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The Reception and Processing of Minors in the United States in Comparison to that of Australia and Canada: Would Being a Party to the UN Convention on the Right of the Child Make a Difference in U.S. Courts?

BY ELIANA CORONA *

I. Introduction

In 2014, a surge of minors flocking to the United States from various Central American countries, including El Salvador, Guatemala, and Honduras took place. U.S. Border Patrol agents apprehended 47,000 thousand unaccompanied migrant children entering the United States during 2014.¹

At the same time as this Central American surge, Syrian refugees were fleeing their native country and seeking refuge in several countries, including Australia and Canada. In 2015, Australia decided to accept 12 thousand Syrian refugees.² Likewise, in 2016, Canada pledged \$8.5 million to support refugees over the time span of two and a half years.³

Unlike in Australia and Canada, on January 25, 2017, the President of

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1. Marco Cáceres, *Child Migrants from Central America: 'War Refugees'* HUFFINGTON POST, Aug. 19, 2014, http://www.huffingtonpost.com/marco-caceres/child-migrants-from-centr_b_5509861.html.

2. *Australia receives first five Syrian refugee*, BBC NEWS, Nov. 17, 2015, <http://www.bbc.com/news/world-australia-34830118>.

3. Allison Jones, *Ontario 'on track' to receive 10k Syrian refugees by end of February, says Kathleen Wynne*, THE CANADIAN PRESS, Feb. 8, 2016, <http://www.cbc.ca/news/canada/toronto/ontario-on-track-to-receive-10k-syrian-refugees-by-end-of-february-says-kathleen-wynne-1.3439093>.

the United States issued an executive order⁴ that called for the immediate suspension of all refugee admission to the United States for 120 days. Although the change affects greater numbers of migrants fleeing war-torn regions of Africa, Asia and the Middle East . . . [immigration] advocates say the order could have dangerous consequences for children and their families in countries such as El Salvador and Honduras.⁵

After the executive order was issued, immigration officials detained children seeking refuge, in particular at U.S. airports.⁶

The focus of this paper is on the treatment and processing of minors⁷ who are unlawfully crossing the borders into the United States, Australia, and Canada. All three countries are parties to the Refugee Convention, while only Australia and Canada are parties to the Convention on the Rights of the Child (CRC). Using both of these treaties, I will explore how being a party (or not) affects the immigration outcomes of minors.

A. *UN Convention on the Rights of the Child*

In 1989, the U.N. adopted the Convention on the Rights of the Child — the first legally binding international treaty that incorporates and states a full range of human rights specifically for children.⁸ As of 2015, 196 countries have become State Parties to the Convention by ratifying the CRC,⁹ including Australia¹⁰ (which ratified it on Dec. 17, 1990)¹¹ and

4. The executive order is in current ongoing litigation. See Liam Stack, *Trump's Executive Order on Immigration: What We Know and What We Don't*, N.Y. TIMES, Jan. 29, 2017, <https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html>.

5. Kate Linticum, *Also Barred by Trump's Executive Order: These Heavily Vetted Kids From Central America*, L.A. TIMES, Feb. 1, 2017, <http://www.latimes.com/world/mexico-americas/la-fg-central-american-refugees-20170131-story.html>.

6. Heather Digby Parton, *Child Refugees from Central America are Being Turned Away, too: The Human Cost of Trump's Ban Grows Daily*, SALON, Feb. 2, 2017, <http://www.salon.com/2017/02/02/child-refugees-from-central-america-are-being-turned-away-too-the-human-cost-of-trumps-ban-grows-daily/>.

7. I will look into both unaccompanied and accompanied minors. An unaccompanied minor is defined as a child, under the age of 18, who has no lawful immigration status in the United States and has “no parent or legal guardian in the United States that is available to provide care and physical custody.” Homeland Security Act of 2002 § 462, 6 U.S.C § 279 (2005). Canada and Australia also have the same/similar definitions of unaccompanied minor.

8. *Protecting Children's Rights*, UNICEF (May 19, 2014), http://www.unicef.org/crc/index_protecting.html.

9. *Frequently Asked Questions*, UNICEF (June 24, 2016), <http://www.unicef.org>

Canada (which ratified it on Dec. 13, 1991).¹² Although the United States signed the CRC on February 16, 1995,¹³ to this day, the United States is one of only two countries that have not ratified¹⁴ the CRC.¹⁵ Somalia is the second country that has not ratified the treaty.¹⁶

There are three provisions of the CRC that are especially applicable and important for considering the immigration systems of the United States, Canada, and Australia. The first is Article 3 of the CRC. This Article states that in all actions concerning children, including those taken in the courts of law, “the best interests of the child shall be the primary concern.”¹⁷ The international community recognizes this principle as a child’s fundamental human right.¹⁸

The second, Article 22 of the CRC, deals expressly with refugee children,¹⁹ declaring:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee . . . receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights.²⁰

The third is Article 19 of the CRC. This Article states children have the

[/crc/index_30225.html](#).

10. *A Last Resort? National Inquiry into Children in Immigration Detention*, AUSTL. HUMAN RIGHTS COMM’N (May 13, 2004), <https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention/4-australias-human-rights>.

11. *View the Ratification Status by Country or by Treaty*, UNITED NATIONS HUMAN RIGHT OFFICE OF THE HIGH COMMISSIONER, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en.

12. *Id.*

13. *Id.*

14. The U.S. government’s reason for not ratifying the CRC is that it undertakes an extensive examination and scrutiny of treaties, which can take several years and only considers one human rights treaty at a time. Currently, the Convention on the Elimination of All Forms of Discrimination Against Women is Top priority. *Id.*

15. *Id.*

16. *Frequently Asked Questions*, UNICEF (Nov. 30, 2005), http://www.unicef.org/crc/index_30229.html.

17. Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 28 I.L.M. 1460 [hereinafter “CRC”].

18. About Us: *Processing in Canada Claims for Refugee Protection of Minors and Vulnerable Groups*, GOV’T. OF CAN., (Feb. 25, 2013), <http://www.cic.gc.ca/english/resources/tools/refugees/canada/processing/minors.asp>.

19. Judith Farbey, *A Legal Analysis of Child-Sensitive Asylum Procedures*, 28(3) J. IMMIGR., ASYLUM & NAT’L L., 254, 255 (2014).

20. CRC, *supra* note 17, at art. 22.

right to be protected from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”²¹

While not every child who claims refugee protection will be granted refugee status, the CRC has specific provisions on how to go about a case involving a child, including making the best interest of the child a priority. Most children that come to court have no idea what the immigration process entails and need a representative to protect their interests. Even if the refugee status is denied, at least referencing the CRC will give the child the opportunity to fair consideration. In Canada and Australia the courts reference the CRC provisions when the hearing affects a child. For example, in Australia immigration courts reference Article 22 of the CRC to argue that children are a recognized identifiable group that merit asylum consideration.²²

B. 1951 Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees

The 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)²³ is an international treaty, which aims to protect the most vulnerable people in the world: refugees.²⁴ The 1951 Refugee Convention and its 1967 amendment, the Protocol Relating to the Status of Refugees (“Refugee Protocol”),²⁵ reaffirm the Universal Declaration of Human Rights’ Article 14, recognizing “the right of persons to seek asylum from persecution in other countries.”²⁶ There are currently 145 State Parties to the 1951 Convention, including Australia, Canada, and the U.S.²⁷

Article 1 of the 1951 Refugee Convention defines “refugee” as a person “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to

21. CRC, *supra* note 17, at art. 19.

22. See *Minister for Immigration and Multicultural and Indigenous Affairs v. VFAY*, (2003) FCAFC 191, at ¶ 35 (Austl.).

23. The Convention entered into force on April 22, 1954. It has been subject to only one amendment: the 1967 Protocol. UNHCR, *Convention and Protocol Relating to the Status of Refugees* at 2 (2010) [hereinafter “Refugee Protocol”].

24. UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011), <http://www.unhcr.org/4ec262df9.html>.

25. Refugee Protocol, *supra* note 23.

26. *Id.*

27. UNHCR, *State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* 1-2, 4 (2015).

such fear, is unwilling to avail himself of the protection of that country.”²⁸ Although the definition explicitly states “refugees” are the only ones who are considered, the Refugee Convention has created the international standard for evaluating an asylum seeker’s claim of persecution. Today, Australia,²⁹ Canada,³⁰ and the United States³¹ use this refugee standard in their respective, domestic courts of law.

Part II of the paper will analyze how Canada’s immigration system aligns with the CRC and the Refugee Convention. Part III of this paper will analyze how Australia’s immigration system has implemented the CRC and the Refugee Convention in their immigration proceedings. Part IV will compare Canada and Australia’s system. Since the U.S. is not part of the CRC, Part V of the paper will focus on the U.S. immigration system regarding the treatment and processing of children and how the Refugee Convention has played a role.

II. Canada

As a signatory to the Refugee Convention and its Protocol, Canada has incorporated the definition of a “Convention refugee” as it is set out in the Convention.³² In order to set forth a refugee claim, the claimant must satisfy the Convention refugee definition set out in Section 96 of the Immigration and Refugee Protection Act (IRPA). The IRPA defines a Convention refugee as a person who “by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside each of their countries of his nationality and is unable or, by reasons of that fear, unwilling to avail himself of the protection of each of those countries.”³³ As a party to the Refugee Convention, Canada’s Section 96 definition in the IRPA is almost identical to that of Article 1(A)(2) of the Refugee Convention. Canada’s policy on this front is therefore

28. Refugee Protocol, *supra* note 23, at 14.

29. Plaintiff M70/2011 v. Minister for Immigration and Citizenship, (2011) 244 CLR 144, 1 (Austl.).

30. Duale v. Canada (Minister of Citizenship & Immigration), [2004] F.C. 150 ¶ 1 (Can.).

31. Christine M. Gordon, *Are Unaccompanied Alien Children Really Getting a Fair Trial?*, 33 DENV. J. INT’L L. & POL’Y 641, 646. (2005).

32. Stacey A. Saufert, *Closing the Door to Refugees: The Denial of Due Process or Refugee Claimants in Canada*. 70 SASK. L. REV. 27, 30 (2007).

33. Immigration and Refugee Protection Act, S.C. 2001, c 27, art. 96 (Can.) [hereinafter “IRPA”].

aligned with the Convention.

The Convention requires that all asylum-seekers have a “full hearing or review³⁴ of their claims and that such decisions be ‘reached in accordance with due process of law.’”³⁵ Additionally, as part of the Refugee Convention, Canada is also required to give refugees the right to access to the courts if they wish to make a refugee claim.³⁶

A. *Immigration Process*

In order to gain refugee status in Canada,³⁷ an immigration officer must first review the applicant’s claim and determine if they are even eligible. If the applicant is eligible, he proceeds to the next stage: an administrative hearing before the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board (“Board”). If the RPD approves the claim, the applicant may obtain permanent resident status, which can potentially lead to citizenship.³⁸

If the RPD denies a claim, the applicant can apply for leave to seek judicial review before the Federal Court of Canada. This decision is final.³⁹ If the judge grants leave, the applicant can proceed to receive a full merits hearing before the Federal Court, which can either remand the case back to the RPD before a different RPD member or instruct the RPD to grant the applicant refugee status.⁴⁰

If an unaccompanied minor under the age of 18 is the applicant, under subsection 167(2) of the IRPA, the Board must designate a representative for the applicant.⁴¹ The Act provisions, as well as the provisions of the Refugee Protection Division Rules, SOR 2002-228, provide the obligation of the court to designate a representative⁴² for the claimant as soon as the

34. IRPA, *supra* note 30, at art. 32(2).

35. Saufert, *supra* note 29, at 31.

36. *Id.*

37. While one can apply for refugee status in Canada through the Overseas Program—where refugees are selected by visa officers abroad or the Inland Program which is conducted within Canadian territory—for the purposes of this paper, I will only be looking at the Inland Program.

38. Stephen Meili, *When do Human Rights Treaties Help Asylum Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 OSGOODE HALL L.J. 627, 638 (2014).

39. *Id.* at 639.

40. *Id.*

41. *Duale*, 2004 F.C. 150, ¶ 3 (Can.).

42. Although legal counsel for the claimant may also be appointed as the designated representative, the roles of the two are distinct, <http://www.irb-cisr.gc.ca/Eng/BoaCom/>

Board becomes aware the claimant is an unaccompanied minor.⁴³

Article 22 of the CRC states children must “receive appropriate protection and humanitarian assistance.”⁴⁴ Here, the minor is in a court of law in a foreign country, thus chances are he will not understand the process he is about to embark on. By assigning the minor a representative, Canada’s own domestic law aligns with the CRC. In addition to the CRC, Canada took its own steps in assuring its compliance with the best interests of the child.

B. Children: A Vulnerable Group

After becoming a party to the CRC and recognizing Canada has an obligation to ensure a child seeking refugee status receives appropriate protection, on September 30, 1996, IRB issued the groundbreaking guidance *Child Refugee Claimants: Procedural and Evidentiary Issues* (“Guidelines”). In the Guidelines, the Canadian government recognized that refugee claims are a particular challenge since children represent an especially vulnerable group.⁴⁵ The Guidelines also recognized that children cannot articulate their own refugee claims the same way as adults. Accordingly, the Guidelines establish additional procedural steps the courts must follow when assessing a minor’s claim.

The Guidelines conform to the obligations of the CRC. Further, they impose an additional obligation on Canada to do what is in the best interest of the child. The IRPA did not have specific provisions for processing the claims of children in court, with the exception of the designation of a representative. However, the Guidelines do. Canada’s addition of the Guidelines filled an important gap and established how committed they are to protecting interests of unaccompanied minors in their immigration system.

Another example of this strong commitment to the best interests of these children is Section Three of the Guidelines, entitled “Processing Claims of Unaccompanied Children.” Section Three explicitly states the “best interests of the child should be given primary consideration at all stages of the processing of these claims.”⁴⁶ This provision is parallel to the

references/pol/GuiDir/Pages/GuideDir03.aspx#note2.

43. *Id.*

44. CRC, art. 22(1).

45. Asylum Officer Basic Training Course (AOBTC) Guidelines for Children’s Asylum Claims, USCIS, RAIIO, Asylum Division, Sept. 1, 2009, at 12.

46. Guidelines Issued by the Chairperson pursuant to §65(3) of the Immigration Act, §3 (1996), <http://www.irbcisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir03.aspx#AIII>.

CRC's "best interest" of the child provision. In order to assure this provision is followed, there are certain procedures the Board must follow, including: The claim should be given "scheduling and processing priority . . . [and in] determining what evidence the child is able to provide and the best way to elicit this evidence, the panel should consider . . . the age and mental development of the child . . . capacity of the child to recall past events and the time that has elapsed since the events, and the capacity of the child to communicate his experiences."⁴⁷ While these are strong procedures, looking to actual immigration proceedings helps to answer the real question of how closely Canada implements the CRC.

In *Stumpf v. Canada*, one of the applicants, a Hungarian-born child, was not assigned a representative during his initial claim and was subsequently denied refugee status.⁴⁸ The Federal Court of Appeals held that the Board had to reopen the minor's refugee claim. The Federal Court found this way despite the decision by a two-member panel of the Convention Refugee Determination Division of the IRB that the Applicant had abandoned his claim and should therefore be denied refugee status.⁴⁹ The lack of assigning a representative to the minor in his initial claim violated subsection 69(4) of the Immigration Act.⁵⁰ Similarly, in *Duale v. Canada*, the 16-year-old applicant was not assigned a representative during his initial claim. However, the proceedings did not get as far along as they did in *Stumpf*. As a result, the Court remitted the matter for redetermination affirming that the "failure to appoint a designated representative could have affected the outcome of the claim."⁵¹ While *Stumpf* does not specifically reference the CRC as a reason to reopen the case, lack of representation was evidently against the best interest of the child provisions emphasized in CRC Article 3 and Article 22, which require the child "receive appropriate protection and humanitarian assistance." In the following case, the Court does explicitly reference the CRC when making a decision that affects a child.

In *Baker v. Canada (Minister of Citizenship & Immigration)*, the Court granted a Jamaican-born mother permanent residency based upon humanitarian and compassionate considerations, pursuant to section 114(2) of the Immigration Act. The court's rationale was based in part on what

47. Guidelines Issued by the Chairperson pursuant to §65(3) of the Immigration Act, §3 (1996) ¶ 6.

48. *Stumpf v. Minister of Citizenship & Immigration*, (2002) FCA 148, ¶ 7 (CAN).

49. *Id.*

50. *Id.* at ¶ 6.

51. *Duale*, 2004 FC 150, ¶ 1.

decision would be in the best interest of the child.⁵² The court held that “attentiveness and sensitivity to the importance of the rights of children, to their best interest, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable matter.”⁵³ However, the court did state that “it is not to say that children’s best interest must always outweigh other considerations,⁵⁴” but this should be considered “where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines.”⁵⁵

Although the *Baker* case dealt with granting relief to an adult, the case reflects the importance of taking into consideration the best interests of the child. Article 9(1) of the CRC states: “State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child.” The applicant was a mother of two whose deportation would significantly impact her two Canadian-born children. As a signatory party to the CRC, the Canadian government took into account the “importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future.”⁵⁶ Taking into account that separation from the parents was not in the best interest of the children, the Court granted the mother legal status in Canada. The decision directly affected the child; as such the Court explicitly referenced the CRC before making a decision.

These cases demonstrate that while the CRC is not legally binding, it does have the potential to influence case outcomes. Although the Court in *de Guzman v. Canada*⁵⁷ held that paragraph 3(3)(f)⁵⁸ of the IRPA does not incorporate the CRC into domestic law, the court stated the IRPA should be construed and applied in a manner consistent with the CRC. Looking to the previously discussed cases, would the case outcome have been different if the court did not consider the best interests of the children, thus complying with the CRC? Probably, since the mother in *Baker* was to be deported prior to the appeal.⁵⁹ Nevertheless, just as *Baker* illustrates an instance where the

52. *Baker v. Canada* (Minster of Citizenship & Immigration), 1999 CarswellNat 1124 at ¶ 75 (Can.).

53. *Baker*, 1999 CarswellNat 1124, at ¶74.

54. *Id.*

55. *Id.*

56. *Id.* ¶ 71.

57. *de Guzman v. Canada* (Minister of Citizenship & Immigration), 2010 FC 149, ¶ 73 (Can.).

58. IRPA, art. 3(3)(f). This Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.

59. *Baker*, (1999) CarswellNat 1124, at ¶ 6.

court took into consideration a child's best interest when deciding an immigration case, one could counter argue that there are also cases where the outcome is not always positive. Thus the CRC may not always encourage a favorable outcome in domestic Canadian cases.

In *Kim v. Canada*,⁶⁰ the applicants were brothers from South Korea applying for refugee status under section 96 of the IRPA.⁶¹ The brothers fled South Korea after their father's death and their mother's inability to care for them.⁶² The RPD denied their asylum application because they did not fit the "definition of refugees under section 96 of the IRPA on the basis that they do not have a well-founded fear that they will be persecuted in South Korea on one of the grounds specified therein."⁶³ The claimants appealed.

Similarly to *Baker*, in this case, the court also took into consideration the CRC during the appeal.⁶⁴ The Court held that,

When determining whether child refugee claimants meet the definition of "Convention refugees" under section 96 of the IRPA, attention must be paid to three factors: first, that children have distinctive rights under the CRC; second, that these rights influence decisions made under the IRPA as a result of paragraph 3(3)(f) and third, that children exist in a state of vulnerability which might make them more susceptible to "persecution" than adults.⁶⁵

Even though the Court held the CRC should be taken into consideration when deciding a case regarding a minor, the Court denied the refugee status explaining "the RPD made a reasonable decision when it found that the Applicants had not adduced sufficient probative evidence to rebut the presumption that state protection is available."⁶⁶ Thus, the Court makes it clear that the CRC is not the sole determinative of a case. The Court noted that "the IRPA is to be construed and applied in accordance with instruments such as the CRC," but even then the court denied them refugee status.⁶⁷ The court reiterates that the "best interests of the child

60. *Kim v. Canada* (Minister of Citizenship & Immigration), 2010 FC 149, at ¶ 10 (Can.).

61. IRPA, art. 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.

62. *Kim*, 2010 FC 149, at ¶ 11.

63. *Id.* ¶ 16.

64. *Id.* ¶ 73.

65. *Id.* ¶ 73.

66. *Id.* ¶ 77.

67. *Id.* ¶ 74.

cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision."⁶⁸ Here, the applicants did not meet the definition of Convention refugee, because they failed to produce sufficient evidence and thus were denied refugee status.⁶⁹

While the CRC is not the sole factor courts take into account when ruling on a case involving a child, as we see in *Kim*, it is still influential to the case. Had the applicants met the requirements of the definition of a refugee, would they have been granted refugee status? Perhaps; even though the applicants were denied status, the court does make it a point to highlight children's vulnerability and the court's need to reference the CRC. The CRC highlights the best interest of the child and emphasizes the importance of seeing children as children, which includes ensuring they are represented. While the Refugee Convention definition does prevail, without the CRC's consideration that balances in favor of protecting children's interests, it is more likely than not that more children would get denied refugee status. In *Kim*, the applicants were denied status, however, as the other cases demonstrate, the CRC could be the determinative factor needed to balance an outcome in favor of the child.

C. Referencing the CRC and Compliance with the Refugee Convention

As seen in *Stumpf*, the court held the minor's claim should be reopened since he was not assigned a representative in his initial claim. The court recognized that a child cannot represent himself and needs the assistance of a representative who will fight for their best interest. While the court did not explicitly reference the CRC to make this decision, it does align with the best interest of the child. In *Kim*, the court looked to the Refugee definition when making its decision and complied with the CRC. If a claimant does not meet the definition, he is not considered a refugee and the application is denied. In *Kim*, the brothers were not fleeing their native country on account of one of the five enumerated reasons in the Convention Refugee;⁷⁰ consequently, the court could not grant them asylum. However, while the claimants were denied refugee status, the court did emphasize that when deciding on an immigration case regarding a

68. *Id.* ¶ 76.

69. *Kim* 2010 FC 149 at ¶ 76.

70. *Id.* ¶ 11.

child, the court must consider the CRC.⁷¹ Similar to *Kim*, in *Baker*,⁷² the court highlighted the importance of the CRC. While the Court did state, “it is not to say that children’s best interest must always outweigh other considerations,” it also emphasized how the CRC should be considered when deciding an immigration outcome that affects the child.⁷³ Taking *Baker* into account demonstrates that if the brothers in *Kim* had fled their native country in order to escape persecution on one of the enumerated grounds, the CRC would have more likely than not helped them get refugee status.

While these are only a few cases out of the many that come through the immigration court, they do show how the CRC is given significant consideration and makes an impact. The Court references the CRC and, reinforces their obligation to comply with the provisions before deciding on a case outcome regarding a child. Similarly to Canada, Australia is also a party to the CRC.

III. Australia

Australia has also ratified the CRC and the Refugee Convention.⁷⁴ As a signatory to the Refugee Convention, Australian courts must interpret the relevant provisions of the *Migration Act 1958*⁷⁵ in a way that corresponds to the international obligations. Australia adopted the Refugee Convention’s definition of a refugee.⁷⁶ Australia “has undertaken in the [Refugees Convention] by granting a protection visa in an appropriate case and by not returning a person, directly or indirectly, to a country where [he] has a well-founded fear of persecution for a Refugees Convention reason.”⁷⁷

71. *Id.* ¶74.

72. *Baker*, 1999 CarswellNat 1124.

73. *Baker*, 1999 CarswellNat 1124, at ¶ 74.

74. UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol 1-2, *supra* note 27.

75. Migration Act of 1958 (Act No. 62/ 1958). Current legislation governing immigration to Australia.

76. *Plaintiff M70/2011*, 2011 244 CLR 144, 1, *supra* note 29.

77. A Refugee Convention reason is being persecuted on account of race, religion, political opinion, nationality, or membership of a particular social group. *Plaintiff M70/2011*, 244 CLR 144, ¶175.

A. *Immigration Process*

In order to cope with the flood of migrants fleeing to Australia, Australian officials “intercept boatloads” of refugees and place them in detention on the remote Australian territory of Christmas Island or Pacific Island nations, such as Nauru or Manus Island.⁷⁸ The refugees are processed and may lodge an asylum claim in the respective island. If the asylum claim is granted, the refugees are settled in the country or have the option of moving to Cambodia.⁷⁹ If the asylum claim is denied, the applicant may seek review of the decision through the Refugee Review Tribunal (RRT), which provides a final, merits review of decisions.⁸⁰ If the RRT grants a claim, the applicant is eligible for relief; if the RRT affirms the previous denial of relief, the applicant may be able to challenge the decision at the Federal Circuit Court through judicial review.⁸¹

Australia’s own Immigration (Guardianship of Children) Act 1946 (“IGOC”) guides the country’s courts when they consider immigration cases involving children. The IGOC applies to any unaccompanied child who comes to Australia intending to be a permanent resident.⁸² Under the IGOC every unaccompanied child arriving in Australia is designated a guardian, referred to as the Minister,⁸³ who serves as the child’s representative throughout the immigration process. The Minister remains the guardian of the unaccompanied child until the child reaches “majority, leaves Australia permanently or otherwise ceases to fall within the provisions of the IGOC Act.”⁸⁴ Similarly to Canada there is also judicial recognition of the CRC.

For example, in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, the Court held that “for the purposes of international

78. Pamela Boykoff & Ivan Watson, “Children Urge Australia to Free them from Nauru island’ prison” CNN, Jan. 27, 2016, <http://www.cnn.com/2016/01/27/asia/australia-nauru-children-detention/>.

79. *What Happens at the Refugee Review Tribunal (RRT)?* Refugee Advice & Casework Service, at 8, http://www.racs.org.au/wp-content/uploads/FS4_What_happens_at_an_RRT_hearing__print.pdf.

80. *See* The UN Refugee Agency, *Australia: Refugee Review Tribunal*, Refworld, http://www.refworld.org/publisher/AUS_RRT.html.

81. *What Happens at the Refugee Review Tribunal (RRT)?* Refugee Advice & Casework Service,

82. *Id.* at 153.

83. Mary Crock & Mary Anne Kenny, *Rethinking the Guardianship of Refugee Children after the Malaysian Solution*, 34 SYDNEY L. REV. 437, 437 (2012) [hereinafter “Crock & Kenny”].

84. *See* Immigration (Guardianship of Children) Act of 1946 (Act No. 45/1946).

refugee law, children are often amongst the most vulnerable groups of refugees in special need of the protection of the Convention. They sometimes arrive in a country of refuge without parents or guardians.”⁸⁵ Both the IGO and this language seem to indicate that the Australian court system has the best interest of the child at heart. However, there is a fundamental flaw in the Australian system.

The Australian immigration process is structurally flawed because the child’s representative is also their prosecutor. The Minister is the appointed guardian under the IGO Act and is also their Judge under the provisions of the *Migration Act*. As a result, the person who is designated to protect the best interests of the child is also the child’s prosecutor.⁸⁶

In what appears to be an effort to correct this irony, the Court has often held that the *Migration Act* and the IGO should be read together when deciding on a child’s refugee claim.⁸⁷ The court has stated that if “there is some conflict between the possible exercise of a power under the *Migration Act* and the Minister’s duties under the *Guardianship Act*, the duties must prevail.”⁸⁸ The guardianship of the child must come before the duty to prosecute. Additionally, “Section 198A⁸⁹ of the *Migration Act* and section 6 of the *Guardianship Act* should be interpreted consistently with Australia’s international obligations under the [CRC].” Under both of these Acts, before deciding to deport a child from Australia, the officer must take into account the best interest of the child.⁹⁰

B. Vulnerability of Children Deserves Special Consideration

In *Minister for Immigration and Multicultural and Indigenous Affairs v. VFAY*, the applicant⁹¹ was a 15-year-old who fled Afghanistan to escape

85. *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, (2000) 201 CLR 293, ¶ 76 (AUSTL).

86. *Crock & Kenny*, *supra* note 83, at 448.

87. *Id.*

88. *Plaintiff M70/2011* 2011 244 CLR 144.

89. *Migration Act of 1958* (Act No. 62/ 1958) §198(a)(1), imposes on an officer a duty to remove from Australia as soon as reasonably possible an unlawful non-citizen who is in detention under section 189(3) [hereinafter “*Migration Act of 1958*”].

90. *Migration Act of 1958*, *supra* note 89; *Guardianship Act*, *supra* note 84.

91. There are two applicants in this case, however, they had separate court hearings. For the purposes of this paper, I will only focus on applicant, VFAY. See *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004*, (2006) HCA 53 (Austl.).

the Taliban's recruitment of young males for military services.⁹² His claim hinged on his fear that he "would be taken to the front lines to fight for the Taliban and that he would be killed."⁹³ He was denied a protection visa under the *Migration Act 1958* (Cth) on the ground that the delegate was not satisfied that he was a minor or came from Afghanistan.⁹⁴ When the Refugee Review Tribunal (RRT) heard the case they found that the applicant was 16 years old and fled Afghanistan because of his fear of the Taliban, they still denied him refugee status stating there was "no longer any real chance that [he] would face persecution by the Taliban"⁹⁵ if he were to return to Afghanistan.⁹⁶ The RRT concluded that his fear was "not well-founded within the meaning of the Refugees Convention," thus the applicant "did not satisfy the criterion set out in s 36(2)(a) of the *Migration Act*."⁹⁷ Further, the RRT stated that the minor was not considered as belonging to a particular social group since "children or unaccompanied young people" are not considered particular social groups.⁹⁸ The RRT denied the child refugee status. However, the RRT did not consider the CRC before making its decision. As will be seen in the judicial review below, referencing the CRC is required and can affect the case outcome.

In judicial review, the "Minister may, if he so decides, exercise that discretion on compassionate or humanitarian grounds"⁹⁹ to grant the applicant's refugee status.¹⁰⁰ Here, the Minister argued, "RRT had erred in failing to refer to the CRC in considering whether children or separated children constituted a particular social group in Afghanistan," as well if "separated children or unaccompanied Hazara minors could not constitute a particular social group."¹⁰¹ The Minister held that the RRT's decision was a "nullity and it was appropriate to grant prerogative relief."¹⁰² The Minister referenced the CRC in order to make the child's case stronger and void the denial of the visa. At court, the Minister argued in favor of the claimant, accordingly looking out for the best interest of the child and acting as a proper representative.

92. VFAY, 2003 FCAFC 191, ¶ 2.

93. *Id.* ¶ 19.

94. *Id.* ¶ 20.

95. The RRT held that circumstances in Afghanistan had changed in "a substantial and material way" since mid- 2001. *Id.* at 25.

96. *Id.* ¶ 23-5.

97. *Id.* ¶ 31-33.

98. *Id.* ¶ 29.

99. Migration Act 1958, § 36(2) (Austl.).

100. VFAY, 2003 FCAFC 191, ¶ 6.

101. *Id.* ¶ 34-6.

102. *Id.* ¶ 36.

Further, the Magistrate Court held that “it was inherent in the reasoning of the High Court in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, that ‘children per se are readily identifiable as a particular social group’ for the purposes of the Convention.”¹⁰³ The Minister argued that the CRC recognizes unaccompanied Hazara children as an identifiable group for the purposes of immigration.¹⁰⁴ The RRT had denied the asylum status-in part-because they did not believe the unaccompanied minors were an identifiable group. Without being classified as a particular social group, the minors would not have met the qualifications of a refugee.¹⁰⁵ The Minister emphasized that the CRC “underscores the point that children in society are an especially vulnerable group deserving of special consideration and protection.”¹⁰⁶ Further, the Minister also “considered that Articles 20(1) and 22(2) of the CRC demonstrated that ‘children have been recognized internationally as an identifiable group meriting consideration as asylum seekers.’”¹⁰⁷ Ultimately, the Minister held the minor could appeal from the RRT’s decision.¹⁰⁸ In order to highlight the importance of a child having a representative, and the impact it has on satisfying their best interests, one must also look at Australia’s detention system and how it affects children.

C. *Representation Makes a Difference*

Prior to the Migration Act’s changes in 2001, the immigration scheme was “predicated on immigration detention for all.”¹⁰⁹ The “detention for all scheme” was based on the logic that detention is effective as a deterrent measure. The changes to the Migration Act in 2001 included the introduction of Sections 46A, 189(3) and 198A, stating a person who arrived in Australia at “any one certain geographic locations would have no access to the visa system unless the Executive decided that they should.”¹¹⁰ Under section 198A, the individual would not be under immigration detention, but rather would be taken to another country to decide whether to grant him protection.¹¹¹ In deciding whether to take a person from Australia

103. *Id.* ¶3 4.

104. *Id.*

105. *VFAY*, 2003 FCAFC 191, ¶ 36.

106. *Id.* ¶ 35.

107. *Id.*

108. *Id.* ¶ 63.

109. *VFAY*, 2003 FCAFC 191, ¶ 63.

110. *Plaintiff M70/2011*, 2011 HCA 32, at 149.

111. *Id.*

to another country under section 198(A)1, an “officer must consider the person’s individual circumstances.”¹¹² As stated above, individuals, including children, who are detained and regarded as “off-shore entry persons,” are detained and processed on islands, including the remote Australian territory of Christmas Island.¹¹³ The Migration Act 1958 mandates “incarceration as the default response to unauthorised arrivals.”¹¹⁴ However, when dealing with children, under Section 6 of the IGOC, the Minister has a duty to “act to advance or protect the welfare of the child.”

In an effort to diminish the negative impacts that detention had on children, in 2010, under the *Migration Act 197AB*, Minister Chris Brown announced, “all children and families would be moved into community-based accommodations by June 2011.”¹¹⁵ As opposed to the detention facilities, in the community detention accommodations, children moved freely in the community.¹¹⁶ By June 2011, 58 percent of the children in immigration detention were moved into community facilities, while the rest remained in detention facilities.¹¹⁷ The harsh detention environment violates the CRC’s Article 22 provision of providing them “appropriate protection and humanitarian assistance” and Article 3’s “best interest of the child” provision. The CRC states children are different than adults; accordingly they should not undergo treatment that implies that they are the same.

IV. Comparing Canada and Australia

As seen above, both Canada and Australia do reference the CRC during immigration proceedings regarding children. Further, Canada and Australia provide some type of representative to an unaccompanied child and are aware that, as stated in the CRC, children are different than adults, and thus should be treated with special consideration. While the Minister is both the prosecutor and representative of the child, in a compelling example of Australia’s dedication to the best interest of the child, Australia’s Minister Chris Brown announced that children would no longer be held in detention facilities, thus acting as a child’s representative who seeks the best interest of the child. Canadian immigration courts

112. *Id.*

113. Crock & Kenny, *supra* note 83, at 443.

114. *Id.*

115. Crock & Kenny, *supra* note 83, at 444.

116. *Id.*

117. *Id.*

acknowledge the importance of representation for children and do not allow a hearing to continue without designating a representative to the child, thus looking out for the best interest of the child.

The United States has not ratified the CRC raising the question of how does it deals with cases regarding minors?

V. United States

While the United States is not a party to the CRC, it is a party to the Refugee Convention. In the following section, I will analyze how the United States has changed its domestic law in order to comply with the Refugee Convention. Looking at the United States' changes after becoming party to the Refugee Convention will shed light on how it could change if it ratifies the CRC.

A. *Immigration Process*

The Immigration and Nationality Act of 1952 (INA) sets the law and guidelines for granting status to undocumented individuals.¹¹⁸ A minor is placed in the custody of the Department of Homeland Security (DHS).¹¹⁹ Before the creation of DHS in 2002, children were treated like adults; children were held in the custody of Immigration and Naturalization Service (INS), which included detention facilities.¹²⁰ Now, under the Homeland Security Act of 2002, if the child is unaccompanied, he is transferred into the care and custody of an office within the Department of Health and Human Services (HHS): the Office of Refugee Resettlement (ORR).¹²¹

The Refugee Act of 1980 establishes the asylum criteria to grant refugee status.¹²² Undocumented individuals can apply for asylum either affirmatively or defensively.¹²³ As opposed to affirmative asylum

118. Christine M. Gordon, *Are Unaccompanied Alien Children Really Getting a Fair Trial?* 33 DENV. J. INT'L L. & POL'Y 641, 652 (2005) [hereinafter "Gordon"].

119. Wendy Young, Megan McKenna, Kids in Need of Defense ("KIND"), *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 249 (2010).

120. Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.- C. L. L. REV. 247, 249 (2010).

121. Homeland Security Act of 2002, 6 USC § 279.

122. Gordon, *supra* 118, at 653.

123. *Id.* at 655.

applications, defensive asylum applications are used as a defense for appeal, at removal proceedings, or when the asylum officer fails to recommend the case for asylum and the applicant appeals to an immigration judge.¹²⁴ This paper will only focus on defensive asylum applications.

Section 101(a)(42) of the INA authorizes the Attorney General, in his discretion, to grant asylum to an undocumented individual who is unable or unwilling to return to his native country because of persecution or a well-founded fear of persecution “on account of race, religion, nationality, membership in a particular social group or political opinion.”¹²⁵ The Act’s definition of a class of refugees who

are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980.¹²⁶

Article 33.1¹²⁷ of the Convention imposed a mandatory duty on contracting States not to return an individual to a country where he would be persecuted on account of one of the enumerated reasons.¹²⁸

Prior to becoming a party to the Convention, the Attorney General had discretion to grant withholding of deportation to undocumented individuals under section 243(h) of the INA.¹²⁹ Article 33.1 of the Convention was the counterpart of section 243(h) of the INA statute, accordingly, the Protocol

124. *Id.* at 656.

125. Immigration and Nationality Act of 1952, 66 Stat. 163, § 101(a)(42); 8 U.S.C. § 1101(a)(42).

126. Immigration & Naturalization Service v. Cardoza- Fonseca, 480 US 421, 424 (1987).

127. Article 33.1 of the Convention Relating to the Status of Refugees states that no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223.

128. Race, religion, nationality, membership of a particular social group or political opinion. *Cardoza- Fonseca*, 480 U.S. 429.

129. Section 243(h) of the Immigration and Nationality Act (INA) requires that the Attorney General withhold deportation of an alien who demonstrates that his “life or freedom would be threatened” thereby on account of specific factors, *Cardoza- Fonseca*, 480 US 423.

does not actually require that the Attorney General must grant asylum to anyone. In order to qualify for asylum, the individual had to demonstrate that it was “more likely than not” he would be persecuted in the country to which he would be deported.¹³⁰

However, there was a change in the U.S. immigration process after the implementation of the Refugee Convention. After becoming a signatory to the Refugee Convention, an undocumented individual “no longer had the burden of showing ‘a clear probability of persecution,’ but instead could avoid deportation by demonstrating a ‘well-founded fear of persecution.’” (citing, *INS v. Stevic*, 467 United States 407, 413 (1984)). This substitution adopted the ‘language of the Protocol as the standard.’”¹³¹ While it seems that the Refugee Convention did bring changes to U.S. domestic law, one of the reasons the U.S. agreed to sign the Refugee Convention and its amendment, the Refugee Protocol, was because the “President and the senate believed that the Protocol was largely consistent with existing law.”¹³² Even with the implementation of the Refugee Convention, there was no drastic change, the Attorney General continued to have the discretion in granting asylum to an individual.

So why does this matter? Some may argue that this is indicative of how the U.S. might treat the CRC if it decides to ratify. While one may argue that if signing the Refugee Convention did not significantly impact U.S. domestic law, then it is not worth signing the CRC, I disagree. As could be seen with Australian and Canadian cases, the CRC has the ability to significantly influence case outcomes.

While the U.S. has not ratified the CRC, it does have its own guidelines for dealing with children’s immigration cases. The 2007 Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children issued by the Department of Justice’s Executive Office for Immigration Review (EOIR) states immigration judges must consider “best interests” as a factor in the child’s immigration proceedings.¹³³ However, it

130. *Immigration & Naturalization Service v. Stevic*, 467 U.S. 407, 429 (1984).

131. Although these languages are different, the Court never explicitly stated the differences between them. *Stevic*, 467 U.S. 413.

132. Some examples of consistencies between U.S. law and the Refugee Protocol: refugees in the U.S. already enjoyed protection and the rights which the Protocol call for; the U.S. already met the standards of the Protocol and the Protocol did not required the U.S. to admit new categories or numbers of aliens. *Stevic*, 467 U.S. 417.

133. Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges, Court Admins. Judicial Law Clerks & Immigration Court Staff, Operating Policies and Procedures Memorandum 07-01; Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), <https://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf>.

also states that the “best interest of the child” cannot “provide a basis for providing relief not sanctioned by law.”¹³⁴ While the immigration judge can take into consideration what constitutes the best interest of the child when making the decision, the judge cannot base his entire decision solely on what is best for the child if it does not comply with the law. Even if the child may face danger in her native country and what is best for the child is to remain in the United States, if the claimant does not meet the statutory language requirements of the Convention Refugee¹³⁵ definition, then the child will not be granted status. The best interest of a child is “generally left up to the discretion of the judicial decision-maker.”¹³⁶

This treatment of best interest is similar to what judges have stated in Canadian and Australian courts regarding immigration proceedings dealing with children.¹³⁷ The CRC has the potential to tip the balance of the case in favor of the child as seen in *Baker*.¹³⁸ Therefore, if the United States were to ratify the CRC, the treaty could have the same effect as it does in Australia and Canada.

B. *Children’s Vulnerability*

In *Abay v. Ashcroft*, two claimants—a mother and her nine-year-old daughter—appealed an immigration judge’s asylum decision.¹³⁹ The mother and daughter fled their home in Ethiopia and applied for asylum on the basis of past persecution, and fear of future persecution, on account of their ethnicity, religious practice, and membership in a political party.¹⁴⁰ The nine-year-old testified in court about her fear of mutilation.¹⁴¹ Her expression of fear in that context came across as “general” or “ambiguous.”¹⁴² However, when assessing her testimony, the Court was advised to keep her age in mind since the INS’ guidelines for children’s asylum claims “advises adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the

134. *Id.*

135. Gordon, *supra*, note 122.

136. Keila E. Molina, “Are we there yet?” *Immigration Reform for Children Left Behind*, 10 REGENT J. INT’L L. 1, 32 (2013).

137. *Kim*, 2010 FC 149, ¶76.

138. *Baker*, (1999) CarswellNat 1124, ¶75.

139. *Abay v. Ashcroft*, 368 F.3d 634, 636 (2004).

140. *Id.*

141. *Id.* at 640.

142. *Id.*

same degree or with the same level of detail as an adult.”¹⁴³ The Court of Appeals granted the claimants’ appeal finding that they are “refugees” within the meaning of the Act.¹⁴⁴

In a similar context, in *Hernandez-Ortiz v. Gonzales*, two brothers from Mexico applied for asylum on the basis of fear that soldiers would force them to join the guerillas.¹⁴⁵ The guerillas had killed their older brother and kidnapped their father.¹⁴⁶ The United States immigration judge denied the brothers’ request for asylum on the basis that she did not find their fear credible because the older brother returned to Mexico to visit his parents after his brother was kidnapped and murdered.¹⁴⁷ On appeal, the court held that the *Guidelines for Children’s Asylum Claims* differentiates between adults and children by noting that “harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution.”¹⁴⁸ Here, although the applicants were over the age of 18, hence not minors, the court held that at the time of the events, they were minors, therefore it was only fair to consider age a critical factor when determining if they held a “well-founded fear of future persecution.”¹⁴⁹

Both *Abay* and *Hernandez-Ortiz*, are examples of how immigration courts deal with cases regarding minors. While neither of these cases involves unaccompanied minors, because in *Abay* the minor entered with her mother,¹⁵⁰ and in *Hernandez-Ortiz*, the claimants were over the age of 18,¹⁵¹ both cases dealt with children. When dealing with children, the immigration courts have made it a requirement to look at the *Guidelines for Children’s Asylum Claims*.¹⁵² While one may argue that the *Guidelines for Children’s Asylum Claims* is already protecting children’s interests even without the CRC, the CRC can still have a major impact. Both Canadian and Australian immigration courts look to the CRC when dealing with children immigration cases, as well as their own guidelines. However, there are important differences between the U.S. cases and the Australian and Canadian cases. In the U.S. cases, there is a lack of any representation

143. *Id.*

144. *Abay*, 368 F.3d 642-6433.

145. *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1044 (2007).

146. *Id.*

147. *Hernandez*, 146 F.3d 1042.

148. *Id.* at 1045.

149. *Id.*

150. *Abay*, 368 F.3d 636.

151. *Hernandez-Ortiz*, 496 F.3d 1044.

152. *See also*, *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2006); *Liu v. Ashcroft*, 380 F.3d 307 (2004).

and a lack of binding law. The guidelines are solely references and are not in any way a requirement for courts to abide by. In order for a child to establish his eligibility as a Convention Refugee he must prove it in court or to the immigration officer. One of the biggest problems facing unaccompanied children in U.S. immigration courts is lack of representation.

C. *No Representation for Children*

Distinct from Canada¹⁵³ and Australia,¹⁵⁴ which designate some kind of representative to an unaccompanied minor, the United States does not. In the United States, unaccompanied children who arrive seeking legal status are not guaranteed a representative or a lawyer.¹⁵⁵ The unaccompanied child may have a lawyer, however it must be one that he is able to retain and pay for himself. Unlike in felony criminal cases in U.S. federal court, where the respondent has a right to an appointed attorney, the same right does not apply in immigration law.¹⁵⁶ As one can imagine, this is practically impossible since the majority of these children come to the United States by themselves and would have no idea how to go about the legal system or have money to pay for a lawyer. At immigration hearings, children “face the same types of immigration charges as adults, ranging from entering the country illegally to overstaying their visas.”¹⁵⁷ The unaccompanied child is left without a representative to help him navigate and understand the nature of the legal proceedings he is about to encounter. While unaccompanied children do not have a right to an appointed attorney, the government, however, does and is represented by DHS attorneys.¹⁵⁸

While the CRC does not require the courts to assign an unaccompanied child a representative, as part of the “best interest” and “providing protection and humanitarian assistance” to the child and as part

153. Asylum Officer Basic Training Course (“AOBTC”) Guidelines for Children’s Asylum Claims, USCIS, RAIO, Asylum Division, Sept. 1, 2009.

154. *What Happens at the Refugee Review Tribunal (RRT)?* Refugee Advice & Casework Service, *supra* note 79.

155. 8 U.S.C. § 1362 (2006).

156. Jerry Markon, *Can a 3-year old represent herself in immigration court? This judge thinks so*, HUFFINGTON POST, Mar. 5, 2016, https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?postshare=1811457113460754&tid=ss_fb.

157. *Id.*

158. *Id.*

of the country's own domestic law, children are given representation in Canada and Australia. Canada and Australia both recognize that children, specifically unaccompanied children, are among the most vulnerable individuals,¹⁵⁹ and as such require someone to represent them in court proceedings. Ironically, the United States has recognized that children and adults are different; especially in the way they react and express fear.¹⁶⁰ However, the U.S. courts have yet to state that children are the most vulnerable group of individual who require a representative. By becoming a party to the CRC, the United States will have a legally binding document that could be interpreted to require some type of representation. U.S. courts will have the pressure of the international community to ensure that the children are treated as children, which may require them to provide representation when the child is unaccompanied.

VI. Conclusion

Both Canada and Australia are parties to the CRC. The United States, on the other hand, has yet to ratify. However, all three countries are parties to the Refugee Convention. By being parties to the Refugee Convention, all three countries have agreed to abide to its provisions, in particular in adapting the refugee definition into domestic law.¹⁶¹ Signing the Refugee Convention did bring about a change to domestic law in all three countries.¹⁶² By ratifying the CRC, the U.S. might also change the way it deals with immigration cases regarding children.

U.S. immigration courts abide by the *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*; however, it is not the same as signing the CRC. The CRC emphasizes that courts should look into the best interest of the child when deciding cases that involves a child. The best interest of the child and providing protection provisions would further urge the United States in assigning some type of representative to an unaccompanied child who seeks protection. As seen in *Baker*¹⁶³ the Canadian court looked to the CRC before granting refugee status to the mother because it was in the best interest of her child. Similarly, in Australia, in *Minster for Immigration and Multicultural and Indigenous*

159. *Stumpf*, 2002 FCA 148; *see also*, *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, ¶76 (Can.).

160. *See* *Abay*, 368 F.3d 640.

161. *See* IRPA, art. 96, 32(2).

162. *Stevic*, 467 U.S. 413, changed standard of review to comply with the Refugee Convention.

163. *Baker*, 1999 CarswellNat 1124 ¶74.

Affairs v. VFAY,¹⁶⁴ the court looked to the CRC to determine that the claimant was to be considered a member of the particular social group, which fulfills the Refugee Convention definition.

All three countries state that the courts must do what is in the “best interest of the child.” However, if the U.S. were really looking into the best interest of the child, would it not make sense to appoint an attorney or some type of legal representative? A four-year-old undocumented refugee cannot process or understand the nature of the legal proceeding he is about to embark on. By ratifying the CRC, the reception and process of minors could be positively impacted.

164. *VFAY*, 2003 FCAFC 191, ¶2.