

2023

Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge

Diana Ramirez
Pace University, Elisabeth Haub School of Law

Follow this and additional works at: <https://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

Recommended Citation

Diana Ramirez *Comparative Immigration Policies for Unaccompanied Minors: A Shared Challenge*, 19 *Loy. U. Chi. Int'l L. Rev.* 157 ().

Available at: <https://lawcommons.luc.edu/lucilr/vol19/iss2/3>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

COMPARATIVE IMMIGRATION POLICIES FOR UNACCOMPANIED MINORS: A SHARED CHALLENGE

Diana Ramirez*

Abstract

Unaccompanied minors from the Northern-Triangle and Mexico have been arriving at the United States border in large numbers over the past decade as a result of forced migration movements. Although the arrival of unaccompanied minors is not a new phenomenon in the United States, recent administrations have responded in ways that have made the country's immigration system increasingly hostile towards them.

However, this issue is not exclusive to the United States. Unaccompanied minors traveling alone to Europe, Australia, South Africa, Canada, or the United States face similar dangers and are particularly vulnerable to abuse and trafficking. Regardless of jurisdiction, the treatment, care, and protection of the human rights of unaccompanied minors pose significant challenges. Around the world, unaccompanied minors are subject to similar human rights violations, and both international and domestic laws have proven to be ineffective in protecting them.

As long as countries prioritize the enforcement of their immigration laws, which are not designed to protect minors, the human rights and international standards of unaccompanied minors will continue to be violated as they migrate and seek asylum. It is crucial to recognize and address the unique needs and vulnerabilities of unaccompanied minors. Only then can we hope to ensure their safety and protect their fundamental human rights.

Table of Contents

I. Introduction	158
II. Immigration Laws and Policies for Unaccompanied Minors	
Seeking Asylum in Europe	160
A. European Standards on International Law and Migration	160
B. The Significance of Children's Rights in the European Regional System to Award Special Protections to Unaccompanied Minors.....	162
C. The Right to Legal Representation for Unaccompanied Minors in Europe	163
III. Immigration Laws and Policies for Unaccompanied Minors	
Seeking Asylum in Australia.....	166
A. Immigration Detention of Unaccompanied Minors in Australia Violates International Human Rights Standards	167

* Associate Director for Graduate Programs and International Affairs and Adjunct Professor at the Elisabeth Haub School of Law at Pace University.

Comparative Immigration Policies for Unaccompanied Minors

B.	Due Process and Representation in Immigration Proceedings Under Australian Law	168
IV.	Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in South Africa	170
A.	African Standards on International Law, Migration, and the Protection on Unaccompanied Minors' Rights	170
V.	Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Canada	172
A.	The Significance of Children's Rights in Canada to Award Special Protections to Unaccompanied Minors Seeking Asylum	172
B.	The Best Interest of The Child Principle as a Means to Protect Unaccompanied Minors in the Canadian Legal System	173
C.	Extended Protection to Qualify for Asylum Under Canadian Law	174
VI.	Comparative Analysis with the United States: A Shared Challenge	178
A.	The Best Interest of the Child as a Corner Stone Principle for the Protection of Unaccompanied Minors	178
B.	Immigration Detention for Unaccompanied Minors Is Used Consistently in all Jurisdictions Despite Being Against International Law and Standards	180
C.	Due Process Guarantees and the Right to Access to Justice ..	181
VII.	Conclusion	184

I. Introduction

Forced migration has caused millions of people around the world to be uprooted. The current migration crisis is one of the most profound and least understood global challenges of our time.¹ The most common factors for forced migration can be listed as follows: (1) various forms of persecution; (2) armed conflicts or heavy gang violence; (3) human rights violations; (4) inequality and poverty; (5) lack of protection of economic, social, and cultural rights; and (6) political instability, corruption, or insecurity in the region.²

Unaccompanied minors “are widely recognized as among the most vulnerable of all migrants, and yet their basic human rights are often neglected.”³ The development of international law has taken into consideration the multiple factors that

¹ GLOBAL FORCED MIGRATION, THE POLITICAL CRISIS OF OUR TIME, S. DOC. NO. 116 48, at (i) (2d Sess. 2020).

² *Human Mobility, Interamerican Standards: Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, Inter-Am. Comm'n H.R., Rep. No. 46/15, OEA/Ser.L/V/II, doc. 46, at 11, 12 (2015) [hereinafter *Human Mobility*].

³ Michael J. Wynne, *Treating Unaccompanied Children Like Children: A Call for the Due Process Right to Counsel for Unaccompanied Minors Placed in Removal Proceedings*, 9 ELON L. REV. 431, 440 (2017).

Comparative Immigration Policies for Unaccompanied Minors

lead unaccompanied minors to migrate, like situations of vulnerability and international protection needs.⁴ For many, the right to leave is a prerequisite to secure protection against (anticipated) persecution and the enjoyment of human rights.⁵

Multiple international laws include provisions relevant to protecting the human rights of unaccompanied minors, including their dignity, health and well-being.⁶ The Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), the Convention on the Rights of the Child (“CRC”), and regional treaties outline fundamental freedoms and conditions that unaccompanied minors are entitled to enjoy.⁷ These freedoms and conditions include the principles of the “best interests of the child” as a primary consideration in all decisions affecting the life of the child, the principle of non-refoulement,⁸ the right to health, the right to due process, and the right to freedom from all forms of violence, among others.⁹

Yet, international standards remain far and unreachable in most domestic jurisdictions. As long as they keep putting the enforcement of their immigration laws first, the human rights of unaccompanied minors will still be violated.¹⁰ The United States, Canada, Australia, South Africa, and some countries in the EU share similar problems. The absence of adequate legal representation; unreliable or harmful age determination procedures; the abusive use of detention, including punitive measures; and the failure to have child-appropriate proceedings taking into account unaccompanied minors’ special vulnerability are all making immigration systems across the world increasingly hostile towards unaccompanied minors.¹¹

The Refugee Convention of 1951 has no provision that specifically applies to migrant children, such as unaccompanied minors. However, the UNHCR Guidelines on International Protection for Child Asylum Claims provide legal interpretation and guidance to a child-sensitive application of the refugee definition. The Refugee Convention was designed after World War II, and therefore it reflects the concerns and thinking of a different period.¹² The time period in which the Refugee framework was created translates into a particularly striking disconnect

⁴ *Human Mobility*, *supra* note 2, at ¶ 81.

⁵ Marjoleine Zieck, *Refugees and the Right to Freedom of Movement: From Flight to Return*, 39 MICH. J. INT’L L., 19, 21 (2018).

⁶ Janna Ataiants et al., *Unaccompanied Children at the United States Border, a Human Rights Crisis That Can Be Addressed with Policy Change*, J. IMMIGRANT & MINORITY HEALTH 1000, 1006 (2018).

⁷ *Human Mobility*, *supra* note 2, at ¶ 83.

⁸ Non-refoulement is a fundamental principle of international law that forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion.

⁹ Ataiants, *supra* note 6.

¹⁰ Bridgette A. Carr, *Incorporating a Best Interests of the Child Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L. J., 120, 159 (2009).

¹¹ Jacqueline Bhabha, *Children, Migration and International Norms*, in MIGRATION AND INTERNATIONAL NORMS 203, 218 (Alexander Aleinikoff & Vincint Chetail eds., TMC Asser Press 2003).

¹² NUALA MOLE, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5, 6 (6th ed. 2000).

Comparative Immigration Policies for Unaccompanied Minors

between law, policy and practice in regard to current issues.¹³ The fact that similar problems were found in different jurisdictions leads to the conclusion that the complexity and scope of the forced displacement of unaccompanied minors call for efforts by the international community to formulate new policy responses.¹⁴

Currently, the main issues with the protection of unaccompanied minors' human rights in immigration proceedings include a lack of child-appropriate proceedings; concern for their life, dignity, and safety during detention; and concerns about due process and representation in immigration courts.¹⁵ To comply with international standards and resolve these issues international and domestic law should ensure the following: (1) the addition of the principle of the "best interest of the child" to immigration legislation and policymaking; (2) stop the unnecessary and prolonged detention of unaccompanied minors; (3) reform the structure of immigration courts and proceedings to accommodate child-appropriate proceedings; (4) provide free legal counsel to unaccompanied minors; and (5) recognize other forms of social violence as a form of persecution.

II. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Europe

A. European Standards on International Law and Migration

Migration has always been common in Europe, but in recent years several member states of the European Union ("EU") have experienced the arrival of significant numbers of unaccompanied minors from non-European countries seeking refuge.¹⁶ The core reasons for the rise of unaccompanied minors in Europe mirror in some capacity those expressed by children arriving at the United States border: better economic opportunities; family reunification; fleeing from violence, disturbance, civil conflicts or war; sexual and labor exploitation; and in some cases forced marriage and/or torture.¹⁷

Assessing the exact number and statistics for unaccompanied minors in Europe is a hard task since every member state has its own immigration ministry; the quality of statistics on unaccompanied minors varies significantly between

¹³ Alison Luke, *Uncertain Territory: Family Reunification and the Plight of Unaccompanied Minors in Canada*, 16 DALHOUSIE J. LEGAL STUDS. 69, 79 (2007).

¹⁴ Arthur C. Helton & Eliana Jacobs, *What Is Forced Migration?*, 13 GEO. IMMIGR. L. J., 521, 521-22 (1999).

¹⁵ Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L. J. 883, 883 (2011); see generally Deborah S. Gonzalez, *Sky Is the Limit: Protecting Unaccompanied Minors by Not Subjecting Them to Numerical Limitations*, 49 ST. MARY'S L. J. 555 (2018); see also Samantha Casey Wong, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853 (2013); Zahra Lanewala, *Shifting Focus from Deportation of Unaccompanied Minors to Investing in Long-Term Reintegration Process*, 5 U. BALT. J. INT'L L. 124 (2016); Sarah J. Diaz, *Failing the Refugee Child: Gaps in the Refugee Convention Relating to Children*, 20 GEO. J. GENDER & L. 605, 620 (2019).

¹⁶ GABRIELLA LAZARIDIS, SECURITY, INSECURITY AND MIGRATION IN EUROPE 138, 140 (1st ed. 2011).

¹⁷ *Id.* at 143.

Comparative Immigration Policies for Unaccompanied Minors

member states and the data from individual states is not necessarily comparable.¹⁸ However, patterns show that most unaccompanied minors in Europe come mainly from Afghanistan, Iraq, Somalia, and the Syrian Arab Republic, and in lesser numbers from Eritrea, Turkey, Venezuela, Nigeria, and Iran.¹⁹ The number of applications for international protection has significantly increased in the European Union over recent years, mostly related to the ongoing crisis in Syria.²⁰ The latest data published by UNICEF in 2018 showed that out of the 30,000 minors arriving in Europe—mostly through Italy, Greece, Bulgaria, and Spain—12,700 were separated or unaccompanied. Of these minors, 70 percent sought asylum mainly in three countries, Germany, France, and Greece, and in lesser numbers in Italy and the United Kingdom.²¹ The top destination for separated and unaccompanied minors in Europe is still Germany, registering 43 percent of all child asylum applications in 2018.²²

Understanding the relationship between international law and domestic law within the EU is important to establish the rights and protections of unaccompanied minors in the region. Recognition of fundamental rights as an integral part of the EU legal order implies that the member states have to respect these rights whenever they act within the scope of EU law (or, “when they are implementing Union law,” as the Charter of Fundamental Rights puts it).²³ The Charter of Fundamental Rights of the European Union (“CFR”) includes human rights standards and elements of the CRC, which are directly incorporated as obligations to all European Union member states.²⁴ The European Convention on Human Rights (“ECHR”) provides an express regional recognition of most of the rights set out in the UDHR, but it does not contain any provision to reflect Article 14 of the Universal Declaration which guaranteed the right to seek and enjoy asylum from persecution.²⁵ It does, however, provide asylum seekers in the EU with a minimum standard framework of protection for their human rights.²⁶ It has been said by the European Commission that the protections for unaccompanied minors come from two sources: the standards of the EU Charter of Fundamental Rights,

¹⁸ Alison Hunter, *Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom*, 3 EUR. J. MIGRATION L. 383, 383-84 (2001).

¹⁹ LAZARIDIS, *supra* note 16, at 143; U.N. Refugee Agency, UNICEF & U.N. Migration Agency, *Refugee and Migrant Children in Europe: Overview of Trends (January-December 2018)*, <https://www.unicef.org/greece/sites/unicef.org.greece/files/2019-11/Refugee-and-migrant-response-service-mapping-data-report-january-december-2018.pdf> (last visited Oct. 29, 2019) [hereinafter UNICEF].

²⁰ See European Migration Network, *(Member) States' Approaches to Unaccompanied Minors Following Status Determination* (2018).

²¹ UNICEF, *supra* note 19.

²² *Id.*

²³ Jurgen Bast, *Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law*, 11 GER. L. J. 1006, 1009 (2010).

²⁴ MARY CROCK ET AL., PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE 239, 243 (Mary Crock & Lenni B. Benson eds., Edward Elgar Publishing 2018).

²⁵ MOLE, *supra* note 12, at 6.

²⁶ Hunter, *supra* note 18, at 386.

and the CRC.²⁷ On the jurisprudence side, the European Court on Human Rights (“ECtHR” or “European Court”) has played a major role in establishing and interpreting human rights in refugee cases.²⁸

B. The Significance of Children’s Rights in the European Regional System to Award Special Protections to Unaccompanied Minors

While every state has its own agencies and institutions that deal with immigration issues, the EU widely recognizes that unaccompanied minors are especially vulnerable in accessing their rights and should therefore be additionally protected.²⁹ Personal dignity, the best interest of the child, and the unity of the family must be guaranteed by states when dealing with children who apply for international protection.³⁰ Along with Article 24 of the EU Charter of Fundamental Rights, which confers on states a duty of care for children, the Geneva Convention takes into account this special vulnerability of children and considers them a “social group” for persecution claims.³¹ In those terms, the forms of prosecution targeted especially at children can include, for example, sexual exploitation, child abuse, and female genital mutilation.³²

The European Council has acknowledged a connection between substantive and procedural rights, reasoning that unaccompanied minors require “specific procedural guarantees on account of their vulnerability.”³³ Although vulnerability does not have an express legal basis in international human rights law, international human rights courts, particularly the ECtHR, have increasingly drawn on this concept in their jurisprudence. The Court has developed an important line of cases concerning migrant children, whom it considers particularly vulnerable to physical and mental harm during the migratory process.³⁴ It has deployed its conception of vulnerability in this regard, emphasizing that migrant children are in an extremely vulnerable situation as they are not only minors, but also aliens in an irregular situation in a foreign country who are not always accompanied by

²⁷ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUROPE, 2022 HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD 13 (2022).

²⁸ CROCK, *supra* note 24, at 243.

²⁹ LAZARIDIS, *supra* note 16, at 146.

³⁰ Parliamentary Assembly, *Improving the Quality and Consistency of Asylum Decisions in the Council of Europe Member States*, Res. 1695, at ¶ 8.3.4 (Nov. 20, 2009), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17795&lang=en>.

³¹ Henriette D. C. Roscam Abbing, *Age Determination of Unaccompanied Asylum-Seeking Minors in the European Union: A Health Law Perspective*, 18 EUR. J. HEALTH L. 1, 11-12 (2011).

³² EU Network of Independent Experts on Fundamental Rights, *Thematic Comment no. 4: Implementing the Rights of the Child in the European Union*, at 70-71 (May 20, 2006) (positing that because the EU considers itself bound by the Convention relating to the Status of Refugees of 18 July 1951 (Geneva Convention) and the New York Protocol relating to the Status of refugees of 31 January 1967, the instruments adopted by the Union in the field of asylum should be read in conformity with the Geneva Convention as interpreted by the United Nations High Commissioner for Refugees).

³³ Council Directive 2005/85, On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 10, at ¶14 [hereinafter Council Directive 2005/85].

³⁴ Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children’s Rights in the Jurisprudence of International Human Rights Courts*, 36 B.U. INT’L L. J. 1, 55 (2018).

Comparative Immigration Policies for Unaccompanied Minors

an adult.³⁵ In addition, the principle of the best interests of the child is used as a complement to the concept of vulnerability by the European Court, which tends to combine both when deciding on issues relating to the protection of migrant children's rights.³⁶ In fact, in February of 2019, the European Court issued two judgments in which it reaffirmed that the respect for the double vulnerability of child asylum seekers must be the primary consideration and not just an equal factor such as their irregular status.³⁷

C. The Right to Legal Representation for Unaccompanied Minors in Europe

Some countries in Europe also provide some degree of free representation to unaccompanied minors. While some appoint lawyers, others only appoint special representatives or social workers to help the unaccompanied minors frame their views during the immigration proceedings.³⁸ It is important to mention that the right to representation is different from the right to have free legal counsel. While it is true that even a non-lawyer representative may guarantee some level of expertise and care in a certain part of the process, they will never possess the necessary skills to navigate the often complicated asylum proceedings.³⁹ While this type of system does convey important rights, it "may not rise to the level of complexity that would require an attorney under human rights standards that govern the right to free legal counsel."⁴⁰

Finland, Norway, Switzerland, Sweden, and the Netherlands all appoint, with some differences between each country, one or two representatives for unaccompanied minors; when two representatives are appointed, one will be an attorney and the other a personal representative. They both identify and advocate for the child's best interests but in different capacities. While the attorney will represent the unaccompanied minor in court, the personal representative will advocate for the child's best interest in issues like living arrangements or assist the minors at interviews with immigration authorities. In other countries, such as Austria, the United Kingdom, France, and Denmark, the right to representation is reserved exclusively for children seeking asylum.⁴¹ The right to an appointed attorney at the expense of the government right holds an exception in Sweden, for cases where it is obvious that there are no reasons to believe an unaccompanied minor will gain his/her/their claim, representation will not be provided.⁴²

³⁵ See, e.g., *Popov v. France*, App. Nos. 39472/07 and 39474/07, Eur. Ct. H.R., ¶ 91 (2012); *Rahimi v. Greece*, Application No. 8687/08, Eur. Ct. H.R., ¶ 87 (2011); *Mayeka and Mitunga v. Belgium*, 2006-XI Eur. Ct. H.R., ¶ 103.

³⁶ *Beduschi*, *supra* note 34, at 71.

³⁷ See generally *Rahimi v. Greece*, App. No. 8687/08, Eur. Ct. H.R. (2011); see also *H.A. and Others v. Greece*, App. No. 19951/16, Eur. Ct. H.R. (2019); *Khan v. France*, App. No. 12267/16, Eur. Ct. H.R. (2019).

³⁸ Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 367 (2013).

³⁹ *Id.* at 370.

⁴⁰ *Id.* at 371.

⁴¹ *Id.* at 367-68.

⁴² *Id.* at 368-69.

Comparative Immigration Policies for Unaccompanied Minors

The existing policies and legislation in the EU provide a general framework for the protection of the rights of the child in migration, covering aspects such as reception conditions, the treatment of their asylum applications, and their integration into the EU.⁴³ European countries have subscribed to the Dublin III Regulation, an EU rule that requires that an asylum applicant applies in the first EU country she or he reaches, under the assumption that they all provide similar protections for asylum seekers and refugees. To achieve that goal, member states have put efforts into drafting more harmonized EU policies to lay down the minimum standards for the treatment of unaccompanied minors.⁴⁴ This has been instrumental in raising awareness about the protection needs of unaccompanied minors, and in promoting protective actions such as training for guardians, public authorities, and other actors who are in close contact with unaccompanied minors.⁴⁵ These standards, while binding for all member states, are not extensive and leave gaps such as the recognition of child-specific forms of persecution, age assessment techniques, and responsibilities of legal guardians within the competence of each Member State.⁴⁶

Some of the general EU policies include:

(1) The appointing of a legal guardian or any other appropriate representation of unaccompanied minors to enable unaccompanied minors to express her or his views in proceedings.⁴⁷ For example, The European Convention on the Exercise of Children's Rights states its objective as promoting children's rights, granting children procedural rights, and facilitating the exercise of these rights by ensuring that children are informed and allowed to participate in proceedings that affect them.⁴⁸ Although, as stated above, not all member states grant the right to representation by a lawyer, the general policy requires member states to grant children the right to be assisted by an appropriate person of their choice to help them express their views.⁴⁹ This helps to ensure that unaccompanied minors are placed with adult relatives, a foster family, or in reception centers for minors, ensuring that siblings are being kept together. A huge concern is that in some countries, like Germany, unaccompanied minors that are 16 years of age or over can be placed in adult asylum seekers' facilities.⁵⁰

⁴³ See European Migration Network, *supra* note 20.

⁴⁴ See, e.g., Council Directive 180/29 O.J. 2013 (L 180) ("The Reception Conditions Directive"); Council Directive 304/12 O.J. 2004 (L 304) ("Qualification Directive"); Council Regulation 604/2013, 2013 (180/31) ("Dublin Regulation"); Council Directive 251/12 O.J. 2003 (L 251) ("Family Reunification Directive"); Council Directive 2008/115 O.J. 2008 (L 348) (EC) ("Return Directive").

⁴⁵ See European Migration Network, *supra* note 20.

⁴⁶ LAZARIDIS, *supra* note 16.

⁴⁷ European Convention on the Exercise of Children's Rights, *opened for signature* Jan. 25, 1996, 1996 E.T.S. No. 160 (entered into force July 1, 2000).

⁴⁸ *Id.*

⁴⁹ King, *supra* note 38, at 352.

⁵⁰ LAZARIDIS, *supra* note 16, at 151.

Comparative Immigration Policies for Unaccompanied Minors

(2) Taking the necessary steps to trace the family members of unaccompanied minors as soon as possible. For example, in the case of unaccompanied minors who have been recognized by a member state, then this member state has the obligation to authorize the entry and residence of a legal guardian (parents, and in case they cannot be traced, any other family member).⁵¹ In the event an unaccompanied minor is returned, member states are required to make sure that the unaccompanied minor will be returned to a family member.⁵²

(3) Ensuring that those working with unaccompanied minors receive appropriate training.⁵³ However, it has also frequently been argued that asylum procedures are designed for adults and that the environment of the interrogation rooms is not suitable for minors.⁵⁴

The EU appears to have enough protections for the rights of unaccompanied minors. And, unlike the United States, all the member states have signed and ratified the CRC. However, the reality lived by the thousands of unaccompanied minors in Europe is not too different from those in the United States. Too often, EU member states' national standards and practices are insufficient to ensure the minors' rights, and sometimes even contravene their protection needs.⁵⁵ There have been concerns raised about the treatment, detention, and due process for unaccompanied minors in Europe.⁵⁶

In Greece, for example, one of the countries that receive the biggest influx of individuals, the UN Working Group on Arbitrary Detention ("WGAD") found issues with the guardianship system and detention of minors in 2013.⁵⁷ Unaccompanied minors often remain in overcrowded detention centers with adults and face "oppressive Greek law enforcement."⁵⁸ Because of these conditions, the ECtHR ruled that Greece is violating Article 3 of the European Convention on Human Rights by subjecting migrants to inhumane and degrading treatment.⁵⁹

⁵¹ LAZARIDIS, *supra* note 16.

⁵² *Id.*

⁵³ *Id.* at 149.

⁵⁴ *Id.* at 153.

⁵⁵ Marta Tomasi, *The European Court of Human Rights and the Best Interests of Unaccompanied Migrant Minors: A Step Towards a More Substantive and Individualized Approach?*, INT'L L. BLOG (Oct. 10, 2019), <https://internationallaw.blog/2019/10/10/the-european-court-of-human-rights-and-the-best-interests-of-unaccompanied-migrant-minors-a-step-towards-a-more-substantive-and-individualized-approach/>.

⁵⁶ LAZARIDIS, *supra* note 16, at 151-57.

⁵⁷ *Working Group on Arbitrary Detention Statement upon the Conclusion of Its Mission to Greece*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Jan. 31, 2013), <https://www.ohchr.org/en/statements/01/working-group-arbitrary-detention-statement-upon-conclusion-its-mission-greece> [hereinafter *Mission to Greece*]; see also *Greece: Humanitarian Crisis on the Islands*, HUM. RTS. WATCH (July 11, 2015, 12:00 AM), <https://www.hrw.org/news/2015/07/11/greece-humanitarian-crisis-islands> [hereinafter *Greece: Humanitarian Crisis*].

⁵⁸ Victoria Galante, *Greece's Not-so-Warm Welcome to Unaccompanied Minors: Reforming EU Law to Prevent the Illegal Treatment of Migrant Children in Greece*, 39 BROOK. J. INT'L L. 745, 752 (2014).

⁵⁹ *M.S.S. v. Belgium & Greece*, App. No. 30696/09 Eur. Ct. H.R. (Jan. 21, 2011).

Comparative Immigration Policies for Unaccompanied Minors

More recently, in June of 2019, the European Court ruled yet again against Greece's practice of locking up unaccompanied migrant and asylum-seeking children in police-like cells. Human Rights Watch found that detained children are constantly forced to live in unsanitary conditions, alongside adults they do not know and are often abused and ill-treated by police.⁶⁰

The treatment of unaccompanied minors was also highly debated in Italy recently because of *Trawalli and Others v. Italy*.⁶¹ In this 2018 case, the European Court was called to rule, among other issues, on whether the detention and reception conditions for unaccompanied minors were lawful and/or constituted an inhuman or degrading treatment under the European Convention on Human Rights.⁶² The Court stated, among other arguments, that:

[w]hen the authorities deprive or seek to deprive a child of her or his liberty, they must ensure that he/she effectively benefits from an enhanced set of guarantees in addition to undertaking the diligent assessment of her/his best interest noted above. The guarantees include prompt identification and appointment of a competent guardian; a child-sensitive due process framework, including the child's rights to receive information in a child-friendly language, the right to be heard and have her/his views taken into due consideration depending on his/her age and maturity, to have access to justice and to challenge the detention conditions and lawfulness before a judge; free legal assistance and representation, interpretation and translation. The Contracting Parties must also immediately provide the child access to an effective remedy.⁶³

III. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Australia

Asylum in Australia has been granted to many refugees since 1945 when half a million Europeans displaced by World War II were given asylum. Since then, there have been periodic waves of asylum seekers from Southeast Asia, mainly Vietnam and Indochina, and the Middle East.⁶⁴ Historically, most asylum seekers arrived by plane. However, since 2000, the arrival of asylum seekers by boat increased.⁶⁵ Around that time, suspected illegal boat arrivals started to be trans-

⁶⁰ Eva Cossé, *European Court Condemns Greece's Migrant Kid Lockups*, HUM. RTS. WATCH (June 15, 2019, 1:00 AM), <https://www.hrw.org/news/2019/06/15/european-court-condemns-greeces-migrant-kid-lockups>.

⁶¹ *Trawalli and Others v. Italy*, App. No. 47287/17 Eur. Ct. H.R. (2018).

⁶² *Id.*

⁶³ *Id.* at 9.

⁶⁴ See generally U.N. High Commissioner for Refugees, *Asylum Levels and Trends in Industrialized Countries, 2005* (Mar. 17, 2006) <https://www.unhcr.org/statistics/country//trends-industrialized-countries-2005.html>; U.N. High Commissioner for Refugees, *Refugee Data Finder (2001-2004)*, <https://www.unhcr.org/refugee-statistics/download/?url=R03KjD> (last visited May 22, 2023); U.N. High Commissioner for Refugees, *UNHCR Statistical Yearbook (2004)* (Aug. 21, 2005), <https://www.unhcr.org/us/unhcr-statistical-yearbook-2004>.

⁶⁵ Janet Phillips & Harriet Spinks, *Boat Arrivals in Australia Since 1976*, 1-3 (Parliament of Australia, 2013).

ferred to Australian Navy vessels to then be transported to off-shore detention facilities for processing.⁶⁶

A. Immigration Detention of Unaccompanied Minors in Australia Violates International Human Rights Standards

The growing number of people arriving by boat initiated a change in Australia's treatment of refugees; in particular, the introduction of mandatory detention of unauthorized arrivals marked the "beginning of a gradual slide into a policy of deterrence, detention, and denial by systematically discriminating against asylum seekers."⁶⁷ To detain refugee children, the Australian government relies mainly on the legislative provisions of the Migration Act of 1958.⁶⁸ The Act provides that an "unlawful non-citizen" must be kept in "immigration detention" until deported or granted a visa, which makes Australia the only western country that has a mandatory detention policy for all undocumented immigrants.⁶⁹ The detention requirement continues until the person is determined to have a lawful reason to remain in Australia (and is granted a visa) or is removed from Australia.⁷⁰ These provisions apply to all unlawful non-citizens regardless of their age, so in effect, all refugee children without valid visas must be detained until they are either granted a visa or deported.⁷¹

One of the biggest concerns regarding the mandatory detention policy is the conditions of the offshore detention facilities: Nauru, Papua New Guinea, and Christmas Island. Several reports found the detainees' poor health and treatment conditions, including water shortage, lack of education access, overcrowding, and sexual abuse of women and children.⁷² Although the legislation states that the detention of minors must be a measure of last resort, the reality is that it is not done as such.⁷³ Detention may last as long as five and a half years.⁷⁴ In 2018, reports surfaced of children as young as eight years old engaging in self-harm and exhibiting suicidal behaviors in The Nauru Regional Processing Centre.⁷⁵ Children are often detained among adults, behind 1200-volt electric, barbed-wire

⁶⁶ Andreas Schloenhardt, *Deterrence, Detention and Denial: Asylum Seekers in Australia*, 22 U. QUEENSLAND L. J. 54, 60 (2002).

⁶⁷ *Id.* at 54.

⁶⁸ Fiona Martin & Terry Hutchinson, *Mental Health and Human Rights Implications for Unaccompanied Minors Seeking Asylum in Australia*, 1 J. MIGRATION & REFUGEE ISSUES 1, 2 (2005).

⁶⁹ Emily A. Benfer, *In the Best Interests of the Child: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT'L & COMP. L. REV. 729, 740 (2004).

⁷⁰ Martin & Hutchinson, *supra* note 68, at 2.

⁷¹ *Id.* at 2-3.

⁷² PETER MARES, BORDERLINE: AUSTRALIA'S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE TAMPA 132-133 (UNSW Press 2002); MICHAEL GORDON ET AL., AN OPEN LETTER TO THE AUSTRALIAN PEOPLE (Australian Association of Social Workers 2015).

⁷³ Benfer, *supra* note 69, at 733.

⁷⁴ *Id.* at 752.

⁷⁵ Virginia Harrison, *Nauru Refugees: The Island Where Children Have Given up on Life*, BBC (Sept. 1, 2018) <https://www.bbc.com/news/world-asia-45327058>.

Comparative Immigration Policies for Unaccompanied Minors

fences, until their cases are reviewed.⁷⁶ As a result of this comingling of age groups, some unaccompanied minors were forced to have their lips sewn together by adult detainees protesting the human rights violations in the detention centers.⁷⁷ The Australian Human Rights Commission has expressed grave concern at the prolonged and indefinite detention of children in remote locations stating that it breaches international human rights standards and is often prolonged under conditions that are unacceptable and violate Australia's human rights obligations.⁷⁸

The government's view, however, is that the UN Convention on the Rights of the Child is irrelevant to the detention of children.⁷⁹ The case of *Re Woolley*, heard in 2004, involved four Afghan children whose parents had brought them to Australia in 2001.⁸⁰ The children, held in the Baxter detention center, sought a court order for their release, arguing that the mandatory detention regime in the Migration Act did not apply to them. This argument was rejected by the Court on the basis that the law clearly provided no express exceptions for children.⁸¹ In *Jaffari v. Minister for Immigration & Multicultural Affairs*, it was questioned whether the Minister had performed according to the terms of international obligations of Australia.⁸² Although the application was unsuccessful in the end, Justice French expressed concern about unaccompanied minors refugees, stating that: "there appears to be a significant discrepancy between the guidelines published by the United Nations High Commissioner on refugees in respect of unaccompanied minors seeking asylum and the current administration of the Migration Act concerning such persons."⁸³

B. Due Process and Representation in Immigration Proceedings Under Australian Law

The protection visa program, established in the Migration Act, is the domestic mechanism through which Australia executes its obligations under the Refugee Convention.⁸⁴ When arriving at an immigration detention center, the individual should be made aware that they may apply for a visa and that unless they obtain

⁷⁶ Benfer, *supra* note 69, at 752.

⁷⁷ *Id.*

⁷⁸ Phillips & Spinks, *supra* note 65, at 13.

⁷⁹ See *Minister for Immigration & Multicultural & Indigenous Affairs v B* [2004] HCA 20 (29 April 2004) (Austl.).

⁸⁰ *Re Woolley; Ex Parte Applicants M276/2003* [2004] HCA 49 (7 October 2004) (Austl.).

⁸¹ *Id.*

⁸² *Jaffari v. Minister for Immigration & Multicultural Affairs* [2001] FCA 985 (26 July 2001) (Austl.).

⁸³ *Id.* at 43.

⁸⁴ *Migration Act 1958* (Cth) ss 35A, 36 (Austl.) [hereinafter *Migration Act*]; see U.N. High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, <https://www.unhcr.org/us/39149> (last updated Apr. 17, 2015) (showing that Australia's signature on January 22, 1954, brought into force the 1951 UN Convention relating to the Status of Refugees).

Comparative Immigration Policies for Unaccompanied Minors

it, they will be removed from Australia.⁸⁵ Under Australian law, however, the officers have no obligation to ask unauthorized arrivals if they wish to apply for a protection visa or if they want to contact lawyers or independent advisers.⁸⁶ So to reduce the number of visa applications, this information is typically not made available to persons who arrive in Australia unlawfully.⁸⁷ Although not advised of their rights, unaccompanied minors are briefly screened to identify prima facie claims for protection.⁸⁸ Those who are screened are given the opportunity to seek legal advice, but only upon request. The ones who are not screened will be returned to the most recent country of departure.⁸⁹ This leaves unaccompanied minors completely uninformed about their status, the circumstances of their detention, the few legal rights they do have, and the assistance they can obtain. This lack of minimum procedural safeguards makes it more likely that they may be refouled even if they have grounds for protection.⁹⁰ In the few cases when unaccompanied minors can secure representation, the remote location of the processing (detention) facilities serves as a barrier for attorneys to contact the children.⁹¹

The Immigration Act of 1946 makes the Minister of the Department for Immigration and Multicultural and Indigenous Affairs (“DIMIA”)⁹² responsible for providing guards, translators, meal services, cleaning services, education, and health care to children. These responsibilities make the DIMIA the entity in charge of both the guardianship of children and removing them from the country, making the Minister “both guardian and jailer,”⁹³ all while serving as the child’s representative throughout the immigration process.⁹⁴ As a result, the person who is designated to protect the best interests of the child is also the child’s prosecutor.⁹⁵ This dual role makes Australian immigration structurally flawed and presents a conflict of interest because the child’s welfare may not always be a priority.⁹⁶ The guardianship of the child must come before the duty to prosecute and according to the Migration Act, it should be interpreted consistently with Australia’s international obligations under the CRC.⁹⁷ Still, the government’s conflicting roles of both the guardian of unaccompanied minors and the entity

⁸⁵ *Migration Act*, *supra* note 84, at ss 35A, 36.

⁸⁶ Schloenhardt, *supra* note 66, at 61.

⁸⁷ *Id.*

⁸⁸ CROCK, *supra* note 24, at 357.

⁸⁹ *Id.* at 358.

⁹⁰ *Id.*; Schloenhardt, *supra* note 66, at 61.

⁹¹ Benfer, *supra* note 69, at 755.

⁹² *Id.* at 741 (highlighting that the DIMIA outsources the management of detention centers to Australian Correctional Services (ACS)).

⁹³ Martin & Hutchinson, *supra* note 68, at 4.

⁹⁴ Benfer, *supra* note 69, at 741; Eliana Corona, *The Reception and Processing of Minors in the United States in Comparison to that of Australia and Canada*, 40 HASTINGS INT’L & COMP. L. REV. 205, 218 (2017).

⁹⁵ Corona, *supra* note 94, at 218.

⁹⁶ Corona, *supra* note 94, at 218; Benfer, *supra* note 69, at 741.

⁹⁷ Corona, *supra* note 94, at 218.

responsible for deporting them must be repaired to ensure the best interest of the child.⁹⁸

IV. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in South Africa

A. African Standards on International Law, Migration, and the Protection on Unaccompanied Minors' Rights

Following the dismantling of the apartheid system in 1994, South Africa joined the international refugee regime.⁹⁹ The International Labor Organization (“ILO”) estimates that Africa has the largest number of migrant workers.¹⁰⁰ Labor migration to richer countries in the region is an upward trend; the top destination countries in the region are South Africa, Botswana, and Namibia.¹⁰¹ Since the economic and social breakdown in Zimbabwe, hundreds of thousands of people have fled the country for South Africa, including thousands of unaccompanied refugee minors.¹⁰² The majority are between the ages of 12 and 18, and approximately 70 percent of the children are boys, but there are likely a greater number of girls who tend to work as domestic laborers or sex workers and thus remain unseen.¹⁰³

To address the new flow of asylum seekers into the country, the South African Parliament passed the Refugees Act of 1998, in which the definition of a refugee set by Article 1 of the UN Refugee Convention was incorporated.¹⁰⁴ The Act also incorporated the 1969 Organization of African Unity’s Convention Regarding the Specific Aspects of Refugee Problems (“OAU Convention”) which allows those who are not specifically persecuted as individuals to claim asylum when fleeing generalized violence.¹⁰⁵ Under the OAU Convention, a person can be awarded refugee status when “[o]wing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence.”¹⁰⁶

Unlike the American and European Regional Systems, Africa has also enacted its own children’s rights charter (the African Charter on the Rights and Welfare of the Child) which has been ratified by forty-seven of the African Union’s fifty-

⁹⁸ Benfer, *supra* note 69, at 768.

⁹⁹ Lindsay M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa*, 15 MICH. J. GENDER & L. 291, 296 (2009).

¹⁰⁰ Adriette H. Dekker, *The Social Protection of Non-Citizen Migrants in South Africa*, 22 S. AFR. MERCANTILE L. J. 388, 389 (2010).

¹⁰¹ *Id.* at 390.

¹⁰² Cerise Fritsch, et al., *The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action*, 38 DENV. J. INT’L L. & POL’Y 623, 623 (2010).

¹⁰³ *Id.* at 624.

¹⁰⁴ Refugees Act 130 of 1998 .§ 3(a) (S. Afr.).

¹⁰⁵ Harris, *supra* note 99, at 297.

¹⁰⁶ Organization of African Unity Convention: Governing the Specific Aspects of Refugee Problems in Africa, U.N.T.S. No. 14691, art. I(2) (entered into force Sept. 10, 1969).

Comparative Immigration Policies for Unaccompanied Minors

three members.¹⁰⁷ The African Children's Charter reaffirms in its preamble the adherence to the principles contained in the CRC and adopts in article 4(1) the "best interests of the child" standard for all actions concerning the child.¹⁰⁸

All legislation on refugees and asylum seekers must be framed according to the South African Constitution, which guarantees fundamental rights to all individuals within the borders of South Africa, regardless of citizenship.¹⁰⁹ In 2005, the Pretoria High Court affirmed the application of the Constitution to unaccompanied minors, and further entrenched the principle that government departments cannot without due process detain and deport unaccompanied foreign children from South Africa.¹¹⁰ Under this analysis, unaccompanied minors should be granted the same legal mechanisms of protection and due process rights as national children from South Africa according to the principle of the best interest of the child.¹¹¹

Like unaccompanied minors in every region, minors who travel to South Africa experience multiple challenges, and their socio-economic and human rights, in general, are often not fully protected.¹¹² They face threats to their physical safety; life without a parent or guardian; legal and social discrimination; xenophobia; and a constant struggle to find food, shelter, education, health care, and employment.¹¹³ Unaccompanied minors who were displaced in South Africa are sheltered in sites set up around the country. Yet, some of these sites are not provided with food or water.¹¹⁴ There is a chronic shortage of shelter for refugees, and it has been reported that hundreds of children are left with no access to a shelter at all and have been forced to sleep in the streets or the bush. In Cape Town, for example, 150 refugees were found living on the street.¹¹⁵ Although the law stipulates that an asylum claim be adjudicated within 180 days of the applicant's date of entry into South Africa, in reality, many claims languish for years due to a backlog of cases.¹¹⁶ While there is no clear explanation for this backlog, it is likely rooted in South Africa's shortage of resources combined with a lack of political will for reform and high levels of xenophobia.¹¹⁷

¹⁰⁷ See *List of Countries Which Have Signed, Ratified/Accessed to the African Charter on the Rights of the Child*, African Committee of Experts on the Rights and Welfare of the Child, <https://www.acerwc.africa/en/member-states/ratifications> (last visited May 22, 2023); see generally Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁰⁸ King, *supra* note 38, at 354.

¹⁰⁹ Harris, *supra* note 99, at 295.

¹¹⁰ *Centre for Child Law & Another v. Minister of Home Affairs & Others* 2005 (6) SA 50 (S. Afr.), http://www.childlawsa.com/case_04.html.

¹¹¹ *Id.*

¹¹² Fritsch, *supra* note 102, at 623; Sarah Swart, *Unaccompanied Minor Refugees and the Protection of Their Socio-Economic Rights under Human Rights Law*, 9 AFR. HUM. RTS. L. J. 103, 124 (2009).

¹¹³ Fritsch, *supra* note 102, at 623.

¹¹⁴ Swart, *supra* note 112, at 111.

¹¹⁵ Swart, *supra* note 112, at 112.

¹¹⁶ Harris, *supra* note 99, at 301.

¹¹⁷ *Id.*

Comparative Immigration Policies for Unaccompanied Minors

South Africa's refugee system is shaped by international and regional standards, which are implemented by domestic legislation. The relatively progressive legal framework stands in sharp contrast to the reality facing asylum seekers and refugees in South Africa, where those international and regional standards are not being protected.¹¹⁸ Although these children have rights under international and domestic law, political and other factors combined have denied children the protection and support to which they are legally entitled.¹¹⁹ The reality is that unaccompanied minors face numerous barriers to obtaining asylum in South Africa including being prevented from lodging claims, failing to have their claims fairly adjudicated, failing to have their rights respected, and continually facing arbitrary arrest, detention, and unlawful deportation.¹²⁰

V. Immigration Laws and Policies for Unaccompanied Minors Seeking Asylum in Canada

A. The Significance of Children's Rights in Canada to Award Special Protections to Unaccompanied Minors Seeking Asylum

The Canada Border Services Agency is the entity responsible for the administration and enforcement of the Immigration and Refugee Protection Act, which, along with jurisprudence as well as internal policies, directives, and guidelines, establishes the rules for the arrest and detention of foreign nationals in Canada.¹²¹ Nonetheless, Canada has no national policy for the care and treatment of child refugees, but rather each of the ten provinces and three territories has its own system for unaccompanied and separated minors.¹²²

Depending on the province, unaccompanied minors are warranted special procedural guarantees throughout their refugee status determinations, such as: the appointing of an officer responsible for the child's case throughout the entirety of the determination procedure; prioritizing these claims to process them as expeditiously as possible; and facilitating pre-hearing conferences to assess what evidence the child can provide, including the best way to elicit this information.¹²³ But the fact that there is a lack of national policy results in an inconsistent framework for the immediate care, protection, and legal representation of unaccompanied minors.¹²⁴

One example is that the Immigration and Refugee Protection Act provides the right to counsel for all persons subject to immigration proceedings before the

¹¹⁸ Harris, *supra* note 99, at 295.

¹¹⁹ Fritsch, *supra* note 102, at 623.

¹²⁰ *Id.* at 646.

¹²¹ Canada Border Service Agency, *National Directive for the Detention or Housing of Minors*, GOVERNMENT OF CANADA, <https://www.cbsa-asfc.gc.ca/security-securete/detent/nddhm-dndhm-eng.html> (last visited May 22, 2023) [hereinafter Canada Border Service Agency].

¹²² *Canada's Treatment of Non-Citizen Children*, CANADIAN COUNCIL FOR REFUGEES <https://ccr-web.ca/files/noncitizenchildrenbackgroundunderen.pdf> (last visited Jan. 10, 2020) [hereinafter *Canada's Treatment of Non-Citizen Children*]; CROCK, *supra* note 24, at 300.

¹²³ See generally Canada Border Service Agency, *supra* note 121.

¹²⁴ CROCK, *supra* note 24, at 300.

Comparative Immigration Policies for Unaccompanied Minors

Immigration and Refugee Board and the appointment of a “Designated Representative” (“DR”) that has the responsibility of representing minors in those proceedings.¹²⁵ However, each province is responsible to establish the rule for the appointment of those DRs and the availability to obtain free legal representation.¹²⁶ In Quebec, the minor will be assigned two trained social workers; one will help the unaccompanied minors to retain counsel during their asylum cases, and the other will help with settlement issues like helping them contact relatives who may already reside in Canada, and placement with families from a similar ethnic background if no relatives were found.¹²⁷ While in Ontario, under an agreement with the Immigration and Refugee Board and a private law firm, the DRs will be pro bono lawyers.¹²⁸ The Committee on the Rights of the Child has made recommendations to Canada to make sure that unaccompanied minors are provided with guardianship and social services in every part of the country and that they are not subject to immigration detention.¹²⁹

B. The Best Interest of The Child Principle as a Means to Protect Unaccompanied Minors in the Canadian Legal System

The Canadian immigration system does recognize that refugee determinations for all children, including unaccompanied minors, must reflect the best interests of the child.¹³⁰ According to Section 60 of the Immigration and Refugee Protection Act, the detention of a minor must be a measure of last resort respecting the best interests of the child.¹³¹ The Canadian system offers the Alternatives to Detention Policy, which allows individuals to live in non-custodial, community-based settings while their immigration status is being resolved. This policy ensures that minors are not detained for reasons relating to their immigration status. Alternatives to detention include community programming (in-person reporting, cash or performance bond, and community case management and supervision) and electronic supervision tools, such as voice reporting.¹³²

Even though Canadian law says that unaccompanied minors should only be detained as a matter of last resort, the reality is that children are routinely held in immigration detention centers for weeks or even months.¹³³ In the last decade, there were several cases when separated and unaccompanied minors were intercepted while being smuggled through the United States into Ontario and Quebec,

¹²⁵ Immigration and Refugee Protection Act, S.C. 2001, c 27, s. 167(2) (Can.).

¹²⁶ CROCK, *supra* note 24, at 301.

¹²⁷ *Unaccompanied Minors*, CANADIAN COUNCIL FOR REFUGEES, <https://ccrweb.ca/en/res/unaccompanied-minors> (last visited May 22, 2023) [hereinafter *Unaccompanied Minors*].

¹²⁸ CROCK, *supra* note 24, at 301.

¹²⁹ *Id.* at 302.

¹³⁰ *Id.*

¹³¹ Canada Border Service Agency, *supra* note 121.

¹³² *Id.*

¹³³ *Canada's Treatment of Non-Citizen Children*, *supra* note 122.

Comparative Immigration Policies for Unaccompanied Minors

and a decision was made to seek their detention on the ground that they would likely not report for removal.¹³⁴

To make a more uniform policy that is aligned with their international obligations, the Government of Canada made the National Directive for the Detention or Housing of Minors.¹³⁵ The Directive establishes that the best interest of the child is “an international principle to ensure children enjoy the full and effective benefit of all their rights recognized in Canadian law and the CRC.”¹³⁶ According to the Directive, the best interest of the child is to be determined separately and before the decision to detain the unaccompanied minors. It needs to be reviewed on an ongoing basis to facilitate any decision-making based on the legal situation of the minor and their well-being. It may only be outweighed by other significant considerations such as public safety, flight risk, danger to the public, or national security.¹³⁷

There is an official list of factors that officers need to use to determine the best interest of the child and it includes: (1) the child’s physical, mental and emotional needs; (2) the child’s educational needs; (3) the preservation of the family environment and maintaining relationships; (4) the care, protection, and safety of the child; (5) the level of dependency between the child and the parent or guardian; (6) the child’s views if they can be reasonably ascertained; and (7) any other relevant factor.¹³⁸

C. Extended Protection to Qualify for Asylum Under Canadian Law

According to the Immigration and Refugee Protection Act, unaccompanied minors can seek protection in Canada under Section 96, which sets the criteria under the Refugee Convention, but it also provides two different alternatives.¹³⁹ One is extended protection in Section 97, which applies to persons who could be in some kind of danger, such as a fear of persecution or harm which does not fit in one of the five enumerated grounds of the Refugee Convention.¹⁴⁰ The other is humanitarian and compassionate reasons under Section 25(1). Humanitarian and compassionate grounds apply to people with exceptional cases, and it does not assess risks of persecution but focuses on other criteria such as: (1) how settled the person is in Canada; (2) general family ties of the applicant to Canada; (3) the best interests of any children involved; and (4) what could happen to the applicant if the requested application is denied.¹⁴¹

Section 97 has been used in cases of persons fleeing from gang and drug violence, and while there is a burden of proof that the person seeking this protection

¹³⁴ Geraldine Sadoway, *Canada’s Treatment of Separated Refugee Children*, 3 EUR. J. MIGRATION & L. 347, 367 (2001).

¹³⁵ Canada Border Service Agency, *supra* note 121.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Immigration and Refugee Protection Act, *supra* note 125, at s. 96.

¹⁴⁰ CROCK, *supra* note 24, at 314.

¹⁴¹ Immigration and Refugee Protection Act, *supra* note 125, at s. 25.

Comparative Immigration Policies for Unaccompanied Minors

is personally targeted by such violence and is not only fleeing due to a generalized fear, it has also been more successful than arguing persecution due to membership to a social group or political opinion.¹⁴² Section 97 provides:

A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence would subject them personally:

- (a) To a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention against Torture; or
- (b) To risk to their life or a risk of cruel and unusual treatment or punishment if:
 - (i) The person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) The risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) The risk is not inherent or incidental to lawful sanctions unless imposed in disregard of accepted international standards, and
 - (iv) The risk is not caused by the inability of that country to provide adequate health or medical care.¹⁴³

Section 25(1) provides an exemption if there are any humanitarian and compassionate reasons, considering the best interest of the child.¹⁴⁴ It provides that:

Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35, or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.¹⁴⁵

Since the enactment of the Immigration and Refugee Protection Act, there has been substantial litigation on how the principle of the “best interest of the child” needs to be interpreted and applied in immigration proceedings.¹⁴⁶ Even though Federal Courts often limit the scope of this principle, in 2015, in *Jeyakannan*

¹⁴² CROCK, *supra* note 24, at 315.

¹⁴³ Immigration and Refugee Protection Act, *supra* note 125, at s. 97.

¹⁴⁴ CROCK, *supra* note 24, at 315.

¹⁴⁵ Immigration and Refugee Protection Act, *supra* note 125, at s. 25.

¹⁴⁶ CROCK, *supra* note 24, at 316.

Comparative Immigration Policies for Unaccompanied Minors

Kanthisamy v. Minister of Citizenship and Immigration,¹⁴⁷ the Supreme Court of Canada ruled that humanitarian and compassionate considerations should include the best interests of a child directly affected. Some saw this development as the first step from the Court to favor a more equitable and humanitarian approach to immigration and refugee law.¹⁴⁸

The significance of international law upon Canadian jurisprudence was also recently discussed in similar terms by the Supreme Court of Canada in *Baker v. Canada*.¹⁴⁹ In this case, the deportation challenge was, like in *Kanthisamy*, based on humanitarian and compassionate grounds.¹⁵⁰ As part of her defense, Baker argued that it was in the best interests of her children, who were all Canadian citizens, that she remain in Canada.¹⁵¹ The most important part of the decision regarding the CRC and the significance of international law in the Canadian system lies in the Court's argument establishing that although the Children's Convention was not directly binding on domestic law, the "values reflected in international humanitarian rights law may help inform the contextual approach to statutory interpretation and judicial review."¹⁵² The Court held that the CRC has special deference on the protections for children, including their interests, needs, and rights.¹⁵³ It also gives the principle importance as a rule of procedure when includes the assessment of the possible impacts (positive or negative) of a decision concerning the child.¹⁵⁴

Canada's Safe Third Country Agreement with the United States has become a flashpoint this past year, both in Canada and in the United States.¹⁵⁵ It came into place in 2004 and under it, the United States and Canada were both designated as

¹⁴⁷ *Kanthisamy v. Canada*, [2015] S.C.R. 61 (Can.).

¹⁴⁸ Mary Thibodeau, *The Expansion of "Humanitarian and Compassionate Grounds": Kanthisamy v. Canada* (2015), THE COURT (DEC. 22, 2015) <http://www.thecourt.ca/the-expansion-of-humanitarian-and-compassionate-grounds-kanthisamy-v-canada/>.

¹⁴⁹ *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.).

¹⁵⁰ *Id.*; Luke, *supra* note 13; *Kanthisamy v. Canada*, *supra* note 147.

¹⁵¹ *Baker v. Canada*, *supra* note 149.

¹⁵² *Id.*; While not considering the application of the Children's Convention, in *Suresh v. Canada* (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3, ¶ 46 (Can.), the Supreme Court of Canada also recognized the important role international norms play in the interpretation of immigration legislation, opining that "a complete understanding of the Immigration Act and the Charter requires consideration of the international perspective."

¹⁵³ *Baker v. Canada*, *supra* note 149; Luke, *supra* note 150, at 82.

¹⁵⁴ Canada Border Service Agency, *supra* note 121.

¹⁵⁵ Marcia Brown, *An Imperiled Border Agreement Could Doom Canada's Welcoming Immigration Policy*, THE AMERICAN PROSPECT, (July 3, 2019), <https://prospect.org/world/-agreement-doom-canada-s-welcoming-immigration-policy/> (explaining that from November 4th to 8th the Federal Court of Canada will hear a challenge to the designation of the U.S. as a safe third country for refugees. The court will hear that sending refugee claimants back to the United States violates Canadian law, including the Canadian Charter of Rights and Freedoms, and Canada's binding international human rights obligations. The Canadian Council for Refugees, Amnesty International and The Canadian Council of Churches alongside an individual litigant and her children, initiated the legal challenge in July 2017. The hearings are taking place at the Federal Court of Canada in Toronto, at 180 Queen Street West. The case is still open.).

Comparative Immigration Policies for Unaccompanied Minors

a “Safe Third Country.”¹⁵⁶ According to the Agreement, refugees entering through a regular point of entry by land from the United States are ineligible to claim refugee status in Canada unless they were denied the claim before in the United States. In other words, the Agreement stipulates that asylum seekers must claim asylum in whichever of the two countries they arrive first, as both countries are considered safe for asylum-seekers under the agreement.¹⁵⁷ There are some exemptions; the first is that if the refugee already has family in Canada, they will be allowed to make their claim there even if they have not done so first in the United States.¹⁵⁸ The other exemption is for unaccompanied minors who have no legal guardian in either the United States or Canada.¹⁵⁹

According to the parties to the Agreement, the purpose of the Agreement is, inter alia, to share refugee status determination responsibility, identify persons in need of protection, and avoid refoulement.¹⁶⁰ Originally this was intended as a guarantee to ensure that unaccompanied minors as a vulnerable group of migrants would enjoy access to refugee protections, but the reality is that there is no information regarding how many unaccompanied minors have used the exemption of the Safe Third Country Agreement to cross from the United States to Canada, making it hard to determine its impact on the matter.¹⁶¹ One of the few statistics found was issued by the UNHCR in 2006 as part of a “first-year evaluation” of the then-new Agreement. In this document, it was reported that between December 2004 and December 2005, “there were 190 claimants younger than 18 years old who sought refuge” at the Canada-United States land border, “48 of whom were unaccompanied minors.”¹⁶²

The Safe Third Country Agreement has faced some backlash in the past year. In fact, in 2019, a group of immigration advocates initiated a challenge in Canadian federal courts under the argument that the United States does not qualify as a “safe” due to former President Trump’s policies on asylum, claiming that they

¹⁵⁶ See *Canada-US Safe Third Country Agreement*, GOVERNMENT OF CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html> (last modified Mar. 27, 2023).

¹⁵⁷ *Id.*

¹⁵⁸ Family member can be: spouse; sons and daughters; parents and legal guardians; siblings; grandparents; grandchildren; aunts and uncles; and nieces and nephews.

¹⁵⁹ *Canada-United States Safe Third Country Agreement*, *supra* note 156.

¹⁶⁰ The last paragraph of the Preamble states that the Parties are: “Aware that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded.” *Final Text of the Safe Third Country Agreement*, GOVERNMENT OF CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html> (last modified Dec. 5, 2002).

¹⁶¹ CROCK, *supra* note 24, at 305.

¹⁶² U.N. High Commissioner for Refugees, *Monitoring Report: Canada-United States “Safe Third Country” Agreement*, 1, 11 (June 2006), <https://www.unhcr.org/sites/default/files/legacy-pdf/455b2cca4.pdf>.

Comparative Immigration Policies for Unaccompanied Minors

leave asylum seekers facing the risk of refoulement, and that they experience human rights violations like unlawful and unnecessary detention.¹⁶³

It is clear by now that the problem of unaccompanied minors is regional. Canada has a long story of welcoming refugees, in fact, in a recent UNHCR report, it was found that the country resettled more refugees—mostly persons fleeing from the Syrian conflict—than any other nation in 2018.¹⁶⁴ But Canada's absence and lack of any kind of response to the crisis at the United States-Mexico border has been gnawing, to say the least, and as part of the Organization of American States ("OAS"), it should help ease the current burden of unaccompanied minors trying to reach safety.

VI. Comparative Analysis with the United States: A Shared Challenge

In the past decade, the number of unaccompanied minors attempting to enter the United States at the southwest border from Mexico, Guatemala, Honduras, and El Salvador has increased significantly.¹⁶⁵ For the first time, unaccompanied minors and families accounted for more than half of border crossers in the United States.¹⁶⁶ However, the steps taken to create and provide legal protections for children under international law and under domestic legal systems leave them almost wholly unprotected.

A. The Best Interest of the Child as a Corner Stone Principle for the Protection of Unaccompanied Minors

A somewhat obvious difference is that the United States is the only one that has not ratified the CRC.¹⁶⁷ The policy stating that a "child's best interest" should not be considered by the adjudicator in immigration proceedings makes the United States immigration system one of the most hostile for unaccompanied minors.¹⁶⁸ The principle of the "best interests of the child" has been a guiding principle in United States law for more than 125 years. It has been incorporated

¹⁶³ Anna Mehler Paperny, *Canada Defends Safe Third Country Agreement as Court Challenge Wraps up*, GLOBAL NEWS (Nov. 8, 2019), <https://globalnews.ca/news/6148781/safe-third-country-agreement-court/>; Stephanie Levitz & Paola Loriggio, *Federal Court Hears Case on Whether Asylum Agreement with U.S. Violates Charter*, CBC (Nov 4, 2019), <https://www.cbc.ca/news/politics/safe-third-country-1.5346557>.

¹⁶⁴ U.N. High Commissioner for Refugees, *Global Trends, Forced Displacement in 2018*, <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> (last visited May 22, 2023); Sara Miller Llana, *Canada Asks, 'Why Aren't We Helping More Central American Refugees?'*, THE CHRISTIAN SCIENCE MONITOR, (Sept. 5, 2019) <https://www.csmonitor.com/World/Americas/2019/0905/Canada-asks-Why-aren-t-we-helping-more-Central-American-refugees>.

¹⁶⁵ PETER J. MEYER ET AL., CONG. RESEARCH SERV. R43702, UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: FOREIGN POLICY CONSIDERATIONS, 1, 15 (2016).

¹⁶⁶ Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS (2020). <https://www.cfr.org/backgrounder/us-detention-child-migrants> (last updated Mar. 27, 2023, 3:11 PM).

¹⁶⁷ *Status of Ratification: Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://indicators.ohchr.org/> (last visited May 22, 2023).

¹⁶⁸ 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).

Comparative Immigration Policies for Unaccompanied Minors

in several statutes governing issues like adoption, dependency proceedings, foster care, divorce, custody, criminal law, education, and labor, among others.¹⁶⁹ Under current United States immigration law, unaccompanied children who are directly affected by immigration proceedings have no opportunity for their best interests to be considered.¹⁷⁰ There is a lack of mandate for immigration judges to consider this principle in decisions concerning children.¹⁷¹ To the contrary, it has expressly been stated that a “child’s best interest” should not be considered by the adjudicator.¹⁷²

The failure of United States immigration law and procedure to incorporate a “best interests of the child” approach ignores a successful means of protecting children that is common both internationally and domestically.¹⁷³ The African Children’s Charter reaffirms in its preamble the adherence to the principles contained in the CRC and adopts in article 4(1) the “best interests of the child” standard for all actions concerning the child.¹⁷⁴ Similarly, in the EU, the notion that an unaccompanied minor is first a child and second a migrant is essential to making the “best interests of the child” a primary consideration during the immigration proceedings.¹⁷⁵ The European Court has recognized their special vulnerability and recognizes children’s rights accordingly.¹⁷⁶

In the Canadian System, the “best interest” principle has two main applications: (1) as a standard for government policy-making; and (2) as a rule of procedure that requires an assessment of the possible impact, whether positive or negative, of a decision concerning the child.¹⁷⁷ It recognizes the importance of the principle of “the best interest of the child” as a pillar in its immigration system and accepts it as an international principle to ensure children enjoy the full and effective benefit of all their rights recognized under Canadian law and the CRC.

¹⁶⁹ See generally *Human Mobility*, *supra* note 2.

¹⁷⁰ Carr, *supra* note 10, at 123.

¹⁷¹ Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, O.P.P.M. 17-01, U.S. DEP’T OF JUSTICE, at 4 (May. 22, 2007).

¹⁷² Young & McKenna, *supra* note 168, at 249.

¹⁷³ Carr, *supra* note 10, at 123.

¹⁷⁴ King, *supra* note 38, at 354.

¹⁷⁵ Council Directive 2005/85, *supra* note 33, at 13, 14 (explaining that the European Commission has also been concerned with the rights of unaccompanied minors, adopting in 2010 a four-year Action Plan on Unaccompanied Minors that promotes “the best interests of the child” as “the primary consideration in all action related to children taken by public authorities.”); *Communication from the Commission to the European Parliament and the Council: Action Plan for Unaccompanied Minors (2010-2014)*, COM (2010) 213 final (Jun. 5, 2010).

¹⁷⁶ See Council Resolution 221/103, Unaccompanied Minors Who Are Nationals of Third Countries, 1997 O.J. (C 221) 23, 24-25.

¹⁷⁷ Luke, *supra* note 150, at 73-77.

B. Immigration Detention for Unaccompanied Minors Is Used Consistently in All Jurisdictions Despite Being Against International Law and Standards

Problems regarding unaccompanied minors' detention are also under the public eye in all of the regions reviewed, and in many of them, such as Australia and some countries in the EU (like Italy and Greece), immigration detention is violating international conventions and standards. Current practices in immigration detention for minors are contrary to the intentions of the 1951 Refugee Convention, the ICCPR,¹⁷⁸ the CRC, and the UNHCR guidelines on refugees.¹⁷⁹ While international covenants impose an obligation to use the detention of children as a last resort, the domestic legal systems are failing to do so.¹⁸⁰

In the EU, for example, there are reports that unaccompanied minors often remained in immigration detention in Greece and Italy for prolonged periods and under unsafe conditions. Because of this, the European Court has called for domestic reform to comply with international and European human rights standards.¹⁸¹ This problem seems to be even bigger in Australia, where UN officials claimed that criminals were treated better than asylum seekers.¹⁸² The Australian Federal Government is using the detention of refugee children as its first option and "Australia's response to growing numbers of onshore asylum seekers has been characterized by a rigid policy of deterrence, detention, and denial."¹⁸³ Although the United States gives some protection to migrants regarding detention with the Flores Agreement, which sets a nationwide policy for the treatment, detention, and release of unaccompanied minors, the actual conditions of the detention centers do not comply with the Flores Agreement nor with international standards.¹⁸⁴ At the very least, detention facilities should be upgraded to meet international human rights standards.¹⁸⁵

The failure of countries to meet their obligations to maintain safe and sanitary conditions inside detention centers has become an increasingly concerning issue. Reports indicate that issues regarding the lack of such conditions are widespread, with unaccompanied minors in both Australia and the United States often being detained alongside adults. This practice poses a serious threat to the safety and

¹⁷⁸ See *Status of Ratification of the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en (last updated May 22, 2023). The ICCPR has been ratified by the United States, Australia, all countries of the EU and South Africa.

¹⁷⁹ Benfer, *supra* note 69, at 757.

¹⁸⁰ U.N. High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), <https://www.refworld.org/docid/503489533b8.html>.

¹⁸¹ *Mission to Greece*, *supra* note 57; see also *Greece: Humanitarian Crisis*, *supra* note 57.

¹⁸² Benfer, *supra* note 69, at 754.

¹⁸³ Martin & Hutchinson, *supra* note 68, at 1; Schloenhardt, *supra* note 66, at 72.

¹⁸⁴ Rachele G. Cecala, *The Substantive and Procedural Rights and Protections of Unaccompanied Immigrant Minors in Detention Centers*, 7 WIDENER J. L. ECON. & RACE 91, 96 (2016).

¹⁸⁵ Benfer, *supra* note 69, at 763.

Comparative Immigration Policies for Unaccompanied Minors

well-being of children, who are at high risk of experiencing sexual and physical abuse and being trafficked.¹⁸⁶

Reports both in the EU and in the United States have surfaced showing that many of the detention centers lack basic services like access to clean drinking, food provisions, and showers and soap, and the centers provide conditions that are not proper for children like freezing temperatures, prison-like detention cells, and inadequate sleeping conditions.¹⁸⁷ The situation in Australia and South Africa is reported to be even worse. In Australia, there have been cases of children with suicidal behaviors due to the dire conditions of their detention, and in South Africa, hundreds of children are left with no access to a shelter and have been forced to sleep in the streets.¹⁸⁸

C. Due Process Guarantees and the Right to Access to Justice

Due Process violations are also a common obstacle unaccompanied minors face. The main due process violation in most cases is the lack of legal representation. The lack of proper, free legal counsel leaves unaccompanied minors experiencing substantial hurdles as they navigate often complex immigration proceedings in search of an asylum grant.¹⁸⁹ These systems are often designed in a way only a trained lawyer will be able to understand, so representation by child advocates and social workers, while useful for some circumstances, is not enough to comply with the due process requirement of legal counsel according to international law.

Some countries in Europe have made efforts to grant some degree of free representation to unaccompanied minors. While some appoint lawyers, others only appoint special representatives or social workers to help the unaccompanied minors frame their views during the immigration proceedings.¹⁹⁰ The examples of Finland, Norway, Switzerland, Sweden, and the Netherlands, where they appoint two representatives for unaccompanied minors (an attorney and a personal representative), may constitute one of the best practices when it comes to access to counsel in immigration proceedings for unaccompanied minors.¹⁹¹ However, it has to be taken into consideration that not all unaccompanied minors in Europe enjoy a categorical right to legal representation.¹⁹²

While representation is mandated in the Trafficking Victims Protections Reauthorization Act (“TVPRA”), which establishes that unaccompanied minors will have independent child advocates,¹⁹³ appointed counsel is not provided as a

¹⁸⁶ Harrison, *supra* note 75, at 201.

¹⁸⁷ *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST, (Oct. 30, 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/FLORES_SETTLEMENT_AGREEMENT.pdf.

¹⁸⁸ Harrison, *supra* note 75; Swart, *supra* note 112, at 112.

¹⁸⁹ Ataiants, *supra* note 6.

¹⁹⁰ King, *supra* note 38, at 367.

¹⁹¹ *Id.* at 368-369.

¹⁹² *Id.* at 352.

¹⁹³ 8 U.S.C. § 1232(c)(6) (2012).

Comparative Immigration Policies for Unaccompanied Minors

necessary service to all unaccompanied minors in the United States.¹⁹⁴ Despite many initiatives to increase the availability of representation in unaccompanied minors' cases, still nearly three out of four cases remain unrepresented.¹⁹⁵ International law and courts have also pointed out the need to provide free legal counsel in immigration proceedings as part of due process guarantees, particularly for unaccompanied minors and separated children, who in view of international law and standards are especially vulnerable.¹⁹⁶

The United States' continued denial of representation to unaccompanied minors in immigration proceedings, infants and toddlers among them, raises serious due process concerns, and the efforts to establish a constitutional right to counsel under the Fifth and Sixth Amendment through litigation have proven to be unsuccessful.¹⁹⁷ Since United States courts have thus far refused to recognize a federal constitutional right to representation, the answer necessarily implicates congressional policy and the creation of statutory rights to ensure that all unaccompanied minors facing immigration proceedings receive access to a free, government-appointed counsel.¹⁹⁸ Given the correlation between representation and outcome, the assistance by counsel needs to be given to unaccompanied minors to ensure fairness and protection of their due process guarantees.¹⁹⁹

In Australia, the law establishes that immigration officers are under no obligation to advise detained unaccompanied minors that they can apply for a visa or seek representation.²⁰⁰ And while in Canada some provinces have provisions in this regard, the fact that there is a lack of national policy results in an inconsistent framework for the immediate care, protection, and legal representation of unaccompanied minors.²⁰¹

The countries in the EU, South Africa, Australia, Canada, and the United States are also bound by the provisions of the 1951 Refugee Convention.²⁰² However, many refugee law materials comment on the lack of a child-oriented policy or the recognition of child-specific forms of persecution.²⁰³ In this sense, the legislation in Canada is the only one that recognizes that the protection needs for unaccompanied minors can go beyond the five enumerated grounds set by the

¹⁹⁴ Ataiants *supra* note 6, at 5.

¹⁹⁵ *Children: Amid a Growing Court Backlog Many Still Unrepresented*, TRAC IMMIGR. (Sept. 28, 2017) <https://trac.syr.edu/immigration/reports/482/#f1>; *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (July 15, 2014), <https://trac.syr.edu/immigration/reports/359/>.

¹⁹⁶ Inter-Am Comm'n H.R., *supra* note 169, at ¶ 317; King, *supra* note 38, at 350; *see also* Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 (Sept. 1, 2005).

¹⁹⁷ *See* J.E.F.M. v. Lynch, 837 F.3d 1026, 1040, n.8 (9th Cir. 2016) at 1038 (holding that the district court lacked jurisdiction to decide the minors' claims that they were entitled to court-appointed counsel because those claims arose from their removal proceedings and thus had to be resolved through the process set forth in 8 U.S.C. § 1252).

¹⁹⁸ King, *supra* note 38, at 333.

¹⁹⁹ *Id.* at 338.

²⁰⁰ Schloenhardt, *supra* note 66, at 61.

²⁰¹ CROCK, *supra* note 24, at 300.

²⁰² Benfer, *supra* note 69, at 757.

²⁰³ Corona, *supra* note 94, at 228.

Comparative Immigration Policies for Unaccompanied Minors

Refugee Convention. It provides two different alternatives: one as extended protection that applies to persons that could be in some kind of danger, fear of persecution or harm which does not fit in one of the five enumerated grounds of the Refugee Convention; and the other based on humanitarian and compassionate grounds.²⁰⁴

Formally, unaccompanied minors have an alternative under the Safe Third Country Agreement to seek asylum in Canada. The Canadian system offers in general better protections than the United States, takes into consideration the best interest of the child, and offers additional grounds for relief under gang violence. The problem is that due to current policies in place, it is hard for unaccompanied minors to safely go all the way to Canada and present their asylum claim, and so many of them will be detained in Guatemala or the United States and face removal to their countries.

The activities of organized crime are becoming one of the prime movers of forced migration in several countries in Central America, and unaccompanied minors from the Northern Triangle and Mexico consistently cite gang or cartel violence as a primary motivation for fleeing.²⁰⁵ However, gang-related violence has proven to be unsuccessful in many courts as a ground to establish persecution based on membership in a particular social group or as political opinion.²⁰⁶ Unaccompanied minors in the Northern Triangle and Mexico face a specific type of harm and violence (cartels, gangs, *pandillas maras*) which is hardly recognized as persecution by United States judges.

The particularities of the region need to be taken into consideration. The scope of the five enumerated grounds for which an alien may qualify for asylum has been the subject of constant dispute and interpretation in courts, and is not sufficient to address the particularities of social violence claims.²⁰⁷ Laws have to change to adapt to new social realities and circumstances.²⁰⁸ Asylum laws need to open to the possibility of new types of claims of persecution.

Like Canadian Law, the TVPRA should include the recognition of social violence as a form of persecution for unaccompanied minors. This would translate to additional protection for unaccompanied minors and would apply when their life, safety, or freedom have been threatened by generalized pervasive social violence, internal violent conflicts, or massive violation of human rights, also integrating the best interest of the child as a consideration in the asylum claim.²⁰⁹

²⁰⁴ CROCK, *supra* note 24, at 314; Immigration and Refugee Protection Act, *supra* note 125, at 25, 97.

²⁰⁵ American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, 2 (June 2015).

²⁰⁶ See HILJEL R. SMITH, CONG. RESEARCH SERV. LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE (2019); see Lorena S. Rivas-Tiemann, *Asylum to a Particular Social Group: New Developments and Its Future for Gang-Violence*, 47 TULSA L. REV. 477 (2011); Timothy Greenberg, *The United States Is Unwilling to Protect Gang-Based Asylum Applicants*, 61 N.Y. L. SCH. L. REV. 473, 476 (2016).

²⁰⁷ See SMITH, *supra* note 206.

²⁰⁸ C. Thomas Dienes, *Judges, Legislators, and Social Change*, 13 AM. BEHAV. SCIENTIST 511, 520 (1970).

²⁰⁹ *Id.*

VII. Conclusions

Although migration has unique characteristics in each region, one commonality stands out: unaccompanied minors face tremendous hardships as they journey to new destinations. Irrespective of their country of arrival, these minors experience significant threats to their physical safety, including the dangers posed by human trafficking, kidnapping, and violence. Additionally, they often encounter legal and social discrimination, xenophobia, and due process violations such as lack of proper representation. The detention centers and shelters meant to provide temporary relief and support often fall short of the required standards, with poor safety and sanitary conditions compounding the already challenging situation. Immigration law has proven to be an area in which the United States is reluctant to be governed by international human rights rules.²¹⁰ The United States is a signatory to international treaties like the UDHR, the American Declaration, the Refugee Convention, and the ICCPR, but the practice of ratifying treaties as non-self-executory has left American courts with little room to apply and interpret them as part of the domestic legal system.

On the other hand, the United States' lack of action regarding some international treaties like the CRC, and the American Convention, as well as the reluctance to accept the jurisdictions of international courts has made experts and academics wonder about the commitment of the United States to its international obligations.²¹¹ Immigration advocates are therefore doubtful to pursue arguments relying on international norms to enhance the protection of unaccompanied minors' human rights since international law has virtually no direct impact on domestic law. This was discussed as a divergence between international and domestic law and, as a result, there are two separate standards for the treatment of unaccompanied minors. International standards remain far and unreachable. Aspects of this diversion can be seen, for example, in the criminalization of immigration, in the significant expansion of detention in criminal-like facilities of non-citizens, and the lack of legal representation for unaccompanied minors in immigration proceedings as part of due process guarantees.²¹²

But the divergence between international law and domestic law is not particular to the United States; similar problems were found in Australia, South Africa, and some countries in the EU. Shared problems include the absence of adequate legal representation; unreliable or harmful age determination procedures; the abusive use of detention, including punitive measures; and the failure to have child-appropriate proceedings taking into account unaccompanied minors' special vulnerability.²¹³ Although some countries award special protections to unaccompanied minors, as long as they keep putting the enforcement of their immigration laws first, the human rights of unaccompanied minors will still be

²¹⁰ Laura S. Adams, *Divergence and the Dynamic Relationship between Domestic Immigration Law and International Human Rights*, 51 EMORY L. J. 983, 997 (2002).

²¹¹ David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L., 129, 177 (1999).

²¹² Adams, *supra* note 210, at 990.

²¹³ Bhabha, *supra* note 11.

Comparative Immigration Policies for Unaccompanied Minors

violated.²¹⁴ The fact that similar problems were found in different jurisdictions leads to conclude that the complexity and scope of the forced displacement of unaccompanied minors call for efforts by the international community to formulate new policy responses.²¹⁵ The protection of unaccompanied minors' human rights in immigration proceedings faces significant challenges, including a lack of child-appropriate proceedings, concerns regarding their life, dignity, and safety during detention, and worries about due process and representation in immigration courts.

To address these issues and comply with international standards, it is crucial that international and domestic law incorporate the following measures: Firstly, the principle of the best interest of the child should be added to immigration legislation and policymaking. This would ensure that the welfare and interests of the child are given priority when making decisions that affect their lives. Secondly, unnecessary and prolonged detention of unaccompanied minors must be stopped. Detention poses significant risks to the physical and mental health of children and violates their right to liberty and security. Thirdly, the structure of immigration courts and proceedings should be reformed to accommodate child-appropriate proceedings. The process must be designed to take into account the developmental stage, language abilities, and cultural background of the child to ensure their full participation in the proceedings. Fourthly, unaccompanied minors should be provided with free legal counsel to ensure that they have adequate representation and access to justice. Legal representation is crucial to protect their rights and interests and ensure that their voices are heard in immigration proceedings. Finally, it is essential to recognize other forms of social violence as a form of persecution. Many unaccompanied minors flee their homes due to violence, including gang violence, organized crime, and internal violent conflicts. It is necessary to recognize these forms of persecution and offer protection to those who are at risk and seeking protection. Incorporating these measures into international and domestic law would go a long way towards protecting the human rights of unaccompanied minors in immigration proceedings and ensuring that their welfare and interests are given priority.

²¹⁴ See Carr, *supra* note 10, at 159.

²¹⁵ Helton & Jacobs, *supra* note 14.