and the judiciary (1992, 1995). Moreover, she attributes the United States’ failure to ratify the Convention not to indifference to children’s rights but to the complicated nature of endorsement, which requires the federal government to consult with, and have the support of, all 50 states. Arguably then, the positive reception this treaty enjoys worldwide is also an indication that Americans’ beliefs in children’s human rights, including civil and political liberties, are powerful in other countries as well.

The importance of the CRC to children’s rights cannot be underestimated. As mentioned, it is not the first international initiative on behalf of children, although it differs from its predecessors in many significant ways. Of primary importance as Covell and Howe state, it was long overdue and imperative since earlier children-specific mechanisms stood as “broad moral principles, ideals and aspirations rather than legally

binding documents” (2001:20). Thus, until 1989, children had no explicit internationally agreed upon legal protection, even if they were implicitly included in other international treaties. Despite some initial resistance to the notion that children are ill protected under international law, Lopatka (1992) claims it became clearer as the drafting continued, that children, by virtue of their vulnerability, required a distinct protective agreement because they were often forgotten or ignored in other (adult-centred) treaties. Indeed, the CRC holds a different view than other international accords by locating children’s well being and rights at the forefront of international and national government policy. Thus, the CRC is a unique and visionary text – and “is more than a dry document with some rules on how to behave...it expresses some basic values about the treatment of children, their protection and participation in society” (Hammarberg, 1995: ix).

First and foremost, the Convention stresses that the principles are universal, and apply to all persons under the age of 18. It delineates four overarching principles, all of which are meant to help with the interpretation of the Convention as a whole. Of these four, the ‘best interests’ notion seems to be most encompassing. Article 3.1 states that “in all actions concerning the child, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be *a primary consideration*.” Like the Convention itself, the idea that nations have a responsibility to act in children’s best interests is deep-rooted. For example, the 1959 Declaration included a ‘best interests’ statement in Principle 2, which stated:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him [sic] to develop physically, mentally, spiritually and social in a healthy and normal manner and in conditions of freedom and dignity.

In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Taken on its own, this ‘best interests’ principle is progressive for establishing that children’s best interests are *the paramount* consideration in the creation of laws, and is actually better wording than in Article 3 of the Convention, which specifies children’s interests as a primary, but not overriding factor. However, the 1959 Declaration seems to advance a notion of children as passive objects in need of adult protection and intervention. Most childhood scholars maintain that adults’ concern for children before the 1960s or so generally reflected this paternalistic concern for young people’s material, health, and disciplinary welfare. The significance of the 1989 Convention, as Ayotte observes, is that it brings together a range of social, cultural, and economic, as well as civil and political rights, all of which must be interpreted as being universal, inalienable, and indivisible (2001b). Thus, the Convention reflects a reorientation of the way children’s best interests are understood and establishes that children are individuals who are valuable to their societies at present, and not only as future or developing humans (James and Prout, 1990; Franklin, 2002a, 1998).

Accordingly, the underlying attitude reflected in the Convention’s ‘best interests’ standard is that it is in the best interests of children to have their desires known, and included, in decisions made about them. These rights are also protected under Article 12, which “assure[s] to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child” and “for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.” In this sense then, the value

of the CRC is two-fold. It recognizes that most of the world's children are marginalized, therefore requiring protection. Yet, it also strives to combat such marginalization by acknowledging children's inherent value, agency, and ability to contribute to their own personhood and societies.

The two other major principles the Convention enshrines are the right to life, survival and development (Article 6) and the right to be free from discrimination (Article 2). The former, although its own article, also encompasses other more specific stipulations, including the right to physical, mental and emotional health (Articles 24 & 39). Thus, there are a range of Articles that provide children access to: a name and nationality (7), economic security (4), family members and family reunification (9, 10 & 22), care (18), religious freedom and direction (14), a minimum standard of living (26 & 27), education (28), and communication with others, books, and the mass media (17). Children are also assured the right to be free from such afflictions as: being trafficked (Article 11); all forms of violence (Article 20); prolonged, unnecessary, and unexamined detention (Article 25 & 37); and being sentenced to lifelong imprisonment or the death penalty upon conviction of a crime (Article 40). These aspects of CRC fall under what Franklin (1995, 2002) calls the protective and provisionary aspects of Convention. Again, both have always been a primary concern for adult advocates and policy makers, but the Convention differs precisely for the aforementioned reasons by stressing that both children's views (participation) and best interests must be taken into account in regard to rules governing their safety, security, and activities.

Children's right to protection and provision are particularly important in view of the fourth principle, the non-discrimination clause. Certainly this is vital for all children,

however, the wording of Article 2 is fundamental to refugee children by explicitly stating that: “States Parties shall respect and ensure the rights set forth...to each child within their jurisdiction.” The last part of the non-discrimination Article, as well as the professed universality of CRC’s application unquestionably compels states to treat foreign national children within their jurisdiction with as much respect and care as child citizens. And while the Convention has only one Article that sets out states’ obligations to asylum seekers, it reiterates these sentiments. In fact, Article 22 explicitly guarantees this for asylum seekers arriving with or without parents or guardians, requiring that States Parties “take appropriate measures to ensure that a child who is seeking refugee status...receive appropriate protection and other humanitarian assistance...”

Despite encompassing a variety of human rights, the Convention is lacking in many respects. Perhaps revealingly, no children were included or consulted in the drafting of the Convention (Ennew, 2002). So at the same time as it professes that children’s opinions and autonomy are critical in the creation of policies, it inconsistently excluded children from participating in the construction of one of the most significant laws affecting them. Therefore, the substance of this treaty reflects what adults feel is important for children, and is hardly a break from earlier sentiments of children as lacking such ‘adult’ traits as rationality, intelligence, responsibility, and competency.

There are two consequences of this oversight. First, the idea of ‘the child’ does not seem to have been wholly destabilized. Indeed, as Ennew (2002) argues in her analysis of the Convention’s applicability to street children, the CRC ostensibly celebrates a particular form of private, domestic childhood. In doing so, it excludes a number of human beings who are children by placing them outside of Western

conceptions of childhood for not acting ‘childlike,’ thereby reinforcing an adult-child dichotomy.

Secondly, there are several necessary child-specific rights missing from the Convention. Freeman (1998:439) identifies three: the right to food; the requirement of children’s consent, especially in the medical context; and the right to have (*pro bono* legal) representation in all proceedings. This last omission is exceptionally detrimental to asylum seeking children, for whom legal representation is essential for successfully navigating the complicated refugee process. Ennew (2002) adds that the Convention fails to guarantee children such powers as the right to not be labeled or described incorrectly, to have their own support systems respected, and to have access to appropriate and relevant services as elaborated by the targeted population. Additionally, the Convention also does not clearly specify that all children should have their asylum applications considered by a judicial or quasi-judicial body, or that such a body has extensive training and experience working with children. Moreover, it does not provide any guidelines on when or how children should be returned to their countries of nationality. Thus, while ensuring that children have the right to be cared for and adopted legally, with their views and best interests in mind, the Convention does not expressly require countries to make proper arrangements for children being sent to another country. As the Canadian Council for Refugees (2002) reports, the removal of children to either third countries or their country of origin is occurring with increased frequency. Thus, while children are guaranteed many protections, these focus most on children’s right protections in the context of the private, rather than public, sphere.

Given these omissions as well as the ambitious goals the Convention has set for States Parties, the extent to which nations have incorporated children's entitlements into their refugee policies are certainly complex. The remainder of the thesis will attempt to outline the explicit procedures Canada and the United States have employed to guarantee that refugee children are properly protected, and the gaps in such protection. The sheer size and complexity of both countries' refugee laws makes it difficult to provide a complete overview of all the issues facing child refugees in the asylum systems, especially since this group generally must meet many of the same legal standards as adult claimants. Still, both countries have taken steps to make the process fairer for children. I will begin my analysis first with Canadian immigration and refugee law, since Canada is a signatory to the Convention and was the first nation to demonstrate it recognizes the problems children face in the refugee determination process.

Canadian Refugee Policies

Canadian immigration and refugee law falls under the jurisdiction of the Department of Citizenship and Immigration (CIC) and is delineated, interpreted, and implemented according to the Act and accompanying Regulations of the day.¹⁷ Since Canada ratified CRC in the early nineties, there have been two immigration and refugee statutes: The Immigration Act (IA78) of 1978 and The Immigration and Refugee Protection Act (IRPA) of 2002, which replaced the preceding legislation. Precise refugee determination clauses are included in Parts 2 and 4 of IRPA, although other Sections, especially dealing with enforcement, are applicable as well. Part 2 sets out the definition of a refugee and a protected person, establishes who is eligible to make a claim or when

such claims are void, provides for the non-refoulement (non-return) of persons at risk, and institutes new processes such as the Pre-Removal Risk Assessment.¹⁸ Part 4 outlines the constitution and laws governing the Immigration and Refugee Board (IRB), to which eligible refugee claims and appeals are forwarded for decision.¹⁹

The most significant similarity between Canada's refugee determination policies under both Acts is the shared origin of the refugee definition in the 1951 United Nations Convention Relating to the Status of Refugees (CSR) and the 1967 Protocol to that Convention, to which Canada is a signatory country. Thus, all persons seeking asylum in Canada must establish that they meet the definition of "Convention refugee" contained in 1A(2) of CSR, which defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such a 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 [and as a result of such events] is unable or owing to such fear, is unwilling to return to it.

Generally under both Acts, all asylum seekers are also guaranteed access to legal representation as well as minimum welfare provisions (Bhabha and Young, 1999).

Furthermore, they may be granted permits to work or attend school pending a decision.

Both Acts share specialized requirements for dealing with child asylum seekers as well. More specifically, both provide for the appointment of a designated representative (DR) to appear on behalf of claimants who are under 18 years of age or who may not appreciate the nature of the proceedings. They further require that the designated representative must be appointed *in addition to* legal counsel.²⁰ The requirements to act as a DR are minimal under S. 19 of the Regulations – all DRs must be at least 18 years of

age, understand the nature of the proceedings, and be willing and able to act without conflict in the best interests of the claimant or protected person. Most of the time, child claimants appearing before the IRB are represented by their parents or legal guardians; so this section is designed to ensure that children without parents or legal guardians enjoy comparable security. Nevertheless, as Sadoway (2001:354) stresses, the DR only acts as a “litigation guardian for the refugee hearing.”

While sharing many common features with IA78, IRPA is a completely new piece of legislation, and has included many significant changes to the refugee (and immigration) process, most of which are beyond the scope of this thesis. Of importance to all child migrants, IRPA was created after Canada became a signatory to CRC (and other international human rights treaties). In keeping with the requirements of ratification, it professes to incorporate children’s rights as specified in the Convention into domestic law. Thus, IRPA explicitly specifies that it “provides for...(e) recognition of Canada’s commitment to the principle of the “best interests of the child”....” This means that the law acknowledges the challenges conventional immigration and refugee processes present to child migrants and directs interpreters to keep this in mind.

Perhaps the strongest protection child asylum seekers enjoy under Canadian law outside of the judiciary is manifest in the groundbreaking 1996 *Guidelines for Child Refugee Claimants: Procedural and Evidentiary Issues* (herein, *Canadian Children’s Guidelines*).²¹ These Guidelines were drafted by the Director of the IRB in response to several factors, but above all, the mounting concern regarding the increasing number of rejections of asylum applications from claimants who did not fit the ‘norm.’ This crisis was identified first in regard to women asylum seekers, whose experiences did not easily

correspond with the definition of persecution as it had been established. Indeed, Oswin (2001:349) contends that Canadian refugee law heavily favours men by assuming the “subject in refugee law is a free, autonomous, rational contract-making individual whose rights are violated in the public sphere by the state.” Accordingly, human rights violations against women, both in the traditional Convention for the Status of Refugees sense and in light of gender-based persecution, received considerable attention in the early 1990s in response to highly publicized negative decisions (Oswin, 2001). In 1991 UNHCR published *Guidelines on the Protection of Refugee Women*, which emphasized the fact that gender-specific and gender-based persecution exist and should be recognized as a basis for asylum. Two years later, UNHCR published *Refugee Children – Guidelines on Protection and Care*, which in some sense reiterates these sentiments by acknowledging that child refugees also face exceptional challenges because of their ages.²² As has been recently elaborated (see Bhabha, 2001, 2002; Bhabha and Young, 1999, 1998; Ayotte, 2001a, 2001b; and Sadoway, 2001, for example) children also face problems meeting the refugee definition, since the same implicit subject under CSR as applied to Canadian law is not just male, but also adult.

Canadian officials responded promptly to the exclusion of women and child asylum seekers by issuing their own sets of Guidelines. The Canadian Guidelines on *Women Refugee Claimants Fearing Gender-Based Persecution* were originally issued on International Women’s Day (March 11) in 1993, and were re-released in 1996, in the same year as the children’s Guidelines. Even if Canada’s *Children’s Guidelines* were preceded by UNHCR’s document, they were remarkably innovative because they applied the need for child-specific attention to the legal context, rather than in relation to care.

As the title suggests, the *Canadian Children's Guidelines* note in the first paragraph that the [then] "*Immigration Act* does not set out specific procedures or criteria for dealing with the claims of children..." Thus, they attempt to provide clarification of the questions surrounding what treatment children require during the adjudication phase. There are two sections to the document, one dealing with the way in which the claims are processed and the other dealing with the way in which evidence is provided and assessed.

Throughout the text, constant reference is made to acting 'in the best interests' of the child asylum seeker, a principle the *Canadian Children's Guidelines* takes as a "fundamental human right of a child." Part one expands on this principle by further refining the appropriate appointment of a Designated Representative (DR) and discussing important measures for processing claims made by children appearing before the IRB. While restating the mandatory criteria necessary for acting as a DR, the *Children's Guidelines* also outline specific factors to consider when assigning a DR, highlighting the appropriateness of his or her "linguistic and cultural background, age, gender and other personal characteristics...". The *Canadian Children's Guidelines* also delineate the minimum duties of the DR, which include such responsibilities as helping the child retain and instruct counsel, assisting the child in obtaining and providing evidence, acting as a witness, and appearing for hearings and conferences. Under the second section, they propose that the Convention Refugee Determination Division (CRDD, now Refugee Protection Division, RPD) ensure minimal processing practices are in place. For example, they suggest that the child be identified and referred to the appropriate child protection authorities as quickly as possible. They require the IRB panel to assign the

claim to an officer, interpreter, and designated representative immediately, and suggest that the claim and other relevant examinations and inquiries are given scheduling priority.

Part Two of the *Canadian Children's Guidelines* sets out procedures for obtaining and assessing evidence regarding child asylum seekers' claims. As important as it is for child refugee claimants to have their applications dealt with expediently, the ultimate determination rests on the ability of petitioners to make their case. In this sense then, it is imperative that adjudicators recognize that at the same time as child asylum seekers have a right to give testimony in support of their claims, their evidence may not be presented as easily or accurately as that of adult applicants. Thus, the *Canadian Children's Guidelines* make several suggestions about child-specific alternatives to the traditional hearing, taking the age and maturity of the child into consideration. For instance, they propose that the hearing, its participants, and what is expected of the child throughout the process are explained at the outset. They further advise that the environment is informal and that questioning is done in a sensitive manner, possibly with the aid of videotape or a liaison. Finally, they advise that the panel seek out evidence from other relevant parties with whom the child has had contact, including family members, DRs, medical experts, teachers, counselors, etc.

Under the second section, the *Canadian Children's Guidelines* describe how the evidence should be assessed by IRB Members, indicating the limitations children may have in describing the persecutory events given their age, trauma, maturity, knowledge of the relevant events, language skills, memory, etc. They also note that children may not be able to express a subjective fear of persecution. Thus, the panel may have to rely heavily or wholly on "objective" criteria, which includes general country conditions and

evidence presented by third parties.²³ Lastly, they recognize that the presence of gaps or disparities in testimony should not necessarily be construed as duplicity. Rather, it should be weighed in light of the type of information the child is trying to present, taking the child's situation into account.

Undoubtedly, the *Canadian Children's Guidelines* have been instrumental in the affirmative determinations of countless unaccompanied child asylum seekers who do not benefit from having their parents or guardians present to provide information, clarification, and support. Still, only narrow legal issues for child asylum seekers are dealt with in this document and there are many shortcomings. This is especially evident in comparison with such documents as the *Canadian Gender Guidelines*, UNHRC's second child-specific 1997 *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, and the U.S. *Guidelines for Children's Asylum Claims*, which will be discussed later. Arguably the major weakness with all of these documents is that none is legally binding.²⁴ As Oosterveld notes, one of the arguments for leaving all Guidelines as open and voluntary directives, at least in the context of gender-based persecution, is that it allows for a balance of competing interests of independence and consistency of IRB adjudicators (1996: 580-581). She further elaborates that IRB Members, in addition to providing written decisions for all negative determinations, are required to provide written decisions when the *Canadian Gender Guidelines* are not respected, regardless of the outcome. Furthermore, failing to respect guidelines has been recognized as a procedural error by courts, and therefore a basis for appeal (581-583).

Sharryn Aiken argues that one of the fundamental flaws in Canada's refugee determination system is the politicization of the appointments process and the competence of Board members (1999:12).²⁵ So even if the need to balance uniformity with IRB Members' discretionary freedom is appropriate in the context of gender-based asylum procedures, it is absolutely inappropriate for panels to selectively apply the *Children's Guidelines*, chiefly they are already limited in scope. One of the problems with the *Children's Guidelines* is that, unlike the *Gender Guidelines*, they do not provide substantive guidance in analyzing cases. In addition to providing procedural guidance to IRB Members, the *Gender Guidelines* also provide assistance in analyzing gender-related issues in refugee claims submitted by women. Accordingly, the *Gender Guidelines* describe common forms of persecution that women experience and specifically link gender persecution to one or more of the grounds in the definition of a Convention refugee (Ramirez, 1994). However, the *Canadian Children's Guidelines* are limited to procedural and evidentiary considerations, noting that: "with respect to the merits of the child's claim, all of the elements of the Convention refugee definition must be satisfied."²⁶ There is no comparable delineation of how the Convention definition as it is set out under Canadian law can be applied to children or how some forms of harm experienced by adults are persecutory to children.²⁷ Given that children have a more difficult burden to meet than (adult) women, since IRB Members, without direction and sometimes limited knowledge of refugee law, have to make the appropriate links between the Convention and children's experiences, it is imperative that the *Children's Guidelines* are followed precisely.²⁸

Failure to follow minimum procedural directions is always detrimental to the child applicant, and is in strict violation of Canadian and international law. Still, it happens frequently. One commonly confronted problem is that adults, often those without proper training, make discretionary decisions according older and older looking children lesser leniency than younger and younger looking children.²⁹ The obvious consequence of such decisions is that it is more difficult for these children to make successful refugee claims, especially when older child claimants' are treated like adults, even when they are attempting to explain persecution that occurred over a long period or at a much younger age. IRPA may exacerbate this problem by reducing panel sizes to one member, which will likely result in increased unevenness in the application of the *Canadian Children's Guidelines* across different panels, particularly in regard to the way in which the evidence is reviewed and weighed.

Canadian immigration and refugee policy is also lacking in other respects as well. The *Guidelines* are important for children in the determination phase of their claim, and are appropriately issued by the branch of CIC that deals only with that element of the asylum application. However, the department has not issued comprehensive supplementary Guidelines on how children are to be treated while their claims are pending. Possibly because Canadian law already provides for the appointment of legal counsel and welfare provisions, the only additional protection enshrined for children under refugee law is the appointment of a designated representative. As Sadoway reminds us, the DR was never envisioned as a legal guardian for a separated child asylum seeker. Yet at the same time, CIC assumes no ongoing responsibility for refugee claimants unless they are detained (2001: 354). If there is no appropriate adult to take

custody of the child, the child is turned over to the appropriate provincial welfare authorities. Ayotte (2001a) reports that the designation of children's care and protection as a provincial responsibility means that, depending on where the child arrives, there are differences in the available services, despite the guarantee that all children under 18 years of age should enjoy child-specific safeguards. For instance, children in Ontario are not provided access to care by the Children's Aid Society after they reach the age of 16, while in British Columbia, youth are protected up to age 19. This is one example of how some child asylum seekers are unnecessarily left to fend for themselves. Certainly there is a need for better co-ordination between the federal and provincial authorities in this respect to ensure that all minors receive uniform treatment.

Canada's increasing reliance on detention of asylum-seeking children is also becoming something of a problem. Ayotte (2001a) maintains that immigration officers normally prefer not to detain asylum seekers, especially unaccompanied children. Guavreau and Williams (2002), however, argue that Canada has committed to detaining more people as a measure of improving security and deterrence. Section 55(2) of IRPA provides for detention if the officer believes the subject is a public threat, will fail to appear for removal, or is generally not satisfied with the identity of the claimant. Current CIC policy requires Immigration officials to detain all persons who lack identity documents upon their arrival, regardless of age. However, IRPA provides for the mandatory review of all detention decisions within seven days of detention, to be made by a member of Adjudication Division of the IRB. Their job is to determine whether CIC's initial decision was correct and whether there are alternatives to detention. In the case of minor children, they are bound by Section 60 of the *Act*, which recognizes that "a

minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.”³⁰

Additionally, the Chairperson of the IRB published *Detention Guidelines* in 1998 to better direct decision-makers in their judgments. It focused heavily on relevant case law concerning the lawfulness of detention, especially as it relates to the Charter of Rights and Freedoms. For that reason the major focus is on the issues surrounding long term detention, the definition of ‘danger to the public’, what procedure and evidence is necessary to justify detention and again, other alternatives to deprivation of liberty. Moreover, *The Detention Guidelines* state that the detention or release of a child should be guided by the CRC, although there is no mention of the appropriate setting of detention, a major concern which weights heavily where children are concerned.

In comparison with other countries, the detention of minor asylum seekers is not an ongoing problem in Canada.³¹ Still, there have been several instances in which CIC detained children pending decision. The best-known case was in 1999 when 134 minor Chinese children arrived on the coast of British Columbia in a boat suspected to be marshaled by human traffickers. That year also saw detention of unaccompanied minors in Ontario as well as in Quebec, again in instances where smuggling/trafficking was suspected. CIC’s primary rationalization for taking these children into their custody was that they had concerns that the children would either flee or be abducted by the smugglers. These safety concerns are legitimate, although as the UNHCR 1997 *Guidelines* and CRC point out, children should not be incarcerated, especially for long periods of time because children’s need for play, education, health and emotional care, etc. are rarely met in prisons. Additionally, as with adult asylum seekers who are fleeing

all kinds of persecution, prison usually aggravates the suffering caused by the experiences that led to their flight in the first place. The consequence of this is that asylum seekers become emotionally, psychologically and even physically depressed, which hinders their desire or ability to make successful asylum claims. Ward (2001) reports that these problems are common among detained children who are treated like criminals even though they have broken no laws. Sadoway argues that CIC's concern about smugglers and traffickers is not sufficient reason to justify children's incarceration, and suggests that other alternatives such as the use of safe houses be discussed.

As much as Canadian refugee laws and procedures toward unaccompanied minor asylum seekers leave much to be desired, Canada is still recognized as a leader in its observance of children's rights as well as in its fair and humanitarian treatment of refugee claimants. Generally, we tend to 'look good' by comparison, most often with the U.S. Thus, I will now examine the procedures provided for unaccompanied child asylum seekers in the United States.

American Refugee Policies

Since the terrorist attacks in the U.S. in September 2001, American immigration and refugee procedures have changed dramatically. Although they had previously suffered from complication and disparity because of the numerous stages at which determination and removal decisions can be made, the new powers conferred on immigration and other state agencies, as measures of terrorist prevention and national security, have exacerbated pre-existing difficulties. One of the biggest problems for refugee claimants is the administrative reorganization of immigration and citizenship

functions to fall under the umbrella of the Department of Homeland Security (DHS), which has further criminalized noncitizens. From 1940 until March 1, 2003, national policy was under the control of the Immigration and Naturalization Service (INS), a branch of the Department of Justice. Under the new regulations, the INS has been dissolved and reorganized as three new departments, including the Bureau of Citizenship and Immigration Services (BCIS).³² BCIS is mandated to handle most immigration and refugee services – it is responsible for issuing documents, making initial asylum determinations, and providing citizenship training, among other things. There are two notable exceptions. The Department of Justice (DOJ) retains control of the Executive Office for Immigration Review (EOIR), which is in charge of the Board of Immigration Appeals (BIA) and other immigration judges. Of most importance, control over the care of unaccompanied minor asylum seekers has been transferred away from other refugee services and has been given to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services for Children and Families, which is also within the Department of Justice.

Similar to most immigration act changes in the United States, the 2001 Immigration Reform and Accountability Act (IRAA), including its reorganization of the INS and its amendments to immigration law, will continue to apply to the interpretation of Title 8 of the U.S. Code of Federal Regulations. Unlike in Canada where one statute is repealed upon replacement, the basis of American immigration and refugee law is the Immigration and Nationality Act.³³ In this sense, U.S. law enjoys a great deal of continuity and allows for the regular statutory update of certain legal issues, as they are decided in the judiciary.

The United States is not a signatory to the United Nations Convention on the Rights of the Child. This makes tracking the policies before and after a national implementation date impossible. However, since the Convention has come into force generally, there have been three legislative modifications to the INA: the Immigration Act (IA) of 1990, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and the aforementioned (IRAA) of 2001. Normally such new bills involve making changes, introductions, and the retractions to INA, and each has its own emphases in this respect. Capaldi (1997:26-28) provides an excellent summary of the highlights under each new law, noting that while IA90 expanded immigration allowances and offered a new route for entry in the diversity lottery, IIRIRA scaled back many of these and other, particularly monetary, provisions for asylum seekers and other immigrants. He claims IIRIRA: “specified grounds for removing illegal aliens, restricted public benefits for aliens and immigrants, imposed sanctions on employers of illegal aliens, and tightened controls on entering the U.S.” These new rules included the creation of the controversial ‘expedited removal’ process, which allows immigration officers to detain and place in accelerated removal, immigrants who have arrived with improper or forged documents, entered the United States unlawfully, or who are otherwise ineligible to make claim to asylum or settlement.³⁴ For its part, IRAA includes similar changes, but the principal objective is the restructuring and coordination of authority over immigration and other departments to respond to security matters.

All three statutes share a common definition of a Convention refugee, which under American law is similarly derived from the 1951 and 1967 United Nations CSR, found in section 101(a)(42) of the Immigration and Nationality Act, and will not be

reiterated. However, this has not always been the case. To be sure, Heer (1996:55-56) remarks that the original refugee definition had traditionally been defined in U.S. law as ‘individuals fleeing communism’ and was not expanded to conform to the UN definition until 1980. Despite lagging behind other countries in this respect, the American government did take many steps to modernize their asylum system and catch up to other nations. Of course, many of the origins mentioned earlier concerning the exclusion of different groups, particularly women and children, from the traditional refugee definition were common worldwide. In fact, UNHCR’s 1991 *Gender Guidelines*, and 1993 and 1997 *Children’s Guidelines* are general directives for all countries. Yet, few countries responded to these issues as quickly as Canada, or interestingly, the United States. As stated, Canada was the first country to create procedures for deciding both women’s and children’s refugee claims. The United States quickly followed suit and was among the first nations to adopt gender guidelines and was actually the second country to publish guidelines for child refugee claimants. The *American Children’s Memorandum* (1998) is interesting because it went further than the *Canadian Children’s Guidelines*, and was thus groundbreaking and innovative in its own right.

First distributed on Human Rights Day (December 10th) in 1998, the children’s guidelines are actually a *Memorandum* from then Acting Director of the Office of International Affairs, Jess Weiss, to all non-judiciary asylum decision-makers who make determinations in the United States and abroad.³⁵ Unlike the *Canadian Children’s Guidelines*, which focused solely on procedural and evidentiary issues in the asylum process, the *U.S. Children’s Memorandum* is much more comprehensive, and to some extent, deals with substantive issues in the asylum determination process. Generally, it

calls attention to the value of international legal instruments and assumes that the *Memorandum* will observe important examples set for children's asylum rights, including UNHCR's two child-specific documents, Canada's *Children's Guidelines*, as well as the CRC. Of particular significance, the 'best interests of the child' principle is also taken as the necessary standard for the adjudication of children's asylum cases in the American context, noting that it is "a useful measure for determining appropriate interview procedures for child asylum seekers..." as is mentioned throughout the text.

The *U.S. Children's Memorandum* is divided into five sections. The first and last include general remarks about the problems children face as asylum seekers and deal with ongoing biases within the asylum system. The fourth section discusses children who 'age out,' which means the asylum seeker turns 21 before their asylum interviews have been conducted. Finally, sections two and three address the procedural, substantive, and evidentiary issues children face and will be the focus of this discussion.

Section Two has a similar focus as the *Canadian Children's Guidelines*. Although one of the most important protections under the *Canadian Guidelines* is the appointment of a DR for all child asylum seekers, neither the *American Memorandum* nor American law in general require that children have any legal representation or a designated representative appointed to act on their behalf.³⁶ Instead, the *Memorandum* suggests, "it is generally in the child's best interest for the Asylum Officer to allow a trusted adult to attend an asylum interview." According to the *Memorandum*, the trusted adult acts more like a general support person than a guide for the child, although the role this particular person has in regard to supervision and care is not elaborated. In addition, the government takes no responsibility to ensure that each child has a trusted adult

present during the asylum interview or that the trusted adult is an appropriate person.³⁷ In this sense then, the trusted adult bears little resemblance to the DR, who in Canada as stated, assists the child with such functions as retaining and instructing counsel, providing evidence, etc. In the United States, the trusted adult is assumed to be a person with whom the child has a relationship, and only provides support and comfort.

Aside from the trusted adult, this section of the *U.S. Children's Memorandum* also elaborates several other procedural requirements for children asylum seekers. It stresses that children be given interviewing and scheduling priority, and even extends this provision to those up to age 21. It advises that Asylum Officers be given appropriate child-sensitive training, particularly in the context of child-sensitive interviewing techniques. Finally, it describes important features of a child-sensitive interview and is quite thorough in this respect. It includes detailed strategies and guidance for improving the individual interview process. Thus, it remarks, for example, that children may be more reluctant than adults to talk to strangers, may feel embarrassed speaking about certain experiences through some interpreters, especially family members, and may show more signs of apprehension. To overcome these difficulties, the *U.S. Children's Memorandum* suggests that Asylum Officers direct the interview using techniques such as active listening and child-sensitive questioning. Thus, it encourages Officers to begin and end interviews with neutral 'rapport-building' conversation to help the child relax before and after the interview. It further suggests that Officers make an opening statement that informs the child of the procedure, encourages the child to speak up when a question is not understood or is unanswerable, and recommends that the child be reassured and encouraged throughout the process. The *Memorandum* advocates that the

interviewer take the child's age, gender, language, and cultural background into perspective when asking questions or weighing answers, and directs Officers to ask questions about occurrences of which the child has knowledge.³⁸

The *U.S. Children's Memorandum* offers similar ideas in terms of the assessment and evaluation of children's evidence. It suggests that officers consider other sources of evidence, including testimony from children's family, friends, counselors, and teachers, as well as other objective evidence such as country conditions and physical evidence. However, it provides further guidance to Asylum Officers in discussing issues of credibility, noting that the child's demeanor, including evasiveness or uncooperativeness should be judged in light of the power relationship between the officer and the child, the child's experiences of trauma or other cultural differences that may impact adult-child interactions.

Section three deals with legal issues an Asylum Officer may encounter when conducting a hearing with a minor and discusses the process in light of relevant jurisprudence. Above all and like the *Canadian Children's Guidelines*, the *U.S. Children's Memorandum* notes that existing law is not altered in any way and that children must meet the definition of a Convention Refugee as it is set out under existing American law.³⁹ The document does describe how the definition of persecution can be applied to child asylum seekers, expressly stating that "the harm a child fears or has suffered, however, may be relatively less than th4t [sic] of an adult and still qualify as persecution." Moreover, Section 4(d)(1), explains how children's claims can be linked to the "on account of" component of the refugee definition, which includes the five aforementioned forms of persecution based on race, religion, nationality, political

opinion, or membership in a particular social group. While directing Officers to explore all possible Convention grounds, including imputed political opinion, the *U.S. Children's Memorandum* provides greatest detail of the various ways in which children make claim to persecution based on membership in a particular social group, deeming such claims to be "frequently difficult, novel, and analytically complicated."⁴⁰ In this section, the *U.S. Children's Memorandum* explains such issues as general legal factors and definitions under American law, noting the way in which social groups can be defined by the child's family membership, can be experienced in whole or in part because of their age, and can be perpetrated by public or private actors. Again, the *Memorandum* qualifies that the ability of children to connect their fear to these or other grounds must be reviewed in view of their age, maturity, trauma, and probable knowledge.

Likely, Canada's positive response toward nontraditional asylum seekers prompted the United States to make similar changes to its law. As in the Canadian case, the American document has been valuable in ensuring that child asylum seekers enjoy the basic protection afforded to them under international law. Compared with the Canadian text, the *U.S. Children's Memorandum* provides a richer explanation of the problems child asylum seekers face in making refugee applications, and this detail helps Asylum Officers connect the Convention to child-specific forms of persecution more easily (see Table 1).

Table 1: Legislative protections for unaccompanied minor asylum seekers by country

Legislative Issue	Canada	United States
Children's best interests codified in law	Yes	No
Non-legal adult representative allowed at hearings	Yes	Yes* (guaranteed at hearings with Asylum Officers only)
State-funded legal counsel	Yes	No
Guidelines directing asylum decision-makers in evidentiary and procedural child-specific issues	Yes	Yes
Guidelines directing asylum decision-makers in substantive child-specific issues related to persecution and the Convention Refugee definition	No	Yes
Review of all child asylum seekers' claims by independent judicial or quasi-judicial body	Yes	Yes* (Some children make affirmative claims with Asylum Officers)
All unaccompanied minor asylum seekers have access to the same protections regardless of whether the claim is made after legal immigration or it is made upon being apprehended	Yes	No* (Children whose removability is established cannot make affirmative claims)

Still, this does not mean that child asylum seekers fare better in the U.S. In fact, exactly the opposite is true. While under Canadian law, the *Children's Guidelines* represent the best protection child asylum seekers have; in America, the *Children's Memorandum* is about the *only* protection afforded to child refugee claimants. Indeed, the problem with the *U.S. Children's Memorandum* is not just that the document has no legal worth. More importantly the *Memorandum* has very limited application. In Canada, the IRB is the

sole body that hears asylum applications. However, under American asylum law, child asylum seekers make claims in front of an Asylum Officer if they enter the country legally (for example, in possession of valid travel documents) or make their claim in front of an Immigration Judge if they have entered unlawfully. The *U.S. Memorandum* only applies to the former group. Additionally, neither the appeals division (the Board of Immigration Appeals, BIA) nor the Federal Courts are bound by the *Memorandum*. Moreover, the *Memorandum* has no substantive statutory complement. Thus, in fact, all three American laws lack any codified differentiation between adult and child refugee claimants (Bhabha, 2001). As David Thronson (2002) observes, children's rights mechanisms are common in many areas of U.S. law, but are largely absent in the immigration context. Instead, the definition of a child as it stands under American immigration law situates children in the role of possession or object of their parents' control, and barring the presence of an adult guardian, children are regularly treated as if they were adults themselves. As such, most children, especially older children, who arrive in the U.S. unaccompanied are treated as adults – forced to meet the same substantive rules, evidentiary requirements, and procedural complexities, even if the *Memorandum* expressly warns against this situation. In this sense, the American system leaves more room for arbitrariness and inconsistency, principally because not all children have access to the protection set out in the *U.S. Children's Memorandum*, or indeed to being defined under the law as children.

Nowhere is this more evident than in the structure of the asylum referral process. As mentioned, Canadian law guarantees all 'eligible' refugee claimants' a quasi-judicial review of their case as well as the assistance of legal counsel. What is more, this review

is conducted by the IRB, which is a separate branch of CIC. Under American law however, refugee claimants face additional obstacles because such safeguards are lacking. Even though the enforcement and service functions have been split under the new act, unfortunately most asylum seekers encounter the enforcement agencies, which are entrusted with disciplinary powers. For example, potential asylum seekers are subject to the removal or the expedited removal process. While the former forces the INS to prove in front of a judge that a migrant is removable, the latter allows immigration officers to immediately return persons who do not have valid travel documents or who attempt to enter the U.S. by misrepresenting themselves. Child migrants are exempt from expedited removal, but not regular removal proceedings. As mentioned, those who indicate a fear of persecution are supposed to be referred for a 'credibility' hearing before being removed expeditiously. However, advocates have noted that many potential asylum seekers are threatened or pressured into 'voluntarily' withdrawing from the U.S., or are not even told that they may apply for refugee status (Morton & Young, 2002). Asylum seekers who actually reach the credibility hearing stage must then show that their fear is not groundless or else risk being placed in regular removal proceedings (Knight, 2001). Upon doing so, they are directed into the normal adjudication process for full consideration of their asylum claims, a point at which they must then establish they have a well-founded fear of persecution.

Even though unaccompanied minors are generally also supposed to be exempt from this process, the manner in which many children's ages are ascertained when they lack identity documents is unreliable. As Glickman (2002) argues, American officials frequently assess age by physical appearance or the use of scientific procedures such as

dental or bone x-rays, even though these tests are known to be inaccurate and have been abandoned by other countries and even other U.S. departments. In many such cases, children are not treated as minors and therefore do not benefit from the *Memorandum* or other child-specific provisions. Moreover, they may be subject to expedited removal despite their real age, since verification is difficult, time consuming, and surely requires adult or legal assistance, something that a majority of separated minor asylum seekers lack.⁴¹ Moreover, their exclusion from expedited removal does not extend to ‘regular’ removal proceedings.

As problematic as it is to treat children as adults during asylum hearings and procedures, the ongoing issue that most refugee advocates highlight is the widespread use of detention. The rationale for detention is similar to Canada in the United States in that refugee claimants must not be detained “arbitrarily.” Rather, they must lack identity documents, be a threat to national security, or be unlikely to appear for proceedings. However, the U.S. lacks comprehensive detention guidelines for asylum seekers and has a lower number of judicial detention reviews than in Canada (Acer, 2002). As Whitaker (2002) has argued, immigrants in Canada are detained with cause, but in the U.S., immigrants are detained on suspicion alone. Indeed, the American detention system is plagued with due process issues, particularly since the agency responsible for removal is also the agency responsible for custody and physical care (Bhabha, 2001). Generally, the INS’s detention policies for asylum seekers have been substandard. Often the facilities chosen for adults are totally inappropriate – they are federal or state penitentiaries that house convicted criminals, and have restrictions on communication, exercise, access to outside, access to legal counsel, counseling, religious direction, health care, and so on

(Young, 1999). Unfortunately, unaccompanied child asylum seekers are detained in similar conditions and most child refugee advocates and scholars agree that this is a common problem, noting that between 4000 and 5000 separated refugee children are taken into custody each year, and many are placed in detention facilities (Bhabha and Young, 1999). Again, these children experience a range of physical and emotional problems. Stories of physical or emotional abuse by guards or other inmates, physical restraint such as handcuffing and shackling, and generally being denied visitors, play, health care, and educational direction are common (Women's Commission for Refugee Women and Children, 2002). Some children have even been transferred literally across the country without notification to attorneys, family members, and even the child (Bhabha, 2000).

The issue of abuse experienced by children in detention was first addressed in 1985 when a class action lawsuit challenged the constitutionality of detention policies and practices toward separated minors taken into custody by the then INS. The plaintiffs and the government eventually settled out of court, in a resolution commonly referred to as *Flores*. Generally, the document addresses a range of minimum standards of care for detained children, which attempt to deal with their physical, mental, and emotional well being. Indeed, paragraph 2(11) of the agreement asserts that the INS must "treat children with dignity, respect, and show special concern for their vulnerability as minors." Still, the agreement has been violated countless times and was scheduled to terminate in 2002, which would have left child asylum seekers with no protection. However, under the new law IRAA, the care of children has been reassigned to the Office of Refugee

Resettlement to alleviate the inherent conflict of interest faced by the INS, who act toward children as both “prison guard and parent.”

Conclusion

Children’s rights as they are set out by the United Nations Convention on the Rights of the Child are wide-ranging and set out the minimum protections children within a particular jurisdiction should be afforded. Still, neither the Canadian nor American policies toward unaccompanied minor asylum seekers show a great deal of consistency or real fairness. Certainly both nations recognize that child refugee claimants face dilemmas because of their age and vulnerability, yet serious problems remain. The values espoused by the CRC seem to have greater resonance in Canadian legislation. Canada’s refugee law specifically endorses the principle of making decisions in children’s best interests while under U.S. refugee law, minor asylum seekers are not specifically protected by the legislation. Thus, Canada has a wider range of protections for minor asylum seekers, although the primary legal directive governing how their claims should be adjudicated, the *Children’s Guidelines*, are inadequate. The *U.S. Children’s Memorandum* is comprehensive and deals with a wide variety of procedural, evidentiary, and substantive issues that affect child refugee claimants. Unfortunately, this is the only protection child refugee claimants have as children, and it is only binding on a small fraction of asylum determination bodies. At the same time as refugee children lack sufficient legal protection, both countries also leave them vulnerable in other ways. The major problem is that both countries continue to rely heavily on detention even though the CRC expressly states that this is a measure of last resort. The reorganization of

detention powers in the U.S. is a much needed improvement. However, their continuing refusal to provide child refugees with guaranteed *pro bono* legal counsel or even a DR needs to be reconsidered. Moreover, the U.S. seems to be excluding older children from child-specific protections by forcing ‘men’ 16 years of age and older from certain ‘terrorist producing’ (Muslim) nations to voluntarily present themselves to immigration officials for interview. It almost seems that the shortcomings in Canadian refugee policy toward separated asylum seeking children are aspirations for refugee advocates in the United States, which implies that Canada’s system is much better. Undoubtedly, Canada’s ratification of CRC is one reason this nation affords child asylum seekers better protection. While this is surely a plausible conclusion, it is not the entire story. Compared with most Western nations, Canada is known for greater leniency toward refugee claimants in general. Thus, while it is important to compare Canadian and American legislation toward child refugee claimants, one certainly has a better understanding of how child claimants are situated by comparing the specific protections they are afforded to those of adult claimants. Looked at in this way, Canadian legislation offers little in the way of child-specific safeguards. This will become clearer throughout the thesis as I examine judicial decisions for unaccompanied minor asylum seekers. Of particular importance, this thesis addresses the question: if Canada has ratified the CRC and has better refugee legislation, how and why are American and Canadian judges’ decisions both similar and different? In the following chapter, I will examine Canadian judicial responses to child asylum seekers.

CHAPTER THREE

REFUGEE DETERMINATION IN CANADA: IN THE CHILD'S BEST INTERESTS?

This chapter examines some recent judicial and quasi-judicial decisions in Canada pertaining to child refugees. In light of asylum determinations made by the Federal Court of Canada (FCC) and the Immigration and Refugee Board (IRB), I will consider legislative provisions as well as theoretical issues outlined in the two previous chapters.⁴² Although I will focus on claims made by separated children, the majority of child asylum seekers enter Canada accompanied by a parent or guardian, and often their cases are based on their family's claims. In these situations, the basis of persecution (i.e. race, political opinion, etc.) is often considered imputed onto the child because of the familial relationship. Since unaccompanied minors have difficulty making this argument, their cases tend to follow a slightly different pattern. My analysis will concentrate on two prominent types of claims made by separated asylum seeking children – those in which the child is fleeing abuse or neglect, and those in which the claimant has been trafficked/smuggled into the country.⁴³ I will also examine cases in which the Designated Representative's (DR) actions or credibility have hindered the child's claim.

I will argue that the IRB and FCC generally have trouble recognizing child asylum seekers as children. By this I mean to say that, even as there are special, albeit

limited, provisions for children, the refugee hearing is almost always governed as if the subject were an adult (Bhabha, 2001, 2000; Bhabha and Young, 1999, 1998; Aiken, 2002, 1999; Sadoway, 2002, 2001, 1997; Stasiulis, 2002b). More specifically, refugee law has been developed in relation to adults, and children experience difficulties making asylum claims because of this. There are several consequences of such treatment for children. First, participation and protection rights are constructed as irreconcilable. Secondly, older and middle age children (between 13 and 17 years old) are usually characterized outside of childhood and the process I earlier identified as adultification frequently means that their experiences of persecution are deemed as ‘difficulty’ or ‘hardship,’ or even described as an attempt at (exploitative) economic gain. This notion is often supported by highlighting the racial and ethnic difference, or ‘Otherness’ of the claimants and or claimants’ countries of origin. Indeed, in most child asylum cases, government officials highlight the superiority of Western countries and the inferiority of ‘Others.’ In doing so, the FCC or IRB conceptualizes childhood in contradictory, and ultimately, inconsistent ways. The position of Canadian government officials seems to be such that childhood is relative, and only some, generally younger children, are deserving of international children’s rights protection.⁴⁴

The ‘Best Interests of the Child’ and Refugee Law: Preliminary Considerations

Before beginning, some qualifications and important issues in Canadian refugee law need to be elaborated. The previous paragraph may suggest that children’s asylum applications are more likely to be denied. Unfortunately, Citizenship and Immigration Canada does not keep a record of the number of minors recognized as Convention

refugees, separated or otherwise. However, some investigation of children's claims suggests that they are at least as successful, if not slightly more successful, than adults' refugee claims.⁴⁵ It would therefore be a mistake to assume that adult asylum seekers fare better than children do in this phase of the process, when this is not necessarily the case.

Most of the selected cases were decided negatively and certainly are not representative of the range of asylum decisions. Despite being unrepresentative of case outcomes more generally, these decisions are interesting and valuable because they are a sample of those applications which are not easily classifiable according to a traditional Convention refugee ground. Many of the cases I am not considering involved quite straightforward circumstances; involving, for example, persecution of a child based on his or her race or religious affiliation. Thus, they did not have the same element of child specificity and did not require the IRB or FCC to really confront the fact that the asylum seeker was a child. The cases below are distinguishable because the nexus with the Convention refugee definition requires the adjudicator or judge to consider child-specific experiences of persecution. In this sense, their decisions are illustrative of a trend in asylum policy in which children make refugee claims based on human rights violations that are largely incomprehensible to adults. Bhabha and Young (1998:762) have argued that these claims are important because "situations that amount to persecution when applied to children (but not adults) are the most likely to give rise to problems for children seeking asylum, since similarly placed adults may fail to establish an asylum claim." Thus, they reveal how the courts construct and produce child refugee claimants,

especially those who are unaccompanied, in ways that have implications for how both children and asylum are conceptualized.

With this in mind, it is important to briefly outline existent jurisprudence that has had a significant impact on child-specific asylum decisions. Only a small number of refugee cases have been decided by the Supreme Court, and only one decision, the case of *Mavis Baker v. Minister of Citizenship and Immigration* [1999], has dealt with the question of Canada's obligation to the principle of the best interests of the child as set out by the United Nations Convention on the Rights of the Child in the realm of immigration decision-making. This judgment involved a Jamaican woman, Mavis Baker, who entered Canada in the early 1980s as a visitor and worked as a live-in domestic worker until 1992. After suffering from debilitating psychological disability, including depression and schizophrenia, she applied for social assistance and was subsequently tracked by Immigration authorities and ordered deported. She applied to remain in Canada for humanitarian and compassionate reasons (H & C), and based her application on the length of her residency in Canada, her mental breakdowns, her doctors' belief that she would have a relapse if returned to Jamaica, and her responsibility as the mother of four Canadian-born children, two of whom she supported financially. Although Immigration Canada initially rejected her application, the Supreme Court overturned the decision. The Supreme Court Justices based their decision on several factors. First, they noted that Immigration Officer Lorenz showed prejudice in his assessment of her circumstances. Lorenz's decision to reject her application rested on observations about her income level, the number of children she had had, and her apparent inability to contribute economically in the near future. In other words, he seemed to characterize her as a pariah on society.

In the Court's view, the Officer's comments did not suggest that enough weight was given to the hardship Ms. Baker or her children would suffer if they were separated. He said, for example: "she of course will be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are not H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that?" (cited in para. 5; capital letter emphases in original notes). Indeed, the Court concluded that the officer was completely dismissive of the interests of Ms. Baker *and* her children, despite international human rights assurances to the contrary. Therefore, they decided the decision was "an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned." (para. 73).

Baker was hailed by child activists because it emphasized that children's rights, as they are set out in the CRC, have domestic policy importance because they help inform the appropriate approach to administering law (Browne, 2002). The judgment has accordingly been influential to laws governing such matters as youth crime, adoption, divorce, and education. Yet even as the *Baker* case has augmented Canadian children's rights, it did not deal with Canada's obligations to the best interests of *all* children within the country's jurisdiction, *per se* (Aiken, 2000). In relation to immigration policy, it more exactly addressed the degree to which Immigration appeals decisions must prioritize the well being of Canadian citizen or permanent resident children of adult foreign nationals. In other words, the issue was whether Canada has an indirect obligation to protect its young citizens when making decisions about their parents. Never in *Baker* were the interests of foreign national children tackled directly. To this day, the Supreme Court of Canada has yet to hear a child refugee's case. Certainly, the absence of

Supreme Court decisions in this area makes one wonder what value child refugee issues are ascribed by the court and evokes appropriate questions about the invisibility of child asylum seekers in domestic policy.⁴⁶

This interpretation is plausible since the milestone recognition of the best interests standard, as it is articulated in *Baker*, includes significant qualifications about the country's obligations to children's welfare. In a certified question asking whether children's interests must be a primary consideration, the Court responded as follows:

The principles discussed above indicate that, *for the exercise of the discretion to fall within the standard of reasonableness*, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. *That is not to say that children's best interests must always outweigh other considerations*, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable (para. 75; emphasis mine).

Even though Stasiulis (2002b) has rightly argued that the *Baker* decision "...was significant and undoubtedly pressed the Canadian government into giving tangible expression to Canada's commitment to the CRC in its new immigration law" (520-1), the noticeable shortcoming is that children's 'best interests' remain only an expression in the refugee context. The principle, as it has been laid out in *Baker*, offers no material benefit to children seeking asylum because the decision would only be unreasonable if it failed to afford children's interests 'substantial weight.' However, Canada's definition of a Convention refugee does not make any reference to children's best interests; rather, it only considers how individuals can stake claim to refugee protection by identifying the preexisting innate or unchangeable characteristic that provoked persecution. Although

children have made successful refugee claims where their social group has been age-based, or their persecution has been exacerbated by their age, it is ultimately the principle that children's best interests need not be a consideration in the process of adjudicating a refugee claim that is problematic. Instead, the best interests principle is attached to the Immigration and Refugee Protection Act and the *Canadian Children's Guidelines*, not the definition of a refugee or the outcome of a negative finding, removal from the country.

As mentioned, to be granted status in Canada, child asylum seekers must base their claim on a well-founded fear of persecution stemming from one or more of the five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group. Failing to do so results in removal, an action that is almost always contrary to any asylum seeker's interests, but particularly children's. Thus, the unfortunate consequence of the Supreme Court's silence with respect to child refugee claimants, despite their otherwise progressive stance on children's rights, is that Canada's legal obligation to asylum-seeking children's rights has not been fully clarified. Children's best interests seem to apply only to 'regular' immigration circumstances, which means that adults without immigration status, although not asylum-seeking adults, benefit from having citizen children, and yet some children within Canadian jurisdiction, namely asylum seeking children, are not given equal consideration. Accordingly, children's interests are only important insofar as they already have status that allows them to make claim to protection by the Canadian government. So it seems that as long as adjudicators make reference to the refugee child's best interests in their decisions, the limitation of the asylum definition is considered reasonable. Consequently, refugee

children's interests in the refugee process are little more than rhetoric, since their interest to remain in Canada, as outlined for foreign national adults in *Baker*, is not recognized. Thus, the refugee process – including the legal requirements and standards – is exactly the same for adults and children.

Even if one were to accept that the Convention refugee definition is of greater consequence than child asylum seekers' right as children to remain in the country, certainly their welfare can still be comprehensible. I have already stated that it is in their interests, and Canadian officials recognize this, to have legal counsel, adult representatives, and to participate in their hearings. However, there is an additional element of refugee children's interests that is worthy of consideration – their interest to have persecution, as children experience it, properly assessed by adjudicators and judges. By this I mean that the judiciary has a duty to consider the implications of refoulement from a child's perspective since refugee law is mostly about adults. Returning any unsuccessful refugee claimant raises concerns about the possibility of future persecution. However, this concern is exacerbated for failed child refugee claimants. Because Canadian authorities must make arrangements about transference of custody, they may contact the persecutors (for example, government officials or even parents) directly. Even if Canadian authorities decline to contact children's guardians because of apprehensions about persecution, the refoulement of any children who arrive in Canada alone prompts questions of custody and care. This may have the inevitable result of allowing more unaccompanied children to remain in the country; however, it certainly does not weaken the refugee definition or the interest of the state to ensure that all

refugee claimants meet the Convention refugee definition that has been adopted in Canadian law. In fact, it is a matter of natural justice.

This chapter will consider how adjudicators' and judges' decisions have met this obligation. The Supreme Court's silence on how to conceptualize and measure refugee children's best interests in relation to persecution can account for the variance in asylum decisions since there is little or no directly relevant higher court from which guidance to draw. As will be shown, adjudicators and judges need only say that they considered the child's interests to escape criticism, regardless of whether their decisions demonstrate that refugee children's welfare has been contemplated at all. Indeed, this dilemma will become clearer throughout the chapter as I explore a selection of Canadian asylum decisions, beginning first with IRB judgments in which the credibility or behaviour of the DR is in question or damages the child's claim. Even though these cases generally involve a failure among IRB Members to incorporate children's rights instruments in administrative aspects of the application, the decisions are illustrative of my larger argument about the adult-centricity, racism, and incompatibility of participation and protection rights in the asylum system.

Children's Best Interests and Adult Negligence in Asylum Determinations

A successful refugee claim depends on the ability of the claimant to provide evidence that the IRB accepts as accurate and trustworthy. Credibility is weighed according to several factors: whether the story is corroborated by third party evidence, whether the story is plausible, and whether applicants' testimony is specific and appears genuine. All asylum applicants, including children, have the right to testify in their

proceedings, as per *Singh* [1985] and *Baker* [1999]. Before *Baker* was handed down, the Convention Refugee Determination Division (CRDD) published the *Canadian Children's Guidelines* to ensure that young refugee claimants are given the opportunity to participate in the process. Still, there is some evidence that the refugee system continues to favour the information provided by adults over that provided by children. This partiality affects all children, especially when children base their claims on that of their parents'. In many of these instances, family members' credibility is doubted, which results in a negative determination for the entire family. However, this problem does not disappear for unaccompanied minors. Their cases, too, are subject to questions of credibility. Sometimes the child is found to be untrustworthy. In other instances, unaccompanied minors' applications are rejected because the DR or another adult is not trusted. As the following examples will illustrate, often neither child asylum seekers' views nor their best interests seem to be considered, despite assurances to the contrary.⁴⁷ As a result, refugee proceedings remain adult-centric and in conflict with children's well being.

One troubling case, *Re O.H.N.* [2001], involves an 8 year-old applicant who was a Nigerian citizen and who claimed to be a member of the Igbo tribe. She requested asylum because of a well-founded fear of female genital mutilation (FGM). Although the girl arrived alone, her mother was already in Canada, and thus acted as the girl's DR. The IRB, whose decision was written by Member Kitchener, inevitably dismissed the daughter's application because they felt her mother's testimony could not be verified, and therefore, they doubted the girl's identity. Since the case involved a great deal of administrative confusion, I will only briefly summarize a few issues. First, the panel felt that the mother failed to obtain the daughter's identity documents quickly enough and

believed that the documents were unreliable. They also thought the mother's testimony was unreliable. For example, the mother made conflicting statements about whether she and the applicant attended the same elementary school. This became a significant issue because the girl's school identity card was entered as evidence and because the mother said that it was the maternal grandparents who were pressing for the procedure. The mother claimed that the daughter had been safe so far because they could not find the girl. The IRB felt that if the girl went to the same school as her mother, the grandparents could have found her easily.

Certainly the mother's inability to remain consistent is troubling. However, in this case the Board gave small discrepancies undue weight to the exclusion of other facts. The mother herself unsuccessfully claimed asylum in Canada and this panel's ruling appears to decide the daughter's claim as if it were a forum for reassessing the mother's application. To be sure, the text is littered with hostile statements about the mother. For example, Adjudicator Kitchener states: "the designated representative is not a babe in the woods about what is needed for the hearing of a refugee claim" and "her failure [to obtain a birth certificate] is not consistent with the behaviour one might reasonably expect from a mother seeking to keep her child in Canada because of the child's fear of persecution in her own country" (4 and 5, respectively). These sentiments leave the impression that this woman is a mendacious and negligent mother.

Such reproach would not be as appalling if other evidence was considered. Tellingly, the Board mentions the child only once at the beginning of the decision. Here, the Member states "as a preliminary matter, I note that after a *brief* conversation with the minor claimant, I was satisfied she is acquainted with the proposed designated

representative and that she lives with and is cared for by her” (2001; emphasis mine).

Given the young age of the child, one would not expect that the panel could appropriately question her about her fear of FGM. However, they could have attempted to find out whether the child considers the DR her mother, if the young girl kept in contact with the DR while they were separated, where she went to school in Nigeria, what relationship, if any, she had with her grandparents, etc. The panel did not discuss any of these matters, even if to say that they had asked such questions and were not provided with practical answers. This is not surprising since the panel never mentioned the *Canadian Children’s Guidelines* or the child’s best interest, although the claimant is a minor. Because they referenced the *Gender guidelines*, one may reasonably assume that this was not an oversight. If they had consulted the *Children’s Guidelines*, they would likely find that a brief chat does not amount to participation. More importantly, the IRB seemingly imported the view of young children as being incapable or undeserving of participation rights appropriate for her age and understanding.

Finally, the Board rejected what amounts to strong documentary evidence about the pervasiveness of FGM in Nigeria, even though they do not expressly reject that the child is Nigerian. Kitchener acknowledged that FGM is an oppressive act and that the Nigerian government has done little to stop it. However, s/he proceeds: “the documentary evidence indicates that the number of young girls now subjected to FGM is declining, and that it is no longer widely practiced in urban areas. According to the designated representative, the minor claimant was raised in the city of Lagos...the designated representative has put before me insufficient evidence to establish the claim of the minor claimant is objectively well-founded” (9-10). This conclusion is actually not in

keeping with the way in which the well-founded fear of persecution test is satisfied. Kitchener recognizes that between 50 and 90% of females in Nigeria are forced to submit to FGM and yet concludes that because the practice is in decline in urban areas, the applicant does not have an objectively well founded fear of FGM. It may be true that FGM is diminishing in Nigeria but this has little bearing on whether any particular young girl could legitimately fear FGM.⁴⁸ Again, perhaps if the panel consulted the *Canadian Children's Guidelines* they would have given more weight to strong documentary evidence that supports the child's objective fear. By failing to do so, one gets the feeling from this decision that the IRB Members believe the adult woman is trying to swindle her way into the country. At no point does this decision ever suggest that the panel acknowledged that an 8 year-old girl was claiming refugee status.

Another IRB decision concerns a motion to reinstate a refugee claim, which was made some time in early 1999. The minor involved was a citizen of India who was 16 years of age when he arrived in Canada, and who was originally scheduled to appear before the Board in November 1997. Neither he nor his designated representative, a maternal uncle, appeared. IRB Member Jackson noted that on or around January 17, 1998, the Board received a letter withdrawing the claim and subsequently sent the claimant a confirmation that the application had been withdrawn. New counsel did not dispute these facts.

The claimant's lawyer argued that the uncle's decision to withdraw the claim should not be held against the claimant, since he was a minor at the time.⁴⁹ He ostensibly based his argument on an earlier Federal Court judgment that examines the jurisdiction of certain parties to execute decisions. Member Jackson, finding the case law and the

current circumstances dissimilar, noted that the child was 17 years old at the time the claim was withdrawn, and felt that since there was no evidence that the uncle acted improperly or against the best interests of the child, then there was no breach of justice. Further, he claims, “I find no persuasive argument that the claimant, having reached the age of majority [he was over 18 at the time the reinstatement claim was made] should now succeed in having the result of a properly reached decision overturned” (2).

Jackson does not consider whether the uncle had the authority to withdraw the claim or discuss how it would be in the claimant’s best interests to have the claim withdrawn. Jackson does not even mention whether the claimant indicated he intended to withdraw the claim or knew that his uncle had done so. Certainly an application for reinstatement, which was made within a reasonable amount of time (about 1 year) suggests otherwise. As a result, it seems as if children’s best interests are unrelated to natural justice. Additionally, the reference to the claimants’ ‘older’ age suggests Jackson disregarded that he was dealing with a power relationship between an adult and a child. And by further mentioning that the claimant is now an adult, Jackson implies that he is no longer owed the right to make a claim for protection against persecution. Again, the ability of children to participate in their own proceedings has been dismissed since an adult’s conduct has been chosen over, and to the exclusion and detriment of, the child applicant’s.

These decisions quite clearly show how some child asylum seekers are invisible in the asylum process, even at their own hearings. In the first example there was significant opportunity for the panel to consider alternatives to the mother’s shaky testimony, particularly since there is sound documentation about the frequency of FGM

in Nigeria. The Adjudicator in the second case could have easily ruled that he could not be certain that the child knew or consented to the withdrawal of his refugee application, and reinstated it. Other IRB Members have taken this approach. In *Re Z.P.W.* [2002], credibility issues were also an issue, but IRB Adjudicator Roy erred on the side of caution. This case involved two Rwandan children, the oldest being 10 years old, whose parents were poisoned because they had been witnesses to the genocide. They claimed to fear persecution because of imputed political opinion and reported that they have been beaten and threatened by the children of Interahamwe.⁵⁰ The children were currently living with their paternal uncle and grandmother in Canada, who initially acted as their DR.

IRB Member Roy found that much of the grandmother's testimony was vague, implausible, and overall, unsatisfactory.⁵¹ A similar conclusion was made about the uncle's evidence. Moreover, she also found that some of the corroborating evidence looked tampered. After the first hearing Roy appointed a new DR because she felt, pursuant to the *Children's Guidelines*, that the family members had not acted in the children's best interests.⁵² She even doubted their relationship enough to request a DNA test, which confirmed they were biologically related. Roy finally remarks that even though the narrative is uncertain, the benefit of the doubt should be given to the children that they would become victims of persecution if returned to Rwanda. Thus, their claims were accepted.

This is a startling contrast to the case involving the Nigerian girl discussed earlier. Roy ensured that the children's interests were prioritized and replaced their DR when she interfered with the claim. She explicitly referenced the *Canadian Children's Guidelines*

and even found that the children's grandmother's refusal to let her speak with the 10 year old was frustrating the claim. She felt the grandmother and uncle were unreliable witnesses, and yet still accepted their testimony as evidence. Finally, although this was not mentioned, she presumably relied on documentary evidence about conditions in Rwanda to corroborate the children's fear. In sum, Roy took issue with untrustworthy testimony and data, but did not hold the child claimants accountable for problems they could not be expected to control. Roy confronted the children's full subjectivity as both vulnerable members of a family and as individuals with the right to participate and contribute. This is an example of a case in which children's interests were prioritized both administratively and substantively. It is to this latter issue that I will now turn. As will be shown, the degree to which IRB Adjudicators consider children's best interest in relation to experiences of persecution is also a matter of concern.

Child Abuse Proceedings

A number of unaccompanied child asylum seekers claim refuge from abusive parents or guardians. These cases differ from the previous ones because the credibility of the claimant and their DRs is not in question. Indeed, in all circumstances the child's evidence and stories were found believable and the Board generally recognized that abused or abandoned children can be considered a particular social group under Canada's definition of a Convention refugee. Still, many of these cases are decided negatively. As the following examples will illustrate, IRB Members doubt that the abuse or abandonment was actually persecutory. Persecution does not have an exact definition *per se*; rather, there are general principles that dictate whether the experiences involve

serious harm to the extent of persecution. Bhabha and Young (1998:762) note that a person is persecuted if their individual physical integrity is undermined by such behaviour as threats, serious human rights violations, or even the culmination of smaller harms. In this section on abused children seeking refugee status in Canada, the courts seemingly minimize the extent to which children more readily experience harm, fear, and insecurity. It is particularly disconcerting that the children involved were older because it seems that neglect, abuse, and possible abandonment are not that terrible for older children. As the following investigation will reveal, the emerging tendency in Canadian refugee law toward abused teenagers is that their experiences, although considered unfortunate, are not really regarded as being bad enough to warrant protection under Canada's refugee law.

One such case, *Re T.H.K.* [2001], involved two girls, aged 15 and 12 from Grenada, who claimed a fear of persecution at the hands of their mother and stepfather who physically and psychologically abused, and subsequently, abandoned them. This abuse consisted of beatings, food deprivation, and witnessing drug use and trafficking in their home. They claimed to have been unloved by both their mother or stepfather, who actually threatened to leave if the girls were not sent away.

IRB Member Schlanger determined that the two children, whose father was under removal from Canada to Barbados, were not Convention Refugees. She provided a number of reasons for the decision, primarily arguing that the children's abuse never constituted persecution. Additionally she argued that the Convention refugee definition is forward-looking and the children need not fear persecution because their abandonment actually showed the mother and stepfather had no interest in persecuting them. Further,

she maintained that the abandonment was not persecutory in this case because the children had other relatives in the country or access to government-funded housing for abused and abandoned children, which “even if not necessarily perfect, it is adequate protection for *these* abandoned minors” (3; emphasis mine).

What is striking about the decision is the way in which Schlanger characterized their experiences. She agreed that the circumstances were “unfortunate” but were “neglect falling short of abuse” and not “‘atrocious’ or ‘appalling’ acts of persecution” (3). These statements fail to grasp the cumulative effect of the abuse these children experienced, and minimize the trauma of violence, neglect, and rejection. For a child, physical abuse, food deprivation, being reviled by family members, and then sent away to another country, are brutal human rights violations from which children are to be protected. Moreover, since their father was a citizen of Barbados, the effect of returning the children to Grenada would deny them access to their primary caregiver, another right enshrined in the CRC. This judgment tellingly mentions nothing about the relationship between abuse, abandonment, and children’s development or security.

The case, *Re A.L.J.* [2002] involved a 14 year-old girl from India who claimed to fear abuse from her adoptive father. The story is quite complicated but she was from a poor family and was adopted by a relative who was living in Canada. He moved to the United States and was consequently unable to continue to care for her. Guardianship was then passed on to her adoptive father’s uncle. The child claimed that this man repeatedly beat her, forced her to do chores, and took gifts sent by her adoptive father.

The panel rejected the claim for several reasons, referencing a wide array of Canadian legal precedents, NGO reports and international agreements, including the

CRC. Overall, they held that the beatings, chores, and seizure of her possessions did not constitute persecution because “they were repetitive but not cruel... and not a serious violation of human rights” (7). In making this assertion, the panel compared the situation of this minor with other impoverished Indian children. They maintained that she, unlike a large number of children in India, was lucky enough to attend school and not live in abject poverty. They further felt that she was able to visit with her parents regularly, she was not unloved and could return to live with them. The panel found that the chores were part of the culture of the country and that children should be expected to “pull their weight” (6). The physical abuse was dismissed because teachers often beat school children as “this is part of the culture of a country that is in transition and still believes in using the ‘rod’” (6). In sum, they reasoned that since so many children live in worse conditions, this young girl’s experiences were not harsh or persecutory. Here, childhood is flexible and what is ‘normal’ for children depends on where they come from.

This decision contains similar justifications for a negative finding as the previous judgment. Again, the minor age of the claimant conveniently ignored. The panel repeatedly called her a young woman, and hoped “she will be able to find a positive solution to her problems” (11). In doing so, the panel seemingly dismissed the impact of the violence and humiliation faced by this 14 year-old girl. They were flippant about the physical beatings she received and failed to examine why she might remain with her adoptive father’s uncle if her parents were so close. Further, they suggested that she was lucky enough to not work, and was therefore protected from economic and social exploitation, which discounts the reality of this child’s story – that she was an indentured servant unable to return to her family home because of their poverty, sacrifice, and

possibly other reasons. To justify their negative determination, the IRB relies on racialized gendered discourses that characterize Indian children as in less need of child-specific protection, accustomed to harsh circumstances, abuse, and more adultlike than Western children. Indeed, the idea that the violence experienced by this 14 year-old girl is not persecutory or a violation of her basic human rights is supported by racist comments that locate her within a more primitive society. As Razack (2002) argues, the place of India becomes a space in which racial texts and bodies are generated. In this instance, India is the place of violence, underdevelopment, and anachronistic morals. Thus, the IRB uses different criteria for judging child abuse than would normally be applied in Canada or The North.⁵³

One further decision, *Re M.Z.J.* [1999], involving child abuse merits discussion. In this situation, a successful refugee application was made by a 16 year-old Mexican claimant who experienced elements of family abuse and abandonment. The boy feared he would face persecution by his mother and he had never known his father. Throughout his life his mother neglected and mistreated him. She left him alone many times, as early as age five. She even left him in the care of his older brother during a visit to the U.S. while he was 13 years old, without a word indicating she would leave. Further, she involved him in practices of 'witchcraft,' forcing him to drink animal blood and had once burned his face. Counsel for the claimant submitted psychological evaluations that reported the child was highly traumatized and suffered from depression and post-traumatic stress disorder. The claimant's sister resided in Canada and acted as his DR. She further confirmed the boy's testimony about their mother's erratic and cruel behaviour.

IRB Member Dauns accepted the boy as a *bona fide* Convention refugee. She felt that the mother had neglected him and that even though the Mexican government had committed itself to combating child abuse in the country, the “level of protection is outweighed by the level of abuse” (6). Further, she argued that the Mexican government is also largely incapable of helping the many children in the streets, and therefore, adult predators would likely victimize the claimant. As Sadoway (1997:108) has argued, abusive acts against children generally have more brutal consequences, making it necessary for the FCC and IRB to consider persecution that is unique to childhood.

Despite this promising decision, the second IRB Member, Donald Galloway, offered a dissenting judgment. First, he maintained that the boy experienced domestic neglect rather than abuse. Galloway based this decision on his view that the mother’s bizarre and irresponsible behaviour was rather harmless, making her something of an eccentric. He felt that since she did not intend violent harm, the boy was therefore not persecuted. Further he insisted that her ongoing neglect was “not a pattern of violence” and that although the burn to his face “did seem quite reckless, it did occur many years ago” (8). While Galloway’s assertion about the mother’s lack of intent to harm her son may be true, she certainly did not attempt to offer him a safe and stable home life. Her behaviour, even if lacking in malicious intent, caused the child deep psychological damage, which was well documented. But these responses were eclipsed in Galloway’s decision. Rather, the only mention of the child’s emotional demeanor is that he is resilient and resourceful. Again, the child claimant, who exhibits any ‘adultlike’ traits, is invisible or really not a child.

Galloway makes more explicit comments that situate the boy outside childhood. He remarks: “He is now sixteen years old and very intelligent. He has a mature attitude. He has learned by necessity to be self-reliant... Life in Mexico may turn out to be difficult for him [but] he has familial support although it may be at a distance” (8). The obvious insinuation is that the boy was not an orphan, ostensibly because he was not really a minor. Indeed, Galloway not only minimizes the hurtful nature of the mother’s abuse and neglect, he also lessens the boy’s vulnerability should he be returned to Mexico. What is particularly interesting is that the claimant is not altogether invisible. Rather, it is his childhood that is unobserved. The conclusion that the claimant “is now 16 years old” suggests that were he younger, his mother’s behaviour or his abandonment would be less acceptable. Once more, the idea that the boy’s experiences are not really horrific or persecutory because he is almost an adult is the main justification for a negative determination, and older children are close enough to adulthood that they do not require protection. This insinuation is also imported into judgments about children who have been smuggled/trafficked into Canada. As will be revealed in the next section, the IRB and FCC have relied heavily on adultifying discourses to rationalize asylum rejections.

Smuggling & Trafficking in Children

In this section I will analyze a sample of cases adjudicated by both the IRB and the FCC involving child refugees who were illegally smuggled/trafficked into Canada from the Fujian province of China between 1999 and 2000.⁵⁴ The judgments in cases where children are smuggled/trafficked are an interesting contrast with cases where

children are abused, neglected and abandoned. Whereas violence against children is trivialized and discounted as persecutory, IRB Members still show benevolent concern about the minors' circumstances and fate. In trafficking/smuggling judgments, IRB Members and FCC Judges make decisions that manifest indifference to the children's situations. Instead, these child asylum seekers are generally considered illegitimate economic migrants attempting to improve their position, not persecuted youth. As a result, the courts' real concern seems to be that the child migrants are abusing the system.

The cases generally involve similar elements. The children concerned were from poor families in China, were between the ages of 13 and 17, and were sent overseas by their families to Canada with the assistance of the snakeheads, a criminal group involved in people smuggling. For their services, the snakeheads charged fees often in excess of \$10,000 U.S. or more, which the children would repay by working at specified jobs.

The children's counsel made various arguments in favour of refugee status with the IRB and FCC. They all maintained that the children were trafficked, not smuggled, because they could not have meaningfully consented to being sent abroad illegally to engage in forced, exploitative labour. In all submissions, the issue of whether any minor could consent to being smuggled was raised, and in *Zhu v. Canada (Minister of Citizenship and Immigration)* [2001], counsel further submitted that these particular children were obliged to respect their parents' direction to migrate illegally because of 'filial piety,' which explained why many of them indicated they had 'consented' to the journey. The children further claimed they experienced persecution by their parents, and indirectly the snakeheads, and were members of the particular social group, children.⁵⁵ Moreover, they argued that if returned, they would be vulnerable to persecution because

they would be forced by both their parents and the snakeheads to make another journey to pay off their debt. They also could not seek protection from Chinese officials because the government would punish them for exiting illegally in the first place, and as elaborated in the *Chen Lin* IRB decision (*Re Q.T.K.*), because the authorities are generally unwilling to intervene in ‘private’ family affairs when children must acquiesce to their parents’ wishes.⁵⁶

All of the cases were eventually decided negatively, even though two IRB panels initially granted the children refugee status and FCC Judge Gibson overturned two negative verdicts.⁵⁷ The basis for the negative determinations in nearly all cases centred on the courts’ conviction that the children had consented to migration, and therefore, were smuggled, not trafficked. Although the FCC generally acknowledged that trafficking in children is a problematic and probably persecutory action, none of the Justices, with the exception of Gibson, wholly examined whether it was a Convention form of persecution because they felt the children were smuggled. The Canadian Council for Refugees differentiates smuggling from trafficking in relation to issues of control and freedom. They claim the major difference is that “a person who is trafficked is kept under the control of the traffickers, whereas a migrant smuggler simply facilitates clandestine entry into a country” (2003). However, they further note that smuggling and trafficking are difficult to distinguish, often because smuggling in persons may be part of, or turn into trafficking, and both can involve similar resultant human rights abuses, especially with respect to children and other marginalized groups.

Overall the Canadian judiciary accepts the former classification that sets trafficking apart from smuggling. For example, in the case of *Xiao v. Canada (Minister*

of Citizenship and Immigration Canada) [2001], Justice Muldoon recognized that trafficking results in the denial of basic human rights (para. 17). In *Zheng v. Canada (Minister of Citizenship and Immigration)* [2002], Justice Martineau further elaborated that children and women are especially vulnerable to victimization in trafficking situations.

However, both Judges seemingly dismiss the notion that smuggling and trafficking are comparable or related acts and that children cannot consent to being smuggled. Muldoon denied asylum to a 17 year-old on the basis that she was nearly an adult who chose to migrate. Citing the CRC repeatedly, he reasoned that children progress toward adulthood, stating: “while 18 years of age is the highest age of minority, the transition is not sudden; the Convention clearly recognizes that maturity is an on-going process such that some “minors” grow into maturity gradually, before attaining the age of 18. A seventeen-year-old is therefore an “elderly minor” (para. 17). Likewise, in *Zhu*, he upheld the IRB’s finding that the minors were not really children, but young adults in search of economic advancement, who “employ[ed] their volitional powers, within the context of their own unique culture, to make, participate in or concur with the decision to leave Canada...[and] already entered the workforce, sometimes out of province” (para. 34). Justice Martineau recognized that smuggling and trafficking often occur together by pointing out that smugglers have an interest in ensuring that smuggling ‘clients’ who are apprehended by authorities inevitably reach the final destination to repay the debt. However, he refused to revisit the issue of whether minors can consent to being smuggled in a case involving a 14 year-old girl, relying on the IRB’s characterization of the migrants as young independents who are able to agree to

smuggling.⁵⁸ Thus, both Justices assume that because the children ‘chose’ to migrate, they did not have a well-founded fear of past or future persecution, but rather, they feared prosecution or rather trivial punishment if returned. Indeed, Muldoon held that the applicant’s argument that because she was persecuted in the past, she would probably be persecuted again “is not proof: it is speculation, even if informed speculation” (para. 17). In line with some jurisprudence, Muldoon believes that experiences of past persecution do not necessarily show that persecution is to be feared in the future. However, he confusingly recognized that her argument is convincing, yet offers no explanation as to why he thinks she would not be trafficked (again).

Even as the Canadian judiciary purportedly recognizes that consent is integral to smuggling, and the lack of meaningful consent results in trafficking, children who were forced to travel with the snakeheads do not fare better. In the case of *The Minister of Citizenship and Immigration v. Zu Huang Li & Young Ming Zhang* [2001], Justice Simpson overturned two positive IRB determinations in which the children indicated that they were forced to migrate against their will on the basis that the particular social group cannot be identified by the persecution experienced; but must be the consequence of one of the five enumerated grounds. In her view, the IRB mistakenly accepted the children as Convention refugees by choosing to define the relevant social group as ‘minor children who are sent from China into servitude and who fear incarceration upon return’ rather than as just ‘children.’ While this contention has legal merit, as directed by the Supreme Court of Canada (see *Canada (Attorney General) v. Ward* [1993]), Justice Simpson seemingly ignores that the IRB saw the children’s minority status as the basis for their social group. In other words, the IRB recognized that the parents chose to send their

children to another country, and this resulted in persecution. Further to this, Simpson made comments about other issues regarding the minors' access to state protection and internal flight alternatives, stating:

I wish to observe that, given the fact that the Respondents are nearing the age of eighteen years, and given that the definition of a Convention refugee is prospective, it seems to me that an assessment of the Respondents' refugee claims...must be made with an understanding of what, if anything, their ages will mean if they return to China. It may be that the Respondents will legally be adults and free of their parents' control by the time they return or soon after their return. In such circumstances, they may be able to ignore their parents and live and work in another part of China" (para. 19).

As in the other decisions made by Muldoon and Martineau, the notion that the children's older age somehow lessens the impact of being forcibly smuggled or makes them less vulnerable to future trafficking is an important feature of Simpson's verdict. Moreover, Simpson seemingly ignores the higher court direction that childhood is an innate characteristic, arguing instead that since it is changeable because children mature into adulthood, older children should not 'benefit' from the very international human rights protections set out for them.

Justice Desjardins also overturned a positive and progressive IRB decision involving a 19 year-old who was smuggled/trafficked with the snakeheads in the case of *Minister of Citizenship and Immigration v. Chen Lin* [2001]. However, this case was particularly interesting because it also involved elements of abuse and abandonment. In the initial determination, the IRB noted that the claimant's father severely battered him over a long period of time, to such an extent that neighbours got involved on more than one occasion. They further felt that his family forced him into being trafficked in a container and other dangerous circumstances, and continued to use threats and reproach

to convince him to continue his journey with the smugglers after reaching Canada. Moreover, they held that his testimony about being forced to travel to Canada with the snakeheads was in keeping with his demeanour as an abused child, despite the fact that the claimant changed his testimony several times. Remarking that the claimant turned 18 before the hearing, the IRB believed that his fragile condition and young adult age made it necessary to consider his claim in light of the *Canadian Children's Guidelines*, and felt this was significant justification for the initial deception. Finally, they generously applied Justice Gibson's ruling that children are a distinct social group who can be persecuted to this claimant, although they also agreed with Muldoon's ruling that children can consent to being smuggled, and distinguished this case from other trafficking and smuggling cases because the applicant was forced by his family to migrate.

Even though children are generally regarded, for example, in the CRC, as being under 18 years of age, in this case, the IRB applied child-specific protections to a young adult. In applying international children's instruments to a case involving a young adult, the panel recognized there is no sudden transition between adulthood and childhood, which is an interesting contrast with judicial decisions that mark older children as sufficiently adultlike as to not warrant child-specific considerations. Unfortunately, Justice Desjardins reversed their decision on several bases. While her decision did not rest explicitly on adultifying discourses that place older children in the world of adulthood, she made several statements that deny the culmination of harm. First, she felt that the claimant's father did not know his son would travel dangerously, and therefore did not place him in a dangerous situation. Further, she believed that there was no foundation for the IRB's contention that it was persecutory for the child to have to work

to support his family. Next, she argued that there was no evidence to support the finding that the applicant was persecuted by reason of his membership in the social group, children. Finally, she felt that the claimant feared the punishment of the Chinese authorities, which “stemmed from the method *chosen* to leave China” (para. 21; emphasis mine). Here, Desjardins ignores the reality that this child did not want to travel, and was being pressured by his parents to continue the journey even after he suffered through a dangerous excursion. Her belief that the claimant’s father did not intend harm is without merit given the longstanding abuse he inflicted, and again, irrelevant because the claimant was forced to make this journey. Furthermore, the idea that a young man should have to work to support his abusive family overseas condemns him to a life of indentured servitude, in spite of jurisprudence that protects children from being abused labourers (Bhabha, 2001). Moreover, it reinforces the belief that children are their parents’ possessions, to be used as is convenient (Franklin, 2002). Lastly, his parents’ actions would submit him to punishment at the hands of the Chinese government for exiting the country illegally, thereby subjecting him to state-sanctioned persecution. As this decision confirms, even children who do not consent to being smuggled are denied child-relevant humanitarian relief, regardless of the many international agreements that link these criminal operatives with social exploitation. Again, children’s best interests are invisible.

The ways in which trafficking/smuggling decisions are made suggests that social factors that contribute to children’s marginalization and subsequent persecution are used as a justification for withholding asylum. As Stasiulis maintains, the courts’ position that “persons under the age of 18 cannot make claim to the protection rights of children if they are in the workforce essentializes childhood as an experience separated from work,

economic necessity and family survival” (2002b: 523). This reasoning places a number of children outside of childhood, undermining the rights as elaborated in the CRC to participate in social life while being ensured basic child-specific protections (Ennew, 2002). Moreover, the discourses of public and private childhoods are racialized and written on the bodies of young refugee migrants because their childhood is ‘other’ to the celebrated childhood of the West. The policing of geography distinguishes domestic children from economic contributors according to race and nationality (Razack 2002; Stasiulis 2002b).

Canadian Views of Refugee Children

There are troubling lessons to be learned from Canada’s response to unaccompanied minor asylum seekers. In each of these cases, either the age or circumstances of the children were relativized. These cases demonstrate little or no recognition that children experience persecution in ways that are both similar to and different than persecution experienced by adults. The CRC and other international human rights instruments explicitly acknowledge that all minors are susceptible to mistreatment because of their vulnerability, and yet they also recognize that children must also navigate an adult world in which their minority is ignored. In Canadian asylum cases, children’s age, immaturity, and control by their parents intensified experiences of persecution, and the inability of IRB Adjudicators and Federal Court Judges to recognize this complexity contributes to the confusing and contradictory decisions. The adult-centricity of child abuse asylum decisions seemingly reinforces the split between the private and public sphere (Oswin, 2001). Whereas torture or genocide, for example, are

characterized as horrendous human rights abuses in which third-party states are obliged to intervene, child abuse is constructed as a regrettable situation outside the scope of asylum. By taking this stance, the Courts disregard children's rights mechanisms that acknowledge children are vulnerable members of their families, often victimized by loved ones and unable or fearful of accessing state intervention (Bhabha, 2000). In many of the cases outlined above, the IRB and Federal Courts have limited the definition of a Convention refugee in such a way as to preclude some children from protection. Their analyses insinuate that children from non-Western regions of the world have greater familiarity with physical or economic hardship, and therefore, are not in need of international protection. In many of the cases delineated above, the childhood of minor asylum applicants is invisible, especially when children are nearing the age of majority. Accordingly, the prospective nature of the refugee definition is offered as a rationale to deny asylum to older children, which has interesting implications for the younger children involved who do not appear to benefit from this reasoning. For older children, childhood is not regarded as an innate or unchangeable characteristic if the child is nearing the age of majority. Accordingly, the courts seemingly defend negative determinations by suggesting that reaching adulthood signifies a change in conditions. In cases where children are abused or trafficked by their parents, the Courts essentially instruct the minor asylum seekers to change their circumstances. At the same time, younger children are deemed incompetent and are excluded from adult-like capacities. Thus, children are either constructed as persons able to participate in society or as pre-people in need of protection, but not both. Consent means one is an adult, and by the

way in which the trafficked/smuggled children are treated in IRB and Federal Court decisions, consent is also seemingly eternal.

New Directions in the Adjudication of Minors' Claims

Despite the many problematic ways in which IRB Members have characterized abuse in refugee proceedings, there have been some very progressive decisions that recognize child-specific rights are fundamental human rights for children. Two excellent judgments were delivered by IBR Member Aulach in December 2002 and IRB Member Kemsley in 2003. The first judgment, *Re B.N.Y.* [2002], concerned a family of mixed ethnicity who was fleeing Costa Rica. The father was a Chinese immigrant and the mother was a Spanish Costa Rican. Together they had a son who was 16 years old at the time of the hearing. The family argued they experienced persecution because they were an interracial couple with a child of mixed ethnicity. They further claimed their persecution was the cumulative result of the harassment and dissension they suffered. Their son claimed he was abused and harassed at school. To avoid such mistreatment, they left Costa Rica and moved to China. Forced to leave in 2000, they decided to come to Canada to claim asylum.

The second case, *Re S.B.O.* [2003], involved a Chinese family who was fleeing from Peru. The two adult claimants immigrated in the mid-1980s and their two children were born in Peru. They argued they were persecuted because of their racial difference. The adults based their claims on harassment generally, and more specifically, to the police department's indifference to multiple robberies of their Lima restaurant, by local gangs, one in which an employee was shot and killed. Their 11 year-old daughter and 13

year-old son claimed they faced bullying and intimidation at school. They were denied routine eye examinations, were prohibited from participating in school events, and their teacher even made racist comments about China. The parents complained to teachers, the principal, and other officials, but nothing was done. They also looked for other schools where their children could escape such racial harassment, but found the circumstances to be the same.

In both cases, the Members rejected the adults' claims, largely arguing that there was inconvenience and mistreatment, but that it did not amount to persecution. However, both Members did accept that the experiences of the minors constituted persecution. In questioning the Chinese-Costa Rican boy, Member Auluch determined that the child had faced irreparable harm, to the point of contemplating suicide, because of the constant teasing and physical violence he had experienced at the hands of his peers. Aulach argued that school bullying may seem trivial from the "lordly perch of an adult...simply because it is not traceable to an adult cause." However, s/he reasoned that "pain is integral to persecution. The children who reviled this boy, who spat upon him, who pushed him around were as much agents of persecution, from a child's perspective, as a policeman beating a prisoner is from an adult's point of view." Member Kemsley, who referenced the CRC, argued that the children's treatment at school was "a serious harm and involved a denial of human dignity...inconsistent with the principles set out in the *Convention on the Rights of the Child*." Although Auluch's decision did not refer to the state's involvement in or inattention to the persecution, Kemsley determined that the Peruvian state was complicit because the school authorities repeatedly failed to take action.⁵⁹

These two judgments are instructive for many reasons. In the first place, both Adjudicators recognized the inseparability of children's right to protection and participation, and were attentive to the specificity of the children's persecution. Certainly if their parents were granted refugee status because of harassment, robberies, or other factors, the children would be have been bestowed refugee protection as members of the family who faced persecution because of their race. However, none of the adults' claims were accepted, essentially situating the children in a position analogous to that of unaccompanied minors, inasmuch as the foundation of their claims were self-supporting.⁶⁰

They then observed children have several fundamental rights, including the right to integrity and education. Both Members were persuaded that the bullying the children endured would (continue to) interfere with their ability to study, as well as their self-esteem. Indeed, the children would be forced to choose between human dignity and education, since having the latter in the country of origin would come at the expense of the former. More likely, none of the children would probably return to school, which Kemsley claimed is "essential to the development and well-being of a child."

The importance of education to the child's development is a particularly important link in Member Auluch's decision because the child involved is older (and within the 'elder child' range mentioned earlier). It seems that Member Auluch rightly dismissed existent jurisprudence that erases the minor age of older children by comparing this boy's case with another case involving a seven year old, and also referring to the claimant at one point as a "boy so young in years."⁶¹ While these examples may seem inconsequential, their importance lies in the fact that Auluch based the finding of

persecution on the boy's experiences at school. S/he did not advocate alternative educational options like tutors or home schooling. Nor did s/he suggest that the child had completed a great deal of education thus far, and therefore he would not lose that much, especially since he was in Canada for a time and would probably be nearing majority by the time he returned to Costa Rica. Instead, this decision insists all young people have the right to an education. More than that, it insists that children have a fundamental right to go to school and therefore have a public space of their own!⁶²

These decisions are also discernible from other cases because the Adjudicators did not criticize Peru or Costa Rica for being decidedly intolerant and racist, or mention the supposed barbarity of the children or other people involved. In fact, the only questionable statement in either decision was that Canada "is a veritable paean to multiculturalism" and that "Toronto for example would be an ideal place [to live]" (Auluch). In addition, neither Adjudicator insinuates that the families have not endured hardship or suggest that they have come to Canada to exploit 'our' generosity. Indeed, the negative decision for all adults did not rest on questions about their 'real' motivation, but lied in the claimants' inability to show that they experienced persecution and that their respective states failed to protect them.⁶³ In sum, neither of these refugee cases involves traditional neo-racist sentiments in which the Western asylum system ostensibly saves refugee claimants from the danger of their country of origin. Most importantly, these cases indicate the difference that meaningful recognition of the CRC and the rights and specific oppressions children experience can have in informing refugee determination practices. Children can benefit from refugee law and asylum protection; however, it may require decision-making bodies to consider the specificity of children's persecution.

Conclusion: Canadian Refugee Law in Practice

Even though Canada has modified its immigration and refugee laws to conform to the values set forth in the United Nations Convention on the Rights of the Child, asylum opinions tell a different story. While explicitly speaking to children's rights, jurisprudence reflecting on the limitations of the Convention definition and conceptualizing persecution import dominant Western discourses about certain types of childhoods. Against the CRC, some children's childhood is ignored and the minors are viewed as mature young adults. At the same time, harmful acts against these children are merely seen as a nuisance, with little regard for the physical, psychological, or physical consequences. The racial, cultural, or ethnic otherness of the child or the child's country underscores such decisions. So while judges and adjudicators pay lip-service to children's minority status, they ignore or disregard it. As will be shown in the following chapter, in comparison with the United States, Canada makes much more explicit reference to children's rights instruments, and in some cases, this has been beneficial for children. What will be discussed next is whether such discussion makes a substantial difference in asylum decisions.

CHAPTER FOUR

REFUGEE DETERMINATION IN THE UNITED STATES: WHERE ARE CHILDREN'S RIGHTS?

In the previous chapter I examined the way in which Canadian judicial and quasi-judicial bodies treat unaccompanied minor asylum seekers. I argued that even though the United Nations Convention for the Rights of the Child is widely recognized in Canadian asylum cases, many children are still denied refugee protection. In this chapter, I will consider American judicial decisions concerning unaccompanied child refugee claimants, focusing primarily on the way in which American jurisprudence compares with Canadian cases.⁶⁴ While the most problematic issue in Canadian refugee law toward children is that frequently the childhood of the claimant and/or the child-specific nature of persecution are largely ignored, American precedential law toward minor asylum seekers seemingly does not even recognize children's rights.⁶⁵ Thus, while Canadian IRB Adjudicators and Judges deny children their youth while speaking to the importance of children's rights mechanisms, American decision-makers simply ignore relevant child-specific instruments altogether. As will be explained, this oversight has had a significant impact for the way in which children assert rights in American asylum proceedings. Rather than being afforded special treatment, under United States refugee law, children

must meet the same legal standards as adults and therefore, they are challenged to secure recognition as persons with differing needs and entitlements.

Preliminary Considerations in American Refugee Law

American refugee law is more complicated than Canadian refugee law in part because there are a greater number of avenues in which applicants can be granted protection. Migrants who fear persecution can apply for three separate and distinct forms of relief: asylum, withholding of removal, and withholding of removal under the Convention Against Torture (CAT). Each of these three types of relief has its own eligibility requirements. As under Canadian refugee law, potential asylees in the United States must establish they have a well-founded fear of persecution based on one of the five enumerated Convention grounds and that the government in their home country is unable or unwilling to protect them. Although the refugee definition in the U.S. is also prospective or forward-looking (meaning an asylum claimant must have a fear of future persecution), the American judiciary has also specified that, in some instances, asylum can be granted for humanitarian reasons even if there is little danger of future persecution (see *Lukwago v. Ashcroft* [2003]).

American law also offers migrants the ability to remain in the U.S. if the Convention refugee definition is not satisfied, under Section 241(b)(3) of the Immigration and Nationality Act – withholding of removal. Yet, the standard of proof for withholding of removal is more strict than for asylum, and to qualify, applicants must show that if returned to their home country, their “life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group

or political opinion.” Unlike asylum applicants who usually must file within one year of arrival, there is no time limit on applying for withholding of removal.

Finally, individuals can apply for withholding of removal under the CAT. To qualify, an applicant must “establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 208.16(c)(2). Unlike when making an asylum or withholding of removal claim, to qualify for protection under CAT individuals need not establish they will be tortured because of one of the five protected refugee grounds, although they must show that they fear torture from a government or state officials.

While these additional safeguards have been instrumental in protecting a number of people, immigration officials award protection under withholding of removal or CAT far less than under regular asylum. In terms of child asylum seekers who already have difficulty linking their experiences with common notions of persecution, these additional possibilities have little effect (Thronson, 2002). Accordingly, it is essential that children have their own specific protections. In the previous chapter, I explored the strongest source of security for child refugee claimants in Canada – the best interests of the child clause that is safeguarded in the legislation, in the *Children’s Guidelines*, and in the *Baker* case. While the best interests principle has been articulated in American asylum policy, it is not codified into U.S. law. Moreover, there is no higher court direction that children’s interests, as they relate to children being vulnerable members of society and in need of specific protection, need be a primary consideration in U.S. immigration proceedings.⁶⁶ More precisely, as Nogosek (2000:21) has argued, the judiciary has held minor asylum seekers to the same legal standard as adults, despite the fact that in other

areas of American jurisprudence, such as in criminal proceedings, children are usually granted clemency to protect their interests.

Despite the fact that both Congress and many factions of the judiciary have overlooked unaccompanied minor asylum seekers rights, there has been some positive American law that has some utility for children in immigration proceedings. Under Section 240A(b) of the Immigration and Nationality Act, aliens with American citizen or permanent resident family members may apply for cancellation of removal if it is established that “removal would cause (exceptional and extremely unusual hardship)” which is significant because the focus in such cases, as in *Baker*, is on the children. In the case, *Matter of Recinas*, et al. 23 I&N Dec. 467 (BIA 2002), the Board considered whether to cancel the removal of a Mexican woman who was the sole caregiver of her four U.S. citizen children because they would suffer immensely if she were returned to Mexico. As the BIA sees it, this severe anguish standard “...constitutes a high threshold that is in keeping with Congress’ intent to substantially narrow the class of aliens who would qualify for relief” (470). Indeed, the Board differentiated this case from the two precedential decisions (see *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001) and *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002)), which were decided against the citizen parents because there was no showing that the “hardship that is substantially beyond that which would ordinarily be expected to result from the person’s departure” (468). In this situation, Ms. Recinas’s family resided in the United States, her children could not speak Spanish fluently, and she had no employment prospects in Mexico through which she could support her children. Thus, while many of the circumstances in the three cases were similar, the BIA argued the hardship factors in this case were more severe than in

the latter two cases. Compared with the Supreme Court of Canada's conclusion that a policy is unreasonable if children's wellbeing is not a primary factor, Section 240(A)(b) of the U.S. Immigration and Nationality Act holds that children (or family members) must suffer excessively.⁶⁷ At the same time, the policy focuses on migration control and containment, a strategy that always affects child migrants negatively (Bhahba, 2000).

While similar to the *Baker* case inasmuch as the interests of children to not have their parents removed is the issue, the legal test and rationale has even less consequence for asylum-seeking children. *Baker* offers child refugee claimants little substantive benefit in its emphasis on children's best interests, yet it has at least tackled children's rights and dealt with Canada's obligation to make domestic policy concur with its international commitments. As a result, Canadian judges and adjudicators have explored its application in cases involving refugee children. However in the United States, judicial and administrative bodies that consider whether to overturn removal orders of a citizen child's parents apply a different, and much stricter legal standard, which further disadvantages child refugee claimants. In fact, the rights of children, in particular, to family reunification are offset by the firm measure that children must suffer excessively, which the judiciary has interpreted as meaning the family member must suffer more than just separation. Even if this were an appropriate test for American citizen or resident adults, it surely is unfitting for children who stand to suffer considerably by losing their primary caregivers. Still, Thronson (2002) argues that giving attention to children's rights in any immigration procedure is a step in the right direction.

At the same time, Section 240(b) of the Immigration and Nationality Act also recognizes the right of aliens to have their removal stayed, another American policy that

protects some children from having their primary caregiver removed from the country.⁶⁸

While the standard to have deportation stayed is also high, the law actually has some significance for asylum-seeking children. One case rendered by the 7th Circuit Court of Appeals is particularly progressive in advancing children's rights. In the case of *Nwaokolo v. Immigration and Naturalization Service* (2002), the court stayed the deportation of an adult Nigerian citizen because she showed that there was a strong possibility that her daughter(s), United States citizens, would be subjected to FGM if they were forced to accompany their mother to Nigeria. Ms. Nwaokolo had been contesting her removal since 1996, and had submitted three petitions for review to the BIA between then and 1999, the latter which was based on withholding of removal under CAT and contended that her daughter, Rachel, would be subjected to FGM. The court observes that in 2001, the BIA denied the motion, but granted a one-year stay of removal. Moreover, they noticed that there was no mention of FGM or Rachel. Ms. Nwaokolo submitted a fourth application on behalf of her second daughter, Victoria, who had not yet been born at the time of the initial application. The BIA denied the motion on the grounds that individuals are limited to one motion to reopen their case absent changed circumstances. However, the court overturned this decision because they felt the BIA abused its discretion by failing to consider that the threat faced by Victoria was qualitatively different and more severe than that faced by Rachel. Thus, even though the court held that the BIA failed to consider Rachel's rights to be free from torture, they believed that Victoria's existence necessitates an examination of her particular circumstances. Said otherwise, the court stipulated that the BIA has a duty to consider the effects of removal from the perspective of each individual child.

This decision offers significantly better protection than afforded family members under S. 240. Although the judiciary never explored the CRC, and this case didn't overtly advance international children's rights mechanisms, the ruling suggests the court implicitly incorporated children's rights as they are envisaged in the Convention. Still, its application is also limited. While the grounds for which a stay of deportation can be granted do not require one or more parties be U.S. citizen or permanent residents, the Federal Court focused quite heavily on the children's American citizenship, asserting:

A stay promotes the public's compelling interest in ensuring that minor United States citizens are not forced into exile to be tortured. This compelling interest is magnified here because neither Rachel nor Victoria has ever been represented by counsel or has ever had their interests considered by the BIA or any court. Nor is there any evidence in the record that the INS has ever notified responsible state authorities of the departure of these minor United States citizens to a country where they would be in immediate danger of significant harm. The government could never do to these girls in this country what the INS seems all too willing to allow to happen to them in Nigeria (14-15).

Their condemnation of the INS's substandard treatment of Ms. Nwaokolo's daughters is an interesting contrast with the way thousands of minor asylum seekers are routinely dealt. Specifically, the court feels the INS is obligated to consider the implications of banishment, to provide legal protection for the children, and to deal with issues of appropriate care. Yet child asylum seekers, including those who are unaccompanied by parents or guardians, are regularly returned to their home countries, even under expedited removal proceedings (Bhabha & Young, 1999). Every day children appear before Asylum Officers, Immigration Judges, and BIA Members without legal counsel, and sometimes, even without adult representation (Bhabha, 2001). At the same time, thousands of children remain incarcerated in jails that house convicted criminals, with little thought about their psychological welfare. Many children have even been placed in

adult detention centres (Young, 1999). While the court has held that the INS has acted irresponsibly toward these children, the government systematically does to child refugee claimants what this court considers deplorable treatment of American citizen children.⁶⁹ Consequently, the court has given important attention to the individuality and distinctive interests that children who are members of the same family may have; yet it has not fully articulated children's rights. Certainly non-citizen children could use this decision to have their own removal overturned, although they may be challenged to meet the specified burden after their asylum claims have been rejected.

These cases involving American citizen children with foreign-born parents illustrate that children's rights as they are set out under the CRC are scarcely recognized by U.S. officials. Specifically, the important notion that children's best interests should be a primary consideration in decisions affecting the child is not discussed at all. So if American children's rights are not prioritized, child refugee claimants fare even worse. This problem will become clearer throughout the chapter as I investigate a variety of American asylum decisions. These cases generally involved a failure among BIA Members and Federal Court Judges to incorporate, to any degree, child-specific understandings of persecution and other children's rights protections. As the following section will show, the question of whether children should be afforded special consideration in the processing of removal orders suggests that non-citizen children from developing countries, particularly those who are older, are treated by U.S. courts as adults.

Children in Removal Proceedings: Minors or Miniature Adults?

The following cases deal with the way in which the BIA has acted toward children who fail to appear for removal proceedings. Removal proceedings are significant for this discussion for two reasons. As Thronson (2002) has pointed out, first, all aliens, including unaccompanied minors, identified by the INS are immediately placed in removal proceedings (1002). Secondly, generally only after removability is confirmed are applications for relief, such as asylum, heard” (1000). Thus, while removal hearings are different than asylum claims, they constitute an important stage in the asylum-seeking process, and ultimately determine whether a child need apply for protection.

In the following cases, the matter of importance was whether a particular form, The Record of Deportable Alien (Form I-213), could constitute clear, unequivocal, and convincing evidence of removability of a minor absent other evidence. This form is used to compile basic biographical data about migrants who are intercepted entering the United States, and is submitted as documentary evidence during hearings. Normally, the I-213 is accompanied by additional testimony or other information. At their removal hearings, migrants are afforded the opportunity to contest all or some of the information as contained in Form I-213. In particular, they may argue that the information is incorrect or was obtained by coercion or duress. Because none of the minor respondents in the following cases appeared, there were two general issues: whether the uncontested facts contained on the Form I-213 adequately establish the respondent’s identity and alienage and whether minors have the maturity to understand the magnitude of the situation when they provide said information. The variance between BIA Members’ opinions shows how child-specific considerations are inconsistently applied, and how

older children are particularly susceptible to adultifying discourses that treat them as miniature adults who are denied child-specific rights and entitlements (Bhabha & Young, 1999).

One of the first cases in which the BIA assessed whether the INS could establish the deportability of a minor involved a 15 year-old El Salvadorian citizen, in the case, *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999). In this judgment, BIA Member Hurwitz noted that migrants who enter the United States without inspection and in contravention of U.S. law can be subject to deportation; however, only if the INS establishes this by evidence that is clear, unequivocal, and convincing. The Immigration Enforcement Officer who intercepted the boy compiled information on Form I-213, which was later submitted as evidence of his identity and alienage, as required. The Immigration Judge claimed that because the child did not attend the hearing, there was insufficient evidence to establish that the information was correct and reliable. Most noteworthy, the judge took issue with the fact that the document did not indicate that the respondent was advised that his statements could later be used against him, which was significant because of his young age. Additionally, the judge felt that to rely on the minor's admission that he entered without inspection was tantamount to accepting an admission of deportability, which is forbidden in cases involving unaccompanied and unrepresented minors.⁷⁰

In sustaining the INS's appeal, Hurwitz agreed that there is no statutory prohibition against the use of a Form I-213 to compile information about unaccompanied minors, and that relying on the information therein differed from accepting an admission of deportability.⁷¹ Specifically, s/he felt that Form I-213 contained biographical

information, not claimants' admissions or challenges. Unless contested, the information is considered to be true and reliable, and can accordingly constitute evidence that a minor is removable. Hurwitz took issue with Immigration Judges' contention that unequivocal evidence of removability is not established if a minor does not understand the facts admitted in support of such a finding only because the respondent failed to appear. Hurwitz argued that an Immigration Judge must address a minor's competence and aptitude during a hearing. Otherwise, it is assumed that children are capable of understanding and admitting facts, and possess the capacity to provide basic information about themselves. Since the minor in this case failed to appear, it should be assumed that he is competent, especially "given his older age," such that the evidence presented in Form I-213 is sufficient for the INS to establish he is deportable. In essence then, the Board ruled that it is minors' responsibility to show they do not understand the facts or purpose of providing information that can be used in support of their removal, despite the fact that the legislation recognizes that minors may lack the maturity to appreciate the significance of providing factual responses or evaluating the consequences of those responses, such that the INS cannot clearly, unequivocally, and convincingly establish removability. Ultimately, this case engendered questions of what special care children require when information is obtained from them. The BIA's decision suggests children should receive no special consideration.

The verdict in *Ponce-Hernandez* was subsequently used as a justification to overturn another Immigration Judge's finding that the INS had not produced sufficient evidence to uphold a removal of a minor in absentia. The case, *Matter of Gomez-Gomez* 23 I&N Dec. 522 (BIA 2002), involved an 8 year-old Guatemalan child who was

apprehended entering the United States with an adult male who identified himself as the respondent's father, Carlos. The Form I-213 indicated that Carlos provided all the information about the respondent, which the Immigration Judge ruled was insufficient evidence to prove removability for two reasons. First, the Immigration Judge felt that since there was no evidence that Carlos was the girl's father or that the information he provided about her was correct, there were doubts as to the reliability of the document. Secondly, she noted that he had a very strong motive to lie about their relationship, since adults who enter the country in the presence of children are seldom detained or asked to pay a bond. Without some evidence that Carlos was her father, and given that he provided the biographical data, the judge reasoned that the INS could not unmistakably be certain that Form I-213 precisely showed she was removable.

Even though the BIA acknowledged the Immigration Judge's "laudable desire to protect the rights of alien juveniles," it nonetheless overturned her judgment in an 11-6 split decision. Member Pauley, speaking for the majority, held that while this case centred on legal issues similar to those in *Matter of Ponce-Hernandez*, ultimately the major question was how to determine "the reliability of information about a minor respondent's alienage obtained from an adult, who the INS believes is accompanying the minor, and whom it treats as such" (524). Pauley felt that there was no proof to discount that Carlos was the girl's father, as alleged, noting that the Immigration Judge's speculation was insufficient proof. Further, he claimed that in the absence of evidence that confirms the parental relationship had been invented, the information provided in Form I-213 cannot be assumed inaccurate. Instead, the respondent must meet the usual tests to show otherwise, which involve appearing at the removal hearing for an interview.

Pauley also rejected the Immigration Judge's contention that the child was not given adequate notice to her duty to appear at the removal hearing. The judge reasoned that since Carlos's parental relationship to the child was uncertain, the INS failed to serve the minor because they sent the Notice to Appear to Carlos. Additionally, she felt that it would be unfair to penalize an 8 year-old because her father or another adult failed to produce her for the hearing. Pauley disagreed with both arguments. In terms of the former, since he rejected the judge's belief that there was reason to doubt the relationship between Carlos and the child, he reasoned that as long as the Notice to Appear was served on Carlos, the adult with whom the child was living, it was assumed served upon her. To the latter issue, he argued that the Immigration Judge's argument effectively means that no child could be deported *in absentia*, an exception that has not been legislated.

In the dissenting opinion, Member Schmidt agreed with the Immigration Judge on both issues. Schmidt argued that while *Matter of Ponce-Hernandez* was an important precedent for this case, there were major differences in the circumstances involving this minor and the child in *Matter of Ponce-Hernandez*. Most noteworthy, Schmidt pointed out that the respondent in the earlier decision was nearly twice the age of this respondent, provided the identity information in Form I-213 personally, and was served directly with the Notice to Appear. Thus, even though the Board held in that case that the Form I-213 was sufficient, the finding of removability need not be applied in this case. Schmidt offered several reasons for this conclusion. Primarily, he felt that her young age undermined the ability of the INS to show the evidence in support of deportation was convincing. Moreover, he objected to the majority's finding that Carlos could be

construed as her father in the absence of corroborating evidence. Instead, Schmidt agreed that since he had filled out the respondent's I-213, had a motive to lie, and did not appear to Immigration Court with his purported daughter, the court could not reasonably find that the information contained in Form I-213 was definite.

The third case, *Matter of Andino*, is an interesting contrast with the two aforementioned rulings. Here, the BIA unanimously agreed to sustain an Immigration Judge's finding that the INS had not proven a 7 year-old Honduran girl was removable by clear and convincing evidence. As in the previous cases, the major issue was whether the Service could rely on the information contained in Form I-213 to prove the minor was deportable in absentia. However, the INS also asked the BIA to recognize that service of the Notice to Appear was legitimately served on the respondent's uncle.

Commenting for the Board on the latter issue, Member Guendelsberger claimed that because the child indicated that she would join her parents in Detroit, the INS improperly served the notice on her uncle. Citing the Circuit Court's ruling in the Elian Gonzalez case, which will be explored later, the BIA claimed that parents are ultimately responsible for minor respondents. Consequently, the INS violated a legal requirement that a Notice to Appear must be served upon a child's parent or legal guardian, in addition to other relatives or accompanying adults.

In a concurring opinion dealing with the former legal issue, Member Espenoza found that the Immigration Judge also properly terminated removal proceedings against the 7 year-old respondent on the grounds that the information contained in Form I-213 was not sufficient in the absence of a determination that the child was able to understand and communicate the information. Notably, Espenoza argued, as Schmidt did in the

dissenting position in *Matter of Gomez-Gomez*, that the precedent in *Matter of Ponce-Hernandez* did not apply to this respondent because she was much younger. She remarked:

...very few 7-year-old children have the intelligence and understanding to provide accurate information regarding alienage, immigration status, and manner of entry. Even those who might ordinarily be able to communicate such information may be prone to suggestion when apprehended and questioned by the Service officers concerning these events. Furthermore, some young children may have been instructed by the adults with whom they are traveling to provide false information to the Service (538).

In addition, Espenoza felt that special care should be taken to explain the course and reliability of the information in Form I-213. She suggested that the document could have included, for example, (corroborating) information from family members who were traveling with the respondent. In sum, Espenoza argued that the INS had not met its burden to prove that the minor respondent was removable, but distinguished this case from *Matter of Gomez-Gomez*, which also involved a young child, on the grounds that “the principles of special care exist when information is obtained from a minor respondent” (539).

Taken as a whole, these decisions concerning minors’ deportability *in absentia* are confusing and illustrate inconsistency on the matter of the specificity of child migrants’ rights. As discussed, the burden to show an alien is removal consists of providing evidence that is clear, unequivocal, and convincing; a rather demanding obligation. Still, the BIA reasoned that two children who failed to appear for their hearings were removable. In the first case, the BIA felt that a 15 year-old can communicate information as accurately as adults. Indeed, their endorsement of removability suggests that older children do not require special care when information is

obtained from them. In the second case, the BIA argued that while special care exists when information is obtained from a minor, no special consideration exists in using information that is obtained from a third party adult in removal proceedings against a young child. Moreover, their declaration in *Gomez-Gomez* that the Immigration Judge showed a “laudable desire to protect the rights of alien juveniles,” implies that children’s rights are secondary legal issues and that the Judge is noble and naïve for recognizing them. Even though the Board’s analysis in *Andino* is encouraging, the legal standards set out in *Ponce-Hernandez* and *Gomez-Gomez* are quite problematical. Childhood has been relativized, children must show they have different levels of maturity or faculty, and adults’ testimony about a child is deemed sufficient information about a child. It is not surprising that the CRC was not once mentioned in any of these judgments, given that none of these verdicts (even *Andino*, because it does not challenge the precedents) seems to consider children’s interests or voices. As will be shown in the next section, the omission of child-specific rights is also common in asylum proceedings.

Positive Asylum Decisions and the Absence of Children’s Rights

One case in which the minor age of a child was crucial to his asylum application involved 17 year-old Bernard Lukwago, who applied for asylum, withholding of removal, and withholding of removal under the Convention against Torture (CAT). In *Lukwago v. Ashcroft* [2003], the Third District Court of Appeals remanded the case back to the IRB on only one account. Lukwago was a native and citizen of Uganda who lived with his parents until he was 15 years of age, when his parents were killed and he was subsequently kidnapped by the Lord’s Resistance Army (LRA) and forcibly conscripted

to fight against the government. During the time he was held captive, he was forced to aid the Army with various tasks, including manual labour and frontline combat. He witnessed the torture and murder of civilians and other child recruits, and was threatened with death if he did not assist in the murder of another child soldier who failed an attempted escape. After about four months he escaped to his uncle's house, who helped him flee to Europe. He applied for asylum in the Netherlands and after nearly two years, his application was denied. He then met a man who facilitated his journey to the United States. The court notes that the Immigration Judge denied his asylum claim, but withheld removal under CAT. Both Lukwago and the INS appealed the decision, and the BIA dismissed Lukwago's appeal and sustained the INS's appeal, thereby denying Lukwago's asylum application and his request for protection under the CAT. Specifically, they argued that he failed to show he was targeted by the LRA because of his membership in a particular social group, namely children, and that he would be targeted by the LRA or the Ugandan government as a former child soldier. They further denied his application under CAT because the Ugandan government purportedly offered amnesty to former rebels and because CAT protection does not offer protection against torture perpetrated by non-governmental entities. Again, Lukwago appealed the negative determination for asylum and withholding of removal under CAT.

Although the judgment was ultimately in the applicant's favour, the court examined several elements of the claim but only remanded for one reason – because former child soldiers, especially those who escape, are at a greater risk of being targeted by the LRA than the general population.

The Court explored the issue of whether Lukwago was persecuted because of an enumerated ground, primarily being a member of the particular social group, children. They reasoned that the BIA erred in seemingly questioning whether a group based on age would qualify, but concurred that since the LRA also recruits adults, the applicant's protected ground did not exist independently of the cause of group affinity. In other words, the persecution was not on account of a protected ground that existed before or brought about the persecution. This was significant because it not only disqualified Lukwago from political asylum; it also disqualified him from a discretionary grant of asylum for humanitarian reasons and withholding of removal. However, they did rule that he was at a greater risk, and therefore, did determine him to be a legitimate refugee.

At first glance the Court's reason for overturning the verdict appears to pay attention to Lukwago's youth. However, they could easily have made such a decision about an adult. That Lukwago would be targeted by the LRA if returned to Uganda had little to do with his age, but with his abscondment and inevitable escape from the LRA. They identified his persecution on the grounds that former soldiers are at a greater risk, which meant that the persecution is not generalized. Surely former adult soldiers could make a parallel claim. So even as the Court's verdict was helpful for this particular applicant, the interpretation of asylum law, particularly their (mis)characterization of the particular social group in this case remains adult-centric and ignorant to child-specific persecution.

As in the Canadian ruling, *The Minister of Citizenship and Immigration v. Zu Huang Li & Young Ming Zhang* [2001], the court's rationalization of the particular social group existing before and independently of the persecution is problematic. Lukwago

notes that international human rights organizations recognize that the LRA intentionally targets children because they are easier to intimidate and control. Specifically, they may raid areas where children can be found. That the LRA also kills adult family members is quite significant considering the court argued the LRA equally forced civilians to fill their ranks. If this were the case, why would they kill potential soldiers, particularly adults who are generally stronger? Moreover, the court's finding that the LRA murders adults and then kidnaps children contradicts their contention that young people are not a pre-existing social group persecuted because of their age, even if some adults are also persecuted. It is well recognized that adults and children experience similar human rights violations. For example, FGM is a practice generally regarded by asylum decision-makers as being persecutory. Certainly the fact that adult women are subjected to the practice does not lessen the reality that in most cases it is minor girls who are at greatest risk. To deny asylum to a girl who feared FGM who submitted she was a member of the particular social group, girls in X country, only because adult women were also vulnerable to the practice would be absurd.⁷² In this case, however, that very reasoning prevailed. Even though the LRA also perpetrates human rights abuses against adults, children are routinely targeted and most negatively affected. To find that they do not constitute a particular social group is based on tenuous reasoning, especially since international bodies recognize that the recruitment of children, although not adults, in militaries and militias is a fundamental violation of their rights. Again, the application of adult-centric understandings of persecution to cases involving children undermines their ability to access necessary humanitarian protection. At the same time, determinations

that children are insufficiently adult-like also prevent children from accessing protection. This problem is most evident in the case of Elian Gonzalez.

Children's Rights and Parents' Rights in Asylum: Elian, Cuba, and Asylum

Undeniably, the most famous recent child asylum case in the U.S. (and possibly the world) involved Cuban national, 6 year-old Elian Gonzalez, who was rescued with two other unrelated adults by two fishermen clinging to an inner tube off the coast of Florida. Elian's case, *Gonzalez v. Reno* [2000], generated international attention primarily because of the subsequent fight that ensued over his custody and the location of his eventual residence, a diplomatic conflict that quickly turned into a media spectacle.⁷³ Although not wholly unique in its circumstances given that numerous children arrive in the United States unaccompanied each year, the battle over Elian called attention to previously unexplored questions about parents' and children's rights in international relations and asylum.⁷⁴ The major focus in the media concerned the clash of two political cultures, and to a lesser extent, whether children should be reunited with parents living in oppressive regimes such as Cuba's. While media analyses are interesting and important, ultimately, the critical matter for this project is the interpretation of Elian's rights as outlined by the 11th Circuit Federal Court of Appeals. As will be explained, the court's ruling was a major setback for children seeking asylum in the United States and is illustrative of a general policy trend in American refugee law that renders children's rights invisible.⁷⁵

In November 1999, Elian's mother, who was divorced from Elian's father, Juan Miguel Gonzalez, and who had primary custody over Elian, boarded a small, dilapidated

boat for the United States with her new husband and several other adults. During the journey, a storm capsized the boat, drowning all but three people including Elian.

Initially, the Immigration and Naturalization Service (INS) took the boy into custody, but eventually granted him admission to the United States and awarded temporary custody to his great-uncle, Lazaro Gonzalez, who resided in Miami.⁷⁶ Within days, Lazaro Gonzalez submitted three related asylum applications on Elian's behalf, one of which Elian signed himself. At the same time, Juan Miguel requested his son's return to Cuba, a demand reiterated by Cuban president, Fidel Castro. He contested Elian's asylum application and asserted that since he had sole custody over his son, he had the primary right and duty to decide whether the 6 year-old could apply for asylum. In determining whether Elian's asylum application could be considered, the American government felt that the issue of who had legal custody of Elian was essential. Generally U.S. officials recognize that birth parents are presumed to have legitimate custody of children unless shown to be unfit. However, given the possibility that the Cuban government was intimidating Juan Miguel to have Elian returned, an INS official subsequently traveled to Cuba twice to determine whether Juan Miguel was genuinely concerned about Elian's welfare and was not being threatened, as Lazaro claimed. After these meetings, one of which was conducted in a neutral area to prevent eavesdrop, the INS concluded that Juan Miguel's desire to have Elian return to Cuba was not coerced by the Cuban government. Accordingly, U.S. officials respected Juan Miguel's right to custody over Elian and withdrew Elian's asylum application on the basis that 6 year-old children lack the capacity to file for asylum against the wishes of their parents.

Lazaro appealed the INS's refusal to hear the case to the Federal Court.⁷⁷ The Lawyers Committee for Human Rights, the Women's Commission for Refugee Women and Children, and the Florida Immigrant Advocacy Centre (collectively, the 'amici'), intervened in the case and submitted a Certificate of Interested Persons, after the first appeal was dismissed by the 11th Circuit Federal Court.⁷⁸ That decision was later affirmed by the 11th Circuit Court of Appeals. At the outset, the Court of Appeals held that the Gonzalez case stimulated important questions about executive authority and the separation of powers under United States law. Nogosek (2000:7-8) explains that the role of the court in immigration law is limited by Congress in order to give the Federal government greater latitude in the area of foreign relations. Specifically, the contentious issue was whether the U.S. Government had the authority to refuse to consider the merit of Elian's asylum claim only because he was a young child. The appellants held that this violated his rights as set out by both the Convention for the Status of Refugees (CSR), to which the U.S. is a signatory country, and Title VIII, Section 1158 of the U.S. Code of Regulations, which stipulates that "any alien...may apply for asylum." In their view, by refusing to hear Elian's claim, the INS violated his due process rights and made an unreasonable executive decision. The INS responded that it merely interpreted an otherwise ambiguous statute enacted by Congress.

Concerning this issue, the 11th Circuit reasoned that the important legal question was "not whether Plaintiff *may* apply for asylum...[but] whether a six-year-old *has* applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent" (8; emphasis in original). The court held that Congress did not outline the

procedures or validity of children's asylum because this task is under the authority of the executive branch. Consequently, the court maintained that the INS made a discretionary policy choice that:

(1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and (4) that the parent lives in a communist-totalitarian state (such as Cuba), in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative" (11).

Moreover, the court felt that while some executive decisions are made as an after-the-fact legal justification for taking a particular action, the court felt that in this case the decision should be afforded some deference because it was made in advance of legal proceedings. Furthermore, the court found that even though earlier INS interpretive guidelines, the *Children's Memorandum*, would dictate that Elian's application be considered, it ruled that these guidelines are not law and that since no law absolutely conflicts with the agency's decision, the course of action was reasonable.

Given that the court ruled that young children have applied for asylum only when a parent or legal guardian has consented to the application, the court then investigated the INS's opinion that Juan Miguel was an appropriate adult to represent Elian's interests.⁷⁹ As mentioned above, U.S. officials traveled twice to Cuba to ensure that Juan Miguel was not intimidated by the Cuban government to petition for Elian's return. The court found that the INS's conclusion that only a parent can act on behalf of a 6 year-old in immigration matters, unless there is a substantial conflict of interest, was also a reasonable choice in general, even if it "might hinder some six-year-olds with non-

frivolous asylum claims, prevent them from invoking their statutory right to seek asylum... [and] be imperfect” (15). As to whether Juan Miguel was an appropriate choice, the court expressed concern that Elian would be returned to a totalitarian country in which fundamental freedoms are disregarded, regardless of whether his father was being intimidated by Cuban officials. However, they ultimately agreed with the INS’s opinion that Juan Miguel’s appeal for Elian’s return was authentic, thus quelling concerns that Elian needed another adult to act on his behalf. They further found that foreign affairs aspects of INS policy required flexibility from the judiciary and argued that ultimately, the question of whether a parent living in a totalitarian state has sufficient freedom to speak for the best interests of a child in the United States was a matter for the INS to decide because “such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent’s country” (17).

Finally, the 11th Circuit briefly explored the foundation of Elian’s asylum claim, which the INS argued lacked objective merit. Lazaro claimed Elian feared persecution based ostensibly on imputed political opinion because many family members had been jailed and harassed for opposing the Castro government. The court further noted that he would not enjoy the same freedom in Cuba as in the U.S., was vulnerable to Communist ‘re-education’ indoctrination, and would be used by the government for propaganda purposes (19). Although the court would not explicitly say the case lacked validity, the analysis of American refugee law suggests they concurred with the INS’s determination.⁸⁰

As stated above, several individuals and organizations submitted a brief to the court outlining their view of children’s inalienable right to apply for asylum.⁸¹ In it, they

outlined three matters of general importance: the right of children to apply for asylum as specified by both international and U.S. domestic law, and special considerations in children's asylum cases.

In their submission, the *amici* remarked that numerous international agreements, including for example, the Convention for the Status of Refugees and the Declaration on Human Rights, guarantee all persons the right to seek and enjoy protection from persecution without any lower age limit or qualification by age. Furthermore, they argued that children's right to apply for asylum is additionally secured in Article 22.1 of the CRC, which says:

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 the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Although they acknowledged the United States has not ratified the Convention, they pointed out that U.S. officials have recognized, notably in the *Children's Memorandum*, that they must refrain from taking action that would undermine the purpose of the Convention (11). In addition, they stressed that Congress has never specified that children be excluded from refugee protection. In fact, they submitted that rather than being silent on the issue of children's right to independence in immigration matters, Congress adopted statutes that ensure parents are able to express their views, indicating that children's separate rights have been noticed. Thus, the *amici's* position was that the 11th Circuit court failed to adequately address the various international and domestic laws

that expressly permit children to make independent asylum applications, even when a parent objects.

The *amici* also directed the court to a third area of concern: the general impact a decision that excluded some children from refugee protection might have. While recognizing that children and adults may flee similar human rights violations that are perpetrated by third parties, the *amici* pointed out that often parents cannot protect their children or are even complicit in their persecution. A policy that prohibits children from applying for asylum because their parents objected could effectively mean the refoulement of children to their persecutors, an action that is also expressly forbidden by international law. In sum, the *amici* felt that insufficient weight was given to child asylum seekers' rights as they are outlined globally and domestically.

Taken as a whole, Elian Gonzalez's circumstances were quite complicated because of his age and the fact that his relatives had competing visions of his best interests. Certainly there are no easy answers as to whether Juan Miguel should have been granted custody over Elian or whether it is appropriate to return a child to a country from which the United States accepts numerous refugees. Moreover, Elian's conflicting interest to be reunified with his father or have political protection in a third country generate more questions than answers as to how Elian's welfare could have been served best. Still, the Appeals Court's justification for nullifying Elian's asylum application leaves an uneasy feeling about the way in which the United States judiciary considers child asylum seekers' rights.

Primarily, the court's rationalization about the difference between having the right to apply for asylum and whether a 6 year-old has applied for asylum is inadequate.

While being allowed to apply for asylum and actually applying for asylum may be separate questions, when framed another way, the reasoning of the court in this case effectively prohibits children from refugee protection. By deeming that a young child has not applied for asylum, the justification for such an opinion being that the child lacks the maturity to make such a decision for him or herself, the court essentially bars migrant children from doing what they are elsewhere permitted to do. In other words, the policy enacted by the INS has the general impact of stating that children may apply for asylum, but have not done so without the assistance of a legal guardian. So the court has not explicitly said that children may not apply for asylum or that only parents or legal guardians may apply on their behalf; however, they have inserted a condition that excludes children from the possibility of applying for asylum. As the *amici* suggested, the court's word games have serious implications for child asylum seekers whose asylum applications could be invalidated by parents who persecute or whose actions aggravate the persecution of children.

In addition, the Court's reasoning about whether Juan Miguel could freely represent Elian's interests was also quite unfortunate. The Court noted that INS officials personally visited Juan Migeul and even left open the possibility that he could apply for asylum as well, an option that would uphold Elian's right to family reunification. In determining whether Juan Miguel was being coerced by the government, they failed to examine whether said coercion was direct or a matter of general understanding. They also failed to take account of other family members Juan Miguel may feel obligated to protect should they remain in Cuba, which is in keeping with Lazaro's contention that many of their relatives had already experienced harassment and unjustifiable

incarceration for opposing Castro's government. Hence, even though Elian and his father potentially had a very serious conflict of interest, and the court remarked that Elian had not even been interviewed about his wishes, they still favoured the adult's wishes over, and to the exclusion of, the child's rights and interests. Surely the court could have erred in Elian's favour or consulted him to determine where and with whom he might prefer to live.

Finally, the court's assessment of the issues in this case largely centred on whether the executive decision to refuse Elian's claim because he was a minor was an unreasonable policy. The court expressed benevolent concern about many aspects of the INS's decision, but still failed to find any of these choices unwarranted. They did examine some domestic jurisprudence to justify their conclusion, but completely omitted a discussion of international protections that asylum seekers are guaranteed. Significantly, the Court did not once mention the United Nations Convention on the Rights of the Child, or other international agreements which the United States has in fact acceded to. And their finding that the INS did not need to abide by its own policy, the *Children's Memorandum*, only because they do not constitute absolute law is disheartening and undermines the purpose of creating such guidelines in the first place. Finally, the conclusion that the policy "may be imperfect" minimizes the consequences for child asylum seekers who are prohibited from claiming refugee status. The precedent set in this case is that some people are less deserving of international refugee protection because they are thought to lack certain capabilities, and is completely out of touch with an international climate that seeks to offer more, not less, security to the world's most vulnerable populations.⁸² Moreover, it is an interesting contrast with the way in which

capacity is characterized during removal hearings. Here a child is too young to apply for asylum because he supposedly lacks the maturity to understand the gravity of refugee protection. However, children are not automatically thought to lack the capacity to complete and remain bound by laws concerning deportability. This is a dangerous judgment for children seeking asylum in the United States, indeed.

Hope for the Future: Integrating Children's Rights in Asylum Law

Even as there are alarming lessons to be learned about the place of children in American refugee law, there are also many affirmative decisions that have recognized the vulnerability of children. In two cases involving child abuse, the BIA and the 9th Circuit Court of Appeals ruled in favour of the petitioners. In *Matter of Juan*, the BIA held that a 15 year-old Honduran had a well-founded fear of persecution which stemmed from longstanding abuse perpetrated by his stepfather. Since the age of three, his stepfather, a former sergeant in the army, severely abused him. Although Juan's mother initially attempted to intervene on numerous occasions, each time Juan's stepfather assaulted her into submission. Eventually, she became complicit in his abuse to avoid beatings. In addition to physical beatings, Juan was habitually denied adequate food or water, was forced to work long hours on the family farm and outside the home, and was withdrawn from school after completing only six years of schooling. He often ran away but was always located by his stepfather, who would punish him severely. Eventually he escaped with the assistance of his uncle. He claimed that he could not return to live with his stepfather, whom he believed would eventually kill him. Thus, he argued he would have to live on the street where he would be susceptible to violence at the hands of drug

dealers, gangs, pimps, and even the Honduran authorities. He further contended that the Honduran government is both unwilling and unable to intervene because his family resides in a rural area of the country.

The Board agreed that Juan had a well-founded fear of persecution on account of his membership in the particular social group, children. Significantly, the Board rejected the INS's claims that Juan had a duty to contact the police, noting that his age and mental state as an abused child in whom tremendous fear had been instilled, made it difficult for Juan to seek protection. Moreover, they also felt that the small size of the country, the Honduran police's general indifference, and his stepfather's ties to the military were significant factors that would make reporting his stepfather potentially very dangerous. Most significantly, the BIA correctly equated Juan's treatment with torture.

In the case, *Aguirre-Cervantes v. INS*, the 9th Circuit Court of Appeals overturned a negative BIA decision involving a 19 year-old Mexican national who applied for asylum at 16. The claimant contends that her family was severely abused by her father for a number of years. This abuse was not just physical. Her father sexually abused her sisters and had on many occasions and prevented family members from seeking medical treatment for injuries he had caused. Thus, she claimed to have a well-founded fear of persecution based on her membership in the particular social group of her immediate family. Moreover, she claimed that the Mexican government was unable or unwilling to stop the abuse, and if she were returned to Mexico, it would continue. The Immigration Judge granted asylum, but the BIA overturned the decision on the basis that her family is not a protected particular social group. Upholding the Immigration Judge's ruling, Federal Court Judge Thompson argued that there was sufficient legal precedent to

establish that one's family could constitute a particular social group as it was legislated. Moreover, he felt that the respondent had sufficiently proven she experienced past persecution, which the INS conceded. However, the INS attempted to argue that because the petitioner is no longer a minor, her circumstances have changed. Thompson rejected this argument for two reasons. First he claimed that the abuse was not age-specific because Mr. Aguirre abused his wife and other children. Second, he maintained that "under the reasoning of *Gafoor* [a precedential U.S. asylum case], if the petitioner were eligible for asylum when the BIA considered her case at the time she was 16, she should not lose that eligibility now that she is 19 just because of an erroneous ruling." In sum, Thompson agreed that domestic violence was a persecutory action from which family members, particularly children, have difficulty finding protection.

These two judgments are startlingly different from most of the Canadian decisions concerning abused children that I outlined in the preceding chapter and the earlier American decisions above. In both decisions the age, emotional capacity and development of the respondents were adequately contemplated and not minimized. The impact of sustained violence and humiliation were taken seriously, and the possibility of being abandoned as the only alternative to abuse was deemed a fundamental breach of the respondents' rights as children. Thus, while a great deal of U.S. immigration and asylum law undermines child refugee claimants' ability to access protection, these cases are a step in the right direction. They interpret statutory protections in light of children's minority, and recognize children's differing needs and entitlements. Still, the lack of explicit attention to children's rights mechanisms, including the CRC, leaves a gap in American asylum law. These positive cases involved intense and enduring abuse, and

exposed both claimants to likely remaining unaccompanied upon return. So, even as both applicants were recognized as *bona fide* refugees, the positive decisions in these cases may be easily attributed to the severity, rather than child-specificity of the persecution. Quite easily, asylum applications from children who did not experience sustained brutality could be rejected because the abuse is determined to be not quite that bad. Consequently, these two affirmative judgments are worthy of praise for providing the claimants with refugee protection, but should be approached hesitantly as truly generalizable or precedential cases.

Conclusion: American Refugee Law in Practice

The way in which the American judiciary has interpreted the state's obligation to unaccompanied minor asylum seekers' rights to apply for asylum, withholding of removal or withholding of removal under CAT leaves much to be desired. American precedential laws hardly acknowledge children's rights instruments and child-specific entitlements. Indeed, there are few special treatments for minor asylum seekers since only children who enter the U.S. 'legally,' for example, with valid travel documents, are given the benefit of the *U.S. Children's Memorandum*. The remainder of children are treated as adults, and must meet the same evidentiary and legal standards. At the same time, young children are excluded from adult dealings, and thus, are excluded from the asylum system altogether. Consequently, in American immigration and asylum proceedings, minors are situated within the oppositional position as either miniature adults or children.

Children's Rights in Canadian and U.S. Judicial Approaches to Unaccompanied Minor Asylum Seekers

As has been argued in this and the previous chapter, the way in which children's rights are conceptualized and applied in judicial and quasi-judicial court proceedings in both countries is shifting and unpredictable. Human rights standards espoused by the CRC are more clearly articulated under Canadian refugee law. National policy generally recognizes that persons 18 years of age are minors and are therefore afforded particular human rights privileges. Nonetheless, a number of hurdles remain. In some instances, child-specific entitlements are overlooked, as in cases where the credibility or actions of Designated Representatives is prioritized. In other cases, the detrimental impact of certain actions toward children is simply minimized. In Canadian cases involving child abuse, few IRB Members discuss the damaging consequences that violence has on children's physical and psychological development. In these instances, refugee claimants are racialized as part of their underdeveloped cultures, making them more adultlike and supposedly equipped to deal with harm. Even when the Canadian judiciary is mindful of children's rights, international human rights protections, and the CRC in particular, some children's claims are still denied. This is most evident in cases where the child applicant has been smuggled or trafficked. Rather than using the CRC to better understand the precarious place of children within their families, Justice Muldoon, in *Shu Ping Li v. Canada (Minister of Citizenship and Immigration)* [2000] and *Xiao v. Canada (Minister of Citizenship and Immigration)* [2001], for example, reasoned that as children reach the age of majority, their ability to consent to being smuggled and even to disobey their families increased. Hence, under Canadian immigration and refugee law, children's

rights have been clearly articulated, but the extent to which IRB Members and Federal Court Judges apply these rights to refugee children varies dramatically.

Under American immigration and refugee law, migrant children are indistinguishable from adults as a group after they apply for asylum. The most salient shortcoming of American immigration and refugee law is that different childhoods are statutorily afforded different protections, despite the fact that the CRC extends child-specific security to all persons under 18 years of age. As stated, an Immigration Judge cannot accept an admission of removability from an unrepresented minor. However, minor in this case is defined as a person under the age of 16. In *Matter of Ponce-Hernandez*, a 15 year-old child was deemed near enough the cut off so as to not require the protection statutorily guaranteed to “children.”⁸³ In *Matter of Andino*, the BIA notes that of a notice to appear must be served upon the person with whom a minor resides. Under Section 239 of the Immigration and Nationality Act, a minor is defined as a person under the age of 13, which therefore means that the INS, or more specifically, U.S. Congress, believe it is appropriate to force children between ages 14 and 17 to present themselves at hearings. At the same time as older and middle-aged children are treated as adults, younger children are constructed as completely devoid of volition. The most prominent example of this view, shared by both the INS and the Federal Circuit Court of Appeals, involved the case of Elian Gonzalez, who was denied the almost universal right to apply for asylum because he was only 6 years old.

The shifting definition of who is a child, who is an adult, and what rights these seemingly dichotomous groups are afforded is pervasive in American law. Dolgin (1999) claims that the age of autonomy is constructed with both the vision of the past and the

reality of the present in mind. As a result, the law "...redefines certain children, for certain purposes, as virtually indistinguishable from adults. Consequently, the law spawns and struggles to harmonize contradictory definitions of childhood and conflicting rules for regulating children's behaviour" (422). Additionally, Schaffner (2002:203) points out that under U.S. law, children's legal capacity for certain behaviours is contingent on both the behaviour and the jurisdiction. For example, children as young as 13 are eligible to be tried for felony crimes or can be sentenced to death as early as age 15, yet may not operate a motor vehicle or work in a public establishment until age 16. Canada and other countries also give children different rights at different ages, but without such great variance. For example, all but a very small number of children who commit crimes under the age of 18 are tried as juveniles, and Canada of course does not apply the death penalty to anyone. So while children cannot drive or collect social assistance until 16 years of age, children in Canada are not treated as adults to the same degree as in the United States (See Stasiulis (2002b) for a discussion of children's right to social assistance). Thus, Dolgin argues that certain children's behaviour is regulated in keeping with certain, albeit absurd and contradictory, social values. Understood in this light, it is no surprise American immigration and refugee law defines asylum seeker's minority at a lower level than advocated by the CRC. America's fixation on illegal aliens, external threats, and national security make the business of controlling borders and migrants crossing borders a more important endeavor than protecting asylum-seeking children.

The problem of fluctuating definitions of children and childhood and the rights afforded accordingly is compounded in the judiciary partly because it is charged with the

responsibility of interpreting existent law. At the same time, children who are clearly recognized as children still face obstacles in having their asylum claims recognized. Specifically, children's right to be protected against physical, psychological, and emotional exploitation is not acknowledged by the judiciary. Under U.S. asylum law, children have no particular protections and the CRC rarely factors in their decisions. For example, in *Lukwago v. Ashcroft*, the court completely ignored the consequences of the LRA's actions toward the applicant. At 15 years of age, Lukwago witnessed his parents' murder, was kidnapped, was forced to engage in combat, and was threatened into harming civilians and other child soldiers. While seemingly viewed as unfortunate, in the court's opinion none of these actions constituted persecution. Instead, the only reason Lukwago was granted asylum was because he had a greater likelihood of being recognized and punished by the LRA, a finding which is not in any way related to his age, but to his experiences as a former soldier. Indeed, the conditions of return, which included being a minor or young adult without access to resources or family to support him, was not even contemplated by the court. In this case, a minor was encountered as if he were an adult. Even in U.S. court cases where children's rights are protected, the CRC is not explicitly referenced. While these cases should be hailed for establishing important jurisprudence that protects minors against persecution, there still remains a gap in the law because decisions become contingent upon particular circumstances and not universal principles of children's rights. Thus, not ratifying the agreement does not necessarily mean that child refugee claimants will be denied asylum. However, it does mean that minor asylum seekers are not necessarily ensured protection exclusive to children. So even as there are flaws with the system that has accepted international human rights

mechanisms, these failings are much better than a structure in which the human rights treaty is not accepted. As American judicial decisions suggest, children's rights are practically absent.

CONCLUSION

In this thesis I have examined the impact that ratification of the United Nations Convention on the Rights of the Child has had on refugee policy toward unaccompanied minor asylum seekers in Canada and the United States. Because I was interested in determining whether ratification improves the way in which asylum-seeking children are treated, I contrasted both states' national refugee legislation and a selection of court cases dealing with minor asylum seekers to see how the CRC, conceptions of childhood, and children's rights were accounted for in both nations' policies. Heyns and Viljoen (2001) assert that international treaties have most weight in countries where they have been ratified. The foregoing analysis suggests that ratification of the CRC is important for the realization of refugee children's rights. However, while necessary, it is not sufficient to ensure that children are properly protected.

The Canadian system protects refugee children slightly better than the American system. Mainly, this is evident in the legislation, which provides several important protections for children that are absent in the American system. For example, following the CRC, all persons under the age of 18 are afforded child-specific protections. The 'best interests of the child' principle has been explicitly articulated in Canadian immigration and refugee legislation, as well as by the judiciary. Moreover, all asylum-seeking children have access to the *Canadian Children's Guidelines*. In contrast, under

American immigration and refugee law, the age of minority shifts between 14, 16, and 18. Additionally, there is no statutory protection of children's best interests. Finally, the *American Children's Memorandum*, while comprehensive, only applies in a very limited number of cases. Children who appear before Immigration Judges, for example, do not benefit from the evidentiary, procedural, or substantive protections outlined in this document.

Despite these promising legislative safeguards in Canada, it is evident that child refugee's rights are still ill-conceived in both countries. This is most evident in judicial interpretations of child asylum seekers' refugee claims, which are inconsistent in both countries. Several Canadian adjudicators and judges pay lip-service to the CRC and ignore the specificity of children's persecution. In some cases, the *Canadian Children's Guidelines* have been ignored or disregarded, even though they only relate to procedural and evidentiary matters. Likewise, U.S. courts fail on many grounds to adequately conceptualize children's rights and child-specific persecution. Principally, the problematic and varying constructions of childhood, both countries' overarching concerns with border security, neoliberal development, and the importation of the right type of future citizen that conforms to models of the ideal (economically secure and productive, adult, male standard) citizen, can account for the indifference shown toward some minor asylum seekers. Thus, an important issue needs to be addressed: why defend ratification of the CRC if it does not *significantly* increase the likelihood that judges or adjudicators will make child-sensitive decisions?

The major reason for doing so is that ratification offers lawyers better means through which to make the case for child-specific protections, even if judges discount

them. International children's rights mechanisms have been referenced in both Canadian and American cases. In *Gonzalez*, the *amici* suggested that the U.S. Federal Court should consider children's rights as they are set out in the CRC. Eventually however, no mention of CRC or children's rights was made by the court in the *Gonzalez* decision. In contrast, when CRC has been advanced in Canada, as in the *Xiao* or *Bian* decisions, the court has been forced to address and interpret, rather than ignore, the place of international human rights mechanisms in Canadian law. Of course, different judges have interpreted these international mechanisms laws in contradictory ways; however, rather than being totally overlooked, children's rights have at least been taken up by the judiciary. And at times, as in *Bian*, this has had a positive outcome. Thus, there have been instances in which IRB Members or Federal Court Judges were attentive to Canada's obligations to the CRC, the best interests of the child, and international child-specific mechanisms as they apply to minor asylum seekers. Without ratification, their consideration of this agreement could be purely selective.

Children's rights in the field of immigration policy are in the process of being developed by the courts. The Canadian judiciary only recognized that *Canadian citizen* children's rights are an important consideration three years ago in the *Baker* case. So even while there have been a spate of decisions toward unaccompanied minor asylum seekers, this is still a very new and underdeveloped area of law. The United States has some catching up to do since immigration and refugee law toward unaccompanied minor asylum seekers has left much to be desired. Ratification of the CRC will be important to American refugee law, even if it will not alleviate all the problems minor asylum seekers face. Ultimately, the sensitivity shown by judges or adjudicators toward unaccompanied

minor asylum seekers is affected by more than international human rights norms. However, making them more prominent is an important step in achieving greater protection for this group.

Policy Implications and Directions for Future Research

This thesis has revealed several shortcomings in Canadian and American policies toward separated minor asylum seekers. Both countries are only beginning to pay attention to the plight of child refugee claimants. To some extent, this is because the migration of lone children in such large numbers is a relatively new and growing trend.⁸⁴ It is obvious that the structure of both nations' asylum systems have had damaging consequences for children since asylum and immigration laws have been created with adults in mind. Without a doubt, immigration and asylum is profoundly adult-centric, and children, if conceived at all, are viewed as objects of their parents' control. Moreover, immigration and refugee law is increasingly oriented toward enforcement. So at the same time as states have taken responsibility for migration control, in the case of unaccompanied refugee children, they have also been charged with providing care. As Young (1999) has explained, the ensuing conflict of interest nearly always resulted in the privileging of immigration management, much to the detriment of children's wellbeing. Significantly, the INS has recently transferred custody over child asylum seekers to the Office of Refugee Resettlement, which has experience working with refugee populations and which does not possess a conflict of interest, in order to ensure minor asylum seekers are treated with a modicum of respect and dignity. This is one recent positive instance in

the United States where children's special protection needs have been adopted into refugee policy.

Likewise, allowances for refugee children who make independent asylum claims are still in the process of being developed. As this thesis has revealed, it is critical that refugee children have access to particularized procedures that account for their psychological development. Both countries have created guidelines to assist decision-making bodies better understand children's forms of persecution; however, the guidelines do not go far enough in either country. All refugee determination bodies should have comprehensive guidelines for dealing with child asylum seekers. These should outline not only procedural and evidentiary matters, they should also include substantive considerations with many detailed examples. And these guidelines must apply to *all children* (while the CRC's definition of persons under 18 is arbitrary, it is notably a universally recognized cutoff) regardless of their ages, the method in which they entered the country, whether they are in possession of valid travel documents, and so on. Furthermore, such guidelines should highlight the importance of international children's rights mechanisms and the child-specificity of persecution. The absence of these safeguards has already been harmful to many children, and will continue to be so until government policies attempt to make the asylum process appropriate to children.

The policy suggestions outlined above require a scholarly complement to better understand the situation of separated refugee children. This thesis has provided only a limited picture of the problems and issues facing child refugee claimants. I have focused most on asylum law and policies, to the exclusion of other important concerns. Because childhood studies is a new and growing field, there are a number of underdeveloped areas

of research. Primarily, scholarship on legal issues that affect child asylum seekers could be better developed. Although this study has attempted to narrow this gap, I did not provide a comprehensive analysis of legal decisions affecting child asylum seekers in the two countries. Such a project has not to date been undertaken by researchers in either country, yet would be a fruitful task. Current research on legal issues affecting child refugees, particularly the way in which the Convention refugee definition has developed to account for age-based persecution, is necessary to understand how child asylum seekers are situated and constructed. Although some researchers, myself included, have analyzed a selection of cases to provide some answers as to how refugee children are conceived, child refugee claimants and their advocates would be much better served by research that amasses and investigates a much larger number of judicial decisions. A larger investigation could reveal important patterns about which children are making refugee claims, whether there differences in acceptance and rejections rates that vary according to gender, nation of origin, or the type of Convention nexus, and so on. And, such a study would be invaluable to refugee advocacy organizations who lobby government and even lawyers who represent child asylum seekers.

There is also a dearth of research that engages directly with children refugee claimants. While many scholars provide brief anecdotal information about child refugees' experiences to illustrate a larger point, few of these discussions engage with child refugee claimants as social actors. What is needed here is some research into child asylum seekers' experiences – they need to be heard and listened to in research about every aspect of the asylum determination process. Significant questions include: what aspects of the events surrounding migration and making an asylum claim were troubling;

what assistance was most beneficial or detrimental; what suggestions might they provide for improving the asylum system for future refugee claimants, and so on. This research would uncover and document children's points of view, and provide child-centred understandings of the asylum system. As has been discussed, adults often assume they know what is best for children. Primary research with child refugee claimants would provide a richer understanding of asylum as foreign national young people experience it. Perhaps consideration of these policy considerations and research endeavours will provide for a better understanding of how states can adequately protect child asylum seekers as both refugees and children.

ENDNOTES

¹ In May, 2002, Somalia became the 190th country to sign the United Nations Convention on the Rights of the Child. Currently, only Somalia and the United States have failed to ratify the agreement into domestic law.

² The United States has signed, but not ratified, the CRC. Signing the agreement means that the country agrees with, and promises to uphold, the values contained in the agreement. Ratification, however, requires the nation to incorporate the treaty into national law and to change existing laws to conform to it. Moreover, it requires additional responsibilities, such as reporting to the United Nations at regular intervals about progress.

³ Realistically, most migrants arrive in a select few provinces and states, which would reduce the number of relevant areas to study. For example, Ayotte (2001a) has examined the conditions of detention, care and custody of separated children in Quebec, British Columbia, and Ontario, since those were the only provinces that reported detaining minor asylum seekers and since those were the three major provinces in which migrants make refugee claims. Similarly in the U.S., states such as California, Florida, and New York receive a high concentration of immigrants and asylum seekers [which can be deduced by the fact that only a few Circuit Courts, representing specific states, have asylum or immigration decisions]. However, given that I limited my focus on the conditions of children's release, even if a large number of children arrived in certain provinces or states, they may inevitably reside in another state pending hearing of their case.

⁴ By 'nexus,' I mean that the claimant based the claim on a fear of persecution stemming from one of the five grounds outlined in the Convention for the Status of Refugees. These are: race, religion, nationality, political opinion, and membership in a particular social group. The legal intricacies will be explained in much greater detail in Chapter Three.

⁵ Most theorists (see Bhabha, 2001, for example) who write about child refugees often note that "80% of the world's refugees are women and children." This statistic is definitely useful for highlighting the way in which oppression often manifests itself in displacement. However, it fails to provide important data regarding the number of children or even their gender composition. Price Cohen (1995) insists that children be recognized as a heterogeneous group that requires thoughtful and creative theorizing. They need their own services, which should be as varied as they and their needs are. Combining children with women does both groups a disservice because the bases for their respective oppressions, although related, differ. Once again, adult males are the points of reference, and women and children, other.

⁶ This is not to say that asylum and human rights are the same. In fact, this thesis will show how they differ, at least in Canada and the U.S. For a further discussion of the tensions between asylum and human rights advocacy, see Jacqueline Bhabha (2002). For a discussion of the increasingly strong relationship between refugee law and human rights advocacy, see Deborah Anker (2002).

⁷ Again, even this statement requires qualification. This description of the difference between 'regular' and refugee migration includes several assumptions. First, and to the dismay of many activists, asylum seekers who apply abroad as well as those who are recruited from refugee camps for humanitarian resettlement are often selected (or denied visas, when applicable) according to

some of the criteria mentioned in the 'regular' immigration field. This is not legislated; rather, it is an informal (and illegal) custom (See Oswin, 2001). Secondly, the distinction between immigrant and refugee tends to construct the former group as being valuable to the receiving nation and the latter group as being taxing to the receiving nation. Again, refugee activists disagree with this characterization and often remark that many of the refugee claimants awaiting determination possess important skills and qualifications that could be useful in the receiving country's job market.

⁸ Forces of globalization are often characterized, especially in the realm of the economy, as being so uncontrollable that states do not have the power to set their own policy agendas. At times governments may play a role in perpetuating this myth in order to escape criticism for their choice to shift toward a neoliberal agenda. There are similarities between the way in which economic and neoliberal immigration policy is approached and explained by the state; however, there is much less criticism by civil society for promoting a neoliberal immigration agenda because immigration itself is justified by what it contributes to the receiving country. Still, government officials use this excuse when challenged by immigration and refugee advocates.

⁹ Even though refugee protection is universal, it is the ultimate responsibility of the state, or state parties to provide protection for individuals.

¹⁰ Recently, the Canadian IRB refused asylum to a Lebanese national and former Israeli spy, identified only as 'Mr. X'. The IRB Member felt that Mr. X, who identified possible members of the Hezbollah organization while working for Israel's external intelligence agency, contributed to human rights abuses (more specifically, crimes against humanity) inflicted by the Israel state against the people he identified. The decision was received so negatively by Israel as well as pro-Israel groups that Immigration Minister, Denis Coderre, issued a statement separating the Canadian government from the judgment, in which he claimed that the decision "doesn't reflect... the policy of Canada towards Israel." (See Canadian Jewish Congress: www.cjc.ca/template.php?action=itn&Story=283&CJC=d60770bfbf27c66fb77df827ee66b71a). This is an unusual and encouraging example of the IRB breaking from government policy and was included to show how refugee decisions create intergovernmental tension.

¹¹ Canada never repatriates persons who have been accepted as Convention refugees, because Canada offers asylum rather than refuge (See Adelman, 1990 for a discussion of the differences between these two concepts). The United States only guarantees asylum initially for one year, after which time the case is reviewed. If the situation remains unchanged, Convention refugees are then given permanent status in the United States. Non-status residents are those who have had their asylum applications rejected, yet who have arrived from a country in which the receiving-country has determined to be too dangerous for refoulement. In both Canada and the U.S., high-ranking officials (in the Ministry of Citizenship and Immigration and the Justice Department, respectively) place a moratorium on repatriation, which is lifted when country conditions 'improve'. Recently, Canada lifted its moratorium on Algeria, resulting in hundreds of deportations since April 2003. What is most interesting about this particular situation is that the Canadian government did not lift its travel advisory, warning Canadian citizens to avoid non-essential travel to Algeria because of ongoing violence. Apparently the Canadian government's position is that Algeria is too dangerous to visit, but not too dangerous to live in. Undoubtedly, a similar situation will develop with Iraq. Even though the country is war-torn, and no North American airlines will fly directly to Baghdad, non-status Iraqi citizens will probably be sent back, despite the ongoing violence and destitution.

¹² The law mainly affects refugees transiting the U.S. Very few people arrive in Canada and travel to the United States to make refugee claims, although many do sneak into the U.S. through Canada and may make refugee claims thereafter (especially if caught en route or inland). Most prefer Canada because there are several differences between Canadian and U.S. asylum policy. For example, Canada has better social programs, including health care. Canada relies less on detention. Canada has a much higher refugee acceptance rate than the U.S., and has a wider definition of some forms of persecution, most notably in terms of gender-based persecution. In fact, Canada accepts many women claimants who would be routinely denied protection in the U.S. This may become even more complicated if the U.S. revisits its precedential gender asylum cases, as has been recently suggested by John Ashcroft. For these reasons Canadian advocates have been very critical of the agreement because it deeply affects Canadian refugee policies while having only a minimal effect on the U.S. In fact, the frequently asked question about this agreement has been, from a Canadian perspective, is the U.S. truly 'safe?'

¹³ The safe third country agreement also has important implications for Canadian or American citizens and habitual residents' ability to make successful asylum claims. Although they are explicitly exempted under Article Two, the accord certainly reinforces the view that these countries are unable to persecute. Indeed, it is already extremely difficult for American citizens to be accepted as Convention refugees in Canada (and *vice versa*) and there have only been a few successful applications, one that will be analyzed in the subsequent chapter. The safe third country agreement will only strengthen the view of Western countries as protectors, not abusers, of human rights.

¹⁴ A person can become a permanent resident of Canada or the United States through asylum channels either by submitting a claim abroad or 'inland,' which includes at the time of arrival or sometime after entering the country. Additionally, individuals may be recruited from refugee camps for resettlement under a different section of the Act, which is in the refugee and humanitarian, not asylum-seeking category. This thesis will only elaborate on the ways in which Canadian and American refugee policies have responded to minors who have made refugee claims inland, although many of the problems that plague asylum seekers who have actually made it to North America's borders affect those applying from abroad.

¹⁵ Canada was the first country to create such guidelines in 1996.

¹⁶ It is also worth mentioning that there are two "Optional Protocols" to the Convention - one related to the involvement of children in armed conflict and one related to the sale of children, child prostitution and child pornography. Both Canada and the United States have endorsed these agreements, although they will actually not come into force in either nation until late 2002 to early 2003. Interestingly, the U.S. noted at the time of signing both Optional Protocols that their agreement should not be construed as ratification of the primary document.

¹⁷ Refugee law also includes legal decisions and precedents, although usually such decisions provide interpretation or clarification of existing regulations. An appropriate example of the judiciary's role under refugee law is illustrated by the definition of persecution. The Act and the Regulations stipulate that refugees are persons who have experienced or who fear persecution. However, the judiciary which has provided a more precise interpretation of what persecution means (in comparison with hardship or suffering; how to apply and balance subjective and objective tests; etc.). Such decisions are codified into law because the IRB is bound by superior court decisions, but only in a few exceptional cases are they included in the Acts or Regulations. The 'best interests' principle is probably one such case.

¹⁸ Pursuant to the Supreme Court *Singh* decision, under Canadian law all ‘eligible’ asylum claimants have their applications forwarded to the IRB for a determination of credibility. IRPA sets out ineligibility rather loosely, although much more strictly than the old Immigration Act. It excludes the following persons from making a refugee claim: 1) Those who are already recognized as Convention Refugees in Canada or another country (same IA78). 2) Those who have been convicted of serious crimes (same as IA78, but expanded definition). 3) Those who have arrived via a designated ‘Safe Third Country’ and who are not exempt (provided for, but never implemented under IA78). This is a source of extreme concern for refugee advocates since the U.S. is, at this point, the only ‘safe third country’ Canada recognizes and it has much more strict immigration regulations. Nonetheless, minors are exempt. So are people with immediate family in Canada). 4) Those who have had their asylum applications refused before. (IA78 provides a minimum time limit that a failed refugee applicant must leave the country before they can return to make a new claim. That time limit has been expanded from three to six months and under IRPA, the repeat asylum seekers’ claim goes right to a risk assessment board even if the basis of the claim is completely different. Again, many refugee advocates are quite troubled by this new development).

¹⁹ IRPA also includes a new “Refugee Appeal Division,” to which all negative decisions made by one-panel members will be forwarded. Despite being guaranteed in the law, the RAD has not yet been instituted, purportedly due to budgetary constraints.

²⁰ This is a tricky distinction because of the wording of S. 19, the ‘duty for counsel to notify the Division.’ It reads: “if counsel for a party believes that the Division should designate a representative for the permanent resident or foreign national in the proceedings because they are under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division and the other party in writing. However, the 1996 Guidelines specify that: “although legal counsel for the claimant may also be appointed as the designated representative, the roles of the two are distinct.” Overall, this DR requirement implies that having a lawyer alone is not sufficient (legal) protection for child (and incompetent) asylum seekers, probably because part of the DR’s duties are to help the child secure and instruct counsel. Yet, all refugee petitioners are guaranteed access to legal representation (although there is a shortage of qualified, accessible lawyers). This makes the appointment of the child’s counsel as DR seem foolish, especially since most attorneys selected to fulfill this role have expertise with immigration and refugee law, but generally lack knowledge or experience of issues particular to children (Bhabha & Young, 1999; Sadoway, 2001). Arguably, the DR is a safeguard to ensure child asylum seekers are protected as expediently as possible.

²¹ IRPA Section 159(1)(h) provides for the continuation of the *Guidelines*, as originally written, which were initially implemented under Section 65(3) of IA78.

²² The 1993 UNHCR *Guidelines* are comprehensive in their approach to refugee children by covering matters related to refugee children in all contexts, including refugee camp settings. However, the emphasis of this particular UNHCR document is care, safety, and protection more than the exclusion of children from the traditional refugee definition.

²³ To be granted refugee status, all asylum applicants must show that they have a subjective fear of persecution and that that fear is objectively well-founded. See Bhabha (2001:297-298) for further elaboration.

²⁴ Of course it is not expected that Guidelines issued by UNHCR would be legally binding on sovereign nations.

²⁵ IRB appointments are patronage-based, and frequently appointees have little, if any, knowledge or experience with refugee law.

²⁶ There is an accompanying footnote in the Guidelines which asserts: “in determining the child’s fear of persecution, the international human rights instruments [my abbreviation], such as the UDHR, ICCP, ICESC and CRC, should be considered in determining whether the harm which the child fears amounts to persecution.” Bhabha and Young (1998:759) cite a statement made by then IRB Chairperson, Nurjehan Mawani, at the 4th Annual Canadian Bar Association Annual Meeting/Commonwealth Law Conference, in Vancouver, Aug. 26, 1996, that “the Canadian Guidelines also recognize that refugee determination must reflect the best interests of the child” (this is a direct quote from Bhabha & Young, and not necessarily Mawani). The exact meaning of the statement is not elaborated; however, one could arguably infer that determination ultimately refers to whether the applicant is granted Convention refugee status. In only an exceptionally few number of cases would it be in the best interests of the child to not grant refugee status. Yet, since the implementation of the *Canadian Children’s Guidelines*, scores of children have been determined not to be Convention refugees and have been subsequently removed.

²⁷ Females under the age of 18, who have feared or experienced gender-based persecution, have successfully utilized the *Gender Guidelines*. This is of little comfort to ‘males’ under 18, who in this respect have no acknowledgment that they require different protections than adult men. Even if girls make claim to the gender guidelines, this should not be a reason for the absence of age-based guidelines as well. On the contrary, the connection between oppressions based on gender, race, age, sexual orientation, etc. has been well documented and requires innovative responses (see Jhappan, 1996). Having (at least) two sets of Guidelines for adjudicating the substantive basis of a refugee application only serves as an extra and necessary protection for persons who experience discrimination on the basis of one or a combination of factors.

²⁸ Children, of course, enjoy legal protections set out by precedents made at the Federal Court Level. However, given the abundance of legal precedents that correspond with the *Gender Guidelines*, which still result in negative determinations (see Razack 1998, for instance), this provides little security for child asylum seekers.

²⁹ I have included the qualification of appearance here because, like many adult refugee claimants, child asylum seekers may travel with falsified or unreliable identity documents. In such cases, Immigration Officers may go by the looks of the child to infer the child’s age and make decisions accordingly. Unfortunately, this has caused the misidentification of many children – causing some children to be treated as older children or even adults. There have also been numerous documented instances where children whose ages are known have been handled as adults (see Stasiulis, 2002b).

³⁰ The Regulations, in Part 14 Section 249 further elaborate: “For the application of the principle affirmed in Section 60 of the Act that a minor shall be detained only as a measure of last resort, the special considerations that apply in relation to the detention of minor children who are less than 18 years of age are (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children (b) the anticipated length of detention; (c) the risk of continued control by the human smugglers or

traffickers who brought the children to Canada; (d) the type of detention facility envisaged and the conditions of detention; (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and (f) the availability of services in the detention facility, including education, counselling and recreation.

³¹ This comparison is really an issue of degree rather than occurrence. Canada does detain minors, including separated children, but as a rule only in small numbers. The majority of child asylum seekers who are detained are with a parent or guardian (Gavreau and Glynis, 2002). The exception of course was the wide-scale detention of the smuggled/trafficked Chinese children carried out in 1999.

³² The other two departments are the Bureau of Immigration and Customs Enforcement (BICE) and the Bureau of Customs and Border Protection (BCBP). These latter two divisions deal largely with security measures, while BCIS is more of a service-oriented department.

³³ This law was originally created in 1952, but the real foundation of current immigration law focuses on the changes originally made in 1965. This new change modified the criteria for entry from privileging quotas (often to the detriment of persons seeking entry from non-European sources) to favoring a point-based system that measured potential immigrants by assigning points according to such factors as family reunification, job skills, language abilities, etc. Canada has a similar system for measuring non-refugee immigrants' 'value' and in both countries, asylum seekers, refugees, and family class immigrants are supposed to be exempt.

³⁴ This law applies to all 'aliens,' even though persons who establish a fear of persecution are supposed to be exempt. The intent of the legislation seems to be to discourage people from making 'frivolous' asylum claims, and therefore many legitimate asylum seekers have been targeted (it is their responsibility to show a credible fear of persecution to an Asylum Officer, whose decisions are final and according to Knight (2001), not subject to judicial review). On August 21, 1997 the INS released a Memorandum, "Unaccompanied Minors Subject to Expedited Removal," which stipulated that most unaccompanied minors are not subject to the expedited removal process. Despite the presence of some checks and balances (the removal is subject to approval by the district or deputy district director), many children have been removed summarily (see Bhabha, 2001, 2000; and Bhabha and Young, 1999 for example). Moreover, the *Memorandum* (to be explained) suggests "alternatives" to expedited removal, such as having minors withdraw their application for admission, which is a rather improper request to make of children who are separated from family members or guardians. Still, unaccompanied minors fare better than other children and adults in this system, however, they are not exempt from 'regular' removal proceedings, and many children are misidentified as adults and put under expedited removal nonetheless.

³⁵ To avoid confusion between the Canadian and American guidelines I will refer to the American as the *U.S. Children's Memorandum*, as this is the title of the document anyway.

³⁶ Under U.S. Immigration law, all asylum seekers have the right to legal representation at all asylum proceedings, although at no expense to the state. Of course children rarely have the financial resources to hire legal counsel, which means they are especially prone to appearing for their immigration and asylum hearings alone or unrepresented. Those who have lawyers access them in a myriad of ways. Sometimes community or church groups provide financial assistance. Often legal firms or individual lawyers designate a certain number of hours to *pro bono* work.

However, Bhabha (2001:302) has noted that most unaccompanied minors detained by the INS have legal counsel, which suggests that children fare much better when they have individuals responsible for their welfare assist them to locate legal support.

³⁷ The *Memorandum* does instruct Asylum Officers to remove persons they feel may be intimidating or endangering the child.

³⁸ For example, Officers are directed to ensure the child understands the ideas and expressions used by the interviewer, particularly in regard to numeric measurements such as ages or calendar dates.

³⁹ One notable exception is that the *Memorandum* provides an explicit comment about the weight the ‘best interests’ principle has in the adjudication process. Although the Canadian context also states that children must meet the refugee definition as it is set out, the comments made by Mawani (see note 12) make the role of ‘best interests’ uncertain. In contrast, the American *Memorandum* notes in Section 3(b) that: “the ‘best interests of the child’ principle, while useful to the interview process, does not replace or change the refugee definition in determining substantive eligibility.”

⁴⁰ It is also important to point out that the document attempts to dispel some of the myths that children, by virtue of their age, cannot be persecuted because of their individual political opinions or activism.

⁴¹ There are varying estimates of the number of children who have legal representation. Bhabha (2001:302) claims that about 90% of separated children seeking asylum in the U.S. are *unrepresented*.

⁴² These cases were located primarily in the database, QuickLaw. However, I also searched the WestLaw Carswell database as well as the Federal Court and IRB websites. I found the cases using the following search terms in varying Boolean combinations: child*, minor, United Nations Convention on the Rights of the Child, best interests of the child asylum, refugee, refugee, Convention refugee.

⁴³ I have intentionally characterized the migration of children whose travel has been facilitated by criminal operatives as both smuggling and trafficking because the difference between the two, and which category the children involved fall under, is contested and will be explored in the chapter.

⁴⁴ Several explanatory notes about how I will refer to IRB and FCC cases need to be made at the outset. There are many constraints on the public’s ability to access IRB decisions, mainly because all claims published by the IRB are sanitized, which means all identifying information is erased. However, no names or other information are substituted in their place. Yet at the Federal Court, identifying information is only omitted if the party can provide a good reason for the court to do so. In these instances, a pseudonym is used in place of the name. This system has made my research and writing quite awkward for many reasons. First, I am dealing with quite a few Federal Court cases (in the section on smuggling and trafficking) that do not identify the corresponding IRB decision, and which are based on such similar facts as to be indistinguishable from one another. For this reason, I will largely avoid the Tribunal decisions and refer only to the Tribunal as it is quoted in the Federal case. However, there is one exception, the *Chen Lin* case [2001]. I will use the IRB’s decision because the case is easily recognizable, and the Federal

Court Judge largely omitted much of the IRB's interesting analysis. I should also explain why I have opted to use some child refugee claimants' first and last names in my writing since doing so raises significant ethical questions. I can justify this for two related reasons. First, the given and family names are already a matter of public record (unless this is a pseudonym). Yet, this does not mean that I will refer to all cases using the first and last names of the claimant. Rather, the other important reason for using first and last names is to avoid confusion because I have more than one case in which the last name is the same. I happen to have two cases in which Lin, and two cases in which Li, is the (first) named respondent/applicant.

⁴⁵ I base this conclusion on my review of children's asylum claims found in the Federal Court and in *Reflex*, which is the publication of 'consequential' IRB decisions. However, decisions in *Reflex* are self-selected by the Board, and many other asylum claims are not part of the public record. In other words, whether children's cases are more successful is an informed, although ultimately, speculative conclusion. Again, because CIC does not keep a record of the number of children admitted to Canada as Convention Refugees, this deduction is not confirmed.

⁴⁶ I find it very interesting that the Supreme Court has not heard any of the cases that made it to the Federal Court of Canada, especially considering how controversial and tricky the decisions have been. This will become most obvious in the third section of the chapter, which deals with smuggling/trafficking decisions. The Court may be forced to grant leave for a case in the near future, surely if children are again trafficked/smuggled into the country after the Optional Protocol to CRC, against the sale (and traffic) of children, comes into force.

⁴⁷ I have limited this section of my analysis largely to IRB decisions because the Federal Court will only overturn or reverse a decision because the IRB found witnesses unreliable, which occur in a small number of cases. In the Court's view, the IRB is an independent, expert panel and is in the best position to assess witnesses' sincerity. In *Chen v. Canada*, Justice Kelen [2002] outlines the reasons for granting a judicial review as follows: "1) the Board did not provide valid reasons for finding that an applicant lacked credibility; 2) the inferences drawn by the Board are based on implausible findings that in the view of the Court are simply not plausible; 3) the decision was based on inferences that were not supported by the evidence"; or, 4) the credibility finding was based on a finding of fact that was perverse, capricious, or without regard to the evidence" (para. 4).

⁴⁸ Knowing that there is a familial relationship between the girl and the adult would be important because the minor's grandparents had subjected their daughter, (the adult), who was against the practice, to FGM. By establishing a pattern in the family, the Board could have easily concluded that it was reasonable to assume the grandparents would also pursue FGM for their granddaughter. However, this fits with the well-foundedness of the subjective fear.

⁴⁹ By the time the reinstatement application was considered, the claimant was over the age of 18. I have included his case in my analysis because the problem occurred when he was a child under the care and control of an adult.

⁵⁰ The Interahamwe are a majority group in Rwanda who perpetrated genocide, and who subsequently killed other people who had witnessed genocide.

⁵¹ I will not bother explaining the details of this case in depth because the determination was positive despite factors working the other way. Moreover, the Board relied heavily on names, all of which have been erased, making the text rather hard to follow.

⁵² The new DR was the woman who brought the children to Canada. The report notes that the children's biological mother was identified and it seems to be the woman who accompanied the children to Canada. However, because the names have been erased, it's hard to know for certain. Thus, the poisoning was of the children's father and stepmother.

⁵³ This case also summons up interesting visions of how this IRB panel might approach Cinderella, the renowned Disney character who evoked sympathy and adoration for being the slave of her stepmother and stepsisters. Of course, she too was forced to continuously perform household chores; her cherished possessions were stolen; she was twice imprisoned in her home; her stepsister struck her; and her stepmother threatened physical abuse. Her liberation by the handsome prince is a classic allegory, which apparently, has no resonance in the panel who confronted this young girl.

⁵⁴ The migration was illegal because none of the children obtained exit visas from the Chinese government, without which, it is unlawful to leave the country. The punishment for illegal departures range, but may include jail time, fines, and physical abuse. Documentary evidence suggests that the penalties increase significantly for those who have been caught leaving more than once.

⁵⁵ The nexus with the particular social group offered by the asylum seekers varied from being 'children' to 'children who are the victims of trafficking' to 'children from the Fujian province of China.' Despite the changing qualifications, in all cases the minority status of the applicants was presented.

⁵⁶ There are further concerns about the very brutal way in which the snakeheads treat smuggling/trafficking victims, which were not wholly examined in the Canadian jurisprudence, yet which have been considered more fully in some American jurisprudence.

⁵⁷ I cannot definitively say that none of the children who arrived with the snakeheads during this time were granted refugee status because the IRB only publishes a selection of refugee cases. Everything that is on record with the IRB (on Reflex) and FCC is negative. The only FCC Judge to reverse and remand negative IRB determinations was Gibson – in two cases, *Bian v. Minister of Citizenship and Immigration* [2000] and *Shu Ping Li v. Canada (Minister of Citizenship and Immigration)* [2000]. However, the children were later found not to be Convention refugees. The positive IRB decisions were overturned by Justice Simpson in *The Minister of Citizenship and Immigration v. Zu Huang Li & Young Ming Zhang* [2001] and by Justice Desjardins in *Minister of Citizenship and Immigration v. Chen Lin* [2001].

⁵⁸ Martineau argued that he would not examine whether minors could consent to being smuggled because he felt that "the applicant has not invited the Court to re-examine the rationale of what has been said in *Xiao*, but simply asks that the matter be referred back to the CRDD [IRB] for re-determination on the basis that the issue of consent was not discussed in the CRDD's reasons" (para. 26). Martineau seems to shirk responsibility for responding to a significant legal question.

⁵⁹ Member Auluch's failure to discuss the issue of protection by the state could result in a successful appeal should the Minister file. At the time of this writing, however, it did not appear that the Federal Court had granted leave to hear the matter.

⁶⁰ Although all three children probably benefited from having their parents present to provide evidence about the bullying and the measures taken to prevent it, which the children would not necessarily have had if they entered the country unaccompanied by their parents.

⁶¹ Comparing a 16 year old child's persecution with a 7 year old's is incredibly insightful since most IRB Members would likely make a comparison with an 18 year old, resulting in a negative determination.

⁶² The only drawback to these decisions is that neither Adjudicator wholly destabilized the notion that children are objects. As I have argued, the children probably would have been granted refugee status if their parents' claims were accepted. However, we do not see the opposite occur in these cases, i.e. that the parents experienced persecution based on the particular social group, parents of abused or tormented children. For a more fully developed explication of the tension between asylum and children's subjectivity, see Aiken (1997). However, the decision does not suggest that the adult applicants' put this argument forward, so the decision not to grant the adults' refugee status for this reason is not entirely the fault of the IRB Members.

⁶³ In the first case the IRB Member did not refer to state protection so it is hard to know what evidence, if any, the adults provided to show that they could not avail themselves of the protection of the state. In the second case, Member Kemsley simply rejected their claims, which centred on racially-motivated robbery in which the police were complicit and that they would be penalized for not paying their permanent resident fees in the time while they were outside of Peru. Therefore, this conclusion is much more easily made in regard to the first case than the second since the Adjudicator argued that the adults claimants "are recognized by the authorities in Peru...as having the rights and obligations which are attached to the possession of nationality in Peru." In making this assertion, one could easily argue that he ignored the fact that their ethnicity excludes them in less obvious ways.

⁶⁴ As with the Canadian legal decisions, most of these cases were also located on QuickLaw. I also searched the BIA website and the Circuit Courts directly and again, used the same search terms, child*, minor, United Nations Convention on the Rights of the Child, best interests of the child asylum, refuge, refugee, and Convention refugee, in varying Boolean combinations.

⁶⁵ I have intentionally specified that this chapter will focus on precedential American refugee law, which means the only cases I will use are Board of Immigration Appeals (BIA) precedent cases, and Federal Court (including the appeals branches) determinations. As in Canada, the U.S. Supreme Court has never heard a minor asylum seeker's case. I have not included any cases from Immigration Court because they are not compiled and indexed by the American government, and therefore are not part of the public record. There are only two ways of accessing these decisions – one can either contact a refugee advocacy organization that has compiled some data or contact the attorney involved. In both cases, there are issues with clients' privacy and privilege, especially considering the clients I am interested in are minors whose confidentiality requires additional sensitivity. Some organizations (those with resources) have taken the time to summarize a few cases, mainly those which might be helpful to other advocates and attorneys. These summaries are helpful for delineating the various ways in which the refugee definition has been applied, although largely inadequate for assessing a Judge's rationale, the topic with which I am ultimately concerned with. Obviously lawyers in private practice, particularly those who work with refugee children (usually *pro bono*) lack the time to amass such data. The BIA also publishes some of its nonprecedential cases, which are referred to as indexed cases. Unfortunately, only a couple of cases involved children, and they were dated. There is one

regrettable outcome in being limited to BIA and District Court cases – the selection of relevant cases is comparatively limited. However, there are sufficient decisions available to identify a trend in American law. Still, it seems that the cases from Canada and the United States are quite dissimilar since I have focused on initial determinations from Canada yet have excluded American jurisprudence at this level. However, two matters are worth highlighting. First, as mentioned, the cases I relied on from the Canadian IRB were also precedential. So while it would be ideal to have cases from that initial determination level in the United States, Immigration Judges' decisions do not have the same legal importance as IRB panels' rulings (probably because there is so much more asylum jurisprudence in the United States than in Canada, made possible by having thirteen regional courts, and also a function of the sheer number of people who make refugee claims in the country). Secondly, the United States has what would be considered an additional judicial level in asylum. Assuming appeals were accepted by the relevant body, in Canada, asylum cases are heard first by the IRB, then the Federal Court, then the Court of Appeals, and finally by the Supreme Court. Under the same circumstances in the U.S., cases go to the Immigration Judge, to the BIA (and sometimes they are reheard without judicial interference), to the Federal District Court, to the District Court of Appeals, and finally to the Supreme Court. The legal structures differ, which means the influence various determination bodies have differs as well.

⁶⁶ Neither the Supreme Court of Canada nor the Supreme Court of the United States have heard a minor's asylum claim. However, the U.S. Supreme Court did hear *Flores v. Reno*, which was a case about unaccompanied migrant children's right to appropriate care and release from government custody. Since the parties inevitably settled out of court, and the major legal issue in question involved due process rights, the decision is beyond the scope of this thesis. For a detailed discussion of the verdict and its implications, see Cecelia Espenosa (1996:437-449).

⁶⁷ Thronson has argued that the BIA's decision in *Matter of Monreal* was quite problematic because the children did not testify about how their father's deportation would affect them.

⁶⁸ This was not an application for withholding of removal, but a petition for review and motion for a stay of deportation, which of course would ultimately have removal quashed. The court notes that a stay will be granted if the petitioner can show: "(1) 'some' likelihood that her petition for review will succeed on the merits; (2) that irreparable harm will occur if the stay is denied; (3) that the potential harm to the movant outweighs the harm the INS will suffer if a stay is granted; and (4) that a stay serves the public interest" (8). It is interesting that the legislation suggests that the INS would be harmed because a migrant was allowed to remain in the U.S.

⁶⁹ Arguably, the court's focus on the children's U.S. citizenship is largely unavoidable. The mother had based her claim on her children's need to remain with their mother in a safe environment. Of course if the entire family was Nigerian, they would likely apply for the same protections. However, I strongly doubt that the court would comment on the INS's behaviour if this was the case.

⁷⁰ Under Section 242 of the Immigration and Nationality Act, this statutory protection is only extended to children under the age of 16.

⁷¹ This distinction needs to be further explained. All migrants in removal hearings may be found removable under Section 240 (b)(5)(A) if the INS can prove it with clear and convincing evidence. In some cases, migrants concede removability. However, Immigration Judges are prohibited from accepting such admissions from unaccompanied minors. Thronson (2002:1000)

claims this condition is designed to ensure children do not make “legal admissions they do not understand.” Certainly it is also designed to protect children from being coerced into making such statements. However, this protection does not mean that children cannot be found removable; rather, the INS must prove it. The question in this case then is, whether the facts on Form I-213 can be used to this end.

⁷² It is worth mentioning that FGM is often politicized and argued as a gender, not children’s issue. In my view, it is both girls’ gender and age that places them at risk.

⁷³ To avoid confusion, I will refer to the members of the Gonzalez family by their first names since they share the same last name.

⁷⁴ The defining feature of this case is that Elian’s father actively contested his son’s migration and asylum application. Certainly, other parents have opposed their children’s migration, although probably not in many situations where the agent of persecution was another party or parties.

⁷⁵ The attention Elian Gonzalez’s case generated among the media, politicians, and the general populace is one reason his case will constitute a significant portion of this chapter. This is not to say that other unaccompanied minor’s cases are less important. Indeed, as Jacqueline Bhabha (2001) has observed, Elian’s situation had the paradoxical effect of drawing attention to the plight of unaccompanied minor asylum seekers as a group, although at the expense of other child claimants. This being said, the primary reason I will spend considerable time analyzing the court’s response to his situation is that it was the first case of its kind in recent history, and had extremely important legal ramifications for minor refugee claimants, which was obviously recognized by numerous American refugee advocates who intervened in the case.

⁷⁶ It is unclear whether Elian was taken under INS custody after being brought to land by the fishermen or whether the Border Patrol Agents intercepted him on board with the fishermen. This is significant because Cuba says the U.S. violated an agreement which stipulates that if Cubans are caught at sea, American authorities are to send them home. If they make it to shore, they’re generally allowed U.S. entry. Either way, this was not an issue in the court case.

⁷⁷ It is worth clarifying that this was not a judicial review of a negative decision. Elian Gonzalez was never given an asylum hearing. This is an appeal of the INS’s decision to reject his refugee claim – a lawsuit designed to force the INS to hear his application.

⁷⁸ Certificate of Interested Persons and Corporate Disclosure Statement No. 11-11424-D Gonzalez v. Reno.

⁷⁹ Legal guardians in this instance also include those who act as *Guardian Ad Litem*, which is Latin for ‘Guardian at Law’. The *Guardian Ad Litem* is a person appointed by the court to look out for the best interests of the child during the course of legal proceedings, and is usually the parent or other legal caretaker. Otherwise, lawyers or children’s protective services take on this role.

⁸⁰ For example, the court noted that political conditions that affect the populace as a whole do not constitute persecution, that re-education does not have to be treated as persecution by the INS, and that harassment without physical harm is not necessarily persecutory. The issue of Elian being used as a propaganda tool was not clearly explored.

⁸¹ In their statement, the interested parties made the following disclaimer limiting their interest in the case: “the amici address only the narrow issue of the right of children to apply for asylum. They do not address the individual circumstances or the underlying merits of the asylum claim in this particular case. The amici also recognize the critical importance of the parent-child relationship, and the general presumption in favor of reuniting a parent and child. They do not, however, address the specific custody issues raised in this case” (6).

⁸² It is again worth noting that neither the Court nor the INS spoke with Elian directly, so there is no way they could know he specifically lacked the capacity to understand the importance of applying for asylum. That Elian was excluded from the proceedings is yet another way in which the 11th Circuit Court of Appeals disregarded the values set out in CRC and the INS’s own *Memorandum*.

⁸³ Of course, the majority held he was removable not because he was close enough to the cut off age, but because the protection he sought was not encompassed in the legislation. Even so, his near ‘majority’ age was later cited in two other decisions by the same Board as an important distinction as to why he was not protected.

⁸⁴ More correctly, the migration of lone children from developing nations, who seek asylum, is a relatively new phenomenon. There have been many instances in which orphaned children were sent to countries such as Canada. In particular, after World War II, a large number of British children were sent to live in Commonwealth countries like Canada and Australia.

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