The U.S. View of the Convention on the Rights of the Child - Time for Reconsideration

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The U.N. Convention on the Rights of the Child (CRC) is the world’s most widely ratified human rights treaty. One hundred ninety-two countries are party to the CRC; only two are not—the U.S. and Somalia (which does not have a formally recognized government and is therefore unable to ratify it). The U.S. government stands alone in opposition to the CRC.

The U.S. government’s position is perplexing for several reasons. First, the CRC has fostered positive changes in law, policies and attitudes towards children in many countries. This alone suggests it is worthy of support. Second, the U.S. was the most active participant during the CRC’s drafting, putting forth proposals and textual recommendations for 38 of 40 substantive CRC provisions. Finally, current opposition ignores the fact that U.S. law and the CRC are compatible in many respects (which should not be surprising given the U.S. role in drafting the treaty).

Compatiblity

Criticisms that ratification of the CRC would force radical changes to U.S. law or that the CRC is inconsistent with American values do not reflect the reality of the CRC and the potential impact of ratification. The CRC and U.S. law are compatible in many fundamental ways. The “best interests of the child” standard—a foundational principle of the CRC—has been used in U.S. law for over 100 years and appears in thousands of federal and state laws and

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Children Navigating through the Immigration System Alone by Adriana Ysern

Marisa*, a 17-year-old girl from Honduras who was raised by her elderly grandparents after her mother abandoned her, was on her way to school one morning when she witnessed two gang members shoot and kill a boy riding his bike. Running from the scene to the protection of her grandparents’ home, the girl entered a state of shock and remained hidden inside for several weeks. She became ill with nerves and could not speak or function. She had never been involved in a crime or witnessed such violence before. Because the gang members saw her at the scene, they knew she would be able to report them to the police. The girl was too afraid to speak to the police for fear that the gang members would harm her or her family. They threatened to kill her neighbor and friend if she came forward. She fled to the U.S. seeking safety.

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FROM THE CHAIRS: An International Issue

This issue of the CRLC Newsletter is focused on international children’s law. How ironic that the United States is one of only two countries in the world that has not ratified the U.N. Convention on the Rights of the Child. This is in spite of the fact that on most topics covered by the convention we have state or federal laws that are at least consistent with, and in several instances exceed, the spirit or the letter of the treaty. Yet, as a policy matter, our leaders do not consider children to be worthy of the political fallout that could result from ratification of the convention. Children are not be seen and not to be heard.

Fortunately for children in the United States, many people who work with children have come to recognize that children should be allowed to have a voice and participate in the decisions that affect their lives. This principle was stated in Article 12 of the U.N. Convention on the Rights of the Child:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

On September 15, 2006 there was an international Day of Discussion regarding the Rights of a Child to participate in judicial and administrative proceedings. Youth and professionals with diverse training who represent or work with children and youth participated in the discussion on how to meaningfully involve youth in the decisions that affect their lives. According to attorney Ed O’Brien, Executive Director of Street Law, Inc., “This discussion is part of the movement for democracy around the world. When a child or youth has a say in a court proceeding or a school decision the experience creates the understanding that they can also shape what happens to them in their future.”

Particularly for youth who are in the custody of the state, it is vitally important that they be allowed to have a say in the decisions that other, even well-meaning adults make regarding their lives. As lawyers for children and youth, we have a duty to make sure that our clients know what each court or administrative proceeding is about, and that we have sought our client’s input in the decisions that go into that proceeding.

For advocacy resources on engaging youth, check these websites:

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court decisions. CRC prohibitions on discrimination (based on race, gender, etc.) reflect U.S. values and law. Additional rights in the CRC are also found in the Bill of Rights, including freedom of expression and freedom of religion.

Other CRC requirements dovetail with U.S. law, including the prohibitions on torture, cruel and inhuman treatment, child labor, trafficking, and sexual exploitation of children (the U.S. has already ratified the Optional Protocols to the CRC on sexual exploitation and child soldiers). Many other areas of agreement exist, including ones discussed below.

Impact of ratification

Ratification of the CRC would provide impetus for specific legislative and policy changes to fulfill our obligations under the CRC to promote the well-being of children. It would require the government to report periodically on implementation. Ratification would also provide a much-needed U.S. foreign policy boost, allowing us to have a “seat at the table” to work with the world community, in fact to play a leadership role, in utilizing the CRC as a vehicle for improving the lives of the world’s most vulnerable children.

Potential benefits of U.S. ratification are significant. Still, the ratification process must be considered thoughtfully. Debate in the U.S. over the CRC frequently produces highly-charged rhetoric. We explore several of the more contentious issues below.

Sovereignty and federalism issues

Critics of human rights treaties suggest that ratification threatens sovereignty. This worry is overblown. The U.S. has ratified human rights treaties previously without ceding sovereignty. Moreover, the CRC does not establish personally enforceable causes of action. In addition, the U.S. traditionally views human rights treaties as non-self-executing and would likely include a non-self-executing Understanding when ratifying the CRC, as it has done in the past (the U.S. typically submits a small number of Reservations, Understandings, and Declarations (RUDs) when ratifying a human rights treaty). As a result, implementing legislation would be required to give effect to the treaty at the domestic level, and sovereignty would remain intact.

Critics also cite the “federalism” or “states’ rights” issue as reason for opposition. That concern is easily remedied by language (similar to that previously used by the U.S.) to the effect that: the U.S. understands that the CRC shall be implemented by our federal government to the extent that it exercises legislative and judicial jurisdiction over those matters, and otherwise implemented by state and local governments; and to the extent that state and local governments exercise jurisdiction over such matters, our federal government will take measures appropriate to our federal system so that competent authorities of state and local governments may take appropriate measures to fulfill our obligations under the CRC.

Parent-child relationship

Opponents of the CRC assert that the CRC will enable kids to sue parents. This is simply not the case. Children can sue now (through a legal guardian) for physical abuse or gross negligence; they will not succeed in suing parents over day-to-day parental decisions regarding child-rearing. Of note, the CRC provides no direct cause of action. Any legal action by children against their parents must be based on existing federal or state law. Fundamentally, the CRC is about protecting children and giving parents and legal guardians more tools to protect their children.

In fact, nineteen CRC articles expressly acknowledge the importance of parents and family in the lives of children. Many such provisions could have been drafted without reference to parents, legal guardians or families, but the CRC’s drafters intended to build into the CRC recognition of the valuable role played by parents and families in the development of children. The CRC calls the family “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children” and requires governments to “respect the responsibilities, rights and duties of parents.” (CRC, Preamble and Article 5).

Abortion

Given spectrum of views on abortion, it is important to understand that the CRC’s position on abortion is neutral. Abortion was a contentious issue in drafting the CRC and any clarity (in either direction) was intentionally avoided to facilitate widespread adoption of and support for the CRC.

To ensure neutrality on this issue, the CRC adopts the following approach: Article 1, the legally-binding definition of the child, does not address the beginning of life, leaving it to individual countries to decide for themselves (it reads: “For the purposes of the present Convention, a (continued on page 4)
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child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”. The non-binding Preamble includes a reference to “before and after birth”; this reflects an understanding of the importance of prenatal care to children’s well-being but does not affect the abortion debate. Finally, the CRC’s travaux préparatoires include a statement that the Working Group, in adopting the preambular language, did “not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties.” This statement further assures that the abortion issue is left to individual countries.

All other CRC provisions (e.g., Article 6’s right to life) depend on Article 1’s definition of the child, and thus the CRC does not affect the abortion debate in any way. Consequently, the U.S. could proceed with ratification while separately continuing a national dialogue on the issue of abortion.

Juvenile justice

Until 2005, the CRC’s prohibition on the use of capital punishment in juvenile justice cases was seen as a significant obstacle to U.S. ratification. However, in Roper v. Simmons, the Supreme Court held that the use of capital punishment in juvenile justice cases is unconstitutional, resolving this difference (543 U.S. 551 (2005)).

The CRC also prohibits imposition of sentences of life imprisonment without parole on juvenile offenders. The idea is that, while punishment is merited in many juvenile cases, we should not give up forever on a child. The U.S. can either ratify the CRC without reservation on this issue, after which implementing legislation would be required to prohibit life sentences without parole for juveniles, or ratify the CRC with a reservation on this point. Either way, this issue does not preclude ratification.

Finally, the CRC also states that juveniles “deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so.” (CRC Article 37(c)). Again, the U.S. has the choice to ratify and conform to the CRC or submit a reservation on this point. This issue does not preclude ratification.

Health care

The CRC does not recognize a “right to health” but rather a right to the “highest attainable standard of health,” acknowledging two important variables: differences among countries and individual differences. (CRC Article 24(1)). It also imposes an obligation on governments to “strive to ensure” that every child has access to health care services and facilities—something less than an absolute requirement but still a firm obligation to provide for children. (CRC Article 24(1)). The CRC also requires states to take “appropriate measures” to address particular health issues, such as infant mortality and early child development. (CRC Article 24(2)).

There is no “right to health” in the U.S. Constitution (certain state constitutions recognize a right to health care). Federal law does not explicitly recognize a “right” to health care. However, several federal programs support the CRC principle that children should have access to health care, including Medicaid, the Emergency Medical Treatment and Active Labor Act, and the State Children’s Health Insurance Program. Still, millions of American children are without health insurance and reliable access to care.

Upon ratification of the CRC, implementing legislation likely would be required to address certain health-related provisions of the CRC. First, the U.S., or some combination of federal and state jurisdictions, would need to recognize some conception of rights that ensures children access to care and treatment. Second, the U.S. would need to give serious consideration to some form of universal health care program for children. The CRC only requires that governments “strive to ensure” that every child has access to health care. However, the current U.S. approach leaves millions without care. A good faith effort would require more.

At first glance, this may suggest a significant change. To date, efforts to establish universal health care have met with resistance. However, the majority of

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Americans favor some form of universal health coverage, so a move toward ensuring health care for children may be more in keeping with American values than staying with the status quo.

Child protection

In 1990 the U.S. Advisory Board on Child Abuse and Neglect stated that the CRC could “become an important American policy instrument for the protection of the physical and psychological integrity of the nation’s children” and that it was a useful “guide to the development of an American child protection policy.” (U.S. Advisory Board on Child Abuse and Neglect, “The Continuing Child Protection Emergency: A Challenge to the Nation,” U.S. Department of Health and Human Services April 1993, at 15). CRC Article 19 indicates that government has a responsibility to protect children, and no nation has more voluminous legislative, administrative, social, or educational child protection measures than the U.S.

The Child Abuse Prevention and Treatment Act (CAPTA) represents one of the world’s most thorough sets of standards guiding the operation of government child protection agencies. The Adoption and Safe Families Act (ASFA) and associated federal laws provide a world-class framework to guide governments as they remove children from home due to severe child maltreatment, place children in foster care, work to reunify families where appropriate, conduct thorough and periodic case reviews, and plan for children’s legal permanency. U.S. laws and practices encompass virtually all forms of child maltreatment, both within and outside the home, and have fostered significant improvements in recent decades.

U.S. ratification, however, could provide incentive for addressing deficiencies in our child protective services (e.g., inappropriately high worker caseloads, failures to engage parents in the development of their cases plans).

The CRC requires that children be protected from “all forms of physical or mental violence.” (CRC Article 19). The terms “corporal punishment” and “parental physical discipline” are not used in the CRC. Article 28, however, requires all appropriate measures to ensure that “school discipline” is administered consistent with the child’s human dignity. The U.S. is already doing well in outlawing corporal punishment in schools, with outright bans in 28 states and DC. In 22 other states, many large school districts have banned it.

Finally, U.S. federal and state laws on adoption are again world-class models and consistent with the CRC. Still, ratification could spur efforts to address some deficiencies in U.S. adoption practice (e.g., safeguarding the rights of all parties to private adoptions, improving the use of pre-adoption home studies, and reforming interstate adoption practice).

Family law

Parent support groups advocating for improvements in U.S. family law would see the CRC as consistent with their goals, including respect for the responsibilities, rights, and duties of parents (Article 5); and legal protections for separating children from parents against their will and the right to parental contact on a regular basis, except if it is contrary to the child’s best interests (Article 9). Article 27 also requires “all appropriate measures” to obtain child support from an absent responsible parent.

Those parent advocates concerned with the particular problem of custodial interference or parental kidnapping would applaud CRC Article 10 language of the right of both parents, except in exceptional circumstances, to maintain regular personal relations and contact with the child, and Articles 11 and 35, that require efforts to combat the illegal transfer and non-return of children abroad and to prevent the abduction of children.

Corporal punishment

The CRC requires that children be protected from “all forms of physical or mental violence.” (CRC Article 19). The terms “corporal punishment” and “parental physical discipline” are not used in the CRC. Article 28, however, requires all appropriate measures to ensure that “school discipline” is administered consistent with the child’s human dignity. The U.S. is already doing well in outlawing corporal punishment in schools, with outright bans in 28 states and DC. In 22 other states, many large school districts have banned it.

Article 37 says that no child shall be subjected to “torture, or other cruel, inhuman or degrading treatment or punishment.” That language, along with the language in Article 19, could be construed as prohibiting corporal punishment in schools and the home. Indeed, the Committee on the Rights of the Child which monitors

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implementation of the CRC has consistently stated that legal and social acceptance of physical punishment of children, in the home and in institutions, is incompatible with the CRC. The Committee has criticized legislation in many countries that permits some level of violent punishment, though it does not have the authority to force countries to change their laws. The ABA, in its recommended RUDs for U.S. ratification, did not call for any permissible use of corporal punishment, but did suggest an Understanding that the CRC does prohibit corporal punishment in schools and that “the United States government will take appropriate measures to bring relevant laws into conformance with this prohibition.” (See ABA, U.S. Ratification of the Convention on the Rights of the Child—Supplemental Action 1994, at http://www.abanet.org/child/abapolicies.html#83).

Conclusion

Careful analysis of the CRC and U.S. law reveals that they are compatible. To the extent that differences exist, it can press the U.S. to make positive changes or, if necessary, be addressed by appropriately crafted RUDs. There are not sufficient differences between the CRC and U.S. laws and values to prevent ratification. Accordingly, the time has come to reconsider our view of the CRC and move toward ratification and the ultimate goal of ensuring the rights and well-being of all the world’s children.


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International:  www.unicef.org; www.crin.org


University of Southern Maine Youth Leadership Advisory Team: www.ylat.org;

www.jimcaseyyouth.org;

www.fosterclub.org

There are also several articles about advocating for unaccompanied immigrant minor children, a vulnerable population that currently has no right to legal representation. Many children are being represented by volunteer lawyers, but not every unaccompanied minor has a lawyer. There is a desperate need for volunteers, so please consider volunteering if you are not already.

We hope that this issue tweeks your interest in international children’s law issues, and reinforces your commitment to working for children just down the street.

Ann Barker is Project Director for Youth OPEN, a project that seeks to ensure permanency for east Tennessee teenagers who are leaving foster care.

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International Human Rights: Law & Resources for Juvenile Defenders & Advocates* by the National Juvenile Defender Center

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The evolution of international human rights law since the Second World War has fueled a movement to secure core rights and freedoms for all individuals across the globe. As international protections strengthen in the arena of juvenile justice, US juvenile defenders and other child advocates should become more informed about human rights law.

The rights of court-involved children are addressed in numerous international treaties and documents. This paper introduces these sources of human rights law, considerations that affect their enforceability in US courts, and key standards.

Sources of International Human Rights

Intergovernmental Human Rights Treaties

There are two main sources of international law: treaties and custom. Treaty law consists of written international agreements that specify states’ rights and obligations. A treaty is binding only on those countries that have accepted its terms through ratification or accession. A treaty is drafted through international negotiation and then submitted to countries for signing and ratification. A treaty “enters into force” according to terms prescribed by the instrument itself, usually on a specified date or upon ratification by a certain number of countries. At this point, the treaty becomes a binding obligation on all countries that have already ratified the treaty as well as those that ratify subsequently.

Human rights are not governed by a single institution or body of law, but by a set of coexisting systems that operate in overlapping geographic regions. Within these systems, treaties – usually titled conventions in the human rights context – have been the primary legal mechanism to articulate and promote human rights. The United Nations (UN) and regional intergovernmental organizations have each promulgated several human rights treaties that are relevant to juvenile justice.

The specialized UN Convention on the Rights of the Child (CRC) entered into force in 1990 and contains strong protections for children’s due process rights, but the US and Somalia are the only countries that have not ratified this treaty.1 The US has ratified the International Covenant on Civil and Political Rights (ICCPR), which contains due process guarantees for all individuals, but declined to join fully the portions of the treaty that address transfer of children into adult court. Key provisions of these treaties are highlighted below. In addition to participating in the UN system, the US falls within the Inter-American human rights system of the Organization of American States (OAS), which spans the Western Hemisphere.

Human rights treaties generally establish administrative bodies to monitor countries’ compliance. Under the United Nations treaties, state parties submit periodic reports to a committee. The committee reviews the information provided by the state and other interested parties and hears an oral presentation by the state party. The committee then issues concluding observations on the country report to identify areas of insufficient compliance with the treaty. Nongovernmental organizations (NGOs) routinely attend committee meetings and prepare “shadow” or alternative reports to supplement and critique the report submitted by a state.

Also influential is the UN Human Rights Council, which in March 2006 replaced the Human Rights Commission. The original Commission, established in 1946, had been widely criticized as ineffectual. The new Human Rights Council has 47 individually-elected member states, is designed to respond to crises in a timely manner, and will meet regularly in order to ensure year-round activity.2

Customary Law and Peremptory (Jus Cogens) Norms

Customary laws are rules derived from a consistent pattern of behavior that prevails among states and to which states conform out of a sense of legal obligation.3 Customary law is binding on all countries except for those that have consistently rejected the practice on which the norm is based. Country practices used to determine whether a customary norm exists are generally limited to official government conduct, but include a broad range of activities such as domestic legislation, international and domestic judicial rul-

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ings, treaty obligations, the practice of international and regional governmental organizations, and statements of domestic policy or law.4

It is possible for a human rights principle to enter into customary law and become binding on states without a treaty. However, customary law has not been emphasized as a way to advance human rights. Some human rights principles are very broad, making it difficult to identify a relevant pattern of state behavior that constitutes a custom. In addition, many countries consistently violate certain rights of their citizens, thereby preventing the formation of a customary law that would safeguard those rights.

Some human rights are protected by a narrow category of customary law called peremptory norms, also known as jus cogens norms. Peremptory norms are considered so fundamental that no state is exempt from their mandates. Unlike ordinary customary law, countries cannot evade a peremptory norm through consistent refusal to follow it. These norms can never be superseded by domestic law or by international treaty, but can only be altered by the formation of a subsequent and contrary norm that is recognized as equally fundamental by the world community.5 Any treaty that violates a peremptory norm is automatically nullified.6 Examples of customary laws that have achieved the status of peremptory norms are the prohibitions on slavery and genocide.

Peremptory norms represent exceptionally powerful statements of international values. In 2002, the Inter-American Commission on Human Rights considered the petition of Michael Domingues, a Nevada youth sentenced to death for an offense committed when he was 16.7 After analyzing international laws and practice, the Commission concluded that a peremptory norm exists prohibiting the execution of offenders who were under 18 at the time of the crime.8 The Commission had considered this question previously in 1987, but was unable at that time to find an international consensus regarding the age of majority in the death penalty context.9 Although the standard for recognizing a peremptory norm is extremely rigorous, the Domingues case illustrates how norms evolve over time. As international views about treatment of delinquent youth advance, the body of peremptory norms may come to include additional principles useful to children’s advocates in the US.

Resolutions of Intergovernmental Organizations

Intergovernmental organizations, such as the UN and the OAS, may use resolutions to express shared views on a variety of topics. A resolution is proposed by any member country and then debated and voted upon by the organization’s assembled member countries. Although a resolution is generally passed with majority support, resolutions may be seen as more influential when they are supported by a higher proportion of member countries. The legal force of these resolutions is open to some discussion, but US legal scholars generally view them as not binding on member nations unless they can be deemed customary international law. Much like a “Sense of the Senate” resolution in the US Congress, intergovernmental resolutions are valued as statements of principle.

International organizations regularly use the resolution process to adopt general formulations of human rights. This type of resolution, typically called a declaration, tends to be worded so broadly that it would be difficult for a court to determine whether it can be deemed customary law. However, human rights declarations articulate widely-accepted moral principles and could be cited to argue for the recognition of a more specific right or prohibition. Juvenile justice practitioners should be aware of two landmark declarations joined by the United States: the American Declaration of the Rights and Duties of Man (1948) and the United Nations Declaration of the Rights of the Child (1959).

The resolution process can also be used to adopt detailed rules or guidelines that are intended to influence member nations’ domestic policies. In the field of juvenile justice, the UN General Assembly (in which all member countries participate) has passed several resolutions that set forth advisory rules on conditions of confinement, delinquency prevention, and the administration of justice. These rules are summarized below. As with other resolutions, these rules are not binding on member countries of the UN. However, UN-approved rules and guidelines may be useful for policy development in the US because they provide highly specific recommendations for justice systems. Moreover, US involvement in passing resolutions can be a persuasive indicator of US policy positions. The US might indicate its support for a human rights principle by sponsoring, drafting, negotiating, speaking in favor of, or voting for a resolution. Courts and advocates should take these activities into account when evaluating the significance of international resolutions for US citizens.

Human Rights in United States Courts

Judicial Opinions of International Courts

In addition to the primary human rights documents generated by countries’ acts, advocates should also be

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aware of the views of international judicial and administrative bodies charged with clarifying and expanding upon the primary text. Both the Inter-American Court and the European Court of Human Rights have issued opinions protecting the rights of child delinquency respondents. For example, the European Court ruled that where two boys aged nine and ten were tried as adults in criminal proceedings, their right to a fair trial was violated by the failure to provide accommodations suited to their developmental stage and the respondents’ consequent inability to assist counsel in preparing their own defense. In addition to the decisions of judicial authorities, US juvenile justice advocates may wish to consult the statements of relevant UN monitoring bodies such as the Committee on the Rights of the Child, the Committee on Civil and Political Rights, and the Human Rights Commission.

Foreign judicial rulings, especially from similar legal systems, may also be helpful for understanding human rights law and determining how to use it. In Canada, for example, the CRC was the partial basis for a successful 2003 Québec Court of Appeal challenge by the government of Québec against the federal government on the ground that its newly enacted Youth Criminal Justice Act was unconstitutional and violated international law by placing insufficient emphasis on rehabilitation.

Making Human Rights Treaties Enforceable

Many steps are required before an international human rights treaty is enforceable in US courts. The US executive branch signs and ratifies international treaties subject to the advice and consent of the Senate. According to the Vienna Convention on the Law of Treaties, a signatory nation that has not yet ratified a treaty is nevertheless expected to “refrain from acts which would defeat the object and purpose of a treaty.” However, without ratification the US is legally bound to follow a treaty only to the extent (if any) that its provisions can be deemed customary law.

US policymakers reluctant to join human rights agreements typically argue that treaties will limit national sovereignty or add nothing to the rights already guaranteed by domestic law. The ratification process can therefore be extremely slow, and the US has signed but not yet ratified several major human rights conventions, including the American Convention on Human Rights and the CRC.

Furthermore, ratification of a convention may not automatically create a human rights cause of action in US courts. Treaty provisions have the force of domestic law only if they are “self-executing” (becoming domestic law upon ratification) or are implemented through separate enabling legislation. The enforceability of treaty obligations is often unclear, and US courts have generally been reluctant to find that treaty provisions are self-executing.

Countries may also attach limitations when ratifying a treaty. These limitations are known as “reservations, understandings, and declarations” (RUDs) and are permitted as long as they are not prohibited by the treaty and are not incompatible with the treaty’s purpose. The United States has frequently added RUDs when ratifying human rights conventions. In particular, upon ratifying the ICCPR, the US reserved the right to process youth in adult criminal systems “in exceptional circumstances.” The US also expressed its understanding that the ICCPR does not require the provision of a criminal defendant’s counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed.

As the foregoing shows, there are significant limitations on the enforceability of international human rights in US Courts. Nevertheless, international human rights instruments represent powerful statements of world opinion and have great moral force. The fact that American states and municipalities have passed human rights legislation and established monitoring commissions shows the growing influence of human rights discourse in US policy. Even if the Senate has not given its advice and consent to a specific human rights instrument, individual provisions from the treaty may influence the views or initiatives of legislators.

Using Human Rights Law to Interpret the United States Constitution

Canada has ratified the CRC, and the treaty is cited in the preamble to the Canadian Youth Criminal Justice Act of 2003. Canadian courts have several times referenced the CRC in interpreting domestic legislation and rights, including in cases ruling that youth status is relevant to the application of DNA testing rules and that the term “violent offense” should be narrowly construed for the purpose of deciding whether a custodial disposition is permitted.

In Roper v. Simmons, the 2005 decision finding the juvenile death penalty to be unconstitutional, the US Supreme Court similarly recognized some role for international and foreign law in interpreting our Constitution. The US has not ratified the CRC, and the language of the

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Simmons ruling is circumspect. The Court twice stated that international authority and foreign laws are “instructive” but “not controlling” in its task of interpreting the Eighth Amendment. Rather, international legal instruments embody “the opinion of the world community” and therefore serve as a source of “respected and significant confirmation” for the Court’s own conclusions.

Nevertheless, the Simmons majority decision has been widely construed to signal an expanded influence of international law on Constitutional jurisprudence, including by Justice Scalia in his dissent. Simmons recognizes that international law sometimes works in tandem with US constitutional guarantees and indicates that these areas of agreement can be a tool for advocates. Even as US law remains the sole source of controlling rules, the Court explained that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”

The Inter-American Human Rights System

The OAS established and administers the Inter-American human rights system. The primary documentary instruments of the Inter-American system are the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The OAS has not yet promulgated any specialized treaties on children’s rights, but its core documents do address the rights of young people.

Compliance with the American Convention on Human Rights is monitored by two complementary institutions: the Inter-American Commission, which predates the Convention itself, and the Inter-American Court, which was created by the Convention. The Court and the Commission each have seven members who are nationals of OAS member states, elected by the OAS General Assembly, and serve in a nongovernmental capacity.

The Inter-American Commission on Human Rights was created in 1959 to investigate human rights violations in all member countries of the Organization of American States. Today, the Commission also processes individual complaints and decides whether to refer them to the Inter-American Court for resolution. The Inter-American Court began its work when the Convention entered into force in 1978. The Inter-American Court has both advisory and contentious jurisdiction. Under its contentious jurisdiction, the Court resolves claims against OAS member countries that recognize the Court’s jurisdiction. Member countries may bring their own claims before the Court, but individual claims must be referred by the Commission. The Inter-American Court may render advisory opinions at the request of OAS member countries or OAS bodies, including the Commission.

Reconciling Due Process & “Best Interests” in Children’s Human Rights

Juvenile defenders in the US are ethically obliged to represent the legitimate expressed interests of each child client, even if the defender does not agree with the child’s choices. This model of representation has superseded earlier views that defenders, like guardians ad litem, should guide the representation according to their own views of the child’s best interests. Yet international human rights instruments commonly promote and protect the “best interests” of the child in provisions related to juvenile justice as well as child welfare. Despite this apparent inconsistency of terminology, human rights law should be understood as reinforcing children’s due process right to express their own views through counsel.

In 2002, the Inter-American Court of Human Rights issued an advisory opinion discussing the possible conflict between the American Convention’s promise to children of special protection (Article 19) and its due process and fair trial guarantees (Articles 8 and 25). The Inter-American Commission requested the advisory opinion based on a concern that governmental authorities, “in making decisions based on what they believe to be the ‘best interests of the child,’ attach less importance to those [due process] guarantees.”

After reviewing regional and international agreements on children’s human rights, the Court explained that “[t]he phrase ‘best interests of the child’, set forth in Article 3 of the Convention on the Rights of the Child, entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives.”

This includes enjoyment of the right to counsel, the right to

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be heard in judicial proceedings, and other due process rights guaranteed to children.\textsuperscript{29} Article 12 of the CRC also supports an expressed interests model of representation by providing that any child capable of forming her own views has the right to express those views, personally or through a representative, and to have those views given due weight in judicial and administrative proceedings that affect her. The Court noted that international standards encourage diversion and other informal resolutions of charges against youth, but that these programs should not operate at the expense of due process.\textsuperscript{29}

The Inter-American Court’s characterization of children as individuals entitled to full rights is consistent with worldwide trends in human rights discourse. The CRC “reflects a new vision of the child” in which each child is an individual “with rights and responsibilities appropriate to his or her age and stage of development.”\textsuperscript{30} As the Inter-American Court concluded, countries’ responsibility to protect children paternally does not overcome children’s due process protections against government intervention.

\textbf{Four Things Juvenile Defenders Can Do}

\begin{itemize}
  \item Cite international law
  \item Litigate in the Inter-American system
  \item Contribute to shadow or alternative reports to treaty monitoring committees
  \item Support US ratification of the Convention on the Rights of the Child
\end{itemize}

\textit{Cite international law}

Although the US Supreme Court did not rely on human rights law to invalidate the juvenile death penalty, it did recognize international law as a “respected and significant” influence.\textsuperscript{31} It may seem futile to cite international law in your local juvenile court, but unless these issues are preserved, they cannot be heard on appeal. Citing human rights laws routinely will habituate courts to these important principles and could set the stage for an influential appellate decision.

\textit{Litigate in the Inter-American system}

Individual petitioners and organizations may submit complaints to the Inter-American Commission on Human Rights, located in Washington, DC. A complaint against the United States must allege a violation of the American Declaration of the Rights and Duties of Man, because the US has not yet ratified other major instruments in the Inter-American legal system. The petitioner must file at the Commission within six months of exhausting remedies available through domestic law. For instructions on how to submit a petition, see \textit{Human Rights: How to Present Petitions in the Inter-American System}, available from the website of the Inter-American Commission on Human Rights (www.iachr.org).

\textit{Contribute to a shadow report}

Nongovernmental advocacy groups frequently file “shadow” or alternative reports alongside state parties’ submissions to human rights monitoring committees. The US is required to report periodically on its implementation of the International Covenant on Civil and Political Rights (ICCPR). Information on shadow reports submitted under the CRC can be found at the website of the Child Rights Information Network, www.crin.org.

\textit{Support US ratification of the Convention on the Rights of the Child}

The US and Somalia are the only countries in the world that have not ratified the Convention on the Rights of the Child (CRC), and Somalia is considered unable to ratify because it lacks an organized government.\textsuperscript{32} Ratification of the CRC would represent a significant advancement of children’s human rights in the US and make more legal tools available to children’s advocates. You can learn more about or join the nationwide campaign for ratification at www.childrightscampaign.org.

\textit{Key Documents}

The full text and status of these documents can be found on the websites of the UN High Commissioner for Human Rights (www.unhchr.ch) or the Inter-American Commission on Human Rights (www.cidh.org).

\textbf{Declarations}

\begin{itemize}
  \item United Nations Declaration of the Rights of the Child (1959)
  \item American Declaration of the Rights and Duties of Man (1948)
\end{itemize}

\textbf{Treaties}

\begin{itemize}
  \item International Covenant on Civil and Political Rights (ICCPR) - Ratified by the United States in 1992
\end{itemize}
INTERNATIONAL HUMAN RIGHTS (continued from page 11)

American Convention on Human Rights - Signed but not ratified by the United States
United Nations Convention on the Rights of the Child (CRC) - Signed but not ratified by the United States

Advisory Rules adopted by UN Resolution
Rules for the Protection of Juveniles Deprived of their Liberty (1990)

The National Juvenile Defender Center (NJDC) provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

www.njdc.info

Endnotes:
6 Id.
8 Id. ¶ 85.
16 Id.
18 The Queen v. C.D., 2005 SCC 78.
20 Id. at 1198, 1200.
21 Id. at 1200.
22 Id.
24 See, e.g., Convention on the Rights of the Child arts. 3(a), 20, 37(a); Beijing Rules 14.2
26 Id. ¶ 3.
27 Id. ¶ 2 (emphasis added).
28 Id. at Conclusion 10.
29 Id. at Conclusion 13.

For assistance in starting a children’s law project visit
http://www.abanet.org/litigation/committees/childrights/
CHILDREN NAVIGATING (continued from page 1)

Sadly, Marisa’s story is all too common an experience for immigrant children newly arriving in the country. Annually thousands of children come to the United States after fleeing their home countries due to the violence they witness or experience. Many suffered persecution on account of their gender, religion or political opinions. U.S. laws may offer protections to Marisa, but how can she receive these protections without an attorney to help her navigate the complexities of immigration law and procedure?

Unlike in state juvenile delinquency or child welfare proceedings which often provide for government-paid attorneys or guardians at litem to represent children, in immigration court proceedings there is no right to government-paid counsel for adult or child. Immigrant children often find themselves making decisions to return to unsafe conditions in their home country without knowing that they have legal protections that would allow them to stay. Many never realize that they have the right to a full and fair hearing before a judge. No child should make a decision of this magnitude on his or her own. Across the country, non-profits and law school clinics are attempting to meet the legal needs of immigrant children, but funding cuts and the sheer volume of need is insurmountable.

In 2005, the U.S. Committee for Refugees & Immigrants (USCRI) established the National Center for Refugee & Immigrant Children (Center) to meet the legal needs of children like Marisa. The Center’s child clients hail from over 35 countries around the world with the great majority coming from El Salvador, Guatemala and Honduras. To date, the Center has matched more than 350 children with volunteer attorneys in over 30 states across the country. With the Center’s assistance and its national network of immigration mentors, many more children will have an advocate by their side to ensure that their voices are heard in immigration court.

The Center’s Work

The Center regularly holds pro bono training sessions in cities nationwide to educate volunteer attorneys on the basics of immigration law, how to work with children from different cultures, and how to handle different kinds of legal cases.

For most pro bono attorneys, the training serves as a starting point as this is likely the first immigrant child that they will represent. The Center works with the American Immigration Lawyers Association (AILA) to match these volunteer attorneys with experienced immigration practitioners who can provide the local, technical and jurisdictional knowledge required for each individual case. In addition, the Center provides attorneys with supplemental online resources, including training and reference materials, as well as sample briefs and research, in order to ensure that the attorneys with whom the Center works are equipped with the necessary materials and knowledge to represent their child clients.

The Center strives to find an attorney for every child regardless of the merits of their case. Many of the children may be eligible for asylum because they fear that they will be persecuted if they return to their home country. Close to one-third of the children referred to the Center have suffered abuse, neglect or abandonment, possibly qualifying them for Special Immigrant Juvenile Status (SIJS) and a green card. SIJS cases require that the attorney file an application with the federal immigration agencies as well as state court action in the appropriate juvenile, family or probate court. While SIJS cases are demanding, they are also among the most compelling and fulfilling for pro bono attorneys.

Join the Center’s Volunteer Pool!

The Center works with attorneys at law firms of any size including solo practitioners and non-profit legal service providers. Lawyers can volunteer or become a mentor by signing up at www.refugees.org/nationalcenter. The Center keeps volunteers informed of future training opportunities and contacts them when there is a child in need of representation in their area.

The Center urgently needs pro bono attorneys who have knowledge of family or juvenile law who will represent a child or mentor other attorneys. An attorney who represents an SIJS-eligible child may need to enter both federal immigration court and the local juvenile, family, or probate court, depending on which court is the best mechanism to go through the guardianship process. Mentoring could involve accompanying the pro bono attorney to court or answering questions via telephone.

The cases vary from a few hours of intake and a basic legal procedure such as negotiating a voluntary return to a home country, to a year or more of representation in a full asylum hearing. Along the way, volunteers
Looking out for the Best Interests of Unaccompanied Immigrant Children in the U.S. By Maria Woltjen

The children come to the United States without their parents from all corners of the world: Central America, Mexico, China, India, Romania, Somalia. They’re fleeing political upheaval, extreme poverty, child labor, or abusive homes. In some cases they’ve come to be reunited with family members who preceded them here. The children are transported by traffickers or by hired smugglers, or make the dangerous journeys on their own. Sometimes they’re too young to understand why they’ve been sent to the United States. In 2005, 7,787 unaccompanied immigrant children were taken into custody by U.S. immigration authorities, up 25% from the previous year. They were caught at the borders and at the airports, and then sent to shelters throughout the country where their stay can range from a month to more than a year.

In 2004, the United States Office of Refugee Resettlement provided funding to build a model project to provide guardians ad litem or Child Advocates for unaccompanied immigrant children. The Immigrant Children’s Advocacy Project, now based at the Legal Clinic at the University of Chicago Law School, trains and supervises bilingual law students and lay volunteers who serve as Child Advocates for unaccompanied immigrant children while they are subject to immigration removal proceedings. The Child Advocates are required to be bilingual in the children’s languages (Spanish, Mandarin, Hindi or Gujarati). The Advocates’ role is to figure out what brought the children to the United States, help identify their eligibility for asylum or special protective visas, and advocate for their best interests while they are separated from their families and subject to immigration removal proceedings.

Background

When unaccompanied immigrant children are apprehended by immigration authorities (at the border, airports or sea ports), they are placed in deportation proceedings before the Immigration Court and referred to the Office of Refugee Resettlement for shelter and care. The Office of Refugee Resettlement places children in shelters and foster homes throughout the United States and requires consideration of the child’s interests in all care and custody decisions. Current U.S. immigration law, however, generally does not require consideration of the best interests of the child in decisions regarding whether a child will be granted asylum or deported. Unlike state child protection courts, which are designed to accommodate children, immigration proceedings are adversarial and require that children meet the same procedural, evidentiary and legal rules as adults. Yet, children often don’t understand how their experiences relate to a possible application for asylum or other immigration protection for which they may be eligible. Or they guard their information — many children have been told repeatedly by adults, family or traffickers — to keep their stories secret.

International standards set forth in the Convention on the Rights of the Child and United Nations High Commissioner for Refugees (UNHCR) Guidelines have long affirmed that children deprived of their families should have the special protection and assistance of guardians ad litem.²

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CHILDREN NAVIGATING (continued from page 13)

have the opportunity to hone their interviewing techniques, build trust with the client, appear in court before an immigration judge, conduct legal research, write briefs, make creative arguments and best of all, give hope to a vulnerable child.

The Center has secured pro bono counsel for Marisa, but there are many other children anxiously waiting for legal counsel to represent them. The children’s plight will touch your heart, and you will be amazed at the difference you will make in their lives!

To volunteer to help a child or to learn more about the Center and its work, please visit: www.refugees.org/nationalcenter. Volunteers need not have any background in immigration law.

*Child’s name has been changed.

Adriana Ysern, formerly an Equal Justice Works Fellow & Children’s Attorney at the Midwest Immigrant & Human Rights Center, a program of Heartland Alliance is now the Senior Immigration Program Officer for the National Center for Refugee & Immigrant Children, a program of the U.S. Committee for Refugees & Immigrants (USCRI).
LOOKING OUT FOR THE BEST INTERESTS… (continued from page 14)

Yet until now few countries have taken affirmative steps to establish such programs. The Immigrant Children’s Advocacy Project, commissioned by the Office of Refugee Resettlement, grew out of proposed legislation, the Unaccompanied Alien Child Protection Act, which would provide for the appointment of Child Advocates for unaccompanied immigrant children in immigration proceedings.

Best Interests

The Child Advocate’s role is to identify and represent the child’s best interests according to the principle set forth in the Convention on the Rights of the Child (CRC) which requires states to take into account “the best interests of the child” in all actions concerning children including asylum and child protection matters. It is important to understand the distinction between application of the best interests standard in domestic child protection cases and immigration proceedings involving unaccompanied immigrant children, in which, under current U.S. law, best interests is not a factor to be considered by immigration judges. In the domestic context, the best interests principle was originally developed to guide judicial decisions on removing a child from parents who had been determined unfit, or in custody disputes in divorce cases. Domestic child protection judges only get to the best interests determination for dispositional purposes after a finding of abuse, neglect or dependency.

There is a recognition, however, that unaccompanied immigrant children are particularly vulnerable and that decisions made on their behalf should take into consideration their well-being and safety. The children often face complex decisions and while in federal custody, they have no relatives or family friends nearby to provide emotional support and guidance. For general decisions affecting unaccompanied children, the CRC requires best interests be a primary consideration among other factors to be weighed. The Child Advocates are asked to advocate for the child’s general well-being with whomever the situation necessitates.

For any decision fundamentally impacting the child’s life, such as separation from parents against their will, placement in foster care, or return to the child’s country of origin, the CRC requires that best interests be the determining factor, while at the same time, expressly requiring the child’s views be considered. In such cases, the Child Advocate is asked to develop a formal, written best interest recommendation. The written report recounts the parents’ and child’s wishes and details factual information about why the child has come to the United States, his or her life before apprehension, conditions in the child’s home country, and any other relevant information. The best interest report, which includes recommendations supported by the factual information detailed in the report, is provided to the child’s attorney (assuming the child is represented) and the Office of Refugee Resettlement.

Role of Child Advocates

The Immigrant Children’s Advocacy Project, which was launched in 2004, has provided Child Advocates to more than 100 unaccompanied immigrant children. The Advocates’ role differs case-by-case, depending on the age and maturity of the child, the complexity of the situation and whether the child is eligible for immigration relief. The following case studies illustrate the role of Child Advocates.

1. The Child Advocate helps untangle the child’s story.

Advocates often serve as a bridge between the child and his attorney since they develop relationships with the children and help sort out their stories. In some cases, the Advocate is asked to ferret out the reasons why a child came to the United States and what, if anything, he or she might return to.

Nabil was 16 years old when he arrived as a stowaway from North Africa and was apprehended by U.S. immigration authorities. When first interviewed by the authorities, Nabil said that he could return safely to his home country. He persisted in denying any fear of returning to his country when later interviewed by shelter staff and the legal services attorney. After several visits with Nabil, the assigned Child Advocate, an immigrant who spoke the same native dialect, discovered Nabil had been living on the streets in North Africa, abandoned by his family, and subject to almost daily torment by the police. Nabil resisted telling anyone about his life because he was afraid that if deported, he’d be punished for having criticized the government. The Advocate encouraged Nabil to tell his story to his attorney who sought a second interview by immigration authorities. This time, accompanied by his Advocate, Nabil recounted what had happened and was found to have a credible fear of returning to his home country. The Advocate served as a

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critical member of Nabil’s team of pro bono attorneys, helping Nabil articulate the suffering he experienced, and helping counsel understand the country from which he fled. In March 2006, Nabil was granted asylum.

2. The Child Advocate ensures the child has legal representation.

In some cases, private Advocates who have been retained by traffickers file appearances on the children’s behalf, yet the attorneys have no intention of providing services beyond securing their release from detention and delivering them to a predetermined labor setting.

When he arrived at the International Children’s Center in Chicago, it was clear to his case manager that Xie Min, a 16-year-old boy from China, had a mental disability. When an Advocate was assigned, she learned that while living in foster care in Seattle, Xie had been required to participate in his asylum hearing pro se and without any adult to accompany him. The Advocate obtained a transcript of the immigration proceeding in which the boy had given nonsensical answers to the government attorney’s questions; nevertheless, the Immigration Judge had proceeded with the hearing and denied relief. The Advocate contacted the attorney of record who told her his only goal had been to get the boy released from custody and that he had no plans to prepare an appellate brief, which was due the next day. The Advocate contacted the National Immigrant Justice Center (NIJC) which found pro bono counsel to prepare and file a motion to reopen with the Board of Immigration Appeals; the motion was granted and the case has since been remanded to the Immigration Court. The Advocate has continued to be involved with Xie and calls him regularly and facilitates communication with his pro bono attorney.

3. The Advocate accompanies the child to Immigration Court and ensures the child’s participation in the proceedings.

Child Advocates accompany the children to court and often play a significant role in ensuring that the children are as comfortable as possible in telling their story in the formal court setting.

Ming Xia, a diminutive girl from China, was 17 when she arrived at the International Children’s Center. Despite her chronological age, she was developmentally more like a young girl of 10 or 11 years old. The shelter caseworker suspected that Ming Xia’s private attorney was hired by the trafficker. The Advocate spent time with Ming explaining the role of an attorney and the option of choosing to be represented by a pro bono attorney. Ming

requested a pro bono attorney through NLJC. The Advocate put Ming’s story in context for the pro bono attorney, helped prepare Ming for her asylum hearing and accompanied her to court. The Immigration Judge was very aggressive and the Advocate, who sat by Ming’s side, helped her maintain her composure throughout the grueling afternoon. The judge granted relief and Ming is now living with a foster family and attending high school, safe from the traffickers.

4. The Advocate provides critical advice to attorneys regarding the child’s best interests.

Particularly for younger children or complex cases, Child Advocates provide critical advice to attorneys regarding best interests.

Susana and Ramon Lopez were 8- and 10-year-old siblings who were taken into custody at the U.S.-Mexico border. The children had traveled with a smuggler from Honduras to be reunited with their family living in the United States. The Advocate spent a significant amount of time with the children, getting to know them and learning about their lives in Honduras. The Advocate wrote a letter to the attorney detailing the children’s history, citing relevant provisions of the Convention on the Rights of the Child to support the request that they be released to their family in the United States. The request was ultimately granted by immigration authorities and the children were reunited with their family.

5. After children are released, the Advocate ensures they continue to receive services such as legal representation.

When children are released from custody to live with family members, the Child Advocate plays a significant

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LOOKING OUT FOR THE BEST INTERESTS… (continued from page 16)

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Endnotes:
1. In domestic criminal and child protection law, children have long been accorded separate consideration in recognition of their vulnerability and need for protection. With the exception of special immigrant juvenile visas, the Immigration and Nationality Act (INA) does not incorporate best interest considerations into decisions in cases in which children are involved. Immigration and Nationality Act, 8 U.S.C. Sec. 1101 (2000) There is a limited exception for children who apply for SIJS or Special Immigrant Juvenile Status (for child victims of abuse, abandonment or neglect), in which the federal government consents to state court jurisdiction so that a juvenile court judge can make a determination, inter alia, of whether it would not be in the child’s best interest to be returned to his or her country of origin.
3. S. 119 The Unaccompanied Alien Child Protection Act passed the Senate by unanimous consent on December 22, 2005. See also the American Bar Association Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States, August 2004.
6. Pseudonyms have been used to protect the children’s identities.

Conclusion

Unaccompanied immigrant children are among the most vulnerable. Some have been sent by parents in the hope that they’ll find a better life here. Some have fled political persecution. Some have escaped a forced marriage or an abusive home. Some have been orphaned. But what they all have in common is their need for protection and to have someone to advocate on their behalf. During the next year, the Immigrant Children’s Advocacy Project plans to expand services to provide Child Advocates for children released to live with sponsors, and to develop a Child Advocate program in Texas, where significant numbers of children are in federal custody.

Visit the Section of Litigation website specifically for young lawyers at: http://www.abanet.org/litigation/younglawyers/home.html
A ten-year-old girl said good bye to her grandparents and boarded a plane in Asia. After several years apart, she was finally flying to America to reunite with her parents in Washington, D.C. Her parents had saved enough money to pay for her transit and to support her in America. She switched planes in Korea and entered the U.S. in San Francisco, but she missed her flight to Washington. Customs and immigration officials found a problem with the girl’s documentation and a week later she celebrated her eleventh birthday in a Chicago shelter, separated from family members.

In the same building that day, a sixteen-year-old boy explained how he ended up in Chicago. Back home in Honduras he worked on a coffee plantation, but at the end of each day as he returned home he was threatened by street gangs causing him to fear for his life. He fled Honduras with a plan to meet up with his cousin and find work in New York City. Via car and train he headed north to the U.S. and Mexican border and he crossed over into Texas hiding in the trunk of a car. He ended up wandering in the desert for four days until he came upon an abandoned truck in which he took shelter. He awoke to the sound of a helicopter hovering above and was quickly seized by border control agents.

The stories of these two children are just a sample of the diverse and difficult paths of unaccompanied immigrant children stranded in the U.S. and held in federal custody. These immigrant children, found in the U.S. without their parents and picked up by the Department of Homeland Security (DHS), are sent to various placements across the country until they are released or return home. Some children are released to live with relatives while their immigration claims are pending. For children who have a legal claim and no relatives in the U.S., foster care is sometimes an option. Some children have no choice but to return to their countries of origin. And some children want to return home but must await the approval of the Immigration Court before they’re allowed to travel.

The ordeals these children endure are difficult to imagine. First, they’re traveling in a foreign country where they’ve never been before and they don’t speak the language. They are alone, without parents or any known acquaintances. Some of the children are caught at airports, while some are found wandering in the desert or in the streets. Suddenly they’re picked up by immigration officials and sent to centers across the U.S. For some children, being caught by DHS impedes if not ruins their chances of meeting up with family members or working to earn money to send home. On the other hand, many of the children are subjects of human trafficking and being picked up by the DHS may save them from being forced into slave-like labor or the illicit sex trade.

Initially, the children are unaware of why they’re being held in custody. They find themselves seemingly randomly in a Chicago shelter when they planned to arrive in another destination such as Washington or New York. For their safety, the children are not allowed to leave the centers without supervision. Ironically, many of them have come to America in search of freedom, but instead find themselves in custody because they entered the country without permission. Unfortunately, many of the children’s family members are also in the U.S. illegally and fear deportation if they come forward to secure their children’s release.

As a summer associate at Baker & McKenzie, I had the opportunity to spend a day at the International Children’s Center of Heartland Alliance/Heartland Human Care Services (“ICC”), a custodial shelter for unaccompanied immigrant children in Chicago. The shelter is contracted by the Department of Health & Human Services Office of Refugee Resettlement and is licensed by the Illinois Department of Children and Family Services to provide up to fifty-four beds for unaccompanied immigrant children.

My summer associate class went to the ICC to assist with the “Know Your Rights” session and to provide pro bono legal services including legal intake and screening for the center’s new arrivals. We interviewed children from Latin America and China in their native languages – fortunately several of my fellow summer associates are Spanish and Mandarin speakers although the center has access to translators – to try to determine why they came to the U.S. and to help figure out whether they had a claim for relief from removal.

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Under the Flores Settlement Agreement reached in 1996 as a result of a class action suit brought against the INS, unaccompanied immigrant children have rights to legal assistance, healthcare, education and recreation, shelter, privacy, and the opportunity to practice their language, culture, and religion (Flores v. Reno Stipulated Settlement Agreement, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997). The ICC offers the services and shelter necessary to accord these children the personal dignity that they deserve. The ICC does an excellent job of making the children feel welcome in the U.S. The children are provided with healthy food, clothing, and a place to live while they go through the process of gaining approval for reuniting with their families or determining whether they have a legal right to remain in the U.S. The children study math, take classes in their native languages, and learn English.

Children at the ICC with special circumstances are provided with guardians ad litem (Child Advocates) through a pilot project commissioned by ORR. The Immigrant Children’s Advocacy Project, which has been housed by Baker & McKenzie since 2004, assigns bilingual volunteers to serve as Child Advocates for individual children. (For more about this program, see Looking out for the Best Interests of Unaccompanied Immigrant Children in the U.S., page 14)

Pro bono legal services are necessary to ensure that each child receives his or her best possible outcome. For many children, it’s in their best interests to return to their home countries. However, some children have a right to remain in the U.S., and lawyers play a key role in securing that right. Legal representation is not considered a right in immigration proceedings. In Chicago, the National Immigrant Justice Center recruits, trains and mentors pro bono attorneys who represent the children at the ICC. Children in placements in other parts of the country are not as fortunate – many of the children go before immigration judges with limited English skills and almost no chance of gaining permission to remain in the U.S. The children need dedicated pro bono attorneys to plead their cases and protect their interests.

The children have six paths to legal residence in the U.S. First, children may receive asylum if they can prove that they are victims of persecution or possess a well-founded fear of persecution. Second, if a child is declared dependent on a juvenile court based on abuse, neglect, or abandonment by the parents, the court may grant the child special immigrant juvenile status. Third, a child may qualify for a T-visa if he or she is the victim of a severe form of trafficking, is in U.S. because of trafficking, agrees to comply with requests for assistance in the prosecution of acts of trafficking, and faces extreme hardship upon return to his or her home country. Fourth, U-visas are given to children who have been victims of criminal activity and can offer help to law enforcement. Fifth, children with parents who are U.S. citizens or legal permanent residents of the U.S. may stay if their parents file a successful petition for residency. Finally, some of the children may become U.S. citizens if their parents or grandparents are U.S. citizens – some immigrant children are U.S. citizens but do not realize it.

Children who qualify to stay in the U.S. for one of the above reasons have a much better chance of proving their case with the help of a lawyer. The day we spent at the ICC brought the plight of these children to our attention and demonstrated another important and noble pro bono undertaking for lawyers.

Thomas J. Dammrich II is a law student at Northwestern University School of Law.

If you run a children’s law program:

We are currently updating our ABA Directory of Children’s Law Programs (maintained on our website at: http://www.abanet.org/litigation/committees/childrights/). If your program is not currently listed, please let us know so that we can make the update. Contact Catherine Krebs at catherinekrebs@prodigy.net. Thanks!
Where can you find:

A listing of national and local children’s law trainings;  
Case notes on children’s law cases; and 
A listing of recently passed legislation that affects children?

The Children’s Rights Litigation Committee website:  
http://www.abanet.org/litigation/committees/childrights/

We are always adding new content. Bookmark this site and visit in regularly!