

5-1-2008

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Recommended Citation

Uram, Justina (2008) "*Les Enfants de Mauvais Souvenir: Conceived through Violence, Born as Outcasts, Living in Danger - Why Parentless and Orphaned Children of Rape Should Receive Refugee or Asylum Status,*" *Penn State International Law Review*: Vol. 26: No. 4, Article 6.

Available at: <http://elibrary.law.psu.edu/psilr/vol26/iss4/6>

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Les Enfants de Mauvais Souvenir: Conceived through Violence, Born as Outcasts, Living in Danger. Why Parentless and Orphaned Children of Rape Should Receive Refugee or Asylum Status

Justina Uram*

I. Introduction

Twelve-year old Claude Hope Muhayimana and his younger sister, eight-year old Claudine, live in a small housing project called the Village of Hope in Kigali, Rwanda.¹ They have no family except for their mother, Eugenia, who is dying of Acquired Immune Deficiency Syndrome (“AIDS”).² Last year, Claude began to wonder about the rest of his family, asking his mother, “Mama, why don’t we have a dad? Why don’t we have any aunties, uncles, cousins? Did they all die with Daddy?”³ Eugenia explains to her son that their family died in a war and his father is in heaven; she is not yet ready to share the truth about how

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1. Emily Wax, *Rwandans Are Struggling to Love Children of Hate*, WASH. POST, Mar. 28, 2004, at A1 <http://www.genocidewatch.org/RwandanAreStrugglingToLoveChildren%20Hate.htm> (recounting the Muhayimana family story); see U.N. PRATT ET AL., LIASON OFFICE, DEP’T OF PUB. AFFAIRS & RELIGIOUS LIBERTY, REMEMBERING RWANDA: WE ARE ALREADY DEAD (2004) [hereinafter REMEMBERING RWANDA], available at <http://parl.gc.adventist.org/documents/pdf/flyer.pdf>; see also Jonathan Clayton, *The Real Star of Hotel Rwanda*, TIMES (London), Apr. 4, 2004, available at <http://www.timesonline.co.uk/article/0,,3-1553831,00.html>.

2. Wax, *supra* note 1.

3. See REMEMBERING RWANDA, *supra* note 1 at 2.

Claude and his sister came into this world.⁴

During the holiday season, Claude becomes more inquisitive when he sees fellow classmates attending family parties and relatives bringing gifts to other students at his school.⁵ His mother, who is 5'9", weighs a mere ninety pounds as her disease worsens.⁶ Eugenia explains to a friend that she hopes to have the courage to tell Claude and Claudine where they came from before she dies.⁷ Eugenia, unlike many other mothers of *les enfants de mauvais souvenir*,⁸ is no longer ashamed of her children and has actually grown to love them.⁹

During the Rwandan genocide of 1994, Eugenia was in her early twenties and a student at the University of Goma in the Democratic Republic of Congo ("DRC").¹⁰ Before the end of the academic year, she returned to Rwanda for a short visit with her parents. During her weeklong visit, Hutu troops raided and destroyed her village, massacring Eugenia's entire family.¹¹

In return for her own life, Eugenia, who was a virgin at the time, was repeatedly gang-raped by the Hutu militia group.¹² She chillingly describes the number of militia members that raped her as "as many as ants."¹³ After becoming the militia's sex slave for three months, Eugenia became pregnant with Claude.¹⁴ Shortly thereafter, when Eugenia's captors fled to the DRC to escape Tutsi forces, one of the soldiers made Eugenia his "wife" and continued to rape her during her pregnancy with Claude.¹⁵ After giving birth to Claude, her captor rejected the baby, stating that he hated Claude because he resembled his mother.¹⁶ When Eugenia became pregnant again with Claudine, she and toddler Claude were able to escape the military on foot, walking from the DRC to Rwanda only to discover, upon her return, she was infected with AIDS.¹⁷

Eight years later, Eugenia is near death, and worries about the future of her children.¹⁸ Claude senses the tension and pretends to be the man

4. *Id.*

5. Wax, *supra* note 1.

6. *Id.*

7. *Id.*

8. Wax, *supra* note 1 (defining *les enfants de mauvais souvenir* as children of bad memories).

9. *Id.*

10. Clayton, *supra* note 1.

11. Wax, *supra* note 1.

12. *Id.*

13. *Id.*

14. Clayton, *supra* note 1.

15. Wax, *supra* note 1.

16. *See generally id.*

17. *Id.*

18. *See generally id.*

of the house by helping his mother cut firewood, carry bricks, and prepare tea for Eugenia in the evenings.¹⁹ He plays Congolese music and asks his mother to dance, which brings a smile to her face.²⁰ To Eugenia, Claude and Claudine appear healthy, but she fears they also have AIDS.²¹

Fortunately, Claude and Claudine live in the Village of Hope²² with other children of rape whose mothers have promised Eugenia they would finish raising her children when she dies.²³ For that reason, Claude and his sister are the lucky ones. However, thousands of other *enfants de mauvais souvenir* have either been killed, neglected, abandoned, or rejected by their mothers and communities.²⁴ Others stand to lose the only adult who cares for them because of the systematic spread of AIDS.²⁵ Even within the Village of Hope, other mothers struggle to love their children, such as Alphonsina Mutuze, who regularly beats her eight-year old son, Inkuba.²⁶ “Out of anger, [Alphonsina] tells Inkuba lies: ‘You are not even mine. I picked you from the trash.’”²⁷

Without an accepting family or community to raise and protect them, children of rape have a significant likelihood of becoming street children,²⁸ who are routinely physically, emotionally and sexually abused and forcibly recruited into militia groups and political demonstrations.²⁹ When and if these children attempt to escape from their homeland, they are placed in refugee camps with adults, which can be equally as dangerous as life on the streets.³⁰ Moreover, children of rape face nearly

19. Wax, *supra* note 1.

20. *Id.*

21. *Id.*

22. See *RWN At a Glance*, The Rwanda Women’s Network, <http://www.rwandawomennetwork.org> (last visited Mar. 17, 2008) (explaining that the Village of Hope at Kagugu, one of three core programs run by the Rwanda Women’s Network, helps to rehabilitate genocide victims, particularly widows, children-headed households, women victims of rape, and orphans).

23. See generally Wax, *supra* note 1.

24. *Id.*

25. *Id.*

26. Wax, *supra* note 1.

27. *Id.*

28. See generally Kathleen Kern, *Victims as Pariahs*, CHRISTIAN CENTURY, Jan. 24, 2004, available at http://www.findarticles.com/p/articles/mi_m1058/is_2_123/ai_n16133193 (“The children of rape who survive become pariahs. Many end up as street children in the cities—a phenomenon unknown before 1996.”).

29. *What Future? Street Children in the Democratic Republic of Congo*, HUMAN RIGHTS WATCH, Apr. 14, 2006, available at <http://hrw.org/photos/2006/drc/streetkids/>.

30. See generally, Forgotten Children of War, UNHCR, *Refugee Children: Guidelines on Protection and Care*, available at <http://www.hrw.org/reports/1999/guinea/guine997.htm> (“Children in all the refugee camps may face serious protection concerns at the hands of their caregivers including physical abuse, sexual abuse and exploitation, denial of food, hazardous labor exploitation, and denial of education. These

insurmountable difficulties when applying for refugee status, as most Western countries' immigration laws, including the United States, do not routinely accept parentless minors as refugees.³¹

There is no question that children are a highly vulnerable social group.³² More specifically, "unaccompanied refugee children seeking asylum are some of the most vulnerable people in the world."³³ According to the United Nations High Commissioner for Refugees ("UNHCR"), "[r]efugee children comprise approximately one-half of the world's refugee population."³⁴ The 1959 United Nations Declaration on the Rights of the Child recognizes that children must be the first to receive relief and protection in times of distress.³⁵ Additionally, Article 22 of the 1990 Convention on the Rights of the Child states that refugee children, whether accompanied or unaccompanied by an adult, must receive appropriate protection and humanitarian assistance.³⁶ Unfortunately, for many refugee children, such as Congolese and Rwandan children of rape, relief from persecution and distress is often impossible.³⁷ Circumstances of *les enfants de mauvais souvenir* are arguably most bleak, as they face their persecution and future threats all alone.³⁸ Those who attempt to flee their countries as unaccompanied refugee minors are particularly at risk for abuse in refugee camps and detention centers because they do not have an adult to protect them.³⁹

Although no one can deny that *les enfants de mauvais souvenir* are subject to harassment, abuse, distress, and disease, and are constantly surrounded by the haunting images of their dying mothers and family

concerns are particularly acute for children who have become separated from their parents during the war, commonly referred to as 'separated children' and 'unaccompanied minors.'").

31. See generally Monica Boyd, Statistics Canada, Canada's Refugee Flows: Gender Inequality, <http://www.statcan.ca/english/kits/social/refugees.htm> (last visited Mar. 17, 2008).

32. See generally HUMAN RIGHTS WATCH, CHILDREN'S RIGHTS WORLD REPORT 2002, at 21 (2002), available at <http://www.hrw.org/wr2k2/pdf/children.pdf> (explaining that "refugee and migrant children, among the world's most vulnerable populations, were at particular risk of abuse when they were separated from their parents and other caregivers") [hereinafter CHILDREN'S RIGHTS].

33. S. Russell, *Unaccompanied Refugee Children in the United Kingdom*, 11 OXFORD INT'L J. OF REFUGEE L. 1999, <http://ijrl.oxfordjournals.org/cgi/content/abstract/11/1/126>.

34. United Nations High Commissioner for Refugees [UNHCR], Note on Refugee Children, ¶ 1, U.N. Doc. EC/SCP/46 (July 9, 1987) [hereinafter Note on Refugee Children].

35. *Id.*

36. U.N. Convention on the Rights of the Child, G.A. Res. 44/25, art. 7 (Nov. 20, 1989).

37. *Id.*

38. *Id.*

39. See generally CHILDREN'S RIGHTS, *supra* note 32.

members, their situations often fail to meet United States (“U.S.”) standards for refugee and asylum status.⁴⁰ Claude Hope is a lucky child of rape because when his mother dies, both he and his sister will be cared for by the Village of Hope and will be less likely to face abduction, abuse, or forced conscription.⁴¹ However, other countless and nameless children of rape continue to suffer unimaginably horrific fates. For the Rwandan child who disappears into the cover of night to flee to Tanzania for help,⁴² or for the child who leaves the DRC to trek across her country to Congo Brazzaville,⁴³ little relief awaits at the refugee camp in which they will find themselves upon arrival.⁴⁴

Denying rejected, parentless children refugee status due to mere technicalities in current U.S. immigration and refugee law and our refusal to ratify the Convention on the Rights of the Child is morally irresponsible. This apparent omission in our law runs contrary to the very framework and founding principles upon which this country originated. Because these children are an extremely sympathetic class, they should be given the chance to qualify for refugee or asylum status in the U.S. under standards specifically aimed at protecting children and in accordance with the applicable United Nations conventions for children.

This Comment outlines the unique plight of children of rape and the brutal history of rape as a war tactic. It also focuses on the difficulties that mothers and children of rape face in their communities. This Comment also tackles the underlying issues of the systematic spread of HIV/AIDS and how it affects families, the history of the Rwandan genocide and Congolese conflicts. Following an explanation of the special challenges that children of rape must overcome to be considered for refugee status in the U.S., a brief explanation of current U.S. refugee and asylum law, as well as a Senate bill⁴⁵ that introduced the Unaccompanied Alien Child Protection Act of 2005, will be discussed. The Bill, passed by both the U.S. House of Representatives as H.R.1172

40. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 944 (4th ed. 2005) (indicating that “children also face . . . special problems in demonstrating even adult-style persecution”).

41. See generally Wax, *supra* note 1.

42. WFP Emergency Report, UNITED NATIONS WORLD FOOD PROGRAMME, Jan. 1998, available at <http://iys.cidi.org/humanitarian/wfp/98a/0006.html> (reporting that, in 1998, 32,500 Congolese refugees were in refugee camps in the Kigoma region of Tanzania, which borders DRC to the east).

43. United Nations Weekly Roundup for Central and Eastern Africa, Office for the Coordination of Humanitarian Affairs, Feb. 16, 2001, <http://iys.cidi.org/humanitarian/irin/ceafrika/01a/ix16.html> (explaining that 100,000 refugees from the DRC crossed into the neighboring Congo Brazzaville in 2001) (last visited Apr. 22, 2008).

44. See generally *id.*

45. See Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005).

and the U.S. Senate as S.119, would have brought U.S. policies and procedures for parentless refugee and asylum seekers in closer alignment with the UNHCR Guidelines had the measure been signed into law.⁴⁶

After laying this foundation, this Comment sets forth a proposal for statutory changes to the current Immigration and Nationality Act,⁴⁷ providing an exception for parentless children seeking refugee or asylum status. Specifically, unlike adult applicants, refugee children should not be required to prove a “well-founded fear of persecution,”⁴⁸ as a child’s mind is often incapable of grasping this concept. Finally, this Comment will recommend adding the children’s advocacy concept of “best interest of the child”⁴⁹ to a proposed test for child refugees. In particular, this recommendation suggests that in immigration proceedings, judges appoint a *guardian ad litem* equivalent to assess the child’s needs, determine the best interest of the child, and advocate for their best interest when a parentless or orphaned child applies for refugee or asylum status.

II. Background

It is important to first understand the silent plight of *les enfants de mauvais souvenir*. When examining the depths of a refugee or asylum seeker’s persecution or potential persecution, it is essential to acquaint oneself with the current status of the applicant’s country of origin, history of his or her experience, and cultural nuances that shape local communities. Therefore, the history of rape in modern armed conflict, particularly in the Central African countries of the DRC and Rwanda, will be examined followed by an explanation of the difficulties *les enfants de mauvais souvenir* face in their communities.

A. Rape as a War Tactic in Modern Armed Conflict

Throughout the world, sexual violence is used against women as a tactic of war.⁵⁰ Extremist groups, militaries, and paramilitaries use this

46. *Id.* See also Unaccompanied Alien Child Protection Act of 2007, S. 884, 110th Cong. (2007) available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-844> (explaining that Unaccompanied Alien Child Protection Act of 2005 was re-introduced to the Senate by Sen. Dianne Feinstein on Mar. 12, 2007 and has been referred the Senate Committee on the Judiciary).

47. See Immigration Nationality Act § 101(a)(42)(A) (1952).

48. *Id.* (defining the term “refugee” and the four elements that must be satisfied to qualify for such status).

49. BLACK’S LAW DICTIONARY, (8th ed., Thomson West 2004) at 170 (explaining that the best interest of the child concept, used in both American and international family law, refers to the determination of what arrangements would be to a child’s greatest benefit).

50. Human Rights Watch Women’s Rights Project, *Shattered Lives: Sexual Violence*

form of terror to threaten, intimidate, and disgrace targeted communities and ethnic groups to achieve a particular political end.⁵¹ “The humiliation, pain and terror inflicted by the rapist is meant to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part.”⁵²

Although the Fourth Geneva Convention of 1949 specifies, “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault,”⁵³ mass rape continues to be a widely used weapon in modern-day warfare, as seen in war-torn African nations.⁵⁴ “Th[at] violence may take gender-specific forms, like sexual mutilation, forced pregnancy, rape or sexual slavery.”⁵⁵

Armed conflict rape can typically be placed into one of four categories: (1) *genocidal rape*, a tool aimed at annihilating an ethnic or political group, as utilized in Serbian rape camps during the Bosnia-Herzegovina conflict;⁵⁶ (2) *political rape*, used to punish political opponents of regimes, such as the rape of women civilians by paramilitary forces in Colombia;⁵⁷ (3) *opportunistic rape*, in which soldiers run amok and resort to rape in areas of intermittent civil unrest, as committed by the Japanese military in the 1930s during the Nanjing Massacre;⁵⁸ and (4) *forced concubinage*, which involves kidnapping typically young girls for use as sex slaves for soldiers, a common tactic employed by military forces in the African countries of Liberia, Sudan, and Cote d’Ivoire.⁵⁹ In addition to the categories listed above, reports also suggest that soldiers in war-torn African nations target the youngest of girls because they believe raping virgins may provide a protection or

During the Rwandan Genocide and Its Aftermath, HUM. RTS. WATCH, Sept. 1996, available at <http://www.hrw.org/reports/1996/Rwanda.htm> [hereinafter *Shattered Lives*].

51. *Id.*

52. *Id.*

53. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3365, 75 U.N.T.S. 973.

54. *Id.*

55. *Shattered Lives*, *supra* note 50.

56. See Catharine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 HARV. WOMEN’S L.J. 5 (1994).

57. AMNESTY INT’L, COLOMBIA: “SCARRED BODIES, HIDDEN CRIMES”: SEXUAL VIOLENCE AGAINST WOMEN IN THE ARMED CONFLICT (2004), available at [http://web.amnesty.org/library/pdf/AMR230402004ENGLISH/\\$File/AMR2304004.pdf](http://web.amnesty.org/library/pdf/AMR230402004ENGLISH/$File/AMR2304004.pdf).

58. Gendercide Watch, Case Study: The Nanjing Massacre, 1937-38, http://www.gendercide.org/case_nanking.html (last visited Mar. 11, 2008) (explaining massacre of Nanjing, also referenced as “The Rape of Nanjing,” where Japanese invading forces savagely gang-raped Chinese men and women).

59. See ENCYCLOPEDIA OF RAPE (Merrill D. Smith ed., 2004), <http://freebooksource.com/?p=2611>.

cure from HIV/AIDS.⁶⁰ In the DRC, rape is a threat to women of all ages as victims range from as young as two-years old.⁶¹

B. *Brief History Linking the Rwandan Genocide to the DRC Conflict*

The DRC and Rwanda touch on the DRC's easternmost border.⁶² While the DRC dwarfs Rwanda in size, Rwanda's political and ethnic conflicts in the mid-1990s greatly affected the political regime of the DRC and vice versa.⁶³ Striking features of both countries include the spillage of armed conflicts, transitional governments and militaries, ethnic and political conflicts, the systematic AIDS spread by rebel militia groups, and vast numbers of unwanted and orphaned children.⁶⁴ Moreover, while Rwanda is notable for the Rwandan Genocide of 1994 where Hutu militias killed 800,000 Rwandans in one hundred days,⁶⁵ the DRC's civil war "carries the tragic label of the deadliest war in the world today," killing 4.7 million.⁶⁶

1. The Congo's Tumultuous Past

Before colonization, the Congo was a wealthy organization of kingdoms in the Great Lakes region of Central Africa.⁶⁷ Under the successful Kingdom of Kongo (ruling from the later 14th to mid 17th century), and later the Luba Empire (ruling from the 17th century forward),⁶⁸ the region was known for artistic achievements, particularly in sculpture, praise poetry and polyphonic music, and was a highly

60. FLORENCE TERCIER HOLST-RONESS, AFR. CHILD POLICY FORUM, THE SECOND INTERNATIONAL POLICY CONFERENCE ON THE AFRICAN CHILD: VIOLENCE AGAINST GIRLS IN AFRICA DURING ARMED CONFLICT AND CRISES (Antoinette Powell ed., 2006), available at http://www.africanchildforum.org/Documents/IPC_Red%20Cross.pdf#search=%22%22children%20of%20rape%22%2Bcongo%22 at 9.

61. Jan Goodwin, *Silence = Rape*, THE NATION, Mar. 8, 2004, available at <http://www.thenation.com/docprint.mhtml?i=20040308&s=goodwin>.

62. See generally *Democratic Republic of Congo, Rwandese—Controlled East: Devastating Human Toll*, AMNESTY INTERNATIONAL, June 19, 2001 available at <http://web.amnesty.org/library/index/engAFR620112001!Open>.

63. *Id.* ("[S]ince August 1998, Rwandese government forces have occupied an area of the Democratic Republic of Congo (DRC, formerly Zaire) equivalent to 16 times the size of Rwanda itself.").

64. *Id.*

65. *Rwanda: How the Genocide Happened*, BBC NEWS, Apr. 1, 2004, <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm> [hereinafter *Rwandan Genocide*].

66. Anneke Van Woudenberg, *A New Era for Congo?*, LONDON REV. OF BOOKS, Oct. 19, 2006 [hereinafter *A New Era for Congo?*]. See also *Silence = Rape*, *supra* note 61.

67. See generally US-Africa.org DR Congo, Sept. 14, 2003, <http://us-africa.tripod.com/zaire.html> (last visited Apr. 8, 2008) [hereinafter *DR Congo*].

68. *Id.*

centralized agricultural, mining and trading state.⁶⁹ In 1885, King Leopold II of Belgium made the Congo his private property at the Conference of Berlin and renamed the country the “Congo Free State.”⁷⁰ In the Free State, King Leopold severely exploited Congolese civilians to make fortunes in the rubber and ivory industry.⁷¹ Between 1885 and 1908, over ten million Congolese died as a consequence of persecution, forced labor, and disease.⁷² “In the words of Adam Hochschild[,] . . . the monarch was ‘a man as filled with greed and cunning, duplicity and charm, as any of the more complex villains of Shakespeare.’”⁷³ Later, the U.S. and the allied powers relied heavily upon the Congo’s rich uranium resources, which were used by allied powers to build atomic bombs during World War II.⁷⁴

After years of exploitation and abuse, the Congo achieved independence in the early 1960s under the leadership of the charismatic and popular liberation leader, Patrice Lumumba.⁷⁵ However, the truly independent state was short-lived as Belgium and the U.S. financially supported a coup against Lumumba led by Joseph-Desire Mobutu, which resulted in Lumumba’s assassination.⁷⁶ After Lumumba’s murder, Mobutu created a dictatorship and renamed the country Zaire.⁷⁷

Over the next thirty-two years, Mobutu pillaged Zaire’s natural mineral resources, built luxurious palaces, and placed billions of dollars in personal Swiss bank accounts until the mid-1990s when rebellions in the east, led by Laurent Kabila, eventually swept Mobutu from power.⁷⁸

69. *Id.*

70. *A New Era for Congo?*, *supra* note 66.

71. *Id.*

72. Baffour Ankamah, *The Butcher of Congo*, NEW AFRICAN (Oct. 1999) (book review of *King Leopold’s Ghost* by Adam Hochschild) available at <http://www.hartford-hwp.com/archives/35/181.html>.

73. *A New Era for Congo?*, *supra* note 66 (quoting Adam Hochschild, author of *King Leopold’s Ghost*).

74. See generally SEPTIMUS H. PAUL, *NUCLEAR RIVALS: ANGLO-AMERICAN ATOMIC RELATIONS, 1941-1952*, (Ohio State Univ. Press 2000) (explaining the U.S.’ attempts to secure control over the world’s uranium supply during World War II, specifically by negotiating control over the Congo’s Shinkolobwe Mine).

75. Steve Bloomfield, *Heart of Africa: From Bullets to the Ballot*, THE INDEPENDENT, July 4, 2006, <http://news.independent.co.uk/world/africa/article1159272.ece>.

76. See generally CIA World Factbook Online, Democratic Republic of the Congo, Jan. 23, 2007, available at <https://www.cia.gov/cia/publications/factbook/geos/cg.html> (last visited Jan. 27, 2007) [hereinafter CIA Factbook Congo].

77. *Id.*

78. See generally William D. Hartung and Bridget Moix, *Deadly Legacy: U.S. Arms to Africa and the Congo War*, Arms Trade Resource Center, World Policy Institute, Jan. 2000, available at <http://www.worldpolicy.org/projects/arms/reports/congo.htm> (explaining that “Mobutu used his U.S.-supplied arsenal to repress his own people and plunder his nation’s economy for three decades, until his brutal regime was overthrown

When Kabila assumed leadership of Zaire, he renamed the country the DRC.⁷⁹ Soon thereafter, in 1998, Rwandan and Ugandan backed insurgents challenged Kabila's regime, which led to Kabila's assassination in 1999.⁸⁰ Kabila's son, Joseph, replaced his father as the DRC Head of State during this period of civil unrest.⁸¹

While Joseph Kabila successfully negotiated a withdrawal of opponents of the Rwandan government who were occupying the DRC's eastern border, known as the Democratic Force for the Liberation of Rwanda ("DFLR"), only a few hundred soldiers actually left the DRC.⁸² The DFLR has since disbanded into several factions, including the *Rastas* who "killed, kidnapped for ransom, and raped civilians around Walungu, South Kivu."⁸³

In addition to dealing with foreign insurgents,⁸⁴ internal strife continues to tear apart the DRC.⁸⁵ In 2005, the former Congolese Rally for Democracy-Goma ("CRD-Goma"), refused integration and fought the national army.⁸⁶ Armed groups unrelated to the peace process also continue to battle the DRC national army, the peace-keeping forces of the United Nations, and each other.⁸⁷ While the DRC is still in turmoil, Joseph Kabila, along with the national government is committed to transitioning the DRC into a truly democratic nation.⁸⁸

C. *Mass Rape in the Democratic Republic of Congo*

All four categories of armed conflict rape can be found in the DRC,⁸⁹ where carefully orchestrated mass rape is the most ubiquitous war tactic used in the complex eight-year long DRC civil war (also referred to as "Africa's First World War").⁹⁰ What may have begun as a

by Laurent Kabila's forces in 1997").

79. CIA Factbook Congo, *supra* note 76.

80. *Id.*

81. *Id.*

82. HUMAN RIGHTS WATCH, WORLD REPORT 2006, at 90 (2006), available at <http://www.hrw.org/wr2k6/wr2006.pdf> [hereinafter WORLD REPORT].

83. *Id.*

84. *Id.*

85. *Id.* (detailing how the continued presence of Ugandan and Rwandan rebel combatants in eastern Congo threatens regional stability).

86. *Id.*

87. WORLD REPORT, *supra* note 82.

88. CIA Factbook Congo, *supra* note 76.

89. See generally ENCYCLOPEDIA OF RAPE, *supra* note 59.

90. Barbara Crossette, *Atrocities Against Women Widespread in Congo War*, WOMENS E-NEWS, Aug. 22, 2002, <http://www.womensenews.org/article.cfm/dyn/aid/1014/context/archive> (last visited Apr. 8, 2008) (describing civil war in DRC from 1998 through 2003 as Africa's widest war, with half a dozen national armies and several rebel groups fighting over the country's wealth).

byproduct of the conflict is now the rebels' *modus operandi*.⁹¹ Mass rape is an effective and inexpensive way to psychologically torture and humiliate civilians, destroy families, and demoralize and debilitate communities.⁹²

Frequently, husbands, fathers and children are forced to not only watch, but also participate in, these gang rapes.⁹³ Armed conflict rapes in the DRC become more atrocious and vile each year, as some rebels mutilate murder victims and subject rape victims to cannibalism, forcing the women to eat murdered loved ones.⁹⁴ In the past few years, Congolese rape counselors have seen more gang rape victims, as young as age two, pass through their doors.⁹⁵ As American feminist and Yale scholar Catherine MacKinnon so aptly describes genocidal rape:

This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.⁹⁶

Rebels commit systematic, genocidal rape with the specific intent to pass on HIV/AIDS,⁹⁷ impregnate women with tribal offspring, or damage young girls so badly they can never bear children.⁹⁸ "Many victims are rendered sterile as a result of the trauma, operations, or scar tissue."⁹⁹

91. Nicola Dahrendorf, *Mirror Images in the Congo: Sexual Violence and Conflict*, OPEN DEMOCRACY, Oct. 27, 2005, http://www.opendemocracy.net/democracy-resolution_1325/congo_2964.jsp.

92. Crossette, *supra* note 90.

93. *Silence = Rape*, *supra* note 61 ("The nature of sexual violence in the DRC conflict is grotesque, completely abnormal. . . . Babies, children, women—nobody is being spared.").

94. UN News Serv., *DR of Congo: UN Reports Instances of Cannibalism, Systematic Killing and Rape*, UN NEWS CTR., July 31, 2003, <http://www.un.org/apps/news/storyAr.asp?NewsID=7882&Cr=DR&Cr1=Congo> (last visited Apr. 8, 2008) (describing rebels in the Mambasa region of the DRC who force civilian families to cannibalize loved ones as an aspect of their systematic, psychological torture techniques).

95. *Silence = Rape*, *supra* note 61.

96. MacKinnon, *supra* note 56, at 11-12 (describing genocidal rape used in the Bosnia-Herzegovina conflict).

97. Crossette, *supra* note 90 ("In addition to mental and physical injury and the risk of pregnancy, rape victims are particularly vulnerable to contracting HIV because body tissues are more likely to be torn. . . . There are six foreign armies fighting on Congolese soil and, on average, soldiers' rates of infection can be up to four times higher than those of civilians.").

98. *Id.*

99. PRATT, MARION, *SEXUAL TERRORISM: RAPE AS A WEAPON OF WAR IN EASTERN DEMOCRATIC REPUBLIC OF CONGO* (Mar. 2004), <http://www.peacewomen.org/resources/DRC/USAIDDCHADRC.pdf>.

The social stigma surrounding the rape victim is in many instances equally difficult for the victim to bear as the rape itself.¹⁰⁰ In fact, “rape often results in ‘social murder.’”¹⁰¹ In a society where the family name, inheritance, and reputation are passed on by the father, in many instances both women and the children born from rape are ostracized by their husbands and communities.¹⁰² Further, although shame is a major factor contributing to husbands’ difficulty in supporting victimized spouses; many husbands ultimately leave families out of fear of HIV/AIDS.¹⁰³ “Experts estimate that some [sixty] percent of all combatants in the DRC are infected with HIV/AIDS.”¹⁰⁴ Because “women rarely have access to expensive antiretroviral drugs, sexual assaults all too often become automatic death sentences.”¹⁰⁵ However, some survivors say bearing and raising children of rape, *les enfants de mauvais souvenir*, is worse than death.¹⁰⁶

D. Les Enfants de Mauvais Souvenir in Rwanda

In Rwanda, Hutu militia groups used similar rape tactics during the genocide of 1994.¹⁰⁷ In fact, “it is estimated that at least 250,000 women and girls were raped during the genocide of 1994.”¹⁰⁸ Nearly thirty-five percent of armed conflict rape survivors in Rwanda became pregnant as a result of rape.¹⁰⁹ Today, the children born of rape—*les enfants de mauvais*, or children of bad memories¹¹⁰—are entering adolescence. Their mothers quietly share stories and feelings about their children even though the subject of *les enfants de mauvais souvenir*¹¹¹ is taboo, even among family members, and a source of constant shame, struggle, and

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Silence = Rape*, *supra* note 61.

105. *Id.*

106. Wax, *supra* note 1 (explaining that “[m]ore than 10,000 children were born of rapes during the [Rwandan] genocide, according to victims’ groups. They are the living legacy of a time of death, in which an estimated 800,000 Tutsis and moderate Hutus were slaughtered in 100 days”).

107. See generally PETER GORDON & KATE CREHAN, UN DEV. PROGRAMME [UNDP], DYING OF SADNESS: GENDER, SEXUAL VIOLENCE, AND THE HIV EPIDEMIC (2000), <http://www.undp.org/hiv/publications/gender/violencee.htm> [hereinafter DYING OF SADNESS].

108. Dahrendorf, *supra* note 91.

109. DYING OF SADNESS, *supra* note 107.

110. *Id.*

111. *Shattered Lives*, *supra* note 50 (explaining that *Les enfants de mauvais souvenir* are also called “pregnancies of the war,” “children of hate,” or “*enfants non-désirés*” meaning “unwanted children”).

confusion.¹¹²

Because of the pain and social stigma surrounding these children and because abortion is illegal in Rwanda, many mothers resort to extreme tactics to either terminate pregnancies or dispose of *les enfants de mauvais souvenir*.¹¹³ For instance, some mothers abandon children at churches and ministries after giving birth.¹¹⁴ Others name their children after their terrible experience, like Alphonsina Mutuze who named her son Inkuba, meaning “war” or “little killer.”¹¹⁵ Still, other mothers resort to the most extreme tactic by trying, sometimes successfully, to commit infanticide.¹¹⁶ Of the women who decide to keep children of war, most struggle with how and when to tell them how they were conceived, especially as they age and begin to wonder about their fathers.¹¹⁷

These families struggle to find acceptance in local communities, as neighbors and friends tend to shun them for fear of HIV/AIDS and disgust of the child’s paternity.¹¹⁸ For example, “[s]ome neighborhoods are filled with gossip about how certain children were conceived. At other times, family members have rejected the children of rape and shunned their desperate mothers.”¹¹⁹ Moreover, rape leaves scars on the family unit, which can be exacerbated by the birth of *les enfants de mauvais souvenir*, as “the mother’s decision to keep the child [causes] deep divisions in the family, pitting those who reject the child against those who prefer to raise the child.”¹²⁰ Unfortunately, there are few families who wish to adopt these children, not only due to the child’s social standing but also because of rampant poverty levels throughout the country¹²¹ and fear of AIDS.¹²²

112. *Id.*

113. *Id.*

114. *Id.*

115. Wax, *supra* note 1 (“Little killer” refers to the child’s father, a Hutu military soldier.).

116. *Id.*

117. *Id.*

118. *Id.* (reporting that during Rwandan genocide, both Tutsi and Hutu women were raped and genitally mutilated by the Rwandan Armed Forces as well as *Interahamwe*, the Hutu military, which has now infiltrated the DRC).

119. *Id.*

120. *Shattered Lives*, *supra* note 50.

121. See generally CIA World Factbook Online, Rwanda, Dec. 19, 2006, available at <https://www.cia.gov/cia/publications/factbook/geos/rw.html> [hereinafter CIA Factbook Rwanda].

122. See generally AMNESTY INT’L, RWANDA: “MARKED FOR DEATH”, RAPE SURVIVORS LIVING WITH HIV/AIDS IN RWANDA (2004), [http://web.amnesty.org/library/pdf/AFR470072004ENGLISH/\\$File/AFR4700704.pdf](http://web.amnesty.org/library/pdf/AFR470072004ENGLISH/$File/AFR4700704.pdf) [hereinafter HIV/AIDS IN RWANDA].

E. Les Enfants de Mauvais Souvenir *in the DRC*

In the Congo, and throughout the world, the number of children born as a result of rape is unknown.¹²³ Like Rwandan children of rape, Congolese *enfants de mauvais souvenir* and their mothers who are “accepted” into their communities suffer constant pain and embarrassment.¹²⁴

Moreover, “[i]n a patrilineal society where one’s social identity comes from the father, the children of rape are social outcasts.”¹²⁵ For example, in North Kivu, a region on the eastern border of the DRC, adults and other children ostracize children of rape for fear of HIV/AIDS and tauntingly call them “Hutus.”¹²⁶ Many children of rape are not even allowed to leave the home because mothers harbor paralyzing fears of injury, social rejection, and death.¹²⁷

F. Children of Rape Experience Human Rights Abuses Immediately and by Default

In areas of armed conflict, children of rape face unique challenges. First, the child must survive the womb, which is difficult as mothers are often extremely young, indigent, and forced to fight alongside rebel soldiers while pregnant.¹²⁸ For example, Mbuchi Charlotte, of the Hema tribe in the DRC, was kidnapped from her village and forced to fight against a rival tribe while pregnant.¹²⁹ Today, she carries both an AK-47 and her one-year old daughter, Emani, into battle.¹³⁰ If mothers do not miscarry, die before giving birth, or perform secret, illegal abortions, the child is born into a world that rejects them.¹³¹ Based on these factors

123. See generally John Fedele and Stephen M. Bosk, *Children Born of Rape, Exploitation In Conflict Zones May Be Particularly Vulnerable*, PITT CHRONICLE, Dec. 5, 2005, available at <http://www.umc.pitt.edu/tr/issues/2006spring/children.html> (explaining that numbers of “children born of war” are unreliable since no systematic data has been gathered on this population due to fear of social stigmatism).

124. See generally Africa Focus, *Congo-Kinshasa: Healing the Wounds of War At Panzi Hospital, South Kivu*, ALLAFRICA, Dec. 12, 2006, <http://www.medworm.com/rss/search.php?qu=congo&page=7> [hereinafter *Wounds of War*].

125. HOLST-RONESS, *supra* note 60.

126. BELINA, ALEX, REMEMBERING RWANDA: AN EYEWITNESS TO THE HORROR, Foreign Service Journal (2004), <http://64.233.169.104/search?q=cache:gLcku4LcBTQJ:www.afsa.org/fsj/apr04/Alex0404.pdf+remembering+rwanda+hutu+Interahamwe&hl=en&ct=clnk&cd=2&gl=us> (explaining that “Hutu” references *Interahamwe* military, who was behind the Rwandan genocide and infiltrated eastern DRC).

127. See generally Wax, *supra* note 1.

128. *Heart of Africa: From Bullets to the Ballot*, THE INDEPENDENT, July 4, 2006, <http://news.independent.co.uk/world/africa/article1159272.ece>.

129. *Id.*

130. *Id.*

131. See generally Wax, *supra* note 1.

alone, one might say the child of rape is *the* most sympathetic candidate for refugee or asylum status. This, however, is not the perspective of current refugee and asylum law practices in the U.S.¹³² Parentless children of rape have, perhaps, the most difficult claim for refugee status when compared to other groups who seek relief for humanitarian reasons.

G. *The Stateless Child: A Major Hurdle*

According to Article 7 of the 1989 Convention on the Rights of the Child,¹³³ “a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality, and, as far as possible, the right to know and be cared for by his or her parents.”¹³⁴ Those rights, however, are often times not afforded to *les enfants de mauvais souvenir*.¹³⁵ The mother who does not reject, abandon, or kill her child of rape often lacks the ability to register her child as a citizen, leaving the baby stateless.¹³⁶ Such statelessness may pose a high hurdle if a child of rape attempts to claim refugee status. Additionally, because the paternity of the child is unknown in most cases, the child either does not have a surname, or a surname is created for the child.¹³⁷ Furthermore, if the mother dies, for example from AIDS, commits suicide, or is murdered, the orphaned child with literally no identity is more likely than other war-affected children to live a life on the street and become subject to forced conscription, human-trafficking, sexual exploitation, or abduction.¹³⁸ Even the “luckiest” children of rape, those who are adopted, have little access to information regarding family background, which becomes significant if family medical and ethnic history is needed.¹³⁹

III. Explanation and Analysis of Current Laws, Guidelines, and Initiatives Regarding Parentless and Orphaned Refugee Children

The UNHCR estimates that nearly half of the fifty million displaced

132. See generally *Shattered Lives*, *supra* note 50.

133. U.N. Convention on the Rights of the Child, G.A. Res. 44/25, art. 7 (Nov. 20, 1989).

134. *Id.*

135. See generally *Shattered Lives*, *supra* note 50.

136. *Id.*

137. Wax, *supra* note 1.

138. See generally U.S. Dep’t of Health & Human Serv., Office of Refugee Resettlement, Overview of the U.S. Refugee Resettlement Program, <http://www.acf.hhs.gov/programs/orr/programs/overviewrp.htm> (last visited Jan. 27, 2007).

139. *Id.*

persons in the world are children.¹⁴⁰ Thousands of these displaced children are parentless or orphaned, such as many of *les enfants de mauvais souvenir*.¹⁴¹ When orphaned or parentless children attempt to enter a third country, such as the U.S., as refugees, they are considered “unaccompanied minors,” but are not given special consideration as children.¹⁴² Rather, they are held to the same standards as adult refugees.¹⁴³ This treatment is significant because parentless refugee children, like adults, may be held in detention centers indefinitely without the right to counsel,¹⁴⁴ and must later present their unfortunate circumstances, using limited English language abilities, to an immigration judge *pro se*.¹⁴⁵ Moreover, if the child refugee is unable to prove his or her case, or if the child is too scared to share his or her story of persecution, the child applicant is returned to his or her country of origin.¹⁴⁶

Human Rights Watch (“HRW”), a prominent non-governmental organization dedicated to protecting the human rights of people around the world, monitors the special needs of particular groups of refugees, including refugee children.¹⁴⁷ In reports examining the treatment and protection of refugee children, HRW determined that the UNHCR has not paid significant attention to the needs of unaccompanied minors in immigration detention in the U.S.¹⁴⁸ In fact, HRW found that “many [unaccompanied child refugees] were held for lengthy periods of time by the [INS] in secure facilities alongside juvenile offenders, without adequate access to legal representation or being fully informed of their rights.”¹⁴⁹

140. UNHCR, Note on Refugee Children, EC/SCP/46, July 9, 1987, available at http://www.refugeelawreader.org/c/79/iii._The_UN_Convention_on_the_Rights_of_the_Child.

141. See generally *id.*

142. See generally STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, 936 (Foundation Press 4th edition) (2005) (explaining that “one of the most wrenching of the world’s refugee problems is the plight of ‘unaccompanied minors’—children who are fleeing either persecution or some event that does not qualify them for refugee status, and who are either orphaned or otherwise separated from their parents”).

143. See generally Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 No. 21 INTERPRETER RELEASES 757.

144. *Id.*

145. *Id.*

146. *Id.*

147. Human Rights Watch is Dedicated to Protecting the Human Rights of People Around the World. See HUMAN RIGHTS WATCH <http://www.hrw.org/about/>.

148. UNHCR at 50: What Future for Refugee Protection? HUMAN RIGHTS WATCH, REFUGEE REPORT, available at <http://www.hrw.org/campaigns/refugees/pdf1.pdf>.

149. *Id.*

A. *Defining the Parentless or Orphaned Refugee Child*

The definition of “refugee” is found in Section 101(a) (42)(A) of the Immigration and Nationality Act (“INA”),¹⁵⁰ and was modeled after the 1951 United Nations Convention Relating to the Status of Refugees.¹⁵¹ According to both the U.S. Supreme Court and the INA, a refugee or asylum seeker must satisfy four elements to obtain relief: (1) the applicant must have a fear of persecution; (2) the fear must be well-founded; (3) the persecution feared must be “on account of race, religion, nationality, membership in a particular social group or political opinion;”¹⁵² and (4) the applicant must be unable or unwilling to return to his or her country of nationality or to the country in which he last habitually resided because of persecution or a well-founded fear of persecution.¹⁵³ When analyzing the factors, fear of persecution must be the primary motivation that drives the applicant to seek refugee status.¹⁵⁴

Children who apply for refugee or asylum status through their parent or guardian are not required to satisfy the four-prong test, as courts focus on the persecution of the adult applicant.¹⁵⁵ If the adult applicant can prove their case for relief, the child is automatically granted asylum or refugee status as well.¹⁵⁶ However, when an “unaccompanied minor” enters the U.S. and independently seeks refuge

150. INA § 101(a)(42)(a); 8 USC § 1101(a)(42)(a) (explaining that “the term ‘refugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

151. See U.N. Convention Relating to the Status of Refugees, G.A. Res. 429 (V) (July 28, 1951).

152. See *Matter of Acosta*, 19 I. & N. Dec. 211 (1985).

153. Legomsky, *supra* note 142, at 944-45.

154. *Id.*

155. See Danuta Villareal, To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers, Mar. 22, 2004, <http://www.encyclopedia.com/doc/1G1-121949042.html> (explaining that “[a]lthough children are generally eligible for asylum on the same terms as adults, they are often viewed as “appendages of their families.” If they are deemed refugees, it is by virtue of the asylum granted to the adult with whom they are traveling) [hereinafter Villareal].

156. *Id.* (explaining that “[u]naccompanied refugee children . . . must provide their own basis for the asylum claim, and unfortunately, the specters of deprivation and abuse they flee do not readily satisfy the current definition of a “refugee”).

or asylum, the child applicant is held to the exact same test as adults.¹⁵⁷ Distinguishing the parentless child from the child who applies for status through an adult is key because, unlike the adult refugee or asylum seeker, a parentless child applicant often does not possess the mental capability or sophistication to grasp the objective and abstract concept of “fear of persecution,” particularly if the child is very young.¹⁵⁸ Thus, satisfying the essential requirement of “well-founded fear of persecution” is many times impossible for a child.

Additionally, even if a child can understand this concept, fear and embarrassment may prohibit the child from relaying his or her story.¹⁵⁹ “The [applicant] child may be reluctant to talk to a stranger due to embarrassment or emotional upset and past trauma.” Therefore, it may take time for an INS official to build a rapport with the child before applicants are able to recount their stories.¹⁶⁰

B. The United States Refugee Resettlement Program (“USRRP”)

It is the historic policy of the U.S. to admit refugees of special humanitarian concern.¹⁶¹ The Immigration and Naturalization Service (“INS”), Department of State (“DOS”), Department of Health and Human Services (“HHS”), private non-governmental organizations (“NGOs”) and faith-based organizations together form the United States Refugee Resettlement Program.¹⁶² This consortium is committed to admitting refugees of special humanitarian concern to the U.S., reflecting its core national value and America’s tradition of being a safe-haven for the oppressed.¹⁶³ Within the USRRP lies a small program called the Unaccompanied Refugee Minors Program, which provides resettlement for a limited number of unaccompanied child asylum and refugee seekers

157. See generally INA Section 101(a)(42)(A).

158. See generally Child Refugee Claimants, Procedural and Evidentiary Issues, Immigration and Refugee Board, Ottawa, Canada, Sept. 30, 1996, available at http://www.irb-cisr.gc.ca/en/references/policy/guidelines/child_e.htm (recognizing that “children are not able to present evidence with the same degree of precision as adults with respect to context, timing, importance and details. They may be unable, for example, to provide evidence about the circumstances surrounding their past experiences or their fear of future persecution. In addition, children may manifest their fears differently from adults.”).

159. *INS Guidelines for Children’s Asylum Claims*, CNN NEWS, Apr. 21, 2000, <http://archives.cnn.com/2000/US/04/21/INS.ruling/index.html> [hereinafter CNN NEWS].

160. *Id.*

161. *Id.*

162. U.S. Dep’t of Health & Human Serv., Office of Refugee Resettlement, Overview of the U.S. Refugee Resettlement Program, <http://www.acf.hhs.gov/programs/orr/programs/index.htm> (last visited Mar. 17, 2008) [hereinafter ORR].

163. CNN NEWS, *supra* note 159.

each year.¹⁶⁴

C. *The Unaccompanied Refugee Minors Program ("URMP")*

In order to address the needs of thousands of child refugees from Southeast Asia without a parent or guardian to care for them, the U.S. Office of Refugee Resettlement (an HHS entity), with assistance from DOS created the URMP in response to the Refugee Act of 1980.¹⁶⁵ URMP aims to grant resettlement and provide refugee foster care to children who are otherwise eligible for resettlement in the U.S., but lack a parent or guardian.¹⁶⁶ Although reunification of minors with parents or other appropriate family members is encouraged through the program, it is not mandatory.¹⁶⁷ In addition to providing resettlement services for parentless children, URMP provides English language training, residential care, education and ethnic and religious preservation.¹⁶⁸

DOS selects children eligible for the program based on certain basic guidelines.¹⁶⁹ DOS identifies refugee children overseas who are eligible for resettlement in the U.S., but do not have a parent or guardian.¹⁷⁰ Upon arrival in the U.S., refugee children are placed into the URMP and receive refugee foster care and other services and benefits.¹⁷¹

URMP receives assistance from two voluntary faith-based organizations: the Lutheran Immigration Refugee Service and the U.S. Catholic Conference.¹⁷² In particular, "[t]hese agencies provide services ranging from identifying entrants and asylum children needing the benefits of the URM program to providing essential direct services to the minors through their affiliate agencies, inclusive of foster care placements, to recommending, researching, [and] planning of URM program services."¹⁷³

164. The Unaccompanied Minors Program, U.S. Dept. of Health and Human Services, Office of Refugee Resettlement, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm [hereinafter Minors Program].

165. *Id.* (describing policy, purpose, and functions of the program including its fourteen locations throughout United States: Washington, DC; Boston, MA; Grand Rapids, MI; Lansing, MI; Fargo, ND; Philadelphia, PA; Seattle, WA; Phoenix, AZ; Jackson, MS; Newark, NJ; Richmond, VA; Tacoma, WA; Rochester, NY; and Syracuse, NY) (last visited Jan. 27, 2007).

166. *Id.*

167. *Id.*

168. *Id.*

169. Minors Program, *supra* note 164 (explaining that, to be eligible for URM, children must be under age eighteen and either refugees, entrants, asylees, or victims of severe trafficking).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

Since 1980, nearly twelve thousand children have entered the U.S. through URMP.¹⁷⁴ In fact, “[a]t its peak in 1985, the [Office of Refugee Resettlement] provided protection to 3,828 children in care.”¹⁷⁵ Currently, the ORR has approximately seven hundred children in URMP care despite the vast number of human rights abuses against children around the globe¹⁷⁶ and the large numbers of parentless or orphaned refugee children who attempt entry into the U.S.¹⁷⁷ It is estimated that “more than 7,000 refugee children from around the world arrive in the United States without their parents” each year.¹⁷⁸ The vast majority of these children are apprehended as soon as they enter the U.S., and are held indefinitely in detention camps with juvenile offenders while they await a hearing.¹⁷⁹ Parentless and orphaned refugee children are treated as adults in the court system and are usually not given an attorney or guardian to represent them.¹⁸⁰ For example, “[i]n 2004, over 6,000 children arrived alone in the US and were placed in immigration removal proceedings,” many without legal representation.¹⁸¹ As UNHCR Goodwill Ambassador to the United Nations, Angelina Jolie, explained in a 2005 press conference launching the National Center for Refugee and Immigrant Children:¹⁸²

It is unethical to not listen to [parentless refugee] children. Because without legal representation we are sending children to court to represent themselves in a language that most of them don't understand. And expecting them to recall accounts so frightening and humiliating, they wouldn't want to tell anyone, let alone a room full of strangers.¹⁸³

In addition to criticism from the international community, pushes to

174. Minors Program, *supra* note 164.

175. *Id.*

176. *See id.*

177. *Id.*

178. USA for UNHCR, Help Refugee Children Get a Fair Hearing—Pass H.R. 1172, <http://www.thepetitionsite.com/takeaction/696485245?tl=1166745215> (last visited Mar. 17, 2008).

179. *See generally id.*

180. *See generally* Lilli Tnaib, *UNHCR Goodwill Ambassador Angelina Jolie Launches Centre for Unaccompanied Children*, UNHCR NEWS, Mar. 9, 2005, <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=422f33944>.

181. *Id.* (explaining that the Center was established in 2005 to match unaccompanied children released from United States' custody with pro bono services with a \$500,000 grant from the UNHCR Goodwill Ambassador Angelina Jolie) [hereinafter *Jolie Launches Center*].

182. *Id.*

183. UN News Serv., *UN Goodwill Ambassador Jolie Launches Centre for Refugee Children in US*, UN NEWS CTR., Mar. 10, 2005, <http://www.un.org/apps/news/story.asp?NewsID=13595&Cr=asylum&Cr1>.

reform current U.S. policies regarding the treatment of unaccompanied refugee children have been voiced from prominent figures within the U.S. government. For example, Senator Dianne Feinstein, lead Senate sponsor of the bipartisan Unaccompanied Alien Child Protection Act of 2005, remarked, “[i]t is a key priority of mine to ensure that unaccompanied children who enter the U.S. receive proper treatment within our federal system. Many are vulnerable children who have suffered traumatic circumstances and are then forced to struggle through a legal system designed primarily for adults.”¹⁸⁴

D. The United States Refuses to Adhere to UNHCR Guidelines and is not a Party to United Nations Conventions for Children

Two international documents provide promising, guiding principles by which to formulate a comprehensive U.S. policy concerning parentless and orphaned refugee children. The first is the 1990 United Nations Convention on the Rights of the Child (“CRC”), which was ratified by nearly every country in the world and is followed by many international organizations, such as United Nations Children’s Fund (“UNICEF”), and HRW.¹⁸⁵ The CRC, which is the world’s “most widely and rapidly ratified human rights treaty in history,”¹⁸⁶ outlines the political, cultural, economic and humanitarian rights of all children.¹⁸⁷

The CRC Committee, concerned with the plight of both accompanied and unaccompanied child refugee and asylum seekers, developed Article 22 of the CRC.¹⁸⁸ This Article requires that refugee children receive “appropriate protection and humanitarian assistance” from signatory countries with help from the United Nations and other IGO’s and NGO’s who can assist.¹⁸⁹ The CRC was ratified by 193 countries around the world.¹⁹⁰ The only two member countries of the United Nations who have not ratified the CRC are the U.S. and Somalia.¹⁹¹ It is important to note that Somalia could not ratify the treaty since the country did not have a working government at the time of

184. Women’s Commission for Refugee Women and Children, Groundbreaking Video to Help Unaccompanied Immigrant, Asylum Seeking Children in the United States, July 19, 2006, http://www.womenscommission.org/archive/06/press_releases/071806.shtml.

185. Convention on the Rights of the Child, UNICEF explanation, <http://www.unicef.org/crc/> [hereinafter CRC].

186. Convention on the Rights of the Child: Frequently Asked Questions, UNICEF, http://www.unicef.org/crc/index_30229.html [hereinafter Questions].

187. *Id.*

188. CRC, *supra* note 185.

189. *Id.*

190. *Id.*

191. Questions, *supra* note 186.

ratification.¹⁹² Despite international criticism for its decision, the U.S. continues to reject the CRC as the litmus test to ensure the rights of the child.¹⁹³ As the Bush Administration explains, “[t]he [CRC] may be a positive tool for promoting child welfare for those countries that have adopted it. But we believe the text goes too far. . . . [T]he human rights-based approach . . . poses significant problems as used in this text.”¹⁹⁴

Another document, the UNHCR’s Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (“Guidelines”), is a significant international model for the protection of parentless and orphaned refugee children.¹⁹⁵ Published in 1997, the purpose of the Guidelines is threefold: (1) to increase awareness of the special needs of unaccompanied children and rights reflected in the [CRC]; (2) to highlight the importance of a comprehensive approach to child refugee issues; and (3) to stimulate internal discussion in each country on how to develop principles and practices to ensure the needs of unaccompanied children are met.¹⁹⁶

The Guidelines, created in response to global concern regarding the treatment of child refugees, recognize the vulnerability of the unaccompanied child and suggest general guidelines, as well as procedural and policy actions, to countries dealing with unaccompanied children.¹⁹⁷ The Guidelines explain that, “[t]he basic, guiding principle in any child care and protection action is the principle of the ‘best interest of the child.’”¹⁹⁸ Further, the Guidelines recommend that children be appointed “a guardian or advisor, who has ‘the necessary expertise in the field of child caring,’ so to ensure the best interests of the child are safeguarded and that his [or] her needs are appropriately met.”¹⁹⁹ Also mentioned in the Guidelines is the suggestion that officials and interpreters who routinely interact with child refugees and asylum seekers receive proper, adequate training and that they be made readily available to children who need them.²⁰⁰

Many of the recommendations and guiding principles found within

192. *Id.*

193. Mary Jo Anderson, *Bush Team Signals New Direction, Decries Erosion of Parental Authority in Internationalization of Family Policy*, WORLD NET DAILY, Feb. 2, 2001, http://wnd.com/news/article.asp?ARTICLE_ID=21590 [hereinafter *New Direction*].

194. *Id.*

195. See UNHCR, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM (1997), available at <http://www.unhcr.org/publ/PUBL/3d4f91cf4.pdf> [hereinafter GUIDELINES].

196. See generally *id.*

197. *Id.*

198. *Id.* at 16.

199. *Id.* at 2.

200. GUIDELINES, *supra* note 195 at 2.

the Guidelines were later replicated in a recent bill, which was passed by unanimous consent in the United States Senate but never became a law.²⁰¹

E. S. 119: The Unaccompanied Alien Child Protection Act of 2005

On December 22, 2005, the U.S. Senate unanimously passed Unaccompanied Alien Child Protection Act of 2007 (also “S.119”), a bill that provided certain, critical protections to ensure the humane care and custody of unaccompanied alien children in the U.S.²⁰² Sponsored by California Senator Dianne Feinstein and co-sponsored by twenty-five other senators,²⁰³ this bipartisan bill was introduced in the Senate in 2001 and specified a number of procedural protections for unaccompanied children, including: (1) the mandatory appointment of *guardians ad litem* to advocate on behalf of the child’s “best interest;” (2) the availability of free legal counsel for all children during immigration proceedings; (3) the establishment of appropriate detention conditions for the unaccompanied alien child; (4) the development of training programs for INS officials and immigration judges who encounter unaccompanied alien children; and (5) the undertaking of efforts to ensure that unaccompanied children in INS custody would not be repatriated into a country or setting that would threaten their life and safety.²⁰⁴ This bill also “authorized funding to establish a pilot program at three sites that would assign legal guardians to such children.”²⁰⁵ Moreover, Title IV of S.119 encouraged the INS to adopt similar guidelines in their handling of child refugee and asylum seekers.²⁰⁶

Even though Unaccompanied Alien Child Protection Act was unanimously endorsed by the Senate, the bill stalled when it was referred to the House of Representatives’ Subcommittee on Immigration, Border Security, and Claims.²⁰⁷ As such, S.119 never had the opportunity to be signed into law.

F. Best Interest of the Child and the Guardian Ad Litem

The internationally recognized “best interests of the child

201. Unaccompanied Minors Act of 2005, *supra* note 45.

202. See Library of Congress, S.119, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s119>: (last visited Mar. 17, 2008) [hereinafter Library of Congress].

203. *Id.*

204. See generally Unaccompanied Minors Act of 2005, *supra* note 45.

205. Washington Watch, *S. 119: Unaccompanied Alien Child Protection Act of 2005*, http://www.washingtonwatch.com/bills/show/109_SN_119.html (last visited Mar. 17, 2008).

206. See Library of Congress, *supra* note 202.

207. *Id.*

principle”²⁰⁸ is a useful measure for determining appropriate procedures for child asylum seekers.²⁰⁹ As explained above, the UNCHR Guidelines’ primary principle in dealing with unaccompanied children should be the best interest of the child.²¹⁰ Additionally, Article 3 of the CRC explains that, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”²¹¹ However, the best interest of the child standard does not currently play a role in determining substantive eligibility under the U.S. refugee definition.²¹²

One way to ensure the best interests of parentless or orphaned refugee children are met is to provide them with *guardians ad litem*.²¹³ “In other areas of U.S. law, children who are confronting the legal system are appointed a *guardian ad litem*,” to safeguard the child’s best interests as they navigate through the complexities of the legal system.²¹⁴ Current U.S. asylum and refugee laws fail to provide the unaccompanied child refugee with such a vital figure.²¹⁵ Enactment of S.119 would have provided the unaccompanied child with a court appointed *guardian ad litem*, when warranted, to care for the child’s best interests in immigration proceedings.²¹⁶

Such appointments are typical in other areas of U.S. law where children are confronting the legal system, such as in dependency, custody, and divorce proceedings.²¹⁷ Traditionally, *guardians ad litem* advise and support their child clients when making decisions or navigating through court.²¹⁸ Because orphaned and parentless refugee children, in particular *les enfants de mauvais souvenir*, face severe psychological and physical trauma related to their past experiences and family separations,²¹⁹ a *guardian ad litem* is especially appropriate.

208. CNN NEWS, *supra* note 159.

209. *Id.*

210. GUIDELINES, *supra* note 195 at 2.

211. U.N. Convention on the Rights of the Child, G.A. Res. 44/25, art. 7 (Nov. 20, 1989).

212. *See generally* GUIDELINES, *supra* note 195.

213. *See generally* Protecting Unaccompanied Children, American Immigration Lawyers Association Issue Packet, available at <http://www.aila.org/content/default.aspx?bc=1019%7C6796%7C17353%7C12545> [hereinafter AILA Packet].

214. *Id.*

215. *Id.*

216. Senate Judiciary Committee Approves Feinstein-Brownback Bill to Protect Unaccompanied Alien Minors, Dianne Feinstein Website, June 3, 2004, <http://feinstein.senate.gov/04Releases/r-unaccompanied-minors-comm.htm> (last visited Apr. 8, 2008) [hereinafter Feinstein-Brownback Bill].

217. AILA Packet, *supra* note 213.

218. *Id.*

219. *Id.*

IV. Recommendations to the United States Government

In order for the U.S. to become compliant with internationally recognized standards for the humane treatment of refugee children, the U.S. must make strides to improve its procedures and practices for handling unaccompanied minors. Policy improvement may be accomplished through two measures: (1) the development of a new test to be incorporated into the INA code,²²⁰ and (2) reintroduction of the Unaccompanied Alien Child Protection Act by the U.S. Senate during the 110th Congress and subsequent passage of the bill by both the House of Representatives and the Senate.²²¹

Creation of a new INS test would ensure that child refugee and asylum seekers are held to a fair, reasonable standard, which reflects the special vulnerability and young mind of a child. Passage of the Unaccompanied Alien Child Protection Act would guarantee that unaccompanied children receive proper treatment and representation during immigration proceedings and detention.²²²

A. *Establishing New Standards for the Unaccompanied Child*

Children who seek asylum or refugee status within the U.S. should not be held to the same standards as adult refugees, regardless of their country of origin. Because these children are often unable or ill-equipped to share their stories, either due to fear, embarrassment, language barriers or lack of understanding, a child refugee should be treated in a manner which considers his or her mental capabilities and vulnerability as a child.²²³ Therefore, children seeking refugee or asylum within the U.S. should be held to a separate test, to be incorporated into the current INS statute.

This test should be fashioned in accordance with the CRC²²⁴ and UNHCR Guidelines,²²⁵ and should take into account internationally-recognized principles surrounding child care and custody—specifically, the best interest of the child standard.²²⁶ Additionally, the current, subjective “fear of persecution” condition, which essentially requires applicants to prove that their fear is genuine, should be modified for the

220. See generally INA, *supra* note 157.

221. See generally Unaccompanied Minors Act of 2005, *supra* note 45.

222. *Id.*

223. Julianne Duncan, Ph.D., Joint Testimony of Migration and Refugee Services/U.S. Conference of Catholic Bishops and Lutheran Immigration and Refugee Service before The Senate Subcommittee on Immigration, Feb. 28, 2002, available at <http://www.nccbuscc.org/mrs/duncantestimony.shtml> [hereinafter Joint Testimony].

224. See generally CRC, *supra* note 185.

225. See generally GUIDELINES, *supra* note 195.

226. *Id.* at 2.

child applicant.²²⁷ Instead, children should be given more leniencies in showing fear, particularly if the child is very young, or does not fully comprehend the significance of his situation, or is severely traumatized.

The proposed two-prong test includes the following requirements: (1) the child applicant must show that he or she has been subject to persecution or hardship on account of, but not limited to, race, religion, nationality, membership in a particular social group, political opinion, or due to the applicant's standing as a child; or (2) if the child is unable to adequately demonstrate persecution or hardship, INS will conduct an investigation to determine whether (a) the child applicant has likely experienced persecution or hardship on account of, but not limited to, race, religion, nationality, membership in a particular social group, political opinion, or due to the applicant's standing as a child; or (b) the child is more likely than not to face persecution or hardship in the future on account of, but not limited to, race, religion, nationality, membership in a particular social group, political opinion, or due to the applicant's standing as a child.²²⁸ According to international law, the refugee status determination process must take account of children's special needs.²²⁹ For that reason, the grant of refugee or asylum status should always be governed by the overarching concern for the best interest of the child.

One way to ensure the proper assessment of the child's needs is to appoint a *guardian ad litem* to each child; a trained professional who would be responsible for safeguarding the child's best interest.²³⁰ "The *guardian ad litem* would investigate the circumstances of a child's presence in the United States, and, using that information, develop recommendations for the child's placement and avenues for legal relief."²³¹

B. The Unaccompanied Alien Child Protection Act Should Be Reintroduced and Signed into Law

One key method to fill the current gaps within U.S. immigration procedures as they relate to unaccompanied children is through legislation. When the Unaccompanied Alien Protection Act was unanimously passed by the Senate in 2005, national and international organizations alike were optimistic that the bill would eventually become

227. See *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987).

228. *Contra* INA Section 101(a)(42)(A), *supra* note 157.

229. A Last Resort? National Inquiry into Children in Immigration Detention, April 2004, Human Rights and Equal Opportunity Commission, http://www.humanrights.gov.au/human_rights/children_detention_report/report/chap07.htm [hereinafter, Last Resort].

230. See GUIDELINES, *supra* note 195. See also Joint Testimony, *supra* note 223.

231. Joint Testimony, *supra* note 223.

law.²³² As explained above, S.119 stalled in the Senate Subcommittee on Immigration, Border Security, and Claims and expired at the end of the 109th Congress.²³³ However, the bill was recently reintroduced into the Senate of the 110th Congress as S. 844: Unaccompanied Alien Child Protection Act of 2007,²³⁴ giving refugee children another chance to receive guaranteed access to the services and assistance they require, in particular, the court-appointed *guardians ad litem*.

V. Conclusion

“Today, approximately half of the world’s refugees are children, totaling twenty million world-wide.”²³⁵ Currently, there is little relief in the U.S. for the strong, resilient and determined child who dreams of a better life and successfully and independently escapes persecution. Many of these children are *les enfants de mauvais souvenirs*, the quintessential refugee and the very embodiment the world’s most striking and sympathetic cause for the improvement of refugee and asylum standards for unaccompanied, displaced children. Even though this issue has been at the forefront of global concern for a decade, U.S. policies and procedures concerning unaccompanied children continue to remain relatively stagnant, despite the initiatives and urgings of the United Nations, global world leaders, and other international, human rights organizations.²³⁶ Ten years ago, Graça Machel, world-renown humanitarian, former first lady of Mozambique and wife of former South African President Nelson Mandela, described the plight of displaced children, such as *les enfants de mauvais souvenir*, in the following manner:

Children are often separated from parents in the chaos of conflict, escape and displacement. Parents or other primary caregivers are the major source of a child’s emotional and physical security and for this reason family separation can have a devastating social and psychological impact. Unaccompanied children are especially vulnerable and at risk of neglect, violence, military recruitment, sexual assault and other abuses.²³⁷

232. See generally *id.*

233. See Library of Congress, *supra* note 202.

234. See Unaccompanied Minors Act of 2007, *supra* note 46 (explaining that S. 119 was reintroduced to the Senate as S. 884 on Mar. 12, 2007).

235. Vallareal, *supra* note 155.

236. See generally Child Refugee Claimants, *supra* note 158. Also see generally Joint Testimony, *supra* note 223.

237. Promotion and Protection of the Rights of Children, Impact of Armed Conflict on Children, U.N. Doc. A/51/30 (Aug. 6, 1996), available at http://www.unicef.org/graca/a51-306_en.pdf.

Thousands of *les enfants de mauvais souvenir* have already been killed, neglected, abandoned, or rejected in their countries of origin by their mothers and communities.²³⁸ Others are orphans, since the only adult who cared for them has died due to the systematic spread of AIDS.²³⁹ Furthermore, many thousands of other children around the world are experiencing different forms of persecution, some equally as horrific, every day.²⁴⁰ Children are the future of our global society. Fundamental human decency requires the U.S. to do its part as a world leader to assist parentless or orphaned child refugees and asylees. Therefore, it is imperative that substantive changes are made to current U.S. immigration and refugee laws in order to meet the basic human needs of the world's most vulnerable social group—children.²⁴¹

238. See generally Wax, *supra* note 1.

239. *Id.*

240. See generally Vallareal, *supra* note 155.

241. See Russell, *supra* note 33.