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Alison Luke

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UNCERTAIN TERRITORY: FAMILY REUNIFICATION AND THE PLIGHT OF UNACCOMPANIED MINORS IN CANADA

ALISON LUKE[†]

In recent years, Canada has experienced a significant increase in the number of refugee claims from unaccompanied minors: those children who are separated from both parents and are not being cared for by an adult who, by law or custom, has the responsibility to do so. Following a brief examination of the nature and scope of the unaccompanied minor problem, the paper explores the difficulties the Immigration and Refugee Protection Act sponsorship schemes present to these children as they endeavor to reunite with their families. The author argues that the Act provides limited opportunities for these children to pursue family reunification, which both undermines Canada's international legal obligations pursuant to the UN Convention on the Rights of the Child, and conflicts with the objectives advocated by domestic immigration and refugee legislation. Having exposed several of the unique challenges these children create for current immigration law, the author concludes by proposing several legal and policy reforms that could assist in addressing the special circumstances and particular needs of unaccompanied minors who seek family reunification in Canada.

The Committee recommends: “[T]hat every feasible measure be taken to facilitate and speed up the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status in Canada.”¹

~ Concluding observations of the UN Committee on the Rights of the Child, 1995

INTRODUCTION

During the summer of 1999, four dilapidated ships laden with human cargo made their way across the Pacific Ocean and took refuge in calm waters off the coast of British Columbia. On board were nearly 600 illegal migrants from China's Fujian province, including 131 children who had undertaken the arduous two month journey in the absence of parents or legal guardians, arriving alone and without family to receive them. The plight of these children sparked a media frenzy and quickly brought the issue of child refugee claimants, and more specifically unaccompanied minors, to the attention of the judiciary, the legislatures, and the Canadian public.

From a global perspective, a lack of documentation makes the breadth and scope of the problem of unaccompanied minors difficult to ascertain.² Best estimates suggest

[†] Alison Luke is currently completing her LLB at the University of Victoria, and will be clerking for the Chief Justice of the Federal Court in the Fall of 2007.

¹ UN Committee on the Rights of the Child, UN Doc. 20/06/95. CRC/C/15/Add.37. In its subsequent report, in October 2003, the Committee noted that this concern had been “insufficiently addressed” (see UN Committee on the Rights of the Child, concluding observations: Canada, UN Doc. CRC/C/15/Add.215.). [UN Committee on the Rights of the Child].

² Unaccompanied minors under 18 constitute over 52% of the population the UNHCR assists, a figure that rises to 60 to 66% in some refugee situations. See UN GAOR, “Report of U.N. High Commissioner on Refugees,

that of the more than twenty million children classified as refugees and internally displaced persons, upwards of five per cent may have been separated from their families.³ Although many of these children never reach Western shores, the United Kingdom, Australia and the United States have all recently documented an influx of unaccompanied minors seeking asylum.⁴ Likewise, Canada has experienced a substantial rise in refugee claims from children separated from parents and legal guardians, processing upwards of 1,830 unaccompanied minors in 2002 alone.⁵

Absent adult family members who are legally responsible for their care, these children present a host of unique challenges to immigration law and policy; and at all levels of government there is concern over the development of appropriate responses to the increasing number of unaccompanied minors arriving in Canada.⁶ Although considerable procedural advances have been made with respect to processing the refugee claims of unaccompanied minors, several major substantive legal deficiencies remain. Of these weaknesses, perhaps the most compelling issue, albeit one that is rarely scrutinized, is that of the inefficacy of the *Immigration and Refugee Protection Act*⁷ (*IRPA*) to deliver on its commitment to facilitate family reunification for these children.

The primary goal of this paper is to explore the tensions between the inability of unaccompanied children to reunite with their families under the *IRPA*'s sponsorship program, and Canada's legal obligations to these children, both domestically as set out under the *IRPA*, and internationally, pursuant to the United Nations *Convention on the Rights of the Child (Children's Convention)*.⁸

The first portion of this paper will outline the nature and scope of the unaccompanied minor problem, and highlight some of the procedural advances aimed at accommodating these children within existing immigration schemes. Noting a lack of concomitancy with respect to substantive legal reforms, I will then shift to a more detailed consideration of a specific problem in the Canadian context, namely, the in-

Citing Increased in Internal Displacement, is Taken-up by 3rd Committee" U.N. Doc GA/SHC/3432 (Nov 3, 1997).

3 Jaqueline Bhabha & Wendy Young, "Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines" (1999) 11 *Int'l J. Refugee L.* 84 at 85. [Bhabha & Young].

4 The number of unaccompanied children detained in the United States more than doubled between 1997 and 2001 from 2,375 to 5,385. See Amnesty International, "United States of America: Unaccompanied children in Immigration Detention", online: Amnesty USA http://www.amnestyusa.org/refugee/usa_children_summary.html (date accessed: 5 February 2007). In the United Kingdom, 2,990 unaccompanied children under age seventeen were seeking asylum in 2004 (Tina Heath & Richard Jeffries, "Asylum Statistics United Kingdom 2004" (August 2005) at Table 2.3 - 4.4, online: The Home Office <http://www.homeoffice.gov.uk/rds/pdfs05/hosb1305.pdf> (date accessed: 5 February 2007).

5 See Ali Mehrunnisa, Svitlana Tarban & Jagjeet Kaur Gill, "Unaccompanied/Separated Children Seeking Refugee Status in Ontario: A Review of Documented Policy and Practices" CERIS Working Paper No.27 (Aug 2003), online: CERIS http://ceris.metropolis.net/Virtual%20Library/Demographics/CWP27_Ali.pdf (date accessed: 5 February 2007). In 1999, 368 refugee claims were made in Canada by unaccompanied minors. In 2000, this figure rose to 674, and 817 in 2001. Although these numbers are relatively small, both in absolute terms and as a fraction of the total number of refugee applicants in Canada (approximately 30,000 annually), these figures have consistently increased in the last few years. Canada's unaccompanied refugees have come from over 165 nations, with Sri Lanka, Somalia, Hungary and the Democratic Republic of the Congo regularly listed among the top source countries over the last 4 years.

6 For a discussion of the issue of unaccompanied minors seeking asylum in Western countries, with a special focus on Canada, see *supra* note 6.

7 S.C. 2001, c. 27 [*IRPA*].

8 20 Nov. 1989, 1577 U.N.T.S. 3 [*Children's Convention*].

ability of unaccompanied minors to seek family reunification through sponsorship under the *IRPA*. I will argue that the restrictions on sponsorship are problematic for three principal reasons: first, these restrictions are contrary to Canada's international obligations under the UN *Children's Convention* and the broader policy recommendations of the international community; second, they contradict the family reunification objectives affirmed domestically in the *IRPA*; and third, few viable alternatives are left for these children to reunite with their families, either within or beyond Canada. Having illuminated these deficiencies, I will conclude with a number of suggestions for legal and policy reforms that address the special circumstances and particular needs of unaccompanied minors.

The Special Situation of Unaccompanied Minors

While quibbling over the precise content of the term 'unaccompanied minor' invariably persists, the widely accepted definition proffered by the United Nations High Commissioner for Refugees (UNHCR) encompasses those individuals under the age of 18 that "have been separated from both parents and are not being cared for by an adult who by law or custom has the responsibility to do so."⁹ Despite the fact that the labels 'unaccompanied minor' and 'separated minor' are often used interchangeably, the latter incurs a slightly different meaning, denoting those children who are separated from both parents or their legal or customary primary caregivers, but not necessarily from other relatives.¹⁰ Although both categories of youth are currently precluded from family sponsorship within Canada, it is the plight of the former, unaccompanied minors, which is of particular concern, given the complete absence of adult guardianship, parental or otherwise.

Political crises, civil wars and religious and ethnic conflicts are recognized as being the main drivers behind the recent influx of unaccompanied children into asylum states.¹¹ Graça Machel's acclaimed United Nations report, *Impact of Armed Conflict on Children*, draws particular attention to the vulnerabilities of unaccompanied minors during wartime.¹² Machel notes that rather than simply being amongst the toll of peripheral civilian casualties, children are increasingly subjected to calculated genocide, forced military conscription, gender based violence, torture and exploitation.¹³ In addition to enduring the displacement and destruction associated with contemporary warfare, several commentators have also stressed the vulnerability of these children to a variety of forms of persecution that specifically target youth, including human trafficking,¹⁴ bonded and hazardous labour, child pornography,

9 UNHCR, "UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" 1997 [UNHCR Guidelines].

10 UNHCR, "Inter-agency Guiding Principles on Unaccompanied and Separated Children" (2004) at 13, online: UNHCR <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=4098b3172> (date accessed: 4 February 2007) [UNHCR Inter-agency principles].

11 *Supra* note 5 at 3. The numbers of unaccompanied children in conflict zones are staggering. For example, by the end of 1994, in Rwanda alone, more than 100,000 children were separated from their families. In 1995, a UNICEF study found that twenty per cent of the children in Angola had been separated from their parents and relatives (UNICEF, "Information: Armed Conflict on Children" online: UNICEF <http://www.unicef.org/graca/> (date accessed: 2 February 2007)).

12 *Ibid.* 14

13 Graça Machel, "Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children", UNGAOR, 51st Sess., item 108 of the Provisional agenda, UN Doc. A/51/150 (1996).

14 Human trafficking, in various contexts and forms, is an increasing concern, although difficulties locating, identifying and documenting these children make it difficult to assess the scope of this problem. Poor economic conditions increase the vulnerability of children to traffickers and smugglers, with young girls being particu-

prostitution and female genital mutilation.¹⁵

Economic hardship is cited as another major reason children are sent, unaccompanied, to safer and more prosperous states. This is particularly so in situations where it may be impossible to flee as a family unit.¹⁶ Although governments in asylum countries often postulate that unaccompanied minors are regularly sent ahead in an attempt to secure immigration for the remainder of the family, there remains a paucity of evidentiary support for this argument, given that in most countries, including Canada, this remains a legal impossibility.¹⁷

The events that cause children to be separated from their families are often both tragic and sobering, and the psychological repercussions of these experiences can be profound. Machel's report states,

Children are often separated from parents in the chaos of conflict, escape and displacement. Parents or other 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.¹⁸

In light of the circumstances prompting these children to flee their home countries without their parents, and their extreme vulnerability to both child specific and non-child specific persecution, unaccompanied minors are frequently afforded refugee protection upon arrival in asylum states.

Procedural and Substantive Changes to the Treatment of Unaccompanied Minors

In 1996, Canada led the international community in setting procedural standards for processing the claims of unaccompanied children through the development of the Immigration and Refugee Board's *Guidelines on Child Refugee Claimants (IRB Procedural Guidelines)*.¹⁹ The *IRB Procedural Guidelines* define unaccompanied children as those "who are alone in Canada without their parents or anyone who purports

larly at risk of sexual exploitation, see Mehrunnisa et al., *supra* note 5 at 3. Trafficking was also recognized as a notable source of unaccompanied minors in the Committee on the Rights of the Child's most recent comment. See UN Committee on the Rights of the Child, "Final Unedited Version: Treatment of Unaccompanied and Separated Children Outside their Country of Origin" 39th Session, Gen. Comment No. 6 (2005) at 4, online: OHCHR <http://www.ohchr.org/english/bodies/crc/docs/GC6.pdf> (date accessed: 5 February 2007) [UN CRC, *Treatment of Unaccompanied & Separated Children*].

15 For a commentary on child specific forms of persecution, see Bhabha & Young, *supra* note 4 at 86 & 101. See also, Danuta Villareal, "To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum Seekers" (2004) 26 *Hous. J. Int'l Law* 743 at 745.

16 See Jacqueline Bhabha, "Minors or Aliens? Inconsistent State Intervention and Separated Asylum-seekers" (2001) 3 *Eur. J. Migr. & L.* 283. See also, Bhabha & Young, *supra* note 4.

17 According to a study by Wendy Ayotte, Convention refugee children are not permitted to sponsor family members in most European states, with the exception of Norway, Sweden and Finland, see Mehrunnisa et al., *supra* note 5 at 3.

18 Machel, *supra* note 13 at para. 69.

19 Immigration and Refugee Board, "Child Refugee Claimants Procedural and Evidentiary Issues" Guideline 3 (Ottawa: Immigration and Refugee Board, 1996) [*IRB Procedural Guidelines*]. The Guidelines primarily set out: 1) issues relating to the appointment of a Designated Representative; 2) steps to be followed when processing the claim of an unaccompanied child; and 3) evidentiary issues relating to all child claimants.

to be a family member.²⁰ These children are warranted special procedural treatment throughout their refugee status determinations. Accommodations include: ensuring the swift identification of unaccompanied children; appointing an officer to maintain responsibility for the child's case throughout the entirety of the determination procedure; prioritizing these claims in order to process them as expeditiously as possible; and facilitating pre-hearing conferences to assess what evidence the child is able to provide, including the best way to elicit this information.²¹ The *IRB Procedural Guidelines* also explicitly recognize that refugee determinations for all children, including unaccompanied minors, must reflect the best interests of the child.²²

Following Canada's lead, in 1997 the UNHCR announced its *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (UNHCR *Guidelines*).²³ The UNHCR *Guidelines* further tailored the procedural aspects of refugee determination process to meet the special needs of unaccompanied minors, and focused on issues surrounding identification, interviewing, interim care and the implementation of long term solutions for these children.²⁴ Shortly thereafter, the United States crafted its own procedures and standards for the adjudication of children's asylum claims,²⁵ which were primarily built upon the Canadian and UNHCR models.

Although this triad of developments suggests significant progress with respect to procedural fairness, these advances have largely failed to address the full range of issues relating to unaccompanied minors. More specifically, while amendments to the procedural aspects of the refugee determination process signify the recognition of the unique circumstances facing these children, substantive legal concessions have not followed course. As a result, most national immigration schemes fail to adequately modify existing law and policy to accommodate these novel claims.

The advent of the UN *Children's Convention*, and the attention given to state obligations *vis-à-vis* the treatment of child refugees therein,²⁶ has highlighted some of the difficulties associated with recognizing the special circumstances of minor refugee claimants within domestic legal frameworks that make few explicit concessions for

20 *Ibid.*

21 *Ibid.* at 4. The *IRB Procedural Guidelines* state that the IRB "decision-makers are expected to follow the guidelines unless there are compelling and exceptional reasons for adopting a different approach."

22 *Ibid.* at 3.

23 *Supra* note 10.

24 *Supra* note 10. In addition to being informed by the Canadian standards, the Guidelines were also an expansion of the 1994 UNHCR *Guidelines on the Protection and Care of Refugee Children*, which incorporated international norms for the protection of children. See UNHCR, "Refugee Children: Guidelines on Protection and Care" (Geneva: UNHCR, 1994). [*Guidelines on Protection and Care*].

25 See Emily Benfer, "In the Best Interests of the Child?: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States" (2004) 14 *Ind. Int'l & Comp. L. Rev.* 729; Michael A. Olivas, "Unaccompanied Refugee Children: Detention, Due Process and Disgrace" (1990) 2 *Stan. L. & Pol'y Rev.* 159; Jessica G. Taverna, "Did the Government Finally Get it Right? An Analysis of the Former INS, the Office of Refugee Resettlement and Unaccompanied Minor Aliens Due Process Rights" (2004) 12 *Wm & Mary Bill Rts. J.* 940; C.J. Seugling, "Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States" (2004) 37 *Vand. J. of Transnat'l L.* 861; Kristine K. Nogosek, "It Takes a World to Raise a Child: a Legal and Public Policy Analysis of American Asylum Legal Standards and their Impact on Unaccompanied Minor Asylsees" (2000) 24 *Hamline L. Rev.* 1; Bhabha & Young, *supra* note 3 for commentary on the American system, with particular attention to the detention of unaccompanied minors.

26 *Supra* note 9, art. 22.

children. In the context of unaccompanied minors, considerable inconsistencies exist between international legal commitments and the manner in which many of these children are received by and treated in asylum countries. The remainder of this paper will endeavour to particularize how the restrictions on unaccompanied minors' petitions for family reunification in Canada bring the friction between immigration control on the one hand, and human rights and child welfare obligations on the other, into sharp relief.

The Problem Defined: The IRPA, Family Reunification & Unaccompanied Minors

Canada has established family reunification as one of the guiding principles of its national immigration strategy. Explicit provisions to this end are embedded within the primary objectives of the *IRPA*.²⁷ In an effort to meet these objectives, Citizenship and Immigration Canada (CIC) has implemented a comprehensive sponsorship system, detailed in the *Immigration and Refugee Protection Regulations (IRP Regulations)*.²⁸ The sponsorship system permits adults to include spouses and dependent children on their application for permanent residence. Although several restrictions are placed on sponsorship, particularly in relation to thresholds of financial self-sufficiency,²⁹ adults are generally able to sponsor any individual that falls within the Family class.³⁰

Notwithstanding the opportunities for adults to pursue family reunification under the *IRPA*, minors can only apply for permanent residence for themselves, and cannot include family members on their application, as they fail to meet one of the principal criteria defining sponsor eligibility: being 18 years of age or older.³¹ Given this restriction, the *IRPA* effectively prevents unaccompanied minors from reuniting with their families until these children reach the age of majority and are able to demonstrate their financial capacity to act as a sponsor.

Alternatively, those individuals that fall within the Convention Refugee or Humanitarian-Protected Abroad classes, and who have been forced to leave family members behind due to 'circumstances beyond their control,' may be eligible to have their family processed for permanent resident status under CIC's *One-Year Window of Opportunity Provisions*.³² While these provisions are less onerous than those of the

27 *Supra* note 8, ss. 3(1)(d), 3(2)(f).

28 SOR/202-227 [*IRP Regulations*].

29 Sponsorship requires signing an undertaking with the Minister of Citizenship and Immigration Canada declaring responsibility for the provision of financial support, for the duration of a ten-year period, for the basic life necessities of those family members immigrating to Canada. The undertaking ensures these persons do not have to apply for social assistance. Individuals deemed to have insufficient income to undertake this responsibility, in particular, those that have been on social assistance, may not be able to act as a sponsor (*IRP Regulations, Ibid.* s. 134). For other restrictions on sponsorship, see *ibid.*, s. 133(1).

30 For a detailed list of the relationships falling within the Family class, see the *IRP Regulations, Ibid.*, s. 117(1). Adults with permanent resident or Canadian citizenship status are generally able to sponsor family members from abroad if they are spouses, common-law or conjugal partners over 16, parents or grandparents, dependent children, children under 18 whom are adopted or intended to be adopted, brothers, sisters, nephews nieces or grandchildren who are orphans, under the age of 18 and not married or in a common-law relationship.

31 *Ibid.*, s. 130(1)(a) states that "You may be able to sponsor if: the person you want to sponsor is a member of the family class...[and] you are 18 years of age or older".

32 Citizenship and Immigration Canada, *Request to Process Following Family Members: One Year Window of Opportunity Provisions*, online: Citizenship & Immigration Canada <http://www.cic.gc.ca/english/pdf/kits/guides/5578E.pdf> (date accessed: 6 February 2007) [One-Year Window of Opportunities Provision].

Family class sponsorship regime, they do require, among other criteria, that individuals meet the definition of ‘family member,’ which is limited to spouses, common-law partners and dependent children.³³ Given that parents, siblings, grandparents and other relatives are ineligible for processing under the *One-Year Window of Opportunity Provisions*, unaccompanied refugee children are unable to utilize this scheme as a means of facilitating family reunification within Canada.

Ultimately, the limitations on unaccompanied minors’ ability to reunify with their families are demonstrative of the friction between international human rights instruments, such as the UN *Children’s Convention*, and domestic immigration and refugee laws that inadequately protect the interests and rights of these children. Throughout the remainder of this paper, I will examine how limiting unaccompanied minors’ opportunities for family reunification is problematic for three principal reasons: first, it is contrary to international obligations under the UN *Children’s Convention* to facilitate family reunification and serve the best interests of the child; second, it contradicts the family reunification objectives affirmed domestically in the *IRPA*; and third, it leaves few viable alternative means for these children to be united with their families within or, in some instances, beyond Canada.

Canada’s International Legal Obligations under the UN *Children’s Convention*: Family Reunification & the Best Interests of the Child

The UN *Children’s Convention* is one of the most widely accepted international human rights treaties in existence today, with its principles and provisions reflected in a growing body of international law.³⁴ Articulating a wide range of substantive rights and obligations to protect children, the *Children’s Convention* covers key issues affecting youth around the globe, including displacement resulting from armed conflict, the arbitrary separation of families, sexual and labour exploitation, homelessness, disability, cruelty and abuse with the criminal justice system.³⁵ While not a refugee treaty *per se*, refugee children, and certainly unaccompanied minors, are amongst those who fall within the ambit of protection afforded by the *Children’s Convention*.³⁶

Two aspects of the *Children’s Convention* are particularly relevant to discerning Canada’s international legal obligations *vis-à-vis* family reunification for unaccompanied minors. First, there are those provisions that directly address the plight of unaccompanied minors: discouraging the separation of families; encouraging family reunification policies; and granting special assistance and protection to refugee children. Second, though certainly not secondary, are those provisions that enunciate the principle of the best interests of the child.³⁷

33 *Ibid.* Other requirements include: the initial applicant was accepted as a member of the Convention Refugees Abroad or Humanitarian Protected Persons Abroad classes; the application for processing family members was submitted within one year from the day on which refugee protection was conferred on the principle applicant; and that the separated family members were identified on the individual’s Application for Permanent Residence in Canada (IMM0008) form.

34 Somalia and the United States are the only countries that have not ratified the *Children’s Convention*.

35 For further discussion on the mandate of the *Children’s Convention*, see Susan O’Rourke Von Struensee, “Violence, Exploitation, and Children: Highlights of the United Nation’s Children Convention and International Response to Children’s Human Rights” (1995) 18 *Suffolk Transnat’l L. Rev.* 589.

36 *Supra* note 9, arts. 1-2. Rights under the *Children’s Convention* are to be granted to all persons under 18 years of age without discrimination of any kind.

37 *Ibid.* Arts. 20, 22(1) and 22(2) of the *Children’s Convention* specifically accord rights to separated children.

Family Reunification

Emphasis on the preservation of family relationships runs throughout the *Children's Convention*, commencing with the Preamble, which states that one of the objectives of the treaty is to enable a child to "grow up in a family environment, in an atmosphere of happiness, love and understanding," and recognizes the family as "the fundamental group of society."³⁸ Although children's rights are placed in the context of parental rights and duties throughout the *Children's Convention*,³⁹ Articles 9, 10, 20 and 22 explicitly address both the separation of children and family reunification. Therefore, these provisions are particularly germane to an analysis of the scope of Canada's international obligations to facilitate the reunification of unaccompanied minors with their families.

Broadly speaking, Articles 9 and 10 of the *Children's Convention* have created a robust set of rights for all children with respect to family reunification, including unaccompanied refugees, by imposing obligations on asylum states to prevent, wherever possible, the separation of children from their families. Article 9(1) of the *Children's Convention* stipulates that:

State Parties shall ensure that a child *shall not be separated from his or her parents against their will*, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.⁴⁰

It is arguable that this provision not only establishes a duty for states to avoid interfering with family unity, but additionally, imposes a positive obligation on governments to facilitate reunification unless the best interests of the child demands otherwise.⁴¹ Further support for family reunification is manifest in Article 10(1), which dictates that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner."⁴² Again, this provision suggests that from an international law perspective, children possess a positive right to family reunification, creating an obvious tension with any law or policy that impedes unaccompanied children from joining their families, regardless of where reunification occurs.

Further, although Article 20 does not address family reunification directly, it does recognize that children deprived of their family are entitled to special protection and assistance provided by the State. Article 22 is more specific, and explicitly speaks to the issue of unaccompanied minors, stating:

State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, *whether unaccompanied or accompanied by his or her parents or by any other person*, receive

38 *Children's Convention*, *supra* note 9, art. 10.

39 *Ibid.* See e.g., arts. 5,14,18. The importance given to the theme of family under the *Convention* is noted in the UNHCR's *Guidelines on Protection and Care*, *supra* note 22.

40 *Supra* note 9, art. 9(1) [emphasis added].

41 Bhabha & Young, *supra* note 4 at 99.

42 *Supra* note 11, art. 10(1).

appropriate protection and *humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention* and in other international human rights or humanitarian instruments to which the said States are Parties.⁴³

Given the rights and obligations established by Articles 9 and 10 of the *Children's Convention*, it is arguable that the "appropriate protection and humanitarian assistance" accorded to unaccompanied children under Article 22 includes access to family reunification.

Best Interests of the Child

The development and iteration of the concept of the 'best interests' of the child is also highly relevant to Canada's international obligation to facilitate family reunification for unaccompanied minors. The notion of a child's best interests, one of the fundamental interpretive principles of the *Children's Convention*, is elaborated in Article 3(1), which states 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 interests of the child shall be a *primary consideration*."⁴⁴

The 'best interests' principle has two main applications: with regard to government policy-making and those decisions made about children on an individual basis.⁴⁵ With respect to the former, the United Nation's *Guidelines on Protection and Care* articulate that Article 3 of the *Children's Convention* requires that the State carefully balance the interests of children against those of adults in all decisions related to budget allocations, the making of laws and the administration of government. Thus, although the government's obligation to act according to the best interests of the child is not absolute, if any conflicts are identified, the best interests of children must be a primary consideration.⁴⁶ Regarding decisions involving an individual child, the principle again comes into play such that the child's best interests remain a primary consideration.

The link between a child's best interests and the provision of opportunities for family reunification is unassailable. In addition to the violence and destruction that often drives unaccompanied minors to seek asylum in the first instance, separation from ones family results in the sudden loss of those people central to these children's lives, often under atrocious circumstances. The psychological damage flowing from such separation has been well documented, and in many cases, the post-migratory experiences of children arriving in and adapting to life in asylum states, absent family, is no less traumatic than the initial experience of displacement.⁴⁷ Not

43 *Children's Convention*, *supra* note 9, art. 22

(1).It is also of note that art. 22(2) affirms that:

States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family (*ibid.*) [emphasis added].

44 *Ibid.*, art. 3(1).

45 *Guidelines on Protection and Care*, *supra* note 21.

46 *Ibid.*

47 Mehrunnisa et al., *supra* note 5 at 34. The 'vulnerability-exposure' paradigm developed by Beiser et al. can help to explain the difference in adaptation between children who live with family members, and children who

surprisingly, the UNHCR has identified family reunification as:

Critical to the child's psychological and social well-being. One of the main principles behind tracing and reunification is that *recovery from harm is most likely to take place* when children are cared for by people who they know well and trust.⁴⁸

International Policy Documents Supporting Family Reunification for Unaccompanied Minors

In addition to the text of the *Children's Convention* itself, several key international policy instruments have endorsed a range of obligations concerning refugee children, and highlight the key role asylum states play in facilitating family reunification for separated and unaccompanied minors.

Most notably, the UNHCR policy statement, *Inter-agency Guiding Principles on Unaccompanied and Separated Children (Guiding Principles)*, explicitly articulates a child's right not to be separated from her parents. The *Guiding Principles* assert that family reunification is the first priority for separated children, and that:

All children have a right to a family, and families have a right to care for their children. Unaccompanied and separated children must be provided with services aimed at reuniting them with their parents or primary legal or customary care-givers as quickly as possible.⁴⁹

Similarly, the UNHCR has iterated that where an unaccompanied refugee minor seeks assistance in being reunited with her family, and reunification in the country of origin is not possible, consideration should be given to allow immediate family members to join the minor in the country of asylum.⁵⁰ Recently, the UN Committee on the Rights of the Child, which oversees the implementation of the *Children's Convention*, recognized family reunification as an essential part of any durable solution to the problems generated by unaccompanied minors. The Committee stated:

The ultimate aim of addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, take into account the child's view and wherever possible, look to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions of unaccompanied or separated children should be initiated and implemented without undue delay, and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights based approach, the search for a durable solution commences with analyzing the possibility of family reunification.⁵¹

are separated from their families. According to this model, "early loss produces vulnerability that, combined with further exposure to aversive events, overtaxes the child's ability to cope." In cases involving unaccompanied children, the loss of or separation from parents makes them extremely vulnerable.

48 *Supra* note 10 at 50 [emphasis added].

49 *Ibid.* at 16.

50 UNHCR Ottawa, "UNHCR Comments on CIC's Draft Discussion paper 'Unaccompanied Minor Refugee Claimants' (13 September 2000) at 16, online: Canadian Council for Refugees: www.web.net/~ccr/uam.htm (date accessed: 1 January 2007).

51 UN CRC, Treatment of Unaccompanied and Separated Children, *supra* note 14 at 21.

Together, these aforementioned factors: the rights and obligations associated with family reunification under the *Children's Convention*; the underlying principles of the best interests of the child; and policy statements from various bodies of the United Nations; provide strong support for the notion that international law entitles unaccompanied minors to family reunification. Given that Canadian immigration legislation currently creates major, if not insurmountable obstacles to family reunification for unaccompanied minors, the tensions with international legal obligations are palpable.

Canada's Domestic Legal Obligations under the *IRPA*: Family Reunification and the Best Interests of the Child

Tensions between the goal of family reunification and unaccompanied minors' exclusion from family sponsorship schemes exist not only at the interface of international and domestic law, but moreover, *within* Canada's national immigration legislation.

As is the case with the Preamble of the *Children's Convention*, the overarching objectives of the *IRPA* resonate with the theme of family reunification. More specifically, Article 3(1) dictates that "the objectives of this Act with respect to immigration are [...] to see that families are reunited in Canada."⁵² The *IRPA*'s objectives relating to refugees also include efforts to "support the self-sufficiency and the social and economic well being of refugees by facilitating reunification with their family members in Canada."⁵³ Strong support for family reunification is further bolstered by the detailed Family class sponsorship scheme set out in the accompanying *IRP Regulations*.⁵⁴

In addition, the *IRPA* recognizes the 'best interests' principle, albeit in a limited context. In contrast to the *Children's Convention*, which requires that a child's best interests be a primary consideration in all actions affecting children, best interests are only considered under the *IRPA* in certain circumstances. Further, rather than being paramount, a child's best interests are only required to be 'taken into account.'⁵⁵ It is notable, however, that the sections of the *IRPA* that do explicitly require consideration of the best interests of the child all relate to, in some form or another, situations in which children have been separated from or are attempting to gain access to family members.

Finally, Article 3(3) of the *IRPA* indicates the Act is to be construed and applied in a manner that complies with the international human rights instruments to which Canada is a signatory – a declaration that again signals support for family reunification as laid out in the *Children's Convention*. In light of this collection of provisions, unaccompanied minors ineligibility for participation in existing family sponsorship schemes represents a particularly striking disconnect between law, policy and practice.

⁵² *Supra* note 8, s. 3(1)(d).

⁵³ *Ibid.*, s. 3(2)(f).

⁵⁴ *IRP Regulations*, *supra* note 26, Part 7.

⁵⁵ See *IRPA*, *supra* note 8, s. 25(1), s. 28.2(c), s. 67(1)(c), s. 68(1), s. 69(2). In particular, neither the *IRPA* nor the Court's holding in *Baker*, *infra* note 63, require a decision-maker to accord greater weight to the best interests of the child than to other considerations when contemplating issues related to family unity. This lies in contrast to the obligation under the *Children's Convention*, requiring the best interests of the child to be a primary consideration.

Untenable Alternatives: Family Reunification Through Other Means

Despite preclusion from family sponsorship, in circumstances where tracing efforts⁵⁶ have successfully located family members or the primary legal or customary caregivers of unaccompanied minors, three auxiliary avenues for family reunification have been suggested as possible solutions for these children. The first option would require an unaccompanied child to make an application to the Immigration Appeal Division (IAD), under s. 63(1) of the *IRPA*. This provision enables an individual, whose application to sponsor a foreign national under the Family class scheme has been rejected, to challenge the refusal based on humanitarian and compassionate grounds. Thus, the question arises: might s. 63 offer a practicable means of providing unaccompanied minors with access to family reunification in Canada?⁵⁷

Although humanitarian and compassionate grounds have proved fruitful for many applicants appealing IRB rulings, a close reading of the *IRPA* reveals that the concessions under s. 63 are, in fact, of little assistance to unaccompanied minors. More specifically, s. 65 of the *IRPA* explicitly states that the IAD may *not* consider humanitarian and compassionate grounds unless the applicant meets the definition of sponsor under the *IRP Regulations*. Herein lies the difficulty: minors, whether unaccompanied or not, clearly do not meet the age requirement for sponsorship.⁵⁸ This problem is reflected in decision in *May Yee v. M.C.I.*,⁵⁹ which involved an application on behalf of a seven-year-old girl to sponsor her mother for permanent residency. The application was refused by the IAD based on the fact that the child failed to qualify as a sponsor in accordance with s.130(1)(a) of the *IRP Regulations*. The IAD ultimately dismissed the appeal on the basis that

The legislation clearly expects an individual who applies to sponsor a member of his or her family class, to be of a sufficient age to assume the responsibilities associated with the sponsorship him or herself as there is no dispute between the parties that the appellant does not meet the basic requirement of a sponsor, specifically as set out in paragraph 130(1)(a) of the *IRP Regulations*, I have no authority under the legislation to consider the humanitarian and compassionate grounds in this case, pursuant to s. 65 of the *IRPA*.⁶⁰

Although the child was not an unaccompanied minor, a claim by any child under 18 would presumably be similarly dismissed.

A more viable method for unaccompanied minors to pursue family reunification on humanitarian and compassionate grounds might involve an application under s. 25 of the *IRPA*. This omnibus provision enables the Minister to use her discretion to grant permanent resident status or exempt an individual from the sponsorship criteria should she be of the opinion that circumstances warrant such flexibility, based on humanitarian and compassionate considerations. Particularly helpful to

56 The UN Committee on the Rights of the Child has identified tracing as an essential component of any durable solutions for separated children, and should be prioritized except where the act of tracing would be contrary to the best interests of the child UN CRC, Treatment of Unaccompanied and Separated Children, *supra* note 13 at 21. Tracing is also noted in Articles 22(2), 9(3) and 10(d) of the *Children's Convention*, *supra* note 9. Tracing is largely spearheaded by the Red Cross, with the assistance of other international organizations.

57 *IRP Regulations*, *supra* note 26 at s. 130(1)(a).

58 *Supra* note 8, s. 65.

59 Immigration Appeal Division File No. VA4-01434.

60 *Ibid.*, at paras. 19-21.

the plight of unaccompanied minors is the fact that the best interests of the child directly affected in such cases *must* be considered in conjunction with the Minister's decision.⁶¹ Although the Minister is only required to take the best interests of the child 'into account' under this provision,⁶² such consideration may bode well for a ruling in favour of family reunification.

Notwithstanding the possibility for family reunification under s. 25, the discretionary nature of decisions based on humanitarian and compassionate grounds is no substitute for strong substantive changes to the laws surrounding the sponsorship eligibility of unaccompanied minors. Considering both Canada's international legal obligations and the guiding principles of the *IRPA*, a child's right to reunify with their family should be a robust one, and not left solely to discretionary Ministerial decisions pursuant to s. 25.

Finally, in addition to engaging the humanitarian and compassionate provisions under the *IRPA*, it has been suggested that Canadian immigration policy provides yet another means of family reunification through the voluntary repatriation of children to their country of origin. Although viable in limited circumstances, many unaccompanied minors have fled situations of extreme hardship and persecution prior to their arrival in Canada. Repatriation in such cases risks infringing the child's s. 7 *Charter*⁶³ guarantees and violating non-refoulement obligations derived from international humanitarian and refugee law.⁶⁴ In the many instances where family reunification in the country of origin is impossible or undesirable,⁶⁵ the principles articulated in Articles 9 and 10 of the *Children's Convention* should be engaged to facilitate reunification *within* Canada. Unfortunately, the sponsorship barriers facing these children present a veritable quagmire, one that leaves unaccompanied minors with limited prospects for family reunification.

Looking Ahead: Challenges and Opportunities for the Family Reunification of Unaccompanied Minors

It is unequivocal that current Canadian immigration law and policy is out of stride with international legal norms and obligations with respect to facilitating family reunification for unaccompanied minors. However, the consequences of such incongruity remain unclear. The extent of the influence international law has on the domestic sphere is somewhat amorphous, as the courts struggle with defining the degree to which international legal instruments ought to influence and guide the Canadian judiciary.

61 *IRPA*, *supra* note 8, s. 25, s. 28(2)(c) and s. 67(1)(c). These provisions of the *IRPA* all require taking account of the child best interests in humanitarian and compassionate considerations.

62 *Ibid.*, s. 25.

63 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

64 Art. 3 of the *Convention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, U.N. Doc. A/RES/39/46, 10 December 1984, art. 3; *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 arts. 6-7; *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 2545, Can. T.S. 1969 No. 6, art. 33 [1951 *Refugee Convention*].

65 UNHCR inter-agency principles, *supra* note 11 at 62. According to the UNHCR Inter-Agency Principles, each case should be reviewed individually by balancing the desirability of family reunification with the factors of: conditions of proposed place of return, conditions of the country of asylum, wishes of the parents and capacity to care for the child, and the quality of care arrangement in the country of asylum.

The significance of international law upon Canadian jurisprudence was recently explored by the Supreme Court of Canada in some detail in *Baker v. Canada*.⁶⁶ Ms. Baker entered Canada as a visitor and remained in the country while working illegally. She challenged her deportation order on the basis of humanitarian and compassionate grounds. As part of her argument, Ms. Baker emphasized that it was in the best interests of her children, all Canadian citizens, to remain united with their mother in Canada.

In its decision, the Court addressed the degree to which interpretations of the *Immigration Act*⁶⁷ ought to be informed by and conform to principles of international law, and more specifically, the *Children's Convention* and the notion of a child's best interests therein.⁶⁸ The Court ultimately ruled that, although the *Children's Convention* was not directly binding on domestic law, the "values reflected in international humanitarian rights law may help inform the contextual approach to statutory interpretation and judicial review."⁶⁹ In addition, the Court held that the *Children's Convention* placed "special importance on the protections for children and childhood, and on particular consideration of their interests, needs and rights."⁷⁰

Although *Baker* indicates that humanitarian and compassionate determinations under s. 25 of the *IRPA* should be guided by the provisions within the *Children's Convention* that address family reunification, as previously suggested, this case-by-case approach remains inadequate. Rather, what is required is a level of reform that produces, both in law and policy, an immigration scheme that clearly recognizes and supports the rights and special circumstances of some of the world's most vulnerable individuals: unaccompanied children.

To this end, it would be judicious for Parliament to engage in the development of a national policy on unaccompanied asylum-seeking children.⁷¹ The UN Committee on the Rights of the Child has criticized Canada for more than a decade with regard to the lack of substantive legal and policy reform in this area. This scrutiny, coupled with the sharp rise in the number of unaccompanied children arriving at Canadian borders each year, indicates that the current lack of a coherent national strategy is clearly problematic. Further, building a robust national policy will become increasingly important as Canada strives to meet the obligations created by the *Canada – US Safe Third Country Agreement*,⁷² which contains provisions that enable unac-

66 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

67 *Immigration Act* [Repealed] R.S.C. 1985, c.1-2.

68 While not considering the application of the *Children's Convention*, in *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 at para. 46, the Supreme Court of Canada also recognized the important role international norms play in the interpretation of immigration legislation, opining that "[a] complete understanding of the Immigration Act and the *Charter* requires consideration of the international perspective."

69 *Ibid.*, at para. 70.

70 *Baker*, *Supra* note 64 at para. 71. It has also been suggested that *Baker* signifies a shift away from limiting international law's application to *Charter* decisions, and towards the recognition of its broader influence in interpreting the values underlying all domestic legislation. See Karen Knop, "Here and There: International Law in Domestic Courts" (1999) 32 N.Y.U. J. Int'l L. & Pol. 5.

71 UN committee on the Rights of the Child, *Supra* note 2 at 46. This was also identified as a top priority in the most recent observations of the Committee on the Rights of the Child which remarked that "[...] The Committee is especially concerned at the absence of: (a) A national policy on unaccompanied asylum-seeking children; (b) Standard procedures for the appointment of legal guardians for these children; (c) A definition of "separated child" and a lack of reliable data on asylum-seeking children; (d) Adequate training and a consistent approach by the federal authorities in referring vulnerable children to welfare authorities" (*Ibid.*).

72 *Agreement Between the Government of the United States and the Government of*

accompanied minors traveling via the United States to lodge refugee claims within Canada.⁷³

From a legal perspective, the *IRP Regulations* should be amended to ensure that unaccompanied minors are eligible to make sponsorship applications under the Family class in situations where sponsorship would reunite the child with parents or other close family members. Additionally, the definition of 'family member' under the *One-Year Window of Opportunity Provisions* should be expanded to enable unaccompanied children recognized as refugees or protected persons to list legal or customary caregivers on their applications. It is only through these types of amendments that unaccompanied minors' rights to family reunification will be consistently upheld. Parliament is likely to argue that the existing restrictions are necessary to deter children from being utilized as 'satellite' claimants, providing families with a means of circumnavigating regular refugee and immigration proceedings. However, this position is untenable for two reasons. First, there is a paucity of evidentiary support that this trend has, or will indeed manifest itself.⁷⁴ Second, the position that maintains that preventing legitimate, unaccompanied child claimants from reunifying with their families is simply the 'cost' associated with deterring those with more dubious intentions is indefensible.⁷⁵ Although Parliament will certainly need to be alive to the potential for these proposed reforms to serve as a back-door immigration option for families that would otherwise be ineligible, careful legislative drafting and thoughtful policy design could do much to minimize this risk.

At present, it is unclear if and when Parliament will be moved to address the problems associated with the family reunification of unaccompanied minors. In addition to being amongst the most vulnerable individuals in Canadian society, these children are also one of the most politically invisible groups – a status that does not bode well for swift governmental action. This is not to suggest that progress is impossible. In 2004, Parliament amended the *IRP Regulations* to enable visa officers to use their discretion to consider permanent residency applications for family members who were initially listed as 'non-accompanying family'. This change now permits families to be reunited even if individuals were not available for examination at the time the application was made, a situation that frequently arises when families become separated.⁷⁶ Although these amendments fail to assist unaccompanied minors, they do suggest that movement on the family reunification issue is possible.

Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, United States and Canada, 5 December 2002 (entered into force 29 December 2004) [Canada – US Safe Third Country Agreement].

73 Under the Canada – US Safe Third Country Agreement, most people trying to make refugee claims at US - Canada border will be turned back; but there is an exception for unaccompanied minors, who in most cases will be able to pursue a refugee claim in Canada.

74 According to UNICEF, although some families do send children ahead in hopes that the whole family will find it easier to gain asylum, almost all unaccompanied minors have been separated from their families *accidentally*. See UNICEF, *The State of the World's Children 1996*, online: UNICEF <http://www.unicef.org/sowc96/4uproot.htm> (date accessed: 6 February 2007).

75 For a discussion on this point, and a more general survey of the impact of the *IRPA* on child refugees in Canada, see Canadian Council for Refugees, "Impacts on children of the Immigration and Refugee Protection Act" (2004), online: Canadian Council for Refugees www.web.ca/~ccr/children.pdf (date accessed: 5 February 2007)..

76 Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2004-167, s. 41(4) amending *IRP Regulations*, *supra* note 25, s.117.

Ultimately, it is more probable that the courts, not the legislatures, will be the first to address the challenges associated with unaccompanied minors seeking family reunification. However, until these issues are brought to the fore, Canada will continue to struggle with incongruous laws, policies and practices relating to the reunification of these children with their families. Unaccompanied minors appear to be caught in the middle of two opposing, and often contradictory, legal frameworks. Preoccupation with immigration controls on one hand, and children's rights and welfare protection on the other.

Although Canada is celebrated as a world leader with respect to the procedural advances associated with accommodating unaccompanied minors, the current state of the law surrounding access to family reunification remains inadequate. Given the failure to adhere to international obligations under the *Children's Convention*, the policy recommendations of the international community, and the overarching domestic objectives of the *IRPA*, there is much need for challenge and change. Until such time, hundreds of unaccompanied children will continue to find their way to Canada, arriving not only in a new country, but additionally, in a future bereft of any meaningful prospect of family reunification.