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Brian Rowe

I. INTRODUCTION

In countries around the world, undocumented immigrants are a vulnerable population in need of special legal protections. Within these populations, unaccompanied children especially need protection. They are often hidden from the public eye, subject to dangerous or abusive conditions, and fleeing persecution in their home countries. When subject to removal without the assistance of legal representation, it may be practically impossible for unaccompanied alien children to obtain relief.

In cases involving alien children, the right to counsel is uniquely necessary and can be specially tailored to meet a child’s needs. In alien child removal cases, counsel plays an informational and relational role: establishing a relationship with the children in pursuit of their interests, and furnishing the decision-maker with the information necessary to the judgment. If a potential case for asylum exists, the court may not be able to sufficiently understand the child’s situation without a legal representative. A legal representative in the form of a lawyer or a guardian will be familiar with the relevant laws, able to provide the necessary individual attention to the child’s case, and able to relay the relevant information to the court and advocate for the child’s wishes or interests if necessary. The use of a guardian in conjunction with the appointment of an attorney is ideal.

In this Comment, I do not intend to argue for new substantive laws, either international or domestic, concerning the rights of aliens. My argument is that a procedural standard must be followed to give traction to substantive rights that already exist. Without the provision of legal assistance in legal proceedings, the rights granted to children under international treaty law, domestic law, and customary international law are in danger of being nullified.

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In Section II of this Comment, I discuss trends in international law regarding aliens and children. Though the clearest sources of international law do not explicitly provide the right to free legal assistance for children in removal proceedings, trends in international law suggest that such a right may exist, at least as an emerging norm. In Section III, I consider various grounds for assessing the strength of this right under international law, including (1) the unique vulnerabilities of unaccompanied alien children, (2) the combined consideration of various international treaties conferring rights on aliens and children, (3) the international legal prohibition on refoulement, (4) the requirement that aliens and nationals receive equal treatment under the law, (5) a critique of the criminal/noncriminal distinction, (6) due process for aliens, and (7) state interests and other considerations. In Section IV, I discuss the substance of the right to free legal assistance, including the use of attorneys and guardians, and potential remedies for failures to provide proper procedure. Finally, I conclude that the right to free legal assistance for children in removal proceedings is a necessary component of due process and an emerging norm under international law.

II. TRENDS IN INTERNATIONAL LAW REGARDING ALIENS AND CHILDREN

International law regarding aliens and children has progressed significantly in the last century. It has evolved from a state-based framework of essentially unenforceable obligations to a system of rights focused on individuals. Children are now recognized as a category of persons requiring special protection. Rights regarding aliens have developed through various treaties and norms and have become increasingly detailed and category-specific. Throughout the historical development of these rights, the recognition of new rights has been balanced against countervailing state interests. Notwithstanding their international legal obligations, states have strong interests in excluding and expelling aliens efficiently and expeditiously.

Since the Second World War, international law regarding aliens has grown from thin agreements between nations, enforceable only by and against nations, to a system of particularized individual rights. As international law regarding aliens continues to progress, classes of aliens formerly excluded from the protections of broad legal instruments are being specifically included. These

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trends are apparent in the realm of asylum law, specifically for children. Since the passage of the Convention on the Rights of the Child (CRC), children’s asylum rights have received a clearer treatment in legal scholarship.

The need for increased legal protections of refugees under international law has grown in conjunction with the increased number of refugees since the Second World War and the increasingly dramatic interstate migration patterns. Since the Second World War, many treaties have attempted to deal with the needs of immigrant and refugee populations. These treaties include the Universal Declaration on Human Rights (UDHR), the Refugee Convention (1954), the Hague Convention on Civil Procedure (HCCP), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC).

Aside from treaty law, there are norms in customary international law that are binding on all states. Most countries recognize some form of due process for aliens, and some international law scholars suggest that due process may constitute a customary international law norm. In addition to the norm of due process, customary international law contains other relevant norms to aliens’ rights. The prohibition on refoulement, the prohibition against discrimination on the basis of nationality, and the right to equal treatment as nationals on matters of procedure are relevant norms to this inquiry. Though some may contest whether these norms have achieved jus cogens status, they have continued to develop as part of the legal patchwork concerning the rights of aliens.

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3 Convention on the Rights of the Child (“CRC”) (1989), 14 ILM 1448. The CRC is an international treaty that lists the fundamental human rights of children, including rights to health care, education, and protection from harmful influences.

4 Universal Declaration of Human Rights (“UDHR”) (1948), General Assembly Res No 217A (III), UN Doc A/810.


7 International Covenant on Civil and Political Rights (“ICCPR”) (1966), General Assembly Res No 2200A (XXI), UN Doc A/6316, 999 UN Treaty Ser 171.

8 CRC (cited in note 3).

9 See Section III.F.

10 Guy Goodwin-Gill, International Law and the Movement of Persons Between States 141 (Oxford 1978) (“It may be affirmed that the prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law.”).

11 Id at 75.
III. LEGAL FOUNDATIONS FOR THE CHILD’S RIGHT TO REPRESENTATION

A. Children and Unique Procedural Protections

The fact that there is no general right to free legal assistance for aliens in removal proceedings reflects the adult-centric nature of international asylum law. On balance, it might be justifiable that adults do not have the right to free legal assistance; presumptions of competence and maturity seem more warranted and may mitigate the need for states to provide legal assistance. However, as scholars note, many of the relevant international legal instruments were not drafted with children’s interests in mind. Rather, the absence of the right to free legal assistance reflects the presumption that aliens in removal proceedings are sufficiently competent to raise cases for asylum. This is not likely to be the case in proceedings involving children, and the emerging norms in international law should reflect this understanding. Immigrant children, especially those not accompanied by a parent, are a vulnerable group in need of special legal protection.

Advocates for children’s rights stand against adult-centered legal systems, just as feminist scholarship critiques male-centered systems. Children have different abilities, needs, and interests than adults. They are not presumed to be autonomous, rational, or competent to the same degree as adults. For these reasons, Van Bueren writes of the special protections found in the CRC as “the grundnorm of the international law on the rights of the child.” With the exception of the CRC, international treaty law does not seem to take into

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12 See Jacqueline Bhabha, Un Verité Juridique?—Migrant Children: The Rights and Wrongs, in Carol Bellamy and Jean Zermatten, eds, Realizing the Rights of the Child, 206, 207 (Rüffer & Rub 2007) (arguing that “the interests and the perspectives of children are generally omitted or at least neglected in the formulation of migration policy and related rights.”).

13 See, for example, Richard Weissbourd, The Vulnerable Child 25 (Da Capo 1997) (describing the vulnerabilities of certain children, including a twelve-year old boy who recently immigrated from Ethiopia); Walter A. Ewing, Immigration Policy Center, A Study in Distortion: FAIR Targets Immigrant Children (Aug 22, 2003), online at http://www.immigrationpolicy.org/special-reports/study-distortion-fair-targets-immigrant-children (visited Nov 21, 2009) (describing immigrant children as “one of the most vulnerable groups in the US”).

14 See, for example, Geraldine Van Bueren, The International Law on the Rights of the Child 52, nn 144–47 (Martinus Nijhoff 1998) (stating that the concept of international children’s rights is similar to the women’s rights movement in challenging the assumption that the law is neutral and objective).

15 For example, the CRC directs that rights are to be adjudicated in a manner consistent with the child’s “evolving capacities.” CRC, Art 5 (cited in note 3).

16 Van Bueren, The International Law on the Rights of the Child at 53 (cited in note 14) (arguing that children’s greater dependency on others has resulted in children being accorded special protection in international law).
account the vulnerabilities of children as a class. Jacqueline Bhabha traces some of the deficiencies of international asylum law concerning children to “the adult male paradigm governing international refugee law, the absence of . . . age as specified grounds of persecution in the [Refugee Convention].”17 Bhabha also notes that “state practice has entrenched this discriminatory stance by adopting asylum procedures which take no account of . . . age-based specificities.”18 Though the inclusion of age as a ground of persecution under the Refugee Convention19 would greatly increase the substantive legal relief available to alien children, such a change would almost certainly be rejected by states for being overbroad. The CRC requires the adoption of the “best interests” standard in matters affecting children.20 This requirement, uniquely suited to meet the needs of children, may suggest that the right to legal aid may require the provision of a guardian, where there is a role for such. The appointment of a guardian for a child, especially in conjunction with representation of an attorney, provides strong procedural protections focused on the best interests of the child. The US initiated a program in 2008 under which the Secretary of the Department of Health and Human Services may appoint a “child advocate”—basically a guardian—in unaccompanied alien children removal cases.21 Guardians serve an essential role in determining and advocating for the best interests of the child.

Additionally, the CRC requires that children be given the right to express their views and the opportunity to be heard in proceedings affecting them.22 In some cases, this right will be meaningless without the provision of legal assistance. The CRC gives no guidance as to when assistance should be made available or what form it should take, though it notes that the child’s age and maturity should be taken into account.23 It leaves implementation open for determination by states. Nonetheless, many countries provide some representation for children in custody proceedings in their implementation of

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17 Jacqueline Bhabha, *Demography and Rights: Women, Children, and Access to Asylum*, 16 Intl J Refugee L 227, 228 (2004) (describing the adult male paradigm as one reason why children are so vulnerable to being excluded from the coverage of international asylum law).
18 Id.
19 Refugee Convention (cited in note 5).
20 CRC, Art 3.1 (cited in note 3) (“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.”).
22 CRC, Art 12 (cited in note 3).
23 Id, Art 12(1) (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”).
the CRC, whether through the use of a guardian or an attorney.\textsuperscript{24} Most of the CRC implementations that scholars study are in the realm of child custody hearings,\textsuperscript{25} but the requirements of the CRC apply equally to immigration proceedings, to the extent that children's interests are affected.\textsuperscript{26} Perhaps the most important way to advance the participation of the child in proceedings—to advance the implementation of CRC Article 12—is to provide legal representation. Without legal representation of some sort, the right of the child to participate in proceedings may gain no traction.\textsuperscript{27}

B. Combined Consideration of International Law Sources

Current international law on the right to counsel may be found in various international legal instruments. Though none of these instruments explicitly grants the right to counsel in removal proceedings, their combined consideration suggests that in certain alien removal cases, international law requires a state to provide legal aid. Such cases include children with potential asylum claims who are unable to effectively represent themselves in legal proceedings.

\begin{footnotesize}
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\item Consider Mervyn Murch, The Voice of the Child in Private Family Law Proceedings in England and Wales, 2005 Intl Fam L 8 (Mar 2005). Professor Murch notes the ways in which children are allowed to participate in family law proceedings in England and Wales, and uses Article 12 of the CRC as an "important yardstick against which the family justice system of England and Wales can be evaluated." Id, ¶ 3.
\item See CRC, Art 12 (cited in note 3) (directing States Parties to extend certain procedural rights "in all matters affecting the child" and "in any judicial and administrative proceedings affecting the child.").
\item The form of representation suitable for children is subject to debate. However, there is widespread agreement that some legal representation (whether in the form of an attorney, guardian, or hybrid counsel), is necessary to preserve a child's participatory rights. See Pask, 1 Intl J Refugee at 213 (cited in note 2) ("In national law, the functions of representative and decision-maker for the minor may be combined or separated, depending on the existing legal system."); Devon Corneal, On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?, 109 Penn St L Rev 609, 648–52 (2004) (arguing that unaccompanied alien children in the US should be provided with attorneys and guardians in order to protect their rights); Linda Elrod, Client-Directed Lawyers for Children: It Is the "Right" Thing to Do, 27 Pace L Rev 869, 907–18 (2007) (arguing that children in child custody proceedings in the US should receive appointed lawyers, and limiting the use of guardians). See also William Wilberforce, Trafficking Victims Protection Reauthorization Act at § 235(c)(6) (cited in note 21) (authorizing the Secretary of Health and Human Services to appoint “independent child advocates” for unaccompanied alien children).
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The first major and most significant instrument in the area of international law concerning aliens is the Universal Declaration on Human Rights (UDHR). Drafted in the wake of the Second World War, the declaration established many norms of human rights law, to be applied equally to aliens and nationals; many of which are understood to be included in customary international law. Most importantly, the declaration establishes that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." The declaration says little about procedural rights for aliens, though it does provide that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Shortly after the UDHR was adopted, the Refugee Convention and the 1967 Protocol (Protocol) were adopted. The Refugee Convention and Protocol afford more specific rights to refugees, including national treatment in procedural issues, the right to due process before expulsion, a prohibition on refoulement, and a conferral of jurisdiction on the International Court of Justice for related disputes between states. There are currently 147 states parties to either or both the Refugee Convention and the Protocol.

The International Convention on Civil and Political Rights (ICCPR), created in 1966, contains important protections for aliens. The ICCPR prescribes separate judicial treatment of accused juveniles, nondiscriminatory protection of children, various procedural requirements for the expulsion of aliens, and fair and public hearings for the criminally accused. There are 165

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28 Consider the norms against discrimination, slavery, and torture, found in Articles 2, 4, and 5 respectively. UDHR, Arts 2, 4, 5 (cited in note 4) (prohibiting discrimination, slavery, and torture).
29 Id, Art 14.1.
30 Id, Art 10.
31 Refugee Convention, Art 16.2 (cited in note 5) (Cautio judicatum solvi is a bond which authors of suits are required to post to cover costs).
32 Id, Art 32.2.
33 Id, Art 33.1.
34 Id, Art 38.
36 ICCPR, Art 10.2(b) (cited in note 7).
37 Id, Art 24.1.
38 Id, Art 13.
39 Id, Art 14.1.

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states parties to the ICCPR, though many states have failed to ratify the treaty or have made significant reservations.40 Of most relevance to this Comment, the CRC was adopted in 1989. Among the many rights specifically tailored to children's unique vulnerabilities, the CRC includes the prescription of the best interest standard for all actions concerning children, access to legal and other appropriate assistance when a child is deprived of liberty, the consideration of age and maturity factors in assessing the child's expressed wishes, and the right to judicial and administrative hearings on the same conditions as nationals.44 The CRC has been ratified by 193 countries, including every member of the UN except the US and Somalia.45

Considered in conjunction with each other, the UDHR, Refugee Convention, ICCPR, and CRC suggest that special procedural protections for alien children may constitute an emerging norm under international law.

C. Non-refoulement and the Right to Counsel

Customary international law is understood to contain a prohibition on refoulement.46 Refoulement is the return of a refugee to a territory in which the refugee would face persecution.47 In the context of unaccompanied alien children removal cases, the prohibition on refoulement would be essentially meaningless in instances where a fair hearing with legal representation is not available.

International law does not explicitly require that all immigrants in removal proceedings have the right to counsel at government expense.48 Undoubtedly, extending the right to counsel to all immigrants with potential asylum claims

41 CRC, Arts 3.1, 18 (cited in note 3).
42 Id, Art 37(d).
43 Id, Art 12.1.
44 Id, Art 12.2.
46 See Goodwin-Gill, International Law and the Movement of Persons between States at 141 (cited in note 10). But see Aoife Duffy, Expulsion to Face Torture? Non-Refoulement in International Law, 20 Intl J Refugee L 373, 390 (2008) (arguing that though the principle of non-refoulement is a principle of customary international law, it has not yet acquired the status of jus cogens).
47 See Refugee Convention, Art 33.1 (cited in note 5).
48 For example, the Refugee Convention only requires that removal decisions be made “in accordance with due process of law.” Refugee Convention, Art 32.2 (cited in note 5).
would increase the rate at which asylum claims are granted. Such a requirement, though, is not found in international law and is likely too strong to be adopted. Adults are presumed to be more capable of representing themselves and availing themselves of available legal relief. Smaller groups within immigrant populations, such as children, have stronger and more particular legal needs that require states to take greater care in attempting their removal. States have the right to remove aliens from within their borders and are not required to provide counsel for every removable alien who requests counsel. There are, however, limits on a state’s right to remove aliens, such as the prohibition on refoulement. A state cannot deport an alien who will face persecution upon her or his return. The problem remains, however, that a state may not “know” of a potential refugee’s situation before they are removed. In refugee states, a lack of procedural protections may equate to a lack of knowledge, leading to the wrongful removal of refugees.

States’ lack of knowledge regarding the asylum claims of their undocumented immigrants may be attributable to any number of factors. Hearings and any legal proceedings are costly and time-consuming. If made public, hearings may bring unwanted publicity on state actions. Hearings may also lead to the discovery of information that would obligate a state to grant refugee status to an immigrant. States may lack motivation to offer adequate procedural protections to immigrants for a variety of reasons, including cultural bias, economic constraints, weak international law, lack of domestic political will, and a simple unawareness of the problems immigrants may face if returned to their home countries.

All immigrants with potential refugee status facing removal should be protected under international law, regardless of whether the state “knows” of such status. Without such a provision, states are motivated to offer less procedural protection. The “head-in-the-sand” approach allows and encourages states to expedite the removal of large numbers of immigrants with little to no procedural protections. International law should not distinguish between states that deport aliens with known asylum claims and those who deport aliens without making inquiries into their status.

D. Equal Treatment of Aliens and Nationals

Under international law, a government cannot remove an alien with a potential right to stay without giving an adequate hearing, which may include

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49 See, for example, *Fong Yue Ting v US*, 149 US 698, 711 (1893) ("The right to exclude or expel all aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation.").

50 Refugee Convention, Art 33.1 (cited in note 5).
representation by an attorney. Under the ICCPR, the ECHR, and the HCCP, aliens are to be treated with the same standards afforded to nationals in the territory. Though a national will never be deported to a foreign country, the consequences of deporting an immigrant child with a strong asylum case may be comparable to or worse than the significant criminal punishment nationals may face, and this action merits strong legal protections.

The international legal right to equal treatment for nationals and aliens raises some questions about the limits on the right of states to remove aliens. A state’s immigration policy lies at the intersection of criminal, civil, and administrative law, and aliens need procedural protection throughout all proceedings that affect their interests. Though the right to counsel in criminal proceedings is well-documented in international legal scholarship, the connection between criminal proceedings and their consequences in immigration proceedings is disjointed. This disjunction highlights some of the difficulties of applying the rule of equal treatment in the cases of aliens, because of the substantive differences in laws dealing with aliens. Even if aliens receive full procedural rights in criminal and removal proceedings, they could still be wrongfully removed without a fair opportunity to raise asylum claims. Since nationals are not subject to removal proceedings, it is impossible to directly apply the right to equal treatment to such situations; if the right is to be applied, it must be by analogy and by consequentialist analysis.

The HCCP requires that legal aid be given to aliens on the same conditions as nationals. Other sources of international law, however, suggest this requirement is mostly limited to criminal trials. Even if the HCCP was read notwithstanding the limitation to criminal trials, it is not clear that a state would

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51 ICCPR, Art 2 (cited in note 7) (granting legal protections to “all individuals within its territory and subject to its jurisdiction”).
52 European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) (1950), Art 1, 213 UN Treaty Ser 222, 224 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).
53 HCCP, Art 20 (cited in note 6).
54 See, for example, L. Griffin Tyndall, ‘You Won’t Be Deported . . . Trust Me!’ Ineffective Assistance of Counsel and the Duty to Advise Alien Defendants of the Consequences of Guilty Pleas, 19 Am J Trial Advoc 653, 662–71 (1996) (examining the lack of legal relief available when aliens are deported as a result of ill-advised guilty pleas).
55 HCCP, Art 20 (cited in note 6) (“In civil and commercial matters, the nationals of each of the contracting States shall in all other contracting States be entitled to free legal aid on the same basis as nationals of the latter States.”).
56 Carmen Tiburcio, The Human Rights of Aliens under International and Comparative Law 245 (Martinus Nijhoff 2001) (“[M]ost of the procedural rights contained in international law instruments are granted only in the context of criminal suits.”).
be required to give legal aid to aliens in removal proceedings, as nationals never undergo removal proceedings. Since the comparison with nationals’ rights in removal proceedings categorically fails, a consequentialist comparison of outcomes (including deportation) may be more appropriate than a formalist approach to rights based on the type of the case.\textsuperscript{57}

The removal of “criminal” aliens is a well-established state practice, but it raises issues with the right to equal treatment. Though the Convention against Torture (CAT),\textsuperscript{58} with its prohibition on extraordinary rendition, imposes a limit on the ability of states to deport criminal aliens,\textsuperscript{59} it is unclear if a state has any limits on imposing deportation as an extra-judicial punishment for crimes, even in the case of asylum seekers or refugees.\textsuperscript{60} Article 14 of the UDHR directs that the right to seek and enjoy asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes.” The Refugee Convention gives states the right to deny asylum for criminal aliens when the crime is “serious” and “constitutes a danger to the community.”\textsuperscript{61} With the right to equal treatment in mind, it seems that states should not be able to deny aliens asylum because of low-level crimes.\textsuperscript{62} If the alien is likely to experience persecution, a certain low level of criminal activity should not subject that refugee to removal and persecution. International law requires refugees to be given the same protections as nationals. This implies that refugees should be subject to standard criminal trials, not removal for small crimes.\textsuperscript{63} In the larger

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\item See, for example, \textit{In re Gault}, 387 US 1, 13 (1967) (employing a similar consequentialist analysis which rejects the formal designation of juvenile delinquency proceedings as non-criminal for the purposes of due process analysis).
\item UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) (1985), 24 ILM 535.
\item See id, Art 3.
\item Consider the situation in Postville, Iowa in 2008, where adults and children were charged with identity theft crimes, and were pressured as a result of these crimes into accepting expedited removal. Consider Erik Camayd-Freixas, \textit{Interpreting after the Largest ICE Raid in US History: A Personal Account}, NY Times (June 13, 2008), online at \url{http://graphics8.nytimes.com/packages/pdf/national/200807111IMMIG.pdf} (visited Nov 21, 2009).
\item Refugee Convention, Art 33.2 (cited in note 5).
\item In the US, immigration authorities enjoy wide discretion to classify crimes as “felonies” sufficient to require an alien’s deportation.
\item Consider a parallel in US law: in \textit{Hunter v Underwood}, 471 US 222, 227–28 (1985), the right to vote was taken away for persons convicted of crimes involving moral turpitude. This was found to have a discriminatory effect on blacks. Stealing chickens was classified as a crime of moral turpitude, whereas embezzlement was not. Similarly, the classification of small crimes as “felonies” for the purposes of immigration law may subvert the policy of affording national treatment to aliens and nationals alike, imposing disproportionately large consequences on alien populations.
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picture, the state’s interest in removing an alien needs to be weighed against the consequences of removing a refugee.

E. The Criminal/Non-criminal Distinction

The right to counsel in criminal proceedings is clear under international law for citizens and aliens alike.64 However, removal proceedings are commonly characterized as non-criminal, which has led to the suggestion that states have no obligation under international law to provide legal assistance in such proceedings. This is a misguided suggestion. Removal of aliens with asylum claims should be governed by the same procedural protections as in criminal cases. The reasons necessitating the uniquely protective procedures in criminal trials equally apply in the asylum context.

A consequentialist analysis of removal proceedings suggests that the only difference between criminal violations and immigration violations are the reduced rights available at trial. The characterization of immigration violations as non-criminal simply reflects a state’s interest in shortcutting procedural protections for aliens. Additionally, states are obligated under international law to provide legal aid to indigent criminal defendants, leading to the counterintuitive result that criminal aliens might receive more procedural protections against removal than non-criminal aliens.

If the defining characteristic of criminal proceedings is the liberty interests at stake, then removal proceedings involving potential children refugees seem more similar to criminal than civil proceedings.65 In many countries, including the US, children undergoing removal proceedings are detained, and thus have liberty interests that have already been significantly limited.66

Additionally, in some countries, including the US, removal proceedings likely to result in deportation may be used as bargaining tools for avoiding

64 See David Harris, The Right to a Fair Trial in Criminal Proceedings as a Human Right, 16 Intl & Comp L Q 352, 364–67 (1967) (discussing the textual basis for the right to counsel in international law for criminal proceedings).

65 For a parallel legal doctrine, consider the US Supreme Court’s holding in In re Gault, 387 US at 36–42 (holding that the juvenile in delinquency proceedings had the right to appointed counsel, even though the proceedings were characterized as civil, not criminal). For a discussion of the US jurisprudence that has developed regarding the civil/criminal distinction, see Brian Smith, Charles Demore v. Hyang Joon Kim: Another Step Away from Full Due Process Protections, 38 Akron L Rev 207, 212 n 31 (2005).

criminal trials. Rather than face lengthy prison sentences followed by deportation, aliens charged with crimes and the states in which they reside may find it easier to avoid prison altogether, and thus choose to seek deportation as the direct criminal remedy.

The characterization of deportation as non-penal and illegal entry as an immigration violation rather than a crime is itself suspect. By characterizing illegal entry and deportation in non-criminal terms, states avoid their international obligations to provide adequate procedural protections. This raises the following question: who controls the distinction between criminal and non-criminal proceedings?

Is it merely a state’s designation of a law as such that controls this characterization? There does not appear to be a definition of “crime” under international law, though one might be useful. A consequentialist analysis suggests that immigration violations may be properly characterized as crimes, with removal as the punishment. This is especially the case when the alien faces possible persecution upon her return. Unlike non-criminal proceedings, the individual’s liberty is at stake. Immigration violations should be considered criminal for the purposes of procedure, possibly as a sort of “international criminal trespass.” The power to call a statute civil or administrative rather than criminal is too susceptible to arbitrary and abusive application; the inquiry of whether heightened procedural protections are necessary should not end at a state’s designation of a statute as non-criminal. Indeed, US courts may be open to the idea that non-criminal cases may require counsel to be provided at government expense. In *Aguilera-Enriquez v Immigration and Naturalization Service*,

67 the Sixth Circuit suggested that the prohibition on providing counsel to aliens facing deportation unlawfully “rested on the outmoded distinction between criminal cases . . . and civil proceedings.”

An interesting section of Michelle Malkin’s book, *Invasion*, concerns the “criminal” nature of immigration violations.69 As mentioned above, immigration laws have long been recognized as civil, not criminal, notwithstanding the consequentialist arguments I have raised to the contrary. Though Malkin has different policy objectives regarding aliens, she similarly challenges the characterization of immigration laws as civil in nature. Appendix B, entitled, “Illegal Immigration Is a Crime,” cites US federal law “that spell[s] out the crime and punishment for aliens that trespass against our borders,”

67 516 F2d 565 (6th Cir 1975).
68 Id at 568 n 3. But see 8 USC § 1229a(b)(4)(A) (2006) (giving aliens in removal proceedings the “privilege of being represented, at no expense to the Government”).
69 Michelle Malkin, *Invasion* 243 (Regnery 2002).
70 Id.
punishment by imprisonment and fines. Though Malkin is not writing for an academic or strictly legal audience, her point is nonetheless salient: in the case of many states' immigration laws, the status of "crime" may fit the "punishment" that is prescribed by the law.

Enhanced procedural norms borrowed from international criminal tribunals are appropriate for asylum proceedings, due to the unique difficulties that asylum claimants face. Rosemary Byrne advocates the employment of certain aspects of criminal procedure in asylum proceedings. The heightened standards for evidence and procedure required in criminal trials are equally necessary to preserve integrity in asylum proceedings. Byrne notes a "paradoxical trend. On the one hand, there is a growing international awareness among authorities of the need to take into consideration the vulnerabilities of refugees. On the other hand, waves of domestic legal reforms abridge and accelerate refugee asylum procedures." Byrne also refers to "procedural barriers that deny the fundamental conditions for an adequate assessment of an applicant's oral evidence." This supports the idea that in countries such as the US and the UK, criminal-like procedural protections preserve the integrity of the proceedings and would protect vulnerable refugee populations, serving state and refugee interests alike.

F. Due Process for Aliens

Some sources of international legal thought, and arguably, customary international law, suggest that even aliens should enjoy a right to due process. The meaning of "due process" is of course unclear and subject to much debate and restrictive interpretation. It is clear, however, that some procedural protections are necessary to the integrity of the proceedings, and it is these protections that a state must provide. The finding of a due process right is a balancing activity in which the interests of the state in low-cost and speedy proceedings must be balanced against the individual's interests in close attention.

72 Id at 612.
73 Id.
74 For example, the Inter-American Commission of Human Rights and the International Commission of Jurists describe the international legal right to due process in terms of twelve specific minimum rights, including "the right to free legal assistance if necessary." Tiburcio, The Human Rights of Aliens under International and Comparative Law at 250–551 (cited in note 56).
75 See Theodor Meron, Human Rights Law-Making in the United Nations 186 (Oxford 1986) ("[D]ue process rights are fundamental and indispensable for ensuring any other right.").
to his or her case. Inevitably, some procedural protections will be more necessary than others, and some may be more costly than others as well. My proposal here is that the right to free legal counsel is a uniquely necessary component of due process for alien children in removal proceedings, and that this protection outweighs the interest a state may have in quickening the process.

It should be acknowledged that due process is easily subverted and that the right to counsel, as part of the standard, is not always a sufficient guarantee of protection. States may try to set up hasty, non-judicial courts to satisfy their duties under international law to provide adequate hearings, adhering to the letter of the rule, but violating the spirit of it. As seen in Postville, Iowa in 2008, even with the provision of counsel for every immigrant in removal proceedings, a government can engineer a judicial process which forces immigrants to forego asylum applications. The Postville raid involved the rapid processing of hundreds of undocumented immigrants in a meatpacking plant, and though they were provided with attorneys, each attorney was assigned to an average of seventeen defendants, and each defendant had little practical opportunity to develop a defense. Coercive plea agreements, trumped up criminal charges, and even short periods of detention were used to deter legal representatives and their clients from pursuing legal relief. The right to counsel is nonetheless a necessary piece of the larger picture of due process. In certain cases, the absence of legal representation is sufficient to make proceedings unfair. Though never entirely sufficient to guarantee due process, the provision of legal assistance is a necessary component of due process, and should be considered and implemented in conjunction with other procedural and substantive protections.

Indeed, US courts have suggested that due process may require appointed counsel at government expense even for aliens in removal proceedings. In Escobar Ruiz v Immigration and Nationalization Service, the Ninth Circuit noted in dicta, “due process could be held to require that an indigent alien be provided with counsel.” Though this concerns due process standards emanating from US law, the notion of due process at the international legal level is not clearly

76 Camayd-Freixas, Interpreting after the Largest ICE Raid in US History: A Personal Account at 9 (cited in note 60).
77 Id at 5.
78 See id at 9–10 (describing a process which “reduced the judges to mere bureaucrats, pronouncing the same litany over and over for the record in order to legalize the proceedings, but having absolutely no discretion or decision-making power . . . when the executive branch forces the hand of the judiciary, the result is abuse of power and arbitrariness, unworthy of a democracy founded upon the constitutional principle of checks and balances”).
79 787 F2d 1294 (9th Cir 1986).
80 Id at 1297 n 3.
different. In the case of unaccompanied alien children with potential cases for asylum, due process would seem to require at least the appointment of counsel at government expense because of the inability of children to advocate for themselves.

G. State Interests and Other Considerations

Procedural rights force states to bear additional costs. Costs in expediency and finances are likely to be the most significant barrier in implementing procedural rights, and states' systems will need to reform gradually to support them. The financial cost of procedural rights creates political difficulties for the implementation of strong norms, but on a strictly legal basis, the financial cost should receive little or no weight. The Refugee Convention directs that refugees facing expulsion be given due process "[e]xcept where compelling reasons of national security otherwise require," and it mentions no other exceptions. This exception for national security does not appear to include consideration of the financial costs a state must bear in order to comply with the Refugee Convention.

There is a good to be achieved—namely, the ability of states to expel unlawful immigrants—but also an evil to be guarded against—that is, the removal of aliens with valid asylum claims. In the realm of international asylum law, the incentives for states to provide strong procedural protections are uniquely lacking; the costs of a system lacking in procedural protections are borne chiefly by the deported aliens and the states receiving them. In criminal law systems, inadequate procedural protections may result in political instability, oppression, and high prison populations. In the realm of asylum law, however, inadequate procedural protections rarely if ever result in costs to the deporting state.

In addition to state fiscal concerns, there are also concerns of fraud and abuse. Sarah Maloney writes, "Western States are concerned that young adults fraudulently claim to be minors in order to receive special treatment and to..."
improve their chances for grants of humanitarian relief." The provision of legal assistance for cases involving the removal of alien children with asylum claims is necessary to preserve the integrity of the proceedings. Providing free legal assistance will help reduce fraud and abuse in several ways.

First, the provision of free legal assistance may make unrepresented children less vulnerable to private attorneys working for traffickers or smugglers. A judge will have more ground to question the background of counsel when there are competing bids for representation. Second, attorneys or advocates appointed or approved by a court would be able to make a candid assessment and presentation of the relevant facts of a child's asylum case. Third, on a related note, attorneys are trained professionals, bound by ethical constraints. In the US, they are allowed and required to report clients engaged in fraud. Children's attorneys would not only offer much needed protection, but would also help prevent fraud and abuse.

IV. PROCEDURAL PROTECTION FOR ALIEN CHILDREN

The right of a refugee to seek asylum in whatever country she or he may be found can only be upheld under the shield of certain procedural rights. As Carmen Tiburcio notes, "[A]s laws are becoming more and more complex and [] legal proceedings are more and more complicated and mysterious, [it is] impossible for the individual to have access to courts and to a trial without being assisted by a lawyer." The right to apply for asylum is well-established under international law. One of the most important procedural protections supporting this right is the right to counsel. In children's cases where deportation is a possible consequence of proceedings, the right to counsel is essential to respecting children's rights under international law.

A. Nature of the Necessity

The provision of legal assistance is necessary in order for states to comply with other international legal rules. Tiburcio describes procedural rights in

86 See note 71 and discussion in Section III.F.
87 See, for example, Maloney, J Refugee Studies at 112–13 (cited in note 85) (speaking of such procedural policies in the UK that “enable full disclosure from unaccompanied/separated children in order to facilitate accurate decision-making”).
88 See MRPC 1.6(b)(2), (b)(3) (ABA 2007).
90 See UDHR, Art 14 (cited in note 4).
general as "rights which guarantee the enforcement of all other rights."\textsuperscript{91} No matter the variety of substantive rights given to aliens under international law, these rights will be meaningless unless coupled with strong procedural protections. Since some procedural rights are involved in upholding non-derogable or fundamental rights under international law, some legal scholars also characterize the procedural rights as non-derogable.\textsuperscript{92} The provision of counsel for immigrant children facing removal is one such non-derogable procedural right that is necessary to avoid running afoul of the prohibition on refoulement of the various international law concerning children.

Counsel should be provided for the purpose of removal proceedings. In Postville, coercive plea agreements, trumped up criminal charges, and even short periods of detention were be used to deter legal representatives and their clients from pursuing legal relief.\textsuperscript{93} One of the problems with the Postville incident was the limitation of the attorneys' roles to criminal matters. The attorneys were provided exclusively to represent the immigrants in criminal charges, and not in immigration or asylum matters. Though many of the accused went to prison for several months, the more serious consequence was deportation: many of the immigrants were from a region in Guatemala known for persecution. Had counsel been able to represent the accused in the full range of the charges—criminal and administrative—the outcome may have been different. It was too little too late, however, and any potential asylum claims were not raised because the immigrants' attorneys were unable to represent them in their removal proceedings.

B. The Form of Legal Assistance: Attorneys and Guardians

Supposing that unaccompanied alien children in removal proceedings are entitled to legal representation at government expense, there is still a question of the content of this entitlement. Children, especially unaccompanied ones, will have much more difficulty navigating a foreign legal system than adults. Taking into account these unique challenges, one author writes, "The international community has recognized [...] that refugee children have different needs from

\textsuperscript{91} Tiburcio, \textit{The Human Rights of Aliens under International and Comparative Law} at 245 (cited in note 56).


\textsuperscript{93} See Camayd-Freixas, \textit{Interpreting after the Largest ICE Raid}, at 9–10 (cited in note 60) (describing a process which "reduced the judges to mere bureaucrats, pronouncing the same litany over and over for the record in order to legalize the proceedings, but having absolutely no discretion or decision-making power . . . . When the executive branch forces the hand of the judiciary, the result is abuse of power and arbitrariness, unworthy of a democracy founded upon the constitutional principle of checks and balances.").
adult refugees when seeking refugee status."\(^9\)

The provision of an attorney through all phases of immigration proceedings would dramatically improve the rates at which children’s asylum claims are granted. Unrepresented children in the US have a much lower rate of success on asylum claims than children with legal representation.\(^9\) It is highly unlikely that this difference is solely attributable to the most meritorious cases being selected for representation. Asylum success rates are consistently higher in areas with stronger representation of asylum seekers, and there is no information suggesting that meritorious cases are disproportionately present in these areas. One researcher notes, “Without legal representation, a child in the U.S. is essentially denied access to the appeals process, since it is largely a paper process in a foreign language.”\(^9\) Immigration proceedings are complex, and children asylum seekers need representation to navigate the process with any chance of success.

Furthermore, the problem of unrepresented children in removal proceedings is exacerbated by traffickers’ attorneys. When a child is unrepresented and has no right to have legal representation provided, an attorney working for an illegal trafficking operation may be able to represent the child for illegal purposes. Children may not be in a position to protect their own interests by rejecting traffickers’ attorneys’ representation.

A guardian may serve an important role in cases involving unaccompanied alien children in removal proceedings.\(^9\) A guardian assists the child throughout


\(^9\) Nationwide from 1994 to 2005, those who did not have legal representation had a 93 percent asylum denial rate, while those who did have legal representation had a 64 percent asylum denial rate. TRAC Immigration, *TRAC Immigration Report*, online at http://trac.syr.edu/immigration/reports/160/ (visited Nov 21, 2009). In some jurisdictions, asylum seekers with legal representation have been up to 1250 percent more likely receive asylum than those not represented by asylum. See Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 Cal L Rev 169, 198 (2007).

the immigration process and advocates for the child's best interest. This may be crucial in cases where the unaccompanied child's expressed wishes are different from her best interests. Attorneys typically represent the client's expressed wishes, so the guardian's role in such proceedings is especially important. One author describes the guardian's role in such situations as "a stand-in for [the] parental role." 

C. Potential Remedies and Other Solutions

No cases exist directly on point for the right to counsel in removal proceedings, but the remedies would be the same as in any other infringement of procedural rights. When possible, damages seem like an attractive remedy (assuming that a rehearing is no longer possible), so that states might internalize the cost of wrongful deportations. In many cases, of course, the harm will be irreparable, and the international legal framework must address such failings ex ante by encouraging domestic legislation implementing the proper standards.

Although cases may be appealable to international tribunals, the non-compliance of many countries with the relevant international legal instruments may necessitate a characterization of the right to legal assistance as "soft law." In countries like the US, which have not ratified certain essential international

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99 For example, Tiburcio cites the case Quaranta v Switzerland, citing 12 Hum Rts L J 249–52 (1991), in which an Italian living in Switzerland was sentenced to six months imprisonment for drug crimes, and the European Court of Human Rights ordered Switzerland to pay damages for failing to provide legal assistance during the criminal trial. Tiburcio, The Human Rights of Aliens under International and Comparative Law at 253–54 (cited in note 56). See also Case Concerning Avena and Other Mexican Nationals (Mexico v. US), 2004 ICJ 12, 71–73 (Mar 31, 2004) (finding that the US violated the procedural rights of Mexican nationals under the Vienna Convention on Consular Relations, and finding the Mexican nationals were entitled to review of their convictions).

100 See, for example, the wrongfully deported Guatemalan child in Bhabha and Schmidt, Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S. at 132 (cited in note 97). A Guatemalan boy attempted to flee gang life by entering the US. A judge denied his request for asylum and ordered him deported back to Guatemala where he was murdered seventeen days later by the gang he had originally fled two years earlier.

101 For an example of the difficulties of achieving compliance with procedural norms under international law, see Medellin v Texas, 128 S Ct 1346, 1358 (2008), in which the Supreme Court of the US refused to hold the ruling of the International Court of Justice as binding on the Texas state court, despite the position of the President of the US in support of the ICJ ruling. Less than one year after the ICJ judgment, the US withdrew from the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention.
law instruments, such a right may be used as persuasive authority by a sympathetic judiciary.  

The consequences of deporting an alien with a legitimate asylum case can be tragic, leading to imprisonment, torture, and even death.  Though such consequences are not administered by the deporting state, the failure to provide adequate protection to such children should be understood to be a violation of their rights or deprivation of their liberty equal or greater than the result of any criminal trial. For example, a Guatemalan boy was deported by the US only to be assassinated by the gang members that had threatened him earlier. If the US were held responsible for the death of this boy, it might at least provide symbolic force to encourage progressive change in US asylum law. Holding states responsible for the wrongful deportation of asylum claimants could be a powerful instrument for policy reform.

No case law exists in international courts regarding the enforcement of such a right; nor is there likely to be such case law in the near future. This is true for several reasons. First, many countries have not ratified the relevant international legal instruments. Cases arising in these countries are not subject to the jurisdiction of international courts, except to the extent that their actions run afoul of customary international law, which is subject to widespread disagreement. Second, countries that have ratified the relevant international legal instruments are not likely to produce cases that will appeal to international courts. They may be sufficiently in compliance with the international legal requirements, and where they are not, a deported asylum claimant may have a difficult time bringing her or his case to the attention of international legal authorities. Finally, international legal authorities may be hesitant to produce rulings on such matters for fear that more countries will opt out of such

102 See, for example, Roper v Simmons, 543 US 551, 576–78 (2005) (discussing the CRC as persuasive authority in US courts). See also Beharry v Reno, 183 F Supp 2d 584, 600–601 (EDNY 2002) (reversed and remanded in Beharry v Ashcroft, 329 F3d 51 (2d Cir 2003)). Beharry v Reno discusses provisions of the CRC as customary international law enforceable in US courts. Though Beharry v Reno was reversed and is not citable as authoritative precedent, Beharry v Ashcroft reversed it on jurisdictional grounds, and did not reach the question of the legal authority of the CRC in US courts.


104 Bhabha and Schmidt, Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S. at 132 (cited in note 97).
agreements, the ruling may not be enforced, the credibility of the court will be threatened, and compliance with international law will decline.

V. CONCLUSION

In May v Anderson, the US Supreme Court wrote, “Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.” Legal reasoning that disentitles aliens from having legal representation provided for them at government expense does not properly apply to unaccompanied alien children. The unique vulnerabilities of unaccompanied alien children with potential asylum cases implicate stronger fairness concerns and require the implementation of additional procedural protections.

The right to free legal assistance for alien children in removal proceedings is an emerging as norm under international law, supported by other procedural norms in treaties and customary international law. Chiefly, the prohibition on refoulement, the norms contained in the CRC, and the customary international legal norms of due process and equal protection require that states meaningfully provide unaccompanied children asylum seekers with legal representation prior to removing them. In addition to attorneys, legal guardians can ensure the child's best interests are heard in order to prevent their wrongful removal. Without adequate legal assistance, children are left voiceless and vulnerable. The right to counsel for children in removal proceedings is one essential right that states must honor to uphold the many rights afforded to children under international law.

105 345 US 528, 536 (1953) (Frankfurter concurring).