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TREATING UNACCOMPANIED CHILDREN LIKE CHILDREN:  
A CALL FOR THE DUE PROCESS RIGHT TO COUNSEL FOR  
UNACCOMPANIED MINORS PLACED IN REMOVAL  
PROCEEDINGS

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## INTRODUCTION

The United States government has recorded a dramatic increase in the number of unaccompanied children from El Salvador, Guatemala, and Honduras, a region commonly referred to as the “Northern Triangle of Central America.”<sup>1</sup> The total number of unaccompanied children apprehended by the United States Customs and Border Protection (CBP) soared from 4,059 in 2011 to 68,541 by September 1, 2014.<sup>2</sup> In fiscal year 2016, a total of 48,311 unaccompanied children were apprehended by CBP.<sup>3</sup> The agency has already recorded 21,321 apprehensions during the first three months of fiscal year 2017.<sup>4</sup> These children arrive at the southwest border alone, vulnerable, unfamiliar with the English language, and completely unaware of the complex and intimidating immigration system that awaits their entry.<sup>5</sup>

In response to the influx of unaccompanied children arriving at the southwest border from the Northern Triangle, President Barack H. Obama issued a presidential memorandum to the heads of executive departments and agencies, and declared it “an urgent humanitarian situation requiring a unified and coordinated Federal response.”<sup>6</sup> Despite labeling the surge as a “humanitarian situation,” the Obama

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<sup>1</sup> *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, U.N. HIGH COMM’R FOR REFUGEES (UNHCR) (Mar. 13, 2014), <http://www.unhcr.org/en-us/protection/children/582226064/unhcrs-views-on-child-asylum-claims.html?query=Children%20on%20the%20Run:%20%20Unaccompanied%20Children%20Leaving%20Central%20America%20and%20Mexico%20and%20the%20Need%20for%20International%20Protection> [hereinafter “*Children on the Run*”].

<sup>2</sup> *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [hereinafter “*Guide to Children Arriving*”]; U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY, *Statement by Secretary Johnson on Southwest Border Security* (Oct. 18, 2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [hereinafter “U.S. CBP, *Johnson Statement*”].

<sup>3</sup> U.S. CBP, *Johnson Statement*, *supra* note 2.

<sup>4</sup> U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY, *U.S. Border Patrol Southwest Border Apprehensions by Sector* (Jan. 18, 2017), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> [hereinafter “U.S. CBP: *Border Apprehensions*”].

<sup>5</sup> Devon A. Corneal, *On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN. ST. L. REV. 609, 610 (2004).

<sup>6</sup> Memorandum on the Response to the Influx of Unaccompanied Alien Children Across the Southwest Border, 2014 DAILY COM. PRES. DOC. 1 (June 2, 2014).

administration continued to spread its message to Central American leaders that these children would be quickly removed.<sup>7</sup> In addition, the administration prepared an emergency request for additional powers to “enable the fast-track deportation of tens of thousands of unaccompanied children from Central America . . . .”<sup>8</sup> Most recently, President Donald J. Trump’s administration issued a memorandum, ordering the Department of Justice Executive Office for Immigration Review (EOIR) to rescind the February 3, 2016, “Revised Docketing Practices Relating to Certain EOIR Priority Cases,” and the March 24, 2015, “Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of New Priorities,” memoranda.<sup>9</sup> The new memorandum—effective immediately—directs EOIR to prioritize proceedings against certain individuals, including “[u]naccompanied children in the care and custody [of] the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR)” who have not yet identified a sponsor in the United States with whom they can live.<sup>10</sup>

In light of the presidential memoranda, the challenges posed by the arrival of thousands of unaccompanied children have ignited vigorous debates between advocates and the government. Despite efforts to establish a unified and coordinated response, serious questions remain about how, and to what extent, the United States should protect these vulnerable children. Should the government continue its aggressive efforts to deport unaccompanied children back to their native country, or should their status as children be taken into account? Accordingly, this article will advocate that the United States should treat unaccompanied children like children, and guarantee their due process right to counsel when placed in removal proceedings. The right to counsel will ultimately provide these vulnerable minors with a meaningful opportunity to participate in the immigration system.

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<sup>7</sup> Mary Giovagnoli, *Effort to Quickly Deport Child Migrants Fails to Address the Problem*, AM. IMMIGR. COUNCIL (June 30, 2014), <http://immigrationimpact.com/2014/06/30/effort-to-quickly-deport-child-migrants-fails-to-address-the-problem.html>.

<sup>8</sup> Paul Lewis, *White House Will Ask Congress for New Powers to Tackle Immigration Surge*, THE GUARDIAN (June 29, 2014, 2:09 PM), <https://www.theguardian.com/world/2014/jun/29/white-house-immigration-children-minors-deportation-powers>.

<sup>9</sup> See Memorandum from MaryBeth Keller, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges, Court Adm’rs., & Immigration Court Staff 1 (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocesingpriorities.pdf>.

<sup>10</sup> *Id.*

*Section I: The Plight of Refugees* introduces the development of international refugee law and illumines the current humanitarian challenge at the southwest border of the United States. *Section II: The Unaccompanied Child* establishes the internationally recognized definition of “unaccompanied child” and exposes the structural conditions that compel these minors to migrate north. *Section III: Navigating the Immigration System* provides an overview of the current system. *Section IV: Due Process Concerns* assesses the violations of the constitutional due process rights afforded to unaccompanied children, asserts the importance of their meaningful participation in removal proceedings, and addresses the strengths and weaknesses of a counterargument.

## I. THE PLIGHT OF REFUGEES

### A. *The 1951 United Nations Convention Relating to the Status of Refugees*

The United Nations High Commissioner for Refugees<sup>11</sup> (UNHCR) convened in 1951 and soon after formed a treaty concerning refugees: The 1951 United Nations Convention Relating to the Status of Refugees.<sup>12</sup> The 1951 Convention, which was subsequently approved by the UN General Assembly, continues to serve as the beacon of international law’s refugee protection.<sup>13</sup> Originally, the 1951 Convention, as a post-Second World War instrument, was limited in scope to persons within Europe fleeing the events that occurred prior to

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<sup>11</sup> See *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, U.N. HIGH COMM’R FOR REFUGEES (Feb. 1997), <http://www.refworld.org/docid/3ae6b3360.html>. The UNHCR is the sole international, intergovernmental United Nations organization entrusted by the UN General Assembly with responsibility for providing international protection to refugees and others of concern and, together with Governments, for seeking permanent solutions to their problems.

<sup>12</sup> U.N. Convention Relating to the Status of Refugees, *opened for signature July 28, 1951*, 19 U.S.T. 6259, 189 U.N.T.S. 137; *Convention and Protocol Relating to the Status of Refugees*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/3b66c2aa10.pdf>; see *Universal Declaration of Human Rights*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.un.org/en/universal-declaration-human-rights/> [hereinafter *Convention and Protocol Relating to the Status of Refugees*] (“(1) Everyone has the right to seek and to enjoy in other countries asylum from prosecution. (2) This right may not be invoked in the case of prosecutors genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the United Nations.”).

<sup>13</sup> *Convention and Protocol Relating to the Status of Refugees*, *supra* note 12, at 2.

January 1, 1951.<sup>14</sup> However, the 1967 Protocol removed these limitations and universally extended the enumerated protections of the 1951 Convention.<sup>15</sup>

The 1951 Convention and its 1967 Protocol (collectively, the Refugee Convention) provide the most comprehensive codification of the rights of refugees, and endorse a single definition of the term “refugee.” Pursuant to Article I, a refugee is a person who:

[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>16</sup>

The Refugee Convention promotes fundamental core status and rights-based principles, most notably non-discrimination, non-penalization, and *non-refoulement*.<sup>17</sup> In addition to these principles, parties who have ratified these instruments must adhere to a number of provisions: cooperate with UNHCR in the exercise of its functions, inform UNHCR on matters pertaining to national legislation, and exempt refugees from the practice of reciprocity.<sup>18</sup>

In 2011, UNHCR celebrated the 60th anniversary of the 1951 Convention by formally recognizing the 147 States that are parties to either the 1951 Convention or its 1967 Protocol.<sup>19</sup> In light of the significance and relevance of these instruments, the UN General Assembly continues to call upon States to promote the protection of refugees.<sup>20</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; U.N. Protocol Relating to the Status of Refugees, *opened for signature Jan. 3, 1967*, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Apr. 22, 1954).

<sup>16</sup> *Convention and Protocol Relating to the Status of Refugees*, *supra* note 12, at 14.

<sup>17</sup> U.N. Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137, Art. 33 (“No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality membership in a particular social group or political opinion.”).

<sup>18</sup> *Convention and Protocol Relating to the Status of Refugees*, *supra* note 12, at 4.

<sup>19</sup> *Id.* at 4–5. See *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/3b73b0d63.html>.

<sup>20</sup> *Convention and Protocol Relating to the Status of Refugees*, *supra* note 12, at 4.

### B. *The Humanitarian Challenge at the Southwest Border*

The surge of unaccompanied minors migrating north towards the southwest border prompted President Obama to declare it an “urgent humanitarian situation.”<sup>21</sup> However, the record number of minors arriving in 2014 should have been no surprise to government officials. Since 2009, UNHCR has registered an increased number of asylum applicants from El Salvador, Guatemala, and Honduras.<sup>22</sup> The total number of unaccompanied children apprehended by CBP increased from 4,059 in fiscal year 2011 to 10,443 in fiscal year 2012, and more than doubled again to 21,547 in fiscal year 2013.<sup>23</sup> As of mid-June fiscal year 2014, CBP apprehended more than 52,193 unaccompanied children at the southwest border.<sup>24</sup> By September 1, 2014, the number of apprehensions increased to 68,541.<sup>25</sup> Despite the fact that apprehensions of unaccompanied children decreased in fiscal year 2015 to 39,970, a 57% increase occurred in fiscal year 2016, resulting in 48,311 apprehensions.<sup>26</sup> Recent trends are alarming, as CBP has already recorded 21,321 apprehensions in fiscal year 2017.<sup>27</sup> According to *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, an extensive study conducted by UNHCR, no less than 58% of minors apprehended by CBP at the southwest border suffered or faced harms that indicated a need for international protection.<sup>28</sup> Furthermore, the

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<sup>21</sup> Guillermo Cantor, *New Report Helps Explain Why Central American Children Are Leaving Their Home Countries*, AM. IMMIGR. COUNCIL (July 1, 2014), <http://immigrationimpact.com/2014/07/01/new-report-helps-explain-why-central-american-children-are-leaving-their-home-countries.html>.

<sup>22</sup> *Children on the Run*, *supra* note 1.

<sup>23</sup> *Id.*

<sup>24</sup> *See Guide to Children Arriving*, *supra* note 2.

<sup>25</sup> *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROTECTION (Oct. 18, 2016), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

<sup>26</sup> *Id.*

<sup>27</sup> U.S. CBP: *Border Apprehensions*, *supra* note 4.

<sup>28</sup> *Children on the Run*, *supra* note 1, at 6 (The protection of children is a core priority of UNHCR at the global, regional and national levels. UNHCR has long recognized both the right of children to seek asylum in their own right and their inherent vulnerability—especially those children who are unaccompanied by or have been separated from their families—as well as the fact that there are certain child-specific forms of persecution that may give rise to a claim for refugee protection. Of foremost concern to UNHCR is that all unaccompanied and separated children be consistently and appropriately screened for protection and, once

UNHCR study revealed several factors, including violence by organized armed criminal actors, violence and abuse in the home, and extreme poverty, as “indicators of the need to conduct a full review of international protection needs consistent with the obligations to ensure that unaccompanied and separated children are not returned to situations of harm or danger.”<sup>29</sup>

In mid-summer 2014, the Department of Homeland Security (DHS) Secretary Jeh Johnson acknowledged the multifaceted humanitarian and security issues posed by the arrival of tens of thousands of vulnerable children at the southwest border.<sup>30</sup> In an effort to secure the border and assist in the processing of the more than 52,000 minors apprehended, Secretary Johnson announced the immediate deployment of approximately 150 additional CBP agents to the Rio Grande Valley in Texas, where the largest numbers of unaccompanied children have arrived.<sup>31</sup> In response to the surge, HHS sent representatives to the border to assist in locating sufficient facilities to detain, house, and process these minors,<sup>32</sup> while the Department of Justice (DOJ) pledged to send more immigration judges to expedite immigration proceedings.<sup>33</sup>

The initial response to the humanitarian challenge ignited vigorous political debates.<sup>34</sup> Republicans blame relaxed border security and President Obama’s immigration policies for encouraging northern migration.<sup>35</sup> Democrats blame Republicans for their refusal to pass

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identified, have full access to seek and receive international protection that takes into account their age and experiences in a child-sensitive manner. A fundamental goal is to ensure that all ‘girls and boys are safeguarded from all forms of violence, abuse, neglect and exploitation.’ All actions taken concerning refugee children should be guided by the principle that ‘the human rights of the child, in particular his or her best interests, are to be given primary consideration.’”)

<sup>29</sup> *Id.* at 6–7.

<sup>30</sup> *CBP Addresses Humanitarian Challenges of Unaccompanied Child Migrants*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 3, 2016), <http://www.cbp.gov/border-security/humanitarian-challenges>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Amy Grenier, *The Facts About the Humanitarian Challenge at the Border*, AM. IMMIGR. COUNCIL (July 10, 2014), <http://immigrationimpact.com/2014/07/10/the-facts-about-the-humanitarian-challenge-at-the-border.html>.

<sup>35</sup> Patricia Zengerle, *Kerry Warns U.S. Will Deport Undocumented Central American Children*, REUTERS (July 1, 2014), <http://www.reuters.com/article/us-usa-immigration-children-centralameri-idUSKBN0F64Y520140701>.

comprehensive immigration reform, which would address specific immigration issues, such as border security and the millions of undocumented immigrants currently living in the United States.<sup>36</sup> Government officials also appear to be sharply divided on viable solutions to the crisis. In a July 2014 Senate Homeland Security and Governmental Affairs Committee Hearing,<sup>37</sup> United States Senator Ron Johnson<sup>38</sup> (R-WI) suggested that deporting undocumented children faster would immediately curtail the flow of migration.<sup>39</sup> Senator Johnson stated,

“[t]he most compassionate thing to do would be to send planeloads full of those children back to their parents in a safe manner, in as humane a fashion as possible, so that they don’t subject their kids to that very dangerous journey where they’re getting raped and they’re getting killed.”<sup>40</sup> In response, the Obama administration proposed a \$3.7 billion plan, which would “increase border security, provide temporary housing and screening, fund a media campaign in Central America, and speed up the immigration court system . . . .”<sup>41</sup>

The United States also announced several initiatives to assist and deter children located in the Northern Triangle from embarking on the dangerous journey towards the southwest border.<sup>42</sup> For example, in accordance with a recent agreement between the government of Costa Rica, UNHCR, and the International Organization for Migration (IOM), qualifying children may be transferred to Costa Rica, where they will undergo further refugee processing prior to being resettled in the United States or another third-country.<sup>43</sup> Additionally, the United States plans to expand its Central American Minors (CAM) program, which would permit a lawfully present parent within the United States to request

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<sup>36</sup> *Id.*

<sup>37</sup> The Committee on Homeland Security and Governmental Affairs is the chief oversight committee of the U.S. Senate. See *About the Committee*, U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFF., <http://www.hsfac.senate.gov/about>.

<sup>38</sup> Ronald Harold “Ron” Johnson is a United States Senator from Wisconsin. He assumed office in January 2011, and is a member of the Republican Party. See *Ron Johnson: U.S. Senate*, <http://www.ronjohnson.senate.gov>.

<sup>39</sup> Grenier, *supra* note 34.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *U.S. Expands Initiatives to Address Central American Migration Challenges*, DEP’T OF HOMELAND SECURITY (July 26, 2016), <http://www.dhs.gov/news/2016/07/26/us-expands-initiatives-address-central-american-migration-challenges>.

<sup>43</sup> *Id.*

refugee status for their child located in El Salvador, Guatemala, or Honduras.<sup>44</sup>

Furthermore, the 2016 Consolidated Appropriations Act,<sup>45</sup> passed by the United States Congress on December 18, 2015, which funds multiple domestic and international programs, included an appropriation of \$750 million in support of the Obama administration's Northern Triangle's Alliance for Prosperity Plan.<sup>46</sup> In accordance with the approved measures, Congress mandated that 25% of the pledged assistance be withheld until the United States Secretary of State confirms that the governments of El Salvador, Guatemala, and Honduras are taking reasonable steps to: “[i]nform its citizens of the dangers of the journey to the southwest border of the United States; [c]ombat human smuggling and trafficking; [i]mprove border security; and [f]acilitate the safe return, repatriation, and reintegration of undocumented migrants.”<sup>47</sup>

An additional 50% will be withheld from the governments of the Northern Triangle until they implement measures to “[c]ombat corruption and strengthen public institutions; [i]mprove civilian jurisdiction and counter activities of criminal organizations; [p]rotect human rights; [s]upport programs to promote equitable growth; [i]mplement effective civil society consultations; and [i]ncrease government revenues.”<sup>48</sup>

Despite these promising efforts, statistical analyses of CBP's apprehensions of unaccompanied children at the southwest border continue to reveal an influx of children migrating north towards the United States.<sup>49</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, 129 Stat. 2242.

<sup>46</sup> *Fact Sheet: The United States and Central America: Honoring our Commitment*, THE WHITE HOUSE, OFF. OF THE PRESS SECRETARY (Jan. 14, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/15/fact-sheet-united-states-and-central-america-honoring-our-commitments>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> U.S. CBP, *Johnson Statement*, *supra* note 2.

## II. THE UNACCOMPANIED CHILD

Children are widely recognized as among the most vulnerable of all refugees, and yet their basic human rights are often neglected.<sup>50</sup> The United Nations Convention on the Rights of the Child<sup>51</sup> (CRC) is the most comprehensive and internationally recognized treaty regarding human rights for children. Pursuant to Article 22(1), CRC provides:

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.<sup>52</sup>

Furthermore, UNHCR advocates that “effective protection and assistance should be delivered to unaccompanied children in a systematic, comprehensive and integrated manner,<sup>53</sup> and defines the term “unaccompanied child” as “those [under the age of eighteen] who are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so.”<sup>54</sup>

### A. Regional Profiles

The United States government has recorded a dramatic increase in the number of unaccompanied children from El Salvador, Guatemala, and Honduras.<sup>55</sup> A brief analysis of the total number of apprehensions of arriving unaccompanied children from each country between fiscal year

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<sup>50</sup> *Promises Broken: An Assessment of Children's Rights on the 10th Anniversary of the Convention on the Rights of the Child*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/press/1999/nov/children.htm> (last visited Feb. 14, 2017).

<sup>51</sup> Convention on the Rights of the Child, *opened for signature Nov. 20, 1989*, 1577 U.N.T.S. 3.

<sup>52</sup> *Id.* at 51.

<sup>53</sup> *Guidelines and Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, U.N. HIGH COMM'R FOR REFUGEES 1 (Feb. 1997), <http://www.unhcr.org/en-us/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html>.

<sup>54</sup> *Refugee Children: Guidelines on Protection and Care*, U.N. HIGH COMM'R FOR REFUGEES 121, <http://www.refworld.org/docid/3ae6b3470.html> (last visited Feb. 14, 2017).

<sup>55</sup> *Children on the Run*, *supra* note 1, at 15. This article only addresses the regional profiles of the Northern Triangle, despite a tremendous increase in the number of children arriving at the southwest border from Mexico.

2011 and fiscal year 2014 through September 30 illuminates the magnitude of the surge. For example, the total number of unaccompanied children from El Salvador apprehended by CBP and the Office of Field Operations (OFO) increased from 1,452 in fiscal year 2011 to 3,437 in fiscal year 2012, to 6,220 in fiscal year 2013, and more than doubled again to 16,404 in fiscal year 2014.<sup>56</sup> The total number of unaccompanied children from Guatemala apprehended by CBP and OFO increased from 1,608 in fiscal year 2011 to 3,915 in fiscal year 2012, to 8,262 in fiscal year 2013, and more than doubled again to 17,057 in fiscal year 2014.<sup>57</sup> The total number of unaccompanied children from Honduras apprehended by CPB and OFO increased from 999 in fiscal year 2011 to 3,091 in fiscal year 2012, to 7,055 in fiscal year 2013, and, once again, more than doubled to 18,244 in fiscal year 2014.<sup>58</sup>

The common denominator is that these three countries continue to produce an overwhelming number of children seeking protection at the southwest border of the United States.<sup>59</sup> However, the numbers do not reveal the structural conditions that motivate these children to migrate north.

### *B. Motivation for Migration*

“With a grant from the John D. and Catherine T. MacArthur Foundation,<sup>60</sup> UNHCR undertook an extensive study” to reveal the structural conditions that compel children from El Salvador, Guatemala, and Honduras to migrate north towards the southwest border of the United States.<sup>61</sup> A brief analysis of this study reveals that increased

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<sup>56</sup> *Id.* at 16.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 15, 16.

<sup>60</sup> See MACARTHUR FOUND., <https://www.macfound.org/about/> (last visited Feb. 14, 2017) (“The John D. and Catherine T. MacArthur Foundation supports creative people and effective institutions committed to building a more just, verdant, and peaceful world.”).

<sup>61</sup> *Children on the Run*, *supra* note 1, at 5 (“UNHCR’s research was to ascertain the connection between the children’s stated reasons, the findings of recent studies on the increasing violence and insecurity in the region, and international protection needs. UNHCR Washington conducted individual interviews with 404 unaccompanied or separated children – approximately 100 from each country – who arrived to the U.S. during or after October 11 and, in the context of the current regional and national environments and the tremendous number of displaced children arriving to the U.S. from these [three] countries, analyzed the children’s response in order to answer two questions: Why are these children leaving their countries of origin? Are any of these children in need of international protection?”).

violence, extreme poverty, and family reunification were motivating factors.<sup>62</sup>

Of the 104 children from El Salvador interviewed by UNHCR, 66% cited violence by organized armed criminal actors as the primary motivator for migration, 21% cited violence and abuse in their home, and 7% cited extreme poverty.<sup>63</sup> “Only one child [cited] the possibility of benefiting from current immigration policies in the United States.”<sup>64</sup> The children that cited violence by organized criminal actors described evading extortion, witnessing murders, and receiving threats.<sup>65</sup> The annual Country Reports on Human Rights published by the United States Department of State corroborates UNHCR’s study. The State Department reported that gang violence and child abuse remain a “serious and widespread problem.”<sup>66</sup>

Of the 100 children from Guatemala interviewed by UNHCR, 84% shared hopes for family reunification in addition to 29% that cited extreme poverty, 23% that cited abuse in the home, and 20% that cited violence by organized armed criminal actors as the dominant themes for migration.<sup>67</sup> The State Department’s Country Report on Guatemala also confirms the statistics established by UNHCR’s study. For example, the State Department stated that “considerable violence was attributed to gangs, organized crime, and narcotics trafficking organizations . . . .”<sup>68</sup> Additionally, the Country Report stated that “[c]riminals and gangs often recruited street children, many of whom were former victims of domestic abuse, for purposes of stealing, transporting contraband, prostitution, and illegal drug activities.”<sup>69</sup> In fact, the Report estimated that approximately “3,000 youth were involved in street gangs” and noted “77 minors

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<sup>62</sup> *Id.* at 6–7. See generally U.S. CBP, *Johnson Statement*, *supra* note 2 (describing the humanitarian issues of unaccompanied children crossing the U.S. southern border).

<sup>63</sup> *Children on the Run*, *supra* note 1, at 9.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., EL SALVADOR 2013 HUMAN RIGHTS REPORT (Mar. 21, 2014), <https://www.state.gov/documents/organization/220654.pdf>.

<sup>67</sup> *Children on the Run*, *supra* note 1, at 9–10.

<sup>68</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., GUATEMALA 2014 HUMAN RIGHTS REPORT (2014), <https://www.state.gov/documents/organization/236904.pdf>.

<sup>69</sup> *Id.* at 19.

suffered violent deaths nationwide between January and October [2013].”<sup>70</sup>

Of the 98 children from Honduras interviewed by UNHCR, 80% shared hopes for family reunification in addition to 44% that cited violence by organized armed actors, 24% that cited abuse in the home, and 21% that cited extreme poverty as the predominate factors that led to their northern migration.<sup>71</sup> Once again, the State Department’s Country Report on Honduras corroborates UNHCR’s study. The State Department reported that “[o]rganized criminal elements, including local and transnational gangs and narcotics traffickers, were significant perpetrators of violent crimes in the country and committed acts of murder, extortion, kidnapping, torture, [and] human trafficking . . . .”<sup>72</sup> In addition, “[p]olice, gangs, and members of the public engaged in violence against poor youths.”<sup>73</sup>

The United States must realize that the majority of unaccompanied children arriving at the southwest border harbor significant protection needs.<sup>74</sup> However, the reality is that few of these children will receive meaningful legal protection.<sup>75</sup>

### III. NAVIGATING THE IMMIGRATION SYSTEM

CBP has already apprehended over 21,000 unaccompanied children at the southwest border during the first three months of fiscal year 2017.<sup>76</sup> Most of these children are ultimately placed in the custody of HHS through ORR while they await a determination of their immigration status.<sup>77</sup> Throughout this process, unaccompanied children must

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<sup>70</sup> *Id.*

<sup>71</sup> *Children on the Run*, *supra* note 1, at 10.

<sup>72</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., HONDURAS 2013 HUMAN RIGHTS REPORT (2013), <https://www.state.gov/documents/organization/220663.pdf>.

<sup>73</sup> *Id.* at 19.

<sup>74</sup> Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AM. IMMIGR. COUNCIL 5 (July 2014), <http://www.immigrationpolicy.org/perspectives/no-childhood-here-why-central-american-children-are-fleeing-their-homes.html>.

<sup>75</sup> Corneal, *supra* note 5, at 611.

<sup>76</sup> U.S. CBP: *Border Apprehensions*, *supra* note 4.

<sup>77</sup> Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L. & POL’Y 148, 155 (2014).

navigate the complex and intimidating immigration system<sup>78</sup>—a system that expressly states that a “child’s best interest” should not be considered by the adjudicator.<sup>79</sup> As expressed in the 2007 Operating Policies and Procedures Memorandum, David L. Neal, the Chief Immigration Judge, provided that “[t]he concept of ‘best interest of the child’ does not negate the statute or the regulatory delegation of the Attorney General’s authority and cannot provide a basis for providing relief not sanctioned by law.”<sup>80</sup>

### A. Apprehension and Placement

Children are immediately placed in the custody of DHS upon their apprehension.<sup>81</sup> In accordance with the Homeland Security Act of 2002,<sup>82</sup> DHS must first determine whether the child meets the statutory definition of an “unaccompanied child” before transferring the minor to the custody and care of ORR.<sup>83</sup> The *Flores* settlement agreement<sup>84</sup>

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<sup>78</sup> *Id.* at 155–56.

<sup>79</sup> See Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the U.S.*, 45 HARV. C.R. – C.L. L. REV. 247, 249 (2010); see also Memorandum from David L. Neal, Chief Immigration Judge to all Immigration Judges, Court Admin’rs, Law Clerks, & Immigration Court Staff, *Operating Policies and Procedures Memorandum 07–01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (May 2007), <http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

<sup>80</sup> Neal, *supra* note 79.

<sup>81</sup> Shea, *supra* note 77, at 156.

<sup>82</sup> Homeland Security Act of 2002, Pub. L. No. 107–296 § 462, 116 Stat. 2202 (codified as amended at 6 U.S.C. § 279 (2012)).

<sup>83</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, § 235(a)(4), 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1232 (2012)); see Young & McKenna, *supra* note 79, at 249.

<sup>84</sup> Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85–4544–RJK (C.D. Cal. Jan. 17, 1997), [https://cliniclegal.org/sites/default/files/attachments/flores\\_v.\\_reno\\_settlement\\_agreement\\_1.pdf](https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf) [hereinafter “*Flores Settlement Agreement*”]. In 1985, a human rights organization, which worked directly with unaccompanied minors, sued the INS, alleging the detention conditions and release policies violated the minors’ rights. *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *rev’d*, *Reno v. Flores*, 507 U.S. 292 (1993). As a result of that lawsuit, a settlement agreement was reached between the parties. “The Agreement sets out nationwide policy for the detention, release, and treatment of minors in custody of the INS.” *Flores Settlement Agreement* at 6. The agreement required that the INS treat “all minors in custody with dignity, respect and special concern for their particular vulnerability as minors.” *Id.* at 7. The Settlement is still in effect, despite the dissolution of the INS, but it has never been fully codified. See Rebecca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1652, 1652 (2012).

(*Flores*) and the Trafficking Victims Protection Reauthorization Act<sup>85</sup> (TVPRA) requires ORR to “‘place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs,’ and when appropriate, release the child from detention to a family member, legal guardian, or entity willing to ensure the child’s well-being and timely appearance in immigration court.”<sup>86</sup> However, ORR will retain custody of any child not released.<sup>87</sup>

### B. Removal Proceedings

Once a child meets the statutory definition of an “unaccompanied child,” Immigration Customs and Enforcement (ICE) begins the removal proceeding on behalf of DHS in accordance with § 240 of the Immigration and Nationality Act<sup>88</sup> (INA).<sup>89</sup> An immigration judge will then determine whether the child is inadmissible under § 212(a) of the INA,<sup>90</sup> removable under § 237(a) of the INA,<sup>91</sup> or qualifies for a substantive ground for relief from deportation.<sup>92</sup>

### C. Forms of Relief

In accordance with the Refugee Act of 1980, Congress mandated the creation of substantive procedures for the granting of status to those defined as refugees and grounds for relief from deportation for those who seek protection in the United States.<sup>93</sup> Substantive grounds for relief

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<sup>85</sup> William Wilberforce Trafficking Victims Protection Act, 8 U.S.C. § 1232 (2012).

<sup>86</sup> Young & McKenna, *supra* note 79, at 250.

<sup>87</sup> Shea, *supra* note 77, at 159.

<sup>88</sup> See Immigration and Nationality Act, 8 U.S.C. § 1229(a) (2012).

<sup>89</sup> See Shea, *supra* note 77, at 159.

<sup>90</sup> 8 U.S.C. § 1182 (requiring that aliens are ineligible for entry for reasons including the following: if the alien’s health poses a threat to others, if the alien has been convicted of certain crimes, if the alien poses a threat to national security, if there is a danger that the alien will become a public charge, if the alien has violated his or her immigration status in the past, or if the alien had been previously removed from the country).

<sup>91</sup> § 1227(a) (requiring that an alien is deportable for reasons including the following: the alien is presently in violation of immigration laws, the alien violated his or her nonimmigrant status or condition of entry, the alien was convicted of certain crime, the alien was involved in fraud related to his or her immigration status, or the alien poses a threat to national security).

<sup>92</sup> Shea, *supra* note 77, at 160.

<sup>93</sup> Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.). The Act recognizes that it has been the historic policy of the United States to respond to the urgent needs of person subject to persecution in their home country. The main objectives of the Act were: to create a new definition of refugee based on the one

from deportation available to unaccompanied children include asylum, protection under the Convention Against Torture, and one of three types of visa classifications: “special immigrant” J visa, T visa, or U visa.<sup>94</sup>

### i. Asylum

Asylum is one category of protection provided by the United States for unaccompanied children fleeing serious human rights abuses.<sup>95</sup> In order to establish eligibility for asylum under United States domestic law, the applicant bears the burden of proving himself or herself a “refugee” as defined in § 101(a)(42) of the INA.<sup>96</sup> Additionally, the applicant must satisfy three distinct elements.<sup>97</sup> First, the applicant must establish past persecution or a well-founded fear of future persecution.<sup>98</sup> Second, the persecution must have been, or is expected to be, committed by either the government or forces that the government is unwilling or unable to control.<sup>99</sup> Third, the past or future persecution must have been, or is expected to be, motivated by one of the five-protected grounds.<sup>100</sup>

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created at the UN Convention and Protocol on the Status of Refugees; raise the limitation from 17,400 to 50,000 refugees admitted each fiscal year; provide emergency procedures for when that number exceeds 50,000; establish the Office of U.S. Coordinator for Refugee Affairs and the Office of Refugee Resettlement; and express explicit procedures on how to deal with refugees in the U.S. by creating a uniform and effective resettlement and absorption policy.

<sup>94</sup> See Corneal, *supra* note 5, at 625.

<sup>95</sup> DREE K. COLLOPY, AILA’S ASYLUM PRIMER 835 (7th ed. 2015). The other two categories of protection provided by the United States for persons fleeing serious human rights abuses are withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and protection under the Torture Convention.

<sup>96</sup> 8 C.F.R. § 208.13(a) (1996); see *In re S-M-J-*, 21 I&N Dec. 722 (BIA 1997); Asylum Officer Basic Training Course, Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence (Sept. 14, 2006), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTTC%20Lesson%20Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf> (showing that under U.S. law, a refugee is a person unable or unwilling to return to his or her country of origin or last habitual residence because of either “persecution or a well-founded fear of persecution” on the basis of race, religion, nationality, membership in a particular social group, or political opinion).

<sup>97</sup> Tina Javaherian, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 428 (2012).

<sup>98</sup> 8 C.F.R. § 208.13(b)(1) (2008); see *Sanz de Santamaria v. Att’y Gen.*, 525 F.3d 999, 1007 (11th Cir. 2008).

<sup>99</sup> See *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

<sup>100</sup> See § 1158(b)(1)(B)(i). The five protected grounds are race, religion, nationality, membership in a particular social group, and political opinion.

The key concept of “persecution has been defined by the Ninth Circuit as the “infliction of suffering or harm . . . in a way regarded as offensive.”<sup>101</sup> If the applicant establishes past persecution, he or she is not required to separately establish that his or her fear of future persecution is well-founded.<sup>102</sup> However, the government may rebut this presumption by establishing a fundamental change in circumstances or a reasonable possibility of internal relocation.<sup>103</sup> In determining whether the applicant has established past persecution, the adjudicator must consider the cumulative effect of all alleged persecution.<sup>104</sup> In the alternative, if the applicant establishes a well-founded fear of future persecution if returned to their country of origin, he or she must satisfy subjective and objective elements.<sup>105</sup> Accordingly, the applicant must present credible, direct, and specific evidence that he or she has a reasonable fear of future persecution.<sup>106</sup>

The applicant must also establish that the persecution he or she suffered or fears was committed by the government, or a force that the government is unable or unwilling to control.<sup>107</sup> In determining whether a persecutor is embraced within this concept, courts often inquire whether the applicant reported the persecution to the appropriate authorities and whether the authorities adequately responded to the situation.<sup>108</sup> However, this is not an absolute requirement.<sup>109</sup> In

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<sup>101</sup> Javaherian, *supra* note 97, at 429.

<sup>102</sup> *Id.*; *See Matter of Chen*, 20 I&N Dec. 16, 18, 1989 WL 331860 (B.I.A. 1989) (noting that “past persecution and a well-founded fear of persecution are alternative methods of establishing eligibility for refugee status”).

<sup>103</sup> 8 C.F.R. §§ 208.13(b)(1)(i)(A), 1208.13(b)(1)(i)(A).

<sup>104</sup> *Delgado v. U.S. Att’y Gen.*, 487 F.3d 855, 861 (11th Cir. 2007).

<sup>105</sup> *See Sans de Santamaria v. Att’y Gen.*, 525 F.3d 999, 1007 (11th Cir. 2008) (“The applicant may prove eligibility by demonstrating . . . a subjectively genuine and objectively reasonable fear of persecution.”).

<sup>106</sup> *Collopy*, *supra* note 95, at 45; *See Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006) (“There is a well-founded fear of persecution if the alien has a subjective fear of persecution that is objectively reasonable.”); *Lusingo v. Gonzales*, 420 F.3d 193, 199 (3d Cir. 2005) (“The inquiry into whether an alien has established the requisite well-founded fear of future persecution is both subjective and objective. The subjective component is satisfied by proof that the professed fear is genuine. The objective component is satisfied by proof that the alien’s subjective fear is reasonable in light of all the record evidence.”).

<sup>107</sup> *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

<sup>108</sup> *See Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (noting that after the applicant reported several assaults and threats to the police, along with the perpetrators’ identifications, the court found that the “failure by the authorities to protect [the applicant] and his family clearly

accordance with the REAL ID Act,<sup>110</sup> courts may examine evidence on country conditions.<sup>111</sup> Under the Act, “a trier of fact may base a credibility determination on the consistency between the applicant’s or witness’s written and oral statements . . . [and] the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions) . . . .”<sup>112</sup> Such evidence provides context for analyzing a claim and relevance to the applicant’s credibility assessment.<sup>113</sup>

Finally, the applicant must establish that the “central reason” of persecution was or is motivated by one of the five protected grounds.<sup>114</sup> Accordingly, the persecution must be linked to race, religion, nationality, membership in a particular social group, or political opinion.<sup>115</sup>

Asylum protection in the United States is not absolute.<sup>116</sup> Despite satisfying the aforementioned elements, the adjudicator must render the applicant ineligible if he or she meets one of the exclusionary bars of asylum law.<sup>117</sup> United States law bars any applicant who: (1) failed to “promptly file for asylum;”<sup>118</sup> (2) “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;”<sup>119</sup> (3) was “convicted by a final judgment of a particularly serious crime;”<sup>120</sup> (4) is believed to “ha[ve] committed a serious nonpolitical crime outside the United States;”<sup>121</sup> (5) is regarded “as a

indicate[d] that the police either could not or would not control the [group] who threatened [the applicant] and his family.”)

<sup>109</sup> *Id.* at 1359.

<sup>110</sup> REAL ID Act, Pub. L. No. 109–13, § 1, 119 Stat. 302; *see also* 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

<sup>111</sup> Collopy, *supra* note 95, at 347–348.

<sup>112</sup> 8 U.S.C. § 1158(b)(1)(B)(iii); REAL ID Act, Pub. L. No. 109–13, § 1, 119 Stat. 302.

<sup>113</sup> *See* § 1158(b)(1)(B)(iii).

<sup>114</sup> § 1158(b)(1)(B)(i).

<sup>115</sup> Javaherian, *supra* note 97, at 432.

<sup>116</sup> Collopy, *supra* note 95, at 182.

<sup>117</sup> Javaherian, *supra* note 97, at 432.

<sup>118</sup> *Id.* at 432 n.78 (“An applicant must apply for asylum within a year of arrival to the United States unless he or she demonstrates extraordinary circumstances or a material change in circumstances. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1158(a)(2)(B) (2006).”).

<sup>119</sup> § 1158(b)(2)(A)(i) (2012); 8 C.F.R. §§ 208.13(c)(2)(i)(E), 1208.12(c)(2)(i)(E).

<sup>120</sup> § 1158(b)(2)(A)(ii), (B)(i); 8 C.F.R. § 208.13(c)(2)(i)(A), (D).

<sup>121</sup> § 1158(b)(2)(A)(iii).

danger to the security of the United States;”<sup>122</sup> (6) has engaged in, or there is a “reasonable ground to believe” is engaged in, or is likely to engage in, or has incited “terrorist activity,” or who is a representative of a designated terrorist organization;<sup>123</sup> or (7) was “firmly resettled in another country prior to arriving in the United States.”<sup>124</sup>

However, it is important to note that § 235(d)(7) of the TVPRA, which was signed into law on December 23, 2008, and became effective on March 23, 2009, modified § 208(b)(3) of the INA to state that “[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . regardless of whether filed in accordance with this section or section 235(b) [of the INA]”<sup>125</sup> Additionally, pursuant to an amendment made by the TVPRA, the aforementioned one-year filing deadline is no longer applicable to unaccompanied children.<sup>126</sup>

## ii. Convention Against Torture

An unaccompanied child may also claim protection under the UN Convention Against Torture (CAT), which was ratified by the United States in 1994.<sup>127</sup> In accordance with Article 3 of CAT, no State shall “expel, return (*refouler*), or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”<sup>128</sup> Accordingly, relief from deportation is available if the applicant can establish that, if removed to a specific country, he or she is “more likely than not” to suffer intentionally inflicted torture.<sup>129</sup>

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<sup>122</sup> § 1158(b)(2)(A)(iv).

<sup>123</sup> § 1158(b)(2)(A)(v).

<sup>124</sup> § 1158(b)(2)(A)(vi); Collopy, *supra* note 95, at 200.

<sup>125</sup> William Wilberforce Trafficking Victims Protection Act, 8 U.S.C. § 235(d)(7) (2012).

<sup>126</sup> *Id.* at § 235(d)(7)(A).

<sup>127</sup> 8 C.F.R. §§ 208.16, 1208.16; Corneal, *supra* note 5, at 634.

<sup>128</sup> U.N. Draft *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 I.L.M. 1027, 1028 (1984) [hereinafter “CAT”].

<sup>129</sup> 8 C.F.R. §§ 208.16, 1208.16; *see* *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005). The CAT, to which the United States signed in 1988 and ratified in 1994, forbids governments from returning a person to a country in which he may be tortured. *See* CAT, *supra* note 128, at 1028. “Unlike asylum and withholding of removal, there are not bars to relief under the CAT.” Collopy, *supra* note 95, at 305.

### iii. Special Immigrant Juvenile Status

The Special Immigrant Juvenile J Visa is another form of protection in the United States available for unaccompanied children seeking relief from deportation.<sup>130</sup> An unaccompanied child may qualify for a J visa if they are:

. . . [U]nmarried . . . [and] under twenty-one-years of age (1) who have been declared dependent in a U.S. juvenile court, such that the court deems the alien eligible for long-term foster care or commits him/her to state custody on the basis of abuse, neglect or abandonment; and (2) for whom an administrative or judicial determination is made that it is not in the alien's best interest to return to his/her country of nationality or last residence.<sup>131</sup>

However, the process for obtaining a J visa is complex.<sup>132</sup> A state juvenile court must first declare the J visa applicant a dependent before proceeding to the federal immigration court.<sup>133</sup> If a child is recognized as a dependent, the "Attorney General must [then] expressly consent to the dependency order serving as a precondition to the grant."<sup>134</sup> However, if a child is in custody of DHS, the child must first receive consent from DHS "before a [state] juvenile court may have jurisdiction to determine [the child's] custody status or placement."<sup>135</sup> Accordingly, a child not released in accordance with *Flores* will only be able to seek the dependency determination in a state juvenile court if "(1) the juvenile is aware that [he or she] must petition the [DHS] to grant jurisdiction to the [state] juvenile court to make a dependency determination; and (2) [DHS] then exercises its discretion to give the court jurisdiction."<sup>136</sup> Despite the challenge, these barriers are not insurmountable.

### iv. Exploited Persons: T and U Visas

Unaccompanied children may also qualify for one of two recently created visas.<sup>137</sup> In 2000, Congress created the T visa for "victims of

<sup>130</sup> 8 U.S.C. § 1101(a)(27)(J) (2012).

<sup>131</sup> Corneal, *supra* note 5, at 636.

<sup>132</sup> Shea, *supra* note 77, at 160.

<sup>133</sup> *Id.*

<sup>134</sup> Corneal, *supra* note 5, at 636 (quoting Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *Special Juvenile Immigrants*, 6 BENDER'S IMMIGR. BULL. 658, 659 (July 1, 2001)).

<sup>135</sup> *Id.* at 636–37 (quoting Yale-Loehr, *supra* note 134).

<sup>136</sup> *Id.* at 637.

<sup>137</sup> *Id.* at 638.

severe forms of trafficking,”<sup>138</sup> and the U visa for victims of “substantial physical or mental abuse.”<sup>139</sup>

T visas are available if: (1) the child “[was] the victim of a ‘severe form of trafficking;’” (2) the child “[is] physically present in the United States or at a valid point of entry as a result of that trafficking;” (3) the child shows “that [he or] she would ‘suffer extreme hardship involving unusual and severe harm upon removal;’” and (4) if the child “is over fifteen years old, [he or] she must ‘compl[y] with any reasonable request for assistance in the investigation or prosecution of acts of trafficking,’ but children fifteen and under are exempt from this requirement.”<sup>140</sup> U visas were created under the Battered Immigrant Women Protection Act of 2000,<sup>141</sup> and designed to protect victims who “have information about, and will assist in, investigations and prosecutions of that abusive criminal activity.”<sup>142</sup> However, a greater burden is placed on children to cooperate with legal authorities in order to obtain this visa.<sup>143</sup>

Despite the aforementioned forms of relief from removal available to unaccompanied children, the United States government must recognize that the current immigration system does not adequately protect these vulnerable minors.

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<sup>138</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 107(e)(1)(C), 114 Stat. 1464, 1477 (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012)); see also H.R. Rep. No. 106–3244 (2000) (Conf. Rep.) (noting that the Victims of Trafficking and Violence Protection Act of 2000 amends the Immigration and Nationality Act to “create new non-immigrant ‘T’ visa for . . . and alien who the Attorney General determines is a victim of a severe form of trafficking”).

<sup>139</sup> See Victims of Trafficking and Violence Protection Act of 2000, 8 U.S.C. § 1101(a)(15)(U)(i)(I); see also H.R. Rep. No. 106–3244 (2000) (Conf. Rep.) (noting that the Victims of Trafficking and Violence Protection Act of 2000 amends the Immigration and Nationality Act to establish a “U” visa classification). The types of abuse include: “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; [and] false imprisonment . . . .” 8 U.S.C. § 1101(a)(15)(U)(iii) (2000).

<sup>140</sup> Corneal, *supra* note 5, at 638–39.

<sup>141</sup> See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106–386, § 1513(e)(b)(3), 114 Stat. 1464, 1534–35 (codified as amended at 8 U.S.C. § 1101(a)(15)(U) (2012)). The Battered Immigrant Women Protection Act of 2000 can be is part of the Violence Against Women Act of 2000, which is part of the Victims of Trafficking and Violence Protection Act of 2000. See Pub. L. No. 106–386, §§ 1, 1001, 1501, 114 Stat. 1464, 1464, 1491, 1518 (2000).

<sup>142</sup> Corneal, *supra* note 5, at 639.

<sup>143</sup> *Id.*

#### IV. DUE PROCESS CONCERNS

The United States “government provides no appointed counsel for unaccompanied children in immigrant proceedings.”<sup>144</sup> In accordance with § 292 of the INA,

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.<sup>145</sup>

As a result, more than half of these minors are unrepresented in an extremely complex system that many courts have suggested “only an attorney can navigate.”<sup>146</sup> However, the Supreme Court has acknowledged the importance of providing adequate legal counsel to children.<sup>147</sup> In accordance with *In re Gault*,<sup>148</sup> which dealt with juvenile delinquency matters, Justice Abe Fortas stated that:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.<sup>149</sup>

The same policy considerations should be applied to the immigration system, as they are both legally and economically sound.<sup>150</sup>

One fundamental right provided to unaccompanied children when apprehended is the requirement for the arresting officer to produce a

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<sup>144</sup> Young et al., *supra* note 79, at 56.

<sup>145</sup> Immigration and Nationality Act, 8 U.S.C. § 1362 (2012).

<sup>146</sup> *See, e.g.*, *Lok v. Immigration & Nat. Serv.*, 548 F.2d 37, 38 (2d Cir. 1977) (noting that the Immigration and Nationality Act bears a “striking resemblance . . . [to] King Minos’s labyrinth in ancient Crete”); *see also* *Castro-O’Ryan v. U.S. Dept. of Immigration & Nat.*, 847 F.2d 1307, 1312 (9th Cir. 1988) (“A lawyer is often the only person who could thread the labyrinth [of immigration laws.]”); *Perez-Funez v. Immigration & Nat. Serv.*, 619 F. Supp. 656, 662 n.11 (C.D. Cal. 1985) (relying on *Lok*’s “oft-quoted line” about the complexity of immigration law).

<sup>147</sup> Corneal, *supra* note 5, at 648.

<sup>148</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>149</sup> *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

<sup>150</sup> *See id.* (holding that the “assistance of counsel is essential for purposes of waiver proceedings”).

Notice of Rights and Request for Disposition through Form I-770.<sup>151</sup> In accordance with this regulation, the arresting officer must explain three basic rights: (1) “the right to use the telephone to call a parent, adult relative, or adult friend;” (2) “the right to be represented by an attorney who can fully explain the child’s rights;” and (3) “the right to a hearing before the immigration judge who will decide whether [the child] must leave or whether [the child] may stay in the United States.”<sup>152</sup> Congressional acts, EOIR standards, and DHS regulations also encourage “child-sensitive procedures” when dealing with unaccompanied children; however, these efforts do not include the right to adequate legal representation.<sup>153</sup>

The United States should guarantee unaccompanied children the right to counsel in removal proceedings. Statistical analyses have confirmed that these unrepresented children cannot overcome the complexities of the system.<sup>154</sup> The demands of removal proceedings require minors “to determine what relief they may be entitled to, gather evidence and witnesses that establish they are entitled to the relief, and present that evidence to the immigration judge in a way that ‘clearly and beyond doubt’<sup>155</sup> establishes that they are entitled to that relief.”<sup>156</sup> On the other hand, an unaccompanied child represented by counsel is six times more likely to be successful with their claim.<sup>157</sup>

The appointment of counsel promotes due process with respect to two important legal considerations: (1) the protection of the child’s

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<sup>151</sup> 8 C.F.R. § 236.3(h) (2012); see also M. Aryah Somers, *Zealous Advocacy for the Right to be Heard for Children and Youth in Deportation Proceedings*, 15 CUNY L. REV. 189, 193 (2011).

<sup>152</sup> *Id.*

<sup>153</sup> Linda Kelly Hill, *The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 63–64 (2011); see also 8 U.S.C. § 1232(d)(8) (2012) (amending the Special Immigrant Juvenile Status and taking “into account the specialized needs of unaccompanied alien children”); 8 C.F.R. § 1240.10(c) (2016) (prohibiting an immigration judge from accepting a plea of inadmissibility from an unrepresented, unaccompanied child.).

<sup>154</sup> Hill, *supra* note 153, at 65. For example, “a child represented by counsel is four times more likely to win asylum.” *Id.*

<sup>155</sup> See 8 U.S.C. § 1229(a)(c)(2)(A).

<sup>156</sup> Shea, *supra* note 77, at 166.

<sup>157</sup> *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States*, AM. IMMIGR. LAW. ASS’N, June, 15, 2016, at 15 [hereinafter “*Due Process Denied*”].

interest; and (2) the guarantee of a fair legal proceeding.<sup>158</sup> First, unaccompanied children range in age from infancy to seventeen-years-old, and are less likely than adults “to [comprehend] all of their [legal] options, to recognize or appreciate all of the ramifications of behavioral alternatives, and to weigh the alternatives in a way that does not produce outcomes that may be unfavorable or even injurious to them.”<sup>159</sup> Furthermore, representation in these proceedings will ensure that each complex immigration issue is addressed, elicit the child’s trust and participation, and promote their best interests.<sup>160</sup> Second, the threat of an unfair proceeding will be reduced by the appointment of counsel.<sup>161</sup> The atmosphere in immigration court is adversarial.<sup>162</sup> When a child is unrepresented at a removal proceeding, the immigration judge is often forced to help the minor develop their case while acting as an adjudicator, thereby jeopardizing impartiality.<sup>163</sup> In addition, consistent questioning by the immigration judge and the government attorney creates a “gross disparity in power” that “can easily intimidate a child and prevent him [or her] from adequately conveying his [or her] story.”<sup>164</sup> Accordingly, the appointment of legal counsel enables the unaccompanied child to meaningfully participate in his or her removal proceeding while satisfying the requirements of constitutional due process.<sup>165</sup>

The Supreme Court cautioned in *Bounds v. Smith*,<sup>166</sup> “the cost of protecting a constitutional right cannot justify its total denial.”<sup>167</sup> While the appointment of counsel in removal proceedings may initially result in additional costs, it will eventually yield concrete savings, as the process

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<sup>158</sup> See generally Corneal, *supra* note 5 at 648–56; Hill, *supra* note 153, at 62–65; Shea, *supra* note 77, at 167–69 (discussing how unaccompanied alien children would greatly benefit from legal representatives that could help them both understand and weigh their options).

<sup>159</sup> Shea, *supra* note 77, at 167.

<sup>160</sup> See *id.* (explaining how trained legal representatives may be able to assist alien children with the complexities of immigration law by allowing them to both understand and weigh their options).

<sup>161</sup> See *id.* (explaining that these young alien children are likely to have more favorable outcomes with trained legal representatives, because they themselves lack the education and experience to ensure such a result themselves).

<sup>162</sup> Hill, *supra* note 153, at 64.

<sup>163</sup> Shea, *supra* note 77, at 168–69.

<sup>164</sup> Hill, *supra* note 153, at 64–65.

<sup>165</sup> Corneal, *supra* note 5, at 649.

<sup>166</sup> *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

<sup>167</sup> Hill, *supra* note 153, at 66.

will be more orderly and efficient.<sup>168</sup> For example, counsel representing a child can review potential claims, provide legal advice, and pursue valid claims for relief from deportation.<sup>169</sup> Counsel familiar with immigration court proceedings has the ability to create a more efficient environment than a child who appears *pro se*, unskilled in the procedural intricacies of presenting evidence and making arguments.<sup>170</sup> A premium on courtroom efficiency will reduce costs by eliminating prolonged hearings.<sup>171</sup> Additionally, counsel is more adept than children at locating family members or other entities willing to serve as guardians, thereby reducing the government's burden of detaining unaccompanied minors throughout their removal proceedings.<sup>172</sup> However, "if there are no workable alternatives, a child may more readily concede removability," a concession that undoubtedly eliminates costs, but "should only come after receiving the benefits of legal advice."<sup>173</sup> Accordingly, appointment of counsel will increase the efficiency of proceedings and the immigration system as a whole, expedite family reunifications, and reduce unwarranted detentions.<sup>174</sup>

In the alternative, it has been argued, "the benefits of appointed counsel for unaccompanied children 'may be outweighed by the cost.'"<sup>175</sup> Each year, the Vera Institute of Justice,<sup>176</sup> in conjunction with ORR, runs the DUCS Access to Legal and Child Advocate Services Project (DUCS Legal Access Project), which provides unaccompanied children in ORR custody with "'Know Your Rights Seminars,' legal screenings, and court preparation and assistance, but does not provide representation."<sup>177</sup> However, 70% of unaccompanied children participating in the DUCS Legal Access Project ultimately receive direct

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<sup>168</sup> See *id.* at 67–68 (providing that the assistance of counsel in child immigration hearings will be more orderly, cost efficient and produce better results than young, inexperienced children representing themselves in these hearings).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 66–67.

<sup>174</sup> *Id.* at 67.

<sup>175</sup> *Id.*; *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976).

<sup>176</sup> The Vera Institute of Justice is a nonprofit organization that works closely with government to improve the services that people rely on for safety and justice. See VERA INST. OF JUST., <http://www.vera.org> (last visited Apr. 23, 2017).

<sup>177</sup> Shea, *supra* note 77, at 162.

legal assistance.<sup>178</sup> If nonprofit and pro bono services already reach an impressive number of unaccompanied children, why burden the government with more costs?

The answer—almost 30% of unaccompanied children do not receive direct legal assistance.<sup>179</sup> In addition, the numbers provided by the DUCS Legal Access Project do not include unaccompanied children released to a family member, legal guardian, or entity willing to ensure the child's well-being, who more often than not will not locate adequate counsel.<sup>180</sup> Reliance on nonprofit and pro bono services “is not an effective mechanism for ensuring” adequate legal representation for unaccompanied children in the United States.<sup>181</sup> Additionally, direct legal assistance increases the efficiency of the proceedings, thereby eliminating the financial burdens associated with backlogged court dockets.<sup>182</sup>

## CONCLUSION

The historic northern migration of unaccompanied children towards the United States over the past several years has ignited vigorous debates between advocates and government with respect to the country's legal and moral obligation to protect this vulnerable population. The debates have illumined the fact that the current immigration system conflicts with core American values—values that seek to protect and promote child welfare standards. The United States' historic “concern for the homeless, the persecuted and the less fortunate of other lands,”<sup>183</sup> and its “long tradition as a haven for people uprooted by persecution,”<sup>184</sup> demands immediate action. The United States should act now by guaranteeing unaccompanied children the right to counsel in removal proceedings.

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<sup>178</sup> *Id.* at 163; Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children through the Immigration System*, VERA INST. OF JUST. 24 (Mar. 24, 2012).

<sup>179</sup> Shea, *supra* note 77, at 163.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Due Process Denied*, *supra* note 157, at 15.

<sup>183</sup> Dwight D. Eisenhower, *Statement by the President Upon Signing the Refugee Act of 1980* (Aug. 7, 1953), <http://www.presidency.ucsb.edu/ws/?pid=9668>.

<sup>184</sup> Jimmy Carter, *Statement by the President Upon Signing the Refugee Act of 1980* (Mar. 18, 1980), <http://www.presidency.ucsb.edu/ws/?pid=33154>.

Attempts to change the immigration system may ultimately fall to the courts, as recent calls for comprehensive reform remain unanswered. Acknowledging that procedural guarantees are traditionally awarded to groups, not individuals, the American Civil Liberties Union, American Immigration Council, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates, LLP, filed a nationwide class-action lawsuit, *F.L.B. v. Lynch*<sup>185</sup> (formerly *J.E.F.M. v. Holder*), on July 9, 2014 in the United States District Court in Seattle, Washington, on behalf of thousands of unaccompanied children, challenging the federal government's failure to provide them with legal representation as it carries out proceedings against them in violation of the U.S. Constitution's Fifth Amendment Due Process Clause and the Immigration and Nationality Act's provision requiring a "full and fair hearing" before an immigration judge.<sup>186</sup> However, only time will tell whether the courts will recognize the "Constitution's promise of fairness and its duty to give these children a real voice in court."<sup>187</sup>

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<sup>185</sup> *J.E.F.M. v. Lynch*, ACLU (June 27, 2016), <https://www.aclu.org/cases/jefm-v-lynch>. On June 24, 2016, a federal judge granted the request to certify a class of children in the ongoing suit against the Attorney General for failing to provide legal representation. On September 20, 2016, the Ninth Circuit ruled that the U.S. District Court for the Western District of Washington lacked jurisdiction to hear the claims. On December 5, 2016, the plaintiffs-appellees filed a petition for a rehearing en banc with the Ninth Circuit Court. The status of the case is pending. *Id.*

<sup>186</sup> See generally *Groups Sue Federal Government over Failure to Provide Legal Representation for Children Placed into Deportation Proceedings*, AM. IMMIGR. COUNCIL (July 9, 2014), <https://www.aclu.org/news/groups-sue-federal-government-over-failure-provide-legal-representation-children-placed>.

<sup>187</sup> *Id.* (quoting in part Kristen Jackson, senior staff attorney with Public Counsel: "Each day we are contacted by children in desperate need of lawyers to advocate for them in their deportation proceedings. Pro bono efforts have been valiant, but they will never fully meet the increasing and complex needs these children present. The time has come for our government to recognize our Constitution's promise of fairness and its duty to give these children a real voice in court.").