

Children Displaced Across Borders:

Bridging Policy, Practice, and Disciplinary Approaches to Further Human Rights

I. **In your Work, what different conceptualization and categorizations do you see regarding children who have been displaced across borders**

This paper examines the non-discrimination principle in Article 2 of the United Nations Convention on the Rights of the Child (“CRC”), as it pertains to Central American migrant children, who enter the United States seeking asylum (refugee) protection under U.S. law. Although the United States is not a state party to the (CRC), it signed onto the Convention on February 16, 1995, but has yet to ratify it. The focus of the discussion is to examine whether the U.S. has specifically passed laws and policies requiring public authorities, who evaluate asylee or refugee claims, to have ‘due regard’ to the requirements of the CRC, with emphasis on the non-discrimination provisions in Article 2.

In 2009, The United Nations High Commission on Refugees developed a Guideline on Child Asylum Claims (UNHCR Guideline) urging States to adopt a child-sensitive approach in evaluating refugee claims. The UNHCR guideline is a further elaboration on the “triangle of rights” principle: “best interest” rule, a policy of non-discrimination toward all refugee children, and age-appropriate participation of children in issues affecting their lives.¹ Article 2 of the CRC lays out the principle of non-discrimination in the application of laws and programs affecting children:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3 of the CRC sets forth the “best interest” standard in all actions concerning children; Article 6 of the CRC provides that each child has an inherent right to life and obligates States to “ensure the maximum extent possible the survival and development of the child;” and Article 12 set forth the right of the child to express his/her views freely on all issues affecting the child and that those views be given due weight. These four articles lay the corner stone for the UNHCR Guideline that directs States to adopt a child-sensitive approach in adjudicating children’s asylum claims.²

In the context of migrant children in the U.S., the most relevant issue is how the four core principles of the CRC play out in the course of these children’s attempt to seek immigration

¹ UNHCR, Refugee Children: Guidelines on Protection and Care (Geneva, 1994).

² UNHCR, Guideline on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 2009 (“UNHCR Guideline on child asylum claims). (<http://www.unhcr.org/en-us/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html>, accessed November 3, 2016.)

protection under U.S. law and how the “child-specific” rights highlighted in the UNHCR Guideline are often ignored in the process. Although each state has its independent set of laws regarding children, immigration law is one uniform set of federal law that is applied across state lines. The UNHCR Guideline further provides that each child has the right to make an independent refugee claim, whether s/he is accompanied, unaccompanied or separated children. However, in practice, the Asylum Office and Immigration Courts appear to have imposed discriminatory classification and an arbitrary minimum age eligibility requirement by insisting that a 6-year-old may not have the maturity to independently advance an asylum claim, but a 12-year-old may have reached the lowest age where such capacity may be conferred.

In 2008, the US recognized the importance of protecting immigrant children and incorporating best interest considerations in our immigration laws by enacting the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”).³ While the significance of codifying child-friendly processes cannot be understated, the next section of the paper demonstrates that the TVPRA must be enhanced and uniformly applied in order to ensure that universal rights of children are protected. Moreover, our immigration system routinely fails to apply fundamental principles of fairness and access to protection for children. Immigration officials, asylum adjudicators, and Immigration Judges often apply the same standards used to adjudicate adult cases in children’s claims which denies child asylum seekers their basic rights.

II. In what ways do current policies or practices treat children more or less favorably according to those categories and conceptualizations?

Child-sensitive approach in adjudicating child claims:

A. Discriminatory classification of migrant children upon their arrival deprive them of fundamental rights under CRC.

We can evaluate how the four core principles of the CRC come into play by following the journey of the migrant children. As soon as the children are apprehended upon crossing into the U.S., the Customs and Border Patrol (“CBP”) begin to categorize them into unaccompanied children (“UAC”) if they come alone without any adult, or in the group of Adults with Children (“AWC”) if they come with a female adult, or “Separated” children if they cross with a male adult who will then be taken into adult custody separated from the child. For purpose of asylum, an unaccompanied minor is a child who is under eighteen years old and who has no parent or legal guardian in the U.S. who is available to provide care and physical custody.⁴ Among the children that are grouped into AWC, they are classified further into a group whose adult company has previous order of removal or one that does not.⁵ For the children who arrive with an adult with previous order of removal, they will be placed in regular removal proceeding without the procedural safeguards⁶ afforded to those classified as UAC or Separated children

³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457 (Dec. 23, 2008).

⁴ 6 U.S.C. §279(g)(2).

⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457 (Dec. 23, 2008).

⁶ Under TVPRA, UACs are afforded various procedural safeguards including the following:

who are often treated as either UAC or AWC in the immigration proceedings. This practice of classifying migrant children based on the gender and immigration history of their adult company appears to violate the non-discrimination principle espoused under Article 2 of the CRC. It also violates the “child-specific” rights of the child to not be separated from parents as provided in Article 9 of the CRC.

Moreover, how migrant children are classified at the border fundamentally impact their rights to seek immigration protection and relief. Children who are classified as UAC are afforded the protection of TVPRA. Children who are classified as AWC will be processed by the immigration system as adults. The AWCs go to family/adult detention centers and must pass credible fear interviews in order to present their claim to an Immigration Judge (IJ). Many times the adult of the AWC has an order of removal from a previous entry, while the child does not. In those cases, the adult will be placed in reinstatement of removal and put under an order of supervision, with no right to see an IJ. The child of the AWC will be placed in regular removal proceeding under INA §240 alone, with no UAC protections. This means that the child of an AWC must file for asylum within one year of arriving (unless other exceptions apply such as a legal disability), and they must file their application in the immigration court. The child will be given the opportunity to have the immigration judge adjudicate her claim in an adversarial setting, with no right to counsel, and having never been provided a “know your rights” presentation. Although the child is effectively alone in removal proceedings, since she is the *sole and lead respondent*, the fact that she entered the U.S. with an adult, she has the adult’s immigration status imputed on her and loses all protections that she should rightly be afforded if she was considered a UAC. Advocates have attempted to proceed as if the children classified as AWCs were in fact UACs, but the asylum office has a policy to not take jurisdiction over these children because they are not UACs and do not fall under the TVPRA. This practice is in direct

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- Asylum office has initial jurisdiction over UAC asylum applications even though they are in removal proceedings. This allows for a child to present their claim in a non-adversarial setting with a child-friendly interviewer. If the child is denied (or referred) by the asylum office, the immigration judge will hear the asylum application de novo. TVPRA §235(d)(7).
 - UACs are not bound by the 1 year filing deadline for asylum applications. TVPRA §235(d)(7).
 - To be eligible for SIJS, the child is no longer required to show that he/she was abused, abandoned or neglected by BOTH parents. Child must show that they have been abused, abandoned or neglected by one or both parents. TVPRA §235(d)(1)(a).
 - Custodians of unaccompanied minors must receive legal orientations to protect the well-being of the UACs released in their care. TVPRA §235(c)(4).
 - Government pays for Voluntary Departure. TVPRA, §235(a)(5)(D)(ii).
 - All UACs are placed in removal proceedings rather than expedited or reinstatement of removal. TVPRA §235(a)(5)(d).
 - Ensuring safe repatriation for UACs. TVPRA §235(a)(5).

For children classified as UACs, they have the opportunity to file their asylum claim with the Asylum Office and have a second chance to present their asylum claim to an Immigration Judge if the Asylum Office denied their claim. TVPRA, Sec. 235(d)(8)(B). Under TVPRA, UACs are exempt from having to file their asylum claim within one year of their arrival, giving them more time to prepare their claim and seek legal representation. INA §208(a)(2)(E), TVPRA, P.L. 110-457 § 235(d)(7)(A).

contradiction with the UNHCR Guideline that should cover all asylum-seekers, including accompanied, unaccompanied, and separated children.⁷

The UNHCR Guideline further provides that each child has the right to make an independent refugee claim, whether s/he is accompanied, unaccompanied or separated. However, in practice, the Asylum Office appears to have imposed an arbitrary minimum age eligibility requirement by insisting that a 6-year-old may not have the maturity to independently advance an asylum claim, but a 12-year-old may have reached the lowest age where such capacity may be conferred.⁸

B. Keeping migrant children in detention violates their fundamental rights.

The child's right to not be detained or imprisoned as provided under Article 37 of the CRC is further abrogated by the CBP's practice of keeping migrant children in detention either with their female company (often their mothers) in family detention centers or in children facilities administered by the Office of Refugee Resettlement (ORR).⁹ For the unaccompanied children, once apprehended, many they inform their case managers of being placed in a "freezer" for one night or more, before being bused to a shelter. This practice is fundamentally against the "best interest of the child" principle under Article 3 of the CRC. At Cabrini, we have encountered cases in which a very young child, aged 5 or 6, was separated from his father at the border and then sent to a children's shelter where he is terrified and is unable to tell the shelter staff his name, his country of origin or any identification information. In the meantime, the father who came with the child may have already been deported under expedited process. The disjointed administration of adult and child facilities also created great barriers to information-sharing in an expeditious manner. Moreover, children classified as AWC and held in adult detention are not afforded the opportunity to be released to a legal custodian, which means that their detention is much more prolonged than those who are classified as UACs, regardless of the strength of their asylum claim.

C. The total disregard of the "best interest of the child" principle in adjudicating child asylum claim fundamentally violates the principles of CRC.

In adjudicating child asylum claims, the UNHCR Guideline directs States to apply the "best interest of the child" principle to assess the harm from the child's perspective. This requires adjudicators to see that "ill-treatment that may not rise to the level of persecution in the case of an adult, may do so in the case of a child."¹⁰ UNHCR Guidelines also cautions that where a child is unable to express fear or exaggerate such emotions, asylum adjudicators should make an objective assessment of the risk that the child would face regardless of such fear.¹¹ The UNHCR Guideline calls for asylum adjudicators to recognize that, in the case of a child, "her immaturity, vulnerability, undeveloped coping mechanisms and dependency [on the adults] as well as the differing stages of development and hindered capacity may be directly related to how

⁷ UNHCR Guideline, para. 6.

⁸ USCIS, Asylum Officer Basic Training Course: guidelines for Children's Asylum Claims, p. 18 (Mar. 21, 2009) (https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf, accessed November 4, 2016) (hereinafter "AOBTC"). See also *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000), *cf.* *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

⁹ TVPRA Sec. 235(a)(4), 235(b)(3).

¹⁰ UNHCR Guideline, para. 10.

¹¹ UNHCR Guideline, para. 11.

a child experiences or fears harm,”¹² and to find well-founded fear where the child’s adult caregiver has expressed such fear or where the harm that a child fears or has suffered may be relatively less than that of an adult.

The best interest of the child is never considered, in the asylum context, absent establishing a legal basis for protection. While USCIS apparently embraces this standard and has provided guidance in the field directing adjudicator officers to recognize that “the harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution,”¹³ in training its asylum officers, the USCIS specifically states that “[t]he internationally recognized ‘best interest of the child’ principle is a useful measure for determining appropriate interview procedures for child asylum seekers, but **it does not play a role** in determining substantive eligibility under the U.S. refugee definition.”¹⁴ And because the U.S. has not yet ratified the CRC, the asylum officer training manual specifically reminds the asylum adjudicators that the international standards are not binding on them. In a 2006 case, the Second Circuit found the applicant, Jorge-Tzoc’s suffered persecution not necessarily based on the fear that the applicant suffered as a child, but because he suffered displacement, economic hardship and witnessed death of close relatives at a time when he was totally dependent on his family and community.¹⁵ While the court found evidence of past persecution based on harm perceived by an asylum applicant as a child¹⁶ or emotional and development injury to a child who lost parents and close relatives,¹⁷ the USICS is willing to take age into account in making persecution determination, but refuse to assess harm from the child’s perspective.¹⁸ We have a case where a child who was molested by her grandmother’s brother when she was 11 years old in Honduras. Her grandmother was her sole caretaker. When the child told her grandmother, the grandmother did not file a report, and allowed her brother to return to the house regularly without supervision. The same family member raped the client’s older sister, as did other male family members. She was 15 years old when the asylum office interviewed her for her asylum application. The asylum office denied her application. When a case is denied (or “referred” as the AO says) they do not tell you exactly why the case is denied. However, the officer repeatedly asked during the interview about the extent of the abuses she experienced, as if to say, “That’s it?” The officer did not indicate that she had credibility concerns in the interview. Additionally, threats alone almost never amount to persecution in child asylum cases. Officers often ask repeatedly about personal attacks perpetrated on the clients, and seem unsatisfied when

¹² UNHCR Guideline on Child Asylum Claims, para. 15.

¹³ U.S.C.I.S. Guidelines for Children’s Asylum Claims, Dec. 10, 1998.

(<http://www.refworld.org/docid/3f8ec0574.html>, last accessed November 3, 2016). *See also* AOBTC, p. 52.

¹⁴ AOBTC, pp. 8, 36. (Emphasis added).

¹⁵ *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2nd Cir. 2006).

¹⁶ *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007).

¹⁷ *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994).

¹⁸ *Mei Dan Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004) (forcibly taken to Village Committee for interrogation, pressured to confess involvement in Falun Gong, hair pulling by police and guards, 2-day detention, subsequent expulsion from school, physically aggressive questioning of applicant’s mother are only harassment that do not rise to the level of persecution), *Santosa v. Mukasey*, 528 F.3d 88 (1st Cir. 2008) (“isolated bullying suffered as a child does not amount to past persecution), *cf. Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005)(economic deprivation resulting from fines against her parents, lack of educational opportunities and trauma from witnessing her father’s forcible removal from home could be sufficient to establish persecution by a 14-year-old).

a child cannot recount an incident when they were personally attacked. Of course you never know which element of asylum they are denying the case on, however it's often nexus, credibility, and persecution.

D. Refusal accept the fact that children can form political opinion independent of their adult caregiver is fundamentally contrary to the principles in CRC.

In assessing a child's asylum claim based on religion or political opinion, the UNHCR Guideline directs the adjudicator to recognize that children have the capacity to hold political opinion and engage in political activities. A child may express such political opinion through actively engage in political activity or by refusing to conform. In evaluating such claims, the State needs to assess the child's level of maturity, education and his/her ability to articulate such views. In other cases, the parent's political view may be imputed upon the child and subject them to persecution. In some cases, there are overlaps between persecution based on political opinion and religion.¹⁹ Many migrant children from Central America, who came to the U.S. fleeing gang violence or gang recruitment, are rarely granted asylum because their action of resistance is often not considered political opinion by adjudicator and the violence perpetrated against them as a result of such resistance disregarded. To overcome such narrow interpretation of persecution on account of political opinion, many UC advocates attempted to advance asylum claim based on the basis of "membership of a particular social group." Even though the UNHCR Guideline suggests that "being a child is in fact an immutable characteristic at any given point in time" because a child cannot dissociate herself from her age in order to avoid the persecution feared,²⁰ asylum claim based on the fact that Central American teenagers of a particular age group are targets of gang recruitment has not been successful in Texas.

E. Application of unreasonable standard in determining credibility of child asylum applicant.

Asylum Officers are instructed that testimony of an applicant, whether a child or an adult, could alone be sufficient to establish persecution, but in reality, asylum applications without extensive corroborating documentation are rarely successful. Credibility is a widespread concern among asylum adjudicators. Adjudicators apply the same standards for credibility to children as they do adults, contrary to the UNHCR Guideline. Issues commonly seen include:

1. Requiring children to provide documentation of the persecution:

Children rarely have documentation to support their claim for many reasons. Many children, especially young children or children who have no parents in either country, are not in control of whether they can access documents from home country and who they speak to in home country. Many children fear making police reports in home country, are incapable of making police reports in home country, are denied access to medical attention in home country, and generally have little proof that the threats and attacks perpetrated against them actually happened. A child's dependency on adults to obtain certain services and/or documents is rarely considered while adjudicating child asylum claims.

¹⁹ See UNHCR Guideline on Child Asylum Claims, paras. 45-47

²⁰ See UNHCR Guideline on Child Asylum Claims, para. 49.

2. Undue obsession about specificity

Asylum adjudicators request specific dates and details that often children cannot recall. This can also be a lack of cultural sensitivity (for example: an officer not understanding that a child never celebrated Christmas or birthdays so they cannot state a date relevant to these events). Requiring this level of detail from a young child demonstrates a lack of understanding of a child's capacity.

3. Failure to consider the mental state of the child when interviewed at the border.

In addition, asylum officers often rely on the I-213 and other border interviews to attack the credibility of the child client. They fail to consider the mental state of the child, the possible lack of comprehension of the child at the time of the interview, the child's perception of authority and how intimidated children feel while being questioned by a CBP officer.

4. The use of adversarial setting during asylum interviews

Despite the guarantee that UACs will be able to present their asylum claims in a non-adversarial setting, and that asylum officers are trained extensively on techniques in interviewing child applicant, many asylum officers have inappropriate interviewing skills for children. They conduct the interview as if they are a DHS attorney conducting cross examination in court. This creates an environment of fear for children and they shut down. Subsequently, the testimony is usually void of details, inconsistent, leading the officers to determine that the child is not credible. In addition, the fact that many asylum officers were former CBP officers also color these officers' view about the credibility of the child applicants.

F. Failure to consider whether children can be safely relocated internally or repatriated to their home country.

After the child established "well-founded" fear, she also needs to show that the government of her home country is unwilling or unable to protect her. In cases where the persecutor is not a state actor, the adjudicators must examine whether the legal system provides sanctions for the persecutory behavior, whether such incidents of persecution are adequately investigated and whether the bad actors are appropriately punished.²¹

In evaluating whether a child asylum applicant can avoid persecution by relocating elsewhere within her home country, the UNHCR cautions that such internal relocation is "only relevant where the applicant can access practically, safely and legally the place of relocation."²² The "best interests of the child are among the principles in determining whether such internal relocation is reasonable. It is unreasonable to expect unaccompanied children to return to their home country without family members or adult support to a place where they have no known relative willing to support or care for them and to propose that the child relocate to live on her own."²³ A mere inconvenience to an adult may in fact cause undue hardship on a child in the event of such internal relocation. More often than not, in rejecting migrant children's asylum

²¹ See UNHCR Guideline on Child Asylum Claims, paras. 37-38

²² See UNHCR Guideline on Child Asylum Claims, para. 54.

²³ See UNHCR Guideline on Child Asylum Claims, para. 55.

claim, Immigration Judges rarely apply the analysis under the UNHCR Guideline. In fact, in many cases where Cabrini seeks a state court predicate to establish a UAC's eligibility for Special Immigrant Juvenile Status, state court judges routinely refused to include language in the order stating that it would not be in the best interest for the child to return to her home country even when she has no parents or adult relative willing and able to care for her upon her return. As a result, migrant children are routinely repatriated to the same dangers from which they fled and where they are in danger of being re-victimized.

G. Failure to afford child asylum applicant procedural safeguards for prosecuting their claims.

Procedurally, the UNHCR Guideline also provides that state should put in place procedural safeguards to help child asylum applicants prepare for and advance their claim. Specifically, the guideline directs that State should process their claims on a priority basis, State also needs to be cognizant that the child needs time to build trusting relationship with adult helpers or guardian to feel safe, to reflect on their experience to render the account and need time to prepare for their claim. Child applicant should be entitled to legal representation and adjudicators should not expect children to provide adult-like account of their experience.²⁴ In practice, vast majority of the child asylum applicants proceed with their claims without legal representation. Asylum Office schedules the asylum interviews within short time frame, and Immigration Judges imposes arbitrary deadline for children to file claims, all these make it impossible for the child applicant to secure legal counsel and to adequately prepare her claim.

III. **If you could identify two key aspects of policy or practice that need to be changed to ensure displaced children are not discriminated against, what would you recommend, and why?**

The two main aspects of Policy of practice that need to be changed to ensure that displaced children are not discriminated against are:

First, afford all children the same protections under the asylum and refugee law regardless of their classification as accompanied, unaccompanied or separated children. The arbitrary practice of classifying migrant children based on the gender and immigration history of their adult company violates the non-discrimination principle espoused under Article 2 of the CRC. It also violates the "child-specific" rights of the child to not be separated from parents as provided in Article 9 of the CRC.

Second, ensure that Immigration officers and immigration judges apply child-sensitive standards in adjudicating child asylum claims.

²⁴ See UNHCR Guideline on Child Asylum Claims, paras.65-72.

IV. If could identify one critical question that future research should investigate to address challenges with “nondiscrimination.” What would that be, and why?

A critical question that future research should investigate is the effect of the discriminatory classification of children as unaccompanied, accompanied and separated on their ability to avail themselves of the protection of the asylum law. It would be helpful to gather statistics that can show whether these discriminatory classifications affect the outcomes of the asylum claims for each category of children. I believe that this would highlight the need to abolish these classifications.