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Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors

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Essay

Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors

ERIN B. CORCORAN

The government estimates that by the end of the fiscal year over 70,000 unaccompanied children will enter the United States. According to the United Nations High Commissioner for Refugees fifty-eight percent of these children will have been forcibly displaced and will be potentially in need of international protection. The only protections for these children are discrete and narrow forms of immigration relief. Such relief depends on whether someone such as an attorney identifies the available relief and assists the child with the application process. Yet, children are not entitled to government-funded counsel and must proceed before an immigration judge alone. For other children there is no available immigration relief; but they have witnessed unspeakable horrors and have been the victims of violence and abuse, yet there is no answer to their calls for help. They are not simply migrants crossing international borders; they are emblematic of an international humanitarian crisis rapidly unfolding in Central America.

The current crisis on the border has underscored the profound structural deficiencies in our federal agencies that cause them to fail to meet the needs of unaccompanied immigrant children—as children. This Essay contributes to the ongoing discussion on how to best handle the surge of unaccompanied minors crossing the southern border this summer. Specifically, this Essay argues that the United States must provide a solution that both keeps the children in need of international protection out of harm's way, and is grounded in international human rights law and practice. The best interest of the child principle must be operationalized in all U.S. government responses for children through a congressionally created interagency "Child Protection Corps." Further, U.S. immigration protections need to be flexible enough to create an avenue for a child to remain in this country, if it is not in the best interest for the child to return to his or her home country. Specifically, the Department of Homeland Security should consider exercising its administrative prerogatives such as prosecutorial discretion and humanitarian parole to provide children in need of protection with a safe haven.

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ERIN B. CORCORAN*

I. INTRODUCTION

I am here [in the United States] because I was threatened by the gang. One of them "liked" me. Another gang member told my uncle that he should get me out of there because the guy who liked me was going to do me harm. In El Salvador they take young girls, rape them and throw them in plastic bags. My uncle told me it wasn't safe for me to stay there and I should go to the United States.

– Maritza, El Salvador, Age 15¹

Maritza is not alone. Sixty-three percent of children fleeing El Salvador report gang violence as the primary reason for leaving.² The Department of Homeland Security (DHS) estimates that by September 30, 2014, upwards of 70,000 unaccompanied minors—children without a parent or legal guardian to provide care and physical custody³—will enter the United States,⁴ up from 24,668 in 2013.⁵ Not only is the number of children

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¹ U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 9 (2014) [hereinafter CHILDREN ON THE RUN], http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.

² *Id.* at 32.

³ 6 U.S.C. § 279(g)(2) (2006 & Supp. IV 2011).

⁴ Richard Fausset & Ken Belson, *Faces of an Immigration System Overwhelmed by Women and Children*, N.Y. TIMES, June 6, 2014, at A12. [hereinafter *Immigration System Overwhelmed*]. The U.S. Senate Appropriations Committee further estimates that this number could rise to as high as 145,000 in Fiscal Year 2015. Press Release, Committee on Appropriations, Chairwoman Mikulski Prepared Remarks: FY15 LHHS Subcomm. Markup (June 10, 2014) [hereinafter *Subcommittee Markup*], available at <http://www.appropriations.senate.gov/news/chairwoman-mikulski-prepared-remarks-fy15-lhhs-subcommittee-markup>.

fleeing the region on the rise, their reasons for flight have shifted. Prior to 2011, most children left their home countries to reunite with family living in the United States. Now, most of the children are fleeing armed criminal violence often caused by gangs or drug cartels and horrific abuse at home.⁶ These children are primarily fleeing from El Salvador, Guatemala, and Honduras, where murder rates mirror those of conflict zones. Human rights violations in those countries are coupled with a lack of meaningful State protection.⁷ Indeed, the United Nations High Commissioner for Refugees recently concluded that at least fifty-eight percent of unaccompanied children arriving from these countries were forcibly displaced and potentially in need of international protection.⁸

However, under U.S. immigration law, unaccompanied children are often seen as illegal migrants and “the law enforcement approach toward unauthorized migrants prioritizes their ‘alien’ status over their status as children.”⁹ As the crisis escalates, many of these children are being housed at emergency shelters in “icebox-cold cells—nicknamed *hierleras*, Spanish for freezers”—with no access to food or medical care.¹⁰ This all occurs while DHS attempts to determine which children may have an available sponsor in the United States to be released to and initiates removal proceedings against each child without valid immigration status.¹¹ The only protections for these children are discrete and narrow forms of immigration relief. Such relief depends on whether someone, such as an attorney, identifies the available relief and assists the child with the

⁵ LISA FRYDMAN ET AL., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 2 (2014) [hereinafter TREACHEROUS JOURNEY], available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf.

⁶ CHILDREN ON THE RUN, *supra* note 1, at 24–25. See WOMEN’S REFUGEE COMMISSION, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 1 (2012) (noting that unaccompanied minors are subject not only to violent gang attacks, but also face targeting by police who mistakenly assume that they are gang-affiliated; additionally girls in particular “face gender-based violence, as rape becomes increasingly a tool of control.”).

⁷ See U.S. CONFERENCE OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 2 (2013), available at <http://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf> (concluding that increases of migration are attributed to “generalized violence at the state and local levels and a corresponding breakdown of the rule of law”).

⁸ CHILDREN ON RUN, *supra* note 1, at 25.

⁹ LAUREN HEIDBRINK, MIGRANT YOUTH, TRANSNATIONAL FAMILIES AND THE STATE: CARE AND CONTESTED INTERESTS 42 (2014).

¹⁰ Editorial, *Innocents at the Border*, N.Y. TIMES, June 17, 2014, at A24.

¹¹ A “sponsor” includes, but is not limited to, the following individuals or entities listed in order of preference: “a parent; a legal guardian; an adult relative (brother, sister, aunt, uncle, or grandparent); an adult individual or entity designated by the child’s parent or legal guardian as capable and willing to provide care.” OLGA BYRNE & ELISE MILLER, VERA INST. ON JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM 18 (2012) [hereinafter VERA INSTITUTE].

application process.¹² Yet, children are not entitled to government-funded counsel and must proceed before an immigration judge alone. For other children, there is no available immigration relief; even though they have witnessed unspeakable horrors and have been the victims of violence and abuse. There is no answer to their calls for help. They are not simply migrants crossing international borders; they are emblematic of an international humanitarian crisis rapidly unfolding in Central America.

This Essay argues that the United States must provide a solution that both keeps the children in need of international protection out of harm's way, and is grounded in international human rights law and practice.¹³ First, this Essay argues that the best interest of the child principle must be operationalized in all U.S. government responses, approaches, guidelines, and forms of international relief and protection for children through a congressionally created interagency: the "Child Protection Corps." Second, U.S. immigration protections need to be flexible enough to create an avenue for a child to remain in this country if it is not in the best interest of the child to return to his or her home country. Specifically, DHS should consider exercising its administrative prerogatives such as prosecutorial discretion and humanitarian parole to provide children in need of protection with a safe haven. Overall, this Essay seeks to specify discrete steps for Congress and the executive branch to take in addressing significant structural gaps in the federal government's capacity to provide for the best interest of each child in need of international sanctuary.

II. OPERATIONALIZING THE BEST INTEREST PRINCIPLE THROUGH PROCEDURAL DUE PROCESS

In June 2014, the Obama administration allocated two million dollars in grant funding for AmeriCorps to provide one-hundred lawyers and paralegals in twenty-eight states to unaccompanied minors under the age of sixteen in removal proceedings.¹⁴ In addition, the Office of Management and Budget has requested that Congress appropriate an additional \$1.9 billion to the Department of Human Health Services (HHS)¹⁵ in order to address the current surge at our borders. These procedural safeguards and

¹² See TREACHEROUS JOURNEY, *supra* note 5, at 37–55 (discussing the failures of the current system to identify unaccompanied minors who are eligible for forms of relief such as Special Immigrant Juvenile Status, T visas, and U visas).

¹³ Unless the conditions in their home countries are also addressed, these children will continue to seek safety and protection from the international community. The United States and neighboring countries must undertake measures that address the root causes of flight to reduce, if not eliminate, the factors that force children to leave. While this topic is equally important, it is beyond the scope of this Essay.

¹⁴ Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES, June 6, 2014, at A11.

¹⁵ *Subcommittee Markup*, *supra* note 4.

emergency based relief are important steps, but are insufficient because they do not reform the laws and policies that govern the actual treatment of unaccompanied minors.

Article 3.1 of the Convention on the Rights of the Child (CRC) provides that: “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”¹⁶ The current response to unaccompanied immigrant minors does not—through statute or regulation—incorporate the best interest principle required by the CRC into the initial screening of children on arrival, the care and custody decisions thereafter, nor the crucial decision of which avenues of relief to pursue. With this current surge, transit stations are overwhelmed and overcrowded.¹⁷ As a result, children are being housed at facilities built for the use of adults such as Lackland Air Force Base and Naval Base Ventura County in Oxnard, California.¹⁸ In many of these facilities, children complain of the lack of medical care, food, and blankets.¹⁹ Law enforcement officers trained in border security with no training or experience in child development and psychology, with no competence to deliver trauma informed care, and no understanding of how to care for children detained in facilities lacking adequate accommodations, are now responsible for interviewing children as young as three years old. Finally, children are expected to navigate the complicated immigration system and assert claims for relief or face deportation without advocates or attorneys.

Reforms that provide unaccompanied immigrant children greater child-centered procedural due process are imperative. This Essay recommends that Congress establish an interagency known as the “Child Protection Corps,” comprised of specialized experts: “child protection officers” who possess both extensive child welfare training and a deep understanding of immigration law. Child protection officers would be deployed to the federal agencies who are either responsible for the care and custody of unaccompanied minors or are charged with determining whether these children have a legal right to remain in the United States. Child protection

¹⁶ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3, 46 (entered into force Sept. 2, 1990) [hereinafter CRC].

¹⁷ Christopher Sherman & Astrid Galvan, *Sights, Smells of Holding Cells for Immigrant Kids*, WASH. TIMES (June 19, 2014), <http://www.washingtontimes.com/news/2014/jun/18/immigrant-children-held-in-crowded-concrete-cells/>.

¹⁸ *Immigration System Overwhelmed*, *supra* note 4.

¹⁹ See Letter from Ashley Huebner et al., Nat’l Immigrant Justice Ctr., to Megan H. Mack, Office for Civil Rights and Civil Liberties, DHS & John Roth, Inspector General, DHS (June 11, 2014) available at <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> (stating that many children reported unsanitary and dangerous conditions).

officers would ensure that government officials apply the best interest of the child principle in determinations about care and custody, as well as in determinations about long-term protection and permanency.²⁰

A. *Screening and Classification*

Providing immigrant children with child-centered due process at initial screenings and classification would more fully comply with Article 3.1 of the CRC. Currently, Immigration and Customs Enforcement (ICE)—the interior enforcement branch at DHS—maintains the exclusive jurisdiction to determine if a child entering the United States is with a parent or legal guardian or is entering alone, i.e., unaccompanied.²¹ The law provides that if a child is classified as unaccompanied then DHS may not remove the child without a formal removal hearing before an immigration judge.²² In contrast, if the child is traveling with a legal guardian or parent, and does not possess the requisite documents to enter the United States, DHS can remove both the parent and the child without a hearing through its expedited removal authority.²³

Under the Child Protection Corps model, child protection officers would be embedded at ICE to initially determine if the child is potentially in need of international protection. Child protection officers would make these determinations instead of Customs and Border Patrol (CBP) or ICE officers, whose primary training and job responsibility is in law enforcement. Child Protection Officers would know how to interview the child in a comprehensive, sensitive manner that takes into account the child's age, maturity, and other pertinent developmental factors. As the screening occurs, the child would also be assigned to a child advocate²⁴ (comparable to a state court best-interests guardian *ad litem*) whose

²⁰ There is no singular definition of best interest, but there are some commonly accepted principles that should persist in assessing the best interest of unaccompanied children including incorporating the child's voice, and prioritizing safety, permanency, and the well-being of every individual child. See generally Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124–28 (2009) (discussing the standards used by various bodies to interpret the best interest of the child doctrine). Cf. Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 114–18 (2011) (presenting empirical research on the systematic failure of federal organizations to protect children of immigrant parents).

²¹ See generally 8 U.S.C. § 1252 (2006) (establishing various restrictions on judicial review and conferring exclusive jurisdiction to ICE over almost all determinations for removal). At least one federal court has held that these restrictions do not bar a federal court from reviewing a habeas corpus petition where the petitioner has a colorable claim that his constitutional rights have been violated. See *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42 (D. Mass. 2005).

²² 8 U.S.C. § 1232(a)(5)(D) (2012).

²³ 8 U.S.C. § 1225(b)(1)(A)(i) (2006 & Supp. IV 2011).

²⁴ This role is already established and defined by federal statute. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1322(c)(6) (2012) (authorizing the appointment of Child Advocates for unaccompanied alien children).

primary responsibility would be to assess, evaluate, and then advocate for the best interests of the child.

B. *Custody Determinations and Placement*

In order to comply with Article 37(b) of the CRC, which dictates that the arrest and detention of children should only be used as a measure of last resort and should be for the shortest appropriate period of time, the United States must provide child welfare experts to monitor and guide DHS and HHS regarding decisions about custody and placements.²⁵ DHS is required to transfer custody of unaccompanied children to the Office of Refugee Resettlement (ORR) within seventy-two hours of apprehension.²⁶ Presently, ORR is obligated by law to place unaccompanied minors in the least restrictive setting as possible.²⁷ ORR typically detains these children until the child is released to the care of a parent or close family member, called a sponsor, and if that is not an option, the child is placed in HHS facilities that are licensed to house children.²⁸ Such placements include long-term foster care, extended-care group homes, and residential treatment centers for children in need of certain psychological or psychiatric services.²⁹ Yet during the recent surge, unaccompanied minors are being detained in “surge shelters,” which are locked temporary shelter programs that are intended to be short-term triage facilities.³⁰ These surge shelters lack basic child-centered services including outside recreation, schooling, and experts who understand how to work with displaced children.³¹

The Child Protection Corps officers would help ensure that, while the children are in ORR custody, the best interest principle guides all accommodations even in surge shelters, including policies regarding visitation, recreation, education, medical treatment, and nutrition. The Child Protection Corps would coordinate with ORR and Non-governmental organizations (NGOs) that have expertise in identifying linguistically and culturally appropriate community resources, including mental health and integration services. These NGOs could provide such services even at the inundated surge shelters and transit centers.

²⁵ CRC, *supra* note 16, art. 37(b), at 55.

²⁶ 8 U.S.C. § 1232(b)(3) (2012).

²⁷ 8 U.S.C. § 1232(c)(2)(A) (2012); Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

²⁸ VERA INSTITUTE, *supra* note 11, at 17–21.

²⁹ *Id.* at 16.

³⁰ WOMEN’S REFUGEE COMMISSION, *supra* note 6, at 1–2.

³¹ *Id.*

C. The Adjudication Process

As Article I immigration judges adjudicate potential relief for unaccompanied minors, statutory and regulatory safeguards must be in place to ensure that the best interest of the child is paramount. Congress should require that all unaccompanied children placed in removal proceedings be afforded a government-funded or pro bono attorney who is trained in representing unaccompanied children. Working with the child and the appointed child advocate, the appointed attorney would apply for immigration relief, including temporary humanitarian options.³²

Some scholars and advocates have argued that immigrant children, or at the very least unaccompanied immigrant children, have a constitutional right to counsel when facing deportation.³³ For example, in Samantha Casey Wong's Note, *Perpetually Turning Our Back to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, she argues that unaccompanied minors have the same constitutional right to counsel as juveniles in delinquency proceedings because of key similarities between these two populations, including "majority age rule, characteristics of minors, their diminished capacity and culpability, and the seriousness of the legal proceeding."³⁴ This is a novel argument that attempts to provide much needed protection for this vulnerable population. Yet, tactics to persuade courts that immigrants have a right to government-paid counsel have repeatedly failed.³⁵ While the Supreme Court of the United States has not specifically addressed whether immigrants in removal proceedings have a right to government-paid counsel, the federal circuit courts have recurrently rejected a constitutionally mandated right to appointed counsel for indigent immigrants facing removal from the United States.³⁶ If

³² See, e.g., Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L. & POL'Y 148, 166–67 (2014) (advocating for unaccompanied children's need for counsel).

³³ See, e.g., Samantha Casey Wong, Note, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853, 870, 880–81 (2013) (arguing unaccompanied minors facing deportation have the same constitutional rights, including right to government provided counsel, as juveniles have in delinquency proceedings); Sharon Finkel, *Voice of Justice: Promoting Fairness Though Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1105 (2001) (making a case for government-funded counsel for unaccompanied minor children facing removal).

³⁴ Wong, *supra* note 33, at 870.

³⁵ See Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrations*, 115 W. VA. L. REV. 643, 644 (2012) (arguing that an "underreported crisis in the immigration system is the thousands of immigrants who are appearing before immigration judges without qualified representation").

³⁶ See, e.g., *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (quoting *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001)) ("While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings."); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) ("As deportation proceedings are civil in nature, aliens in such proceedings are

unaccompanied children are to be accorded government funded counsel, it will come through congressional or executive branch action.

In addition to Congress providing unaccompanied children who face deportation with counsel, it should require that all unaccompanied children in removal proceedings be assigned to a dedicated juvenile docket at the immigration court. Every immigration court would maintain a dedicated juvenile docket with at least two dedicated immigration judges assigned to this docket.³⁷ These judges would receive significant, uniform training from child protection officers on adjudicating children's cases, including children specific relief and how evidentiary rules should be applied to children in these proceedings. Finally, every ICE Trial Attorney unit would have an ICE trial attorney who specializes in immigrant children's cases and has been thoroughly trained on the best interest principle by child protection officers. These ICE attorneys would be educated on when and how to question children in removal proceedings, and be instructed to exercise prosecutorial discretion in favor of not seeking deportation in deserving cases. Lastly, these attorneys would be encouraged to work with appointed counsel to find a solution for the child that is in the child's best interest.

not protected by the Sixth Amendment right to counsel.”); *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) (citation omitted) (“Second, there is no Sixth Amendment right to counsel in deportation hearings, so any claim of ineffective assistance of counsel advanced by *Uspango* must be based on the Fifth Amendment's due process guaranty.”); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir. 2000) (“Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel.”); *Mojsilovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998) (“Of course, deportation hearings are civil proceedings and therefore aliens do not have a right to counsel under the Sixth Amendment.”); *Sene v. U.S. Immigration & Naturalization Serv.*, 103 F.3d 120 (4th Cir. 1996) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)) (“Deportation proceedings are ‘purely civil’ in nature; thus, constitutional guarantees that apply only to criminal proceedings, such as the sixth amendment right to counsel, do not attach.”); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (“[N]o sixth amendment right to counsel in a deportation proceeding exists.”); *Castro-O’Ryan v. U.S. Dept’ of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988) (citing *Ramirez v. INS*, 550 F.2d 560, 563 (9th Cir. 1977) (“No right to counsel under the Sixth Amendment is recognized in deportation proceedings.”); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (“Because deportation is a civil proceeding, potential deportees have no sixth amendment right to counsel.”); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 569 (6th Cir. 1975) (“In Petitioner’s case the absence of counsel at his hearing before the Immigration Judge did not deprive his deportation proceeding of fundamental fairness.”); *Matute v. Dist. Dir., INS*, 930 F. Supp. 1336, 1341 (D. Neb. 1996) (“Because deportation hearings are considered civil proceedings, aliens have no Sixth Amendment right to counsel; instead, the right to counsel at a deportation hearing is governed by the due process clause of the Fifth Amendment.”).

³⁷ Currently about half of the country’s immigration courts have established juvenile dockets. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT. OF JUSTICE, UNACCOMPANIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS (2008), available at <http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.pdf> (providing agency overview of unaccompanied minor adjudications).

III. PROVIDING WELL BEING, PERMANENCY, AND SAFETY: ALIGNING SUBSTANTIVE IMMIGRATION RELIEF WITH THE BEST INTEREST OF THE CHILD PRINCIPLE

Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.³⁸

Under the CRC, the United States should provide for children fleeing physical harm as well as abuse and neglect. These children are fleeing horrific violence such as sexual abuse, severe beatings, and threats to their lives perpetrated by family members who should be responsible for their well-being. In addition to the violence at home, their home country's government has failed to provide the requisite protection it undoubtedly owes to its own citizens. In some instances, the state has failed to remove a child from an abusive home and to provide a safe alternative; in other cases the government has been unable to stop pervasive gang violence, drug cartels, and organized crime.

Currently, the most common forms of relief for unaccompanied minors are asylum, special immigrant juvenile status (SIJS), and U and T visas. Asylum requires proving a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁹ SIJS entails a state court finding that the child has been abused, neglected, and abandoned and a determination by DHS that it is in the best interests of the child not to be returned to his or her home country but to remain permanently in the United States.⁴⁰ U and T visas provide long term protection for victims of certain severe crimes and human trafficking.⁴¹ However, some children may legitimately fear violence or have suffered past harm but do not qualify for these forms of immigration relief. For example, fleeing generalized violence perpetrated by armed criminals or gang members, no matter how horrific, is not grounds for asylum, SIJS status, or U and T visas.⁴² In these circumstances, DHS should utilize their existing administrative authority, including prosecutorial discretion and humanitarian parole, to provide temporary

³⁸ CRC, *supra* note 16, art. 19, at 50.

³⁹ 8 U.S.C. § 1101(a)(42) (2006 & Supp. V 2012).

⁴⁰ 8 U.S.C. § 1101(a)(27)(J)(i-iii) (2006).

⁴¹ 8 U.S.C. § 1101(a)(15)(T), (U) (2006).

⁴² See Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Clause Right to Counsel For Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 59–60 (2011) (showing that, of the various forms of relief for children, none of the avenues list generalized violence as a qualifier).

protection for these children. Such administrative remedies do not require congressional action and can be implemented immediately.

One option for children with no foreseeable immigration relief, but undoubtedly in need of protection, is to request that DHS exercise its inherent power of prosecutorial discretion for these children in need of protection.⁴³ Prosecutorial discretion does not provide legal status, nor does it create a path to citizenship. Nevertheless, it is a tool used by the executive branch to stay the removal of certain individuals who have compelling personal circumstances, which warrant compassion and a grant of humanitarian relief. There is current authority for ICE attorneys to administratively close removal proceedings for an unaccompanied minor because the existing guidelines for trial attorneys states that age is a positive factor when considering whether to exercise prosecutorial discretion.⁴⁴

Another option is to grant certain children in protection humanitarian parole on a case-by-case basis.⁴⁵ DHS has the authority to grant parole into the United States for “urgent humanitarian reasons,” or if the grant would result in a “significant public benefit.”⁴⁶ This would allow children who are in need of protection to remain in the United States temporarily and not be returned to certain harm.

IV. CONCLUSION

Overall, the current crisis on the border has underscored the profound structural deficiencies in our federal agencies to meet the needs of unaccompanied immigrant children—as children. Congress and the executive branch must conduct a systemic overhaul of federal agencies that operationalizes the best interest of the child principle by creating the Child Protection Corps and by providing immigration relief for children in need of international protection. If these reforms can be realized, the U.S. can provide effective protection to children like Maritza, who flee unspeakable violence that no child should have to endure.

⁴³ 8 C.F.R. § 274a.12(c)(14) (2013); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 263 (2010).

⁴⁴ Memorandum from Doris Meissner, Commissioner, Dep’t of Justice, Immigration & Naturalization Serv., to Dirs., Agents, and Counsel of the Dep’t of Justice Immigration & Naturalization Serv. 1, 11 (Nov. 17, 2000), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>.

⁴⁵ See U.S. DEP’T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVS., HUMANITARIAN PAROLE PROGRAM 8 (2011), available at <http://www.uscis.gov/tools/resources-congress/presentations-and-reports> (stating that for children under 16 humanitarian parole requests should be immediately processed).

⁴⁶ 8 U.S.C. § 1182(d)(5)(A) (2006).